UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 12

1990

University of Hawaii Law Review

Volume 12 / Number 1 / Summer 1990

ARTICLES

COMMENTS

NOTES

RECENT DEVELOPMENTS

Summary Judgment at the Crossroads: The Impact of the *Celotex* Trilogy

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*** The authors wish to thank for their valuable research assistance Cathy Takase, David Gierlach, Michael Healey and Tracy Smith.

I. INTRODUCTION

Summary judgment law in Hawaii courts is approaching a crossroads. The path it takes will be influenced by the courts' view of recent changes in the federal summary judgment landscape. A trilogy of 1986 United States Supreme Court cases[1] has sent a message, loud and clear to trial judges: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ."[2] This message has not gone unheeded; federal and state courts alike are looking to the opinions in these three cases to unlock the wonders of summary adjudication.[3]

Our inquiry is divided into four parts. The first is an overview of Hawaii's traditional and somewhat murky approach to summary judgment law. The second part is an in-depth critique of the 1986 Supreme Court trilogy regarding the evolution of — some say revolution in — federal summary judgment law. The third is a description of the Hawaii appellate courts' apparent drift toward federal standards without express adoption or discussion of underlying value tensions. The final part describes three alternate paths to Hawaii's summary judgment future and analyzes each path doctrinally and in light of competing values of efficiency and access. Our premise is that this value tension provides context for meaningful evaluation of summary judgment law. As Justice Rehnquist observed in *Celotex Corp. v. Catrett*,[4] summary judgment exists not in a vacuum, but within a system of procedural rules and standards.

What is the context of summary judgment reform? A perceived "litigation explosion" in federal and state courts has generated cries for litigation reform. Accounts of delay and excessive cost have fueled a strong movement toward efficiency improvements, nationally and in Hawaii. Reform has occurred at two levels: administrative reforms, such as computerized case files and more efficient calendaring systems; and procedural reforms for admitting and handling cases. In the federal courts, the procedural reforms include "new" Rules 11,[5] 16,[6] and 26,[7] often referred to as managerial rules.[8] Hawaii courts have adopted

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[1] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[2] Celotex Corp. v. Catrett, 477 U.S. at 327.

[3] A LEXIS search has revealed over 3,000 citations to *Celotex* in published state and federal court opinions as of March 1990.

[4] 477 U.S. 317, 327 (1986).

[5] Fed. R. Civ. P. 11 (deterring unreasonable filings).

[6] Fed. R. Civ. P. 16 (pretrial conferences).

[7] Fed. R. Civ. P. 26 (limiting discovery).

[8] *See* Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395 (1987). Modified versions of these rules are pending before the Hawaii Supreme Court. The rules are recommended by the Judiciary's rules committee chaired by Judge Philip T. Chun. Professor Yamamoto served as counsel for the

mandatory arbitration and greatly revised circuit court rules and are currently considering modified versions of the recently amended Federal Rules of Civil Procedure (FRCP).[9]

One price of enthusiastic efficiency reform is diminished court access. Are the reforms worth the price? Does everyone benefit equally from the reduction of cost and delay? Does reform undermine values of the litigation processes — values such as personal dignity, individual participation in governmental process, public education and institutional accountability?[10] Summary judgment reform is appropriately analyzed in the context of these questions.

For the sake of discussion, we have identified two conceptually distinct, although practically related, dimensions of summary judgment law. The first dimension is the "mechanics" of summary judgment; the second is the "substantive standard" for summary judgment. Summary judgment "mechanics" has two facets: technical requirements such as filing deadlines, use of affidavits, and interrogatories;[11] and the burdens of producing evidence by the movant[12] and respondent. This article focuses on the latter facet of summary judgment mechanics because it is conceptually complex and practically important and because shifting burdens of production enable courts to regulate the balance of power between plaintiffs and defendants.

The "substantive" summary judgment standard refers to the standard that a court applies to decide whether, after both sides have carried their burdens of production, the movant has satisfied its ultimate burden of persuasion on the motion (no genuine issue of material fact and entitled to judgment as a matter of law). This article focuses on the substantive standard because it too affects the balance of power between plaintiffs and defendants and implicates competing concerns about cost reduction and open court access. For example, if the substantive summary judgment standard is "the slightest doubt," a plaintiff that demonstrates possibly conflicting inferences arising out of scant evidence will defeat a defendant's motion. The case then settles or proceeds to public trial. In contrast, if the standard incorporates the "preponderance of the evi-

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committee.

[9] Yamamoto, *Pending Procedural Reform In Hawaii's Courts—New Civil Rules 11, 16 and 26: Benefits and Problems of Active Case Management*, 22 HAWAII B.J. 1 (1989).

[10] Yamamoto, *supra* note 8, at 406-07; Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part I*, 1973 DUKE L.J. 1153, 1172 (1987).

[11] *E.g.*, Wilder v. Tanouye, 7 Haw. App. ____, 753 P.2d 816 (1988), clarifies the operation of 56(f) concerning continuances to allow for discovery. Messier v. Association of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 531, 735 P.2d 939, 945-46 (1987), allows filing of summary judgment motions after the deadline for substantive motions set by Circuit Court Rule 12.

[12] Courts and commentators use "movant" and "moving party" interchangeably to refer to the proponent of the motion for summary judgment. Nonmovant, nonmoving party, respondent, and responding party all refer to the party opposing the motion for summary judgment. We use movant and respondent.

dence" level of proof and requires the judge to assess the quality of the evidence, the result is different. Defendant prevails; further cost and a public trial are avoided.

Commentators suggest that the balance of power in federal courts has shifted markedly toward defendant-movants, in principal part because of the United States Supreme Court's recent analysis of both summary judgment mechanics and the substantive standard.[13] Whether that shift is salutary (restoring the balance between plaintiffs and defendants), disastrous (equipping defendants with a tool of harassment), or something in between is the subject of continuing debate. We begin by summarizing and conceptualizing summary judgment law in Hawaii.

II. SUMMARY JUDGMENT IN HAWAII STATE COURTS

Hawaii summary judgment law may be characterized in three ways. First, it may be characterized by a lack of a precise mechanical framework. With few exceptions, reported cases do not analyze summary judgment mechanics and merely cite provisions of Hawaii Rule of Civil Procedure (HRCP) 56.[14] Second, Hawaii law on substantive summary judgment standards may be characterized by a clearly articulated appreciation for the values of jury access and full public trials. Reported cases caution against limiting access to trials except in clear-cut situations. Finally, Hawaii summary judgment law may be characterized by a relative silence about efficiency concerns. These aspects of Hawaii courts' interpretation and application of Rule 56 are discussed in the following sections.

A. *Mechanics*[15] *of Rule 56: Burdens of Producing Evidence*

On a summary judgment motion each party bears a burden of producing evidence. Conceptually, the movant must first support its motion by demonstrating to the court that the evidence in the discovery record, supplemented by affidavits, considered alone, warrants judgment for the movant. The respondent must then respond by producing conflicting evidence or evidence that raises

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[13] *See, e.g.*, Lankford, *New Life for Defensive Summary Judgment Motions*, FOR THE DEFENSE 2 (April 1987) ("The United States Supreme Court has made it much easier for defendants to obtain summary judgment under Rule 56 of the Federal Rules of Civil Procedure. . . . [T]he defendant's obligation is merely to analyze plaintiff's evidence, not to disprove plaintiff's case."); *accord* Stemple, *A Distorted Mirror, The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

[14] *See, e.g.*, Abraham v. Onorato Garages, 50 Haw. 628, 446 P.2d 821 (1968); Cane City Builders, Inc. v. City Bank of Honolulu, 50 Haw. 472, 443 P.2d 145 (1968).

[15] Under the heading of "Mechanics" we focus on burdens of production. Technical requirements, which are also part of mechanics, are discussed generally throughout the article.

conflicting inferences. Few Hawaii cases have addressed the parties' burdens of production.

Mossman v. Hawaiian Trust Co.[16] provided the Hawaii Supreme Court's first instruction on the movant's burden. There, the court placed the burden on the movant regardless of whether it had the burden of persuasion at trial.[17] The imposition of the initial burden of production on the movant, whether plaintiff or defendant, is consistent with the supreme court's view that "caution on the part of a trial court in the use of summary judgment procedure is commendable."[18] In *Mossman* and for several years following, the court did not, however, discuss the quantum of evidence needed to carry the movant's initial burden.

The Intermediate Court of Appeals (ICA) added to the discussion of the movant's initial burden of production and illustrated the operation of the respondent's corresponding burden twenty-three years later in *Arimizu v. Financial Security Insurance Co.*[19] Arimizu filed a complaint against his employer, seeking a statutory penalty for failure to pay back wages. To support his summary judgment motion, Arimizu referred to deposition testimony showing that his employer owed him wages and vacation benefits but refused to pay.[20] Arimizu thus satisfied his initial burden of production on the motion under Rule 56(c) through the use of specific evidence in the discovery record. The burden then shifted under Rule 56(e) to his employer to respond with "specific facts."

> Under Rule 56(c), HRCP, once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, "then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial."[21]

The employer "failed to factually raise his defense in resisting Arimizu's motion for summary judgment," thereby failing to discharge its burden of production. The motion was granted in Arimizu's favor.[22]

Arimizu is the clearest articulation of burdens of production to date, at least where a plaintiff is the movant. But, its precedential value was thrown into

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[16] 45 Haw. 1, 361 P.2d 374 (1961).

[17] *Id.* at 9, 361 P.2d at 379. "The rule is that the defendant, as the party making the motion for summary judgment, has the burden of establishing the absence of a 'genuine issue as to any material fact' even though, upon trial, the burden . . . would rest on plaintiffs." *Id.*

[18] *Id.* at 12, 361 P.2d at 381 (citing 6 MOORE, FEDERAL PRACTICE § 56.15(1) (2nd ed. 1976)).

[19] 5 Haw. App. 106, 679 P.2d 627 (1984).

[20] *Id.* at 110-11, 679 P.2d at 632.

[21] *Id.* at 110, 679 P.2d at 632 (quoting Securities & Exchange Commission v. Murphy, 626 F.2d 633, 640 (9th Cir. 1980)).

[22] *Id.* at 111, 679 P.2d at 632.

question only two months later when the ICA seemed to ignore the *Arimizu* standard in deciding *Carrington v. Sears, Roebuck & Co.*[23] In *Carrington*, the court made no mention of the *Arimizu* burdens and stated only that "[w]here there are no genuine issues of fact, a defendant . . . is entitled to judgment as a matter of law if it is clear that there is no discernible theory under which plaintiff could recover."[24] As authority for this language, the court cited *Abraham v. Onorato Garages*,[25] a case decided sixteen years before *Arimizu*, ignoring *Arimizu*'s elucidation of mechanics.

The critical issue unaddressed by *Arimizu* (which involved a plaintiff's motion) was the extent of the initial burden of production of a defendant-movant. Must the moving defendant produce "specific facts," as a moving plaintiff must, or can the defendant discharge its burden by simply asserting that the discovery record lacks evidence supporting plaintiff's claims? The year after *Carrington*, the ICA seemed to address this question in *Waimea Falls Park, Inc. v. Brown*.[26] The court again did not acknowledge the language in *Arimizu*. Instead, the court relied on a treatise on federal civil procedure and stated somewhat ambiguously that the summary judgment movant may discharge its burden by showing that if the case went to trial there would be "no competent evidence" to support a judgment for his opponent.[27]

The guidance value of this statement for defendant-movants is questionable because the movant in *Waimea Falls* was the plaintiff. The court did not acknowledge the potential application to a defendant-movant attempting to satisfy its initial burden of production by simply pointing to a bare record. The opinion also failed to explain the meaning of "no competent evidence," the manner in which a defendant-movant might demonstrate a plaintiff's lack of evidence, or the manner in which the plaintiff-respondent might respond to such a motion.

Waimea Falls again left the Hawaii courts without an encompassing, coherently explained framework of the mechanics under Rule 56 concerning the burdens of production, especially for defendant-movants. That apparent confusion mirrored the ambiguous state of federal summary judgment law. A comment descriptive of federal court rulings also generally describes Hawaii's past summary judgment decisions on mechanics: "The actual decisional process appears to rely primarily on the facts of each case and a general, unarticulated sense of

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[23] 5 Haw. App. 194, 683 P.2d 1220 (1984).

[24] *Id.* at 197, 683 P.2d at 1224.

[25] 50 Haw. 628, 446 P.2d 821 (1968).

[26] 6 Haw. App. 83, 712 P.2d 1136 (1985).

[27] "If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless and the movant is therefore entitled to a judgment as a matter of law." *Id.* at 92, 712 P.2d at 1142 quoting 10A WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (1983). The court also used the phrase "no competent evidence."

when summary judgment is appropriate."[28]

The failure of the courts, both state and federal, to clearly articulate and follow mechanical standards defining the relative burdens of the parties appears to have resulted in uncertainty among practitioners.[29] In addition, the absence of a consistently applied framework may have contributed to decisions that seem to have no sound procedural basis. *Uffman v. Housing Finance and Development Corp.*[30] is an example. In this fee conversion case, defendant moved for summary judgment asserting that plaintiff's land failed to meet the requisite five acre minimum. Defendant's evidence indicated that plaintiff's land was 4.713 acres, based on descriptions in recorded documents.[31] Plaintiff responded by citing evidence indicating that the size of the area in question was 5.0002 acres, based on a recent survey of the beachfront land.[32] Despite this conflicting evidence, the trial court granted the motion. The Hawaii Supreme Court accepted the trial court's determination without explanation even though the trial court had summarily decided a disputed issue of material fact.

The lack of precise standards for summary judgment motions arguably contributed to the puzzling nature of this decision. Did the court decide that plaintiff failed to carry its responding burden of production because its survey evidence was inadmissible or otherwise unacceptable? Or did the court decide that the substantive summary judgment standard was satisfied even though conflicting evidence existed? Or did the court decide on some other basis? Neither Rule 56 standards nor the court's rationale are adequately explained.

The lack of clarity and uniformity in Hawaii summary judgment law is particularly troublesome in light of *Munoz v. Yuen*.[33] There the Hawaii Supreme Court stated that appellate courts "will not examine evidentiary documents . . . not specifically called to the attention of the trial court, even though they may be on file in the case."[34] The court's intention was to avoid forcing appellate courts to "wade through all of a voluminous record" searching for relevant documents, and thereby foster efficiency at the appellate level.[35] One result of this decision, however, is that a party responding to a summary judgment motion must bear the cost and bother of presenting its entire evidentiary case

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[28] Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1023, 1042 (1989).

[29] *Id.*

[30] 70 Haw. 64, 760 P.2d 1115 (1988). In this case, the plaintiffs sought a fee conversion from defendants pursuant to Hawaii Revised Statutes Chapter 516. The statute stipulated that such a fee conversion could not be obtained for a lot less than five acres in size.

[31] *Id.*

[32] *Id.* at 66, 760 P.2d at 1116.

[33] 66 Haw. 603, 670 P.2d 825 (1983).

[34] *Id.* at 606, 670 P.2d at 827.

[35] *Id.* at 605, 670 P.2d at 826.

couched in its various legal theories. The respondent at this pretrial stage will always reveal its entire case for two reasons: (1) it does not know precisely what is required to defeat the motion, and (2) it does know that if the motion is granted, the appellate court will only consider evidence specifically called to the attention of the trial court. Overkill by respondents seems inevitable.

In sum, Hawaii cases contain only scattered and inconsistent discussion of the mechanical steps to a summary judgment motion. Attempts to articulate the relative burdens of movant and respondent have not produced a definitive standard. The language in *Arimizu*[36] is perhaps the most detailed analysis by a Hawaii court to date, but it is far from an encompassing framework. It leaves unaddressed the burden of production of the defendant-movant, is rarely repeated in reported cases, and is not consistently followed. The lack of a uniform standard can lead to wasted time for motions judges and litigants and unpredictable results, perhaps frustrating the substantive principle declared by Hawaii courts, discussed below, that summary judgment should be granted sparingly.

B. Substantive Standard Under Rule 56

1. The basic standard

When both parties produce some evidence in support of their respective positions on the motion, arguably satisfying their respective burdens of production, the motions judge must then examine the evidence in light of a substantive standard to determine whether a *genuine* issue of *material* fact exists. A standard that makes it difficult for defendants to prevail on summary judgment may reflect the court's preference for public trials and jury access, but it may also promote inefficiency and unfair settlements. On the other hand, a standard that encourages defendants to file summary judgment motions without solid grounds may transform summary judgment into a tool of discovery or even harassment. And, this standard may disserve values associated with compromise resolutions and public trials.

Hawaii courts historically have employed a substantive standard known as "scintilla of evidence" or "slightest doubt," indicating a preference for settlements or public trials and jury decisions rather than truncated case terminations. In *Abraham v. Onorato Garages*,[37] the Hawaii Supreme Court announced that a defendant's summary judgment motion should be granted only if "it is clear that the plaintiff would not be entitled to recover under any discernible theory" and that "[t]he inferences drawn from the underlying facts . . . must be

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[36] *See supra* text accompanying notes 19-22.

[37] 50 Haw. 628, 446 P.2d 821 (1968).

viewed in the light most favorable to the party opposing the motion."[38] Consistent with the scintilla of evidence standard, the court did not incorporate the level of proof at trial (preponderance of the evidence, for example) into the summary judgment calculus. This combined posture has discouraged summary judgments.

Ten years later, in *Packaging Products Co. v. Teruya Bros. Ltd.*,[39] the Hawaii Supreme Court again indicated that the substantive standard is weighted heavily in favor of the respondent. If the court can find even arguably conflicting inferences, it is not to grant summary judgment. "Where . . . the evidence is fairly susceptible to conflicting interpretations, even though the operative facts themselves are not in dispute, there is a genuine issue of a material fact and the motion for summary judgment will be denied.[40] The *Teruya* court also stated that it is "incumbent upon the trial court to view the evidence in the light most favorable to the party opposing the motion . . . and to resolve all material ambiguities and disagreements against the movant."[41] Again, the court's statements evinced a strong preference for case resolutions via trials, in practical effect discouraging defendant summary judgment motions.

The preference for jury access is expressed strikingly in *McKeague v. Talbert*.[42] The ICA noted that the impact of summary judgment is "rather drastic" and therefore "must be used with due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues."[43]

> Even in cases where the judge is of the opinion that he will have to direct a verdict . . . he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge

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[38] *Id.* at 632, 446 P.2d at 825; *See also* Del Rosario v. Kohanuinui, 52 Haw. 583, 586, 483 P.2d 181, 183 (1971); McKeague v. Talbert 3 Haw. App. 646, 650, 658 P.2d 898, 903 (1983); Kang v. Charles Pankow Assocs., 5 Haw. App. 1, 5, 675 P.2d 803, 806 (1984); Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982); Bidar v. Amfac, Inc., 66 Haw. 547, 553, 669 P.2d 154, 159 (1983); Aku v. Lewis, 52 Haw. 366, 371, 477 P.2d 162, 165 (1970); Rodriguez v. Nishiki, 65 Haw. 430, 438, 653 P.2d 1145, 1150 (1982); Fasi v. Burns, 56 Haw. 615, 616, 546 P.2d 1122, 1123 (1976).

[39] 58 Haw. 580, 574 P.2d 524 (1978). This case was a contract dispute in which neither side disputed the existence of or language in a bill of sale. The court found that the language was subject to conflicting inferences about the intent of the parties and thus created a genuine issue of material fact for trial. *Id.* at 584-85, 574 P.2d at 527-28.

[40] *Id.* at 583, 574 P.2d at 527. ("Not only must there be no dispute as to the basic facts but there must also be no reasonable controversy as to the inferences which may properly be drawn from them.").

[41] *Id.* at 584, 574 P.2d at 528.

[42] 3 Haw. App. 646, 658 P.2d 898 (1983) (vacated summary judgment for plaintiff).

[43] *Id.* at 650, 658 P.2d at 903.

weigh evidence in advance of its being presented.[44]

This language exemplifies the conflict between Hawaii's historical treatment of summary judgment and the new federal standard, discussed *infra*, which tends to equate summary judgments with directed verdicts.[45] To the extent *McKeague* is representative, Hawaii courts have recognized important differences between summary judgments and directed verdicts.[46] They have recognized that the trial process serves values of personal dignity, individual participation, public education and institutional accountability that are undercut by pretrial summary disposition of cases. When summary judgment is granted, the decision is based on a paper record without a public trial. When a directed verdict is granted, the decision is based on evidence scrutinized at a public trial — after a party has had its day in court. This view also implies a preference for compro-

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[44] *Id.* at 651, 658 P.2d at 903 (citing Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951)). In Anderson v. Liberty Lobby, Inc., the United States Supreme Court states the federal view: "[t]he primary difference between the two motions is procedural; summary judgments are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." 477 U.S. 242, 251 (1986) (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983)).

[45] Anderson v. Liberty Lobby Inc., one of the cases in the federal trilogy which forms the basis for the current federal standard, contains language antithetical to *McKeague*. 477 U.S. 242 (1986); *see infra* notes 105-122 and accompanying text. In *Anderson*, the court stated that "the judge must view the evidence presented through the prism of the substantive evidentiary burden" to be used at trial. 477 U.S. at 254. Thus, under *Anderson*, summary judgment is a directed verdict before the trial, with the judge evaluating the "quantum and quality of proof necessary to support liability" under the standard of proof that would be used at trial, to determine whether a question of material fact exists. *Id.*

[46] What the Hawaii courts view the differences to be is not entirely clear. In contrast with *McKeague*, in at least three cases, the Hawaii Supreme Court has noted the similarity between summary judgment and directed verdict without noting the difference that at directed verdict neither party is deprived of the trial experience. *See* Fry v. Bennett, 59 Haw. 279, 280-81, 580 P.2d 844, 846 (1978):

> A summary judgment is analogous to a directed verdict. State v. Midkiff, 49 Haw. 456, 421 P.2d 550 (1966). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. In both instances the movant is asserting that there is no genuine issue of material fact to be resolved by the factfinder and that he is entitled to judgment on the merits as a matter of law. 6 MOORE, FEDERAL PRACTICE, § 56.04(2) (2d ed. 1976). Where, therefore, the proffered facts on a motion for summary judgment or the evidence at trial on a motion for directed verdict, and the inferences which may fairly be drawn from them, are reasonably susceptible to conflicting interpretations, neither the motion for summary judgment, Packaging Products Co., Ltd. v. Teruya Bros. Ltd., 5[8] Haw. [580], 574 P.2d 524 (1978), nor the motion for directed verdict, Young v. Price, 47 Haw. 309, 388 P.2d 203 (1963), will be granted.

See also, Waimea Falls Park, Inc. v. Brown, 6 Haw. App. 83, 92, 712 P.2d 1136, 1143 (1985)(also citing State v. Midkiff).

mise resolutions over summary judgment. If the case is settled rather than adjudicated on summary judgment, the plaintiff recovers something rather than nothing (if it is a defendant's motion) or the defendant contributes something rather than everything (if it is plaintiff's motion).

Consistent with this larger view of the role of summary judgment in dispute resolution, the Hawaii courts predominantly have limited grants of summary judgment to clear-cut cases, *e.g.*, where the respondent fails to proffer opposing evidence.[47] This comports with the Hawaii appellate judges' extreme distaste for improvidently granted motions.[48] Significantly, this larger view does not explicitly acknowledge or attempt to accommodate efficiency concerns. Hawaii courts have not addressed the costs and burdens on courts and movants resulting from denials of summary judgment motions — the expense and time of further discovery, motions and trial; the settlement of cases involving claims or defenses clearly lacking in merit; or the problem of busy court calendars.

2. *Departure from the basic standard*

In addition to their general disfavor for summary judgment, Hawaii courts have displayed an extraordinary reluctance to grant summary judgment in three classes of cases. First, the courts seem particularly disinclined to grant summary judgments that foreclose the state or public interest in matters deemed to be of "vast public importance." Second, the courts seem especially hesitant to grant summary judgment in favor of defendants in ordinary negligence cases, particularly where an injured individual is suing a corporation or someone indemnified by insurance. Third, courts disfavor summary judgments where "state of mind" or credibility is at issue. These cases demonstrate an even stronger judicial allegiance to access values than the basic standard. In contrast, in a fourth category of cases, the courts have granted summary judgment for the defendant, even though a jury might reasonably decide for either party. This category of cases seems to reveal a desire to keep certain decisions away from juries, possibly to prevent the expansion of tort law liability.

a. Issues of public importance

A heightened summary judgment standard appears in cases involving controversial public issues where summary judgment will foreclose the public's interest. This elevated standard was first articulated in *State v. Zimring*.[49] The Ha-

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[47] Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 679 P.2d 627 (1984).

[48] *See infra* the second paragraph of note 165 which discusses remarks made by Justice Padgett and Judge Burns at a HICLE meeting.

[49] 52 Haw. 472, 479 P.2d 202 (1970). *Zimring* involved a dispute between the State of

waii Supreme Court noted that the issue before it was "of vast public importance"[50] and employed the standard of *Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co.*:[51] "[S]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances."[52] The requirement that the record reflect no circumstances under which the respondent can prevail is arguably a mere rephrasing of the standard espoused in *Abraham v. Onorato Garages* that the record demonstrate the respondent would not be entitled to recover under any discernible theory.[53] However, the court in *Zimring* added:

> Judgment on issues of public moment based on . . . [conflicting affidavits], not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of declaratory summary judgment.[54]

The court recognized that the value of the trial process, beyond dispute resolution, is especially great when the outcome is of wide-spread particular interest or will have a pronounced impact on the general public. The credibility and integrity of the court system may be called into question if the court is perceived, however erroneously, as giving only cursory treatment to an issue of vast public importance.

The court reaffirmed its reluctance to grant summary judgment in cases of public importance in *Leong v. Takasaki*[55] and *Keller v. Thompson*.[56] In *Keller*, the court quoted *Phoenix Savings and Loan* and the "vast public importance"

Hawaii and private land owners over title to new land created by a volcanic eruption which extended the seashore boundary.

[50] *Id.* at 476, 479 P.2d at 204.

[51] 381 F.2d 245 (4th Cir. 1967).

[52] *Zimring*, 52 Haw. at 475, 479 P.2d at 204.

[53] Abraham v. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968).

[54] *Zimring*, 52 Haw. at 476, 479 P.2d at 205 (quoting Eccles v. Peoples Bank, 333 U.S. 426 (1948)).

[55] 55 Haw. 398, 520 P.2d 758 (1974). The plaintiff in *Leong* brought the action to recover damages for nervous shock and psychic injuries suffered without accompanying physical impact or resulting physical consequences. The court declined to grant defendant's summary judgment motion on plaintiff's attempt to create new law concerning the infliction of emotional distress, holding summary judgment inappropriate as long as there is "any doubt" about a defense victory.

[56] 56 Haw. 183, 532 P.2d 664 (1975). The court reversed a grant of summary judgment for general assistance recipients that declared a flat grant plan sought to be implemented by the Department of Social Services null and void as without statutory authority. Ordinarily, the existence of statutory authority for administrative regulations is deemed a question of law that is readily susceptible to summary judgment.

language from *Zimring* and added that "this is precisely the type of case where good judicial administration requires that the determination of the validity of the regulations be withheld until all testimony is adduced after a full trial."[57] This language arguably goes beyond the *Zimring* standard and makes summary judgment in a case of vast public importance an impossibility. The court's apparent unwillingness to foreclose the public's interest summarily suggests recognition of the value of public education engendered by a public trial and the value of enhanced system legitimacy derived from jury rather than judge decisions on controversial matters.

Six years later, the Hawaii Supreme Court retreated somewhat from its extreme position in *Keller*. In *Molokai Homesteaders Cooperative Association v. Cobb*,[58] the court upheld a grant of summary judgment, citing *Zimring* and stating that "in cases of public importance summary judgments should be granted *sparingly*, and never on limited and indefinite factual foundations."[59] Therefore, while maintaining that public importance cases should be treated as a special category, the Hawaii Supreme Court has not foreclosed the grant of summary judgment in such cases.

b. Issues of negligence

The Hawaii Supreme Court's stance with respect to summary judgment on issues of negligence is frequently expressed through a quote from *Pickering v. State*:[60] "[i]ssues of negligence are ordinarily not susceptible of summary adjudication."[61] *Bidar v. Amfac, Inc.*[62] illustrates the extreme application of this language. The plaintiff, a 220 pound person, was injured when a towel bar she used to lift herself gave way. Plaintiff asserted defendant's placement of the towel bar near the toilet was negligent. The trial court granted summary judgment for the defendant hotel, in effect finding no dispute about the appearance and intended function of the towel bar. The Hawaii Supreme Court reversed, stating that both breach of duty and causation, even in this case, are issues not susceptible to summary judgment:

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[57] *Id.* at 193-94, 532 P.2d at 672.

[58] 63 Haw. 453, 629 P.2d 1134 (1981).

[59] *Id.* at 458, 629 P.2d at 1139 (emphasis added). *See also* Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61 n.3, 647 P.2d 713, 716 n.3 (1982).

[60] 57 Haw. 405, 407, 557 P.2d 125, 127 (1976).

[61] *See also* McKeague v. Talbert, 3 Haw. App. 646, 650, 658 P.2d 898, 903 (1983); Messier v. Association of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 536 735 P.2d 939, 947 (1987).

[62] 66 Haw. 547, 669 P.2d 154 (1983) (notably involving a private individual plaintiff and corporate defendant).

> Whether the obligation to exercise reasonable care was breached is ordinarily a question for the trier of fact to determine . . . . "[r]easonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." Whether the breach of duty was more likely than not a substantial factor in causing the harm complained of is normally a question for the trier of fact also.[63]

The mere existence of possibly conflicting inferences arising out of undisputed facts precludes summary judgment in negligence cases. Since almost all negligence cases involve some possibly conflicting inferences as to liability, the court seems to have erected a nearly insurmountable barrier to summary judgment in negligence cases.[64] Why has the court done this? One explanation is that "reasonableness" inquiries are fraught with ambiguities that are best resolved according to community standards as determined by juries. Another explanation is that the court prefers to rectify, at least partially, the imbalance of power between injured individuals and defendant companies (or individuals indemnified by insurance) by giving negligence case plaintiffs every opportunity to try their cases before a jury or achieve some type of settlement.

c. Issues of credibility and state of mind

The Hawaii courts have indicated that issues of credibility and state of mind, like negligence issues, present questions ordinarily left to the trier of fact. In *Jacoby v. Kaiser Foundation Hospital*,[65] a medical malpractice case, the ICA employed the strict *Zimring* standard used in cases of public importance. The court further stated that "the issue . . . of credibility . . . is for the trier of fact . . . 'unless it also appears that the party opposing the motion cannot prevail in any event and that the issue of credibility therefore is immaterial.' "[66]

Also within the category of credibility are a trio of complex defamation cases. Each case involved materials which allegedly contained slanderous and defamatory statements suggesting that the plaintiffs, all public figures, had connections

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[63] *Id.* at 552-53, 669 P.2d at 159 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.8, at 1059 (1956)). The court reversed the grant of summary judgment because "reasonable minds could draw different inferences from the facts and arrive at conflicting conclusions on relevant factual issues." *Id.* at 554, 669 P.2d at 160.

[64] *See also* Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 183, 664 P.2d 261, 268 (1983); De Los Santos v. State, 65 Haw. 608, 610-11, 655 P.2d 869 (1982); Leary v. Poole, 5 Haw. App. 596, 599, 705 P.2d 62, 65 (1983); Lagua v. State, 65 Haw. 211, 215, 649 P.2d 1135, 1137-38 (1982).

[65] 1 Haw. App. 519, 622 P.2d 613 (1981).

[66] *Id.* at 527, 622 P.2d at 618 (quoting 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 526-31 (1983)); *see also* Aku v. Lewis, 52 Haw. 366, 378 477 P.2d 162, 169 (1970).

with organized crime. The first of the trio is *Rodriguez v. Nishiki*,[67] in which the Hawaii Supreme Court stated that issues of state of mind are not suitable for summary judgment:

> If there is a factual dispute about defendant's state of mind with regard to actual malice, summary judgment should not be granted . . . . "The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition."[68]

The court added that "if a statement can be interpreted as having both an innocent and a defamatory meaning, it is within the province of the jury, rather than the trial court in summary judgment, to determine the sense in which it was understood."[69]

In the second case, *Mehau v. Gannett Pacific Corp.*,[70] the court merely quoted the language of *Rodriguez*. In the third case, *Beamer v. Nishiki*,[71] the court expressed a preference for jury access and quoted *Zimring*, a public importance case, as the standard.[72] In a footnote, the court commented that it "searched in vain for a single case upholding summary judgment for a public figure defamation plaintiff.[73]

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[67] 65 Haw. 430, 653 P.2d 1145 (1982). *See generally*, Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 527, 543 P.2d 1356, 1361 (1975); Tagawa v. Maui Publishing Co. (TAGAWA I), 49 Haw. 675, 679, 427 P.2d 79, 82 (1967), *appeal after remand*, 50 Haw. 648, 448 P.2d 337 (1968).

[68] *Rodriguez*, 65 Haw. at 439, 653 P.2d at 1151 (quoting Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)).

[69] *Id.* at 439, 653 P.2d at 1151. The *Rodriguez* court also stated that in actions involving the alleged defamation of public figures, when "determining whether the moving party is entitled to judgment as a matter of law," the proper burden of proof is "clear and convincing." *Id.* at 439, 653 P.2d at 1150. The court's dedication to sparing use of summary judgments when the issue is defamation and its incorporation of a high burden of proof in the summary judgment calculus make sense only when the movant has the burden of proof at trial. When the moving party is the defendant, requiring the plaintiff to fend off the motion under a burden of "clear and convincing" proof would facilitate rather than discourage summary judgment and the court's position would be a paradox. *Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[70] 66 Haw. 133, 145, 658 P.2d 312, 321 (1983).

[71] 66 Haw. 572, 670 P.2d 1264 (1983).

[72] *Id.* at 578, 670 P.2d at 1270-71. The court stated that "the question of the defendant's state of mind is generally a question for the trier of fact." *Id.* at 584, 670 P.2d at 1274. The court also repeated the "clear and convincing proof" language of *Rodriguez*. *Id.* at 582, 670 P.2d at 1272-73. Like *Rodriguez*, this case only makes sense if it is viewed as applicable only to instances in which the movant is asking for summary judgment of an issue he would have the burden of proving clearly and convincingly at trial.

[73] *Id.* at 584 n.9, 670 P.2d at 1274 n.9.

d. Issues of compelling substantive policy

In recent years, the Hawaii courts have occasionally granted summary judgments under less than clear-cut circumstances in a narrow category of cases. In these cases, the courts apparently perceive a need for judges rather than juries to control the expansion of tort law. These cases represent a departure from the basic standard and favor summary judgments. They are connected by a core of common attributes:

1. The plaintiffs rely on the language of existing principles, but seek to have that language apply to a new category of fact situations;
2. The application of existing principles to this new category would significantly expand the scope of current tort law, encouraging a host of previously excluded filings; and
3. The facts in these cases are particularly compelling and a sympathetic jury might stretch existing legal principles to conform to its view of the facts.

One example is *Wolsk v. State*,[74] where the Hawaii Supreme Court affirmed summary judgment in favor of defendant, the State of Hawaii. Plaintiffs asserted that the State breached a duty to provide reasonable security against criminal attacks against tent campers at a State camping park. The State provided facilities, invited campers, and created a park ranger force but failed to undertake any security measures at the particular park despite a significant history of crimes against visitors there and at other nearby parks. Despite apparently conflicting evidence about whether the State had a "special relationship" with the tent campers, the court did not address the issue and affirmed summary judgment on the ground of an absence of duty. One explanation of the court's decision is that a jury award for plaintiffs, a deceased doctor and his seriously injured (hemiplegic) fiancee, would likely have opened the doors to a multitude of claims against the State arising out of crimes at State parks.[75]

Another case in this category is *Feliciano v. Waikiki Deep Water, Inc.*[76] Plaintiff Feliciano filed a dram shop action against a hostess bar, claiming that the bar served him liquor after he was intoxicated. After leaving the bar, Feliciano drove his car and caused an accident rendering himself a quadriplegic. A prior Hawaii case barred such a claim unless Feliciano could show that the bar

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[74] 68 Haw. 299, 711 P.2d 1300 (1986).

[75] *See also*, Moody v. Cawdrey & Assoc., Inc., 68 Haw. 527, 721 P.2d 707 (1986) (The Hawaii Supreme Court reversed the Intermediate Court of Appeals and reinstated defendant condominium's summary judgment regarding criminal assault on condominium owner's guest in the owner's unit); Note, *Wolsk v. State: A Limitation of Governmental Premises Liability*, 9 U. HAW. L. REV. 301 (1987).

[76] 69 Haw. 605, 752 P.2d 1076 (1988).

took "affirmative acts that increase[d] the peril to an intoxicated customer."[77] Feliciano's opposition to the hostess bar's motion for summary judgment established that he was an unsophisticated 19 year old from Waianae who had never been to Waikiki. He did not recall asking for a drink but three hostesses brought him four drinks over a two and a half hour period at a cost of $175.00. He stated that he was intimidated by their aggressiveness and consumed drinks he had not ordered. The Supreme Court affirmed the lower court's summary judgment. It decided that "without more, aggressive sales of drinks at a bar do not constitute affirmative acts that would create liability to the consumer on the part of the bar or tavern."[78] It is not clear that a reasonable jury would have reached the same conclusion. The court, however, declined to allow a jury to expand substantive tort law, declaring as a matter of law that the facts did not satisfy the rather ambiguous legal standard of "affirmative acts."[79]

Cases such as *Wolsk* and *Feliciano*, in which jury access may lead to a marked expansion of tort liability and litigation volume, provide the only detectable exception to Hawaii courts' reluctance to grant summary judgment as reflected in the basic standard. The use of summary judgment in this manner to effectuate substantive policy is appropriate if a court clearly acknowledges its use of the procedural vehicle for that purpose. The court seemed to do this in *Feliciano* but not in *Wolsk*. Somewhat ironically, these cases in which summary judgment disposition is favored tend also to be cases of "public importance," in which summary judgment is to be "sparingly granted."

III. The Federal Summary Judgment Standard

In 1986, the United States Supreme Court significantly changed[80] federal summary judgment doctrine and practice through its decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[81] *Anderson v. Liberty Lobby, Inc.*,[82] and *Celotex Corp. v. Catrett*.[83] These three decisions established a mechanical and substantive framework that encourages litigants and federal judges to use

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[77] *Id.* at 606, 752 P.2d at 1077 (referring to Bertelmann v. Taas Assocs., 69 Haw. 95, 735 P.2d 930 (1987)).

[78] *Id.* at 608, 752 P.2d at 1079.

[79] Our analysis of the court's use of procedure to implement substantive policies is not meant as a critique of the soundness of the policies.

[80] *See* Stemple, *supra* note 13 at 99; Note, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C.L. Rev. 747 (1987).

[81] 475 U.S. 574 (1986).

[82] 477 U.S. 242 (1986).

[83] 477 U.S. 317 (1986).

summary judgment more freely.[84] It is a framework that differs markedly from central aspects of Hawaii's summary judgment approach. Mechanically, this trilogy clarifies the burdens of production of the movant and the respondent. Substantively, these decisions incorporate the standard of proof at trial into the calculus for determining the existence of a genuine issue of material fact at summary judgment and redefine the capacity of motion judges to weigh conflicting evidence and assess the credibility of witnesses. These opinions also enable a judge to grant summary judgment because he or she finds the plaintiff's theory of the case to be implausible.

A. Matsushita v. Zenith

Matsushita was a complex antitrust case brought by American electronics manufacturers against Japanese manufacturers of consumer electronics products (CEPs).[85] Plaintiffs contended that the Japanese manufacturers conspired to drive the American firms from the American CEP market by, in part, maintaining artificially high CEP prices in Japan and artificially low CEP prices in the United States.[86] According to plaintiffs, defendants were able to carry out this price-cutting scheme in the U.S. market over a twenty-year period because of the considerable profits obtained in Japan through their concerted action and the support of the Japanese government.[87]

After years of detailed discovery, the United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment.[88] First, the district court ruled that the bulk of plaintiffs' evidence was inadmissible.[89] Then, the court found that plaintiffs' claims depended on infer-

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[84] Commentators had been proposing clarification and reform of summary judgment law for years before these decisions were handed down. *See, e.g.*, Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974) (Justice Rehnquist cites the Louis and the Currie articles in *Celotex*, 477 U.S. at 324 n.5). Since 1986, many writers have discussed the merits and possible ramifications of this trilogy of cases. *See, e.g.*, Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988); Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change In Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOKLYN L. REV. 279 (1987).

[85] 475 U.S. 574, 577 (1986).

[86] *Id.* at 577-78.

[87] *Id.* at 580-82.

[88] *Id.* at 578-79. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981).

[89] 475 U.S. at 578. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp.

ences drawn from defendants' parallel conduct in the Japanese and American markets and the effects of that conduct on the American companies.[90] The district court held that "any inference of conspiracy was unreasonable" because (1) some of the evidence suggested that defendants' conspiracy did not injure plaintiffs, and (2) the evidence of the alleged conspiracy failed to rebut the more plausible inference that defendants were trying to compete in the American market and not attempting to monopolize it.[91]

The Court of Appeals for the Third Circuit reversed,[92] finding that the lower court had erroneously excluded admissible evidence and that "a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market."[93]

In a five-four decision, the Supreme Court reversed the court of appeals' decision.[94] The Court found that, despite conflicting evidence on material issues, the court of appeals "failed to consider the *absence of a plausible motive* to engage in predatory pricing."[95] In the majority's view, the alleged predatory pricing scheme made "no practical sense."[96] And, when a claim is one that makes no economic sense, plaintiffs must present more persuasive evidence supporting their claim to escape summary judgment.[97] Although the Court remanded for consideration of any other evidence "sufficiently unambiguous" to overcome the Court's conclusion that plaintiff's theory was implausible,[98] the majority's economic analysis signaled the end of this litigation.[99]

Some commentators view *Matsushita*'s impact as limited to antitrust conspiracy cases.[100] The *Matsushita* opinion's broad statements, however, present

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1190 (E.D. Pa. 1980).

[90] 475 U.S. at 579.

[91] *Id.*

[92] In re Japanese Elec. Prods., 723 F.2d 238, 251 (3d Cir. 1983), *rev'd sub nom.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 577 (1986).

[93] 475 U.S. at 581 (discussing the court of appeals decision).

[94] *Id.* at 597-98.

[95] *Id.* at 595 (emphasis added).

[96] *Id.* at 597.

[97] *Id.* at 587.

[98] *Id.* at 597.

[99] *See* In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987) (On remand, the Third Circuit affirmed the trial court's judgment as to all defendants).

[100] *See* Risinger, *supra* note 84, at 36. ("*Matsushita* seemed to be too tied up with narrow constructions of both the substantive law and the standards of proof in the antitrust area to be of general impact."); Stemple, *supra* note 13, at 111 ("Summary judgment was merely the vehicle by which the Court rid the judicial system of an antitrust claim disfavored by five of the Court's members. As to summary judgment doctrine itself, the Court did not make vast doctrinal pronouncements.").

troubling implications for summary judgment doctrine in other types of cases. *Matsushita*'s "implausibility" test has been applied in gender discrimination cases, enabling judges to dismiss a plaintiff's claim as implausible despite reasonable inferences jurors might draw from direct evidence that support the plaintiff's theory.[101]

In addition, as noted by the dissenters,[102] the Court in *Matsushita* simply ignored plaintiffs' expert testimony that contradicted the majority's economic analysis of the case.[103] Instead of allowing a factfinder to determine which economic theory was more plausible, the Court chose to evaluate and discount one side's evidence and then weigh all evidence together as a prelude to finding inadequate support for plaintiffs' theory. Justice White, writing for the dissent, suggested that the majority overturned settled law by allowing a judge who was hearing a defendant's motion for summary judgment to evaluate the evidence and decide whether the weight of the evidence favors the plaintiff.[104]

B. Anderson v. Liberty Lobby

Three months after the *Matsushita* decision, in *Anderson v. Liberty Lobby, Inc.*,[105] the Supreme Court confirmed that it was encouraging broader use of summary judgment to dispose of cases in the federal courts.

The plaintiffs[106] in *Anderson* brought a libel suit against columnist Jack Anderson and The Investigator magazine[107] after the defendants published three articles portraying the plaintiffs as "neo-Nazi, anti-Semitic, racist, and Fascist."[108] The United States District Court for the District of Columbia granted defendants' motion for summary judgment, ruling that plaintiffs were limited-

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[101] *E.g., Beard v. Whitely County REMC*, 840 F.2d 405 (7th Cir. 1988).

[102] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 577, 601-03 (1986)(White, J. dissenting).

[103] Plaintiffs' experts, including Dr. Horace J. DePodwin, Dean of the Graduate School of Business Administration at Rutgers University, Kozo Yamamura, Professor of Economics and Asian Studies at the University of Washington, Gary R. Saxonhouse, Professor of Economics at the University of Michigan, and John O. Haley, Associate Professor of Law at the University of Washington, all agreed that plaintiffs' economic theory of the case was plausible in light of Japanese business and export marketing practices. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp 1100, 1137 (E.D. Pa. 1981).

[104] 475 U.S. at 600-01 (White, J., dissenting).

[105] 477 U.S. 242 (1986).

[106] The plaintiffs in this case are Liberty Lobby, Inc., a not-for-profit corporation and self-described "citizens' lobby" and Willis Carto, its founder and treasurer. *Id.* at 244.

[107] Named defendants were Jack Anderson, publisher of The Investigator, Bill Adkins, president and chief executive officer of Investigator Publishing Co., and Investigator Publishing Co. itself. *Id.* at 245.

[108] *Id.*

purpose public figures and therefore were required to prove their case under the *New York Times Co. v. Sullivan* standards[109] and finding that actual malice was precluded by evidence[110] presented by defendants.[111]

On appeal, the Court of Appeals for the District of Columbia reversed in part,[112] holding that: (1) the evidentiary threshold at trial was irrelevant for summary judgment purposes; (2) summary judgment should be denied whenever " 'a minimum of facts supporting the plaintiff's case' " can be established;[113] and (3) a genuine dispute existed about whether publication was made with reckless disregard of the truth.[114] The Supreme Court vacated the court of appeals' decision, reinstating defendants' summary judgment.[115]

The Court's holding established two significant changes in summary judgment jurisprudence. First, the Court determined that the evidentiary standard of proof at trial[116] (*e.g.*, clear and convincing proof) must be considered in ruling on a motion for summary judgment.[117] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[118]

Second, in contrast with the approach of Hawaii courts, the Court stated that a trial judge must "bear in mind the actual quantum and quality of proof necessary to support liability" when inquiring as to the existence of a genuine issue of material fact.[119] And if, for example, "the evidence presented in the opposing affidavits is of insufficient *caliber* or quantity," then no genuine issue of material fact is raised.[120] The majority thus held that the "quantum and quality" of a respondent's evidence must be sufficient to defeat a motion for

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[109] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This case held that, under the first amendment, a libel plaintiff who is a public official must show, with clear and convincing evidence, that defendant acted with actual malice. *Id.* at 279-80, 285-86.

[110] The district court relied on the affidavit of Charles Bermant, an employee of defendants and the author of two of the three articles. Bermant stated that he obtained information about the plaintiffs from numerous sources and that he believed that the articles were factually accurate. *Anderson*, 477 U.S. at 245.

[111] *Id.* at 246. *See* Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201 (D.D.C. 1983).

[112] The Court of Appeals for the District of Columbia reversed as to 9 of the 30 allegedly defamatory statements. *Id. See* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

[113] 477 U.S. at 247 (quoting the court of appeals, 746 F.2d at 1570). This "minimum of facts" standard closely resembles the "scintilla of evidence standard" apparently applied by Hawaii courts. *See supra* notes 37-48 and accompanying text.

[114] 477 U.S. at 247.

[115] *Id.* at 257.

[116] In this case, the applicable standard of proof was "clear and convincing" evidence.

[117] *Id.* at 252.

[118] *Id.*

[119] *Id.* at 254.

[120] *Id.* (emphasis added).

directed verdict.[121] In a striking departure from traditional practices, the Court seemed to invite judges to evaluate the credibility of witnesses and the reliability of evidentiary materials. *Anderson* not only puts an increased burden on the respondent to establish that a material factual dispute exists, it also takes great strides toward usurping the jury's role in interpreting conduct and making other fact interpretations.[122]

C. Celotex Corp. v. Catrett

On the same day as the *Anderson* decision, the Supreme Court addressed the procedural mechanics of summary adjudication in *Celotex Corp. v. Catrett*.[123] The plaintiff in *Celotex* alleged that her husband's death resulted from exposure to defendant's asbestos products.[124] In response, plaintiff produced three documents which tended to show that the decedent was exposed to defendant's products.[125] Nevertheless, the district court granted the motion for summary judgment after defendant argued that the documents were inadmissible hearsay and "thus could not be considered in opposition to the summary judgment motion."[126]

The Court of Appeals for the District of Columbia reversed, holding that defendant's motion for summary judgment was "fatally defective" because defendant "made no effort to adduce *any* evidence . . . to support its motion."[127] The court of appeals, relying on *Adickes v. S.H. Kress & Co.*,[128] found

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[121] *Id.* The Court stated:

> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Id. at 250.

[122] *See* Stemple, *supra* note 13, at 115:

> [T]he Court removed from the jury one of its traditional roles in litigation - to interpret conduct and decide whether it was "reasonable," "negligent," "reckless," "intentional," "indifferent," "fraudulent," "knowingly false," and the myriad of other fact interpretations that have been reserved to the jury, pursuant to the seventh amendment and the traditional federal court practice.

The majority in *Anderson* denied that this was the result: "our holding . . . does not denigrate the role of the jury." *Id.* at 477 U.S. at 255.

[123] 477 U.S. 317 (1986).

[124] *Id.* at 319.

[125] *Id.* at 320. The documents included: (1) a transcript of the decedent's deposition from a workman's compensation hearing; (2) a letter from decedent's former supervisor whom plaintiff intended to call as a witness at trial; and (3) a letter from an insurance company describing asbestos products to which the decedent had been exposed. *Id.* at 335-36 (Brennan, J., dissenting).

[126] *Id.* at 320.

[127] *Id.* at 321 (quoting Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir.

that summary judgment was inappropriate because defendant had not submitted affirmative evidence in support of its motion.[129]

The Supreme Court unanimously rejected the court of appeals' reading of *Adickes*.[130] The Court found that Rule 56 did not require a defendant-movant to support its motion with specific affirmative evidence negating an element of plaintiff's claim.

Justice Rehnquist's plurality opinion stated that a moving defendant can meet its initial burden of production by merely "pointing to the record" to show that there is an absence of evidence to support the plaintiff's claim.[131] The burden then shifts to the respondent plaintiff who must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admission on file, 'designate 'specific facts showing that there is a genuine issue for trial.' "[132] Because the lower court had inappropriately relied on *Adickes* in construing the defendant-movant's burden of production, and because the defendant had satisfied its burden by simply pointing to a bare record, the Court remanded the case to the court of appeals to address the adequacy of plaintiff's response to defendant's motion.[133]

Justice White concurred with the result but added the cautionary statement that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[134]

Justice Brennan's dissent, which purported to agree with the majority's legal framework while disagreeing with its application, drew upon Justice White's reservation with the plurality opinion and artfully restated Justice Rehnquist's procedural analysis in a way that softened its impact on plaintiffs opposing summary judgment.[135] First, Justice Brennan made clear that "[t]he burden of establishing the nonexistence of a 'genuine issue' is on the party moving for summary judgment."[136] This burden has two parts: (1) an initial burden of

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1985) (emphasis in original)).

[128] 398 U.S. 144 (1970).

[129] Catrett v. Johns-Mansville Sales Corp., 756 F.2d at 184.

[130] Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); *id.* at 328 (White, J. concurring); *id.* at 334 (Brennan, J. dissenting).

[131] *Id.* at 325.

[132] 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

[133] *Id.* at 327-28. The majority stated, somewhat confusingly, that evidence need not be submitted in admissible form. Under Rule 56(e), a respondent may use the evidentiary materials listed in Rule 56(c) (except the pleadings), including: depositions, answers to interrogatories, admissions on file, and affidavits. Clearly, not all of these materials are in a "form" that would be admissible at trial, but they may be used to support or defeat a motion for summary judgment.

[134] *Id.* at 328.

[135] *Id.* at 329-37.

[136] *Id.* at 330.

production (which we have defined as part of summary judgment mechanics); and (2) an ultimate burden of persuasion (which we have defined as part of the substantive standard).[137] The movant must satisfy its initial burden of producing evidence *before* the burden of production shifts to the respondent and certainly *before* the court needs to decide whether the movant has satisfied its ultimate burden of persuasion.[138]

Next, Brennan described the movant's burden of production as a requirement that the movant "make a *prima facie* showing that it is entitled to summary judgment."[139] If the movant will bear the burden of persuasion at trial, it must demonstrate that it would be entitled to a directed verdict at trial if its evidence were uncontroverted.[140] If the movant will not bear the burden of persuasion at trial, it may satisfy its burden of production in either of two significantly different ways: (1) by submitting "affirmative evidence that negates an essential element of the nonmoving party's claim;" or (2) by demonstrating that the nonmoving party's evidence is "insufficient to establish an essential element" of its claim.[141]

The second option is a departure from prior law, expanding defendants' summary judgment opportunities. It builds on the broad statement in Rehnquist's opinion about simply "pointing to the record," but recasts that statement in a tighter conceptual framework. That option, as recast, enables a defendant-movant to carry its initial burden of production without offering "specific facts" in support of the motion. The defendant, however, must "affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party."[142] This affirmative demonstration may "require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence."[143] A conclusory assertion that there is no evidence will not suffice.[144] Such a " 'burden' of production is no burden at all and would simply permit summary judgment procedure to be

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[137] *Id.*

[138] *Id.* at 330-31.

[139] *Id.* at 331 (quoting 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (1983)).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 332.

[144] *Id.* If there is no evidence at all in the record, and there is no information in the record reasonably likely to lead to admissible evidence, then the movant can affirmatively show the absence of evidence by reviewing the admissions, interrogatories, and other parts of the record for the court. *Id.* The defendant-movant cannot simply file a two page memorandum in support of its motion asserting generally that the discovery record is bereft of admissible evidence in support of plaintiff's claim.

converted into a *tool for harassment*."[145]

Summary judgment will be denied if the defendant-movant fails this initial burden of production.[146] If the movant's initial burden has been met, then under Rule 56(e) the burden of production shifts to the respondent, who must: (1) locate relevant evidence in the discovery record that has been overlooked;[147] (2) rehabilitate the evidence attacked by the movant;[148] (3) produce specific evidence, not yet in the discovery record, contradicting movant's assertions; or (4) request further discovery as provided in Rule 56(f).[149] Under Rule 56(e), summary judgment will be granted if the respondent fails to respond or if, after the response, the court finds that the movant has met its ultimate burden of persuasion by showing the absence of any genuine issue of material fact for trial.[150]

Celotex, *Anderson*, and *Matsushita* have focused attention onto summary judgment doctrine in the federal courts. The full impact of these decisions may not be apparent for several years. What is apparent is that the revitalization of the summary judgment mechanism is one aspect of systemic efficiency reforms implemented to cope with the perceived increase in, and difficulty of, federal cases and that the revitalization marks a shift in litigation power towards defendants.

IV. Is Hawaii Drifting Toward The Federal Standard?

Several recent Hawaii cases use language indicating allegiance to some aspects of the reformulated federal summary judgment standards without discussion of the competing values of court access and efficiency or other ramifications of the federal trilogy. Without such discussion, we find it difficult to conclude that Hawaii courts have adopted the federal standards. References to *Celotex* and *Anderson*, however, point to the need for full discussion of the issue, lest Hawaii courts adopt federal standards by assimilation or default without consideration of their effects.[151]

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[145] *Id.* (emphasis added).

[146] *Id.*

[147] *Id.*

[148] The nonmoving party must rehabilitate the evidence in the record attacked by the moving party's papers. Presumably, the nonmoving party does this by presenting its own analysis of the evidence contained in the affidavits, depositions, and answers to interrogatories disparaged by the moving party.

[149] 477 U.S. at 332 n. 3. *See also* 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727, at 138-43 (1983).

[150] *Id.* Justice Brennan's analysis is recast in a detailed framework in Section V, C, *infra*.

[151] Although decided before *Celotex*, the trio of defamation cases surrounding the campaign of Wayne Nishiki seems to lay the foundation for adoption of the federal standard because it ac-

The ICA opinion in *Hall v. State*[152] quoted from *Celotex* and *Anderson* but did not expressly adopt the federal standards.[153] The decision did not acknowledge the dissonance between Hawaii law and the federal trilogy. Indeed, the weight of *Hall*'s reference to *Celotex* and *Anderson* was thrown into question by *Wong v. Panis*,[154] decided by the same court one year later. In *Wong* the court reviewed a grant of a defendant's summary judgment but made no mention of *Hall*, *Celotex* or *Anderson*. It instead relied on *Carrington v. Sears, Roebuck & Co.*[155] which in turn cited *Abraham v. Onorato Garages*,[156] and *McKeague v. Talbert*.[157] *McKeague*, as noted above, conflicts with the federal trilogy and is the leading case for the proposition that Hawaii courts prefer to deny summary judgment motions and to dispose of "undisputed fact" cases via directed verdict after the presentation of evidence at trial.[158]

The Hawaii Supreme Court recently entered the fray with its decision in *First Hawaiian Bank v. Weeks*.[159] The court started its discussion of the movant's substantive burden by citing section 2727 of a treatise by Wright, Miller & Kane[160] for the proposition that the movant "has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense." The court further stated that the movant "may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent."[161] The court concluded by

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cepts a directed verdict standard at the summary judgment phase. All three decisions contain language to the effect that when the standard used at trial is one of "clear and convincing proof," in order to succeed at summary judgment the plaintiff must have sufficient proof such that a reasonable jury could find the existence of the elements of plaintiff's case with convincing clarity. Rodriguez v. Nishiki, 65 Haw. 430, 439, 653 P.2d 1145, 1151 (1982); Mehau v. Gannett Pac. Corp. 66 Haw. 133, 145, 658 P.2d 312, 314 (1983); Beamer v. Nishiki, 66 Haw. 572, 578, 670 P.2d 1264, 1270 (1983). As discussed above, these cases also state that summary judgment should be granted sparingly and therefore only make sense if the "clear and convincing" burden is imposed solely on a movant who will have that burden at trial. Furthermore, these cases constitute a departure from the basic standard followed by Hawaii courts and arguably apply only to cases in which credibility or state of mind is at issue.

[152] 7 Haw. App. ____, 756 P.2d 1048 (1988).

[153] *Id.* at ____, 756 P.2d at 1055.

[154] 7 Haw. App. ____, 772 P.2d 695 (1989).

[155] 5 Haw. App. 194, 197, 683 P.2d 1220, 1224 (1984).

[156] 50 Haw. 628, 446 P.2d 821 (1968); *see also supra* notes 37-38 and accompanying text.

[157] 3 Haw. App. 646, 658 P.2d 898 (1983); *see also supra* notes 42-46 and accompanying text.

[158] *See supra* notes 42-46 and accompanying text.

[159] 70 Haw. 392, 772 P.2d 1187 (1989).

[160] 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 121, 130 (1983).

[161] 70 Haw. at 396, 772 P.2d at 1190 (quoting 10A WRIGHT MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 130 (1983)).

citing *Celotex* with a "*cf.*" signal and reciting the *Celotex* proposition that the movant can satisfy its initial burden by merely pointing to the record as devoid of evidence in support of its opponent's claims.[162]

What did the court mean by this reference to the treatise and to *Celotex*? The ICA had cited section 2727 of the Wright, Miller & Kane treatise in past cases that retained the traditional Hawaii law perspective on the substantive standard for summary judgment.[163] The court thus may have intended this quotation to demonstrate its continued allegiance to the idea that summary judgment should be granted sparingly. In *Waimea Falls Park, Inc. v. Brown*, the ICA cited the same section 2727 for the proposition that "if the movant, by uncontroverted affidavits or by using any of the other materials specified in the rule, completely explores and establishes the facts, he may be able to demonstrate the absence of any genuine issue of fact."[164] This language requires more of the movant than merely pointing to the record and asserting an absence of evidence, which seems to be permitted by the Rehnquist approach in *Celotex*. Thus, the court's "*cf.*" reference to *Celotex* in *First Hawaiian Bank* is arguably a statement by the court that it recognizes the existence of *Celotex* but has not adopted it — an invitation to its readers to compare the Hawaii standard and the *Celotex* standard.[165]

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[162] The actual language of the court is as follows:

> *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed. R. Civ. P. 56 need not support his motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is an absence of evidence to support the opponent's claims). For "[i]f no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless . . . ." 10A WRIGHT, MILLER & KANE, *supra*, at 130.

First Hawaiian Bank v. Weeks, 70 Haw. at 397, 772 P.2d at 1190.

[163] Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 679 P.2d 627 (1984); Jacoby v. Kaiser Found. Hosp., 1 Haw. App. 519, 622 P.2d 613 (1981).

[164] 6 Haw. App. 83, 92, 712 P.2d 1136, 1142-43 (1985).

[165] However, this view is arguably not in strict accord with the bluebook treatment of the "*cf.*" signal. The bluebook discussion of the "*cf.*" signal appears under the heading "[s]ignals that indicate support" and is described as meaning that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." *A Uniform System of Citation*, Rule 2.2(a) (14th ed. 1986) (The definition goes on to state that "[l]iterally, '*cf.*' means 'compare.' " *Id.* This provides further support for the argument that the court was inviting a comparison and calling attention to the differences between Hawaii and federal court practices.) Thus, the court's statement arguably means that the federal practice of allowing the movant to meet its initial burden by merely pointing to the record is different from the Hawaii practice but is sufficiently analogous to lend support. What does this say about the Hawaii practice? The bluebook definition of the "*cf.*" signal is reconcilable with the argument of the preceding paragraph if the similarity between the Hawaii and federal practices is that movant has the initial burden of demonstrating to the court the absence of any genuine issue of material fact, and the difference between them is the degree of affirmative action required of the movant to meet this burden.

V. At the Crossroads

The Hawaii courts can move in one of three directions: (1) they can continue Hawaii's traditional and somewhat murky approach to summary judgment; (2) they can adopt the federal trilogy, significantly reformulating summary judgment mechanics and the summary judgment standard; or (3) they can attempt to navigate a middle course, perhaps by incorporating Hawaii's substantive values into an improved mechanical framework. Each of these options has merit, each has drawbacks. A productive analysis must consider both mechanical and substantive aspects of these choices in light of the underlying values affected by the various applications of summary judgment doctrine.

A. Maintaining the Status Quo

The first option is to maintain the status quo. Hawaii's current summary judgment law, however, provides little practical guidance beyond the language of Rule 56 itself. Mechanical aspects of the rule have been occasionally elucidated, only to be ignored in subsequent cases.[166] No clear statement has been offered on the defendant-movant's options in discharging its initial burden of producing evidence. Without clearer guideposts, summary judgment mechanics will continue to be characterized by unpredictability.

Hawaii's substantive summary judgment standard is even hazier.[167] Some cases appear to adopt a "scintilla of the evidence" standard, which suggests focus on a search of respondent's evidence for something to raise the "slightest doubt" in the mind of the judge about whether movant should prevail. Other cases speak of a directed verdict standard, which suggests consideration of evidence of both movant and respondent and a prediction of how reasonable jurors would rule. In addition, special classes of cases exist in which summary judgment is to be even more reluctantly granted on the one hand, or more readily granted on the other. The precedential value of any case is unpredictable because the decisions have not been consistently followed.

In spite of the ambiguities in *Weeks*, at a recent Hawaii Institute for Continuing Legal Education (HICLE) meeting, Justice Padgett of the Hawaii Supreme Court and Judge Burns of the ICA both stated, without hesitation, that the federal standard has not been adopted in Hawaii. Justice Padgett also said that if there is the "slightest doubt" as to the existence of a genuine issue of material fact, then summary judgment should not be granted. He stressed that summary judgment should not be used as a method of calendar control and that, in his opinion, too many summary judgments were being granted. Frank D. Padgett and James S. Burns, Remarks at HICLE meeting, Motions and Appeals: The Art of Oral and Written Advocacy (February 3, 1990).

[166] *See supra* text accompanying notes 16-36.

[167] *See supra* notes 37-79.

There is, however, a salutary aspect to Hawaii summary judgment history. The most consistent themes in Hawaii summary judgment cases are jury access and public trials. This has led to a general reluctance to grant summary judgment and has created a process of litigation fully accessible to all with at least colorable positions. There is, in turn, a troublesome aspect to this ease of access. Hawaii courts, in their opinions, have not addressed the concerns reflected in the federal trilogy. These concerns are the added administrative burdens on courts, the unnecessary costs to litigants and the distortion of settlement leverage created by the failure of Rule 56 to terminate cases without material facts in controversy.

B. Embracing the Federal Standard

The second option is to embrace federal standards. To review this option we have placed federal standards into two categories: first, the *Celotex* trilogy (divided into "burdens of production" and the "substantive standard"); and second, the proposed amendments to the text of Federal Rule 56.

1. The Celotex *trilogy*

a. Burdens of producing evidence on the motion

Recent references to *Celotex* and *Anderson*[168] in Hawaii appellate court opinions have fueled speculation that Hawaii may adopt the reformed federal summary judgment standards enunciated in the *Celotex* trilogy.[169] One laudable feature of federal summary judgment reform is its introduction of a mechanical framework to guide judges and litigants through the procedural maze of Rule 56. A similar framework of burdens of producing evidence, adopted by Hawaii courts, might assist motion judges and attorneys in the orderly presentation and assessment of summary judgment motions. It might deter the filing of some motions. It would probably allow judges to grant a somewhat higher percentage of defendant summary judgments. It might also enable litigants to consider summary judgment dispositions as part of their overall litigation strategy. Of course these projected "effects" might be perceived as benefits by some and detriments by others. They are also speculative. Part of the difficulty of prediction, and part of the difficulty of deciding whether to adopt *Celotex*, results from the divergent views expressed within *Celotex* itself.

Where the movant bears the burden of persuasion at trial (usually a plain-

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[168] *See supra* text accompanying notes 152-164.

[169] FRCP Rule 56 decisions by federal courts, of course, do not control the interpretation of HRCP 56 unless Hawaii courts adopt the approach of the federal courts.

tiff's motion), the application of the *Celotex* framework is well understood and the justices are in agreement. For example, if a plaintiff asserting a negligence claim moves for summary judgment, it must produce specific evidence establishing duty, breach, proximate cause and damages. If plaintiff does this, the defendant must respond by discrediting plaintiff's evidence, rehabilitating any evidence in the discovery record that plaintiff has disparaged, or producing new specific evidence contradicting plaintiff's evidence.

However, where the movant will not bear the burden of persuasion at trial (usually a defendant's motion), the justices appear to disagree on significant aspects of the framework. The question raised by their disagreement is whether the defendant-movant really bears any burden at all. Justice Rehnquist's plurality opinion suggests that the answer is no.[170] The movant needs only to point to the discovery record and declare it bereft of evidence. In contrast, Justice White's concurrence and Justice Brennan's dissent indicate that an equal number of justices believe that a moving defendant must bear a meaningful burden of production before the responding plaintiff is compelled to fully assemble and present its case.[171]

The uncertainty generated by these conflicting approaches presents a daunting problem for plaintiffs. *Celotex* does not provide a plaintiff with a mechanism for challenging a defendant-movant's failure to meet its initial burden, short of the plaintiffs presenting its entire case. Even if a plaintiff believes that a defendant's motion simply "pointing to the record" is ill-conceived under the Brennan formulation, it knows the motion may be adequate under the Rehnquist formulation. The plaintiff must present its affirmative evidence in response. The risk is too high to do otherwise. If the plaintiff chooses not to present its affirmative case, and is wrong about defendant's satisfaction of its minimal burden, plaintiff will lose the summary judgment motion. Thus, as long as the Rehnquist approach in *Celotex* survives, a defendant can compel a plaintiff to disclose its entire affirmative case simply by filing a bare summary judgment motion. This creates the specter of summary judgment "harassment" identified by Brennan.[172]

This potential unfairness to plaintiffs would be exacerbated in Hawaii. In *Munoz v. Yuen*,[173] the Hawaii Supreme Court held that appellate courts are to consider only the evidence presented to the lower court at the time the summary judgment motion was supported or opposed. Therefore, a plaintiff who does not fully present its case in response to a defendant's summary judgment

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[170] *See supra* text accompanying notes 131-133.

[171] Justice Stevens dissented on other grounds, never reaching the question of what is the moving party's initial burden of production. Celotex Corp. v. Catrett, 477 U.S. 317, 337-39 (1986) (Stevens, J. dissenting).

[172] *Id.* at 332. *See supra* note 143 and accompanying text.

[173] 66 Haw. 603, 670 P.2d 825 (1983). *See supra* text accompanying note 33.

motion (which under *Celotex* need not be supported by any evidence) not only risks losing the motion, it also risks losing the opportunity for meaningful review of all of its evidence.

Accepting the Rehnquist approach in Hawaii would probably create insurmountable problems of unfairness. Defendant summary judgment motions would likely be transformed into a strategic discovery tool unavailable to plaintiffs.

Justice Brennan's approach, however, has considerably more potential. If thoughtfully executed, this procedural framework[174] could further the quest "to secure the just, speedy and inexpensive determination" of civil litigation.[175] First, instead of allowing the defendant simply to "point to the record," the movant-defendant is required affirmatively to show that an essential element of plaintiff's case is unsupported by discovered evidence. The movant must identify the unsupported element and explain how the record fails to demonstrate even *prima facie* support of that element. If, as in *Celotex*,[176] the record contains inadmissible evidence that might lead to admissible evidence on point, the defendant must reasonably pursue that lead. If the plaintiff believes the motion is premature, the court is encouraged to carefully and seriously consider allowing additional time for discovery under Rule 56(f). Through this mechanism, a court could prevent a defendant from forcing a plaintiff to prematurely bear the cost and bother of assembling the entire case. The liberal use of Rule 56(f) as an integral part of the summary judgment process could prevent misuse of the relatively inexpensive and easy motion for summary judgment by defendants.

Additionally, where the plaintiff has had ample and unobstructed opportunity to build its case, the framework reasonably expects plaintiff to be able to make at least a *prima facie* showing of each element of its claim. The defendant and court should be able to avoid a costly trial if the plaintiff cannot muster minimally reasonable support shortly before trial. The plaintiff may in fact benefit from the process of compilation and self-examination at this point. Settlement possibilities may be enhanced. Properly executed, this framework provides a measure of predictability, safeguards against the imbalanced distribution of litigation power, and promotes efficiency for litigants and the court system.[177]

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[174] *See infra* note 195 and accompanying text.

[175] Fed. R. Civ. P. 1. Rule 1 indicates that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Streamlining the summary judgment process undoubtedly furthers the goals of speedy and inexpensive determination, but justice must remain the first consideration.

[176] *See supra* note 125 and accompanying text.

[177] *Cf.* Schwarzer, *supra* note 84. While arguing for greater use of summary judgment to further efficiency and economy in the federal courts, Judge Schwarzer recognized that the reservations about summary judgment were not without foundation and that "supposed shortcuts [may] be costly and time-consuming when not well managed." 99 F.R.D. at 467.

b. Burden of persuasion on the motion: the substantive standard

Within the mechanical framework, a judge must also apply the substantive summary judgment standard. *Anderson*[178] and *Matsushita*[179] indicate that the applicable federal standard mirrors the directed verdict standard and incorporates the evidentiary standard of proof at trial — either "a preponderance of the evidence" or "clear and convincing evidence."

The use of this aspect of the directed verdict standard at summary judgment is appealing for two reasons. First, both judges and litigants are familiar with these standards. Second, these standards would allow efficient disposition of claims that would not get to the jury at trial. More summary judgment motions are likely to be granted under this standard because responding plaintiffs would have to show more than a scintilla of evidence to fend off summary judgment. A responding plaintiff would need to present enough of its case to convince the court that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[180]

The problem with the 1986 federal trilogy is that it goes beyond merely incorporating the quantitative level of proof at trial into the substantive summary judgment standard. *Anderson* directs the lower courts to evaluate the "caliber and quality" of evidence as well as the "quantum"[181] of proof. This is a major drawback to the substantive standard proffered by these cases. The motions judge is invited to evaluate the quality of the paper evidence without allowing the parties to develop fully the evidence and the credibility of witnesses through the trial process. This may transform a summary judgment motion into a "full blown paper trial on the merits."[182]

This troubling invasion of the jury's province is also seen in *Matsushita* where the Supreme Court appears to "undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment."[183] Judicial weighing of evidence facilitates speedier, cheaper resolution of claims, but at a price. Plaintiffs with novel economic or legal theories may never get a public airing. Litigants may not be able to fully develop the

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[178] *See supra* text accompanying notes 105-122.

[179] *See supra* text accompanying notes 85-104.

[180] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[181] *Id.* at 254; *see also* 477 U.S. at 266 (Brennan, J., dissenting).

[182] *Id.*

[183] 475 U.S. 574, 600-01 (White, J. dissenting). The *Matsushita* majority stated that if "the respondents' claim [is] implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587. The Court invited judges to evaluate the plaintiffs' theory of recovery to determine the adequacy of the underlying facts to defeat summary judgment, rather than view the facts in the most favorable light to the party opposing the summary judgment.

testimony of hostile or uncooperative witnesses. And, the impartiality of the judge may be called into question. The price exacted by the judicial weighing of evidence on the summary judgment motion is a price Hawaii courts historically have been unwilling to pay.[184]

The *Celotex* trilogy thus offers some summary judgment changes that are advantageous and others that are problematic. In a later section, discussing the "Middle Ground" option, we have extracted the beneficial changes and incorporated them into a recommended framework.

2. *Proposed Amendments to FRCP 56*

The Advisory Committee to the Civil Rules has proposed a major restructuring of Rule 56.[185] The proposed changes reflect the efficiency values expressed in the 1986 trilogy. However, as currently drafted, the text and commentary appear to go even farther, shifting the balance of power significantly toward defendant-movants. Martin Louis, who has argued since 1974 that the defendant-movant's burden should be lightened, calls the proposed modifications "unabashedly pro-defendant."[186] At a recent meeting, Professor Louis stated, "At a time when in my opinion it is time to apply the brakes and steer for the middle of the highway, [the advisory] committee still has its pedal to the metal and very strongly."[187]

A detailed discussion of the proposed changes to Rule 56 is beyond the scope of this article. In brief, the rule is substantially rewritten. One important change provides for the summary establishment of fact or law, either on motion or at a pretrial conference.[188] Also, summary judgment may be entered upon motion or, significantly, at pretrial conference on the basis of "facts stipulated or summarily established or establishable as a matter of law."[189] Another change, important to this discussion, is the elimination of Rule 56(f) and the replacement with the "new" Rule 56(d) which states that "summary judgment shall [not]

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[184] *See supra* text accompanying notes 41-47.

[185] Advisory Committee on Civil Rules, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 105-20 (September 1989).

[186] M. Louis, Remarks at the 1990 Annual Conference of the Association of American Law Schools at San Francisco, California: Civil Procedure Section Program (January 4-7, 1990) (Tape 71 produced by Recorded Resources Corp., 1468 Crofton Parkway, Crofton, MD 21114). Louis's seminal article, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974), is often credited with starting the movement toward federal summary judgment law reform.

[187] M. Louis, Remarks *supra* note 186.

[188] Proposed Rule 56(a)(1), Advisory Committee on Civil Rules, *supra* note 185, at 105-06.

[189] Proposed Rule 56(b)(1), Advisory Committee on Civil Rules, *supra* note 185, at 107-08.

be rendered . . . nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established."[190] The advisory committee notes state that the new rule limits the discretion of the district court to withhold the opportunity for discovery.[191] Despite these assurances, there is no specified time period in the new Rule 56(d) in which a party can exercise its "reasonable opportunity" to use discovery.[192]

The overhaul of Rule 56 inevitably would create a new era of uncertainty for summary judgment law in the federal courts. It is unclear what impact the amended rule would have on existing federal case law and what response the new rule would elicit from federal judges. In light of the ever-changing face of federal summary judgment doctrine, Hawaii courts should move with extreme caution, if at all, toward the wholesale adoption of the current, or future, federal summary judgment standards.

C. *Towards a Middle Ground: Procedural Clarity and Substantive Integrity*

The summary judgment mechanics of the *Celotex* trilogy articulated in Justice Brennan's opinion in *Celotex* would provide Hawaii with clear guidelines for the marshalling of evidence and a well-balanced scheme that protects the interests of both plaintiffs and defendants.[193] The Hawaii Supreme Court began the process in *Mossman* nearly 30 years ago and the ICA contributed significantly in *Arimizu* in 1984;[194] now, the Hawaii courts should seize the opportunity to finish building a mechanical framework for Hawaii summary judgment law. The framework we suggest, drawn primarily from Justice Brennan's "clarification" of the plurality's general statements in *Celotex*,[195] is summarized below:

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[190] Proposed Rule 56(d), Advisory Committee on Civil Rules, *supra* note 185, at 112.

[191] Advisory Committee Notes, Advisory Committee on Civil Rules, *supra* note 185, at 119-20.

[192] Although the proposed Rule 56(d) does not include any specific time frame, the advisory committee notes indicate that a party would have a right to at least 30 days to oppose a proposed determination. This is the time allotted under the proposed Rule 56(b)(2)(B). However, it is interesting to note that a court may, for good cause, shorten or extend the 30 days under the proposed Rule 56(b)(2)(B). Advisory Committee on Civil Rules, *supra* note 185 at 108, 120.

[193] *See supra* text accompanying notes 169-177.

[194] *See supra* text accompanying notes 16-36.

[195] Celotex Corp. v. Catrett, 477 U.S. 317, 329-32 (1986); *see supra* text accompanying notes 135-145. We offer this summary based on Justice Brennan's framework for two reasons. First, it is based on a far more sophisticated analysis of summary judgment mechanics than the general statements of the plurality opinion. Second, it seems to balance better the interests of plaintiffs and defendants than does the plurality opinion. This is discussed *supra* notes 169-177 and accompanying text.

1. When the burden of persuasion at trial rests with the movant (generally, a plaintiff's motion for summary judgment):
   a. Movant has the initial burden of producing enough specific evidence to make a *prima facie* showing on each element of its claim;
   b. If, and only if, the movant's initial burden is met, the respondent must (1) attack and discredit the evidence proffered by the movant, (2) rehabilitate the evidence in the discovery record attacked by the movant, or (3) produce specific evidence not yet in the discovery record that contradicts movant's evidence; or the respondent may request a continuance on the motion under Rule 56(f) to conduct further discovery;
   c. If both parties meet their burdens of production, then movant has the ultimate burden of persuading the court that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law.

2. When the burden of persuasion at trial rests with the respondent (generally, a defendant's motion for summary judgment):
   a. Movant has the initial burden of either (1) producing specific evidence that negates an essential element of the respondent's claim, or (2) affirmatively demonstrating the absence of evidence in the record supporting an essential element of the respondent's claim;
   b. (1) If the movant's initial burden is met by producing specific evidence negating an essential element of the respondent's claim, the respondent can then satisfy its burden of production in the manner set forth in 1(b) above;

      (2) BUT if the movant's initial burden is met by affirmatively demonstrating the *absence* of acceptable record evidence supporting an essential element of the respondent's claim, the respondent may (a) rehabilitate record evidence attacked by the movant, (b) produce specific evidence not yet in the discovery record supporting respondent's claim, or (c) refer to evidence already in the record or suggested by the record that has been overlooked by the movant; or the respondent may request continuance on the motion under Rule 56(f) to conduct further discovery;
   c. If both parties meet their burdens of production, then movant has the ultimate burden of persuading the court that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law.

The strong middle ground embodied in this framework has a number of attributes. First, it spells out the moving party's (especially the defendant-movant's) initial burden of production options under HRCP 56(e). The defendant can support its motion with specific evidence or it can show that the record is bereft of evidence supporting plaintiff's claim. As to the second option, Justice Rehnquist's vague direction allowing defendant simply to "point to the rec-

ord"[196] is avoided. Instead, the defendant-movant is instructed to "affirmatively demonstrate" the absence of support for plaintiff's claim by summarizing and analyzing the evidence (that may bear on the challenged elements of the claim) contained in the discovery record.[197] This may require the movant to pursue reasonable leads to evidence that appear in the record.

Second, the framework recognizes the utility of Rule 56(f) continuances to allow for further discovery if a defendant prematurely files a motion relying upon the second option. It also recognizes Rule 56(f) as a possible mechanism for challenging defendant's failure to carry its initial burden when it points conclusorily to the record and asserts plaintiff's lack of evidence.[198] By making a Rule 56(f) request, the plaintiff is asking the court to halt the summary judgment process because it is premature to require plaintiff to respond. Although the provision is usually applied when plaintiff has had inadequate time for discovery, it could be applied more expansively to enable the plaintiff to assert the prematurity of his response in light of defendant's failure to discharge its burden of production by inadequately "pointing" to the discovery record. These aspects of the suggested framework ease the defendant's initial burden of producing evidence, but also prevent the defendant from using the motion for summary judgment as a tool for harassment or easy discovery.[199]

Third, the framework explains the point at which the burden of production shifts from movant to the respondent. It also sets forth in detail the varying ways in which the respondent can satisfy its burden of production. These are three significant attributes of a mechanical framework that endeavors to balance the interests of plaintiffs and defendants and accommodate underlying value tensions between efficiency and access.

Even if the suggested mechanical framework is embraced, however, we believe that Hawaii courts should part ways with the *Celotex* trilogy on the substantive standard for summary judgment. The substantive standard espoused by the Supreme Court in *Anderson* and *Matsushita* encourages the motions judge to evaluate the quality of evidence presented and weigh conflicting evidence as a fact-finder without the benefit of trial.[200] This is repugnant to the values Ha-

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[196] *See supra* text accompanying note 41.

[197] *See supra* text accompanying notes 135-145 (Justice Brennan's explanation of the moving party's initial burden of production).

[198] *See supra* note 173 and accompanying text.

[199] In part because Hawaii has yet to adopt a penalty comparable to FRCP 11, there is little incentive to avoid use of summary judgment as inexpensive and efficient discovery. The adoption of a Rule 11 identical to FRCP 11 is now being considered by the Hawaii Supreme Court. A significant penalty for the frivolous filing of a motion for summary judgment would deter the use of this motion as a harassment tool. Therefore, Hawaii courts could ease the defendant's initial burden of production, making summary judgment more readily available in appropriate cases, and avoid potential abuses.

[200] *See supra* notes 85-122 and 178-184 and accompanying text.

waii courts have consistently placed on access to the trial process.

We suggest, however, that Hawaii courts could incorporate the "level of proof at trial" (*e.g.*, preponderance of the evidence) into the summary judgment consideration without offending Hawaii's high regard for fairness (through jury access), provided that courts do so with appropriate safeguards. In many cases, a plaintiff can at least raise the "slightest doubt" that defendant is entitled to prevail. The current Hawaii summary judgment standard allows a plaintiff to proceed to trial even without evidence remotely resembling a *prima facie* case. Once a plaintiff has had an opportunity to make full discovery, defendants and the court ought to be saved the expense and burden of a full trial if the plaintiff still cannot muster a credible case. Incorporating the level of proof at trial into the summary judgment standard would accomplish this. After adequate time for full discovery, without evaluating the quality of the evidence, and viewing the evidence in a light most favorable to the respondent, the court would ask: can a reasonable jury find for the respondent by a preponderance of the evidence? If the answer is no, the court would grant the motion. Nevertheless, safeguards are necessary. In circumstances involving hostile witnesses who are uncooperative or defendants who are obstructionist throughout discovery, the motions judge would need to consider plaintiff's difficulties in obtaining evidence in determining whether plaintiff has presented a *prima facie* case.

Finally, as a matter of explicit policy, and in recognition of the added value of public trials and jury access in certain circumstances, the Hawaii courts could maintain the "slightest doubt" standard in cases involving issues of public importance,[201] issues of negligence,[202] and issues of credibility or state of mind.[203]

These flexible standards would allow wider use of summary judgment to be used more widely without compromising the underlying values that have concerned Hawaii courts in the past. They would provide enhanced clarity and predictability for litigants and motions judges. And, they would allow each procedural step of the summary judgment process to be evaluated in light of a substantive standard that takes appropriate notice of the competing goals of our adjudicatory system.

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[201] *See supra* text accompanying notes 49-59.

[202] *See supra* text accompanying notes 60-64.

[203] *See supra* text accompanying notes 65-73.

Extreme Emotion

by Harold V. Hall*

I. Overview

This article focuses on extreme mental or emotional disturbance and related concepts, such as partial mental responsibility, irresistible impulse, emotional insanity, heat of passion, and diminished capacity as mitigation to the offense of murder. The psychological assumptions upon which mitigation is based are discussed. In particular, they are: (1) the inherent unreliability of measuring cognitive and affective events;[1] (2) the neglect of previous violence by the accused;[2] and (3) the underemphasis on defendant self-control.[3]

A psycholegal model which links case law and behavioral science in regard to extreme emotion is proposed. At the core of this model is an analysis of the defendant's ability to choose and exercise control over his behavior, which may range from disorganized to highly competent in nature. An individual's degree of self-control is compared to both his or her own baseline/normal behavior and normative data from other base-rate groups of which the defendant is a member. This analysis retains the "objective-subjective" test for extreme emotion, which is elaborated upon later in this article. The synthesis provided by this

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[1] J. Coleman, J. Butcher & R. Carson, Abnormal Psychology and Modern Life (1984); H.V. Hall, Violence Prediction: Guidelines for the Forensic Practitioner (1987); R. Rogers, Conducting Insanity Evaluations (1986).

[2] Hall, *Dangerousness Prediction and the Maligned Forensic Professional: Suggestions for Estimating True Basal Violence*, 9 Crim. Just. & Behav. 3 (1982); J. Monahan, The Clinical Prediction of Violent Behavior, Pub. No. ADM 81-921, National Institute of Mental Health (1981).

[3] I. Weiner & A. Idess, Handbook of Forensic Psychology (1987); Hall, *Cognitive and Volitional Capacity Assessment: A Proposed Decision Tree*, 3 Am. J. of Forensic Psychology 3 (1985); Hall & McNinch, *Linking Crime-specific Behavior to Neuropsychological Impairment*, 10 Int'l J. of Clinical Neuropsychology 113 (1988).

model allows the evaluator to scrutinize his or her decision-making process in arriving at proffered conclusions relevant to extreme emotion.

II. BACKGROUND

The Model Penal Code's concept of extreme mental or emotional disturbance, commonly referred to as "extreme emotion," is currently recognized in Hawaii, New York, and Oregon.[4] Under these schema, an accused can use extreme emotion as a mitigating factor to reduce a murder charge to manslaughter. The Hawaii Revised Statutes states the following:

> In a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.[5]

The Hawaii Revised Statutes adopted the definitions of extreme emotion as articulated in *People v. Shelton*:

> [E]xtreme emotional disturbance is the emotional state of an individual, who: (a) has no mental disease or defect that rises to the level established by [HAW. REV. STAT. § 704-400 (1985)[6]]; and (b) is exposed to an extremely unusual and overwhelming stress; and (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, guilt, excessive agitation or other similar emotions.[7]

The intent of the extreme emotion provision is to provide a basis for mitigation which merges the concepts of "heat of passion" and "diminished capac-

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[4] Recent Development, *State v. Dumlao: Hawaii's "Extreme Mental or Emotional Disturbance" Defense*, 9 U. HAW. L. REV. 717 (1987).

[5] HAW. REV. STAT. § 707-702(2) (1985).

[6] This statute reads:

> (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

HAW. REV. STAT. § 704-400 (1985).

[7] 88 Misc. 2d 136, 149, 385 N.Y.S.2d 708, 717 (1976).

ity"; however, it is not truly either idea in substance or in form. Extreme emotion in terms of diminished *mens rea* for committing murder is not the same as so-called emotional insanity,[8] which is rejected by most states.[9]

A. *Heat of Passion*

In Hawaii, the notion of mental and emotional extenuation for heat of passion crimes has its roots in the nineteenth century[10] — "Whoever kills another . . . under the sudden impulse of passion . . . of a nature tending to disturb the judgment and mental faculties, and weaken the possession of self-control of the killing party is not guilty of murder, but manslaughter."[11] The basis of the heat of passion approach conforms to the ancient concept that killing another while momentarily enraged represents a less heinous state of mind than necessary for murder. Hence, the perpetrator is seen as less culpable. This is a minority view currently held by nine states, not including Hawaii.[12]

The heat of passion defense has four elements: (1) provocation that would rouse a reasonable person to the heat of passion; (2) actual provocation of the defendant; (3) a reasonable person would not have cooled off in the time between the provocation and the offense; and (4) the defendant did not cool off.[13]

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[8] Emotional insanity refers to the lack of criminal responsibility caused by a mental disorder characterized by problems in maintaining control of affect (feelings). The thinking of the defendant may not be impaired, only the emotional component of his mental life.

[9] *See* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 91-94 (1954); WILKINSON & A. ROBERTS, INSANITY DEFENSE; 41 AM. JUR. 2D *Proof of Facts* § 11 (1985); 3 M. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1987); State v. Foster, 44 Haw. 403, 425, 354 P.2d 960, 972 (1960); *cf.* Brett, *The Physiology of Provocation*, 1970 CRIM. L. REV. 634.

[10] The King v. Greenwell, 1 Haw. 85 [146] (1853); The King v. Sherman, 1 Haw. 88 [150] (1853). For at least one and a quarter centuries, Hawaii case law has contained the common-law provision for reduction of murder to manslaughter in cases where emotional or mental disorders were established. Previous Hawaii law described manslaughter as the unlawful taking of a life "without malice aforethought, and without authority, justification, or extenuation." *See* Commentary to HAW. REV. STAT. § 707-702 (1976).

[11] The King v. Greenwell, 1 Haw. at 87 [149], *cited in* Commentary, HAW. REV. STAT. § 707-702 (1985).

[12] *See* Comment, *Provoked Reason in Men and Women: Heat of Passion, Manslaughter, Imperfect Self-Defense*, 33 UCLA. L. REV. 1679 (1986); Note, *Proof of Extreme Emotional Disturbance in Oregon Murder Prosecutions: A Constitutional Analysis*, 58 OR. L. REV. 98 (1979); Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982); Eshelman, *Criminal Law-Psychiatric Evidence Ruled Admissible in Murder Prosecution to Determine Whether Defendant Acted in Heat of Passion*, 77 DICK. L. REV. 435 (1977); 2 W.R. LA FAVE & A.W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.10(b) (1986).

[13] State v. Dumlao, 6 Haw. App. 173, 177, 715 P.2d 822, 826 (1986). *See also*, Donovan & Wildman, *Is the Reasonable Man Obsolete?* 14 LOYOLA L. REV. 435, 438 (1981).

B. Diminished Capacity

Diminished capacity, which addresses degree of guilt rather than exculpation, is also referred to as partial or diminished responsibility. It is based on the assumption that less punishment should be attached to less criminal intent. This approach allows for testimony regarding specific intent in order to reduce the original charge.[14] It is noteworthy that the Model Penal Code allows for testimony regarding extreme mental or emotional disturbance from the perspective of the accused. It is also noted that the Ninth Circuit recently upheld the so-called "diminished capacity" defense despite changes in the Insanity Defense Reform Act.[15] Hawaii law follows California case law.[16]

As summarized by Rogers,[17] this concept has been under increasing attack, with various jurisdictions rejecting the use of diminished capacity for (1) substance-related conditions, such as alcoholism, pathological intoxication, side effects of prescribed medication, and drug use or withdrawal, and (2) purely genetic or environmental influences on behavior.

C. Extreme Mental or Emotional Disturbance

The concept of extreme mental or emotional disturbance fuses elements of heat of passion and diminished capacity. Requirements include the following: (1) that the homicide was not caused by a mental disorder, in which case an insanity defense is more appropriate; (2) that the defendant was faced with overwhelming stress and emotion, from the viewpoint of the defendant; and (3) that, as a result, self-control was weakened to the point where the instant violence was perpetrated.[18] The level of *mens rea* is irrelevant in that the defendant

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[14] *E.g.*, the "Wells-Gorshen Doctrine," from People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949) and People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); similarly formulated by U.S. v. Brauner, 471 F.2d 969 (D.C. Cir. 1972).

[15] 18 U.S.C. § 17 (1984). The Insanity Defense Reform Act restricts the American Law Institute (ALI) test of insanity and, therefore, its potential misuse. The volitional arm of the ALI test, having to do with a possible impairment in one's ability to conform his conduct to the requirements of the law, for example, has been deleted in its entirety.

See U.S. v. Twine, 853 F.2d 676 (9th Cir. 1988); *see generally* CRIMINAL LAW LATEST DEVELOPMENTS PRACTICE AND PROCEDURE, 3RD ANNUAL SEMINAR 1971-1972, CAL. TRIAL LAWYERS ASSOC. (L. Katz ed. 1972); *compare Symposium on Cal. Proposition 8*, 13 W. ST. U.L. REV. 1 (1985); Comment, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984).

[16] *See* State v. Rodrigues, 67 Haw. 70, 679 P.2d 615 (1984), *cert. denied*, 469 U.S. 1078 (1984); State v. Nuetzel, 61 Haw. 531, 606 P.2d 920 (1980).

[17] R. RODGERS, CONDUCTING INSANITY EVALUATIONS (1986).

[18] State v. Russo, 69 Haw. 72, 734 P.2d 156 (1987); State v. Dumlao, 6 Haw. App. 173, 715 P.2d 822 (1986); *see* Recent Development, *State v. Dumlao: Hawaii's Extreme Mental or*

could have intentionally or knowingly committed the instant violence. Mitigation from murder to manslaughter, rather than exculpation, follows a successful defense.

The landmark case in Hawaii in the area of extreme mental or emotional disturbance is *State v. Dumlao*,[19] which is often cited in trial proceedings concerning this issue. *Dumlao* provides operative guidelines by implication and by example. In general, there is *no* preclusion to this defense for: (1) claims of victim provocation; (2) a personality disorder of the accused; (3) previous violence to others by the accused, not including the instant victim; (4) a claim of accidentally killing the instant victim; (5) a cooling-off period between the stressor causing the extreme distress and instant violence; (6) cumulative, as opposed to momentary, stressors; or (7) single versus multiple (*i.e.*, mixed) resultant emotions (*e.g.*, combinations of passion, anger, distress, grief, excessive agitation). The totality of circumstances and history of the accused is considered in a "subjective-objective test" — the (subjective) mental life and (objective) appraisal of events, even if inaccurate, are the twin foci of this defense.[20]

The only preclusion to a successful legal defense involves situations where the accused created his or her own mental disturbance, as during the stress of a robbery. Tjioe suggested that extreme mental or emotional disturbance could be explained under *behavioristic*, *psychoanalytic*, or *physiological* approaches to the

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Emotional Disturbance Defense, 9 U. HAW. L. REV. 717 (1987); State v. Manloloyo, 61 Haw. 193, 600 P.2d 1139 (1979); State v. Freitas, 62 Haw. 17, 608 P.2d 408 (1980); *cf.* State v. Matsuda, 50 Haw. 128, 432 P.2d 888 (1967); State v. Miyahira, 6 Haw. App. 320, 721 P.2d 718 (1986); *compare* Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988).

[19] 6 Haw. App. 173, 715 P.2d 822 (1986). Vivado B. Dumlao was convicted of murder in the shooting death of his mother-in-law, and of reckless endangering in the first degree for shooting and injuring his brother-in-law. The violence was perpetrated within a context of chronic conflict among the family members. The violence included the defendant accusing his wife of having sexual relations with her brother, beating and kicking her frequently, throwing a knife at her, and threatening to kill her on numerous occasions. The defendant did not appeal the reckless endangering charge. On appeal, the Intermediate Court of Appeals (ICA) reversed the conviction and remanded the case. The ICA held as follows: (1)that the trial court was required to instruct the jury regarding a manslaughter defense as requested by defendant if there was any evidence, no matter how weak, inconclusive, or unsatisfactory, to support a finding that at the time of the offense the defendant suffered an extreme mental or emotional disturbance for which there was a reasonable explanation when the totality of circumstances was judged from his personal viewpoint; and (2) evidence that defendant shot his mother-in-law while under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation was sufficient to warrant an instruction on manslaughter notwithstanding that there was contradictory evidence concerning defendant's attack on his mother-in-law.

[20] The "subjective" mental life of the defendant refers to the internal, complex, and often unconscious interplay of thoughts, feelings, and imagery. The "objective" appraisal of events refers to the awareness of the external and environmental events which affect the defendant and how he or she decides to behave.

concept.[21] He erroneously stated that extreme mental or emotional disturbance "is perceived by these approaches as a legal defense that does not require the actor to be insane, recognizing that some actions are involuntary."[22] Actually, only psychoanalysis incorporates the concept of a "defense" and that is in the psychological sense. None of the approaches are concerned with "insanity," which is a legal concept, not a psychological one. Further, the three approaches selected by Tjioe view most behaviors as essentially predetermined in nature (*i.e.*, free will is seen as non-existent or as operating under strict limitations), a fundamental departure from legal theory. Finally, most practical applications of behavioral science involve a mixture from a variety of schools and disciplines. It is therefore inappropriate to categorize extreme emotion in terms of single theories of mental functioning. Hence, Tjioe's attempt to clarify extreme mental or emotional disturbance through the psychological/psychiatric literature is not helpful.

Tjioe does cite case law, in particular *Gray v. State*,[23] which expresses the opinion that the legal defense of extreme mental or emotional disturbance is subject to abuse, is unclear and unsound, and decreases the motivation for the accused to act in a rational manner, given possible later mitigation of the charge. Tjioe suggests that the jury's ability to empathize with the accused may render the extreme mental or emotional disturbance defense more reliable. The literature suggests the exact opposite; that is, empathy with the defendant may render defenses and verdicts unreliable, primarily because of lack of behavioral referents to alleged violence and because of the notorious differences in jurors' abilities to empathize.[24] In the final analysis, Tjioe states that deterrence is ineffective against an accused with a *bona fide* mental or emotional disturbance and he predicts that the concept will have a favorable impact on Hawaii law.

III. THE *Dumlao* MODEL

A model of extreme mental or emotional disturbance is inherent in *Dumlao*. Certain psychological assumptions must be held in order to reach the conclusions set forth in that case and the others which followed. These assumptions describe a sequence of events in extreme mental or emotional disturbance as follows.

First, certain external events are seen to impinge upon the accused. These can be: (1) developmental or personality-forming experiences; (2) cumulative stres-

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[21] Recent Development, *supra* note 4.

[22] *Id.* at 719.

[23] 482 So. 2d 1318, 1329 (Ala. Crim. App. 1986).

[24] R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983); C. BARTOL, PSYCHOLOGY AND AMERICAN LAW (1983).

sors, such as an impaired central love or work relationship; or (3) momentary provocation, such as provided by mutual combat, an arrest for illegal behavior, injuries to third parties, or even words conveying information as if the fact were observed (*e.g.*, being told of an unfaithful act by a spouse). The model holds that external events create stress for the accused in the nature of cause and effect. These original stressors are thought to be the provoking stimuli for the psychological reaction which follows.

Second, an internal reaction is then seen to take place in the accused. A cognitive appraisal of the provoking stimuli occurs, based upon the nature and quality of the stressors themselves acting upon the idiosyncratic characteristics of the defendant (*e.g.*, sexual preference, deformities, pregnancy, gender). Other subjective mental activities may influence the cognitive appraisal of the provoking stimuli.

Third, emotions are then held to result from the accused's cognitive appraisal of events. Intense passion, anger, distress, grief, and/or excessive agitation, alone or in combination, are suggested possibilities.

Fourth, loss of self-control is seen to take place as a result of the overwhelming nature of the resultant emotions. The loss of self-control should be reasonable when the three preceding factors (*i.e.*, provoking stimuli, cognitive appraisal, and intense emotions) are taken into account. Loss of self-control is held to be both an internal event (*e.g.*, release of inhibitions — see "overborne" in *Dumlao*) and an external behavior (*e.g.*, the behavior of killing the victim).

IV. Flaws in the Model

Substantial problems emerge from the above model. The model is simplistically sequential (*i.e.*, stress → cognition → emotions → impaired self control). As the following sections illustrate, human behavior operates in a rich interplay of cause and effect, in both parallel and sequential fashion, where internal events occur simultaneously or nearly so in rough concordance with an unfolding sequence of environmental changes.

Under *Dumlao*, in an attempt to be fair to the defendant and to remain congruent with modern psychology and psychiatry, almost every conceivable stressor would qualify as grounds for mitigation under extreme mental or emotional disturbance. There appears to be no stressor, of either a long- or short-term nature, that does not qualify as a trigger to the supposed mental or emotional disturbance.

A related error is to consider previous violence by the defendant as a mitigating factor (as in the defendant's claim of jealousy shown by beating his wife in *Dumlao*). As suggested by the behavioral science literature, a history of violence may account for the instant violence itself (*i.e.*, explain all known contributions). Pointing to past violence as an expression of jealousy (or any other hy-

pothesized trait), the partial basis of mitigation, assumes uncontrollability on the part of the accused. Otherwise, the deliberate expression of violence in the past can be the basis for assumed loss of violence-related self-control at the time of the instant offense. Therefore, past violence should be analyzed for self-control in order for it to qualify as a mitigating factor. Those acts of previous violence which are characterized by high self-control should not be grounds for mitigation because the defendant created, or at least could have prevented, the ultimate behavioral outcome.

A further problem with the model concerns the difficulty of assessing the defendant's thoughts and feelings. Internal events, such as cognitive activity and emotions, are measured retrospectively only with great difficulty and subjectivity. The state of art in psychology and psychiatry is simply too primitive. The best data shows that cognitive and emotional events are almost impossible to assess at any particular point in time. Agreement among evaluators of the same defendant is low for both knowledge of the internal events and mental diagnosis.[25] Therefore, the focus should be on defendant behavior — only through an accused's actions can conclusions be drawn concerning loss of self-control. Put another way, we see a behavior and infer thoughts and feelings and loss of mastery. In this manner, we can hypothesize a "state of mind" for the time of the alleged offense.

A final problem with the model has to do with definition. The Hawaii Revised Statutes provision for "a reasonable explanation"[26] is tautological. All explanations are reasonable when one takes into account an individual's personal history, encountered stress, and his or her idiosyncratic appraisal of events and resultant emotions. There is no room for unreasonable explanations except in those rare instances where an insanity defense is more appropriate, for example, when the defendant suffered from a disorder of perception. Virtually all human reactions characterized by extreme mental or emotional disturbance responses are classifiable as bona fide mental disorders using Diagnostic and Statistical Manual criteria.[27] Therefore, in essence, in all cases of alleged murder, except in cases such as felony murder, *Dumlao* can, by definitional inclusion, reduce the charge to manslaughter or provide the basis for an insanity defense. A definition that includes 100 percent of behavioral reactions provides no basis for exclusion, and is therefore a poor and illogical guideline.

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[25] J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981); J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (1985).

[26] HAW. REV. STAT. § 707-702(2) (1985).

[27] DIAGNOSTIC AND STATISTICAL MANUAL, THIRD EDITION, prepared by WORKING GROUP TO REVISE DSM III of the AMERICAN PSYCHIATRIC ASSOCIATION (1987).

V. REFORMULATION OF THE MODEL

The *Dumlao* model is salvable with the following observations and modifications:

A. *Self-control Is the Basic Concept in Extreme Mental or Emotional Disturbance*

From a psychological vantage point, most violence outside of that which functions to achieve some purpose for the perpetrator is seen to involve loss of self-control. For without loss of self-control, the defendant merely experiences inner stress or turmoil. Behavioral self-regulation in this situation remains intact. The alternative explanation is that the defendant perpetrated the violence as a result of training and/or a long-acting desire for given outcomes (as in murder for hire, robbery, or serial murder). Often, emotion emerges as a by-product in this latter type of aggression. Loss of self-control, therefore, is the initial concept to consider in regard to whether stress/emotion was, in fact, overwhelming to the degree where the defendant could be expected to act.

B. *Characteristic Self-controlling Behaviors Are Associated with Stress*

Individual reactions to stress or threat are diverse, but they do exhibit some common properties. Stresses or threats of mild to moderate intensity invoke reactions that are somewhat flexible and subject to self-control. These reactions include: (1) verbal aggression; (2) withdrawal and resignation; and (3) constructive problem solving. Other reactions, more as by-products and longer lasting in effect, include: (4) increase in dependency; (5) increase in achievement motivation; (6) substance abuse; (7) the development of psychosomatic reactions; and (8) mixed or other reactions. A psychological model of these possibilities, noting that the motivational component of aggression can be based upon either emotional arousal *or* expectancy of reinforcement, is clearly articulated in the social science literature.[38]

C. *Under Increasing Stress, Idiosyncratically-defined, the Range of Behaviors Available to an Individual Is Sharply Reduced*

The tendency to show a wide variety of reactions to stress/emotion/threat *decreases* dramatically when arousal reaches heightened proportions. "Fight or

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[38] A. BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS (1973).

flight,"[29] a concept which has been recognized for over one-half of a century, becomes the dominant response tendency.[30] The neurological areas corresponding to this basic response mode include those in the subcortex, most particularly the amygdala, hypothalamus, and other limbic system and diencephalic sites.[31] Here, the neurological equivalent of self-preservation by aggression or withdrawal is seen in stimulation and ablation studies. Neurological structures and functions thus represent an initial step in the eventual behavioral expression of fight or flight patterns.

Individuals who would be exceptions to this general rule of "fight or flight" would be those who were well trained to deal with stressors (*e.g.*, through "stress inoculations," combat training, exposure to martial arts). In addition, those instant crimes characterized by rehearsal, planning, knowledge of outcome, and payoff would lower the tendency to run or aggress upon presentation of the arousing/threatening stimulus. In other words, increase familiarity with the expected process and outcome of violence allows more time for deliberation and action. This means more self-control and choice was involved if one, under these circumstances, engaged in the "fight or flight" response.

D. Extreme Stress Which Causes Extreme Emotion Creates One of Two Primary Extreme Reaction Tendencies

Under prolonged or very intensive stress, a breakdown of "fight or flight" is seen. The motive for flight is the same (desire to preserve the self), but the organism is frozen into immobility. If fighting behavior was expressed previously, it becomes disorganized.

Breaking down under excessive stress (*i.e.*, decompensation) creates an overresponsiveness to stressors, or in many cases, an insensitivity to stressors as in apathy and loss of hope.[32] The General Adaptation Syndrome (GAS) describes three basic biological and psychological stages that occur when an individual is exposed to continual and substantial stress: (1) alarm and mobilization; (2) resistance; and (3) exhaustion and disintegration.

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[29] "Fight or flight" is defined as the body and mind's mobilization for action when faced with stress. Usually the heart speeds up, the breath comes quickly, and muscles tense in anticipation. W. CANNON, THE WISDOM OF THE BODY (1932).

[30] R. ATKINSON, R. ATKINSON & E. HILGARD, INTRODUCTION TO PSYCHOLOGY (8th ed. 1981); N. Haimowitz, *Deprivation Effects*, in 1 ENCYCLOPEDIA OF PSYCHOLOGY 357-58 (R. Cosini ed. 1984).

[31] K. HEILMAN & E. VALENSTEIN, CLINICAL NEUROPSYCHOLOGY (1985); R. STRUB & F. BLACK, ORGANIC BRAIN SYNDROMES: AN INTRODUCTION TO NEUROBEHAVIORAL DISORDERS (1981).

[32] H. SEYLE, 1 SEYLE'S GUIDE TO STRESS RESEARCH (1980); H. SEYLE, 2 SEYLE'S GUIDE TO STRESS RESEARCH (1983a); H. SEYLE, 3 SEYLE'S GUIDE TO STRESS RESEARCH (1983b); J. COLEMAN, J. BUTCHER & R. CARSON, ABNORMAL PSYCHOLOGY AND MODERN LIFE (7th ed. 1984).

If normal coping responses fail, the individual's adaptive resources become taxed. The following, congruent with concepts of the two primary response tendencies to massive stress, may appear:

(1a) Psychosis, including hallucinations and delusions. Basically, this is a person's last-ditch attempt to save his or her integrity by restricting reality. Exaggerated defense measures may appear here.

(1b) An acute stress reaction, involving disorganized or highly unusual stress-related behavior for a particular individual.

(2a) A reactive or major depression, resulting in psychomotor retardation, general feelings of sadness or hopelessness and associated features. The individual is in learned helplessness mode. Other affective disorders are possible.

(2b) Death or debilitating illness. Recompensation to near normal health may or may not occur.

Forensically, psychotic reactions (1a) and affective disorders (2a) should be the focus of insanity defenses. Disorganized stress reactions (1b) may or may not involve a mental disorder, depending on history and other factors. Death or impaired physical functions (2b) may not be relevant for either insanity or extreme emotional or mental disturbance defenses. Figure I sums up the different coping styles to various levels of stress/threat.

COPING RESPONSES TO STRESS

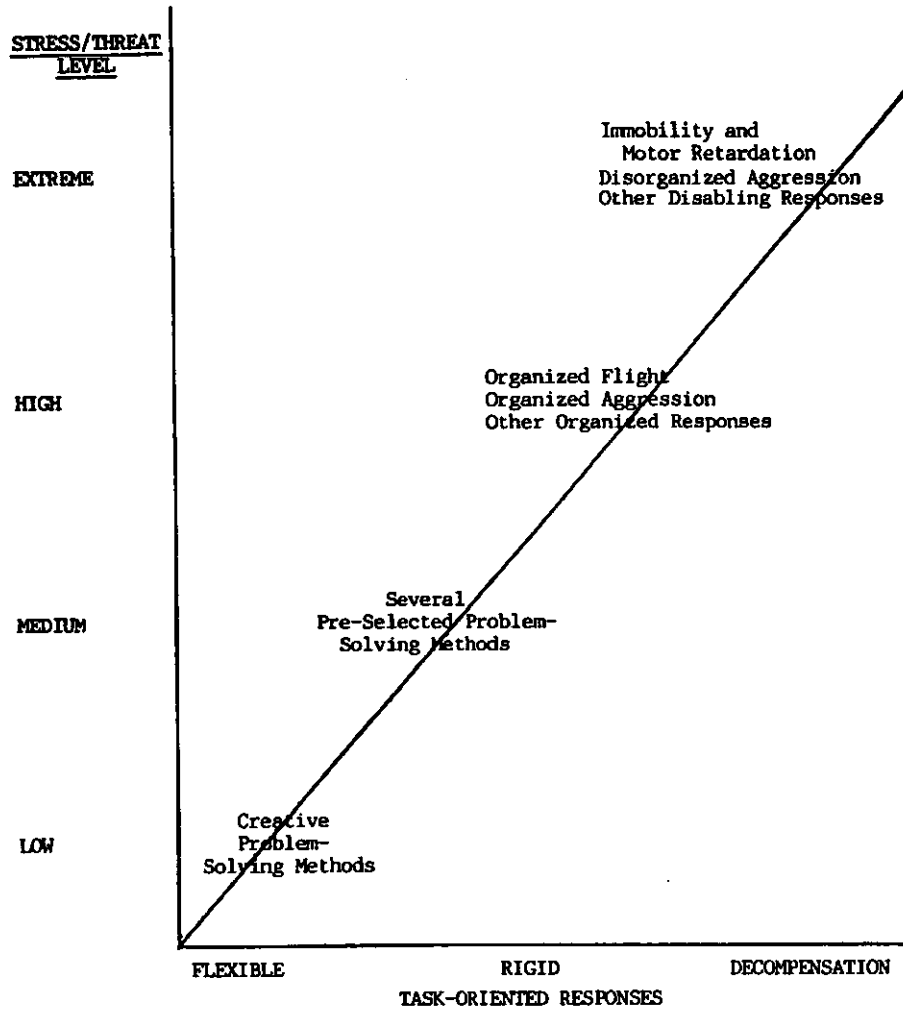

FIGURE I

What then are the correlates of extreme emotion? There is a continuum between the ends of each correlate. Some factors may overlap. Table I lists psychomotor retardation as a Type I or "freezing" mode associate, and a person's normal activity level as its opposite. Immobilization is seen as the opposite of

Correlates of Extreme Emotion

	Threat Response	Behavioral/Affective/Cognitive Opposite
TYPE I	Immobilization	Ambulation/Movement
	Psychomotor Retardation	Normal Activity Level
	Psychic Numbing	Full Range of Emotions
	Delayed Responses to Stimuli	Normal Latency of Response
	Cringing, Withdrawal	Approach Behaviors
	Hypersuggestibility	Absent
	Mute or Restricted Verbal Flow	Verbal Interaction
	Mental Confusion	Clarity of Thought
	Disorientation	Orientation Times Four
	Amnesia	Recall
TYPE II	Disorganized Action Sequences	Change in Action Principle
	Non-Goal Directed Hyperactivity	Goal-Directed Motor Responses
	Startle Reactions	Absent
	Immediate Responses	Normal Delay/Waiting
	Uncontrolled Crying, Tearfulness	Absent
	Hyposuggestibility, Resistance to Influence	Absent
	Mental Confusion	Clarity of Thought
	Disorientation	Orientation Times Four
	Amnesia	Recall

TABLE I

movement, a different but overlapping concept from slowing down of motor behavior. Type I behaviors are the most common response to high impact stress.

Type II behaviors are those which represent disorganization as a response to severe stress. They are listed in the lower half of Table I. The first behavior listed in this section, "disorganized action sequences," refers to the lack of an orderly, synchronized set of behaviors in any particular situation. The behavior of a victim who is trapped in a corner by a mugger and who is fighting her assailant is one example. Another is a man who, in a drunken state, kills another in a fist fight in a bar.

The opposite of a disorganized action sequence is the "change in action principle," which involves a person behaving during a crime in a manner that is functionally different from that which immediately preceded that behavior. Shifting from physically assaulting a victim to stealing her money, raping her, or removing valuables from her person after the assault, are examples.

Type II active behaviors are the focus of forensic applications because in all but inchoate crimes (as in conspiracy), *mens rea* must be acted upon in order for a crime to be perpetrated. A few Type I behaviors are also exhibited in Type II behaviors. For example, amnesia is reported by 30 to 50 percent of defendants in murder cases.[33]

In sum, the essential difference is that Type I behaviors, when taken in their entirety, involve a slowing down or stopping of motor behaviors. Type II behaviors involve acting out in a disorganized, fragmented, or unplanned manner. Type II behaviors are the focus of extreme emotion cases and should be present when there is a loss of self-control during the perpetrated violence.

E. Competent Executive Behavior Is Incompatible with Loss of Self-control Due to Extreme Emotion

"Executive" behavior is a neuropsychological term referring to motor output, self-monitoring, and judgment after sensory and processing functions have been initiated. Skilled executive behavior occurs in a situation where the accused observes and changes his or her behavior simultaneously in response to a fluctuating environment, all in accordance with the goal or desired object of the action sequence. Hypothesis testing is the highest form of effective performance, as when the accused changes his own behavior (*e.g.*, threatens the victim, puts a key in a lock) in order to see the reaction or outcome (*e.g.*, victim acquiescence, the door unlocking) and then changes his own behavior accordingly (*e.g.*, proceeds to assault the victim, goes through the door into the bedroom). In es-

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[33] J.W. Bradford and S.M. Smith, *Amnesia and Homicide: The Pandola Case and a Study of Thirty Cases*, BULL. AM. ACAD. OF PSYCHIATRY AND THE LAW (1979).

sence, this skill taps the defendant's ability to show a concordance between intentions/plans and actions. It is measurable, objective, observable, and incompatible with both extreme mental and emotional disturbance and Type II behaviors.

Executive behaviors which tend to rule out extreme mental or emotional disturbance for the time of the instant offense include the following:

a. Motor or mental rehearsal of the crime sequence;
b. Demonstration of a variety of violent acts (flexible behavior as with several weapons);
c. Ability to orchestrate a multi-step or multi-task scheme (*e.g.*, long, connected chains of behavior);
d. Ability to show change in principles;
e. Ability to delay violent responses;
f. Nonstimulus boundedness (acts independent of environmental influences);
g. Ability to regulate tempo, intensity, and duration of violent behaviors;
h. Ability to avoid nonerratic behavior during violence unless that was the planned effect (*e.g.*, deliberately becoming substance intoxicated prior to the instant offense).

A full inventory of defendant competencies is presented in the Appendix.

F. The Decision Path to Extreme Mental or Emotional Disturbance Can Be Identified

The decision process of an evaluator in determining whether or not offense behaviors are associated with extreme emotion may be examined. Table II presents critical questions in this decision process. Essentially, an adequate fo-

PROCESS QUESTIONS FOR EXTREME EMOTION ANALYSIS

1. Adequate Forensic Data Base Collected?
    a. Perpetrator factors
    b. Victim factors
    c. Context factors
2. Distortion and Deception Analyzed?
    a. Minimizing/denying
    b. Exaggerating/fabricating
    c. Honest response style
    d. Invalidating assessment procedures
    e. Mixed styles
3. True Basal Violence Determined?
    a. Perpetrator to victim relationship
    b. Weapons, accomplices, substances
    c. Violence severity (outcome)
4. Self-Control for Instant Offense Analyzed?
    a. Extreme emotion response style (i.e., type)
    b. Incompatible self-controlling behaviors
    c. Self-control by temporal period (i.e., before, during, after)
5. Synthesis and Conclusions
    a. Decision path of evaluator
    b. Analysis by temporal period (i.e., before, during, after)
    c. Limitations and feedback mechanism

TABLE II

rensic data base must be collected. The data base must include information about the perpetrator, victim, and alleged crime context. Next, an analysis must be done of possible inconsistency by data base sources, such as that caused by concealing information upon interrogation. This is done in an attempt to establish "ground truth" for any particular alleged criminal event. Then the previous violence of the defendant must be examined, especially where emotional upset may have been an aggravating factor. This is to determine whether or not self-control was exhibited and the degree to which it is similar to the instant violence. Next, the degree and kind of self-control for the instant violence should be examined before rendering an opinion as to conditions relevant to whether or not extreme mental or emotional disturbance was operating for the alleged crime. Table II displays the decision path by which conclusions regarding extreme emotion can be analyzed retrospectively.

VI. Summary and Recommendations

A. The psychological model inherent in *Dumlao* errs in focusing on all inclusive and nonverifiable stressors, feelings, and thoughts. The use of previous violence to establish "state of mind" in instant violence is not recommended without first examining the voluntary nature of basal violence. Because it is impossible to disprove the negative using the current model (*i.e.*, that extreme emotion did not exist), the burden of proof for showing extreme emotion clearly should be shifted from prosecution to the defense.

B. Extreme emotional reactions, within both legal and psychological meanings, involve a breakdown in self-control and have definable characteristics. This means that the focus should be on overt behavior, from which an internal condition (*i.e.*, "state of mind" can be hypothesized for the time of the alleged offense).

C. A rough breakdown of "fight or flight" responses into freezing or disorganizing action under extreme emotion, in addition to other disabling coping patterns, is suggested from the clinical-empirical literature. This breakdown is a starting point in our analysis of self-controlled and chosen behaviors operative for the time of the instant offense.

D. Higher order executive functioning, shown by various types of self-controlling and self-regulating behavior, is incompatible with extreme mental or emotional disturbance. The instant offense can be scrutinized for the presence of such higher order executive functions.

E. The forensic professional should always specify the decision path he or she used to arrive at the conclusion in regard to extreme emotion. Critical process questions are provided in this article in addition to a comprehensive checklist of factors relevant to the ability of the defendant to self-control behavior at the time of the instant offense.

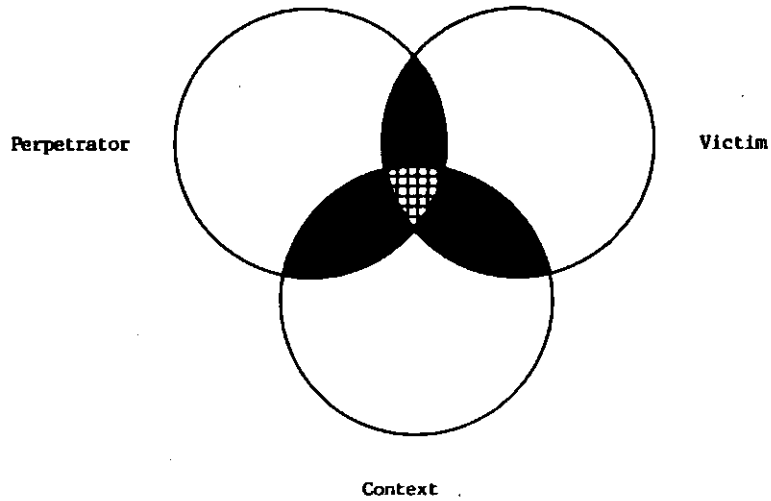
In sum, this article represents an attempt to consider both legal and psychological concepts in the analysis of extreme emotion. The basic premise of this article is that *Dumlao* and other cases provide a conceptual model to the evaluator, which then be operationalized using findings from the behavioral science literature. The necessity of analyzing the defendant's violence history is discussed — particularly that which functions similarly to that perpetrated in the instant offense. The analysis of self-control during the violence is crucial to the evaluation and is based on the notion that the defendant cannot simultaneously be in good control of his or her responses and behaviorally disorganized. Finally, it is suggested that the evaluator has a moral and scientific obligation to share how decisions regarding extreme emotion were formed and synthesized in individual cases.

APPENDIX

SELF-CONTROL AND INSTANT OFFENSE BEHAVIORS: CHECKLIST OF DEFENDANT COMPETENCIES

Please take time to fill out this checklist as carefully as you can before drawing conclusions in regards to a particular criminal case. This checklist may be helpful to the forensic professional in assessing different levels of self-control before, during, and after alleged criminal behavior.

In several of the sections, you will be asked to think about the sequence of the alleged behaviors in addition to a number of victim and crime context factors. The ultimate purpose of this checklist is to illuminate the decision path of the evaluator. Please try to go along with this new perspective because, in doing so, you may be able to gain additional insight into the ability of the defendant to choose and self-regulate instant offense behaviors.



PART A: DEMOGRAPHIC AND BACKGROUND FACTORS

Present Date _____ Accused's Full Name _____

Evaluator's Name _____ Aka's _____

Agency _____ Social Security No. _____

Reason for Referral_____ Criminal No. _____

Referral Source _____ Charges _____

Date of Birth _____

Place of Birth _____

In State Since _____

Sex _____ Marital Status _____

Race/Ethnic Group _____

Other Languages Spoken _____

Educational Level (and Area of Study)

_____

Occupation _____

Hand Dominance _____

Accused's
Height _____ Weight _____# Blood Type____

Victim's
Height _____ Weight _____# Blood Type____

BACKGROUND FACTORS

- History of alcohol abuse or dependence? Specify _____
- History of drug abuse or dependence? Specify _____
- Psychiatric/Psychological History

Diagnosis/Condition	Date of Diagnosis/Condition	Intervention	Agency	Therapist

Specify if there is a history of critical conditions/events not presented on previous page (e.g., psychosis, retardation, brain damage, homicidal/ suicidal behaviors) _____

_____

_____

(Continue on other side of page)

- Juvenile Arrest History

Offense	Date of Offense	Disposition	Date of Disposition

- Adult Arrest History

Offense	Date of Offense	Disposition	Date of Disposition

- Physical/mental deterioration for one week before alleged offense? Specify

_____

- Physical/mental deterioration for 90 days before alleged offense? Specify

_____

- Physical/mental deterioration for one year before alleged offense?

Specify _____

- Anticipated stressors at time of instant offenses? Specify _____

_____

- Employment in the three months before evaluation:

____ None ____ Part-time ____ Full-time

Where and what? _____

- Estimated income from employment in last year prior to evaluation _____

CURRENT FACTORS

1. Is accused fit to legally proceed (if no, why not)? _____

_____

2. Accused's present status

___ Incarcerated ___ Outpatient ___ Inpatient ___ Other

Address _____

Contact parties, relationship to accused, and phone number(s) _____

_____

_____

3. Present medications _____

4. Present alcohol abuse or dependence? Specify _____

___ Yes ___ No _____

5. Present drug abuse or dependence? Specify _____

___ Yes ___ No _____

6. Significant current psychiatric deficits or problems _____

_____

7. Relevant medical problems _____

_____

8. Relevant other current information _____

_____

_____

_____

_____

_____

_____

_____

PART B: BASAL VIOLENCE ANALYSIS

Previous violence to others is scrutinized in order to determine whether instant violence is part of a habit pattern or an isolated event. Since attaining adulthood, indicate whether each act of significant violence had the associated feature listed on the left. Threats to do significant violence to

another are considered violence and are rated as such. First, threats create psychological trauma in victims. Second, some threats are arrestable behaviors (e.g., robbery, terroristic threatening).

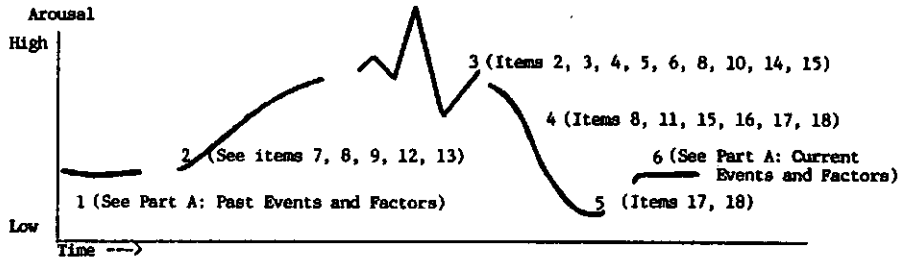
Look at the entire basal history of violence to see if trends emerge. Determine whether these trends are operative in the instant violence and the degree to which they were the result of choice and self-control factors.

	ASSOCIATED FEATURES OF PREVIOUS VIOLENCE	INDIVIDUAL ACTS OF VIOLENCE TO OTHERS 1	2	3	4	5	6	7	8	9	10
1.	Date of violence or serious threat	—	—	—	—	—	—	—	—	—	—
2.	Description of violence or threat (e.g., assault in the third degree)	—	—	—	—	—	—	—	—	—	—
3.	Injury to victim (one or more of following for each act)										
	a) Verbal or physical intimidation of victim	—	—	—	—	—	—	—	—	—	—
	b) Intimidation by weapon	—	—	—	—	—	—	—	—	—	—
	c) Minor harm	—	—	—	—	—	—	—	—	—	—
	d) Treated and discharged	—	—	—	—	—	—	—	—	—	—
	e) Hospitalized	—	—	—	—	—	—	—	—	—	—
	f) Killed	—	—	—	—	—	—	—	—	—	—
4.	Forced sex act	—	—	—	—	—	—	—	—	—	—
5.	Relationship (victim to accused)										
	a) Stranger	—	—	—	—	—	—	—	—	—	—
	b) Acquaintance	—	—	—	—	—	—	—	—	—	—
	c) Family	—	—	—	—	—	—	—	—	—	—
	d) Institutional (e.g., police, military)	—	—	—	—	—	—	—	—	—	—
6.	Accomplice present	—	—	—	—	—	—	—	—	—	—
7.	Instructions to aggress (e.g., military police, contract murder)	—	—	—	—	—	—	—	—	—	—
8.	Weapons (one or more of										

ASSOCIATED FEATURES OF PREVIOUS VIOLENCE	INDIVIDUAL ACTS OF VIOLENCE TO OTHERS 1	2	3	4	5	6	7	8	9	10
following):										
a) Firearms	—	—	—	—	—	—	—	—	—	—
b) Knife	—	—	—	—	—	—	—	—	—	—
c) Other weapon (e.g., hammer, rope)	—	—	—	—	—	—	—	—	—	—
d) Weapon found at scene	—	—	—	—	—	—	—	—	—	—
e) Use of protected body part (e.g., victim kicked with boots)	—	—	—	—	—	—	—	—	—	—
f) Use of unprotected body part (e.g., hands)	—	—	—	—	—	—	—	—	—	—
g) Use of primitive weapons (e.g., bites or clubs victim with head)	—	—	—	—	—	—	—	—	—	—
9. Substance intoxication										
a) Alcohol intoxication	—	—	—	—	—	—	—	—	—	—
b) Drug intoxication	—	—	—	—	—	—	—	—	—	—
c) Pathological intoxication	—	—	—	—	—	—	—	—	—	—
d) Cessation of prescribed medication	—	—	—	—	—	—	—	—	—	—
10. Pain cues from victim which enhanced violence	—	—	—	—	—	—	—	—	—	—
11. Positive consequences for violence (e.g., money, praise, no incarceration)	—	—	—	—	—	—	—	—	—	—
12. Disrupted central love relationship (e.g., from intimate other)	—	—	—	—	—	—	—	—	—	—
13. Work-related violence	—	—	—	—	—	—	—	—	—	—
14. Characteristics of victims										
a) Female gender	—	—	—	—	—	—	—	—	—	—
b) Weighs less than accused	—	—	—	—	—	—	—	—	—	—

ASSOCIATED FEATURES OF PREVIOUS VIOLENCE	INDIVIDUAL ACTS OF VIOLENCE TO OTHERS 1	2	3	4	5	6	7	8	9	10
c) Shorter than accused	—	—	—	—	—	—	—	—	—	—
d) Alone before violence	—	—	—	—	—	—	—	—	—	—
e) Victim displayed weapon	—	—	—	—	—	—	—	—	—	—
f) Physical infirmity	—	—	—	—	—	—	—	—	—	—
15. Violence context characteristics										
a) Night-time occurrence	—	—	—	—	—	—	—	—	—	—
b) Weekend occurrence	—	—	—	—	—	—	—	—	—	—
c) Private residence	—	—	—	—	—	—	—	—	—	—
d) Public building	—	—	—	—	—	—	—	—	—	—
e) Roadway or transportation system	—	—	—	—	—	—	—	—	—	—
f) Property aggression involved	—	—	—	—	—	—	—	—	—	—
16. Acknowledgement of violence (e.g., spontaneous statements; written confession)	—	—	—	—	—	—	—	—	—	—
17. Apologizes for violence	—	—	—	—	—	—	—	—	—	—
18. Suicidal/self-mutilative gestures in response to violence	—	—	—	—	—	—	—	—	—	—

Synthesis: Examine the above tables after completion for behavioral themes. Look for themes that are common both to previous violence and the instant case. Place the common descriptors on the assault cycle which follows.



1. Typical Behavior
2. Triggering Phase
3. Violent Act
4. Recovery Phase
5. Depression Phase
6. Return to Baseline

PERPETRATOR AND VICTIM CHARACTERISTICS
AT THE TIME OF THE INSTANT OFFENSE

Please check as many as apply. Fill in the blanks when indicated.
P = Perpetrator; V = Victim

P	V	SEX
___	___	Male
___	___	Female
___	___	Unknown
___	___	KNOWN AGE
		ESTIMATED AGE
___	___	Below 15 years
___	___	15 yrs.-19 yrs.
___	___	20 yrs.-24 yrs.
___	___	25 yrs.-29 yrs.
___	___	30 yrs.-39 yrs.
___	___	40 yrs.-49 yrs.
___	___	50 yrs.-65 yrs.
___	___	Over 65 yrs.
		HEIGHT
___	___	Under 5'0"
___	___	5'0" to 5'1"
___	___	5'2" to 5'3"
___	___	5'4" to 5'5"
___	___	5'6" to 5'7"
___	___	5'8" to 5'9"
___	___	5'10' to 5'11"
___	___	6'0" to 6'1"
___	___	6'2" to 6'3"
___	___	6'4" to 6'6"
___	___	Over 6'6"
		WEIGHT
___	___	Under 100 lbs.
___	___	100 lbs. to 119 lbs.
___	___	120 lbs. to 139 lbs.
___	___	140 lbs. to 159 lbs.
___	___	160 lbs. to 179 lbs.
___	___	180 lbs. to 199 lbs.
___	___	200 lbs. to 219 lbs.
___	___	220 lbs. to 239 lbs.
___	___	240 lbs. to 260 lbs.
___	___	Over 260 lbs.
		ETHNICITY
___	___	Black
___	___	White
___	___	Hispanic
___	___	Chinese
___	___	Filipino
___	___	Hawaiian
___	___	Japanese
___	___	Polynesian
___	___	Portuguese
___	___	Samoan
___	___	Mixed/Combo
___	___	Other _____
___	___	Unknown

P	V	BUILD
___	___	Skinny
___	___	Slim
___	___	Medium/Average
___	___	Heavy
___	___	Husky
___	___	Muscular
___	___	Fat
___	___	Unknown
		POSTURE
___	___	Stooped
___	___	Bowed Legs
___	___	Bent to One Side
___	___	Normal/Erect
___	___	Stiff
___	___	Unknown
		GAIT
___	___	Slow
___	___	Shuffle
___	___	Limp
___	___	Walks with Cane
___	___	Normal
___	___	Walks Fast
___	___	Runs
___	___	Unknown
		UNUSUAL MANNERISMS
		What? _____
___	___	Unknown
		ACCENT
___	___	What does it sound like?
		_____
___	___	Unknown
		INJURIES
___	___	Where and what? _____
___	___	_____
___	___	Unknown
		TATTOOS
___	___	Arm, Left
___	___	Arm, Right
___	___	Back
___	___	Chest
___	___	Fingers, Left
___	___	Fingers, Right
___	___	Hand, Left
___	___	Hand, Right
___	___	Leg, Left
___	___	Leg, Right
___	___	Other _____
___	___	Unknown

P	V	BODY SCARS
___	___	Abdomen, Left
___	___	Abdomen, Right
___	___	Arm, Left
___	___	Arm, Right
___	___	Back
___	___	Chest
___	___	Hand, Left
___	___	Hand, Right
___	___	Leg, Left
___	___	Leg, Right
___	___	Wrist, Left
___	___	Wrist, Right
___	___	Other _____
___	___	Unknown

		FACIAL SCARS
___	___	Cheek, Left
___	___	Cheek, Right
___	___	Chin
___	___	Eyebrow, Left
___	___	Eyebrow, Right
___	___	Forehead
___	___	Harelip
___	___	Lip, Lower
___	___	Lip, Upper
___	___	Nose
___	___	Ear(s), Pierced
___	___	Other _____

		JEWELRY
___	___	What and where? _____
		_____
		_____

		OTHER (e.g. hearing aid)
___	___	What and where? _____
		_____
		_____

		HEAD HAIR—Color
___	___	Black
___	___	Brown
___	___	Blond
___	___	Dirty Blond
___	___	Red
___	___	Gray
___	___	White
___	___	Other _____
___	___	Unknown

		HEAD HAIR—Style
___	___	Straight
___	___	Curly
___	___	Wavy
___	___	Afro
___	___	Tied
___	___	Braided
___	___	Neat
___	___	Flat Top
___	___	Wig
___	___	Unknown

P	V	HEAD HAIR—Length
___	___	Bald
___	___	Crew Cut
___	___	Neck Length
___	___	Shoulder Length
___	___	Long
___	___	Unknown

		FACIAL HAIR—Type
___	___	Mustache
___	___	Goatee
___	___	Beard
___	___	Other _____
___	___	Unknown

		FACIAL HAIR—Color
___	___	Black
___	___	Brown
___	___	Blond
___	___	Red
___	___	Gray
___	___	White
___	___	Other _____
___	___	Unknown

		EYES—Color
___	___	Black
___	___	Brown
___	___	Blue
___	___	Gray
___	___	Green
___	___	Other _____
___	___	Unknown

		EYES—Glasses
___	___	Bifocal
___	___	Other Prescription
___	___	Contact Lenses
___	___	Sunglasses
___	___	Reflective
___	___	Other _____
___	___	Unknown

		EYES—Frames
___	___	Wire
___	___	Plastic
___	___	Rimless
___	___	Clear
___	___	Color _____
___	___	Unknown

		EYES—Traits
___	___	Crossed
___	___	Squinting
___	___	Bloodshot
___	___	Dilated/Constricted Pupil
___	___	Lazy Eye
___	___	Wide
___	___	Missing, Left
___	___	Missing, Right
___	___	Other _____
___	___	Unknown

P	V	COMPLEXION
___	___	Pale
___	___	Fair
___	___	Medium
___	___	Ruddy
___	___	Tanned
___	___	Brown
___	___	Black
___	___	Clear
___	___	Moles
___	___	Freckles
___	___	Blackheads
___	___	Acne/Pimples
___	___	Pock-Marked
___	___	Birthmark
___	___	Other _____
___	___	Unknown
		TEETH
___	___	Yellow
___	___	White
___	___	Normal
___	___	False
___	___	Broken
___	___	Braces
___	___	Missing
___	___	Stained
___	___	Filled
___	___	Other _____
___	___	Unknown
		MOUTH
___	___	Stink Breath
___	___	Alcohol Smell
___	___	Saliva
___	___	Normal
___	___	Unusual Lips
___	___	Mouth Concealed
___	___	Other _____
___	___	Unknown
		HANDS
___	___	Small
___	___	Stubby
___	___	Large
___	___	Spotted
___	___	Normal
___	___	Hairy
___	___	Injured
___	___	Other _____
___	___	Unknown
		CLOTHING—Hat
___	___	Baseball Cap
___	___	Business
___	___	Military
___	___	None
___	___	Other _____
___	___	Color _____
___	___	Designs _____
___	___	Unknown

P	V	CLOTHING—Shirt/Blouse
___	___	Aloha Shirt
___	___	T-Shirt
___	___	Pullover
___	___	Sport Shirt
___	___	Dress Shirt
___	___	Blouse
___	___	Other _____
___	___	None
___	___	Unknown
___	___	Color _____
___	___	Sleeve Length _____
___	___	Markings _____
		CLOTHING—Trousers
___	___	Jeans
___	___	Dress Slacks
___	___	Shorts
___	___	None
___	___	Casual
___	___	Corduroy
___	___	Other _____
___	___	Unknown
___	___	Color _____
___	___	Length _____
___	___	Markings _____
		CLOTHING—Shoes
___	___	Barefoot
___	___	Slippers
___	___	Dress Shoes
___	___	Work Shoes
___	___	Boots
___	___	Sandals
___	___	Other _____
___	___	Unknown
___	___	Color _____
___	___	Material _____
		CLOTHING—Dress
___	___	Muumuu
___	___	Formal
___	___	Casual
___	___	Work
___	___	Unknown
___	___	Color _____
___	___	Length _____
___	___	Markings _____
		VEHICLE
___	___	Automobile
___	___	Bicycle
___	___	Motorcycle
___	___	Truck
___	___	Other _____
___	___	Unknown
___	___	Make _____
___	___	Color _____ Year ____
___	___	Unusual Features _____
___	___	Decals _____
___	___	License # _____

P	V	TYPE OF WEAPON
___	___	Arson
___	___	Ax
___	___	Blunt Instrument
___	___	Firearm
___	___	Handgun ____ Cal.
___	___	Shotgun ____ Ga.
___	___	Rifle ____ Cal.
___	___	Machine Gun ___ Cal.
___	___	Garrotte/Ligature
___	___	Hatchet
___	___	Knife, Large (6" or larger)
___	___	Knife, Small (less than 6")
___	___	Odd/Unusual Weapon
___	___	Physical Force
___	___	Sharp Instrument (other than knife)
___	___	Vehicle
___	___	Tire Tool
___	___	Other _____
___	___	Unknown
___	___	Color _____
___	___	Composition _____
___	___	Container _____

		FIRST SEEN BY OTHERS
___	___	Car
___	___	Club/Disco
___	___	Date First Seen _____
___	___	Estimated Time _____
___	___	Health Club
___	___	Hitchhiking
___	___	House/Apartment
___	___	Playground or Parks/Yards
___	___	Public Conveyance
___	___	School
___	___	Shopping
___	___	Walking
___	___	Work
___	___	City/State
___	___	Other _____
___	___	Unknown

		LAST SEEN BY OTHERS
___	___	Car
___	___	Club/Disco
___	___	Date Last Seen _____
___	___	Estimated Time _____
___	___	Health Club
___	___	Hitchhiking
___	___	House/Apartment
___	___	Playground or Parks/Yards
___	___	Public Conveyance
___	___	School
___	___	Shopping
___	___	Walking
___	___	Work
___	___	City/State
___	___	Other _____
___	___	Unknown

P	V	CRIMINAL OCCUPATION
___	___	Arson
___	___	Burglary
___	___	Fraud
___	___	Gambling
___	___	Homicide
___	___	Larceny
___	___	Motorcycle Gang
___	___	Narcotics
___	___	Organized Crime
___	___	Pornography
___	___	Prostitution
___	___	Robbery
___	___	Other _____
___	___	Unknown

		LIFESTYLE
___	___	Bisexual
___	___	Day Person—in early
___	___	Heterosexual
___	___	Homosexual
___	___	Involved/Outgoing
___	___	Narcotics User
___	___	Night Person—stays out late
___	___	Socializes Frequently
___	___	Socializes Seldom
___	___	Withdrawn/Shy
___	___	Other _____
___	___	Unknown

		OCCUPATION
___	___	Gas Station Attendant
___	___	Business/Professional
___	___	Homemaker
___	___	Laborer/Services
___	___	Street Person
___	___	Student
___	___	None
___	___	Realtor
___	___	Priest/Minister
___	___	Conv. Store Clerk
___	___	Other _____
___	___	Unknown

CRIME CONTEXT AND MODUS OPERANDI:

LOCATION WHERE OCCURRED

___ Apartment/House
___ Building
___ Construction Site
___ Field
___ Hotel/Motel
___ Interstate or Highway
___ Rural
___ Street/Alley
___ City/State _____
___ River/Lake
___ Woods
___ Other _____

PLACEMENT/POSITION OF VICTIM

___ Buried
___ Concealed
___ Displayed
___ Dumped
___ Face Down
___ Face Up
___ Fetal Position
___ In Receptacle
___ In Water
___ Moved After Injury or Death
___ Nude
___ Partially Nude
___ Propped-up Sitting
___ Fully Clothed
___ Other _____

TREATMENT OF VICTIM

___ Bound
___ Body Covered
___ Burned
___ Face Covered
___ Gagged
___ Handcuffed
___ Kidnapped
___ Raped
___ Sodomized
___ Tortured
___ Duct Tape Used to Bind
___ Rope/String Used to Bind
___ Clothes Used to Bind
___ Surgical Tape Used to Bind
___ Other Tape/Material Used to Bind
___ Other _____

MODUS OPERANDI

___ False Pretense
___ Hitchhiker
___ Impersonates Doctor
___ Impersonates Police
___ Newspaper Ad
___ Random
___ Robbery/Burglary
___ Stalker
___ Stranger
___ Victim Knew Suspect
___ Suspect Arms Self at Scene
___ Disables Lights/Electricity
___ Disables Telephone
___ Disables Victim's Car
___ Fingerprints Removed
___ Ransacks
___ Suspect Cleans Up Scene
___ Suspect Injured at Scene
___ Suspect Returns to Scene
___ Takes Souvenirs
___ Wears Disguises/Gloves
___ Suspect Takes Victim's Vehicle
___ Other _____

VULNERABILITY ANALYSIS

Lighting _____

Security _____

Presence of Others _____

Exits _____

Locking System _____

Visibility _____

Noise _____

Temperature _____

History of Violence _____

Architecture _____

Concealment _____

HOMICIDE CASES:

CAUSE OF DEATH
___ Asphyxiation
___ Bludgeoning
___ Burning
___ Drowning
___ Drug Overdose
___ Electrocution
___ Poisoning
___ Scalding
___ Shooting
___ Slashing
___ Stabbing
___ Strangling
___ Unknown
___ Other _____

SECONDARY WOUNDS
___ Asphyxiation
___ Bite Marks
___ Bludgeoning
___ Burning
___ Drowning
___ Drug Overdose
___ Electrocution
___ Multiple Wounds
___ Poisoning
___ Scalding
___ Shooting
___ Slashing
___ Stabbing
___ Strangling
___ Unknown
___ Other _____

CONDITION OF BODY WHEN FOUND
___ Mutilated
___ Necrophilia
___ Objects in Throat/Mouth
___ Objects in Penis
___ Objects in Rectum
___ Objects in Vagina
___ Objects or Symbols Placed on Body
___ Penile/Anal Penetration
___ Penile/Oral Penetration
___ Penile/Vaginal Penetration
___ Possible Sexual Contact
___ Decomposed/Skeletal
___ Other _____

TECHNICAL/PHYSICAL EVIDENCE
___ Body X-Rays Available
___ Casting Available
___ Composite Available
___ Dental X-Rays Available
___ Fibers
___ Fingerprints Available
___ Finger Scrapings
___ Fluids
___ Footprints Available
___ Hair
___ Multiple Perpetrators
___ Semen
___ Tire Impressions Taken
___ Weapon Found at Scene
___ Other _____

ARTICLES LEFT ON BODY
___ Clothing
___ Jewelry
___ Other _____

MEDICAL INFORMATION (DESCRIBE)
___ Broken Bones _____
___ Blood Type _____
___ Pregnancy _____
___ Other _____

PART C: DAY OF ALLEGED OFFENSE (Specify date, time, and day of week) _____

Please fill in these items based upon the various data base sources relevant to the day of the instant violence.

Event	Defendant		Victim	
	Time	Specify	Time	Specify
1. Significant events the night before				
2. Intoxicating substances ingested before instant violence occurred				
3. Procurement of weapons				
4. Presence of other people				
5. Arrival at instant violence scene				
6. First sighting of victim (accused)				
7. Verbal interaction with victim (accused)				
8. Time of instant violence				
9. Time left scene				
10. Destination				

PART D: SELF-CONTROL DURING THE INSTANT OFFENSE SEQUENCE

Physical and Mental Activities

These refer to rudimentary skills and/or homeostatic activities of the defendant. They create the foundation for all self-control behaviors exhibited before, during or subsequent to instant violence by the accused. Check the appropriate space and present comments when appropriate.

	Insufficient Data	No	Yes	Specify
Ability to sleep				
Ability to eat/drink				
Responds to autonomic pressure (e.g., takes a leak)				
Self-awareness (e.g., "I" statements)				
Long-term memory skills (e.g., visual, auditory, tactile, olfactory)				
Short-term memory skills				
Reports cognitive activity				
Awareness of surroundings (e.g., observations of environment)				
Ability to estimate time				
Ability to ambulate (e.g., voluntary movements)				
Intact sensory skills (e.g., visual, olfactory, hearing)				
Ability to express feelings (e.g., verbalizes anger, shows rage or fear)				
Intact motor skills (e.g., grasping reflex, biting				
Withdrawal reflex from pain				
Voice recognition (e.g., of victim)				
Self-grooming				
Ability to maintain posture				
Ability to show facial expression				

	Insufficient Data	No	Yes	Specify
Rudimentary chaining of behaviors (e.g., tracking and moving toward visual stimulus)				
Ability to drive				
Other signs of basic self-regulation				

Goal Formulation

Relevant to the time before the alleged violence, goal formulation taps the ability to systematically analyze and integrate the accused's awareness of self and environment. The capability of productively elaborating from a small number of cues from the crime context is also measured. The ability to think of the violence act before it occurred, as evidenced by behaviors compatible with the idea of the violence to follow, is the central issue of this section.

	Insufficient Data	No	Yes	Specify
Marked cognitive and/or behavioral focus				
Ability to link thoughts with adaptive behavior (e.g., walking until entrance is found)				
Verbal coherence and verbal fluency				
Speaks to victim (e.g., requests money)				
Controlled conversation with victim				
Appreciation of temporally distant need (e.g., need for more drugs to prevent withdrawal)				
Knowledge of steps or elements in violent sequence				

	Insufficient Data	No	Yes	Specify
Cognitive mapping (e.g., navigating from home to crime scene)				
Shows capacity for reflective thought about violence (e.g., verbalizations which involve comparisons)				
Ability to think of alternatives to instant violence				
Statements to others that he/she would harm the victim (e.g., for socially undesirable behavior)				
Victim a targeted individual				
Personalizes victim				
Other signs of goal formulation				

Planning and Preparation

Relevant to the time before the alleged crime, this refers to the ability to show cognitive preparation for subsequent behaviors. Routine rehearsals for the alleged crime are the highest form of ability in this dimension.

	Insufficient Data	No	Yes	Specify
Foreknowledge of alleged crime				
Creation of time schedules				
Temporal ordering of steps to complete task				
Ability to revise plan given new information				

	Insufficient Data	No	Yes	Specify
Completes plan in reasonable time frame				
Ability to interpersonally relate to others as planned				
Motor or mental rehearsal of crime sequence				
Use of ruse to fool victim				
Lured victim into defenseless position				
Brings weapon and paraphernalia (e.g., "rape kit") to scene				
Telephone, lights, security devices disabled				
Other signs of planning/ preparation				

Effective Performance

Occurring during the violence sequence, effective performance reflects the notion that the accused may simultaneously observe and change his or her behavior in response to a fluctuating environment, all in accordance with the goal or desired object of the action sequence. Hypothesis testing is the highest form of effective performance, as when the accused changes his own behavior (e.g., threatens victim, puts key in lock) in order to see the reaction (e.g., victim acquiescence, door becomes unlocked) and then changes his own behavior accordingly (e.g., proceeds to rape victim, goes through door to bedroom). In essence, this skill taps the ability to show a concordance between intentions/plans and actions.

	Insufficient Data	No	Yes	Specify
Able to view environment objectively (takes abstract attitude)				
Violence did not occur close to home/work (for planned violence)				

	Insufficient Data	No	Yes	Specify
Demonstrates a variety of acts (flexible behavior as with several weapons)				
Displaying multiple sets of simultaneous motor behaviors				
Able to orchestrate multi-step, multitask scheme (e.g., long-connected chains of behaviors)				
Concerted effort in order to accomplish goal (e.g., despite victim resistance)				
Ability to show change in principle (e.g., from robbery to rape)				
Ability to show self-controlled somatic responses (e.g., sex with ejaculation, eating, drinking; all within violence sequence)				
Ability to delay responses				
Ability to monitor and self-correct ongoing behavior				
Nonstimulus boundedness (acts independent of environmental influences)				
Ability to regulate tempo, intensity and duration of behaviors				
Controlled mood during infliction of violence				
Ability to avoid non-erratic behavior unless planned (e.g., deliberately becomes substance intoxicated)				

	Insufficient Data	No	Yes	Specify
Hypothesis testing				
Awareness of wrongdoing during violence (e.g., from statements to victim)				
Ability to hit/penetrate vital body target (e.g., deep knife penetration, shots to head)				
Controlled cutting of victim				
Ability to stop violence (e.g., response cessation with no perseveration)				
Intact self-control (retrospectively reported by accused)				
Victim bound or other restraints used				
Mouth taped				
Mouth gag used				
Blindfold placed over victim's eyes				
Absence of bite marks on victim				
No blood smearing or splattering				
Victim tied to another object				
Takes pictures of victim				
Perpetrator encourages bystander to engage in violence to victim				
Torture of victim				
Other aggressive acts prior to death				

	Insufficient Data	No	Yes	Specify
Obliteration or destruction of evidence during instant violence	_____	___	___	_____
Other signs of effective performance				_____
				_____

Recovery Period Behaviors

The accused may, after the instant offense, exhibit behaviors suggestive of memory/knowledge that a possible crime had been committed. These include efforts ostensibly directed towards not getting caught for the alleged offense, or of minimizing possible aversive consequences.

	Insufficient Data	No	Yes	Specify
Moves away when help arrives	_____	___	___	_____
Disposes of or hides victim's body	_____	___	___	_____
Amputation of "ID" body parts (i.e., head, hands)	_____	___	___	_____
Disposes of victim's clothing	_____	___	___	_____
Other alteration of crime scene	_____	___	___	_____
Disposes of weapon used in offense	_____	___	___	_____
Disposes of other crime-related material	_____	___	___	_____
Takes souvenir from victim/ scene	_____	___	___	_____
Cleans up own body	_____	___	___	_____
Washes own clothes used in alleged crime	_____	___	___	_____
Cleans/washes other material	_____	___	___	_____
Makes verbal statements of crime recall (e.g., spontaneous statements)	_____	___	___	_____

	Insufficient Data	No	Yes	Specify
Relevant nonverbal gestures (e.g., points to victim's body)	_____	___	___	_____
Prevaricates incompatible behavior (e.g., makes up verifiably false story)	_____	___	___	_____
Writes confession	_____	___	___	_____
Other signs of recall for instant offenses	_____	___	___	_____

Post-Violence Depression Phase

For some violent perpetrators, a period of guilt and remorse is experienced after the exhibited aggression. This is especially true for episodic or rare violent offenders. The self-control to avoid self-punitive behavior is the focus of concern here (e.g., suicidal, self-mutilative gestures). Apology and remorseful behaviors are very common here and imply little about self-control or choice at the time of the instant violence.

Routine Mental/Psychological Behaviors

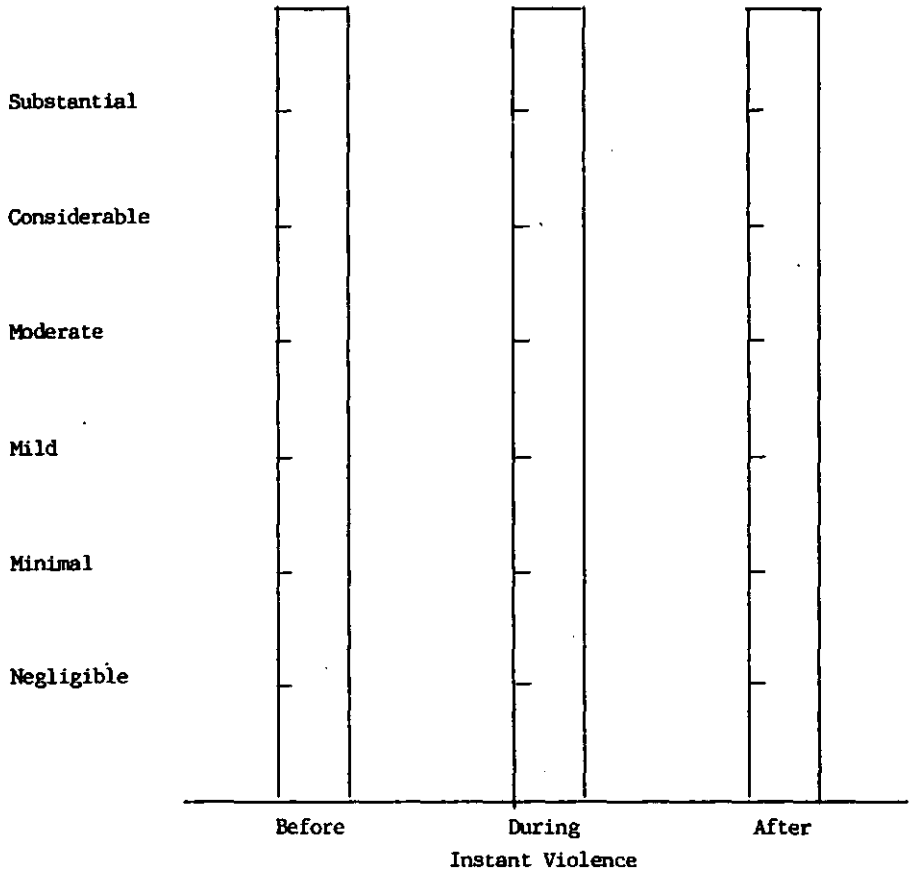
Eventually, there is a return to baseline functioning for most individuals who perpetrate violence (see Physical and Mental Activities, page 14). The new baseline of routine activities and skills would also include that which is a function of violence-related learning, such as increased substance abuse, disturbed sleep patterns, and fashioning of new weapons. Some behaviors may be reduced (e.g., driving after conviction for negligent homicide, social activities which require trust and reciprocity). In the final analysis, an individual is never the same after the perpetration of substantial violence to others.

SELF-CONTROL OF INSTANT VIOLENCE BEHAVIORS

Synthesizing all self-control factors, judge whether the highest type of self-control called for at each of the levels has been attained. The suggested degree of maximum self-control this implies for the instant offense is presented on the left margin. Generic examples of each level of self-control are presented for each type.

MAXIMUM LEVEL OF SELF-CONTROL IMPLIED	Routine Mental/ Psychological Behaviors (Before)	Goal Formulation (Before)	Planning & Preparation (Before)	Effective Performance (During)	Recovery Period Behaviors (After)	Post-Violence Depression Phase (After)	Routine Mental/ Psychological Behaviors (After)
Substantial				Coordination of multiple behaviors to achieve objective goal; change in principle with shifting and monitoring			
Considerable			Ability to show cognitive and behavioral preparation for violence to follow; use of time in planning		Efforts to avoid detection & apprehension; ability to recall instant violence		
Moderate		Ability to integrate internal & external information and to choose which action to follow; use of environmental cues				Ability to avoid suicidal or self-mutilative behavior; presence of remorse or apology	
Mild	Awareness of inner & outer state and events; sensory & motor skills; short- and long-term memory; homeostatic & visceral activity						Awareness of inner & outer state and events; sensory & motor skills; short- and long-term memory; homeostatic & visceral activity
STAGE :	A	B	C	D	E	F	G

ESTIMATE OF SELF-CONTROL BY TEMPORAL PERIOD



Combining all events within a time period, present the overall degree of self-control for BEFORE, DURING, and AFTER the instant violence on the above histogram.

NOTE: BEFORE = A, B, C on the graph on the previous page; DURING = D; AFTER = E, F, G .

PART E: SELF-CONTROL MODEL

The rationally-based decision model below can be adapted to a wide range of instant offenses. The model represents the evaluator's post-hoc decision path in coming to conclusions relevant to defendant's competencies at the time of the instant offense.

Forensic Psychological Criteria	Opinion Yes	No	No Opinion
1. Adequate forensic data base. Includes historical and instant offense information relevant to the accused, alleged victim(s) and crime context (Part A)	___	___	_____
2. Presence of significant basal violence (two or more acts of threatened, attempted, or consummated violence; Part B)	___	___	_____
3. Common themes for basal violence and instant offense (Part B)	___	___	_____
4. Self-Regulation (Part C)			
Considerable to substantial goal formulation	___	___	_____
Considerable to substantial planning & preparation	___	___	_____
Considerable to substantial concordance between plans and actions	___	___	_____
Considerable to substantial effective performance	___	___	_____
(To meet model requirements for substantial overall self-control, the evaluator must score Yes on 1-4 above.)			
5. The accused had substantial self-control at the time of the instant offense.	___	___	_____

In sum, this checklist focuses on competencies of the accused by the examination of alleged perpetrator, crime context and victim factors. The basal history of the accused is scrutinized in addition to abilities/competencies shown before, during and after instant offense. A model of defendant competencies is presented as a prelude to the examination of critical factors in the evaluator's own decision path. This checklist may have heuristic value in generating hypotheses for the study of quantitative criterion-based models.

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Liability Insurance Coverage for Pollution Claims

by Eugene R. Anderson, Esq., Sharon A. Merkle, Esq. and Natalia Kisseleff, Ph.D.[1]

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I. INTRODUCTION

Hawaii policyholders should be protected by their liability insurance policies for claims made against them because of environmental damages.

Environmental contamination resulting from past activities conducted on property currently being purchased for development in Hawaii is a growing problem for policyholders. It is of growing concern to buyers who may be held liable for future clean-up costs, and also to lenders who may unwittingly finance the purchase or development of contaminated real estate.[2]

In 1980, Congress enacted the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as the Superfund Act.[3] The Act was reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA).[4] The Superfund legislation establishes a fund to be used for the clean-up of hazardous waste sites identified by the federal Environmental Protection Agency (EPA). It also provides for the identification of parties responsible for the creation of the sites and recovery of clean-up costs from those parties.

Costs associated with the clean-up of hazardous wastes and other environmental contaminants, whether voluntarily or under threat of government prosecution, can be enormous. An unwary buyer may face clean-up costs which are certain to wipe out anticipated profits on the property and are likely to threaten the buyer's solvency as well.

Businesses faced with catastrophic clean-up costs and their lenders often do not realize such losses may be covered by insurance.[5] Many companies, assuming their losses are not covered, fail to submit a claim. Others, who have submitted claims and whose insurance companies have denied coverage, bring legal actions to enforce the terms of their policies. Litigation concerning insurance coverage for environmental liability is a rapidly growing area of law, primarily because the stakes for American business are so high. Simply stated, the out-

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[2] *See* Lomont, *Toxic Real Estate*, HAWAII INVESTOR, Aug. 1989, at 34; NATIONAL BUSINESS INSTITUTE, INC., BASIC REAL ESTATE LAW IN HAWAII (1989).

[3] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (current version at 42 U.S.C. § 9601 (1989)).

[4] Pub. L. No. 99-499, 100 Stat. 613 (1986).

[5] In materials prepared for a recent seminar on Hawaii real estate law, the authors acknowledge "[t]he potential for severe legal liability for those who violate this growing area of federal, state, and municipal hazardous waste regulation."
Lezak and Rudy, *Initial Considerations in a Real Estate Transaction*, BASIC REAL ESTATE LAW IN HAWAII, at 3.

In the only comment devoted to the critically important issue of insurance coverage for such liability, the authors state: "Lenders should also investigate the possibility of obtaining hazardous waste liability insurance, although it is generally unavailable except in limited circumstances for residential properties." *Id.* at 21. Lenders may in fact already have coverage under standard comprehensive general liability insurance policies.

come of this litigation will determine whether insurance will help pay the billions of dollars of environmental related liabilities facing such companies. Our society has determined that a clean environment is worth the economic cost. We are still in the process of determining whether insurance will help bear the cost to business policyholders, allowing the survival of many companies which otherwise would fail under this staggering burden.

Hawaii recently enacted sweeping legislation which provides for state regulation of hazardous waste management. Act 212 of the 1989 Legislative Session, which became effective on June 7, 1989,[6] repealed the former Environmental Quality Law. Act 212 contains seven new chapters providing for state regulation of air and water quality; noise; solid waste; the transport, recycling and disposal of used oil; hazardous wastes; and underground storage tanks. Regulations are currently being drafted to implement this legislation and Hawaii's superfund act, Hawaii Revised Statutes, Chapter 128D, enacted in 1988.[7] The Solid Hazardous Waste Program and the Hazardous Waste Evaluation and Emergency Response Program, both under the auspices of the State Department of Health, are working with EPA officials to draft proposed regulations. Public notice of the proposed regulations is expected in early 1990. Following the promulgation of regulations, enforcement will begin, and policyholders can expect regulated activities to be closely monitored.

Certain features of the Hawaii law, *e.g.*, the provisions relating to underground storage tanks, are deemed to be more stringent than applicable federal legislation. Liability may also be found under state law which would not exist under federal law because the federal statute's "innocent purchaser exemption"[8] was omitted from the Hawaii superfund law. Thus, under the Hawaii state law, strict liability could be imposed on a property owner, regardless of whether the owner knew or had reason to know that a hazardous substance was disposed of on the property prior to the date of purchase and regardless of the prospective purchaser's diligence in attempting to learn of this information.

In addition, in Hawaii, agricultural pesticides pose a particular problem. Although pesticides are generally regulated under the federal Insecticide, Fungicide, and Rodenticide Act,[9] improper disposal could result in liability under CERCLA and the state counterpart. An attempt to impose such liability occurred in the wake of much publicity regarding contamination of underground

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[6] Codified as Hawaii Revised Statutes, Chapters 342B, 342D, 342F, 342H, 342J, 342L and 342N.

[7] There are currently bills pending in both houses of the Hawaii Legislature to amend the state superfund law by adding stringent civil and criminal penalties for violations, detailed reporting requirements and broad definitions of terms used in the statute.

[8] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 613, 42 U.S.C. § 9601 (35)(a) (1986).

[9] 7 U.S.C. § 136 *et seq.* (FIFRA).

water contained in water wells on Oahu; a lawsuit was filed in 1983 in Honolulu federal district court against manufacturers and distributors of various pesticides.[10] The suit, brought by private parties, sought three billion dollars in damages. The action was dismissed on the grounds that the plaintiffs lacked standing to bring the action and failed to state a claim against the defendants.

Recent renewed concern over maintaining water quality in the aquifers underlying central Oahu, the main source of the island's water supply, has fueled current controversy over the planned development in that area. Environmental quality issues and the enforcement of Hawaii's new statutes and regulations will almost certainly receive increasing attention as the current development boom continues. The EPA, which has already identified more than fifty hazardous waste sites in the state, including central Oahu wells, is in the process of updating the list of Hawaii sites to be added to the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS).[11] In light of these developments, Hawaii policyholders can and should expect enforcement efforts to begin in earnest.

II. Meeting Policyholder Expectations: Coverage Under Comprehensive General Liability Policies

The primary purpose of insurance is to insure.[12] Comprehensive general liability insurance is one of the oldest and most common forms of insurance purchased by American businesses. The standard policies sold to policyholders to insure against losses resulting from pollution or environmental impairment liability are comprehensive general liability (CGL) policies.[13]

Hawaii policyholders should expect to be covered by liability insurance when

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[10] Wyman v. Shell, Civ. No. 83-1293 (D.C. Haw. 1983).

[11] CERCLIS is a computerized database that helps EPA headquarters and regional personnel with site, program and project management. The database contains the official inventory of CERCLA sites. It is used to support performance targeting, current site planning and tracking functions. CERCLIS is the required and sole source of Superfund planning and accomplishment data. The information contained within CERCLIS is public information and may be obtained through a Freedom of Information Act request directed to the EPA.

[12] 13 J. Appleman, Insurance Law and Practice § 7403 at 302 (1976).

[13] Other types of policies may also provide coverage for environmental claims. Policyholders should examine the terms of their property insurance policies; environmental impairment liability (EIL) policies; automobile policies, workers' compensation policies; ocean and marine-related policies; retroactive liability policies; boiler and machinery policies; homeowners' policies; title insurance policies; product liability policies; umbrella or excess policies; directors' and officers' liability policies; manuscript policies; any insurance required by state or federal laws and regulations; transporters, disposers and site operators' policies; other people's insurance policies; certificates of insurance; and any contractual undertakings providing for indemnity of the policyholder. This article is limited to an analysis of coverage under the CGL policy.

environmental claims are made against them. A commentator writing in the Illinois Bar Journal recently noted:

> Businesses purchasing either comprehensive general liability (CGL) or excess liability (Umbrella) policies typically expect insurers to defend them against actions for violations of environmental statutes or regulations and to indemnify them for fines or penalties.[14]

In a recent article, authors Thomas Crisham and Janet Davis of the Hinshaw, Culbertson, Hoban & Fuller law firm in Chicago also discussed policyholder expectations:

> Once an entity is identified by a governmental agency as a party potentially responsible for the contamination of a site, the entity will be advised that it may have to participate in or contribute to the clean-up of the site. At this point, the potentially responsible party is likely to turn to its insurers, both past and present, to seek defense and indemnification for the clean-up required by the government.[15]

Given the state's interest in protecting its citizens, and in light of the history of liability insurance coverage discussed in the following sections, Hawaii policyholders' expectations of insurance coverage under standard form comprehensive general liability insurance policies should be fulfilled, not dashed.

Liability insurance is one of the oldest, most common forms of insurance.[16] This type of insurance covers the risk that the policyholder will be subject to legal liability. Whenever there is an attempt to impose legal liability upon the policyholder because of bodily injury or property damage, liability insurance covers the claim unless a specific exclusion applies.[17] In general, liability insur-

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[14] McCall, *Insurance Coverage for Environmental Liabilities*, 548 ILL. B.J. 1 (June 1989). The author then points out that these expectations are frequently dashed: "However, most CGL and Umbrella policies offer little assistance to businesses who produce, transport, or store hazardous wastes, because most insurance companies deny that they have a contractual obligation to defend against or indemnify for environmental liability." *Id.*

[15] Crisham and Davis, *CGL Coverage for Hazardous Substances Clean-Up*, FOR THE DEFENSE at 21 (Mar. 1988). (The Hinshaw, Culbertson, Hoban & Fuller law firm is one of the leading law firms in the United States representing insurance companies battling their policyholders.)

[16] *See* Note, *Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795 (1984); Annotation, *Insurance against injuring property or person of third person as liability or indemnity insurance*, 37 A.L.R. 644 (1925).

[17] The standard form policy covers "all sums which the [policyholder] shall become legally obligated to pay as damages because of bodily injury or property damage." 1 MILLER & LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES: ANNOTATED 411 (1988). The above language was used from 1966 to 1985.

ance covers indemnification, as well as all prior stages of the litigation process, including investigation and defense.[18]

Standard form comprehensive general liability insurance is legal liability insurance. It is tortfeasor insurance. It is litigation insurance, and it is insurance that covers wrongdoers. Liability insurance has been essential to the development of our agricultural and industrial economy because it provides economic stability to farms, businesses and industries. In exchange for a fee paid by the policyholder in the form of a policy premium, liability insurance shifts the burden of risks that potentially could be economically devastating from the policyholder to the insurance company. Liability insurance protects not only the policyholder, but also the policyholder's customers, neighbors, employees, owners, creditors and the public. As one commentator observed in a recent article, "To buy or not to buy insurance is no longer a private option."[19]

A. Case Law

There are no Hawaii cases dealing with insurance coverage for environmental claims. The cases from other jurisdictions are evenly split on the issue of whether liability insurance covers such claims. A collection of the cases on both sides of this issue is set forth in *Claussen v. Aetna Casualty & Surety Co.*[20]

The inconsistent judicial interpretations of the same standard form CGL policy language discussed in *Claussen III* should alone be sufficient for the Hawaii courts to conclude that the policies are ambiguous. Therefore, the policy language should be construed to cover a policyholder's liability for environmental claims.[21] Just as the cases are irreconcilably split, so are the authors of various

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[18] The issues of indemnification, investigation and defense will be discussed in the appropriate sections of this paper.

[19] McAlear, *The Emperor's Old Clothes*, BEST'S REV. (PROPERTY-CASUALTY) at 22 (Feb. 1989).

[20] 865 F.2d 1217 (11th Cir. 1989) (Question Certified to Supreme Court of Georgia, hereinafter "*Claussen III*". The Supreme Court of Georgia resolved this split of authority in favor of the policyholder, 259 Ga. 333, 380 S.E.2d 686 (1989) (Certified Question answered by Supreme Court, hereinafter "*Claussen IV*"). (The other decisions of *Claussen* referred to in this paper are: 676 F. Supp. 1571 (S.D. Ga. 1987). There are two District Court decisions in *Claussen* at this level, "*Claussen I*" and "*Claussen II*". *Claussen I* is appended to *Claussen II*, conformed, 888 F.2d 747 (11th Cir. 1989) (hereinafter "*Claussen V*")).

Another collection of the cases on both sides of the issue appears in a recent brief of United States Fidelity and Guaranty Company filed with the Supreme Court of Illinois. *See* Brief on Petition for Leave to Appeal, No. 68605, at 10, United States Fid. & Guar. Co. v. Specialty Coatings Co., et al., 180 Ill. App. 3d 378, 535 N.E.2d 1071, (1989), *rev. denied*, 136 Ill.2d 609, 545 N.E.2d 133 (1989). (USF&G noted, "[T]here is a split of authority nationwide with two irreconcilable lines of cases." *See also* Decision in the lower court, USF&G v. Specialty Coatings Co. et al., No. 84 L 51188 (Cir. Ct. Cook County, Ill. 1989).

[21] *See* Annotation., *Division of Opinion Among Judges On Same Court Or Among Other Courts Or*

current articles,[22] further establishing the ambiguity of the policy language, which should be resolved in favor of policyholders.

B. CGL Policies Cover Pollution Liability

Standard form comprehensive general liability policies sold to thousands of policyholders in Hawaii were, according to a writer sympathetic to the insurance industry, "tailor made" to cover most pollution problems.[23] Standardized liability insurance policy forms are prepared by industry-wide insurance organizations.[24] The insurance industry released a standard form comprehensive general

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Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy is Ambiguous, 4 A.L.R. 4th 1253, 1255 (1981). *See also*, 2 G. COUCH, COUCH ON INSURANCE 2D § 15:84 at 419 (rev. ed.). Contrast the policyholders' successful quest for insurance coverage in *Claussen IV with* Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989). *Reported in* MEALEY'S LITIGATION REPORTS—INSURANCE, June 27, 1989, at C1. *See also* Government Employees Ins. Co. v. Franklin, 66 Haw. 384, 662 P.2d 1117 (1983); Airgo, Inc. v. Horizon Cargo Transp., Inc., 66 Haw. 590, 670 P.2d 1277 (1983).

[22] For contrasting views of the insurance available to policyholders, *see* Anderson & Luppi, *Environmental Risk Insurance: You Can Count On It*, RISK MANAGEMENT, October 1987, at 68 *and* Jernberg & Furse, *Environmental Risk Insurance: Don't Count On It*, RISK MANAGEMENT, July 1987, at 42. *See also* Sayler & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, [hereinafter Sayler & Zolensky, *Intent of the CGL Drafters*] MEALEY'S LITIGATION REPORTS—INSURANCE, 4,425 (1987); Russell, Schaufelberger & Nessman, *Lawyer's Say Insureds Are Attempting to Reinvent History*, MEALEY'S LITIGATION REPORTS—INSURANCE, 29-38 (1988).

[23] *See* Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251 (1986). The *Looking Glass* article is patently pro-insurance company, but the author does concede that pre-1970 CGL policies were "tailor-made" to cover most pollution events: "Faced with customers' demands for greater coverage, the uncertainty of judicial interpretations, and the general trend toward judicially expanded coverage, the insurance industry switched universally to 'occurrence-based' coverage in 1966 . . . . [T]he insurers used new language to remove only the suddenness barrier and *to cover pollution liability that arose from gradual losses*. The standard policy made it clear that the loss had to be unexpected and unintended from the insured's standpoint for coverage to apply." *Id.* at 1246-47 (footnotes omitted) (emphasis added).

For a graphic illustration of the ambiguity of the pollution exclusion that was introduced into the policy in 1970, see the section in the article beginning at page 1281 and ending at page 1300, in which the author presents a virtually incomprehensible model for the application of the pollution exclusion.

[24] Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, 1965-1966, A.B.A. SEC. ON INSURANCE NEGLIGENCE AND COMPENSATION LAW 250. Mr. Wendorff was a member of the Joint Forms Committee (JFC) that drafted the CGL policy form. Mr. Wendorff explains what is meant by "standard" policies: "[The] policies are not 'standard' from the standpoint of being statutory policy, such as the fire policies . . . [T]he 'standard' policies which have been promulgated by the two rating organizations under their National Standard Policy Provisions Program have become a standard of comparison for other 'nonstandard' policies. *Id.* at 251."

liability policy in 1940-41 and revised the form in 1943, 1947, 1955, 1966 and 1973.[25]

When the standard form CGL policy was modernized in the 1960's, the insurance industry marketed the new policy (1966 CGL policy) as a broadening of coverage because, among other things, it covered liability for damages because of pollution, including liability for damages because of gradual pollution. Most, but not all of the cases involving the pre-1966 standard form comprehensive general liability insurance policy held that the policyholder was covered for liability resulting from pollution.[26]

To put the subsequent discussion of drafting history documents in context, the following background is provided. In the early 1960's, the American Insurance industry established a task force to draft what eventually became the 1966 standard form insurance policies. In 1960, two insurance industry organizations, the Mutual Insurance Rating Bureau (MIRB), representing mutual companies, and the National Bureau of Casualty Underwriters (NBCU), representing stock companies, established several committees that were engaged directly in the revision process. For a brief discussion of the drafting history of the standard form CGL policies, *See* American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-01 (S.D.N.Y. 1983) *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). MIRB and NBCU merged in 1971, forming the Insurance Service Office (ISO). NBCU and MIRB each maintained a separate Rating Committee and jointly maintained committees known as the Joint Scope of Coverage Subcommittee (JSCS), the Joint Forms Committee, and the Joint Drafting Committee (JDC). Mr. Wendorff was a member of the Joint Forms Committee which drafted the CGL policy form.

As Travelers Indemnity Company and other insurance companies have noted,"[b]ecause of the way the insurance industry operates, most of the relevant policy language is found in standardized insuring forms, drafted by insurance associations or bureaus, and used industry-wide. Thus, questions of intent may be addressed on a standardized basis." *See* Travelers' Reply Memorandum in Support of Coordination at 7-8 (Dec. 30, 1980), Armstrong Cork Co. v. Aetna Cas. & Sur. Co., No. C 315367, as part of In re Asbestos Ins. Cvge Cases, Judicial Counsel Coordination Proceeding No. 1072 (Cal. Super. Ct. May 29, 1987).

[25] DEFENSE RESEARCH INSTITUTE (DRI), INSURANCE LAW: GENERAL LIABILITY INSURANCE—1973 REVISIONS, at 3 (1974). There was a standard form revision in 1947, although the DRI monograph does not include that date. In 1985, the Insurance Services Office (ISO) rewrote and renamed the liability policy as the New Commercial General Liability Policy. (A discussion of the New Commercial General Liability Policy is beyond the scope of this paper.)

[26] *See, e.g.*, Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145 (D.Or. 1966); Moffat v. Metropolitan Cas. Ins. Co. of New York, 238 F. Supp. 165 (M.D. Pa. 1964); City of Myrtle Point v. Pacific Indem. Co., 233 F. Supp. 193 (D.Or. 1963); City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W.2d 632 (1973); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 437 Pa. 493, 263 A.2d 368 (1970), *rev'd*, 214 Pa. Super. 80, 251 A.2d 739 (1969); Taylor v. Imperial Cas. & Indemn. Co., 82 S.D. 298, 144 N.W.2d 856 (1966); The Travelers v. Humming Bird Coal Co., 371 S.W.2d 35 (Ky. 1963); Employers Ins. Co. of Alabama v. Rives, 264 Ala. 310, 87 So.2d 653 (1955), *cert. den.*, 264 Ala. 696, 87 So. 2d 658 (1956); White v. Smith, 440 S.W.2d 497 (Mo.App. 1969); Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71 (3d Cir. 1955); Moore v. Fidelity and Cas. Co. of New York, 140 Cal. App. 2d 967, 295 P.2d 154 (1956); Rockwood Water District v. General Ins. Co. of America, No. 66-184 (D. Or. 1967), *Reported in* Fire & Cas. Cases 1967-69 (CCH), at 301;

An examination of the historical development of the 1966 standard form CGL policy establishes that the insurance industry intended the CGL policy to cover environmental damage claims. In 1965, G.L. Bean, Assistant Secretary of Liberty Mutual Insurance Company, stated at an insurance industry conference that, under the new 1966 CGL policy:

> *[I]t is in the waste disposal area that a manufacturer's basic premises — operations coverage is liberalized most substantially.* Smoke, fumes, or other air or steam *pollution* have caused an endless chain of severe claims for *gradual property damage*. The waste disposal cases have been difficult ones, because when the injury or damage first starts to emerge, no corrective action is taken in many cases, because the manufacturer is reluctant to admit his waste disposal is causing it. This is probably an honest doubt. When the cause *is* pinpointed, it may or may not be easy to make a quick elimination of the cause. The cost of an alternative method of waste disposal may be terrifically expensive or might even force the manufacturer out of business, even if it can be made, it may take months to convert.[27]

In yet another paper that touted the then new CGL insurance policy, Mr. Bean noted some of the environmental damage claims which would be covered under the new policy:

> [C]overage for gradual BI [Bodily Injury] or gradual PD [Property Damage] resulting over a period of time from exposure to the insured's *waste disposal*. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of down stream industrial sites, the Donora, Pa. atmospheric contamination, and the like.[28]

Cosmopolitan Mut. Ins. Co. v. Packer's Supermarket Inc., 72 Misc. 2d 980, 340 N.Y.S.2d 461 (1972); Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396 (Tex. 1967); *But see*, American Cas. Co. of Reading, Pa. v. Minnesota Farm Bureau Serv. Co., 270 F.2d 686 (8th Cir. 1959); Clark v. London and Lancashire Indem. Co. of America, 21 Wis. 2d 268, 124 N.W.2d 29 (1963); Farmers Elevator Mut. Ins. Co. v. Burch, 38 Ill. App. 2d 249, 187 N.E.2d 12 (1962); Town of Tieton v. General Ins. Co. of Am., 61 Wash. 2d 716, 380 P.2d 127 (1963); United States Fid. & Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951); Leggett v. Home Indem. Co., 461 F.2d 257 (10th Cir. 1972).

[27] G.L. Bean, Assistant Secretary, Liberty Mutual Insurance Company, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, paper presented at Mutual Insurance Technical Conference (Nov. 15-16, 1965), at 6, *quoted in* Pendygraft, Plews, Clark, and Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 141 (1988) (emphasis added) [hereinafter Pendygraft, *Environmental Damage*].

[28] G.L. Bean, Summary of Broadened Coverage Under New CGL Policies with Necessary Limitation to Make This Broadening Possible, paper presented in 1966, at 1, *quoted in* Sayler & Zolensky, *Intent of the CGL Drafters*, *supra* note 22, at 4431-32.

Lyman J. Baldwin, Jr., then Secretary of Underwriting for the Insurance Company of North America (INA), made observations in a presentation before the American Society of Insurance Management in New Orleans on October 20, 1965 that were strikingly similar to those of Mr. Bean in their emphasis on intended coverage for environmental damage claims. Mr. Baldwin cited "slow ingestion of foreign substances or inhalation of noxious fumes" as two examples of covered liabilities and emphasized that the new CGL policy would provide coverage for property damage resulting from the emissions of "noxious fumes" from a chemical manufacturing plant.[29]

In a presentation to insurance industry executives at the Sheraton Boston Hotel on November 11, 1965, Hartford Insurance Company executive Henry G. Mildrum noted:

> [T]hat the coverage afforded by the policy includes bodily injury and property damage resulting from injurious exposure to conditions over a period of time. That is, it is no longer necessary that the incident causing injury or damage be sudden in character . . . . Slow ingestion of foreign matter, inhalation of noxious fumes or the discharge of corrosive material into the atmosphere or water courses are examples of exposure type situations.[30]

Messrs. Bean, Baldwin and Mildrum were joined in their interpretation of the new policy by Willard J. Obrist, Assistant Manager of the General Accident Group, who also offered as an example of coverage, claims arising from the "inhalation of noxious fumes." Also concurring in this interpretation was Richard H. Elliott, the Secretary of the National Bureau of Casualty Underwriters. Mr. Elliott stated that the standard policy provided coverage for "the many instances of injuries taking place over an extended period of time" and gave as examples the "slow ingestion of foreign substances or inhalation of noxious fumes."[31]

The consistent and uncontradicted positions of Messrs. Bean, Baldwin, Mildrum, Obrist and Elliott, on behalf of the insurance industry, left little doubt that damages because of bodily injury or property damage from gradual pollution were to be covered by the 1966 CGL policy. The 1966 standard form

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[29] Baldwin, Address to American Society of Insurance Management (Oct. 20, 1965), at 6; *also quoted in* Anderson & Luppi, *Environmental Risk Insurance: You Can Count on It*, RISK MANAGEMENT, Oct. 1987, at 68.

[30] Mildrum, Implications of Coverage For Gradual Injury or Damage, Presentation at Sheraton Boston Hotel on November 11, 1965, at 2-3; also *quoted in* Sayler & Zolensky, *Intent of the CGL Drafters*, *supra* note 22, at 4431-32.

[31] Obrist, *The New Comprehensive General Liability Insurance Policy — A Coverage Analysis*, DRI (November 1966), at 6, *Reprinted in*, DRI, INSURANCE LAW: GENERAL LIABILITY INSURANCE, 1973 REVISIONS 38, 39 (1974); Elliott, *The New Comprehensive General Liability Policy*, *quoted in* Sayler & Zolensky, *Intent of the CGL Drafters*, *supra* note 22, at 4431.

CGL policy was in use in Hawaii until 1985. Liability for gradual property damage due to pollution expressly was anticipated when the policy was drafted and premiums were collected for it. The courts followed the lead of these insurance industry spokespersons and found coverage for pollution liability under the 1966 CGL policy.[32]

C. Pollution Exclusion

If the standard form comprehensive general liability insurance policy form was "tailor made" to cover most pollution losses, did the addition of the pollution exclusion change the scope of coverage? Until recently, the insurance industry contended that it did not. The pollution exclusion was added to the standard form policy in 1970 as a mandatory endorsement[33] with accompanying fanfare stating that it was a "mere clarification" of existing coverage.

The pollution exclusion provides that the insurance coverage does not apply to:

> (f) bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutions into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[34]

The insurance industry claim that the pollution exclusion did not change coverage was incredibly effective. The public announcement regarding the new exclusion by one major insurance company, Insurance Company of North America[35], led the Wall Street Journal to report: "INA Corp., a large insurance holding company, has announced that it no longer will exclude most pollution coverage from its general liability policies. For the most part this seems a sensible step,

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[32] *See* Grand River Lime Co. v. Ohio Cas. Ins. Co., 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972); Growers Refrigerating Co., v. American Motorists Ins. Co., 260 Or. 207, 488 P.2d 1358 (1971); Syteyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978).

[33] Houser and Gordon, The Pollution Exclusion—Is the 1966 Revision the Answer?, Presentation at DRI Seminar, Insurance Coverage and Practice, Westin Hotel, Chicago, Ill., at E6 (May 15-17, 1985).

[34] DRI, INSURANCE LAW: GENERAL LIABILITY INSURANCE—1973 REVISIONS, at 14 (1974).

[35] Compare the Wall Street Journal account with that in Rosenkranz, *The Pollution Exclusion Clause Through The Looking Glass*, 74 GEO. L.J. 1237, 1252, n. 79: "According to Insurance Co. of North America (INA) President Charles K. Cox, 'INA will continue to cover pollution which results from an accidental discharge of effluents—the sort of thing that can occur when equipment breaks down.' "(Citation omitted)

not only for INA but for the rest of insurance industry."[36]

The Insurance Commissioner of the State of West Virginia was dubious about the insurance industry's claim regarding the very limited scope of the proposed exclusion. He ordered public hearings after which he rendered a written decision:

> 1) The said companies [INA, Travelers, American Home, St. Paul and American States] and rating organizations [Mutual Insurance Rating Bureau and Insurance Rating Board] have represented to the Insurance Commissioner, orally and in writing that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached;
> 2) to the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions. [37]

At the same time, the West Virginia Commissioner rejected another proposed pollution exclusion relating to oil and gas operations because he found that it did in fact reduce coverage. In 1973, the insurance regulatory authorities in New Hampshire, Maryland, North Carolina and Puerto Rico did not buy the insurance industry's "mere clarification" assurance. They rejected the pollution exclusion.[38]

Presentations similar to those made to the West Virginia commission were made to state regulatory authorities in many states.[39] These 1970 representations have been labelled "dishonest" by two courts.[40] If the insurance industry

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[36] *Insuring Against Pollution*, Wall St. J., Apr. 14, 1970, at 22, col. 6.

[37] Order of the Insurance Commissioner for the State of West Virginia (August 19, 1970), at 3; *see also* Sayler & Zolensky, *Intent of the CGL Drafters*, *supra* note 22, at 4433-34, *quoting* order and responses by the Mutual Insurance Rating Board, Insurance Rating Board and Travelers to the West Virginia Commissioner's concerns about the exclusion. Each responded that the exclusion was intended to clarify existing coverage under the occurrence definition, excluding coverage for expected or intended damage.

[38] *See* Insurance Advisory Bulletin (Jan. 1, 1973) in the files of the North Carolina Insurance Department that states under *ISO-G-521* that "[t]his endorsement deletes the contamination exclusion from the parts listed in the box at the top as respects policies issued in Maryland, New Hampshire, North Carolina and Vermont where the exclusion has not been approved."

[39] *See* letter from Mutual Insurance Rating Bureau top Members and Subscribers (July 1, 1970), acknowledging that the pollution exclusion endorsement has been filed in 31 states including Mississippi. The letter was appended as Exhibit "D" to the Affidavit of William Rice, Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981).

[40] *See* decision of the District Court in *Claussen II*, Claussen v. Aetna Cas. & Sur. Co., 676 F. Supp. 1571, 1573, n. 4 (S.D. Ga. 1987). Despite the finding of dishonesty, the district court denied insurance coverage to the policyholder. The appeal was recently decided in favor of the policyholder. *See* discussion, *supra* note 20. In FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Super. Ct. Santa Clara County, Dec. 9, 1988), the court denied the policyholder's motion

is held to its word, even after the addition of the pollution exclusion to the standard form CGL policies — a "mere clarification" — the policies continued to be "tailor-made" to cover most pollution liability.[41]

The genesis of the term "sudden and accidental" is essential to an understanding of the phrase. Although the insurance industry first used this "sudden and accidental" phrase in the "pollution exclusion" in 1970, that same phrase was used in boiler and machinery insurance policies for many years previous to 1970.[42]

The 1970 "pollution exclusion" was written against the background of widely accepted interpretations of the words "sudden and accidental" as having no temporal connotation. In fact, one insurance company, United States Fidelity & Guaranty Company, recently stated that: "no less an authority than *Couch on Insurance* states that '[t]he judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them *will be presumed to have been the construction intended to be adopted by the parties.*' "[43]

In boiler and machinery policies, the insurance industry defined the word

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for partial summary judgment that had been based on judicial and collateral estoppel arising out of the filings with and representations to the West Virginia Insurance Commissioner. The court stated that the insurance companies had "understated" their position on the pollution exclusion to the Commissioner, but also observed that their acts could not be characterized as the sort of dishonesty that would give rise to a judicial estoppel. The California Supreme Court has accepted the policyholder's petition for review. A decision by the California Court of Appeal, Sixth District, AIU Ins. Co. v. Superior Court of Santa Clara County, H005467 (Santa Clara County Super. Ct. No. 643058) (filed Sept. 7, 1989) overturned the lower court decision. A Petition for Rehearing in that case was filed on Sept. 22, 1989 by FMC and a petition for review was filed with the California Supreme Court by FMC on Oct. 17, 1989.

[41] The insurance industry now contends that the pollution exclusion "effected a very dramatic change in coverage." *See* Transcript of Argument of Counsel for Atlantic Mutual Insurance Co. before the New York Court of Appeals at 26, Technicon Electronics Corp. v. American Home Ins. Co., No. 155 (N.Y. Ct. of App. June 30, 1989). If so, a premium reduction would have been required at that time by state insurance regulators. Further, in some states insurance companies must notify policyholders upon renewal of any reduction in coverage. As the court held in Allstate Ins. Co. v. Fibus, 855 F.2d 660, 663 (9th Cir. 1988) ("[A]n insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage." (quoting Fields v. Blue Shield of Cal., 163 Cal. App. 3d 570, 209 Cal. Rptr. 781, 785-86 (1985)). ("To be adequate, notice must be conspicuous, plain, and clear." (citing *Id.*, 209 Cal.Rptr. at 786)).

[42] Hoey, *The Meaning of "Accident" In Boiler And Machinery Insurance And New Developments In Underwriting*, 19 FORUM 467 (1983-1984).

[43] Memorandum of Law of United States Fidelity and Guaranty Company in Opposition to Pepper's Steel and Alloy Inc.'s and Norton Bloom's Motion for Partial Summary Judgment on the issue of Liability at 27-28, Pepper's Steel & Alloy v. USF&G, *filed* Dec. 28, 1989 [hereinafter USF&G Memorandum of Law] (quoting G. COUCH, COUCH ON INSURANCE 2D §15:20 (1984); and citing J. APPLEMAN, INSURANCE LAW AND PRACTICE §7404 (1969) (emphasis added). Although the USF&G brief dealt with a different phrase in the CGL policy, the rule is identical).

"accident" to mean a "sudden and accidental breakdown" or a "sudden and accidental tearing asunder."[44] Prior to 1970, the industry had already litigated the meaning of "sudden and accidental" in boiler and machinery policies. The phrase, "sudden and accidental," as used in boiler and machinery policies, was uniformly interpreted by the courts to mean *unexpected and unintended.*[45]

A recent treatise discusses the construction of the meaning of the "sudden and accidental" phrase in boiler and machinery policies.[46] Clearly, the insurance industry's 1970 intention regarding the meaning of the pollution exclusion must have been consistent with those prior court interpretations of the meaning of "sudden and accidental."[47] Additional support for the notion that "sudden and accidental" was not meant to be the opposite of "gradual" when the pollution exclusion was drafted is found in early gradual injury cases which also predated the pollution exclusion.[48] Indeed, a leading commentator on insurance law takes the position that the primary meaning ascribed to the term "sudden" should be "unexpected" rather than "instantaneous."[49]

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[44] Hoey, *supra* note 42, at 467; S. HUEBNER, K. BLACK AND R. CLIPE, PROPERTY AND LIABILITY INSURANCE 274 (1984).

[45] COZEN, INSURING REAL PROPERTY § 5.03(2)(b) (1989).

[46] The treatise stated the following:

> In order for the insured to recover under a boiler and machinery policy it must demonstrate that the occurrence was "sudden and accidental." Although the terms "sudden" and "accidental" seem to imply that an immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the "common meaning" doctrine, the courts have *uniformly* held that the dictionary definition of the terms as "unforeseen, *unexpected and unintentional*" is controlling. [Emphasis added.]

Cozen, *Insuring Real Property* § 5.03(2)(b) (1989) (citation omitted); Hoey, *supra* note 42, at 468-69.

[47] In 1953, the Supreme Judicial Court of Massachusetts in New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 116 N.E.2d 671 (1953), found that in the context of boiler and machinery insurance the word "sudden" meant "coming or occurring unexpectedly, unforeseen, unprepared for. . ." Further, the court found that "damage to the spindle could not be reasonably anticipated, and its occurrence was unexpected and unforeseen, and consequently sudden in the ordinary meaning of the word." *Id.* at 680-81.

In 1959, the Washington Supreme Court, in Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co., 53 Wash. 2d 404, 333 P.2d 938 (1959), interpreted the word "sudden" in a boiler and machinery policy to cover "unforseen and therefore unavoidable" happenings. The court found that damage which occurred over a long period of time, "as long as its progress was undetectible [sic]," can properly be described as "sudden and accidental." *Id.* at 940.

[48] Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N. Am., 411 Ill. 325, 104 N.E.2d 250 (1952) (seven months was sudden enough to invoke coverage for "accident"); Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71 (3d Cir. 1955) ("accident" means "unforeseen and unintended"; five years or eight years was "sudden" enough).

[49] 10A G. COUCH, CYCLOPEDIA OF INSURANCE LAW 2D § 42:396 (1982).

> When coverage is limited to a sudden "breaking" of machinery the word "sudden" should be given its primary meaning as a happening without previous notice, or as some-

The argument of the insurance industry that gradual pollution is not covered because it is not "sudden and accidental" does not withstand careful scrutiny. The drafters of the pollution exclusion in 1970 were either fully aware or are presumed to have been aware that the then well-used phrase included gradual happenings.[50] In fact in a 1982 letter sent by Travelers to the State of New York Insurance Department, Travelers wrote:

> "Sudden and accidental" as a term standing by itself is capable of many interpretations.
>
> . . . .
>
> [T]here is nothing in the term "sudden and accidental" which *requires* the elimination of gradually occurring events from the collective.
>
> . . . .
>
> There is nothing which prevents gradually occurring events from being considered to be "sudden and accidental" as long as there is no intent to cause injury or damages.[51]

In its Liability Coverage Manual, a manual that was used as a guide for Travelers Insurance Company's agents in the 1970's after the pollution exclusion was added to the standard form CGL policy, Travelers states that:

> The use of sudden and accidental language would not prevent covering gradually occurring events. The courts by 1960 had eliminated "suddenness" as a coverage requirement . . . . Insureds need coverage for both kinds of accident — Travelers was willing to provide it. A business judgement was made to generally provide coverage for both kinds of accident.[52]

As one Aetna Casualty and Surety Company attorney summarized the position of the insurance industry on pollution coverage in 1971:

> The role of insurance is significant, as I said, but it is also traditional. Some time

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thing coming or occurring unexpectedly, as unforeseen or unprepared for. That is, "sudden" is not to be construed as synonymous with instantaneous. *Id.* (citations omitted). *See also*, Picchetti v. Pittsburgh Plate Glass Co., 105 Ohio App. 514, 153 N.E.2d 209, (1957) (construing "sudden" in context of workers' compensation insurance statute; "contrary to our preconceived notion of the word 'sudden' does not mean instantaneous").

[50] USF&G Memorandum of Law, *supra* note 43, at 27-28.

[51] Letter from Thomas A. Jackson, Secretary, Product Management Div., The Travelers, to Mark Presser, Associate Insurance Examiner, Property and Casualty Insurance Bureau, State of New York Insurance Dept. (Jan. 13, 1982) (responding to objections to Travelers' Environmental Hazard Policy raised by Mark Presser in a Dec. 11, 1981 letter).

[52] *Cited in* Memorandum of Allied-Signal Inc. to UOP Inc. in Opposition to Defendants' Motion to Compel Discovery, at 12, Allied Signal, Inc. v. Abeille-Paix Reassurances, Nos. MRS-L-226-88 (N.J. Super. Ct., Law Div., filed Aug. 22, 1989).

> ago insurance underwriters adopted standard exclusions for use with casualty insurance policies which addressed specifically to [sic] pollution. One exclusion eliminates coverage entirely for certain types of insureds who are engaged in oil, gas or petroleum operations. This was considered necessary because the type of exposure which these risks present is one which was not considered manageable by underwriters under a standard liability policy. The other exclusion eliminates coverage if bodily injury or property damage arises out of the discharge, release or escape of pollutants *unless*, and a very important *unless*, the discharge, dispersal, release or escape is sudden and accidental. The *unless* clause of this exclusion in the opinion of the underwriters allows them to perform their traditional function as insurers of the unexpected event or happening and yet does not allow an insured to seek protection from his liability insurer if he knowingly pollutes.[53]

Indeed, even after enactment of CERCLA,[54] Aetna shifted its position somewhat and expressly acknowledged that its policy provided coverage in certain circumstances:

> [W]hile many liabilities imposed under a Superfund clean-up will not be covered by the CGL policy (with the pollution exclusion attached), there are such situations where such coverage will exist:
> a. Where pollution actually took place and it was caused by a "sudden" occurrence.
> b. Where clean-up activity takes place away from the insureds' premises - as in the case of a generator.[55]

Two courts recently have relied upon these 1970 filings to hold that the pollution exclusion was inapplicable.[56] With this drafting and regulatory history before it, the Supreme Court of Georgia held that a policyholder was covered for its legal liability for damages because of pollution.[57] The Supreme Court of Alabama on the other hand, without having the benefit of the drafting history and regulatory background, held that the pollution exclusion barred coverage.[58]

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[53] Bruton, *Historical Liability and Insurance Aspects of Pollution Claims*, A.B.A. SEC. PROC. NEGLIGENCE AND COMP. LAW 303, 310-11 (1971) (emphasis added).

[54] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, as amended by Superfund Amendments & Reauthorization Act, Pub. L. No. 99-499 (1986).

[55] Interoffice communication from R.L. Stenlake, Director of Underwriting, Aetna, to C.N. Green, Assistant Vice President of Underwriting, at 3 (Apr. 27, 1982) (emphasis added).

[56] *See Claussen III*, 865 F.2d 1217 (11th Cir. 1989), and the decision in that case recently handed down in the Supreme Court of Georgia, 259 Ga. 333, 380 S.E.2d 686 (1989) (*Claussen IV*); United States Fid. & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1989 Ill. App. Lexis 256 (1989), *reh'g denied*, 136 Ill. 2d 609, 545 N.E.2d 133 (1989).

[57] *Claussen IV*, at 687.

[58] Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989).

The Hawaii Insurance Commissioner's office cannot locate copies of the 1970 filings. Any copies maintained by the Insurance Services Office, Inc.[59] in New York, are not publicly available because the insurance industry maintains that they are confidential trade secrets.[60] If and when these filings are made available to Hawaii policyholders, they can be expected to be as helpful to policyholders seeking insurance coverage for pollution claims as the filings in the other states which have become public.[61]

Very recently, First State Insurance Company and Lloyds of London in one case,[62] and Allstate Insurance Company[63] in another, successfully argued that

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[59] Insurance Services Office, Inc. is a national, non-profit corporation that gathers, stores and disseminates aggregate statistical information to insurance regulators—as required by law—and to insurers for their use. In addition, ISO develops and assists in implementing insurance policy coverage programs and distributes industry-wide advisory insurance rate information, and where appropriate, files that information with state insurance regulators. ISO, INC., INSURANCE SERVICES OFFICE IN A COMPETITIVE MARKETPLACE: ISO'S RULE WITHIN THE PROPERTY/CASUALTY INSURANCE INDUSTRY 4 (June 1987).

[60] *See* MEALEY'S LITIGATION REPORTS—INSURANCE, at 9 (1988), with respect to ISO's protective orders:

> (The Insurance Services Office has prevailed in another attempt to protect documents relating to the drafting of CGL insurance policies (Morton Thiokol, Inc. v. General Accident Insurance Co. of America, et al., No. C-3956-85, N.J. Super. Ct., Bergen Co., Chancery Div. (reference omitted).
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> . . . .
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> . . . According to attorneys who attended a hearing on the matter, Bergen County Judge Donald W. deCordova ruled on May 18 that only attorneys working the Morton Thiokol, Inc. coverage litigation may obtain copies of the drafting history documents and that they may be used only in the Morton Thiokol case in his court. No outside sources may obtain the materials.
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> . . . .
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> . . . Another opinion on the protection of ISO's documents was issued just over a year ago, on May 1, 1987, in New Castle County v. Hartford Accident & Indem. Co., et al. (No. M8-85-MEL, S.D. N.Y., See 5/12/87, Page 4,295). In that decision U.S. Judge Morris E. Lasker required the production of pre-1985 ISO documents relating to the drafting history, but said that the ISO showed good cause for protecting the materials.)

Interestingly these "secret" documents are freely used by insurance companies when it suits their purposes. *See also* discussion of *Upjohn* case, *infra* notes 54-56 and accompanying text.

[61] Kipin Industries Inc. v. American Universal Insurance Co., 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987), *reh'g denied*, No. 87-1720 (Sup.Ct. Ohio Jan. 13, 1988); Broadwell Realty Svces, Inc. v. Fidelity & Cas. Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (1987); *Cf.* Buckeye Union Insurance Co. v. Liberty Solvents and Chemicals Co., 17 Ohio App. 3d 127, 132-134; 477 N.E.2d 1227 (1984) (the 1970 circular was in the record, but not referred to in the decision).

[62] Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W. 2d 813 (1989), *petition for review pending* Nos. 86909-11 (Mich. 1989).

[63] Allstate Ins. Co. v. Quinn Constr. Co., et al., 713 F. Supp. 35 (D. Mass. 1989), *appeal dismissed.*

the pollution exclusion had a very limited scope. In the *Upjohn* case, First State, a member of the Hartford Insurance Group,[64] and Lloyds told a Michigan Court of Appeals that the pollution exclusion was not intended as an "additional hurdle" for policyholders.[65] The First State and Lloyds syndicate won. The court held "that even a continuous discharge of chemicals may be both accidental (*i.e.*, unintended) and sudden (*i.e.*, unexpected) and, therefore, outside the pollution exclusion."[66] The First State and Lloyds' syndicate brief appended "secret" 1970 filings made with the insurance regulatory authorities in Ohio, New York and West Virginia.

In the *Allstate* case, Allstate Insurance Company told the United States District Court for the District of Massachusetts:

> The so-called pollution exclusions contained in National Union's and INA's policies bar the recovery of liability insurance proceeds for the *intentional* disposal or release of hazardous substances. The exclusion does not prevent recovery where the release is "sudden and accidental", *i.e.*, where the release was not intended by the insured . . . .
>
> The purpose of the exclusion is limited; it is intended solely to deter intentional and willful pollution of the environment. As is evidenced by the exception to the exclusion for "sudden and accidental" releases, the exclusion was *not* meant to penalize companies for unintended and unexpected discharges of hazardous substances.[67]

Allstate's argument was successful.

As *Upjohn* and *Allstate* illustrate, many cases pit insurance company against insurance company. When put in the posture of a policyholder, the insurance companies advocate a different position on coverage issues. Insurance companies should be estopped from taking positions in Hawaii courts which are contrary to the positions they successfully argued in other cases here or elsewhere.

A recent editorial entitled "Revisionist History" in Business Insurance, an insurance trade magazine, specifically drew attention to the contradictory and inconsistent positions of the insurance companies noting that "[i]f the [drafting history] documents reveal that insurers actually intended the pollution exclusion clause to only clarify that intentional acts were barred from coverage, there is no way that insurers should be allowed to change their tune and now argue that

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[64] A. M. BEST CO., BEST'S INS. REPORTS—PROPERTY—CASUALTY 1164 (1988).

[65] Brief of Plaintiffs-Appellees on Appeal at 24-25 filed Nov. 6, 1987, Upjohn Co. v. New Hampshire Ins. Co., 178 Mich App. 706, 444 N.W.2d 813, *petition for review pending*, No. 86909-11 (1989).

[66] *Id.* at 710, 444 N.W.2d at 817 (citations omitted).

[67] Brief in Support of Motion for Partial Summary Judgment at 12 (filed Apr. 25, 1988), Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35, *appeal dismissed* (emphasis in original).

the clause means something more."[68]

If the same rules apply to Hawaii policyholders as those that First State (Hartford), the Lloyds syndicate and Allstate argued, then policyholders should have no trouble obtaining the liability coverage they bought and paid for. The pollution exclusion should be construed by the courts in Hawaii to be a mere clarification of the "neither expected nor intended" exclusion in the occurrence definition. It should not be an additional hurdle for Hawaii policyholders.

D. "Expected or Intended": What Is an Occurrence?

Beginning in 1966, comprehensive general liability insurance policies provided coverage for damages resulting from an "occurrence." The standard form policy used by the insurance industry from 1966 to 1973 provided the following definition: " 'Occurrence' means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[69]

In 1973, standard form CGL policies substituted the phrase "continuous or repeated" for the word "injurious" in this definition: " 'Occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[70] The policies provide insurance for the unintended and unexpected results of intentional acts. In 1966, one commentator stated:

> The definition of "occurrence" also includes the words "bodily injury or property damage neither expected nor intended from the standpoint of the insured." This phrase is intended to eliminate the necessity for an "assault and battery" condition or exclusion. Further it should eliminate the precedent of court decisions which have applied the concept of fortuity from the point of view of the injured party rather than the insured.
>
> Two factors must be considered in connection with this definition; one involves intent and the other foreseeability . . . . [I]nstances arise when the injury is an unintended result of an intentional act. *The two situations, an absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.*[71]

In 1966, a Hartford Insurance Group executive wrote in a letter to Johnson & Higgins, a leading insurance brokerage firm, that "[e]xpected means 'expected

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[68] *Opinions: Revisionist History*, BUSINESS INSURANCE Sept: 25, 1989 at 8.

[69] DRI, INSURANCE LAW: GENERAL LIABILITY INSURANCE — 1973 REVISIONS at 8 (1974).

[70] *Id.* at 9.

[71] Obrist, *supra* note 31, at 6 (emphasis added); DRI Reprint at 39-40.

for a certainty.' "[73]

Insurance companies are now contending that "expected or intended" is the equivalent of the negligence concept of foreseeability.[78] In the recent *Shell Oil Company* case in California,[74] the judge held that the policyholder, Shell, forfeited its insurance coverage "if Shell intentionally committed an act wherein it should have reasonably been known by Shell that there was a high degree of certainty that damage to the property of another would result."[75]

The policy drafters were more realistic. One of the principal drafters of the 1966 CGL policy, Herbert P. Schoen, Associate General Counsel of Hartford Accident and Indemnity Co., testified in the California *Coordinated Asbestos Coverage Cases*:

> [O]ne of the original reasons for using "accident" was — "caused by accident" — was it was [sic] fortuitous from the point of view of the insured.
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> . . . .
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> We obviously did not want to cover the intentional results of intentional act, such as murder. We didn't want to cover that. That is an intentional act with an intentional result.
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> . . . .
>
> When we tried to spell it out, although it was in the concept of accident, it caused problems for everyone and we agreed that it [the word 'accident'] be deleted.[76]

The drafters also considered and rejected an approach which could have highlighted an exclusion for intentional injuries, thereby removing some ambiguity: "Control over intentional injuries is by way of a specific exclusion rather than by phraseology in the definitions of 'accident' and 'occurrence'. The exclusion approach highlights the limitation so that it should be more effective . . . and

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[73] Letter from Harold Schaffner, Hartford Insurance Group, to Robert F. Bauer, Assistant Secretary, Johnson & Higgins, at 5 (Aug. 25, 1966).

[78] *See* City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979). *Contra*, Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Partial Summary Judgment at 127, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 507 F. Supp. 59 (W.D. Pa. 1981), *aff'd*, 676 F.2d 56 (3d Cir. 1982), in which Liberty Mutual Insurance Company argued that if the drafters had intended to exclude foreseeable damage, they would have used the word in the definition of occurrence.

[74] Shell Oil Co. v. Accident & Cas. Ins. Co. of Winterthur, No. 278953 (Cal. Super. Ct. San Mateo County Oct. 6, 1988).

[75] *Id.*, slip op. at 48.

[76] Testimony of Mr. Herbert P. Schoen, a member of the Joint Drafting Committee (JDC), on March 4, 1986 at 15901-2, In re Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct. May 29, 1986)(Testimony during deliberation of Phase III Issues).

permits a less cumbersome definition of occurrence."[77]

With Mr. Schoen's testimony before him, and after reviewing drafting history documents, the California trial judge, Justice Ira A. Brown, in the Coordinated *Asbestos Insurance Coverage cases* held that the "neither expected nor intended" language in the definition of "occurrence" excluded coverage only "where the insured acted either willfully, intentionally or maliciously for the purpose of causing injury."[78] The California court placed special emphasis on the phrase "from the viewpoint of the insured," which it found "clearly mandates that the Court focus its inquiry on the insured's actions and motivations rather than the insurer's knowledge and perspective."[79] Finally, the court found that its standard "accords" with "the language's focus on the policyholder's *intention to cause the resultant damage*, rather than on its intention merely to commit the act which causes the damage."[80]

Another California court has formulated the rule as follows:

> [T]he Court finds the phrase "expected or intended" ambiguous in terms of its operation and effect in the policies. Under the California law, " 'any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and . . . if semantically permissible, the contract will be given such construction as will . . . provid[e] indemnity for the loss to which the insurance relates.' " [Citations omitted.] Furthermore, "[w]hereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured . . . exclusionary clauses are interpreted narrowly against the insurer." Therefore, the coverage grant in the policies issued by [defendant] must be interpreted broadly and so as to provide indemnity, compelling the conclusion that the limiting phrase of "expected or intended" is in fact an exclusion designed to deny coverage in certain narrow instances.[81]

Based on their analysis of other types of insurance policies, Hawaii courts

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[77] Schmalz, Taking the Suddenness Out of Accident—Some Drafting Problems and Possible Solutions, 14 (undated note attached to Letter from Edward F. Earle to Stock Members of Joint Forms Committee (April 21, 1961)).

[78] In re Asbestos Insur. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 Slip Op. at 74 (Cal. Super. Ct. May 29, 1986) (Tentative Decision of Phase III Issues).

[79] *Id.* at 75. *See also* Allstate Ins. Co. v. Freeman, No. 81239 (Mich. Sup. Ct. July 18, 1989) (*en banc*).

[80] In re Asbestos Ins. Cvge Cases, Judicial Council Coordination Proceeding 1072 slip op. at 75. (Tentative Decision of Phase III Issues).

[81] Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 820-21 (N.D. Cal. 1987), *aff'd*, 848 F.2d 1242 (9th Cir. 1988) (citations omitted). (Therefore, the insurance company had the burden of proof to show that damage was neither expected nor intended. "Thus, in order for Commercial to prove that Clemco 'expected or intended' the losses for which it seeks coverage, Commercial had to prove that Clemco engaged in some conscious, calculated, or deliberate act(s) that directly led to the losses that are now the subject of the disputed coverage.")

should hold that coverage is provided for damages relating to environmental claims arising from conditions which were not intended to cause injury.

Absent insurance coverage for foreseeable damage, there is virtually no insurance coverage at all. As Judge (later Justice) Cardozo held long ago, "[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow."[82] Even if foreseeability were the test, insurance company documents indicate that environmental damage was ordinarily not foreseen by the policyholder. Maurice R. Greenberg, President and Chief Executive Officer of American International Group, one of the largest insurance companies in the world, has publicly stated that environmental contamination was not usually caused by irresponsible policyholders:

> It is important to state that this liability is being imposed even when those responsible did not violate any laws when disposing of their wastes. The environmental regulations that we take for granted today simply did not exist then.
>
> . . . .
>
> We should also recognize that, in the majority of cases, these companies were not acting in a deliberate or irresponsible way. At the time, they were not aware of the future consequences of their wastes disposal practices, and business was not alone in this ignorance. Otherwise, federal, state and local government would have enacted laws to govern the handling and disposal of waste.
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> . . . .
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> It is, therefore, understandable that companies should now bridle at being held responsible for actions that occurred long in the past — and which were not illegal, deliberate or irresponsible at the time.[83]

Moreover, insurance companies have confirmed that their policies cover illegal acts. In *American States Insurance Co. v. Maryland Casualty Co.*, William H. Roberts of American States Insurance Company testified that:

> Q. Isn't there a specific exclusion in your policy against illegal acts?
> A. Well, there are a lot of times insureds, sir perform acts which are illegal and in violation of law, but nevertheless constitute a premise. If I run a stop sign, that is and illegal act, but I have [sic] covered under my policy.[84]

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[82] Messersmith v. American Fid. Co., 232 N.Y. 161, 163, 133 N.E. 432, 432 (1921).

[83] American International Group, Financing the Cleanup of Hazardous Waste: The National Environmental Trust Fund at 2, Press Release (Mar. 2, 1989). Mr. Greenberg has recently stated in a television interview that: "Overwhelmingly, the companies that are being asked to clean up the environment, their pollution sites, were doing so at the time in accordance with law and regulation, they were disposing of waste not illegally at the time, but legally." *Inside Business: Interview with Maurice Greenberg* (Cable News Network, Nov. 18, 1989).

[84] Trial Transcript at 94 (Feb. 17, 1984) (No. 82-70353), American States Ins. Co. v. Maryland Cas. Co., 587 F. Supp. 1549 (E.D. Mich. 1984).

While a "substantially certain" test gives Hawaii policyholders less insurance coverage than they bought and paid for, it is better than a type of foreseeability test that would yield no coverage at all. Policies were sold to Hawaii policyholders on the basis that damages because of property damage were covered unless the property damage was expected to a certainty and unless the policyholder had a subjective intention to cause the precise damage that resulted.

It will be a rare Hawaii policyholder who will be found to have forfeited coverage by setting out on a deliberate, conscious course designed to damage the State's environment.

III. TRIGGER OF COVERAGE

Where environmental damage occurs over a number of policy years — as it usually does — multiple policies apply. This is the continuous trigger principle, which provides maximum protection to the policyholder. Some insurance companies have advocated a continuous trigger principle. It was the trigger intended by the drafters of the 1966 CGL standard form policy.

In 1965, G.L. Bean, Assistant Secretary of Liberty Mutual Insurance Company, discussed coverage for continuing damage under a pending proposed revision of the CGL standard form policy:

> This brings into focus one important change in our policy - the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.[85]

Mr. Bean's pronouncement, if reduced to a phrase, describes the continuous trigger of coverage principle. When property damage or bodily injury is a continuing process spanning several policy periods and thus involving multiple policies, there is insurance coverage under each and every policy. The principle was perhaps best stated by the Court of Appeals for the District of Columbia in *Keene Corp. v. Insurance Co. of North America*: "We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable to Keene for indemnification and defense costs."[86]

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[85] Bean, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, Paper presented at Mutual Insurance Technical Conference, Nov. 15-16, 1965 at 6.

[86] 667 F.2d 1034, 1041 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, *reh'g denied*, 456 U.S. 951 (1982).

Where environmental damage occurs over a long period of time, various insurance companies have successfully contended that all of the policies in effect during the entire span of time are applicable when triggered. For example, in *Hobart Brothers Co. v. United States Fidelity & Guaranty Co.*,[87] United States Fidelity & Guaranty Company urged the court to "hold that an insurer with a policy in effect at any time between a claimant's initial exposure to a toxic substance and a manifestation of injury is liable on the full amount due . . . ."[88]

North Star Reinsurance Corporation, a member of the General Reinsurance Group, contended in its opposition to a motion for leave to appeal in *Solvents Recovery Service v. Midland Insurance Co.* that "a continuing process causing damage can be construed as an occurrence, even outside of the asbestos context."[89] Similarly, in *Centennial Insurance Co. v. Lumbermens Mutual Casualty Co.*,[90] Centennial Insurance Company "maintain[ed] that an occurrence took place on each occasion when the insured's allegedly hazardous wastes were delivered to the [disposal] site and then, or in close proximity in time thereto, were discharged or otherwise released upon the [disposal] site soil."[91]

In *Madsen & Howell, Inc. v. Sentry Insurance Co.*,[92] North River Insurance Company, a member of the Crum and Forster group of insurance companies, urged application of the *Keene* trigger of coverage for asbestos-related bodily injury claims, stating that "[t]he persuasive logic of its rationale, and the valid public policy objective of maximizing available insurance coverage to compensate injured victims of asbestos exposure, mitigate in favor of the adoption of the *Keene* interpretation of coverage . . . ."[93] Likewise, in *Porter v. American Optical Corp.*, Aetna Casualty & Surety Company took the position that:

> [T]hese policies tell the insured, in effect, that if the insured committed a wrong one day ago, one year ago or twenty years ago, he is covered by the insurance so long as injury resulting from that wrong is sustained during the policy period. This is what most insureds expect.[94]

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[87] No. 86-518 (D.D.C. 1986).

[88] *Id.*, Memorandum of Points and Authorities in Opposition to Motion of Great American Surplus Lines Insurance Company to Dismiss USF&G's Third Amended Third-Party Complaint, at 5.

[89] Brief on Behalf of Defendant North Star Reinsurance Corporation in Opposition to Defendant-Appellants' Motion for Leave to Appeal at 18-19, Solvents Recovery Service v. Midland Ins. Co., 218 N.J. Super. 49, 526 A.2d 1112 (1987).

[90] 677 F. Supp. 342 (E.D. Pa. 1987).

[91] *Id.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 6-7.

[92] No. L-021632-85 N.J. Super. Law Div. (Apr. 2, 1986).

[93] *Id.*, Brief on Behalf of North River Insurance Company in Support of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, at 11.

[94] Post-Argument Brief of Appellee The Aetna Casualty & Surety Company at 1, Porter v.

In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[95] an asbestos bodily injury case, the Travelers Indemnity Company of Rhode Island argued in favor of a continuous trigger and against the "exposure" theory, stating: "It is the injury, not exposure, that triggers coverage and as long as the injury continues to happen the policies in effect during those times are activated."[96] The court also noted that one of the companies, INA, had switched from an exposure theory to a manifestation theory. The court found this switch significant.[97]

Further, in its brief in *Appalachian Insurance Co. v. Liberty Mutual Insurance Corp.*, Liberty Mutual also presented the argument for a continuous trigger stating that: "Case Law supports the conclusion that there was one continuous occurrence for coverage purposes."[98]

In addition, in a brief filed in *American Star Insurance Co. v. American Employers Insurance Co.*,[99] American Star advocated the continuous trigger of coverage. Citing *Gruol Construction Co. v. Insurance Co. of North America*,[100] and *Keene*,[101] American Star argued that the continuous trigger of coverage applied to property damage as well as to personal injury: "[T]he reasoning of the asbestos-related cases should be applied to the instant case due to the latent and cumulative nature of the process which was active from installation of the defective pipe until the inevitable and eventual damage in the form of leaks."[102]

Finally, in *Hancock Laboratories, Inc. v. Admiral Insurance Co.*,[103] Admiral

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American Optical Corp., 641 F.2d 1128 (5th Cir.) *cert. denied*, 454 U.S. 1109 (1981) (hereinafter "*Porter*").

[95] 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

[96] Brief of Appellee Travelers Indemnity of Rhode Island at 30, *filed on appeal* in Insurance Co. of N. Am. v. Forty-Eight Insulations Inc., 451 F. Supp. 1230 (E.D. Mich. 1978) *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *modified*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981).

[97] Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. at 1239.

[98] Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and In Support Of Defendant's Motion for Partial Summary Judgment. No. 78-1151A (3d Cir. filed ____ 1981), Appalachian Ins. Co. v. Liberty Mut. Ins. Corp., 507 F. Supp. 59 (W.D. Pa. 1981), *aff'd*, 676 F.2d 56 (3d Cir. 1982).

[99]. No. GO-0189 (4th Dist. Oct. ____, 1983), *American Star*, 165 Cal. App. 3d 728, 210 Cal. Rptr. 836 (1985), *op. withdrawn* by order of the court. American Star is affiliated with Classified Insurance Co. and with Rathbone, King & Seeley Insurance Services, Inc., a California corporation.

[100] 11 Wash. App. 632, 524 P.2d 427 *reh'g denied*, 84 Wash. 2d 1014 (1974).

[101] Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 951 (1982).

[102] American Star Brief at 14. This position was adopted by the California Court of Appeals, American Star Ins. Co. v. American Employer's Ins. Co., 165 Cal. App. 3d 728, 210 Cal. Rptr. 836 (1985), *op. withdrawn* by order of the court.

[103] 777 F.2d 520, (9th Cir. 1985).

Insurance Co., a member of the W.R. Berkley Corporation Group, argued in favor of interpreting the standard form CGL policies to incorporate the *Keene* trigger.[104]

Many insurance companies have followed the continuous trigger in practice. For instance, the Travelers' Liability Claims Manual recognizes that continuous damage triggers successive policies:

> Reviewing the occurrence definition, one can see it does several things. First of all, it is no longer necessary that the injury be sudden in character, and in fact many courts have already defined accident in almost the same way we defined occurrence. The injury must occur during the policy period because coverage is triggered by the injury, not the accident, but *the focus must always be on the injury. When the injury is gradual, resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy — the policies in effect during the period of injury.*[105]

One could even cite Professor Kenneth Abraham, academic advocate without equal for insurance companies, as authority for *Keene*: "Until recently, for example, the standard CGL always had been an occurrence policy — it provided coverage against liability arising out of activities occurring during the policy period, regardless of the time when a claim or suit alleging such liability was made."[106]

The best review of the cases and the answer to the argument is set forth by First State Insurance Company and a Lloyds of London syndicate in their brief to the Michigan Court of Appeals in *Upjohn Co. v. New Hampshire Insurance Co.*[107] First State, which is a member of the Hartford Insurance Group, and Lloyds argued for a "continuous injury" trigger and discussed the trigger of coverage as follows:

> The issue of determining when property damage occurs in cases where the initial exposure to harmful conditions and discovery of injury can be separated by substantial periods of time is difficult to resolve. At least four different theories have been applied to determine when damage occurs in cases dealing with exposure to

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[104] *Id.* at 524 (The other insurance companies argued for an exposure trigger, and the court adopted their interpretation).

[105] *Quoted from* Memorandum of Allied-Signal Inc. In Support Of Its Motion For Partial Summary Judgment And In Opposition To Travelers' Motion For Partial Summary Judgment at 203, Travelers Indem. Co. v. Allied-Signal Inc., (D. Md. Filed March 21, 1989) No. JFM-88-89 (emphasis added).

[106] Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 964 (1988).

[107] 178 Mich. App. 706, 444 N.W.2d 813 (1989), *petition for review pending*, Nos. 86909-11 (Sup.Ct. Mich. ____ 1989).

> toxic substances: (1) Manifestation — damage occurs when injury or damage becomes apparent. (*See Eagle-Picher v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982)); (2) Initial exposure — damage occurs at the instant damage first begins, (*See Ins. Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980)); (3) Actual injury — damage occurs at the actual time of injury irrespective of when damage is discovered (*See American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983); (4) Multiple triggers or continuous injury — damage occurs continuously or at all points from exposure to manifestation, (*See Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981).
>
> Plaintiffs contend that the continuous or multiple trigger approach is the most appropriate theory to be applied in the present case. [108]

The appeals court in *Upjohn* held "that damage occurred with each spill within the policy period."[109] Thus, the drafting history, the case law, and many insurance companies as well support the adoption of a continuous trigger of coverage principle.

According to the insuring agreement of the standard form CGL policy, the insurance company agrees to indemnify the policyholder for "all sums which the insured . . . shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence."[110] In relation to the acceptance of a "continuous trigger" concept or any other extended exposure definition of occurrence, the phrase "all sums" has an important bearing on the allocation of liability among various policies. Questions arise such as (1) whether the policyholder must pay some portion of the liability itself if the policyholder was uninsured or underinsured in various years that have been triggered; and (2) whether there should be a *pro-rata* assessment among the companies that have issued policies of indemnity payments for liability to the policyholder for "base" periods.

According to one of the drafters of the CGL policy, Richard A. Schmalz, Assistant Counsel of Liberty Mutual Insurance Company, who spoke at the Mutual Insurance Technical Conference in 1965, "[t]here is no pro-ration formula in the policy, as it seemed impossible to develop (sic) a formula which would handle every possible situation with complete equity."[111]

In the asbestos property damage context, several courts have concluded that

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[108] Brief of Plaintiffs-Appellees on Appeal at 46, *Id.* First State has now disavowed its position.

[109] Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813, 820 (1989), *petition for re'g pending*, Nos. 86909-11 (Sup.Ct. Mich. ____ 1989).

[110] I MILLER & LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES, ANNOTATED 411 (1988).

[111] Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation at Mutual Insurance Technical Conference, Nov. 15-18, 1965 at 6. Mr. Schmalz was at that time Assistant Counsel of Liberty Mutual Insurance Company.

under policies which provide for payment of "all sums", all of the insurance companies whose policies were "triggered" are jointly and severally liable to the policyholder for indemnity payments. As the court ruled in the *Asbestos Insurance Coverage Cases*,[112] the insurance companies are not entitled to make a *pro rata* allocation to the policyholder or, until the policyholder has been paid, to any other triggered policies, because every triggered policy "has an independent obligation to respond in full to a claim."[113] In other words, "all sums means all sums."[114]

Because the policy requires the insurance company to pay "all sums," the policyholder is entitled to full coverage under each of the triggered policies at its option up to the limits of liability.[115]

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[112] Judicial Council Coordination Proceeding No. 1072, slip op. at 68 (Cal. Super. Ct. May 29, 1987) (Tentative Decision of Phase III Issues).

[113] *See* Lac D'Amiante Du Quebec. Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1559-61 (D. N.J. 1985), *vacated on other grounds* as to one insolvent defendant, 864 F.2d 1033 (3d Cir. 1988) (asbestos-related property liability for damage triggers coverage from installation through removal or abatement of asbestos-containing material); California Union Ins. Co. v. Landmark Ins. Co., 145 Cal. App. 2d 462, 470, 193 Cal. Rptr. 461 (1983). (The court held that liability for damage caused by an underground leaking pipe over two policy periods was covered under both policies. The court based its holding on recent asbestos-related bodily injury insurance decisions that there was joint and several liability for water seepage over several policy periods). *See also* Gruol Constr. Co. v. Insurance Co. of N. Amer., 11 Wash. App. 632, 524 P.2d 427, (1974) *reh'g denied*, 84 Wash. 2d. 1014 (Three successive insurance companies were all held responsible for progressive and continuous damage caused by underground dry rot beginning several years before its discovery).

[114] In Keene Corp. v. Insurance Co. of N. Amer., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), the court held that the "all sums" language of the policy required a finding of joint and several liability under the rationale that the dominant purpose of the insurance coverage was to:

> [relieve the insured] of the risk of liability for latent injury of which [it] could not be aware when it purchased insurance. [The policyholder] did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred. If, however, an [insurance company] were obligated to pay only a pro-rata share of [the policyholder's] liability . . . those reasonable expectations would be violated.

Id. at 1047-48.

[115] *See* Avondale Industries, Inc. v. Travelers Indem. Co., 697 F. Supp. 1314 (1988), 123 F.R.D. 80 (1988), *aff'd*, 887 F.2d 1200 (1989), *reh'g denied*, No. 89-7035 (2d Cir. 1990). "Avondale had the clear right to choose which insurance company it would name as a defendant, regardless of whatever rights Travelers may have to demand defense costs from the other carriers . . . . " 887 F.2d at 1207-08; Reading v. Travelers Indem. Co., No. 87-3031, slip op. at 3 (E.D. Pa. Feb. 18, 1988) ("Each insurer is jointly and severally liable for the injuries which occurred during its policy period").

IV. THE DUTY TO INVESTIGATE AND TO DEFEND ADMINISTRATIVE ACTIONS

Policyholders involved in environmental actions brought by government agencies and private parties require defense. As part of the defense, investigatory services are often needed. Insurance companies contend that environmental actions are not "suits" as that word is used in the policy,[116] and, therefore, that there is no duty to defend.

A. Duty to Investigate

One of the services sold by insurance companies to their policyholders is the investigation of claims. This duty was set forth by Liberty Mutual in one case, *Liberty Mutual Insurance Co. v. Continental Casualty Co.*[117] Liberty Mutual's appellate brief states:

> Continental's witness, Mr. John G. Burke, a retired Continental claims manager even admitted that as part of the services rendered under its policy Continental investigates as well as defends claims . . . . The Supreme Court of Alaska has aptly recognized the broad range of protection to be afforded by insurance companies such as Continental by citing with approval 7C. J. Appleman, *Insurance Law and Practice* (Berdal ed.) Section 4637 [sic, should be 4687], at 181-82.
>
> It [the insurance company] is a professional which advertises by all media of mass communication its skill in the investigation, settlement, and litigation of liability cases. It asks the individual, who is an armature [sic, should read "amateur"] in these matters but would be deeply concerned over a case in which he is personally interested, to substitute its skill for his, its judgment for his, and its conduct for his own acts.
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> *Continental Insurance Company v. Bayless and Roberts, Inc.*, 608 P.2d 281, 293 (Alaska 1980). The services rendered under Continental's policies include more than just an obligation to defend. The obligation to investigate the Hancock window claim was a fundamental part and parcel of Continental's obligations as well as its customary undertaking.[118]

Authors Ostrager and Newman, who represent insurance companies in insurance coverage disputes,[119] have noted that:

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[116] The standard form CGL policy wording is: "[T]he Company shall have *the right and duty to defend any suit* against the insured . . . . " (emphasis added).

[117] 771 F.2d 579 (1st Cir. 1985).

[118] Brief of Plaintiff-Appellee Liberty Mutual Insurance Company at 10-11, *Id.* (While the *Liberty Mutual* case did not involve insurance coverage for pollution damage, the principles espoused by Liberty Mutual in that case are equally applicable to pollution problems.)

[119] *See*, B.R. OSTRAGER AND T.R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.04(a) (2d ed. 1988) (citations omitted).

> It is well settled that an insured is entitled to a reasonable investigation as part of its defense.
>
> . . . .
>
> As a general rule, post-claim payments by an insurer to the insured for non-remedial measures to determine the source of pollution should be categorized as defense expenses. And, post-claim investigation costs to determine liability are also defense costs. The law is unsettled as to an insurer's liability for pre-claim investigative expenses.[120]

In a treatise on insurance law, cited by Ostrager and Newman with respect to insurance responsibilities, the view is that:

> [The] duty to prepare for a defense in a particular case should be predicated on a degree of probability of a claim being asserted that would cause an ordinarily prudent person to act in advance in order to be prepared to meet a claim should it arise.
>
> . . . .
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> If the evaluation [of costs versus benefits] is such that an ordinarily prudent person would decide to prepare for the possibility of a claim, an insurer should be obligated to undertake such preparations.[121]

Policyholders should look to their insurance companies for investigative services.[122]

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[120] *Id.*

> Compare Gibbs v. St. Paul Fire & Marine Ins. Co., 22 Utah 2d 263, 451 P.2d 776 (1969) (even though likely that a claim would be filed, costs of retaining an investigator pre-claim were not recoverable because the duty to defend had not yet ripened) with Travelers Ins. Co., v. Chicago Bridge & Iron Co., 442 S.W.2d 888 (Tex. Civ. App. 1969) (retention of lawyers pre-claim was a legitimate defense cost payable by the insurance company)."

Id.

[121] *Id., citing* R. KEETON & A. WIDISS, INSURANCE LAW § 9.1 at 991 (West 1988).

[122] With respect to the duty to investigate the question of whether a claim is or is not covered by the insurance policy, *see* J. B. BERKELEY, AVOIDING COMMERCIAL INSURANCE PITFALLS: A GUIDE FOR CORPORATE COUNSEL AND BUSINESS 87 (1987):

> In *CNA Casualty v. Seaboard*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986), the primary carrier was held to have a duty to investigate and evaluate the facts in the complaint prior to rightfully rejecting a tender of defense. The Court rejected the insurer's argument that the suit was incapable of amendment to include covered causes of action for defamation, malicious prosecution, trade disparagement, unfair competition or idea misappropriation, in light of the federal policy of liberal amendment of antitrust suits. In *California Shoppers, Inc. v. Royal Globe Insurance Co.*, 175 Cal. App. 3d 1, 221 Cal. Rptr. 171 (1985), the court held that the duty to defend was breached by Royal Globe's failure to make a further inquiry when it received the summons and complaint naming its insured.
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> . . . .
>
> In contrast, it has been held that an insurance company has no duty to investigate

B. *Duty to Defend*

The standard form pre-1966 CGL policy provides that "with respect to such insurance as is afforded by this policy, the [insurance] company shall: (a) defend any suit (against the insured) . . . . "[123] The standard form 1966 CGL policies contain a slightly different defense provision: "[The company] shall have the right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent."[124]

Although the administrative actions taken by environmental regulating authorities may not be "suits" in the narrow, technical sense of the word, governmental actions such as the issuance of Potentially Responsible Party (PRP) letters[125] are indisputably assertions of liability against the policyholder. Drastic legal consequences flow from these administrative actions. Where, for example, policyholders do not comply with governmental directives made in administrative actions, formal litigation in the courts is likely. Therefore, an immediate investigation of the merits of a claim is necessary. Familiarity with the complicated issues of a case that is to be litigated is a crucial part of the policyholder's defense.

Policyholders contend that the term "suit"[126] in the insurance policy provisions covers both judicial actions against the policyholder and the governmental administrative actions in which a policyholder has been designated a potentially responsible party. The defense provision has been litigated in a number of cases.[127]

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where the claim is excluded by the clear and unambiguous language of the policy. (*Security Insurance Co. v. Wilson*, 800 F.2d 232 (10th Cir. 1986); citing *Nautilus Virgin Charters, Inc. v. Edinburgh Ins. Co.*, 510 F. Supp. 1092 (D. Md. 1981).

[123] *See, e.g.*, Commercial Union Ins. Co. v. Pittsburgh Corning Corp., 553 F. Supp. 425, 429 (E.D. Pa. 1981).

[124] I MILLER AND LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES: ANNOTATED 411 (1988).

[125] An environmental action against a policyholder is normally initiated by a PRP letter.

[126] The word "suit" comes from equity. BLACK'S LAW DICTIONARY 1286 (5th ed. 1979). The use of an ancient equitable concept in the standard form policy does not square with the present contention of the insurance industry that the word "damage" used elsewhere in the policy form is limited to damages at law and does not encompass equitable damages. *See infra* notes 136-162 and accompanying text. Given their interpretations, (a) the insurance companies would defend suits in equity, but not pay equitable judgments and (b) would not defend actions at law, but would pay judgments at law.

[127] *See, e.g.*, Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71 (E.D. Mich. 1987) and Detrex Chemical Indus., Inc. v. Employers Ins. of Wausau, 681 F. Supp. 438 (N.D. Ohio 1987). *See also*, New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1367 (D. Del. 1987), 685 F. Supp. 1321 (D. Del. 1988) (decision on merits); United States Fid. & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535, N.E.2d 1071,

In *New Castle County v. Hartford Accident & Indemnity Co.*,[128] the court ruled that the insurance companies were obligated to defend New Castle County, the policyholder, against assertions of environmental liability arising from two polluted landfills: "The Insurers are required to defend any action which potentially states a claim which is covered under the policy."[129]

In order to deny the policyholder a defense, the insurance company must show that there is no possibility, either legal or factual, under which it could in the future be obligated to indemnify the policyholder.[130] If there is any possibility of coverage, the insurance company must defend.

Furthermore, the duty to defend is independent of the obligation to indemnify the policyholder.[131] The insurance company is obligated contractually to defend even if the underlying allegations are groundless, false or fraudulent. Any doubts as to the underlying allegations are to be resolved in favor of the policyholder.[132]

In many cases, insurance companies have supported the policyholders' position with respect to the broad scope of the duty to defend. For example, in an insurance coverage case that did not involve pollution, *Liberty Mutual Insurance Co. v. Continental Casualty Co.*,[133] Liberty Mutual Insurance Company sought and obtained defense costs incurred prior to the filing of a judicial action against the policyholder. The case was a subrogation action in which Liberty Mutual successfully argued:

> By immediately employing a law firm to investigate the merits of the inevitable complaint, after its insurer Continental refused to extend coverage in breach of its contract, Robertson was able to become familiar at an early stage with the complicated issues which were later litigated . . . . Continental cannot escape from the fact that the defense of a complex construction suit does not begin with the

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reh'g denied 545 N.E.2d 133 (1989); Sterilite Corp. v. Continental Cas. Co., 17 Mass. App. 316, 458 N.E.2d 338, 340 (1983), *reh'g. denied*, 391 Mass. 1102, 459 N.E.2d 826 (1984), *rev'd*, 397 Mass. 837, 494 N.E.2d 1008 (1986); Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1183, 1185 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980).

[128] 673 F. Supp. 1359 (D. Del. 1987), 685 F. Supp. 1321 (D. Del. 1988) (decision on merits).

[129] *Id.* at 1367.

[130] Sterilite Corp. v. Continental Cas. Co., 17 Mass. App. 316, 458 N.E.2d 338, 343-44 (1983).

[131] Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227, 1230 (1984); *but see* City of Farragut v. Hartford Accident & Indem. Co., 837 F.2d 480 (Nos. 87-1230), (87-1268), slip op. at 6 (8th Cir. Dec. 17, 1987) (decision without published opinion).

[132] *E.g.*, Norvell Wilder Supply Co. v. Employers Cas. Co., 640 S.W.2d 338, 340 (Tex. App. 1982). *See also* Brief of Plaintiff-Appellee Liberty Mutual Insurance Company at 10-11 in Liberty Mut. Ins. Co. v. Continental Cas. Co., 771 F.2d 579 (1st Cir. 1985).

[133] 771 F.2d 579.

filing of a complaint . . . .[134]

Liberty successfully argued that Continental was liable for the defense costs because (1) defense had to begin from the day the policyholder was first informed by the underlying claimants' counsel that the policyholder could be held liable and (2) the pre-lawsuit defense work was just as important to the policyholder's defense as the work done after the judicial complaint was formally filed.

In an environmental pollution insurance coverage case, *Fireman's Fund v. Rogerson*, Fireman's Fund Insurance Company affirmed the principle that the duty to defend is broader than the coverage obligation:

> [I]ndeed, so broad is the duty to defend that "[i]n order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a *possibility* that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage."[135]

Mr. Leslie Cheek, Senior Vice President for Federal Affairs of Crum & Forster Insurance Company, one of the largest insurance companies in the country, has also recognized that insurance companies should defend government environmental claims at the earliest possible stage:

> A growing number of cases are recognizing the unusual nature of superfund actions, where a failure to become involved in negotiations prior to the filing of a suit can have severe repercussions, among them the imposition of joint and several liability and treble damages. To wait for a lawsuit in the face of this is senseless and counterproductive to both sides' interests.[136]

Insurance companies say their policyholders should get a defense in environmental coverage cases. The Hawaii courts should agree.

V. ARE CLEAN-UP COSTS COVERED "DAMAGES"?

Some insurance companies are contending that government mandated costs for investigation of the extent of contamination, removal of hazardous wastes

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[134] Brief of Plaintiff-Appellee Liberty Mutual Insurance Company at 10. *Id.*

[135] Memorandum of Plaintiff Fireman's Fund Ins. Co. in Support of its Motion for Summary Judgment as to Count IX of its Complaint, Fireman's Fund v. Rogerson, No. 85-0916-Y (D. Mass. 1985), Brief, reported in HAZARDOUS WASTE LIT. REP. 7,777, 7,824 (Aug. 5, 1985) (citation omitted).

[136] Cheek, Graham & Wardzinski, *Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Nonlitigation Approach*, 19 ENV. L. REP. 10203, 10205 (1989) (citation omitted).

and monitoring do not constitute "damages". The term "damages" is used in the coverage provision of the standard form CGL policy:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages* because of
> [Coverage]: A bodily injury or
> [Coverage]: B property damage
> to which this [insurance] applies, caused by an occurrence and the company shall have the right and duty to defend any suit against the insured seeking *damages on account of such bodily injury or property damage* . . . .[137]

The insurance companies argue that clean-up costs under CERCLA and other response costs are restitutionary, equitable or both. Their insurance policies, they contend, cover only "legal" damages ("damages at law") and hence do not cover equitable or restitutionary relief.[138] The policyholders contend that the specific policy terms "all sums" and "damages" are unqualified and provide coverage for clean-up costs.

A. Drafting History

There is a massive and well documented history detailing the development of standard form policies. No insurance company has ever purported to find a single document in the massive drafting history of the 1966 standard form CGL policy stating, or even hinting, that there is any basis for the insurance industry's new position that it only provides coverage for damages "at law". There is no historical support for the contention that the word "damages" in the standard form CGL policy is a coverage-limiting word.[139]

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[137] I MILLER AND LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES: ANNOTATED 411 (1988) (emphasis added).

[138] If one were to agree that clean-up costs were not covered by the indemnity provision, they should nevertheless be covered as defense costs. *See* B.R. OSTRAGER & T.R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.04 (a) ("The Duty to Defend May Include the Costs of Investigating CERCLA Claims"). Clean-up costs could also be covered as loss mitigation costs. *See* Globe Indemn. Co. v. People, 43 Cal. App.3d 745, 118 Cal. Rptr. 75 (1974)

> ("When an insured takes out an indemnity policy . . . it is more reasonable to suppose that he expects to be protected by his insurance in any situation wherein he becomes liable for damage to tangible property. It would seem strangely incongruous . . . to us, that his policy would cover him for damages to tangible property destroyed through his negligence . . . but not for the sums incurred in mitigating such damages . . . . ")

and Aronson Ass'n Inc. v. Pennsylvania National Mut. Cas. Ins. Co., 14 Pa. D. & C.3d 1 (Pa. 1977), *aff'd* 272 Pa. Super. 606, 422 A.2d 689 (1979) (Insurance company was obligated under indemnity provision to reimburse policyholder for expenses incurred when the policyholder tried to prevent further contamination of a water supply by leakage of gasoline).

[139] *See* Boeing Co. v. Aetna Cas. and Sur. Co., 113 Wash. 2d 869, 784 P.2d 507 (*en banc*).

Clearly, clean-up costs relating to pollution were included within the scope of coverage under CGL policies. A provision, inserted by the insurance industry in 1966 and deleted in 1973, expressly required loss mitigation by the policyholder as a condition of the policy. G.L. Bean, discussing this provision, noted: "Our new policy requires the insured to *promptly* take *reasonable* steps to correct conditions causing gradual injury or damage, once discovered. Opinions as to what is reasonable may vary widely. Meanwhile losses continue."[140]

Early policy forms used the phrase "damages at law" and the words "at law" were later dropped.[141] As Judge Ira Brown who presided in the marathon California *Asbestos Insurance Coverage Cases* trial wrote, albeit in a different context: "The rejected language's importance lies in the inference from that rejection that there was no intent to restrict coverage to other than that determined by the court in this decision."[142]

The minutes of an IRB[143] meeting in 1969 reveal the insurance industry's explicit recognition that standard CGL policies clearly provided coverage for environmental clean-up costs. In connection with offshore oil spill incidents, the General Liability Governing Committee (GLGC) of the IRB observed that "*damages, including the cost of clean up*, may be catastrophic" and that consideration should be given to excluding such claims from CGL coverage.[144]

(Response costs incurred pursuant to a consent decree between policyholders and the state and federal governments are "damages" within the meaning of the standard form CGL coverage clause. The court notes that its decision is in accord with numerous federal and sister-state decisions.)

[140] Bean, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, paper presented at Mutual Insurance Technical Conference (Nov. 15-16, 1965) at 6. This provision was removed from the policy form in 1972.

[141] *See* Taylor, *The Liability Imposed By Law*, INS. COUNS. J., Oct. 1945, at 38.

[142] In re Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072, slip op. at 40 (Cal. Super. Ct. May 29, 1987) (Tentative Decision of Phase III Issues); *see also*, Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 651 (9th Cir. 1988) (*citing* Royal Indemn. Co. v. John F. Cawrse Lumber Co., 245 F. Supp. 707, 711 (D. Or. 1965) ("Words deleted from a contract may be the strongest evidence of the intention of the parties.")); *see also*, 3 A. CORBIN, CORBIN ON CONTRACTS § 564 at 298 (1967) (coverage restrictions that were expressly considered and rejected by policy drafters will not be read into the policy *sub silentio*). Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316 (Mo. 1968); Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974); Vargas v. Insurance Co. of N. Am., 651 F.2d 838 (2d Cir. 1981); Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switzerland, 35 N.J. 1, 170 A.2d 800 (1961); 6 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7403 at 324. ("When an insurer considered and rejected alternative or more precise language that would have put an issue beyond reasonable doubt, a policy will be construed against the insurer.")

[143] Insurance Rating Board, predecessor of ISO.

[144] *See* Agenda and Minutes—meeting of the GLGC, Insurance Rating Board, Oct. 28, 1969 (emphasis added). The GLGC was composed of senior underwriters from various companies that were members of the IRB.

B. Industry Practice and Recent Submissions to Congress

Travelers recently explained the scope of its coverage as extending to restitutionary payments for clean-up costs, saying: "For example, if an accidental [policyholder] pollution spill damaged the beach of a hotel, and the hotel sued [the policyholder] for money damages measured by its costs of cleaning the beach, Travelers would, subject to the other policy terms and conditions, provide coverage for such damages."[145]

Submissions to Congress demonstrate that the insurance industry intended to treat clean-up costs such as those mandated by CERCLA as "damages" under CGL policies. In 1985, the American Insurance Association (AIA), the insurance industry's principal lobbying trade association, prepared a "Proposal to Reform and Expedite Clean-up under Superfund" for Congressional review. The proposal treats "damages" and "clean-up costs" synonymously, referring to (1) "clean-up costs and other damages" (Executive Summary at 22); (2) "clean-up costs and other cognizable types of damages" (Section-by-Section Analysis at 29); and (3) "response costs or other damages at any site" (Section-by-Section Analysis at 56).[146]

In 1985, the insurance industry attempted to amend CERCLA to include a provision which would have negated all insurance policies sold before 1980. This proposal was known as the "Silver Bullet Amendment". It was not adopted. Leslie Cheek III, the Senior Vice President for Federal Affairs of the Crum & Forster Group of Insurance Companies, recently referred to the Silver Bullet Amendment as "infamous" and commented on the failure of this attempt at statutory revision: "Although the insurance industry may have come closer to succeeding than commonly thought, this failed attempt has demonstrated that the insurance industry will not be able to solve its problems statutorily at the PRP's expense."[147] The proposed Silver Bullet Amendment would have been unnecessary if clean-up costs were not covered in the first place.

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[145] Memorandum Of Law In Support Of Plaintiff Travelers Motion For Summary Judgment (Filed Jan. 30, 1989) at 76 in Travelers Indem. Co. v. Allied-Signal Inc., 718 F. Supp. 1252 (D. Md. 1989).

[146] In 1985, when Congress was debating the reauthorization of CERCLA, the AIA lobbied for amendments that would have retroactively withdrawn liability coverage for most cleanup claims. At that time they distributed the following proposal, Proposal to Reform and Expedite Cleanup under Superfund. Reference above is to that unpublished document distributed to Congress during discussion of Proposed Amendments to S. 51, 99th Cong., 1 Sess. 301 (1985).

[147] Cheek, Graham & Wardzinski, *supra* note 136, at 10203. *See also*, L. Cheek & D. Graham, *Superfund Defense and Cleaning Costs*, 6:1, ACCA Docket, 7-38 (Winter, 1988).

C. *The Inconsistent Litigation Position of the Insurance Industry*

Insurance industry giants have successfully maintained that clean-up and other response costs are covered "damages" under CGL policies.[148]

In *Compass Insurance Co. v. Cravens, Dargan and Co.*,[149] Cravens, Dargan & Co., a wholly-owned subsidiary of Insurance Company of North America, recovered clean-up costs from another insurance company that sold comprehensive general liability insurance to the State of Wyoming. In its brief to the Supreme Court of Wyoming, Cravens, Dargan & Co. rejected the other insurance company's argument that "response costs" are not "damages" under the standard form comprehensive general liability policy.[150] Cravens, Dargan & Co. told the Supreme Court of Wyoming that the *Mraz* and *Armco* decisions[151] were inapplicable. Cravens, Dargan & Co. stated "there is better-reasoned law elsewhere which supports the decision of the trial court [that response costs are covered]."[152] Cravens, Dargan & Co. concluded its plea for coverage as follows:

> Taken to its logical extension, Appellant's argument would mean that if an insured cleans up the pollution for which it is responsible, thereby eliminating the injurious condition which existed, then there is *no* coverage under its policy — but if the insured fails to clean-up the pollution, leaving the water and land in a damaged condition, then there *is* coverage for such damage. Surely such an illogical conclusion should not be allowed, particularly in light of unambiguous policy language providing coverage for the effects of sudden and accidental oil discharges.[153]

Cravens, Dargan & Co. prevailed on the appeal.

Similarly, in *Centennial Insurance Company v. Lumbermens Mutual Casualty*

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[148] *See* Brief of Cravens, Dargan & Co. as Appellee, Compass Ins. Co. v. Cravens, Dargan & Co., 748 P.2d 724 (Wyo. 1988); Brief of Plaintiffs-Appellees (First State Insurance Co. and Lloyds Filed Nov. 6, 1987), Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 *petition for reh'g pending*, Nos. 86-909-11 (Sup.Ct. Mich. 1989). Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment, Centennial Ins. Co. v. Lumbermens Mut. Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987); Brief of United States Fidelity & Guaranty Company In Support Of Its Motion For Summary Judgment, United States Fid. & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich.), *vacated*, Lexis 3560 and 3515 (1988).

[149] 748 P.2d 724.

[150] Brief of Cravens, Dargan & Co. as Appellee at 8-14, *Id.*

[151] Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986) and Maryland Cas. Co. v. Armco, Inc., 643 F.Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988), are the two principal cases supporting the proposition that CERCLA costs are not "damages."

[152] Brief of Cravens, Dargan & Co., *supra* note 148, at 9.

[153] *Id.* at 14-15 (emphasis in original).

Company, Centennial Insurance Company, a member of the Atlantic Mutual Group, successfully argued that clean-up costs are covered damages.[154] Centennial stated in a brief: "Clean-up costs and costs incurred to correct a pollution condition may constitute property damages."[155]

United States Fidelity and Guaranty Company (USF&G) took the same position in a brief filed in *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*[156] Arguing that the court should follow the decision in *United States Aviex Co. v. Travelers Ins. Co.*,[157] USF&G said: "It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs . . . ."[158] USF&G prevailed on this issue.

Further, First State Insurance Company, a member of The Hartford Insurance Group, and a Lloyds of London syndicate both argued in *Upjohn v. New Hampshire* that "as a matter of public policy and contract interpretation, such [CGL policy] provisions must be read as providing indemnity for clean-up costs."[159] First State and the Lloyds were successful.

In addition, both Continental Insurance Co. in *Continental Insurance Companies v. Northeastern Pharmaceutical and Chemical Company* (NEPACCO),[160] and the United States Government, in an *amicus* brief filed on the rehearing of the same case, have taken the position that clean-up costs are property damages and are covered under CGL policies.[161]

In moments of candor, the insurance industry continues to recognize that clean-up costs are properly within the scope of the CGL policy. In a recent article, Mr. Cheek of Crum & Forster commented upon court decisions which held that the CGL policies draw a distinction between money judgments paid to third parties and clean-up costs paid as a result of governmental directives. He said: "From the insured PRP's standpoint such decisions completely ignore

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[154] Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 5, Centennial Ins. Co. v. Lumbermens Mutual Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987).

[155] *Id.*

[156] Brief of United States Fid. & Guar. Co. in Support of Its Motion for Summary Judgment at 24, United States Fid. & Guar. v. Thomas Solvent, 683 F.Supp. 1139 (W.D. Mich.), *vacated*, Lexis 3560 and 3515 (1988).

[157] 125 Mich. App. 579, 336 N.W.2d 838 (1983).

[158] Brief of United States Fid. & Guar. Co. In Support Of Its Motion For Summary Judgment at 24, United States Fid. & Guar. Co. v. Thomas Solvent Co., *supra* note 154.

[159] Brief of First State Insurance Company and Lloyds (as Plaintiffs-Appellees) at 32, filed March 6, 1987 in Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989), *petition for reh'g pending*, Nos. 86-909-11 (Sup.Ct. Mich. 1989). First state has now recanted.

[160] 811 F.2d 1180 (1987), *on reh'g*, 842 F.2d 977 (8th Cir. 1988) (*en banc.*).

[161] Continental has now disavowed its original contention that cleanup costs are covered.

the expectations of the [policyholder] that should be the first rule of interpretation. Most [policyholders] would never have expected, indeed rarely understand such distinctions."[162]

Insurance companies expect coverage for clean-up costs under CGL policies. Their policyholders should also receive such coverage.[163]

VI. CONCLUSION

As rapid development continues throughout the state, and government efforts to regulate environmental quality continue to expand, Hawaii citizens can expect much increased environmental enforcement activity. This activity will in turn result in imposition of legal liability for policyholders, who must be prepared to deal with their insurance companies on issues related to coverage for environmental claims.

Risk managers, corporate counsel, and outside legal counsel should never routinely assume that particular policies do not cover pollution claims or costs incurred in connection with environmental problems. Even lawyers who regularly represent insurance companies have acknowledged that: "[G]iven existing case law, one would be foolish not to seek coverage under almost all old general liability policies."[164]

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[162] Cheek, Graham & Wardzinski, *supra* note 136, at 10206.

[163] Most recently, a Pennsylvania court held that under Missouri law cleanup costs are covered "damages" as that term is used in the standard form CGL insurance policy. The decision of the Eighth Circuit Court in Jones Truck Lines v. Transport Ins. Co., No. 88-5723 (E.D. Pa. June 27, 1989) was that the cleanup activities were conducted for the purpose of mitigating further damage and, therefore, are covered. *See* Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash. 2d 869, 784 P.2d 507 (1990) (on certification of "damages" issue from No. C86-352WD); New Castle County v. Hartford Accident Indem. Co., 673 F. Supp. 1359, 1364-67 (D. Del. 1987); CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 183, 187, 536 A.2d 311, 312, 318 (App. Div. 1988); Aerojet-General Corp. v. San Mateo County Superior Court, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621, *reh'g denied*, 258 Cal. Rptr. 684 (1989) (holding that damages include the cost of environmental clean-ups ordered by the government) (interpreting California law).

[164] Jernberg and Furse, *Environmental Risk Insurance: Don't Count On It*, RISK MANAGEMENT MAGAZINE, July 1987, at 48.

Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation

I. INTRODUCTION

Item:

> Whether it intends to or not, the human race is conducting an unprecedented worldwide experiment on the Earth's climate-control system. The intensive burning of gas, oil and coal over the last century and the clearing of tropical rain forests have increased the concentration of carbon dioxide in the atmosphere by nearly 25%. Because this colorless gas regulates Earth's temperature by trapping heat . . . a rise of this magnitude could lead to an average global warming of 3 to 9 degrees within the next century. And that in turn could cause a [disastrous] shift in weather patterns.[1]

Item:

> A study by scientists at NASA this spring concluded that the amount of ozone over the Northern Hemisphere decreased as much as 3% from 1969 to 1986. Each 1 percent reduction in ozone may cause as much as a 6 percent increase in skin-cancer cases annually from increased exposure to ultraviolet radiation.[2]

Nature is sending a message. Planet Earth can no longer support an ever-increasing population's insatiable demands for more and better goods and services. Pollution of the air, water and land is rampant, and the magnitude of this unfolding tragedy increases daily. The end result of this environmental crisis is uncertain. At the very least, this serious and perhaps permanent degradation of the Earth's environment means a corresponding reduction in the quality of life. Already, for example, smog alerts regularly warn residents of cities as far-removed as Los Angeles, California and Athens, Greece to remain indoors on high-pollution days. Periodic oil spills, most far less publicized than the recent ten million gallon dump off Alaska's coast, despoil shorelines and kill marine and bird life around the globe.

Across the nation, alarmed citizens search for answers to such environmental threats. Because the environment is fundamental, Americans turned initially to the nation's fundamental laws — the federal and state constitutions — in an effort to gain protection for the environment. They reasoned that elevating environmental protection to constitutional status would assure these values a permanent place in national life.

Americans made two efforts to amend the United States Constitution, which contains no explicit environmental protection provision. The first, a two-sentence amendment proposed by Senator Gaylord Nelson, declared:

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[1] *Planet Earth*, U.S. NEWS & WORLD REPORT, Oct. 31, 1988, at 61.

[2] *Id.* at 63.

> Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right.[3]

Congressman Richard Ottinger, another environmental advocate, introduced the second proposal, a more detailed attempt to create a federal environmental guarantee.[4] Both were unsuccessful.

Undeterred by these disappointments, environmentalists next attempted to find constitutional protection for the environment by reading environmental rights into the federal Constitution.[5] Advocates argued that the right to protection from environmental degradation is implied in the fifth, fourteenth[6] and ninth amendments.[7] America's courts, however, have not been persuaded by this reasoning.[8]

Americans have also tried to amend their state constitutions in order to secure environmental protection, since state constitutions provide governing prin-

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[3] S.J. Res. 169, 91st Cong., 2d Sess. (1970).

[4] Rep. Ottinger introduced the following proposed amendment to the U.S. Constitution:

> SEC. 1. The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment shall not be abridged.
>
> SEC. 2. The Congress shall, within three years after the enactment of this article, and within every subsequent term of ten years or lesser term as the Congress may determine, and in such manner as they shall by law direct, cause to be made an inventory of the natural, scenic, esthetic and historic resources of the United States with the state of their preservation, and to provide for their protection as a matter of national purpose.
>
> SEC. 3. No Federal or State agency, body, or authority shall be authorized to exercise the power of condemnation, nor undertake any public work, issue any permit, license, or concession, make any rule, execute any management policy or other official act which adversely affects the people's heritage of natural resources.

H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968)

[5] Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970). *See also* Rodgers, *A Constitutional Law of the Environment*, Constitutional Bicentennial Lecture, ALI/ABA COURSE OF STUDY, ENVIRONMENTAL LITIGATION (1987).

[6] Environmentalists asserted that protection of life, liberty and property implicitly encompasses a due process right to environmental protection under the fifth and fourteenth amendments. Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D. W. Va. 1973).

[7] They argued that protection of one's environment is an unenumerated right. *Id.* at 1063.

[8] See Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D. W. Va. 1973) ("Acts resulting in air pollution are not violations of any judicially cognizable federal constitutional right."); Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974) ("[the] right to a healthful environment is not a fundamental right under the Constitution . . . . Procedural due process applies only when the interest taken away is encompassed within the Fourteenth Amendment's protection of liberty and property. The right to a healthful environment is not such an interest."); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972) ("No legally enforceable right to a healthful environment . . . is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution.").

ciples independent of those set out in the federal Constitution.[9] Unlike the results at the federal level, these efforts have proved successful, and state constitutions now contain a broad spectrum of environmental protection provisions. The legal impact of such provisions, voted into state constitutions by concerned Americans, has not, however, brought about the protection hoped for.

This comment examines environmental protection provided by state constitutions. It begins with a brief look at the recent trend to incorporate environmental protection provisions into these documents. It next examines the four kinds of environmental protection provisions and how courts have interpreted each. Finally, this comment offers an evaluation of the interpretive process and calls for a more active judiciary in this critical area of the law.

II. Recent Trend to Expand Environmental Protection in State Constitutions

A wave of interest in constitutional reform swept the country after World War II.[10] By the end of 1972, more than two-thirds of the states had considered constitutional revision in one form or another.[11] That process continues today.[12] Environmental concerns, which coincidentally and serendipitously gripped the national consciousness in the 1960s and 1970s, rode the crest of

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[9] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, respectively, are reserved to the states or to the people." U.S. Const. amend. X. It follows that state constitutions can only serve to limit the otherwise plenary power of the state. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 Va. L. Rev. 928, 966 (1968).

[10] Following World War II, the states began to realize that their constitutions were outmoded. Half the documents had been written during the last three decades of the nineteenth century. Major Problems in State Constitutional Revision (W. Brooke Graves ed. 1960). In 1955, The Commission on Intergovernmental Relations pointed out that "many State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many states to perform all of the services their citizens require . . . . " *Id.* at v. Under these circumstances the states had little choice but to modernize their constitutions.

[11] A. Sturm, Trends in State Constitution Making, 1966-1972 3 (1973).

[12] Sturm & May, *State Constitutions And Constitutional Revision: 1980-81 And The Past 50 Years*, in The Book Of States 1982-83 115-16 (1982). *See also* Burdick, The Constitution Of The Federated States Of Micronesia, in Politics And Government In The Pacific Island States 282 (Y. H. Ghai ed. 1988) which indicates that environmental concerns have spread to newly independent Pacific states. The Federated States of Micronesia incorporated the following declaration into its recently adopted constitution:

> Radioactive, toxic, chemical or other harmful substances may not be tested, stored, used or disposed of within the jurisdiction of the Federated States of Micronesia without the express approval of the national government of the Federated States of Micronesia.

F.S.M. Const. art. XIII, § 2.

this reform wave,[13] and protectionist provisions are now commonly part of state constitutions.[14]

Two factors account for the success in amending state constitutions, whereas efforts to amend the federal Constitution failed.[15] First, forming a consensus at the state level is far easier than at the national level, where all regions of the country must be accommodated before change can be made. Consequently, state constitutions are more easily and more frequently amended than the federal Constitution. For this same reason, state constitutions often contain rights and guarantees extending beyond those found in the federal Constitution.[16]

Second, state constitutional law represents a revitalized force in American jurisprudence. Over the past decade, the number of cases in which state courts have grounded decisions on state constitutional law rather than federal constitutional law has risen remarkably.[17] The significance of this trend was noted by Associate Justice William J. Brennan, Jr. of the United States Supreme Court:

> [T]he most significant development in American constitutional jurisprudence today is the increasing reliance by state courts throughout the country upon enforcing the protections for civil rights and liberties provided by their own state constitutions rather than upon those found in the federal Constitution.[18]

Thus, environmental protection is often broadly addressed in state constitutions.[19] For example, Hawaii's constitution includes declarations that promote a healthful environment,[20] proscribe excessive demands on the environment[21] and protect natural resources, including marine[22] air, water, land, mineral and en-

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[13] A. STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING: 1938-1968 15 (1970).

[14] *See infra* notes 20-27 and accompanying text.

[15] *See supra* notes 3-4 and accompanying text.

[16] A recent count of state supreme court cases revealed more than 400 cases in which the courts found that their own state constitutions provided greater protection than the federal Constitution. Schuman, *The Right to Equal Privileges and Immunities, A State's Version of "Equal Protection*, 13 VT. L. REV. 221 (1988).

[17] Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13. (1987).

[18] Remarks of William J. Brennan, Jr. *Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 1, 11 (1987).

[19] *See infra* notes 20-27 and accompanying text.

[20] "The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment or the State's resources." HAW. CONST. art. IX, § 8.

[21] *Id.*

[22] The Hawaii Constitution declares:

> The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically

ergy resources.[23]

III. Judicial Interpretation of Environmental Provisions in State Constitutions

Environmental provisions in state constitutions come in four basic forms: (1) declarations that preservation of the environment is a matter of public policy, (2) statements that citizens have a right to a healthful environment, (3) provisions that set out financial methods to support environmental protection, and (4) clauses that restrict environmental prerogatives of state legislatures. The four types of environmental provisions are examined in turn, together with judicial interpretations of the provisions and suggested alternatives to these interpretations.

A. Declarations That Environmental Protection Is Public Policy

Environmental policy statements emphasize the importance of the environment to the people of the state. These constitutional value statements are found in a variety of forms, including both explicit and implicit declarations of policy, mandates and directives to state legislatures, and public trust doctrine statements.[24]

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limited by federal or international law.

All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.

Haw. Const. art. XI, § 6.

[23] The Hawaii Constitution states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, air, water, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people. Haw. Const. art. XI, § 1.

[24] The public trust doctrine originates in common law. The doctrine holds that land under navigable waters is the property of the sovereign who holds it in trust for the use and benefit of the people in common. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, in Developments in State Constitutional Law 146, 157 (1985) An upland doctrine has recently emerged, under which the lands and the natural resources they contain are held by the government for the benefit of the people. Jarman, *The Public Trust Doctrine In The Exclusive Economic Zone*, 65 Or. L. Rev. 1, 11 (1986).

Constitutional policy statements are as individual as the states themselves, reflecting each state's resources and priorities.[25] Ten state constitutions contain explicit policy statements pertaining to the environment or natural resources.[26] Four indicate that amelioration of environmental problems is in the general welfare.[27] Four set out their policy statements in the form of a mandate to the state to preserve the environment.[28] Thirteen set out state policy in the form of a directive to the state legislature to protect the environment.[29] Eleven state

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[25] An extensive vocabulary of environmental terms is used to cover this broad ground. Included in environmental policy statements are terms such as the following: healthful environment: (ALASKA CONST. art. VIII, § 7; HAW. CONST. art. IX, § 8; ILL. CONST. art. XI, § 1; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; natural beauty: (FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 1); land: (ALASKA CONST. art. VIII, § 1; HAW. CONST. art. XI, § 1; MONT. CONST. art. IX, § 2; N.C. CONST. art. XIV, § 5; R.I.CONST. art. I, § 17); VA. CONST. art. XI, § 1); noise: (FLA. CONST. art. II, § 7; MASS. CONST. art. XCVII; N.C. CONST. art. XIV, § 5; N.Y. CONST. art. XIV, § 4); water: (ALASKA CONST. art. VIII, § 2; Cal. Const. art. XA, § 1; COLO. CONST. art. XVI § 5; FLA. CONST. art. II, § 7; HAW. CONST. art. XI, § 1; N.C. CONST. art. XIV, § 5; VA. CONST. art. XI, § 1); air: (N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; R.I. CONST. art. I, § 17; MASS. CONST. art. XCVII; LA. CONST. art. IX § 1); agricultural land: (FLA. CONST. art. II, § 2; HAW. CONST. art. XI, § 1; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; R.I. CONST. art. I, § 17; VA. CONST. art. XI, § 1; N.C. CONST. art. XIV, § 5); marine resources: (HAW. CONST. art. XI, § 6); shorelines: (N.C. CONST. art. XIV, § 5; N.Y. CONST. art. XIV, § 4); cultural value resources: (ALASKA CONST. art. VIII, § 7; HAW. CONST. art. IX, § 9; MONT. CONST. art. IX, § 4); historical value resources: (ALASKA CONST. art. VIII, § 7; LA. CONST. art. IX, § I; MASS. CONST. art. XCVII; MONT. CONST. art. IX, § 4; N.Y. CONST. art. XIV, § 4; VA. CONST. art. XI, § 1); forests: (HAW. CONST. art. IX, § 7; MASS. CONST. art. XCVII; R.I. CONST. art. I, § 17); minerals: (HAW. CONST. art. XI, § 1; MASS. CONST. art. XCVII; R.I. CONST. art. X, § 17); physical good order: (HAW. CONST. art. IX, § 7); public lands: (VA. CONST. art. XI, § 1); recreation: (ALASKA CONST. art. VIII, § 7; MONT. CONST. art. IX, § 5; VA. CONST. art. XI, § 1); scenic values: (FLA. CONST. art. II, § 7; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MONT. CONST. art. IX, § 4; N.Y. CONST. art. XIV, § 4; N.C. CONST. art. XIV, § 5); scientific value: (ALASKA CONST. art. VIII, § 7; MONT. CONST. art. IX, § 4); sightliness: (HAW. CONST. art. IX, §7); submerged lands: (ALASKA CONST. art. VIII, § 6); wetlands: (N.C. CONST. art. XIV, § 5; N.Y. CONST. art. XIV, § 4); wilderness: (N.Y. CONST. art. XIV, § 21); plants and wildlife: (ALASKA CONST. art. VIII, § 5; N.Y. CONST. art. XIV, §3; R.I. CONST. art. I, § 17); esthetic qualities: (LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII).

[26] ALASKA CONST. art. VIII, § 1; FLA. CONST. art. II, § 7; ILL. CONST. art. II, § 1; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 52; N.Y. CONST. art. XIV, § 3; N.C. CONST. art. XIV, § 5; PA. CONST. art. I, § 27; VA. CONST. art. XI, § 1.

[27] ALASKA CONST. art. VIII, § 7; CAL. CONST. art. XIV, § 3; MICH. CONST. art. IV, § 52; N.M. CONST. art. XX, § 21.

[28] HAW. CONST. art. XI, § 1; MONT. CONST. art. IX, § 1; PA. CONST. art. I, § 27; UTAH CONST. art. XVIII.

[29] ALASKA CONST. art. VIII, § 2; FLA. CONST. art. II, § 7; ILL. CONST. art. XI, § 1; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; OR. CONST. art. XIH § 6; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII, § 1.

constitutions frame the state's concern for the environment in terms of declarations authorizing the legislature to act to protect the environment.[30]

Policy statements also vary in length and specificity. At one end of the spectrum is Illinois' brief declaration:

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.[31]

At the other end of the spectrum is the detailed North Carolina declaration:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.[32]

While the format of policy statements varies from state to state, all state constitutional declarations encounter two generic judicial interpretation problems. The first stems from potential application of the doctrine of *expressio unius est exclusio alterius*.[33] The second results from judicial reluctance to enforce environmental provisions in state constitutions without legislative concurrence.

1. Application of the doctrine of expressio unius est exclusio alterius

The potential application of the doctrine of *expressio unius est exclusio alterius* (*expressio unius*) threatens when two factors are present. The first is a superfluous grant of power.[34] State constitutions easily meet this requirement. *All* grants of power in state constitutions are theoretically superfluous, since the state is the repository of powers not delegated to the federal government or restricted by the state constitution.[35]

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[30] ALASKA CONST. art. VII, § 5; CAL. CONST. art. XIV, § 3; KAN. CONST. art. XI, § 9; MASS. CONST. art. XCVII; MO. CONST. art. III, § 37; N.Y. CONST. art. XIV, § 3; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. VIII, sect 115; S.C. CONST. art. XIV, § 5; TENN. CONST. art. XI, § 2.

[31] ILL. CONST. art. XI, § 1.

[32] N.C. CONST. art. XIV, § 5.

[33] The literal translation of the phrase is, "The expression of one thing is the exclusion of another" Grad, *supra* note 9, at 966.

[34] *Id.*

[35] "The powers not delegated to the United States by the Constitution, nor prohibited by it to

The second factor inviting *expressio unius* is the omission of specific items within the subject of a superfluous grant of power.[36] According to this rule, any items omitted from a superfluous grant of power are thereafter excluded from the state's power.[37] *Expressio unius* is intended to apply only to statutes, but interpretive confusion exists because state constitutions occasionally cross the line separating declarations of governing principles from specific authorizations to state legislatures to act in a rigidly prescribed manner.[38] Courts find these authorizations so similar to statutes that they invoke *expressio unius.*[39]

If *expressio unius* were applied to environmental declarations in state constitutions, mere lists of goals or constitutional authorizations to enact specific legislation would preclude protection of any goals not specifically mentioned. To avoid possible application of *expressio unius*, states have employed two safeguards. The first is a general statement of environmental policy such as that found in the Illinois constitution.[40]

The second safeguard is the non-exclusion clause, an open-ended phrase added to the list of environmental objectives contained in the state constitution. For example, New Mexico's constitution provides:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air . . . . water *and other natural resources of this*

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the States, respectively, are reserved to the states or to the people." U.S. CONST. amend. X.

[36] Grad, *supra* note 10, at 966.

[37] *Id.*

[38] *Id. See also infra* note 39.

[39] For example, an express constitutional grant of power to the legislature to levy certain taxes has been held to imply that no other taxes could be levied. Evans v. McCabe, 164 Tenn. 672, 52 S.W.2d 159 (1932) ("One exception to a general grant or denial of power necessarily excludes other exceptions.") 164 Tenn. at 680, 52 S.W.2d. at 161. This decision also quotes Gibbons v. Ogden, 22 U.S. (9 Wheat.) 191:

> It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power . . . plain inhibitions to the exercise of that power in a particular way, it is proof that those who made these exceptions and prescribed these inhibitions, understood the power to which they applied as being granted.

164 Tenn. at 678, 52 S.W. 2d at 159.

[40] The constitution provides;

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

ILL. CONST. art. XI, § 2.

state.[41]

Both safeguards overcome the doctrine's requirement of the omission of items within the framework of a superfluous grant of power. Although *expressio unius* has been applied in other areas, research reveals no case in which courts have applied the doctrine to environmental provisions in state constitutions. The effectiveness of such provisions has, however, been curtailed by the courts' application of another doctrine of judicial interpretation.

2. *Judicial reluctance to enforce environmental provisions without legislative concurrence — the self-execution test*

The second problem vexing state constitutional efforts to protect the environment is judicial reluctance to enforce environmental provisions in state constitutions without legislative concurrence. The issue turns on whether the constitutional provision is self-executing. A self-executing provision in and of itself creates a legally enforceable right, while a provision which is not self-executing amounts to an exhortation to the legislature to pass a law giving life to the constitutional value.[42] State constitutions generally do not address this point, and the matter is left to judicial interpretation.[43]

To determine whether a state constitutional provision is self-executing, a court must decide "whether the constitutional intent is to provide a presently enforceable rule by means of which the given right may be enjoyed and protected and the duties imposed may be enforced without supplementing legislation."[44] This judicial doctrine is known as the self-execution test.[45] Theoreti-

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[41] N.M. CONST. art. XX, § 21 (emphasis added).

[42] "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplementing or enabling legislation. A provision is not self-executing if its terms duly construed indicate that it is not to become operative without supplemental or enabling legislation." 16 C.J.S. *Constitutional Law* § 46 (1984) (quoting State *ex rel.* Russell v. Bliss, 156 Ohio St. 147, 101 N.E.2d 289, 291 (1951)).

[43] The California constitution at one time contained a provision stating that "[t]his section shall be self-executing, and the legislature may also enact laws in furtherance of the policy in this section contained." Cal. Const. art. XIV, § 3. (added Nov. 6, 1928; repealed June 8, 1976).

[44] Student Gov't Ass'n of L.S.U. v. Board of Supervisors, 262 La. 849, 859, 264 So. 2d 916, 919 (1972).

[45] For cases applying the self-execution test, *see* St. Joseph Bd. of Public Schools v. Patten, 62 Mo. 444, (1876) (constitution imposes an obligation on the state to replace shortages in the school fund, but the constitutional provision fixing the obligation is not self-executing and the courts are powerless to compel performance); Southern Ry. v. Commonwealth, 200 Va. 431, 105 S.E.2d 814, (1958), (sections of the constitution dealing with assessment and taxation of property of railroads are not self-executing mandates and legislation is necessary to carry them into effect); Commonwealth v. Stringfellow, 173 Va. 284, 4 S.E.2d 357 (1939) (constitutional provision that

cally, judicial inquiry seeks to determine the provision's intent, as it existed in the minds of its framers who were charged with interpreting the intent of the people.[46] In practice, this long-range psychoanalysis is all but impossible. Thus, the interpretive process becomes an examination of the language of the constitutional provision itself in a judicial effort to glean intent.[47]

In certain instances the test is appropriate. Constitutional directives to state legislatures are uniformly and understandably found not to be self-executing. By their very terms, they require implementing legislation. For example, Alaska's constitution declares that "[t]he legislature *shall provide* for the utilization, development and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."[48] The provision creates a legislative imperative, but unless the legislature chooses to enact an implementing law, no environmental right is created. Moreover, if the legislature does not act, the separation of powers doctrine precludes courts from entertaining citizen suits to force the legislature to act.[49]

Other state constitutional declarations, however, are not directives to state legislatures and cannot readily be said to require implementing legislation. Nevertheless, courts routinely find that even the most explicit declarations of environmental policy which make no reference to the legislature whatever and which clearly reflect the people's intent to protect the environment, also require implementing legislation.

For example, in *State v. General Development Corp.*,[50] a Florida court found that an explicit declaration of environmental policy required implementing legislation. In that case, the defendant, without obtaining appropriate air and water quality permits, conducted dredging and filling operations in constructing

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all property shall be taxed is not self-executing and legislation is necessary to carry it into effect).

[46] See Haile v. Foote, 90 Idaho 261, 409 P.2d 409 (1965) ("[The] fundamental object to be sought in construing a constitutional provision is to ascertain intent of [the] framers, and the provision must be construed or interpreted in such manner as to fulfill [the] intent of the people and never to defeat it."). 90 Idaho at 270, 409 P.2d at 414).

[47] For example, in Haile, the court stated, "[t]hose who adopt . . . or amend [a constitution] may make its provisions self-executing, and whether a particular provision is self-executing is determined from language used in the instrument itself and the purpose intended to be carried out." 90 Idaho at 270, 409 P.2d at 414.

[48] ALASKA CONST. art. VIII, § 2 (emphasis added).

[49] A Florida court, in applying the separation of powers doctrine, stated "[t]hough performance of duty is required of the legislature by [the] constitution, [the] court, being another coordinate branch of government, is not authorized to compel [the] legislature to exercise a purely legislative prerogative." Brewer v. Gray, 8 Fla. Supp. 183 (Fla. Cir. Ct.), *aff'd*, 86 So. 2d 799 (1956) (legislature refused to reapportion state house of representatives and senate to reflect population shift, although constitution directed that this be done and provided a formula for implementing reapportionment).

[50] State by State Attorney for Twelfth Dist. v. General Dev. Corp. 448 So. 2d 1074, (Fla. Dist. Ct. App. 1984) *aff'd*, State v. General Dev. Corp., 469 So. 2d 1381 (Fla. 1985).

canals and artificial lakes, resulting in air and water pollution. The Florida State Attorney brought a civil suit on behalf of the people of the state based on the Florida constitution, which declares, "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty."[51] Notwithstanding this avowed constitutional policy declaration demanding environmental protection, the appellate court held that the State Attorney lacked standing under the state constitution to bring the case absent a law specifically conferring authority on him to do so.[52]

A similar case, *Robb v. Shockoe Slip Foundation*,[53] involved interpretation of the Virginia constitutional declaration, which states in part, "[i]t shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources, its public lands, and its historical sites and buildings."[54] Based on this provision, Robb, an environmental activist, sought to enjoin the state's plan to destroy certain buildings of possible historic value. The circuit court issued the requested injunction based upon its interpretation that this constitutional provision was self-executing. The Virginia Supreme Court unanimously reversed the circuit court, finding that the constitutional provision was vague, in need of statutory definition and, thus, was not self-executing.[55] Taking refuge in the interpretation that the Virginia constitutional policy declaration amounted to simply a statement of principles, the Court declined to find it self-executing.

The implications of *General Development Corp.* and *Robb* are wide-ranging and distressing. For example, several state constitutions contain policy statements similar to the Virginia provision requiring historic preservation.[56] Preservationists in these states undoubtedly hoped that these constitutional provisions would offer substantive protection to values not articulated in the federal constitution. Instead, the Florida and Virginia rulings dash such hopes by demonstrating that explicit constitutional policy statements demanding environmental protection are no more effective than directives to state legislatures to protect

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[51] FLA. CONST. art. II, § 7.

[52] *General Dev. Corp.*, 469 So. 2d at 1381.

[53] 228 Va. 678, 324 S.E.2d 674 (1985).

[54] VA. CONST. art. XI, § 1.

[55] *Robb*, 324 S.E.2d at 676. In reaching this decision, the Court relied on a treatise by Judge Thomas Cooley, who wrote:

> A constitutional provision may be said to be self- executing if it supplies a sufficient rule by means of which the right given may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by which those principles may be given the force of law.

228 Va. 678, 324 S.E.2d at 674 (quoting T.F. COOLEY, CONSTITUTIONAL LIMITATIONS 167-68 (8th ed. 1927)).

[56] ALASKA CONST. art. VIII, § 7; HAW. CONST. art. VIII, § 5; LA. CONST. art. VI, § 17; MASS. CONST. arts. XLIX, LI; MO. CONST. art. III, § 48; PA. CONST. art. I, § 27; TEX. CONST. art. XVI, § 39; VA. CONST. art. XI, § 1.

the environment.[57] Judicial interpretation, under these circumstances, is an inquiry into whether the state legislature has passed implementing legislation. While a mechanical approach of this sort unquestionably eases the burden of interpretation for the courts, it does not serve the public interest for a number of reasons.

First and foremost, constitutional provisions are often adopted for the purpose of shielding the values they espouse from legislative caprice and whimsy.[58] The requirement of implementing legislation utterly defeats this purpose. A legislature can nullify a fundamental law by simply refusing to take action. The self-execution test thus defeats the intent of constitutional provisions pertaining to the environment. That intent, as expressed by the popular will, is to protect the environment from continuing abuse.[59] Citizens who approved these constitutional policy statements decided that certain environmental values merited protection and voted to give effect to their decision. They did not intend that their state legislatures have the power to determine which of these constitutional values merit protection and which do not. By demanding legislative concurrence to effectuate all environmental provisions in state constitutions, state courts disregard and defeat the peoples' intent as expressed in the constitutional provisions.

The self-execution test also fails to serve the public interest because it provides no workable guidelines for interpretation. In 1900, the United States Supreme Court provided a striking example of the circular reasoning inherent in this test when it concluded that a constitutional provision is self-executing only insofar as it is capable of execution.[60] Rather than grapple with this tautology, state courts now routinely find that environmental provisions in state constitu-

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[57] The judicial view that constitutional policy statements are, in and of themselves, ineffectual is reinforced by state statutes implying that constitutional policy statements require implementing legislation. For example, describing the Pennsylvania Solid Waste Management Act, the statute declares "It is the purpose of this act to . . . implement Article I, section 27 [the state's environmental rights declaration] of the Pennsylvania Constitution" 39 PA. STAT. ANN. tit. 35, § 6018.102(10) (Purdon 1980). The Pennsylvania constitutional article, as written, leaves the execution question to judicial interpretation. Pennsylvania courts, however, have accepted the legislative presumption that the constitutional article is not self-executing, applied the self-execution test and ruled that implementing legislation is required to give substance to the constitution's policy statement. *See* Snelling v. Dept. of Transp., 27 Pa. Commw. 276, 366 A.2d 1298 (1976) (holding that the environmental rights declaration does not require consideration of factors beyond those addressed by statute); Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86 (1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976) (holding that the environmental rights declaration is not self-executing);.Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 302 A.2d 886 (1973), *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973) (holding that the constitution's environmental rights declaration requires implementing legislation).

[58] Grad, *supra* note 10, at 946.

[59] *See supra* notes 20-27 and accompanying text.

[60] Davis v. Burke, 179 U.S. 399, 403 (1900).

tions require implementing legislation because these provisions are not sufficiently specific.[61]

Yet courts have not hesitated to interpret non-specific terms in other areas of the law. For example, in constitutional law, courts frequently interpret imprecise terms such as due process, equal protection, and cruel and unusual punishment. Likewise, nuisance laws, which contain many terms similar to those found in environmental provisions of state constitutions, are also routinely interpreted by the courts.[62]

Thus an anomaly exists. While self-imposed notions of judicial restraint are invoked by courts to preclude enforcement of constitutional environmental protection clauses, these same notions do not prevent courts from creating effective standards of environmental harm based on nuisance law.[63] No principled justification exists for the distinction in interpretive rules.[64] Furthermore, when an

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[61] *See* State v. Sanbria, 192 Conn. at 688,689, 474 A.2d at 771, (1984) ("The standards enunciated in Davis v. Burke still prevail . . . where the substance of the amendment cannot be determined with reasonable precision on judicial inquiry . . . it is unenforceable. In such circumstances the amendment does not take effect until implementing legislation is enacted."); State *ex rel.* Cotter v. Leipner, 138 Conn. at 158, 83 A.2d at 171 (1951) ("Constitutional provisions are not necessarily self-executing. In so far as they either expressly or by necessary implication require legislative action to implement, they are not effective until that legislative action is had.") *See* cases cited *supra* notes 44-46,49,50.

[62] Nuisance, for example, has been broadly defined to "extend to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property." Caldwell v. Knox Concrete Products, Inc., 54 Tenn. App. 393, 391 S.W.2d 5 (1964). In Caldwell, defendant's concrete plant operations resulted in a noise level sufficient to dissuade potential patrons of plaintiff's motel from patronizing the motel, with the result that the motel closed. The court found the noise a nuisance. 54 Tenn. App. at 394, 391 S.W. 2d at 7. The fact that courts have applied a broadly defined concept such as "nuisance" to specific fact situations weakens the argument that broadly defined environmental provisions in state constitutions are too vague to be applied.

[63] *See* Rose v. Standard Oil Co., 56 R.I. 272, 185 A. 251, *reh'g denied*, 56 R.I. 472, 188 A. 71 (1936)(petroleum products percolating into the soil found to be a nuisance); Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1958) (smoking chimneys polluting the atmosphere found to be a nuisance).

[64] One commentator argues that courts are not suited to make environmental decisions. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment:Towards an Environmental Due Process*, 49 IND. L.J. 203, 236 (1974). Courts, the writer claims, do not possess the necessary technical expertise to make environmental decisions. In literal fact, that is true; however, courts have obtained expert advice and made appropriate decisions when they have felt compelled to do so. School busing, desegregation and housing are prime examples of areas in which the nation's courts have obtained expert advice and taken active roles.

Related to concerns over technical expertise are worries about runaway litigation. Opponents of self-executing environmental provisions are concerned that the legal system will be inundated with challenges to both legislative and executive actions if the courts interpret environmental provisions to be self-executing. ILL. CONST. art. XI, § 2 commentary. Precisely because legislatures and executives have failed to act in the problem areas of busing, desegregation and housing, numerous

environmental right is part of a constitution, rather than statutory or common law, judicial balancing should weigh heavily in favor of protecting the right.

For all of these reasons, state courts should alter their approach to the application of the self-execution test and interpretation of state constitutional provisions intended to protect the environment. The courts should focus on the language of the provision. If the words direct the legislature or grant authority to the legislature to enact environmental protection statutes, the courts are justified in requiring implementing legislation. If, however, the language indicates that environmental protection is state policy, declares a right to a healthful environment or embodies other such declarations of environmental policy or grant of environmental rights with no reference to the legislature, then the courts should implement the constitutional values without legislative concurrence.

B. Declarations That Citizens Have a Right to a Healthful Environment

Declarations to the effect that citizens have a right to a healthful environment appear in the constitutions of Hawaii, Illinois, Massachusetts, New York, Pennsylvania, Rhode Island, and Texas.[65] However, none of these constitutions provides a precise definition of "healthful environment". Illinois, for example, defines "healthful environment" as "that quality of physical environment which a reasonable man would select for himself were a free choice available . . . ."[66] Hawaii's constitution defines the term by referring to "laws relating to environmental quality, including control of pollution and conservation, protection, and enhancement of natural resources."[67]

Constitutional declarations of a right to a healthful environment also vary in terms of the designated holder of the right. Massachusetts, Pennsylvania, Rhode

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citizen suits have turned the courts into reluctant administrators of extensive schemes to right societal wrongs. Opening up another area of the law to numerous suits is not attractive to the judiciary. Yet, as the record shows, courts do so when judges feel sufficiently compelled for reasons of equity and justice. The need for effective environmental protection based on state constitutional law merits such action by the nation's courts.

[65] HAW. CONST. art. XII, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. art. XCVII; N.Y. CONST. art. XIV, § 5; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; TEX. CONST. art. XVI, § 59.

[66] ILL. CONST. art. XII, § 9.

[67] The constitution states:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

HAW. CONST. art. XI, § 9.

Island, and Texas declare that the right belongs to "the people."[68] Hawaii and Illinois vest the right in "each person."[69] New York offers a hybrid; it gives the right to "the people" and to "any citizen" with the consent of the state supreme court, upon notice to the attorney general.[70] The Illinois and Montana constitutions impose a duty on each person to maintain a healthful environment.[71]

1. When the right is vested in the people

States constitutions that declare the right to a healthful environment resides in "the people" are placing power in the state government to act under its police power to enforce the declaration. Pennsylvania is the only state where the issue has been tested.[72] Because of self-execution problems, constitutional declarations vesting a right in the people have fared no better than policy declarations.

In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[73] for example, the Pennsylvania Attorney General sought to enjoin the construction of a 300 foot observation tower at the site of the famous Civil War battleground, claiming that the tower would violate the state's duty under the state constitution to protect the rights of the people to preservation of scenic, historic and esthetic resources.[74] The Commonwealth Court found that the constitutional article was self-executing, but it decided that the tower would not offend the protected environmental values and, therefore, could be built. The Pennsylvania Supreme Court likewise found that the tower did not offend environmental values, but reversed the Commonwealth Court on the issue of self-execution. The Supreme Court invoked the Cooley doctrine[75] and ruled that the principles articulated in Pennsylvania's environmental rights declaration were too vague to

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[68] Mass. Const. art. XCVII; Pa. Const. art. I, § 27; R.I. Const. art. I, § 17; TEX. Const. art. XVI, § 59.

[69] HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2.

[70] N.Y. CONST. art. XIV, § 5.

[71] ILL. CONST. art. XI, § 2; MONT. CONST. art. IX, § 1.

[72] Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973).

[73] *Id.*

[74] *Id.* at 233, 302 A.2d at 888. Pennsylvania's environmental protection provision declares:

> The people have a right to clean air, pure water and to the preservation of the scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

[75] *See supra* note 54.

provide a sufficient rule to enforce the rights.[76]

Pennsylvania created an additional barrier to constitutional recognition of environmental rights in *Payne v. Kassab*.[77] The Commonwealth Court ruled that a highway interchange could be built unless the complaining environmentalists could show that increased auto emissions would endanger people living in nearby homes. The court created a three-part balancing test, limiting judicial inquiry to:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
> (2) Does the record demonstrate a reasonable effort to reduce the environmental harm to a minimum?
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[78]

By measuring alleged constitutional violations against statutory law, this test, first of all, forecloses the issue of self-execution by looking to statutory rather than constitutional law. Second, the balancing in the test places the proverbial thumb on the state's side of the scale. The state need demonstrate only that it has complied with its own statutes and regulations and that it has made reasonable effort to reduce environmental incursion to a minimum. Environmentalists, on the other hand, must show that environmental harm "clearly outweighs benefits" of the action. The burden is so one-sided that the state always stands a better chance of winning. And to date, Pennsylvania has not lost a case arising out of this constitutional provision.

2. *When the right is vested in each person*

The Hawaii, Illinois and New York constitutions grant an environmental right to "each person" rather than exclusively to "the people".[79] This difference appears significant in that the constitution grants power to the individual, not the state, to enforce the environmental right and thus avoids self-execution concerns. In practical terms, however, the personal right is extensively limited in all three constitution, either by requiring advance consent of the court or by authorizations to the legislatures to impose reasonable limits on each person's right to sue.

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[76] 8 Pa. Commw. at 231, 302 A.2d at 886.

[77] 11 Pa. Commw. 14, 312 A.2d 86 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

[78] *Id.* at 14, 312 A.2d at 86.

[79] HAW. CONST. art. XII, § 9; ILL. CONST. art. XI, § 2; N.Y. CONST. art. XIV, § 5.

New York's constitution declares that state policy is to conserve and protect the environment.[80] The constitution allows an action to be brought "with the consent of the supreme court in appellate division, on notice to the attorney general at the suit of any citizen."[81] A New York court has ruled that consent of the court in advance of citizen's action is required.[82]

The Illinois environmental rights declaration, while granting standing to each person to enforce the right against any party, places a limitation on that right by the phrase "subject to reasonable limitation and regulation as the General Assembly may provide by law."[83]

The constitution's drafting committee concluded that environmental pollution had reached the crisis stage and that the judicially imposed "special injury" requirement — a rule requiring the citizen to prove that the harm he suffered is distinguishable from harm to other citizens in order that he may have standing to sue — should be set aside.[84] Apparently, however, the drafters feared litigation as much as they feared environmental pollution, for they inserted the phrase into the provision authorizing the legislature to limit individual standing.[85]

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[80] The New York Constitution states:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products.

N.Y. CONST. art. XIV, § 4.

[81] The New York Constitution provides:

> A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.

N.Y. CONST. art. XIV, § 5

[82] People v. System Properties, 281 A.D. 433, 120 N.Y.S. 2d 269 (1953).

[83] The Illinois Constitution declares:

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

ILL. CONST. art. XI, § 2.

[84] ILL. CONST. art. XI, § 2 commentary.

[85] The commentary to the Illinois constitution's environmental right declaration reflects the rationale for the limitation. Convention delegates were concerned about a potential flood of litigation resulting from granting standing to individuals. Their concern was heightened by the sweeping scope of the declaration, which entitled individuals to enforce the right against both the government and private parties and superceded the judicially imposed rule that in order to bring an action against polluting activities, the citizen must first have suffered "special damage". The delegates knew that in the usual course of events a citizen would have difficulty proving that the harm he suffered is distinguishable from harm inflicted on the general population. ILL. CONST. art. XI, § 2 commentary. For a discussion of the standing issue implicit in this situation *see*: Note, *Kapiolani Park Preservation Society v. City and County of Honolulu: The Lease of Public Park Land as a Breach of a Charitable Trust*, 11 U. HAW. L. REV. 199 (1989).

The commentary to the environmental rights declaration reveals that:

> [t]he term 'subject to reasonable limitation and regulation by law'is included to emphasize not only the leadership function the Committee envisions for the Legislature . . . but also [legislative] power to reasonably limit and regulate the declared ability of the individual to enforce his right.[86]

On the very day that the committee filed its report on the proposed environmental article with the convention, the Illinois legislature passed the Environmental Protection Act, which requires citizens to file environmental complaints with the state's Pollution Control Board for administrative processing.[87] Thus, an administrative agency was established by statute to deal with the Illinois environmental crisis, despite the constitutional provision which purportedly granted individual standing to press environmental claims under the state constitution. A private right of action for the assertion of environmental rights apparently does not exist under the Illinois constitution.

Hawaii's constitutional provision resembles that of Illinois in that it grants an individual right. The provision states:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, *subject to reasonable limitations and regulation as provided by law.*[88]

Hawaii's constitutional drafters, like their counterparts in Illinois, intended to give standing to citizens to sue:

> Your committee believes that this important right [to a healthful environment] deserves enforcement and has removed standing to sue barriers . . . and [the constitutional article] provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers . . . . Your Committee intends that the legislature may reasonably limit and

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[86] ILL. CONST. art. XI, § 2 commentary.

[87] The constitution's drafters considered four options for implementing reasonable limitations and regulation: (1) a law requiring individuals to first file suit with the state attorney general, and only if he refused to act, would the individual be empowered to sue on his own behalf; (2) a statute establishing an administrative agency to handle claims against polluters; (3) a special court created to handle pollution suits; or (4) a law requiring that pollution suits be brought by the attorney general with the individual's right to intervene. ILL. CONST. art. XI, § 2 commentary. The drafters, together with the legislature, chose the second option, an administrative agency. ILL. CONST. art. XI, § 2 commentary; ILL. ANN. STAT. ch. 111.5, ¶ 11 (Smith-Hurd 1979).

[88] HAW. CONST. art. XI, § 9 (emphasis added).

> regulate this private enforcement right by, for example, prescribing reasonable procedural and jurisdictional matters, and a reasonable statute of limitations.[89]

In interpreting the constitutional provision, Hawaii's courts have denied citizen standing. *Stop H-3 Ass'n v. Lewis*[90] involved the application of a Hawaii law which prohibits taking, killing or otherwise harming endangered species of Hawaii's plant and wildlife.[91] The statute grants enforcement power to police officers and certain other government employees.[92] The Hawaii Supreme Court ruled that the specific legislative grant of authority to enforce the statute was intended to and did preclude any private right of action based upon the "healthful environment" provision of the Hawaii constitution.[93] The Court further ruled that the exclusion of all other plaintiffs constituted "reasonable limitations and regulation as provided by law" on the constitutional right to a clean and healthful environment granted in article XI, section 9 of the state constitution.[94]

Another case that the courts may use to limit individual standing under the

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[89] S.C. REP. NO. 77, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, JOURNAL AND DEBATES (1978). Hawaii's citizens, like their counterparts in sister states, have shown increasing concern over environmental degradation, particularly in the past two decades as consequences of environmental abuse have become ever more apparent in the islands. Recognizing that environmental quality affects not only the health of state residents but also the health of the state's visitor industry — life-blood of the state's economy — the 1978 Constitutional Convention labored to strengthen environmental safeguards. One commentator called the proceedings the "environmental Con Con". Honolulu Star-Bulletin, Oct. 27, 1978, at A-21, cols. 2-4. Strong support for the convention's environmental thrust came from a broad spectrum of citizens and environmental groups spearheaded by the Hawaii Chapter of the Sierra Club. Honolulu Star-Bulletin, Oct. 16, 1978, at A-5, col. 3. Opposition to environmental amendments was led by the Hawaii Sugar Planters Association, the Construction Industry Lobbying Organization, the Hawaii Resort Developers' Conference and county governments, all of which cited concerns related to the economic impact of such protectionist measures on their respective interests. Honolulu Star-Bulletin, Sept. 14, 1978, at A-2, col. 3.

The 1978 Constitution does indeed provide for protection of land, air, and water resources, but what would have been an innovative feature — the grant of standing to individuals to sue the government or any other alleged violator of the constitution's protected environmental rights — was watered down. Although the drafting committee initially favored granting an unrestricted right to sue to citizens, the amendment which ultimately emerged as article XII, § 9 subjects any individual right to sue to the prerogative of the state legislature to limit such right. Honolulu Star-Bulletin, Sept. 6, 1978, at A-5, col.3. Thus, a conflict exists between the drafters' statement indicating their intent that citizens have standing to enforce their constitutional right to a healthful environment and the constitutional provision stating that such standing can be limited by the legislature. 90. 538 F. Supp. 149 (D. Haw. 1982).

[90] 538 F. Supp. 149 (D. Haw. 1982).

[91] HAW. REV. STAT. § 195D-4(c).

[92] *Id.*

[93] *See supra* note 62.

[94] 538 F. Supp. 149 (quoting HAW. CONST. art. XI, § 9).

constitution is *State v. Rodrigues*.[95] The case involved interpretation of the Hawaii constitutional declaration providing for "an independent counsel appointed as provided by law to advise the members of the grand jury . . . ."[96] The Hawaii Supreme Court acknowledged that the purpose of the constitutional provision was to ensure independence of the grand jury by restricting the prosecutor's role to presentation of evidence, with independent counsel to advise the jury as to law. Although the *Rodrigues* grand jury brought an indictment without benefit of independent counsel, the Court found that the qualifier "as provided by law" in the constitutional provision precluded citizen standing to sue under this provision. Because the same qualifier appears in the environmental rights declaration, Hawaii's courts may similarly deny citizen standing to sue under the provision.[97] The constitutional article calling for an independent counsel, however, unlike the article setting out environmental rights, does not

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[95] 63 Haw. 412, 629 P.2d 1111 (1981).

[96] The text of the provision states:

"Whenever a grand jury is empaneled, there shall be an independent counsel appointed as provided by law to advise members of the grand jury regarding matters brought before it . . . ."

HAW. CONST. art. I, § 11.

[97] Hawaii's statutory environmental protection law is codified at HAW. REV. STAT. Title 19, Chapters 341-344. The law is comprehensive. Chapter 344 sets out a broad policy of conserving natural resources and includes a goal of conditions under which "man and nature can exist in productive harmony." HAW. REV. STAT. § 344-3(1) (1974).

Chapter 341, Environmental Quality Control, sets out the administrative organization for enforcement. Under the auspices of the Department of Health, this chapter establishes an office of environmental quality control (commonly known as the "Environmental Center") at the University of Hawaii. The office is headed by a director who advises state government agencies on matters concerning environmental quality. The director also spearheads educational programs, conducts research and recommends courses of action to the government and to private industry. HAW. REV. STAT. § 341-4(a) and (b) (1970). Chapter 341 also establishes an environmental council with up to 15 members appointed by the governor. The council serves as a liaison between the Director of the Environmental Center and the public. HAW. REV. STAT. § 341-3,6. (1970).

Chapter 342 delineates administrative procedures for handling environmental complaints, issuing permits, and granting variances from the statutory requirements. HAW. REV. STAT. § 342-2 (1972). The chapter also describes enforcement mechanisms and penalties for violations. HAW. REV. STAT. § 342-61 (1972). Newer sections of the chapter include provisions regulating underground storage tanks. HAW. REV. STAT. § 342-61 (1988); used oil transport recycling and disposal. HAW. REV. STAT. § 342-61 (1987); and hazardous waste management. HAW. REV. STAT. § 342-91 (1988).

Chapter 343 establishes requirements for environmental impact statements. Of particular interest to the general citizenry is that this chapter directs that the public (1) have access to all documents prepared by any party in connection with environmental impact statements, (2) be informed of the availability of such documents and (3) be invited to comment on such documents. HAW. REV. STAT. 343-3 (1988). As stringent as statutory environmental protection laws have become in Hawaii, none grants a private right of action.

grant individual standing. Thus the two declarations are distinguishable, and *Rodrigues* should not be persuasive.

Instead, Hawaii courts should give weight to the constitutional drafters' intent and strive to find standing when private parties seek environmental protection under the Hawaii constitutional provision granting each person a right to a healthful environment. The judiciary can find further support for granting private rights of action in the Hawaii constitution's provision which declares that constitutional provisions "shall be self-executing to the fullest extent that their respective natures permit."[98] The courts should allow only for reasonable procedural and jurisdictional restraints on a citizen's right to sue. An avenue to court must remain open for the individual who, after exhausting all administrative pathways and overcoming all other reasonable restraints finds his environmental complaint unresolved. If no such recourse exists, the constitutional provision amounts to empty words. The very government charged with protecting the environment will become the judge of its own conduct. In the face of the environmental crisis, Hawaii and the rest of the nation need active, assertive judges who will insure that no undue barrier stands between the citizen who has an environmental claim and the courtroom in which he or she can press that claim.

3. *When each person has a duty to maintain a healthful environment*

The Illinois and Montana constitutions go a step further and impose a duty on each person to maintain a healthful environment.[99] The commentary to the Illinois constitution states that the duty applies to persons and to local and state governments, and that this duty means that the right to use one's property is limited by the obligation to maintain a healthful environment.[100] Montana similarly imposes a duty to maintain a healthful environment, but does not specifically refer to a limitation on a citizen's right to use his property.[101]

Based on these provisions, a factory owner in South Chicago, Illinois, for example, or a mine operator in Butte, Montana who pollutes the air through careless burning would violate this constitutional duty to maintain a healthful environment. What legal action would follow such a violation of the constitutional duty has yet to be determined, for "duty" provisions have not been tested in the courts. Constitutional provisions creating a duty, however, impose a positive obligation on the citizen to maintain a healthful environment, in contrast to declarations granting a right to a healthful environment which are passive and require no action on the part of the citizen. Illinois and Montana

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[98] HAW. CONST. art. XVI, § 16.

[99] ILL. CONST. art. XI, § 1; MONT. CONST. art. IX, § 1.

[100] ILL. CONST. art. XI, § 1 commentary. *See also* ILL. CONST. §¢C0°¢00°¢00°2 commentary.

[101] MONT. CONST. art. IX, § 1.

courts should find that these duty provisions create a self-executing right of each citizen to bring an action.

C. *Financial Provisions To Support Environmental Protection*

Financial provisions to support the environment are the third way in which state constitutions promote environmental protection These provisions take the following forms: (1) authorizations of bond issues for environmental purposes, (2) tax structures designed to protect land resources,[102] (3) requirements that tax revenues be spent for environmental protection and (4) expense and time limit exemptions.

1. *Bond issues for environmental purposes*

The most popular financial method of promoting environmental protection is the constitutional provision authorizing a state legislature to float bond issues for environmental purposes. These provisions primarily address land, water and air pollution.[103] Other environmental issues addressed by bond authorizations include sewage,[104] reservoirs,[105] parks and recreation,[106] reclamation of land and water resources,[107] historical preservation[108] and slum clearance.[109]

2. *Tax structures to protect land resources*

A second financial method of promoting environmental protection is through constitutional provisions that provide favorable tax treatment for designated

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[102] The Georgia Constitution at one time granted a tax exemption to private parties for the installation and use of solar heating, cooling and pollution-abatement devices. GA. CONST. art. VII, § 1 (1976). The 1983 revised Georgia constitution eliminated the exemption granted to solar devices as of July, 1986, presumably because by that date, the property owner claiming exemptions would be "reimbursed" for any cost differential between the solar and conventional unit. *See* GA. CONST. art. VII, § 2. The new constitution also relegated the exemption granted to pollution-abatement devices to Georgia's statutory tax law. *See* GA. CODE ANN. § 48-5-41 (1978). Like any other provision of the tax code, the exemption is subject to change far more easily than would be the case had it remained part of the state constitution.

[103] CAL CONST. art. XVI, § 14; IDAHO CONST. art. VIII, § 3; MO. CONST. art. III, § 37; OR. CONST. art. VIII, § 16.

[104] N.Y. CONST. art. VIII, § 5.

[105] PA. CONST. art. VIII, § 16; OHIO CONST. art. VIII, § 2.

[106] OHIO CONST. art. VIII, § 2.

[107] PA. CONST. art. VIII, § 16.

[108] PA. CONST. art. VIII, § 15.

[109] N.Y. CONST. art. XVIII, § 4.

lands. One type of provision declares that certain types of real property are to be taxed at "current use"[110] value rather than fair market value. Because fair market value almost invariably exceeds the value of its current use, the "current use" provision shields the landowner from property tax increases which would normally accompany escalating land values. The land owner is thus relieved of the pressure to develop his property in order to pay increasing property taxes. The kinds of property addressed by constitutional provisions of this nature include agricultural land,[111] timberland,[112] open space,[113] marshland,[114] recreation areas[115] and wildlife reserves.[116]

Another tax structure approach to environmental protection is a financial provision giving the state legislature flexibility to enact methods of tax assessment that foster environmental protection. Forestland is the most popular area singled out for preferential treatment of this sort. California exempts immature forest trees from taxation.[117] Ohio allows the state legislature to exempt all lands devoted to forestry from taxation.[118] Massachusetts allows its legislature to establish tax plans for forests which promote and conserve this resource.[119]

3. *Spending requirements for environmental protection*

State constitutions may mandate that certain tax revenues be spent on environmental protection. For example, the Oklahoma constitution declares that revenues derived from certain sources shall be spent only for "the control, management, restoration, conservation and regulation of the bird, fish, game and wildlife resources . . . for the administration of laws pertaining thereto, and for no other purpose."[120] This provision allows the legislature flexibility in determining the specific resource on which to spend the funds, yet it limits expenditures to certain environmental concerns.

Other constitutional provisions vary this theme by tying environmental expenditures to other expenditures. For example, the California constitution requires that when the state legislature spends revenue derived from motor vehicle taxes, (a) it must also spend some of these funds on ameliorating air and

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[110] LA. CONST. art. VII, § 18; ME. CONST. art. IX, § 8.
[111] LA. CONST. art. VII, § 18; ME. CONST. art. IX, § 8.
[112] LA. CONST. art. VII, § 18; ME. CONST. art. IX, § 8.
[113] ME. CONST. art. IX, § 8.
[114] LA. CONST. art. VII, § 18.
[115] ME. CONST. art. IX, § 8.
[116] *Id.*
[117] CAL. CONST. art. XIX, § 3.
[118] OHIO CONST. art. II, § 36.
[119] MASS. CONST. art. XCVII.
[120] OKLA. CONST. art. XXVI, § 4.

noise pollution created by motor vehicles,[121] and (b) it must expend funds raised from gasoline taxes on environmental hazards associated with highways, on mass transit, and on other public facilities.[122] The Montana constitution establishes a trust fund financed by taxes on the extraction of natural resources. The constitution requires the legislature to spend funds from this trust on reclamation of land disturbed by the taking of these resources.[123]

4. *Expense and time limit exemptions*

Expense and time limit exemptions are also employed in state constitutions to promote the environment. These provisions offer the state flexibility in meeting contingency needs. Expense limit exemptions provide that the amount of money spent for a specified purpose may exceed the sum appropriated in the state's budget for that purpose, even if the expenditure means surpassing the state's debt limit ceiling. For example, the New York constitution excludes funds needed to build sewage treatment plants from state debt limits.[124] Similarly, a Nevada constitutional provision exempts certain legislative expenditures intended to protect the state's natural resources from budgetary limitations.[125]

Time limit exemptions work in a similar fashion, but address the time limit for spending appropriated funds rather than the amount of expenditure. Under a time limit exemption, expenditures may be made beyond the deadline imposed by the state budget. For example, the Virginia constitution excludes funds spent on environmental projects from the constitutional law that no appropriated funds may be spent more than two years and six months after the legislative session in which the expenditure was authorized.[126]

No cases on record speak to the legal effect of financial provisions in state constitutions that are intended to promote the environment.[127] If a financial provision is read as a mandate or a directive to the state legislature, a court will likely find that the provision is not self-executing. Bond issue authorizations, for

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[121] CAL. CONST. art. XIX, § 2.

[122] CAL. CONST. art. XIX, § 3.

[123] MONT. CONST. art. IX, § 2.

[124] N.Y. CONST. art. VIII, § 5.

[125] NEV. CONST. art. X, § 3.

[126] VA. CONST. art. X, § 7.

[127] Although tax exemptions granted for environmental purposes have not been tested in the courts, tax exemptions granted for economic purposes have. In Board of Supervisors v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917 (Miss. 1984), the Mississippi Supreme Court upheld a constitutional provision (MISS. CONST. art. VII, § 182) which permits the legislature to grant ten-year tax exemptions to businesses willing to locate in Mississippi. *See also* Morco Indus., Inc. v. Long Beach, 530 So. 2d 141 (Miss. 1988) (the legislature may use its constitutional power to grant exemptions in a manner which divests its political subdivisions of taxing authority they would otherwise hold).

example, are clearly not self-executing and courts cannot require a state legislature to float bond issues. Similarly, legislatures cannot be required to take advantage of expense and time limit exemptions, for these are also authorizations to the legislature to act in the manner prescribed.

Provisions setting out spending requirements, however, including provisions tying environmental expenditures to other expenditures are restrictive in that they specify the purpose of the expenditure. Because state constitutions can only restrict power,[128] it is likely that the courts will uphold such restrictions. For example, a court will likely treat the Oklahoma declaration that certain revenues may be spent *only* for specified environmental purposes[129] as a constitutional restriction on the legislature and find the provision self-executing to the extent that the legislature is precluded from overriding the provision. Constitutional restrictions are discussed more fully in the next section.

D. Restrictions On Environmental Prerogatives of State Legislatures

A constitutional restriction occurs when the declaration imposes an absolute limitation on the legislature[130] or when the court infers a restriction under *expressio unius*.[131] The New York constitution declares that certain state-owned lands known as the "forest preserve" shall remain as "wild forests."[132] This is a constitutional restriction.[133] While courts have not forced positive obligations

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[128] *See supra* note 10 and accompanying text.

[129] *See supra* note 120 and accompanying text.

[130] OKLA. CONST. art. XXVI, § 4; N.Y. CONST. art. XIV, § 3.

[131] See supra notes 33-39 and accompanying text.

[132] N.Y. CONST. art. XIV, § 1.

[133] An exception to a constitutional restriction occurs when a constitutional declaration frees the legislature in a limited way from an otherwise blanket restriction. For example, the New York Constitution contains a restriction on development in certain forested areas of the state. N.Y. CONST. art. XIV § 3. Another article in the New York Constitution, however, frees the legislature in a limited way from the constitutional restriction on development. The latter provision permits the legislature to authorize construction of facilities such as roads, ski trails, refuse disposal sites and an airport runway. N.Y. CONST. art. XIV, § 1. It also allows the legislature to preserve historic buildings and to exchange land within the protected area for land outside, whenever it deems a trade in the state's environmental interest. N.Y. CONST. art. XIV, § 1. Another example of an exception to a constitutionally imposed restriction on legislative power is found in a California constitutional provision which allows the legislature, by means of a two-thirds roll call vote in each house, to amend, repeal or add to certain restrictions set out in statutes which can only be otherwise amended by the voters. CAL. CONST. art. 10A, § 2. Among the powers granted to the legislature by the lifting of the limitation is the freedom to alter (1) restrictions which statutorily prescribe the manner in which the state may protect fish and wildlife resources and enforce water quality standards (CAL. CONST. art. 10A, § 3), (2) restrictions which limit appropriation of water from the otherwise protected California Wild and Scenic Rivers System (*Id.*), and (3) restrictions intended to minimize development of wetlands protected under the Delta Protection Act. (CAL.

on state legislatures to implement constitutional policy statements, directives or mandates, courts have upheld explicit constitutional restrictions on state legislatures.[134]

In *Pederson v. Moser*,[135] a Washington court went a step beyond interpreting an explicit constitutional restriction and struck down a state law that it found contrary to constitutional policy. The court, in reaching its decision, held that "[A]ll [of the state's] constitutional provisions are self-executing to the extent that they void all action taken in violation of them and preclude enforcement of any statute violating them."[136] Thus, a constitutional policy statement has been found self-executing under the narrow circumstance of a state legislature attempting act contrary to the policy statement.

Unfortunately, these few narrow exceptions to the usual rule that constitutional provisions are not self-executing does little to stem the tide of environmental pollution. State courts must take a more assertive posture in order to make a significant difference in the nation's environmental dilemma. The Washington court's reasoning in *Pederson* not only justifies holding constitutional provisions self-executing when a legislature acts contrary to a constitutional policy statement, the same reasoning justifies finding these provisions self-executing under all circumstances. Consistency of interpretation, in fact, demands that an environmental provision, if self-executing at all, be self-executing under all circumstances.

IV. Call for Judicial Action to Protect the Environment

An informed, courageous judiciary is needed to help stem the tide of political and economic compromises which have resulted in the current, perhaps irreversible levels of environmental pollution. The first step should be a reexamination of the self-execution issue. When a constitutional declaration does not expressly call for legislative action, state courts should find the provision self-executing. In this way, constitutional provisions setting out state environmental policy and constitutional declarations of an environmental right would become effective tools for environmental protection because courts could then enforce them without the need for legislative action. Moreover, interpreting these provisions to be self-executing would correctly reflect the intent of the voters who demanded

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CONST. art. 10A, § 4).

[134] See Robison v. First Judicial Circuit Court, 73 Nev.169, 313 P.2d 436 (1957) (denied legislature's authority to remove state officials from office by any means other than constitutionally prescribed procedure); Evans v. McCabe, 164 Tenn. 672, 52 S.W. 2d 159 (1932) (denied legislature power to create and make laws for special purpose tax districts because constitution restricts authority to do so).

[135] 99 Wash. 2d 456, 662 P.2d 866 (1983).

[136] 99 Wash. 2d at 461, 662 P.2d at 869.

environmental protection.

The judiciary can find additional support for enforcing environmental protection provisions in state constitutions by utilizing the public trust doctrine. Under this doctrine, the state is deemed to be trustee of natural resources for the benefit of the people.[137] The public trust doctrine is found in a variety of constitutional forms across the country.[138] It appears in two Hawaii provisions, one declaring that the state is the trustee of natural resources for the benefit of the people,[139] and the other proclaiming that the state holds public land in trust for native Hawaiians and the general public.[140] The Pennsylvania constitution contains a similar provision declaring that the state is the trustee of natural resources for the benefit of the people.[141] The Alaska constitution provides that fish, wildlife and waters are reserved to the people for common use.[142] The Louisiana constitution commands the state to protect air and water resources for the benefit of the people.[143]

In both common law and constitutional forms, the public trust doctrine creates an obligation on the part of the state to preserve and maintain natural resources, and air and water quality for the benefit of the people.[144] The obligation is particularly emphatic in states that include a trust declaration in their constitutions, for then it takes on the mantle of supreme law, where it complements and reinforces the other forms of constitutional provisions demanding

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[137] Pollack, *supra* note 24, at 146. Doctrinal development of the public trust concept in this country goes back to the eighteenth century. Following the Revolutionary War, ownership of lands covered by tidal flow passed from the English Crown to the separate states. *Id.* at 157. As other states were admitted to the Union, they too relied on the public trust doctrine to assert public ownership of state land. *See, e.g.* Carstens v. California Coastal Comm'n, 182 Cal. App. 3d 277, 227 Cal. Rptr. 135,(1986) (holding that when California was admitted to the union, it acquired ownership of tidelands under terms of a common law trust doctrine evolved from Roman and English law). In this way, the public trust doctrine was perpetuated in the New World, where it ultimately found its way into state constitutions. *See also* Jarman, *supra* note 24, at 11. An illustration of the long and well-respected history of the public trust doctrine in America is its most celebrated case, Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). The United States Supreme Court upheld repeal by the state legislature of an earlier grant to Illinois Central of 1000 acres of submerged land in Chicago harbor. The court concluded that Illinois held the property in trust for the people of the state and could not violate that trust by relinquishing control of the property to a private interest. 146 U.S. 387 (1892).

[138] CAL. CONST. art. I, § 25., R.I. CONST. art. I, § 17, HAW. CONST. art. XI, § 6. and VA. CONST. art. XI, § 1 (extend fishing rights and rights of access to beaches for people.) ALA. CONST. art. I, § 24, S.C. CONST. art. I, § 28 and WIS. CONST. art. IX (extend rights of navigation to the people.)

[139] HAW. CONST. art. XI, § 1.

[140] HAW. CONST. art. XII, § 4.

[141] PA. CONST. art. I, § 28.

[142] ALASKA CONST. art. VIII, § 3.

[143] LA. CONST. art. IX, § 1.

[144] *See supra* note 130 and accompanying text.

environmental protection.[145]

In *People ex rel MacMullan v. Babcock*,[146] the Michigan State Court of Appeals upheld the view that the constitutional embodiment of the public trust doctrine places an increased responsibility on the state when it interpreted the Michigan constitution's declaration, which reads:

> The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.[147]

The Court declared that "the importance of this trust is recognized by the People of Michigan in our Constitution."[148] It then ruled that submerged lands under the Great Lakes may not be filled and used for commercial purposes unless they have "no substantial public value for hunting, fishing, swimming or pleasure boating and . . . the general public interest will not be impaired."[149]

State courts across the nation should follow Michigan's lead in employing the public trust doctrine to advance the cause of environmental protection in America. They should interpret the public trust doctrine, as reflected in common law and constitutional provisions, expansively and should impose on the states a fiduciary duty to preserve and protect the environment for the benefit of the people. No other interpretation serves the public interest. Of what value, after all, is an environmental trust which permits its beneficiaries to be harmed by air unfit to breathe, water unfit to drink, and land unfit to inhabit? To date, courts have played a limited role in enforcing public trusts, yet "their influence has been important in defining trust responsibilities."[150] The time has come for courts to expand the definition of public trust responsibilities to provide the environmental protection so clearly needed.

V. CONCLUSION

Faced with the prospect of continuing environmental degradation, people across America concluded that the time has come to take matters out of the hands of elected officials. They chose to elevate environmental protection to con-

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[145] When a state constitution embodies both a public trust declaration and a separate environmental protection provision, demands of interpretive consistency add weight to view that the environmental provision should be found self-executing. If a public trust declaration imposes a positive obligation, it follows that any other environmental protection declaration should also impose a positive obligation. It is axiomatic that all parts of a constitution are equally effective.

[146] 38 Mich. App. 336, 196 N.W.2d 489 (1972).

[147] MICH. CONST. art. IV, § 52.

[148] 38 Mich. App. at 337, 196 N.W.2d at 490.

[149] *Id.* at 337; 196 N.W.2d at 490.

[150] Jarman, *supra* note 24, at 13.

stitutional status where, they hoped, these values would be beyond the political milieu, and where they would receive the highest protection. Citizens counted on the judiciary to guarantee these environmental values. But state courts have let America down.

The primary reason for this failure is the self-execution test which, for the most part, has reduced constitutional environmental provisions to moral exhortations to state legislatures to enact protective legislation. Even though the self-execution test calls for judicial inquiry to determine whether a constitutional provision is self-executing, long-standing concerns over judicial restraint and separation of powers cause the courts to routinely find that environmental declarations require implementing legislation, regardless of the peoples' intent or the language of the provision. Thus, the protections set out in the environmental provisions of state constitutions have turned out to be largely illusory, absent implementing legislation. It is ironic that the judiciary should tell American citizens that they must deal with environmental problems through the political process, when their votes to bestow constitutional protection on the environment were intended to do precisely that.

America's need for environmental protection is clear. State courts should change their approach to environmental protection based upon state constitutional law by finding that citizens have standing to sue for environmental injury whenever the state constitution sets out a policy statement that makes no reference to the state legislature. Environmental protection is an issue that will not wait and will not go away. Neither judicial nor political restraint is appropriate in face of the present crisis, for the future of the planet is put in jeopardy by such timidity. The nation's courts should step into the environmental crisis, just as they once stepped into civil rights issues, in a similar effort to change the nation's direction. State law, as U.S. Supreme Court Justice William J. Brennan, Jr. observed, is a revitalized force in American jurisprudence.[151] Constitutional provisions which rest upon the hopes of the people for a better environment give America's state courts the opportunity to develop yet another area of state jurisprudence: constitutional law protecting the environment.

Robert A. McLaren

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[151] Brennan, *supra* note 18.

Municipal Waste Combustion: A Wasted Investment?

I. INTRODUCTION

In "The Dump Ground,"[1] Wallace Stegner concludes that society says a lot about itself through its garbage. Our nation's abundant waste indicates we are inclined to consume and discard as much as we possibly can. This disposable mentality, however, has led to a growing waste management crisis, which threatens to alter our current lifestyle. For instance, almost one third of existing solid waste landfills in America are expected to last for only five to seven years.[2] In Hawaii, Honolulu officials predict that all landfills on Oahu will reach capacity level in five years unless they find an alternative method of solid waste disposal.[3]

Cities have increasingly turned to municipal waste combustors (MWCs) or resource recovery systems[4] as a solution to the landfill shortage problem. Al-

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[1] Stegner, *The Dump Ground*, in II OREGON CURRICULUM LITERATURE 163 (1969).

[2] U.S. EPA, STATEMENT OF LEE M. THOMAS BEFORE THE [HOUSE] SUBCOMMITTEE ON TRANSPORTATION, TOURISM & HAZARDOUS MATERIALS 1-2 (April 13, 1988).

[3] *Council Ready to Fuel Restart of H-POWER Construction*, Honolulu Star-Bulletin & Advertiser, Jan. 10, 1988, at A-3, col. 1 [hereinafter *Council Ready*].

[4] Municipal waste combustors fall into three groups: mass burn, modular, and refuse derived fuel. Mass burn plants consume the entire waste stream, except for large items such as refrigerators, without preprocessing. They usually process 50 to 1000 tons of trash per day. Waterwall furnaces in modern mass burn plants recover energy. 1987-1988 COUNCIL ON ENVIRONMENTAL QUALITY ANNUAL REPORT 32.

Modular combustors are essentially small mass burn plants and burn mixed trash more slowly than a mass burn plant does. CITIZEN'S CLEARINGHOUSE FOR HAZARDOUS WASTES, INC., SOLID WASTE INCINERATION: THE RUSH TO BURN 46-47 (November 1988) [hereinafter CITIZEN'S CLEARINGHOUSE]. They usually accommodate 5 to 100 tons of waste per day and do not preprocess trash either. 1987-1988 COUNCIL ON ENVIRONMENTAL QUALITY ANNUAL REPORT 33.

Refuse derived fuel plants incinerate only the burnable portion of the waste stream. Shredders, screens, and density classifiers remove metals, glass, and other non-burnable products, which are either recycled or landfilled. The burnable portion may be shaped into pellets and burned in dedicated industrial boilers or co-fired with coal or oil in utility furnaces. *Id.*

though MWCs offer to end our waste management problem, they emit various toxic pollutants that thwart our optimism. The Environmental Protection Agency (EPA) provides little guidance or regulatory control over MWCs even though these combustors disperse large amounts of ash residue and toxic substances into the environment.

This comment addresses the pollution problems of MWCs and regulatory responses to these problems. Part II reviews the regulatory structure of the Clean Air Act (CAA). Focusing primarily on the Prevention of Significant Deterioration program of the CAA and its application to MWCs, Part II finds that state governments can best implement and enforce air pollution standards under the auspices of the federal government. Part III examines the inadequacy of current air pollution standards in light of legislation and the EPA's proposed regulatory program, and Part IV considers the adverse environmental impact of ash generated by MWCs, a problem that the federal government has not properly addressed. Finally, Part V contends that the federal government must aggressively adopt an integrative and preventive approach to environmental risks posed by resource recovery systems; otherwise, municipal incinerators will only contribute to the ultimate problem: our nation's disposable mentality.

II. Regulation of Municipal Waste Combustor Emissions

A. Overview of the Clean Air Act

The Air Pollution Control Act of 1955[5] initially paved the way for today's CAA. While promoting air pollution research under the authority of the Department of Health, Education and Welfare, the 1955 Act left states with actual control of air pollution.[6] The CAA OF 1963[7] and Air Quality Act of 1967[8] further expanded the Act.

The CAA of 1970[9] authorized the EPA to develop and administer a plan for

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The city of Honolulu expects to begin operating its MWC, called H-POWER (*H*onolulu *P*roject *o*f *W*aste *E*nergy *R*ecovery) in 1990. *Council Ready*, *supra* note 3, at col. 1. Capable of burning approximately 570,000 tons of municipal solid waste a year, the plant should generate enough electricity to power 30,000 to 50,000 homes. *Id.* at cols. 1-2.

[5] Air Pollution Control Act, Pub. L. No. 84-145, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 and Supp. V 1987)).

[6] M. Squillace, 3 Environmental Law 41 (1988).

[7] Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C.).

[8] Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485 (1967) (codified as amended in scattered sections of 42 U.S.C.).

[9] Clean Air Act of 1970, Pub. L. No. 91-604, §§ 2-11a, 12-15(a), (c), 84 Stat. 1676-1713 (1970) (codified as amended in scattered sections of 42 U.S.C.).

achieving compliance with the ambient air standards in states that failed to adopt adequate plans, vesting the EPA with power to enforce compliance independent of state influence.[10] Although the 1977 Amendments[11] made substantial changes to the CAA, its basic framework remained.[12]

The CAA created an ambitious regulatory program which aims to assure clean air, while minimally affecting growth and development and distributing the burden of achieving clean air fairly evenly on the responsible parties.[13]

The CAA's regulatory program consists of eight major components: 1) ambient air quality standards for certain types of pollutants called "criteria" pollutants;[14] 2) state implementation plans (SIPs) that seek primarily to attain ambient air quality standards;[15] 3) performance standards for stationary sources;[16] 4) the Prevention of Significant Deterioration (PSD) program aimed at preventing the significant deterioration of "clean air";[17] 5) emission standards for new mobile sources;[18] 6) regulation of fuels and fuel additives;[19] 7) special standards aimed at protecting the stratosphere;[20] and 8) a multifarious enforcement program.[21]

MWCs are subject to review under the Prevention of Significant Deterioration program.[22] The next section focuses on this controversial program and its application to MWCs.

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[10] SQUILLACE, *supra* note 6, at 41.

[11] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in scattered sections of 42 U.S.C.).

[12] SQUILLACE, *supra* note 6, at 41.

[13] *Id.*

[14] 42 U.S.C. §§ 7408-7409 (1982). In general, "criteria" pollutants are air pollutants from diverse sources which the EPA has determined endanger public health or welfare. *Id.* § 7408.

[15] *Id.* § 7410 (1982 and Supp. V 1987). A SIP must provide legal authority for the state agency to regulate air pollution and must list the resources the state agency has made available to carry out the plan. 40 C.F.R. §§ 51.230-51.232, 51.280 (1989). A SIP must also include a plan for achieving compliance with the national ambient air quality standards. *Id.* § 51.110.

[16] 42 U.S.C. § 7411 (1982 and Supp. V 1987). A stationary source is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 7411(a)(3).

[17] *Id.* §§ 7470-7479 (1982).

[18] *Id.* § 7521.

[19] *Id.* §§ 7545-7551.

[20] *Id.* §§ 7450-7459 (1982 & 42 U.S.C.S. Cumulative Supp. 1989).

[21] *See id.* §§ 7413, 7420, 7459, 7477, 7523-7525, 7541, 7545(d), 7603, 7604, 7607 (1982 and Supp. V 1987). *See* SQUILLACE, *supra* note 6, at 41.

[22] 42 U.S.C. §§ 7475(a), 7479(1) (1982).

B. *The Prevention of Significant Deterioration Program: Truly Preventive?*

1. *Enactment and purpose*

Congress added the PSD program to the CAA in 1977[23] after the Sierra Club successfully argued that section 101(b) of the CAA[24] required measures to protect air that was cleaner than the national standards.[25] These regulations established that state and local governments could decide what degradations would be "significant" according to local conditions.[26] Three types of areas were designated with certain "increments" of additional pollution allowed in each.[27] In 1978, the EPA reissued PSD regulations, implementing the PSD program Congress added to the Act in 1977.[28] Environmentalists and industry challenged the regulations;[29] consequently, the EPA published a new set of regula-

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[23] Scattered sections of Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in 42 U.S.C. §§ 7470-7604 (1982 and Supp. V 1987).

[24] One of the purposes of Title I of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (1982 and Supp. V 1987).

[25] Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 256 (D.D.C. 1972), *aff'd sub. nom.*, Fri v. Sierra Club, 412 U.S. 541 (1973) (the district court prohibited the EPA from approving portions of state implementation plans that failed to provide for prevention of significant deterioration of air quality in areas that exceeded the secondary ambient air quality standards). The U.S. Supreme Court's affirmance of the district court's opinion validated the Sierra Club's argument that the Act was to "protect and enhance the quality of the Nation's air resources . . ." *Id. See* 42 U.S.C. § 7401(b)(1) (1982 and Supp. V 1987). The lower court decisions, holding that the EPA was authorized and required to issue implementing regulations, caused the EPA to publish regulations in 1974, placing provisions into each SIP to prevent significant deterioration of air quality. 344 F. Supp. at 253. *See* 39 Fed. Reg. 42,510 (1974).

[26] 40 C.F.R. § 52.21 (1989).

[27] *Id.*

[28] 40 C.F.R. § 51.166 (1989).

[29] Environmentalist groups claimed that the EPA was required to dictate states' policy for managing consumption of allowable increments. The court held that while the EPA had authority to do so, its authority was limited. Alabama Power Co. v. Costle, 636 F.2d 323, 363-364 (D.C. Cir. 1979) (regulations upheld in part and remanded in part).

Industry petitioners argued that § 165(a) of the CAA did not pertain to sources located in nonattainment areas. Section 165(a) states that a PSD permit is required before a major emitting facility "may be constructed in any area to which this part applies." The court sided with the petitioners, reasoning that sections other than § 165 fulfilled the congressional objective of coping with the interstate pollution problem. *Id.* at 364-368.

Industry petitioners, the State of Texas, and the District of Columbia convinced the court to set aside the EPA's uniform baseline date and to reinstate the statutory baseline date. *Id.* at 375.

The court rejected the EPA's regulatory definition of "modification" under § 111(a)(4) of the Act which, unlike the statute, exempted from PSD review any modification that did not increase the potential emission rate of any air pollutant regulated under the Act by either 100 or 250 tons per year. *Id.* at 399-400.

tions on August 7, 1980.[30]

The intent of the PSD program is clear — to prevent as much deterioration of air quality as possible.[31] Specifically, the PSD program aims to 1) protect public health and welfare from actual or potential negative effects of air pollutants that may reasonably be anticipated, even though the national ambient air quality standards have been attained; 2) preserve, protect, and augment the air quality in "areas of special national or regional natural, recreational, scenic, or historic value"; and 3) guarantee that economic growth will occur such that existing clean air resources will be preserved.[32]

By limiting increases in air pollution, the PSD program attempts to attain these purposes.[33] In each area that meets air quality standards for a given pollutant, the program permits an increment of listed increase in the atmospheric concentration of that pollutant.[34] The Act sets increments for two pollutants — particulates and sulfur dioxide.[35] The size of an increment is based on the level of growth that Congress and the state consider desirable for the area, whether it is categorized as Class I, II, or III.[36] Finally, to construct or modify a major source in a PSD area, one must acquire a PSD permit, the main tool used to prevent violations of these increments.[37]

The PSD program compels each SIP to have provisions requiring review of new sources and modifications to existing sources of air pollution.[38] Municipal incinerators capable of processing more than two hundred and fifty tons of

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The EPA's adoption of a qualified form of the "bubble" concept for defining modifications subject to PSD review was challenged. The court rejected the regulation, stating that the EPA lacked the authority to impose procedural requirements on a facility which showed no net increase of any pollutant from contemporaneous alterations. *Id.* at 400-403.

[30] 40 C.F.R. §§ 51.166, 52.21 (1989).

[31] 42 U.S.C. § 7470 (1982).

[32] *Id.*

[33] Terziev, *PSD: New Regulations and Old Problems*, 5 HARVARD ENVIRONMENTAL LAW REVIEW 130, 132 (1981).

[34] 42 U.S.C. § 7473(a)-(b) (1982).

[35] *Id.* § 7473(b).

[36] *Id.* §§ 7472(a) (Class I includes all international parks and large wilderness areas), 7472(b) (Class II includes all other PSD areas), and 7474(a) (states can redesignate Class II areas to Class I or Class III areas).

Id. § 7473(b) (Class I allows the least amount of growth, Class II allows reasonable growth, and Class III allows more concentrated growth).

[37] *Id.* §§ 7475(a), 7479(2)(C), 7411(a)(4).

[38] *Id.* §§ 7471, 7475(a), 7479(2)(C), 7411(a)(4) (1982 and Supp. V 1987). If a state fails to comply, the EPA will assume the state's role. 40 C.F.R. § 52.21(a) (1989) (provisions of this section are incorporated by reference into state implementation plans which have been disapproved because of inadequate PSD provisions for areas of states where existing air quality exceeds the national standards).

waste per day are subject to review.[39] Before constructing such a major emitting facility, the owner or operator must show the following: 1) no violation of the national ambient air quality standards; 2) no violation of the statutory PSD increments for any emission of sulfur dioxide or particulates; and 3) use of the best available control technology for each pollutant under the CAA that the facility emits.[40]

2. *Administration*

How pristine the PSD program manages to keep our nation's air depends partly on who administers the program — the federal or state government. Although states can set air pollution standards that are stricter than the national standards,[41] the federal government can most effectively administer the PSD program.

Under Title I of the CAA, SIPs regulate stationary sources to attain different air quality goals.[42] Because the EPA regulations require SIPs to include PSD provisions,[43] states have either the EPA delegated PSD programs which require the state or district to adopt federal rules by reference,[44] or SIP approved PSD programs which require federal government approval of rules adopted by states or districts.[45]

Under a delegation program, the EPA works closely with the state throughout the permitting process. In Hawaii, the State Department of Health must forward all relevant permit application materials immediately to the EPA following their receipt; the EPA then promptly communicates any comments or

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[39] 42 U.S.C. § 7479(1) (1982). A source is subject to new source review if it falls in one of twenty-eight industrial categories and has the "potential to emit" more than one hundred tons of any pollutant governed by the CAA. *Id.*

[40] *Id.* §§ 7475(a)(3)-(4), 7473(a). Best available control technology is a case-by-case determination of the maximum emission reduction that a facility can meet, considering cost, energy, environmental impacts and other factors. *Id.* § 7479(3).

[41] California *ex rel.* State Air Resources Bd. v. Dep't of Navy, 431 F. Supp. 1271, 1274 (N.D. Cal. 1977).

[42] 42 U.S.C. §§ 7411(a)(1)(C), 7412 (1982 and Supp. V 1987).

[43] *Id.* § 7471 (1982).

[44] Thirty-nine states or districts have delegated PSD programs. Letter from John C. Lewin, M.D., Director of Health, State of Hawaii, to Sen. Mamoru Yamasaki, Chair, Sen. Ways and Means Comm. (Feb. 2, 1989) (responding to a request for a list of all states delegated by the EPA to administer the PSD permit program) [hereinafter "Lewin"].

Hawaii has a PSD delegation agreement with the EPA to implement and enforce the federal PSD program, effective as of August 15, 1983. 48 Fed. Reg. 51,682 (1983). Since then, the EPA has amended the delegation agreement, providing more specific guidance. 54 Fed. Reg. 23,978 (1989) (to be codified at 40 C.F.R. pt. 52) (proposed July 5, 1989).

[45] Lewin, *supra* note 44. Twenty-four states or districts have SIP approved PSD programs. *Id.*

concerns about a pending PSD permit.[46] In contrast, the state permitting authority typically first receives feedback from the EPA at the public notice/hearing stage under the SIP approved plan.[47]

In the delegation program, the applicant faces less risk of added delay and costs than in a SIP approved plan. Because the EPA works closely with the state in the initial permit stage, it can convey any unfavorable comments or potential problems to the applicant at an early point in the permitting process.[48]

A SIP approved program poses difficulty to the state or district in getting program approval. Constantly changing federal regulations impede the approval of SIP approved plans.[49] States must insure that standards remain just as or more stringent than the federal regulations; consequently, SIPs may have to

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[46] 48 Fed. Reg. 51,682 (1983).

[47] Interview with Wilfred Nagamine, State Dep't of Health, Environmental Permits Branch, Supervisor of Air and Solid Waste Permits (Feb. 17, 1989) [hereinafter "Nagamine"]. Industry, however, prefers a SIP approved plan over a delegation program, mistakenly believing that a SIP approved plan gives a state full authority to issue permits without EPA interference. *Id.*

[48] Unfortunately, in Hawaii, the state's refusal to consider the EPA's comments at an early stage cost the applicant time and money, a result more commonly expected in a SIP approved program that withholds any unfavorable responses until the public hearing stage, after detailed permit review. The State Department of Health issued H-POWER's PSD draft permit for public comment on February 3, 1986, absent the EPA's concurrence on its best available control technology determination, which required no sulfur dioxide control. EPA REGION 9, RESPONSE TO PETITION FOR ADMINISTRATIVE REVIEW, IN THE MATTER OF HONOLULU RESOURCE RECOVERY FACILITY, H1-84-01, PSD APPEAL NO. 86-6, U.S. EPA, WASH. D.C. 9 (March 4, 1987) [hereinafter PETITION]. Despite the EPA's request to withdraw the permit and its inability to concur with the state's best available control technology determination, the state proceeded with the public hearing. *See* Letter from Judith E. Ayres, Regional Administrator, Region 9, U.S. EPA, to James K. Ikeda, Deputy Director for Environmental Health, State of Hawaii (Feb. 10, 1986) (ordering immediate withdrawal of H-POWER permit issued in contravention of August 15, 1983 agreement). *See also* Letter from David P. Howekamp, Director of Air Management Division, Region 9, U.S. EPA, to James K. Ikeda, Deputy Director for Environmental Health, State of Hawaii (Feb. 25, 1986) (providing comments on the draft permit proposed for public notice); PETITION, *supra*, at 8. The State Department of Health's understanding of the delegation agreement was that the EPA's concurrence on its best available control technology determination occurs during the signing of the final permit. Telephone interview with Wilfred Nagamine, State Dep't of Health, Environmental Permits Branch, Supervisor of Air and Solid Waste Permits (Oct. 27, 1989) [hereinafter "Nagamine"].

Ultimately, following much discourse between the EPA and the state, the EPA concurred on a best available control technology determination that did not require the installation of scrubbers by signing the November 1986 permit. PETITION, *supra*, at 8-12.

In December 1986, various organizations and individuals successfully challenged the permit; consequently, a final revised permit was issued in November 1987, requiring the installation of additional air pollution control equipment. Challengers of the air quality permit included the American Lung Association of Hawaii, the Sierra Club, and Life of the Land. *Council Ready*, *supra* note 3, at col. 5.

[49] Nagamine, *supra* note 48.

undergo frequent revision — a burdensome process which works against efficient pollution control enforcement.[50] Further, obtaining SIP approval for a PSD program is difficult due to litigation challenging the EPA's determination that state standards are equal to or higher than the federal standards.[51] Thus, the delegated PSD programs will work to the best interests of the permit applicants and provide better safeguards against inefficient administration of the PSD program.

3. Challenges to the PSD program

The goal underlying the PSD program — preventing the deterioration of clean air — clashes with our society's preference to maximize economic growth *until* a pollution problem arises. For example, industry asserts that the PSD requirements fail to protect health and welfare and merely represent philosophical or aesthetic judgments.[52] It argues that government may not restrain degradation of air quality, absent evidence of adverse effects, and that aesthetic concerns represent illegitimate public welfare interests.[53]

Industry's arguments seem to explain Hawaii's relaxation of its ambient air quality standards, which were stricter than the federal standards up until 1986.[54] The state argued that the federal standards[55] it adopted provided an adequate margin of safety to protect public health and welfare and, therefore, that the amended ambient air standards would continue to meet the state's responsibility of protecting these interests.[56]

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[50] Telephone interview with Wilfred Nagamine, State Dep't of Health, Environmental Permits Branch, Supervisor of Air and Solid Waste Permits (March 2, 1989).

[51] Nagamine, *supra* note 47.

[52] Terziev, *supra* note 40, at 139-40.

[53] *See Hearings Before the Subcomm. on Health and the Environment of the [House] Comm. on Interstate and Foreign Commerce: Oversight Hearings on the Clean Air Act*, 96th Congress, 2d Sess. 131 (1980) (statement of the American Paper Institute and the National Forest Products Ass'n).

[54] 40 C.F.R. §§ 50.1 *et seq.* (1989). HAW. ADMIN. RULES § 11-59-4 (amend. 1986) (includes raising the ambient air concentration of suspended particulate matter so as not to exceed the average value of one hundred micrograms per cubic meter of air during any twenty-four hour period to one hundred fifty micrograms per cubic meter of air; for sulfur dioxide, the average ambient air concentration threshold was raised from eighty micrograms per cubic meter of air in any twenty-four hour period to three hundred sixty-five micrograms per cubic meter of air).

[55] 42 U.S.C. § 7409(b)(1)-(b)(2) (1982).

[56] DEP'T OF HEALTH, STATE OF HAWAII, SUMMARY OF PROPOSED SUBSTANTIVE CHANGES, HAW. ADMIN. RULES § 11-59-4 (Oct. 17, 1983) [hereinafter SUMMARY]. While federal standards are health- and welfare-based, the state's standards were specifically tailored toward "environmental cleanliness." Telephone interview with Wilfred Nagamine, State Dep't of Health, Environmental Permits Branch, Supervisor of Air and Solid Waste Permits (Feb. 14, 1989) [hereinafter "Nagamine"]. Therefore, the relaxation of state standards suggests that aesthetic concerns fall outside the public welfare realm.

Although one goal of the PSD program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources,"[57] the public[58] expressed concern that the state was relaxing its ambient air standards to accommodate a few industries and areas presently unable to comply with the standards, while the majority of the state was meeting them.[59]

Maintaining higher ambient air quality standards arguably is welfare-based because a clean environment is best for the economy of a state like Hawaii that depends on tourism for a substantial part of its income.[60] This argument finds further support in the state's environmental policy — to "[c]onserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, *by preserving or augmenting natural resources*, and by safeguarding the State's unique natural environmental characteristics in a manner which will *foster and promote the general welfare* . . . ."[61] (emphasis added).

The state's more stringent standard can also be viewed as providing a greater measure of safety for public health.[62] This is particularly true in the case of sulfur dioxide, where existing studies show adverse effects on asthmatics at levels substantially below the national ambient air quality standards.[63]

Because adoption of the amended ambient air quality standards was proposed in conjunction with adoption of the PSD program, the state reasoned that adoption of the less stringent national ambient air quality standards would not adversely affect Hawaii's air quality. SUMMARY, *supra* note 56.

[57] 42 U.S.C. § 7470(3) (1982).

[58] DEP'T OF HEALTH, STATE OF HAWAII, STATE-WIDE PUBLIC HEARINGS TO CONSIDER REVISIONS TO ADMIN. RULES CHAPTER 11-59, AMBIENT AIR QUALITY STANDARDS, AND CHAPTER 11-60, AIR POLLUTION CONTROL (May 1984) (testimonies: Steven Francis, Chairman, Environmental Health Comm., American Lung Ass'n of Hawaii; George D. Hall, Jr., Chairman, Environmental Health Comm., American Lung Ass'n of Hawaii (Hawaii county); Gary Paul Levinson, Esq., Toxic Coordinator/Regional Legal Counsel, Greenpeace Foundation; Barbara Meierdiericks and Mary Finley, private citizens).

[59] SUMMARY, *supra* note 56. Further, the State Department of Health preferred the national ambient air quality standards as a matter of administrative convenience. If compliance with the state standard was difficult, a facility had the right to request a variance, which the State Department of Health processed accordingly. Because the state standards were not health-based, it was difficult for the state to refuse a variance. Thus, the relaxed but health-based standards in conjunction with the PSD provision, all but eliminated any further requests for variances. Nagamine, *supra* note 47.

[60] Interview with James Morrow, American Lung Ass'n, Director of Environmental Health (Feb. 16, 1989).

[61] HAW. REV. STAT. § 344-3(1) (1985).

[62] Telephone interview with James Morrow, American Lung Ass'n, Director of Environmental Health (October 31, 1989).

[63] Shepard, *Exercise Increases Sulfur Dioxide-induced Bronchoconstriction in Asthmatic Objects*, 123 AMERICAN REVIEW OF RESPIRATORY DISEASE 486-91 (1981). *See* 40 C.F.R. §§ 50.4-50.5 (1989).

The ambient air standard is a significant part of the preconstruction review process because an applicant must demonstrate it will not violate the national ambient air quality standards.[64] Because states, like Hawaii, may choose to adopt stricter pollution control requirements than the EPA standards in their SIPs,[65] it is the states that need to adopt affirmative policies which make "environmental cleanliness" a legitimate state objective. In the alternative, the national ambient air quality standards' threshold for health and welfare should be raised to reflect a truly preventive approach to preserving clean air.

III. Inadequate Air Emission Standards for MWCs

A. Lack of Regulations

Under the CAA, only general restrictions applicable to stationary sources govern emissions from MWCs.[66] Thus, while the CAA regulates sulfur dioxide, particulate matter, carbon monoxide, nitrogen dioxide, ozone and lead,[67] other toxic metals, such as mercury, or dangerous organic chemicals, such as dioxin, are released freely.[68] In 1987, the EPA announced its intent to start regulating emissions from new or modified MWCs under section 111(b) of the CAA,[69] but to date it has not issued any regulations.

Lack of federal regulations on MWC emissions endangers public health and welfare. For example, when the city of Honolulu applied for a PSD permit,[70] Region 9 of the EPA determined that the best available control technology for H-POWER required the installation of scrubbers to control sulfur dioxide.[71] When the State Department of Health firmly rejected the EPA's best available control technology determination, the EPA consented to the state's less stringent determination.[72] The EPA acquiesced to prevent further delay of H-POWER,

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[64] 42 U.S.C. § 7475(a)(3)(B) (1982).

[65] California *ex rel.* State Air Resources Bd. v. Dep't of Navy, 431 F. Supp. 1271, 1274 (1977, ND Cal).

[66] *Control of Air Pollution from Municipal Waste Incinerators: Hearings Before the Subcomm. on Health and the Environment, House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 2 (1987) [hereinafter *Air Pollution Hearings*] (statement of Henry Waxman, Chairman).

[67] 40 C.F.R. §§ 50.4-12 (1989).

[68] *Air Pollution Hearings*, *supra* note 66, at 2.

[69] 52 Fed. Reg. 25,399 (1987) (to be codified at 40 C.F.R. pt. 60) (proposed July 7, 1987). Section 111(b)(3) provides: "The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section."

[70] Petition, *supra* note 48, at 6.

[71] *Id.* at 8.

[72] *Id.* at 9-11.

which it viewed as central to solving Hawaii's solid waste management needs.[73] The fact that the final determination allowed a twenty-five percent sulfur dioxide control when almost every other project in Region 9 was required to have eighty to ninety percent sulfur dioxide control[74] — the control efficiency a dry scrubber would possess[75] — suggests that the EPA succumbed to political pressure from Hawaii officials in affirming the final determination.[76] Absent specific regulations on MWC emissions, the EPA is free to relax the best available control technology standard for air pollution controls in order to expedite the air quality permitting process in other situations.

The EPA's failure to promulgate MWC emission standards also hurts the permit applicant. In Hawaii, because the city's initial PSD permit failed to specify the use of a scrubber to control sulfur dioxide, the EPA administrator remanded to Region 9 its concurrence on the permit for H-POWER.[77]. The remand resulted in a one year delay and additional costs of approximately $20 million[78] before the final permit was issued in November 1987.[79]

The experience had one positive effect — it helped spur the EPA into issuing operational guidance for new sources.[80] To advance consistent control regulations over MWCs and lessen delay and confusion in the permitting process, the guidance established acid gas scrubbers plus fabric filter or scrubbers plus electrostatic precipitators as the best available control technology standard for MWCs.[81] While the guidance provides state and local permitting agencies with a standard in reviewing best available control technology determinations, it lacks the authority to assure immediate use of effective control technologies[82] as would the implementation of section 111 standards.

B. Insufficiency of the EPA's Proposed Regulations

In 1987, Representative James Florio[83] of New Jersey responded to the EPA's lethargy in promulgating regulations for MWC emissions by introducing

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[73] *Id.* at 10.

[74] *Id.* at 19.

[75] *Id.* at 8.

[76] *Id.* at 12-13.

[77] *Air Pollution Hearings*, *supra* note 66, at 32 (statement of Don Clay, the EPA).

[78] HONOLULU CITY COUNCIL, STATE OF HAWAII, H-POWER: ENERGY TOO GOOD TO WASTE (H-POWER Workshop) 27 (Nov. 20, 1987).

[79] *Council Ready*, *supra* note 3, at col. 5.

[80] 52 Fed. Reg. 25,399, 25,406 (1987) (to be codified at 40 C.F.R. pt. 60) (proposed July 7, 1987).

[81] *Id.*

[82] *Air Pollution Hearings*, *supra* note 66, at 52 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[83] James Florio has been serving as the Governor of New Jersey since 1989.

legislation to amend the CAA.[84] The bill required the EPA to (1) set MWC emission standards for about two dozen toxic pollutants, including dioxins, polychlorinated biphenyls, lead and other toxic substances; (2) base its emission standards on application of the best technology currently available; (3) set emission standards within one year of the bill's enactment; (4) apply air emission standards to existing as well as new facilities on a schedule the EPA establishes; and (5) set air emission monitoring requirements for incinerators.[85]

Florio's bill has not been enacted, and the EPA has ignored it in light of its forthcoming regulations on MWC emissions. According to the EPA, section 111 of the CAA requires the best proven technological system(s) of continuous emission reduction for MWCs. Factors to be weighed include costs, any non-air quality health and environmental effects, and energy requirements, reflecting emission limits and quantitative requirements for monitoring.[86] The EPA claims that its proposed regulations recognize that "potential health and welfare impacts of MWC emissions span a broad range of concerns,"[87] but its rejection of Florio's legislation reveals an overriding concern that industry operates with the least cost possible at the expense of health and welfare.

First, the EPA asserts that its proposed regulatory program will protect adequately the public and environment and that it surpasses Florio's bill in minimizing implementation costs, in the reasonableness of its specific control requirements, and in keeping the combustion option for waste management alive.[88] Convinced that setting individual performance standards for all twenty-six pollutants is too burdensome and time-consuming, the EPA proposes setting standards for a small number of key emission constituents because the best control stragegy for one may be the same for another.[89] It rationalizes that some pollutants lack emissions data and that the expense of gathering the data outweighs the "minor" health and welfare effects to be gained from the information.[90] By seeking to minimize costs, however, the EPA disregards the health risks posed by different pollutants. Moreover, the ever-changing nature of technology mandates setting standards for *each* pollutant because a new technology may decrease the impact of a specific pollutant which lacks an individual performance standard. Without such a standard, the EPA will struggle to enforce the use of the new technology as the best available control technology.

Second, the EPA would not require all MWCs to install nitrogen dioxide

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[84] H.R. 2787, 100th Cong., 1st Sess. (1987).

[85] *Id.*

[86] *Air Pollution Hearings*, *supra* note 66, at 41 (statement of Don Clay, the EPA).

[87] 52 Fed. Reg. 25,399, 25,406 (1987) (to be codified at 40 C.F.R. pt. 60) (proposed July 7, 1987).

[88] *Air Pollution Hearings*, *supra* note 66, at 43 (statement of Don Clay, the EPA).

[89] *Id.* at 44.

[90] *Id.*

control technology, reasoning that MWCs contribute less than one-half percent of the total national nitrogen dioxide emissions and that the required technology is costly.[91] The EPA estimates, however, that as many as four hundred incinerators may be burning one-third or more of the country's solid waste by the year 2000.[92] Thus, nitrogen dioxide emissions from MWCs will contribute significantly to the nation's total nitrogen dioxide emissions, making current control of nitrogen dioxide pollution essential.

Finally, the EPA claims it will not mandate as frequent monitoring of some MWC emissions as Florio's bill would.[93] Under Florio's bill, opacity, hydrogen chloride, sulfur dioxide, nitrogen oxides, and various indicators of combustion efficiency would be monitored continuously. The remaining twenty-six pollutants would be periodically monitored.[94] The EPA reasons that a single compliance test for all pollutants listed in the bill could run up to $150 thousand, while the EPA's program will assure "reasonable compliance" while avoiding "unreasonable costs."[95]

The risks to human health and the environment without frequent monitoring of dangerous pollutants, such as nitrogen dioxide and sulfur dioxide, substantially outweigh the costs of compliance tests. For instance, both nitrogen dioxide and sulfur dioxide produce smog and acid rain, which irritate the eyes and respiratory system.[96] Sulfur dioxide also causes acid fog problems.[97]

Further, the EPA fails to consider the international dimension of acid rain by limiting the risks of our nation's pollution to the United States. Measurements at incinerators worldwide demonstrate that these facilities emit considerable amounts of sulfur dioxide, nitrogen dioxide and other acids.[98] Additionally, although the EPA has left blank the extent of monitoring it will require to assure "reasonable compliance," infrequent monitoring provides little incentive for compliance.

Because garbage incinerators initially developed in Europe,[99] and Europeans have had more experience burning garbage in densely populated areas than Americans,[100] European regulations governing MWCs serve as an influential guide. European countries impose stricter regulations for incineration than the

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[91] *Id.* at 44-45.

[92] *Air Pollution Hearings*, *supra* note 66, at 23 (statement of Rep. James Florio).

[93] *Air Pollution Hearings*, *supra* note 66, at 46 (statement of Don Clay, the EPA).

[94] *Id.*

[95] *Id.*

[96] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 11.

[97] *Id.*

[98] *Air Pollution Hearings*, *supra* note 66, at 57 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[99] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 7.

[100] *Europeans Disagree Over Dioxin from Burnt Garbage*, 6 INFORM REPORTS 4 (Jan./Feb. 1986).

United States does. For example, since the EPA published standards for incinerators in 1971, it has not developed new standards or upgraded existing emission standards for MWCs.[101] West Germany, in the meantime, has changed and upgraded its standards for MWCs three times.[102] Sweden has set strict emissions guidelines for mercury, hydrogen chloride, and 2,3,7,8-tetrachlorodioxin (a dioxin) which pertain to all new plants.[103]

The EPA's philosophy of assuring "reasonable compliance" while avoiding "unreasonable costs" suggests that industry has convinced the EPA that adopting Swedish standards will put industry out of business.[104] Confirming its support of industry as opposed to the public's interest, the EPA criticizes setting performance standards which will force communities to initiate recycling programs.[105] If a community, however, pursues recycling or other waste management options because compliance with MWC regulations is too expensive, such action only proves the true cost of protecting health and the environment.

C. Protecting Health and the Environment

By solely trusting a technology-forcing mechanism to provide safeguards against air pollution emissions, both the EPA and Florio's bill neglect the health consequences of MWC pollutants. Infatuated with technology, the EPA has overlooked the dangerous effects of metals which are sent into the gas phase by temperatures in modern incinerators.[106] Research at the Norwegian Technological University SINTEC Institute shows that as much as ninety-one percent of the mercury, twenty-eight percent of the cadmium, and twelve percent of the lead present in the trash prior to incineration exist in stack gas emissions *after* particulate control.[107]

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[101] R. Egdall, Air Quality Permitting, presented at the Seventh Annual Resource Recovery Conference 1 (1988).

[102] *Id.*

[103] Repa, *Why the Swedish Moratorium Was Ended*, WASTE AGE, November 1986, at 90. These standards were set after Sweden banned construction of new waste-to-energy facilities in 1985; the facilities were suspected of contributing heavily to the high dioxin levels found in fish and mother's milk. *Id.*

[104] *See id.* Viewed as a deterrent to new plant construction, Swedish standards regarding 2,3,7,8 tetrachlorodioxin (a dioxin), hydrogen chloride and mercury have been subject to controversy in the U.S. *Id.*

[105] *Air Pollution Hearings*, *supra* note 66, at 45 (statement of Don Clay, the EPA).

[106] *Air Pollution Hearings*, *supra* note 66, at 60 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[107] *Id.* Dr. Paul Connett, Professor of Chemistry at St. Lawrence University, describes pollution control of MWC emissions as a catch-22 situation because conditions conducive to controlling one pollutant may be ineffective for controlling another. For instance, raising the temperature is usually the best way to destroy many organic compounds but the worst way to control emis-

Instead of relying totally on best available control technology to minimize pollution effects, a health-based approach would force the EPA to examine MWC emissions in their various forms, their sources, and their precise effects in regulating MWC emissions.[108] For instance, highly toxic, unburnable metals such as lead, cadmium, arsenic, mercury, beryllium, selenium and chromium induce damage to the nervous system and to various organs.[109] While enclosed in consumer goods, these metals pose minimal harm, but burning them in waste releases them more freely into the environment, endangering the public health.[110]

Another pitfall to burning waste is that the combustion process itself produces dioxins and furans,[111] some of the most toxic man-made substances.[112] Reducing the hazards of these substances, then, requires minimizing the incineration of waste.[113]

Air pollution devices provide limited health-based protection from MWC emissions. Biological markers could insure adequate protection by disclosing the existence of pollutants within the body.[114] This method would indicate a popu-

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sions of toxic metals. Oja, *Ill-Conceived Landfill. Recycling Necessary for the Environment*, The Hudson Valley Green Times, 1986, at 5, col. 1.

[108] *Air Pollution Hearings*, *supra* note 66, at 57 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[109] *Id.*

[110] *Id.* at 59. In consumer goods, most metals are enclosed within various matrices — within polymers of certain plastics which use lead, zinc, tin and cadmium as catalysts or in magazines and papers which contain lead-based and cadmium-based pigments. *Id.* While in these matrices, the metals release into the environment slowly; however, burning these products releases uncombustable metals and reduces the size of the final matrix significantly. *Id.* Such metals displace to the outside of the resulting ash particle. Nationwide tests reveal that these metals tend to leach due to their reduced size. *Id.* at 60. Further, humans can inhale, ingest, or absorb small particles of fly ash either in the air or after they settle in the environment. *Id.*

[111] *Id.* at 58.

[112] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 3. Dioxins cause skin rashes, lower the body's defenses, and produce reproductive disorders, liver disease, and kidney cancer. U.S. EPA, EPA HEALTH ASSESSMENT DOCUMENT FOR POLYCHLORINATED DIDENZO-P-DIOXINS (1985), *cited in* CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 12-13. Furans closely resemble dioxins and cause similar health damage. CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 13.

[113] Studies reveal that dioxins and furans concentrate in the food chain after they leave the stack — another reason to eliminate these substances from the incineration process. SWISS FEDERAL OFFICE FOR PUBLIC HEALTH, BULLETIN NO. 8, 66-69 (1985), *cited in* CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 14. In Switzerland, for instance, cows grazing near garbage incinerators had five times as much dioxins and furans in their milk as cows unexposed to plant emissions. *Id.* Consequently, siting could significantly reduce the risk of exposure, especially because opposition to incinerators in urban areas has made rural areas more attractive incinerator targets. CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 15.

[114] *Air Pollution Hearings*, *supra* note 66, at 73 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

lation's degree of exposure by testing for levels of lead in the blood and levels of dioxin in blood lipids,[115] breastmilk fat, or adipose tissue.[116] This health-based standard would complement, and not replace, proposed technological standards.[117] In sum, the biological markers would assure that the technology-based regulations and legislation accomplish the primary goal of the CAA — protection of health and environment, not industry.

IV. INADEQUATE ASH MANAGEMENT

A. The Ash Problem

Ash produced by MWCs also threaten public health. MWCs produce two types of ash: fly and bottom ash. Bottom ash consists of large particles which remain after incineration, while fly ash consists of small particles, composed of "airborne particulates that leave the furnace with emission gases."[118] Because fly ash contains more potential pollutants than bottom ash, including complex organic compounds,[119] its potential to adversely affect the environment exceeds that of bottom ash. Further, fly ash has a higher concentration of key contaminants, such as metals, and its small particle size makes it susceptible to leaching.[120]

The Resource Conservation and Recovery Act of 1976 requires any waste that shows a "hazardous character" to be managed as a hazardous waste.[121]

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[115] Lipids *or* fats and fatlike materials generally are insoluble in water and, together with proteins and carbohydrates, compose the main structural material of living cells. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1978).

[116] *Air Pollution Hearings*, *supra* note 66, at 71 (statement of Ellen K. Silbergeld, the Environmental Defense Fund). Adipose tissue is the body's connective tissue, containing stored cellular fat. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1978). *See also Air Pollution Hearings*, *supra* note 66, at 73 (statement of Ellen K. Silbergeld, the Environmental Defense Fund) (stating that lead and dioxin represent substantial risks and are conducive to biological monitoring, making them ideal for this type of testing).

[117] *Id.* at 76.

[118] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 15; McNurney, Couppis, & Steinzor, *Municipal Incinerator Ash — Technical and Regulatory Trends*, in NATIONAL WASTE PROCESSING CONFERENCE 133 (1988) [hereinafter "McNurney"].

[119] McNurney, *supra* note 118, at 133.

[120] *Id. Municipal Waste Disposal Crisis: Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials, House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 52 (1987) [hereinafter *Municipal Waste Hearings*] (testimony of the Environmental Defense Fund on the environmental hazards of ash from incineration of municipal solid waste). Leaching is the process in which a percolating liquid dissolves and washes out the soluble constituents of a substance. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1978).

[121] Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6921 (1982 and Supp. V 1987). *See also* 40 C.F.R. §§ 261.1 *et seq.* (1989).

Consequently, if enough toxic metals are present in ash, causing it to fail the extraction procedure toxicity test,[122] the ash will be designated as a hazardous waste.[123] The EPA, however, questions its authority to regulate ash as a hazardous waste under subtitle C of the Resource Conservation and Recovery Act,[124] which concerns hazardous waste management. The EPA reads the legislative history of section 3001(i) of the Act[125] to possibly exempt ash produced by MWCs that burn solely household hazardous waste and other non-hazardous wastes.[126]

Although the EPA has expressed its intention to provide a comprehensive plan for dealing with MWC ash disposal,[127] it has yet to provide any relevant regulations. Instead, the EPA relies on engineering techniques such as ash monofills — landfills that exclusively contain ash — to dispose of ash.[128] Consequently, MWC operators have ignored the possibility that ash may be hazardous[129] despite recent test data showing that ash often contains heavy metals in toxic concentrations.[130]

In 1988, Representative James Florio[131] introduced a bill[132] to mandate disposal of ash as hazardous waste unless the EPA developed treatment standards

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[122] In the extraction procedure toxicity test, the waste sample is separated into its solid and liquid components. The solid part of the waste sample is placed in slightly acidic water that is monitored for twenty-four hours. (If, after separation, however, the solid residue is less than 0.5% of the original weight of the waste, the liquid phase is treated as the extract; no extraction procedure is needed.) The separated and extracted liquid are combined and analyzed for contaminants listed in Table I of 40 C.F.R. § 261.24 (1989). 40 C.F.R. § 261 Appendix II (1989).

If the liquid extract from the waste sample contains any of the contaminants listed in Table I at a concentration equal to or greater than the respective value in the Table, the solid waste is considered toxic. 40 C.F.R. § 261.24 (1989).

[123] 40 C.F.R. 261.20(a) (1989).

[124] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6921-31 (1982 and Supp. V 1987).

[125] H. CONF. REP. NO. 98-1133, 98th Cong., 2d Sess. 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5677. The Senate amendment exempts an energy recovery facility from hazardous waste requirements "if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." *Id.*

[126] *Municipal Waste Hearings*, *supra* note 120, at 127 (letter from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, the EPA).

[127] *Id.*

[128] *Id.*

[129] *Municipal Waste Hearings*, *supra* note 120, at 52 (testimony of the Environmental Defense Fund).

[130] *Id.*

[131] *See supra* note 83.

[132] H.R. 2517, 100th Cong., 2d Sess. (1988). Although Florio's bill has not been enacted, it delineates the weaknesses in existing law for handling ash and suggests that unless legislation which specifically addresses the toxic potential of ash is passed, public health stands unguarded.

for such residue.[133] The bill was intended to coerce the EPA into effectuating systematic new regulations concerning disposal of ash residue on a tight statutory schedule.[134] The bill has not passed, and, to date, the EPA has not promulgated treatment standards for ash.

Because testing is required before ash can be deemed to be hazardous,[135] the Environmental Defense Fund has begun pressuring MWC operators to regularly test their ash, threatening to sue incinerator owners and operators who fail to test their ash routinely.[136] In response to the Environmental Defense Fund's campaign, the EPA announced what appears to be an affirmative testing obligation:

> Operators of municipal incinerators should not assume that their wastes are automatically exempt from federal and state hazardous waste regulations . . . EPA's position has been and remains that fly ash and bottom ash which are determined to be hazardous must be managed as hazardous wastes. It is the legal obligation of facility operators to determine whether their waste streams are hazardous.[137]

In spite of this announcement, the EPA has left MWC operators ignorant of any legal ash testing obligation.

Many MWC operators fear testing their ash because a "hazardous" designation could mean the shut down of their incinerators due to limited hazardous waste landfills.[138] Some operators of MWCs mix fly ash with the less toxic bottom ash in an effort to reduce the toxicity of the fly ash.[139]

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[133] McNurney, *supra* note 118, at 132.

[134] *Id.*

[135] 40 C.F.R. § 262.11(c)(1) (1989).

[136] McNurney, *supra* note 118, at 132.

[137] EPA OFFICE OF PUBLIC AFFAIRS, EPA STATEMENT ON ENVIRONMENTAL DEFENSE FUND PRESS RELEASE (A-107) 1 (March 12, 1987), *cited in* McNurney, *supra* note 118, at 135-36.

[138] McNurney, *supra* note 118, at 136.

[139] *Municipal Waste Hearings*, *supra* note 120, at 57-58 (testimony of the Environmental Defense Fund). Because fly ash is not specifically listed as a hazardous waste under federal regulations, it escapes subjection to the Resource Conservation and Recovery Act mixture rule. 40 C.F.R. § 261.3(a)(2)(iii) (1989), *amended by* 54 Fed. Reg. 36,592, 36,641 (1989). *See* 40 C.F.R. §§ 261.30 *et seq.* (1989). Under the rule, generators of listed hazardous wastes cannot escape compliance with subtitle C regulations merely by mixing such wastes with nonhazardous wastes to dilute their toxicity. *Municipal Waste Hearings*, *supra* note 120, at 57-58 (testimony of the Environmental Defense Fund). Even combined ash, however, has failed the extraction procedure toxicity test, although not as frequently as the fly ash. ENVIRONMENTAL DEFENSE FUND, SUMMARY OF EXTRACTION PROCEDURE TOXICITY TEST DATA ON MSW INCINERATOR ASH (May 1989); J. KNUDSON, STUDY OF MUNICIPAL INCINERATION RESIDUE AND ITS DESIGNATION AS A DANGEROUS WASTE 1 (August 1986). Typical combined ash from MWCs contain about two parts per thousand of lead, approximately four times the maximum amount permitted in paint since 1973. *Municipal Waste Hearings*, *supra* note 120, at 53 (testimony of the Environmental Defense Fund).

The current practice among MWC operators is simply to treat ash as regular garbage and dump it in municipal landfills or, in some cases, in ashfills or monofills.[140] Absent specific laws or federal regulations regarding testing and disposal of ash residue from MWCs, this practice will continue.[141]

B. *Need for Strict Controls*

Clearly, the EPA needs to promulgate regulations concerning ash testing and disposal, but a more basic problem concerns the extraction procedure toxicity test itself. The high levels of toxic metals found in ash that passes the toxicity test call for a new test.[142] In determining solubility of toxic metals in slightly acidic water, the toxicity test disregards the wide range of leaching conditions found in municipal landfills where most ash is dumped. These conditions include the increase of leaching potential caused by decomposition of landfill waste, the presence of other complex matter, and the chemical effects that occur beyond the twenty-four hour test.[143] The leaching test also falls short by measuring only potential ground water contamination, ignoring exposure to substances still attached to ash particles that cause harm via direct inhalation or ingestion of polluted water, dust, or soils.[144]

The EPA also must establish stringent standards regarding the use of scrubbers and fabric filters for controlling MWC stack emissions because particle-enriched ash that is trapped by scrubbers and fabric filters contains a much higher degree of metals than ash trapped by electrostatic precipitators only.[145] The EPA's operational guidance[146] and Representative Florio's proposal[147] call

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[140] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 15.

[141] Honolulu plans to dispose of its H-POWER ash in a lined monofill because, based on pending federal legislation and industrial newsletters, city officials understand that ash need not be tested if it is deposited in a monofill. Interview with Roy Takara, Dept. of Public Works, City and County of Honolulu, Energy Recovery Engineer (Feb. 15, 1989) [hereinafter "Takara"]. The Environmental Health Specialist of the State Hazardous Waste Program acknowledges that the H-POWER operator would not be legally obligated to test its ash because the EPA has yet to develop rules requiring ash to be tested for toxicity. Interview with Grace Marcos, Environmental Health Specialist, Hazardous Waste Program, State of Hawaii (Oct. 23, 1989).

[142] *Municipal Waste Hearings*, *supra* note 120, at 55 (testimony of the Environmental Defense Fund).

[143] *Id.*

[144] *Id.* at 55-56.

[145] The Canadian Government National Incinerator Testing and Evaluation Program, *noted in Air Pollution Hearings*, *supra* note 66, at 69 (testimony of Ellen K. Silbergeld, the Environmental Defense Fund).

[146] 52 Fed. Reg. 25,399, 25,406 (1987) (to be codified at 40 C.F.R. pt. 60) (proposed July 7, 1987).

[147] H.R. 2787, 100th Cong., 1st Sess. (1987).

for the EPA's prompt action because both require scrubbers and fabric filters for controlling MWC stack emissions.[148]

Until the EPA proclaims whether incinerator ash should be deemed a hazardous waste or not, how should industry dispose of it? Under Representative Florio's bill,[149] most ash would be disposed of in hazardous waste landfills due to the bill's conservative testing procedures and stringent restrictions on ash mixing and treatment.[150] Such strict standards appear to protect the public's best interest but would mean consuming limited space in hazardous landfills.[151] Further, under these standards, ash that marginally passes the toxicity test would be disposed of in non-hazardous waste landfills. Typically unlined, having limited siting constraints, and minimally monitored, such landfills increase the risk of ground water contamination or dermal contact with the ash.[152]

The alternative — disposing *all* the ash in ordinary landfills that use double liners, leachate collection systems, landfill caps and siting restrictions specially tailored for ash disposal — would still require use of landfilling space that is nearly depleted.[153] Further, even "state of the art" double lined landfills will leak.[154]

The high risk of ash contamination from nonhazardous waste landfills compels industry to dispose of ash that fails the extraction procedure toxicity test in hazardous waste landfills. To prevent ash which marginallly passes the toxicity test from being dumped in regular, poorly protected landfills, the EPA must insure that the toxicity test provides a sufficient margin of safety.

Representative Florio's legislation would have reached beyond the scope of the extraction procedure toxicity test and adopted a broader approach to measuring pollution from MWCs, thereby requiring the EPA to develop criteria for determining ash "hazards."[155] The bill would have required the EPA to develop such criteria by weighing current as well as potential effects and all possible means of human or environmental exposure including inhalation and ingestion.[156] This comprehensive approach sought to halt ongoing practices of handling ash as a nonhazardous waste, such as hauling ash to municipal solid

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[148] *See Air Pollution Hearings*, *supra* note 66, at 69 (testimony of Ellen K. Silbergeld, the Environmental Defense Fund).

[149] H.R. 2517, 100th Cong., 2d Sess. (1988).

[150] McNurney, *supra* note 118, at 137.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Montague, *Hazardous Waste Landfills: Some Lessons From New Jersey*, JOURNAL OF AMERICAN SOCIETY OF CIVIL ENGINEERS 54 (September 1982); CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 177-84 (1983).

[155] McNurney, *supra* note 118, at 136.

[156] *Id.*

waste landfills in uncovered trucks and using ash to fill wetlands, as landfill cover, or as de-icing grit on public roads.[157]

In conclusion, the additional burden Representative Florio's bill imposes on hazardous waste landfills hardly warrants classifying ash residue — which possesses characteristics of hazardous waste — as nonhazardous. Instead, this strain on dwindling hazardous waste landfill space should incite the government and public to reduce the creation of ash in the first place. Finally, lack of any foolproof protection against ash contamination should further provide an incentive to discourage the creation of ash.[158]

V. AN INTEGRATIVE, PREVENTIVE APPROACH TO MWC POLLUTION

A. Recycling

The risks associated with MWC pollutants demand that the government recognize the link between air, land, and water pollution in order to protect public health and welfare in the best manner. Although the EPA requires controls for toxic emissions, it fails to address incinerator ash disposal, thereby transferring the risks from one point of release to another.[159] Thus, lead from a MWC may not pass into the air, but it may seep into groundwater through leaching of ash particles.

Reducing rather than transferring the risk of pollutants from one medium to another is a challenge facing the EPA.[160] Under current federal regulations, resource recovery facilities often burn trash only to transfer pollutants to the air or into ground water. By minimizing the need to burn trash, recycling could greatly reduce the risk of MWC pollutants.

Often called "resource recovery" systems, incinerators which convert trash into energy may easily be mistaken for recycling plants by virtue of their name alone.[161] In reality, these incinerators typically reduce trash weight from sixty to

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[157] *Municipal Waste Hearings*, *supra* note 120, at 55 (testimony of the Environmental Defense Fund). In Long Island, New York, several thousand tons of ash have been used under roadways. Slatalla, *The 'Trash' of Incineration*, Newsday, December 15, 1987, at 29, col. 1 (reprint).

[158] For instance, tests the Environmental Defense Fund performed on fly and combined ash involved more than twenty facilities, using a wide range of both combustion and pollution control technology including several state of the art incinerators. *Municipal Waste Hearings*, *supra* note 120, at 55 (testimony of the Environmental Defense Fund). Test results revealed that the type of technology used does not affect ash toxicity. *Id.*

[159] *Air Pollution Hearings*, *supra* note 66, at 69 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[160] Gruber, *Are Today's Institutional Tools Up to the Task?*, EPA JOURNAL, Nov./Dec. 1988, at 5.

[161] CITIZEN'S CLEARINGHOUSE FOR HAZARDOUS WASTES, INC., RECYCLING . . . THE ANSWER TO OUR GARBAGE PROBLEM 56 (May 1986) [hereinafter RECYCLING]. Although "resource recovery"

seventy-five percent, leaving twenty to forty percent as ash that still requires disposal.[162] Refused derived fuel systems like H-POWER convert approximately seventy percent of garbage to fuel, and the remaining thirty percent is landfilled,[163] leaving a very small percentage for recycling. In contrast, many successful recycling programs have managed to achieve between thirty and forty percent volume reduction, while others have achieved up to seventy to eighty percent reduction.[164]

Economically, local governments will pay at least $50 million for a small incinerator, while a successful recycling program with comparable results can run on a budget of $100 thousand to $250 thousand.[165] Recycling presents an attractive option for a city like Honolulu which forsees its plant's twenty year operational costs soaring as high as $785 million due to costs of pollution control equipment, interest on borrowed funds and delay costs.[166] And, in fact, city officials' prediction that all existing landfills will reach capacity level by 2004 has prompted legislators to introduce recycling proposals.[167]

The situation in Honolulu confirms the evolving EPA policy that environmental legislation needs to be prevention-oriented. Besides regulating the disposal of waste, legislation should primarily aim toward preventing its creation in the first place. Attempts to dispose of waste through incinerators leave pollution in forms other than solid waste, such as ash, or create new forms, such as dioxins, in the process. On the other hand, recycling poses no additional environmental hazards and its costs translate into separation of recyclable materials in the home, educating the public on recycling benefits, attending to the maintenance and quality of recyclable materials, and expanding markets to use, re-

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once referred to the recovery of valuable resources from scrap metal and electroplating, the energy crisis shifted its focus to energy conservation. Rather than recycling, then, burning refuse to generate steam for electricity became the primary goal of resource recovery systems. *Id.* at 56-57.

[162] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 8-9.

[163] RECYCLING, *supra* note 161, at 57. Specifically, eighty percent of the incoming refuse (by weight) will be converted to fuel; about five and one-half percent will be recovered as ferrous scrap; about eleven percent will be non-combustible residue that is transported to the landfill, and three and one-half percent will be lost as moisture to the air. DEP'T OF PUBLIC WORKS, CITY AND COUNTY OF HONOLULU, H-POWER ENVIRONMENTAL IMPACT STATEMENT, Chapter II, at 27 (August 1983).

[164] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 9. For instance, one hundred families volunteered in a pilot recycling program in East Hampton, New York, which reduced ordinary household waste eighty-four percent by weight. Center for the Biology of Natural Systems, Intensive Recycling: Preliminary Results from East Hampton and Buffalo, presented at the Fourth Annual Conference on Solid Waste Management and Materials Policy 2, 9 (January 27-30, 1988).

[165] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 9. *See also* Telephone interview with Brian Lipsett, Citizen's Clearinghouse for Hazardous Wastes, Inc. (March 5, 1990).

[166] *Council Ready*, *supra* note 3, at col. 3.

[167] *Legislators Draft Trash Bills by the Dozen*, The Honolulu Advertiser, January 27, 1989, at A-21, col. 1 [hereinafter *Legislators Draft*].

.cover, and recycle collected materials.[168]

B. *Impediments to Recycling*

The absence of nationally-based markets for secondary materials blocks the implementation of recycling programs; consequently, the nation lags in its commitment to recycling.[169] As the Hawaii legislature considered recycling legislation in the 1989 session, the legislation's success revolved around developing a marketing strategy.[170] Since the early 1970's, the federal government has supported policies encouraging the use of virgin materials versus secondary ones.[171] The EPA, however, shows progress in reversing this trend through its promulgation of rules regarding federal procurement of materials containing recycled products.[172] A policy urging the government to purchase recycled paper products whenever possible lends hope that Hawaii may develop a market for recycled materials as well.[173]

"Flow control" presents another potential impediment to recycling. Because incinerators often need a large and continuous amount of waste to operate at optimum efficiency, recycling tends to work against incinerators by reducing the amount of burnable wastes.[174] Paper and plastics are especially valued for their high heat value.[175] "Flow control" agreements typically protect incinerator operators from having to compensate for the material lost to recycling. In such agreements, the municipality must insure that the incinerator has sufficient trash to allow optimum productivity.[176] Honolulu has such an agreement with the

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[168] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 10.

[169] *Municipal Waste Hearings* , *supra* note 120, at 323 (testimony of Pamela K. Day, Deputy Director, City of Tampa Sanitation Dep't and International Vice President, Refuse Collection and Disposal Ass'n).

[170] *Legislators Draft*, *supra* note 165, at cols. 2-4.

[171] *Municipal Waste Hearings*, *supra* note 120, at 323 (testimony of Pamela K. Day, Deputy Director, City of Tampa Sanitation Dep't and International Vice President, Refuse Collection and Disposal Ass'n).

[172] *See* Guideline for Federal Procurement of Paper and Paper Products Containing Recovered Materials, 40 C.F.R. pt. 250 (1989); Guideline for Federal Procurement of Lubricating Oils Containing Re-refined Oil, 40 C.F.R. pt. 252 (1989); Guideline for Federal Procurement of Retread Tires, 40 C.F.R. pt. 253 (1989); and Guideline for Procurement of Building Insulation Products Containing Recovered Materials, 40 C.F.R. pt. 248 (1989).

[173] *See* H.R. Res. 66, 15th Haw. Leg., Reg. Sess. (1989) and H.C.R. Res. 50, 15th Haw. Leg., Reg. Sess. (1989) ("Urging All State and County Agencies to Adopt Policies which Promote the Use and Purchase of Goods and Supplies Made from Recycled Materials").

[174] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 33-34.

[175] *Id.* at 34.

[176] *Id.*

H-POWER contractor.[177]

Still, the city denies that a potential conflict exists between proposed recycling legislation and the operation of H-POWER, claiming that the plant does not need the kinds of materials which the legislature is considering for recycling.[178] Although a study on the marketability of products in Hawaii showed that viable markets exist for aluminum cans, tin cans and glass containers (items which would not be prime for H-POWER's operation), three types of waste paper products — newspapers, corrugated containers, and high-grade paper — also have marketable potential.[179] The study showed no viable market for plastics,[180] but their potential for recycling grows.[181] Further, H-POWER forseeably may defeat or drastically diminish any recycling efforts by the state. In Arlington, Virginia, for instance, a new incinerator project in the next county cut voluntary paper recycling sixty-six percent to insure a sufficient supply of burnable garbage.[182]

The Environmental Defense Fund compared New York City's proposal to build five garbage incinerators to a recycling program that would produce similar results. In strictly economic terms, the organization found that the benefits of recycling outweighed those of incineration.[183] Alluding to the situation in Honolulu, the Environmental Defense Fund observed that cities tend to commit to incineration initially because of institutional momentum and to consider recycling only at the next stage.[184] Unfortunately, such an approach curtails the

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[177] HONOLULU, HAW., REV. ORDINANCES, ch. 9, art. I, § 9-1.0(6) (1978, 1983 ed., 1986 Cumulative Supplement). Section 9-1.0(2) reads:

> [T]he chief of the division of refuse collection and disposal for the department of public works of the city may require all solid waste . . . [to] be disposed of at disposal facilities . . . or in areas designated by such person if it is found to be in the best public interest.

[178] Takara, *supra* note 141.

[179] *Outlook for Recycling in Islands is Much Brighter, Auditor Reports*, Honolulu Star-Bulletin, February 14, 1989, at A-5, col. 3.

[180] *Id.* at col. 4.

[181] The City Council recently passed a bill to launch a pilot recycling program by January 1990. HONOLULU, HAW., REV. ORDINANCES § 9-1 (1989). The program will begin on a voluntary basis and, if necessary, on a mandatory basis. City agencies and their employees may separate out paper, aluminum, glass, cardboard, plastic containers, and possibly other materials for recycling. *Id.* § 9-1(a).

[182] CITIZEN'S CLEARINGHOUSE, *supra* note 4, at 34.

[183] ENVIRONMENTAL DEFENSE FUND, TO BURN OR NOT TO BURN: THE ECONOMIC ADVANTAGES OF RECYCLING OVER GARBAGE INCINERATION FOR NEW YORK CITY vi (1985). Specifically, the Environmental Defense Fund noted that while incinerators pose health and environmental risks even with modern pollution control devices, recycling poses no similar threat and conserves our natural resources — a benefit equal in value to the production of energy from refuse. *See id.* at 78.

[184] *Id.* at 80.

short and long-term effects of recycling.[185] Consequently, once H-POWER is in full operation, it may hamper Honolulu's recycling efforts.

C. *Other Preventive Measures*

Other measures to reduce the risks of pollution include targeted recycling and removing toxic substances at the production stage. Targeted recycling, which would remove items of waste containing substances of concern such as metals, presents a workable solution to reducing harmful emissions. For example, recycling batteries and newspapers most likely would reduce the amount of lead, mercury, and cadmium from MWCs.[186] Further, the EPA could reduce the use of toxic metals at the production stage under the authority of the Toxic Substances Control Act.[187] The government has displayed insensitivity to the value of such measures in two ways: (1) the Food and Drug Administration has proposed an increased usage of polyvinyl chloride in food packaging, a move which would generate more hydrochloric acid in waste-to-energy plants;[188] (2) the EPA's designation of lead acid batteries as hazardous waste has reduced the recycling of these batteries; consequently, their presence in municipal waste has increased.[189] Increased acids and lead in landfills will lead to stronger leachates and more heavy metals and acid gases in the emissions of waste-to-energy plants.[190]

The federal government's failure to initiate the removal of hazardous substances from the waste stream prior to incineration has prompted citizen action.[191] For instance, the national Coalition for Recyclable Waste in Washington, D.C., helped prevent the plastic Coca-Cola can from ever reaching the supermarket.[192] In addition, the group has opposed the Food and Drug Administration's proposal to increase the use of polyvinyl chloride in food

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[185] *Id.*

[186] *Air Pollution Hearings*, *supra* note 66, at 64 (statement of Ellen K. Silbergeld, the Environmental Defense Fund).

[187] *Id. See generally* Toxic Substances Control Act, 15 U.S.C. § 2605 (1982) (authorizing the Administrator to promulgate rules, placing requirements on the manufacture of a chemical substance or mixture upon a reasonable finding that the substance or mixture poses an unreasonable risk of injury to environment or health).

[188] *Municipal Waste Hearings*, *supra* note 120, at 325 (testimony of Pamela K. Day, Deputy Director, City of Tampa Sanitation Dep't and International Vice President, Refuse Collection and Disposal Ass'n).

[189] *Id.*

[190] *Id.*

[191] C. POLLOCK, MINING URBAN WASTES: THE POTENTIAL FOR RECYCLING 45 (1987).

[192] *Id.* The group argued that the polyvinyl chloride label would add to dioxin formation if the cans were burned; further, because the plastic cans resembled aluminum, if mistakenly recycled, they would release sudden flares of heat, ruining secondary smelters. *Id.* at 45-46.

packaging.[193]

Finally, minimizing consumers' reliance on disposable goods would tremendously conserve our nation's dwindling landfill space. By weight, containers and packaging comprise almost forty percent of the waste stream.[194] Moreover, the United States could significantly impact the conservation of world resources. Although comprising only five percent of the world's population, Americans consume thirty-three percent of the world's resources and create thirty-three percent of the world's pollution.[195] In Hawaii, a bill giving recycling manufacturers and centers a tax credit on glass beverage containers suggests a modest but significant start in that direction.[196]

VI. CONCLUSION

The nation's solid waste disposal crisis runs deep. The federal government has responded to diminishing landfill space by encouraging waste-to-energy facilities; however, its focus on technology-based solutions inadequately accounts for health and environmental risks. Lead, sulfur dioxide, nitrogen dioxide and other pollutants must no longer find their way into water, cow's and mother's milk.

The government's failure to act and its proclamations of "intentions" to set standards specifically for MWCs only exacerbate the waste disposal crisis. Unless the EPA acts soon, the public will persistently brush aside the true risks posed by MWC emissions:[197] toxic air pollutants will continue to go unmonitored and ash will be managed and disposed of with limited precautions. The PSD program and the EPA's recognition of the shortcomings of a command-and-control approach to dealing with environmental protection offer some hope. Further, despite the federal government's limited guidance for pollution control of

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[193] *Id.* at 46.

[194] *Municipal Waste Hearings*, *supra* note 120, at 325 (testimony of Pamela K. Day, Deputy Director, City of Tampa Sanitation Dep't and International Vice President, Refuse Collection and Disposal Ass'n).

[195] Berle, *Setting Environmental Priorities: Six Observers Speak (An Environmental Leader)*, EPA JOURNAL, Nov./Dec. 1988, at 7, 10.

[196] H.B. 298, H.D. 2, 15th Haw. Leg., Reg. Sess. (1989) (pending a hearing in the Senate Agriculture Comm. in the 1990 session). The bill provides a $0.05 tax credit per glass beverage container which a recycling manufacturer buys and refills within the State, and a $0.03 tax credit per glass beverage container which a recycling center buys and crushes for shipment outside the State. By providing recycling manufacturers and centers with a tax credit to offset their costs, consumers will be encouraged to save and recycle glass beverage containers. H.B. STAND. COMM. REP. NO. 680, 15th Haw. Leg., Reg. Sess. (1989).

[197] In Hawaii, the city administration argued that stricter control requirements for H-POWER were unwarranted because the "winds would blow emissions out to sea." *Council Ready*, *supra* note 3, at col. 3.

MWCs, states can work toward a preventive and integrative approach to harmful emissions by adopting stricter pollution standards than those of the federal government and by working closely with the EPA in administering air quality permits under the PSD program.

On the other hand, if risk reduction rather than transference of pollution from one medium to another is the goal of the nation, then MWCs fall short of fulfilling this end. Economically and environmentally, recycling proves more attractive than resource recovery systems. Recycling, source reduction and modification of consumer patterns, however, can only complement, not replace, strict regulations that consider various avenues of exposure to MWC pollutants. Until the EPA promulgates such regulations, it makes little sense to laud MWCs' contribution to the nation's energy resources when such facilities threaten our most valuable resources: our environment and health.

Susan M. Komo-Kim

Kaiser Hawaii Kai Development Company v. City and County of Honolulu: Zoning by Initiative in Hawaii

I. INTRODUCTION

In *Kaiser Hawaii Kai Development Company v. City and County of Honolulu*[1] (*Sandy Beach*), the Hawaii Supreme Court ruled that the initiative procedure is not a valid means of rezoning because it is inconsistent with the Hawaii Zoning Enabling Act's requirements that land use and zoning decisions be made in accordance with, and for the purpose of, implementing a long-range, comprehensive general plan.[2] Specifically, the court held that initiative proposals adopted by the electorate to downzone two tracts of land from residential to preservation were invalid.[3]

The facts of the case are presented in Part II of this note. Part III provides an historical overview of zoning by initiative. The Hawaii Supreme Court's ruling in *Sandy Beach* is analyzed in Part IV, and the impact of this decision on the future of zoning by initiative is discussed in Part V.

II. FACTS

The Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate (Bishop Estate)[4] are the fee simple owners of the 30.9 acre parcel of land that was the subject of the initiative in the present matter.[5] The land, which is divided into two segments (Golf Course 5 and Golf Course 6), is located in

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[1] 70 Haw. 480, 777 P.2d 244 (1989).

[2] *Id.* at 489, 777 P.2d at 250.

[3] *Id.*

[4] Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate were Matsuo Takabuki, Myron B. Thompson, William S. Richardson, and Henry H. Peters. Trustee Richard Lyman, Jr., who was one of the original parties to the action, died on December 23, 1988.

[5] In 1884, the will of Princess Bernice Pauahi Bishop designated Bishop Estate the owner of the land for the purpose of establishing a perpetual trust for the education of Native Hawaiians. *See* Hawaii Hous. Auth. v. Lyman, 68 Haw. 54, 66 n.7, 704 P.2d 888, 894 n.7 (1985).

Kalama Valley, on the eastern portion of the Island of Oahu,[6] commonly referred to as Hawaii Kai.[7] It has been zoned for residential use since 1954.[8]

In 1961, Bishop Estate conveyed the parcels to Kaiser Hawaii Kai Development Company and Kaiser Development Company (Kaiser), giving Kaiser the exclusive rights to possess and develop the property.[9] A 1966 Detailed Land Use Map, the City and County of Honolulu's (City) planning document, approved the designation of 6,000 acres of land, including Golf Courses 5 and 6, for "low-density apartment" use.[10] The land was rezoned in 1969 to "R-6 Residential" for single-family residences.[11] In 1975, a portion of the parcels became subject to the Coastal Zone Management Act.[12]

In 1983, the City's General Plan/Development Plan Land Use Map designated the land for residential use.[13] Two years later, the City moved the boundary of the Shoreline Management Area in the seaward direction, thereby excluding approximately 68% of the tracts from the Shoreline Management Area.[14]

In 1986, pursuant to provisions of the Coastal Zone Management Act, Kaiser applied to the City for a Shoreline Management Permit for its proposed construction of 211 single-family homes on the tracts.[15] Kaiser's permit application became the target of protest by citizens who objected to the housing development because of its alleged negative impact on Sandy Beach, a popular shoreline recreational area located across the highway from the site of Kaiser's proposed residential development.[16] Over several months, the Department of Land Utilization, the Hawaii Kai Neighborhood Board, and the Planning and Zoning Committee of the City Council held numerous public hearings and meetings at which citizens expressed their concerns about Kaiser's permit appli-

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[6] 70 Haw. 480, 777 P.2d 244.

[7] The tract is identified as Tax Map No. 3-9-10: portion of 1.

[8] 70 Haw. at 481, 777 P.2d at 245.

[9] *Id.*; Record Vol. I at 58.

[10] Record Vol. II at 166.

[11] *Id.*

[12] *See* HAW. REV. STAT. ch. 205A (1985 & Supp. 1988). Section 205A-1 defines the coastal zone management program:

> [T]he comprehensive statement in words, maps, or other permanent media of communication, prepared, approved for submission, and amended by the State and approved by the United States government pursuant to Public Law No. 92-583, as amended, and the federal regulations adopted pursuant thereto, which describes objectives, policies, laws, standards, and procedures to guide and regulate public and private uses in the coastal zone management area, provided however the "coastal zone management program" is consistent with the intent, purpose, and provisions of this chapter . . . .

[13] Record Vol. II at 166.

[14] Record Vol. III at 124.

[15] Kaiser Hawaii Kai Development Co. v. City and County of Honolulu, 70 Haw. at 481-82, 777 P.2d at 245.

[16] *Id.* at 482, 777 P.2d at 245-46.

cation.[17] On April 15, 1987, by a 5-4 vote,[18] the City Council granted Kaiser's scaled-down application for a Shoreline Management Area Use Permit to build 192 homes.[19]

In an effort to prevent the development, a group of citizens opposed to the housing development formed the Save Sandy Beach Initiative Coalition (Coalition).[20] Coalition members circulated an initiative petition which proposed to amend the zoning designation of the land on the City's land use development plan and zoning maps from "Residential" to "Preservation" in order to retain the stretch of natural coastline located across the street from the planned residential development.[21] The initiative petition[22] proposed an ordinance which would alter the development plan land use designation of Golf Courses 5 and 6 from "Residential" to "Preservation" and the zoning map designation from "R-5 Residential District" to "P-2 General Preservation District."[23] In August 1987, the City issued a Cluster Housing permit to Kaiser, indicating that the previously approved homes conformed to the Cluster Housing provisions of the Honolulu Land Use Ordinance.[24]

On August 28, 1987, the Coalition submitted a petition with over 39,000 signatures[25] of citizens in favor of downzoning the site to preservation land to

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[17] *Id.* at 482, 777 P.2d at 246.

[18] Council members voting in support of the approval were Arnold Morgado, Donna Kim, David Kahanu, Randall Iwase, and John DeSoto. Council members voting in opposition to the approval were Marilyn Bornhorst, Leigh-Wai Doo, Gary Gill, and Dennis O'Connor. *See* City Council Res. 65 (1987).

[19] *Id.*

[20] 70 Haw. at 482, 777 P.2d at 246.

[21] *Id.*

[22] The Sandy Beach Initiative Zoning Ordinance reads as follows:

Be it ordained by the people of the City and County of Honolulu:

Section 1. The Development Plan Land Use Map for East Honolulu is hereby amended by changing the land use designation for parcels located near Sandy Beach, Oahu, in Tax Map Key 3-9-10: portion of 1 commonly identified as Golf Course 5 and 6, from Residential to Preservation, as shown on the map below marked Exhibit "A" and included by reference herein.

Section 2. City and County Zoning Map No. 1, Hawaii Kai is hereby amended by changing the zoning for parcels located near Sandy Beach, Oahu, in Tax Map Key 3-9-10: portion of 1, commonly identified as Golf Course 5 and 6, from R-5 Residential District to P-2 General Preservation District, as shown on the map below marked Exhibit "B" and included by reference herein.

Section 3. This Ordinance shall take effect upon its approval.

[23] Record Vol. II at 170, 229.

[24] *See* In re Cluster Hous. Dev. App. No. 87/Cl-6, 87/ZBA-114 (appeal dismissed Dec. 1, 1988) (affirmed issuance of Cluster permit). Cluster zoning modifies size and frontage requirements of lots based on certain conditions involving setting aside of land by the developer for parks, schools, or other public needs. BLACK'S LAW DICTIONARY 232 (5th ed. 1979).

[25] Brief for Sandy Beach Initiative Coalition at 2, Kaiser Hawaii Kai Dev. Co. v. City and

the City Clerk, Raymond K. Pua .[26] On September 11, 1987,[27] Pua certified that the Coalition had gathered the necessary number of valid signatures required under article III, chapter 4 of the Revised Charter of the City and County of Honolulu[28] to place the initiative proposals on the November 8, 1988 general election ballot.[29]

County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989). (Coalition Brief).

[26] *Id.* at 3-4.

[27] *Id.*

[28] HONOLULU, HAW., REV. CHARTER art. III, ch. 4, § 3-402 (1984), Procedure for Enactment and Adoption, states:

1. Petition. An ordinance may be proposed by petition, signed by qualified electors equal in number to at least ten percent of the entire vote cast for mayor in the last preceding mayoral election.

2. Form of Petition. Each elector signing such petition shall add to the signature, the elector's printed name, residence and the date of signing.

3. Affidavit on Petition. Signatures may be on separate sheets, but each sheet will have appended to it the affidavit of some person, not necessarily a signer of the petition, that, to the best of the affiant's knowledge and belief, the persons whose signatures appear on the sheet are qualified electors of the city, that they signed with the full knowledge of the contents of the petition and that their residences are correctly given.

4. Proposed Ordinance. Such petition shall set forth the proposed ordinance, or a draft of the proposed ordinance may be attached and made part of such petition.

Art. III, ch. 4, § 3-403, Filing and Examination of Signatures on petition states:

1. Duty of Clerk. Upon filing of such petition with the council, the clerk shall examine it to see whether it contains a sufficient number of apparently genuine signatures of qualified electors. The clerk may question the genuineness of any signature or signatures appearing on the petition, and if the clerk finds that any such signature or signatures are not genuine, the clerk shall, after public disclosure of the signatures in question, disregard them in determining whether the petition contains a sufficient number of signatures.

2. Clerk to Reject Petition, When. The clerk shall eliminate any sheet of the petition which is not accompanied by the required affidavit. The invalidity of any sheet shall not affect the validity of the petition if a sufficient number of signatures remains after eliminating such invalid sheets. The clerk shall complete the examination of the petition within fifteen days after the date of filing with the council.

3. Review by the Court. A final determination as to the sufficiency or validity of the petition may be subject to court review.

[29] HONOLULU, HAW., REV. CHARTER art. III, ch. 4, § 3-404 (1984), Submission of Proposal to Electors, states:

1. For General Elections. Any petition for proposed ordinance which has been filed with the council at least ninety days prior to a general election and which has been certified by the clerk, shall be submitted to electors for the aforementioned general election.

2. For Scheduled Special Election. If any petition for proposed ordinance is filed at least ninety days before a scheduled special election within the city and which has been certified by the clerk, it shall be submitted to the electors for the aforementioned special election.

3. For Initiative Special Elections. A special election for an ordinance by initiative power shall be called within ninety days of filing of the petition if signing by qualified electors equal to at least fifteen percent of the number of the entire vote cast for mayor in

On September 30, 1987, Kaiser filed a complaint against the City, Pua, and the Coalition for a declaratory judgment that 1) the proposed initiative ordinance was an invalid method of downzoning the land from residential use to preservation; 2) Kaiser's right to develop the property had vested and the City was estopped from downzoning the property; and 3) the initiative petition was defective because it did not comply with article III, chapter 4 of the City Charter.[30] Kaiser also sought to enjoin the parties from placing the proposed initiative ordinance on the ballot in any general or scheduled special election.[31] Bishop Estate intervened as a plaintiff.[32]

In February 1988, Kaiser moved for a judgment on the pleading on the ground that the proposed initiative ordinance would violate the superior constitutional and statutory provisions and also on the basis of the Hawaii Supreme Court's recent ruling in *Lum Yip Kee, Ltd. v. City and County of Honolulu*.[33] The Coalition filed a motion for dismissal or summary judgment on March 7, 1988.[34]

On April 15, 1988, Circuit Court Judge Robert G. Klein issued an order granting in part Kaiser's motion for declaratory judgment, ruling that the City's voters may not enact a zoning ordinance by initiative[35] and enjoining the placement of the initiative proposals on the ballot.[36] Kaiser and Bishop Estate filed renewed motions for injunctive relief.[37]

Judge Klein granted the motions and issued orders on behalf of Kaiser and Bishop Estate enjoining the City, Pua, and the Coalition from taking steps to

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the last preceding mayoral election, and if such petition specifies that a special election be called; provided that if the clerk certifies less than fifteen percent but at least ten percent, the proposed ordinance shall be submitted at the next general election or scheduled special election. No special initiative election shall be held if an election is scheduled within one hundred eighty days of submission of the proposal.

4. Adoption by the Council. If the council introduces and adopts after three separate readings, including a public hearing, the proposed ordinance which was the basis for a petition on or before ten days prior to date of publication of the proposed ordinance as required in this charter, then the proposed ordinance need not be submitted to the electors.

[30] Coalition Brief, *supra* note 25, at 4.

[31] *Id.*; Record Vol. I at 1-40.

[32] Kaiser Hawaii Kai Development Co. v. City and County of Honolulu, 70 Haw. 482, 777 P.2d at 246.

[33] Brief for City and County of Honolulu at 5, Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. 480, 777 P.2d at 244 (1989). For a description of Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. 179, 767 P.2d 815 (1989), *see infra* notes 139-140 and accompanying text.

[34] Record Vol. II at 215-352.

[35] Record Vol. III at 212-17.

[36] 70 Haw. at 482, 777 P.2d at 246.

[37] Record Vol. III at 284-344.

place the initiative on the ballot.[38] The Coalition moved for a stay of the injunction and for a modification of Judge Klein's orders. In the alternative, the Coalition, along with the City and Pua, moved for leave to file an immediate appeal.[39] On September 9, 1988, the Hawaii Supreme Court issued a stay of Judge Klein's orders, but expressly reserved comment on the validity of rezoning by initiative.[40]

In the general election held on November 8, 1988, voters approved the initiative proposals[41] by a nearly two-to-one margin.[42] Kaiser and Bishop Estate brought an immediate challenge to the validity of the vote to the State Supreme Court.[43]

On May 3, 1989, the City Council's Planning Committee, by a 4-0 vote, sent a bill changing the zoning of Golf Courses 5 and 6 from "Residential" to "Preservation" before the full Council for a vote. However, Council chairperson Arnold Morgado refused to schedule a vote, saying that the validity of zoning by initiative should first be decided by the Hawaii Supreme Court.[44]

In a May 17, 1989 ruling, the Hawaii Supreme Court affirmed Judge Klein's decision, thereby striking down zoning by initiative and invalidating the November initiative vote.[45] The court issued its written decision on June 21, 1989.[46]

On May 24, 1989, the City Council approved an amendment to the Development Plan to change zoning of the tracts from residential to preservation.[47] On October 11, 1989, the City Council unanimously passed a bill to reclassify the land as approved previously.[48]

III. History of the Law

A. *Background of the Initiative*

The initiative process, which was utilized in *Sandy Beach*, allows the electorate to propose legislative or constitutional changes by filing formal petitions

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[38] 70 Haw. at 482, 777 P.2d at 246; Record Vol. IV at 52-55, 166-69.

[39] Record Vol. IV at 87-97.

[40] 70 Haw. at 482, 777 P.2d at 246.

[41] *Id.*

[42] The unofficial results were 164,006 votes in favor of adopting the ordinance and 85,210 votes against adopting it. Coalition Brief, *supra* note 25, at 5.

[43] Honolulu Star Bulletin, Aug. 3, 1989 at A8, col. 5.

[44] *Id.*

[45] 70 Haw. at 489, 777 P.2d at 250.

[46] *Id.* at 480, 777 P.2d at 244.

[47] Honolulu Star Bulletin, Aug. 3, 1989 at A8, col. 5.

[48] Honolulu Star Bulletin, Oct. 12, 1989 at A5, Col. 1.

and to enact or reject these proposals at the polls, usually independent of the legislature.[49] Although courts and other authorities often consider and discuss the initiative in connection with the correlative power of referendum,[50] they are two distinct processes.[51] This note focuses on the use of the initiative in regard to zoning amendments.

Initiative, as a form of "popular lawmaking," was first adopted in the United States as part of the Progressive movement in the early 1900s[52] due to the people's growing distrust of and dissatisfaction with their legislative bodies, which they saw as being controlled increasingly by large corporations and powerful groups of individuals.[53] The Progressives saw the initiative as a tool for overcoming the power of these special interest groups by giving the people a direct means by which to counteract those influences.[54] Proponents of the initiative contended that it would give voters direct control over their government, increase the people's interest in and understanding of important political issues, and ultimately lead to a government which reflected the will of the majority.[55]

In its present form, the initiative is usually reserved to the people as a right or power by the state constitution[56] or by statutory or charter provisions.[57] In Hawaii, the state constitution does not explicitly reserve the power of initiative or referendum to the people, nor does it confer these powers on the counties.[58]

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[49] *See* BLACK'S LAW DICTIONARY 705 (5th ed. 1979); Annotation, *Zoning Ordinance as Subject of Initiative*, 72 A.L.R.3d § 1[a], at 991 (1976).

[50] The referendum, a related method of direct legislation, is the power reserved to the people to approve or reject at the polls an act or constitutional amendment passed by the legislature. Annotation, *supra* note 49, at 991.

[51] Initiative is distinguished from referendum as follows:

> [T]he basic distinction between an initiative and referendum is that the referendum process is commenced after the legislative body has passed a zoning amendment, whereas an initiative is commenced by the electorate in the first instance, independently of the legislative body.

2 E. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 27.07[2], at 27-71 (1988).

[52] Comment, *Judicial Review of Initiative Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461 (1980) (*Judicial Review*).

[53] *See* Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 736 (1988) (*Lousy Lawmaking*); 82 C.J.S. *Statutes* § 117 (1953).

[54] *Lousy Lawmaking*, *supra* note 53, at 735.

[55] *Id.*

[56] *See, e.g.*, CAL. CONST. art. II, § 8; COLO. CONST. art. V, § 1; OHIO CONST. art. II, § 1f; FLA. CONST. art. II, § 3. These states reserve the initiative power in their state constitutions. Therefore, constitutional provisions supercede conflicting zoning enabling statutes and any conflict between the two must be resolved in favor of the constitutionally reserved initiative power. No such reservation appears in the Hawaii constitution.

[57] ZIEGLER, *supra* note 51, § 27.07, at 27-70.

[58] HAW. CONST. art. I, § 1, entitled "Political Power," states: "All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All

Delegates to the Constitutional Conventions of 1950,[59] 1968,[60] and 1978[61] rejected proposals to amend the state constitution to include initiative and referendum powers.[62] Further, during the 1987 legislative session, at least three House Bills[63] and five Senate Bills[64] were introduced to amend the state constitution to include provisions for initiative and referendum, but none passed and no such bills were introduced in the 1988 session.

Generally, unless prohibited by the state constitution, the initiative and referendum powers with respect to municipal ordinances may be adopted through the municipal charter or by general laws.[65] In Hawaii, although the state constitution does not provide for the initiative and referendum powers, it gives the legislature the power to create counties[66] and each county has the power to

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government is founded on this authority."

[59] STAND. COMM. REP. NO. 47, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1950, at 182 (1960); 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1950, at 774 (1961). The Standing Committee Report states:

> [T]he controversy between proponents of and authorities on these subjects is very great as to the merits and effectiveness of any of these measures, and the evidence as to such merits and effectiveness is far from conclusive. In the absence of a clear showing of great popular demand for any such measures, or convincing evidence of the necessity for or merit and effectiveness of the same, none of which has been satisfactorily established in the minds of the majority of [the Standing] Committee, we believe that such provisions should not be included in the Constitution.

1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1950, at 186.

[60] STAND. COMM. REP. NO. 44, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1968, at 208 (1973); 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1968, at 520 (1972).

[61] STAND. COMM. REP. NO. 72, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 677 (1980); 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 816 (1980). The Standing Committee Report states:

> In the absence of clear and convincing evidence demonstrating the necessity, effectiveness or merits of initiative in any form and/or referendum, [the] Committee recommends against the inclusion of statutory initiative and/or referendum, and constitutional initiative in the constitution.

1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 682.

[62] *See supra* notes 59-61 and accompanying text.

[63] H.R. 119, H.R. 559, and H.R. 1245, 14th Leg., Reg. Sess. (1987).

[64] S. 74, S. 330, S. 560, S. 732, and S. 734, 14th Leg., Reg. Sess. (1987).

[65] *See* 42 Am. Jur. 2d *Initiative and Referendum* § 2 (1969). General laws have been defined by the Hawaii Supreme Court as those

> which apply uniformly throughout all political subdivisions of the state. But a law may apply to less than all of the political subdivisions and still be a general law, if it applies uniformly to a class of political subdivisions, which, considering the purpose of the legislation, are distinguished by sufficiently significant characteristics to make them a class by themselves.

Bulgo v. County of Maui, 50 Haw. 51, 58, 430 P.2d 321, 326 (1967).

[66] HAW. CONST. art. VIII, § 1 states: "The legislature shall create counties, and may create other political subdivisions within the State, and provide the government thereof. Each political

frame and adopt its own charter, subject to limitations provided by general laws.[67] On this authority, each of Hawaii's four counties has enacted a charter which includes a provision instilling the powers of initiative and referendum in the people. The County of Maui was the first to include these powers in its Charter in 1968,[68] followed by the County of Hawaii in 1969,[69] the County of

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subdivision shall have and exercise such powers as shall be conferred under general laws."

[67] HAW. CONST. art. VIII, § 2 states:

Each political subdivision shall have the power to frame and adopt a charter for its own self-protection within such limits and under such provisions as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section.

[68] MAUI, HAW., CHARTER art. 11 (1983), states:

Section 11.1 Powers. 1. The voters of the county shall have power to propose ordinances to the council. If the county fails to adopt an ordinance so proposed without any change in substance, the voters may adopt the same at the polls, such power being known as the initiative power.

2. The voters shall have power to propose the reconsideration by the county of an adopted ordinance or any portion thereof. If the county fails to repeal an ordinance so reconsidered the voters shall have the power to reject the same at the polls, such power also being known as the initiative power.

3. The initiative power shall not extend:

a. To any part of all of the capital program of annual budget;

b. To any property tax levied;

c. To any ordinance making or repealing any appropriation of money;

d. To any ordinance authorizing the issuance of bonds;

e. To any ordinance authorizing the appointment of employees; or,

f. To any emergency ordinance.

[69] HAWAII, HAW., CHARTER art. XI (1980), provides as follows:

Section 11-1. The Powers of Initiative and Referendum.

(a) The power of voters to propose ordinances (except as provided in Section 11-2) shall be the initiative power.

(b) The power of voters to approve or reject ordinances by election (except as provided in Section 11-2) shall be the referendum power.

Section 11-2. Limitations to Powers. The initiative power and the referendum power shall not extend to: any part or all of the operating budget or capital budget; any financial matter relating to public works; any ordinance making or repealing any appropriation of money or fixing the salaries of county employees or officers; any ordinance authorizing or repealing the levy of taxes; any emergency legislation. [As a result of a charter amendment proposal approved by the voters in a 1982 general election, this section was deleted.]

Kauai in 1976,[70] and the City and County of Honolulu in 1982.[71]

The weight of authority is that the granting or reserving of direct governmental power to the people of a municipality does not violate the federal or state constitutional guaranty of a republican form of government.[72] Municipal provisions for initiative and referendum do not violate the federal Constitution's guaranty of a republican form of government because the guaranty does not apply to municipalities.[73]

Since the general rule is that the initiative and referendum powers granted to municipalities are to be construed liberally in order to permit, rather than restrict, those powers,[74] a court has no mandatory duty to rule on the validity of an initiative proposal before it is sent before the electorate.[75] The charters of the County of Kauai and the City and County of Honolulu include provisions for judicial review of a petition to determine its sufficiency in regard to containing an adequate number of apparently genuine signatures of qualified voters.[76] However, none of the county charters requires a court to rule on the validity of

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[70] KAUAI, HAW., REV. CHARTER art. XXII (1984), states:

Section 22.01. Power of Initiative and Referendum.

A. The power of voters to propose ordinances (except as provided in Section 22.02) shall be the initiative power.

B. The power of the voters to approve or reject ordinances that have been passed by the county council (except as provided in Section 22.02) shall be the referendum power.

Section 22.02. Limitations to Powers. The initiative power and the referendum power shall not extend to any part or all of the operating budget or capital budget; any financial matter relating to public works; any ordinance authorizing or repealing the levy of taxes; any emergency legislation; any ordinance making or repealing any appropriation of money or fixing the salaries of county employees or officers; any ordinance authorizing the appointment of employees; any ordinance authorizing the issuance of bonds; or any matter covered under collective bargaining contracts.

[71] HONOLULU, HAW., REV. CHARTER ch. 4 (1984), states:

Section 3-401. Declaration— 1. Power. The power of electors to propose and adopt ordinances shall be the initiative power.

2. Limitation. The initiative power shall not extend to any ordinance authorizing or repealing the levy of taxes, the appropriation of money, the issuance of bonds, the salaries of county employees or officers, or any matter governed by collective bargaining contracts.

[72] 5 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 16.50, at 253 (1989).

[73] 42 Am. Jur. 2d *Initiative and Referendum* § 2 (1969).

[74] MCQUILLIN, *supra* note 72, § 16.51, at 254.

[75] MCQUILLIN, *supra* note 72, § 16.52, at 256.

[76] KAUAI, HAW., CHARTER art. XXII, § 22.06(D) (1984) states: "A final determination as to the sufficiency of a petition shall be subject to court review. A final determination of insufficiency, even if sustained upon court review, shall not prejudice the filing of a new petition for the same purpose."

HONOLULU, HAW., REV. CHARTER art. V, § 3-403 (1984) states, in relevant part: "A final determination as to the sufficiency or validity of the petition may be subject to court review."

an initiative proposal before it may be placed on the ballot.[77]

The initiative power is usually restricted to legislative ordinances, resolutions and measures,[78] and is not extended to administrative[79] or quasi-judicial actions.[80] However, if the issues is one of statewide concern, for which the legislature has designated the local council or board as the decision-maker in implementing state policy, the action would be characterized as "administrative" and would therefore be beyond the scope of the initiative and referendum processes.[81]

There are two types of initiatives—direct and indirect.[82] In the direct initiative process, once a petition concerning a particular measure has been certified as having the required number of valid signatures, the proposal is placed on the ballot for a vote at the next election.[83] The indirect initiative requires that the completed petition be submitted to the legislature, which then has three options: (1) pass the measure into law, (2) propose alternative measures for inclusion on the ballot, or (3) not take any action on the proposal.[84] All counties in Hawaii provide for direct initiative.[85]

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[77] *See supra* notes 68-71 and accompanying text.

[78] MCQUILLIN, *supra* note 72, § 16.55, at 266. McQuillin defines legislative acts as those "[a]ctions relating to subjects of a permanent and general character . . . . " *Id.*

[79] *Id.* McQuillin defines administrative actions as "those providing for subjects of a temporary and special character." He differentiates between legislative and administrative actions as follows:

> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose and making provision for ways and means as its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body. In applying the "legislative" versus "administrative" test distinguishing on the basis of "new policy or plan" versus "pursuit of plan already adopted," the court will apply a liberal rule of construction[.] (citations omitted).

Id.

[80] A quasi-judicial action is one that executes an existing rule. ZIEGLER, *supra* note 51, § 27.07[3][b], at 27.77. Functions that are "not purely and completely judicial or legislative in nature, but have qualities or incidents resembling them, are referred to as quasi-judicial or quasi-legislative." Hyson v. Montgomery County Council, 242 Md. 55, 62, 217 A.2d 578, 582-83 (1966).

[81] MCQUILLIN, *supra* note 72, § 16.55, at 267.

[82] Note, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143, 1145 (1979).

[83] *Id.*

[84] *Id.*

[85] *See supra* notes 68-71 and accompanying text.

B. Background of Zoning by Initiative

Zoning[86] is one of the oldest devices for local control of land use.[87] The United States Supreme Court first recognized zoning as a proper means of regulating land use in *Village of Euclid v. Ambler Realty*.[88] Following that landmark ruling, the use of zoning became commonplace throughout the nation.[89]

As early as three years after the *Euclid* decision, the California Supreme Court, in *Hurst v. City of Burlingame*,[90] became the first to address the "hopeless inconsistency" between zoning laws and the use of the initiative.[91]

Over the years, zoning ordinances have continued to conflict with the initiative power, which is generally very permissive and is reserved to the people in broad terms.[92] Courts have been called upon to resolve the numerous conflicts arising between constitutional, statutory, or charter provisions providing for the initiative power and zoning enabling statutes or ordinances enacted pursuant to such statutes.[93]

Courts have generally analyzed the validity of initiative (and of referendum) proposals in terms of several commonly asserted objections. Among these arguments are that the initiative process (1) violates due process requirements,[94] (2)

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[86] Zoning is defined as "[t]he division of a city by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put." BLACK'S LAW DICTIONARY 1450 (5th ed. 1979).

[87] Note, *Land Use Planning and the Public: Zoning by Initiative*, 36 MONT. L. REV. 301 (1975) (*Land Use Planning*).

[88] 272 U.S. 365 (1926). The ultimate holding of the United Supreme Court in this case was that "the dividing of a city or village into use zones and the permitting or prohibiting of various uses and classes of uses therein was constitutional, though such zoning might be found to be unconstitutionally applied in a given case." D. Callies, Regulating Paradise: Land Use Controls in Hawaii 22 (1984).

[89] CALLIES, *supra* note 88, 22.

[90] 207 Cal. 134, 277 P. 308 (1929).

[91] The *Hurst* Court nullified an initiative provision that regulated and established classifications of property, created a city planning commission, and provided penalties for violations of the ordinance. The Court stated:

> The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope.

207 Cal. at 141, 277 P. at 311.

[92] *Id.*; ZIEGLER, *supra* note 51, § 27.07[1], at 27-70.

[93] ZIEGLER, *supra* note 51, § 27.07[1], at 27-70 to 27-71.

[94] Comment, *The Initiative and Referendum's Use in Zoning*, 64 CAL. L. REV. 74, 75 (1976) (*Use in Zoning*). *See, e.g.*, Tascher v. City Council, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (4th Dist. 1973) (a city organized under general law could not enact a building height limit ordinance through the initiative process because the proposed ordinance did not comply with the State

is an impermissible delegation of the legislature's power,[95] and (3) represents an unsuccessful attempt to circumvent state laws establishing procedures for enactment of zoning measures.[96]

1. *The due process issue*

In *Euclid*, the United States Supreme Court held that zoning statutes do not constitute a deprivation of property without due process, provided that requirements of notice and public hearings were met.[97] In order to meet these standards, state zoning statutes require that property owners be notified of the proposed zoning amendment and that the public be given an opportunity to express their views before any local zoning ordinance is enacted.[98]

Opponents of zoning by initiative contend that the initiative process does not provide for notice and public hearings prior to passage of a zoning ordinance and that it is therefore unconstitutional.[99] On the other hand, proponents of zoning by initiative argue that the initiative process offers protections that are equivalent, if not identical to, those provided by procedural requirements of notice and public hearings.[100] None of the charters for any of the counties in Hawaii contains a notice requirement.[101]

Although the due process argument has not prevented the use of referendum

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Zoning Law procedures).

[95] *Use in Zoning*, *supra* note 94 at 75; *see*, *e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968) (the legislative body of a city could not voluntarily refer matters before it to the electors and the initiative process was not available to citizens as a means of amending a comprehensive zoning plan).

[96] *Use in Zoning*, *supra* note 94, at 75; *see*, *e.g.*, Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929), *see supra* note 92; Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972) (amendment to zoning ordinance adopted by initiative was invalid because the procedures outlined in the Zoning Enabling Act must be adhered to strictly and the legislature intended to authorize enactment of zoning ordinances only through legislative action, not by initiative).

[97] 272 U.S. at 365 (1926).

[98] *Land Use Planning*, *supra* note 87, at 301.

[99] *Use in Zoning*, *supra* note 94, at 78.

[100] For example, in California, notice of intent to circulate an initiative petition must be published prior to signatures being gathered and the text of the initiative proposal, along with brief written arguments by proponents and opponents of the measure, must be mailed to voters in the jurisdiction before the election. *Use in Zoning*, *supra* note 94, at 78.

Furthermore, in jurisdictions where there are no such provisions, proponents of the initiative contend that the adversary nature of the politically-oriented initiative process affords the public with sufficient opportunity to hear all viewpoints. *Id.*

[101] HAWAII, HAW., CHARTER art. XI, §§ 11-1, 11-2 (1980); HONOLULU, HAW., REV. CHARTER ch. 4, § 3-401 (1984); KAUAI, HAW., REV. CHARTER art. XII, §§ 22.01, 22.02 (1984); MAUI, HAW., CHARTER art. 11, § 11-1 (1983).

in enacting zoning ordinances,[102] referendum, which complies with the required notice and public hearing procedures in the original passage of the ordinance, is readily distinguishable from the initiative[103] and it remains to be seen whether or not the same reasoning would apply to the initiative procedure.

2. *Improper delegation of legislative power*

Opponents of zoning by initiative and referendum have attacked such procedures as improper delegations of legislative power, in violation of due process rights of property owners.[104] However, in *Eastlake v. Forest City Enterprises, Inc.*,[105] the United States Supreme Court ruled that, under the State constitution, the people of Ohio could reserve the referendum power to themselves. Therefore, no delegation of referendum power was involved.[106] Although *Eastlake* dealt specifically with the use of the referendum process to enact a zoning amendment, the language of the opinion may be read as indicating that the Court would arrive at a similar ruling in regard to rezoning through the use of the initiative process.[107]

3. *Attempts to circumvent state zoning laws*

In the majority of cases in which courts have struck down the use of the initiative in zoning, the reasoning has been that the initiative process is inconsistent with state and local procedural requirements for the enactment of zoning

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[102] *See* Eastlake v. Forest City Enter., Inc., 426 U.S. 668 (1976) (due process rights of the landowner were not violated by a zoning amendment enacted by referendum because the referendum decision was not a delegation of power and the referendum rezoning decision was properly reserved to the people under the Ohio Constitution).

[103] *Use in Zoning*, *supra* note 94, at 78. *See supra* notes 50-51 and accompanying text.

[104] *Use in Zoning*, *supra* note 94, at 97.

[105] 426 U.S. 668 (1976).

[106] The *Eastlake* Court held:

> The referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create . . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

Id. at 672.

The Court went on to reason that the referendum "is means for direct political participation allowing the people the final decision, amounting to a veto power, over enactments of representative bodies".

Id. at 673.

[107] ZIEGLER, *supra* note 51, § 27.07[3][c] n.26, at 27-81.

measures.[108] Courts have had to decide whether, on one hand, constitutional, statutory, or charter provisions granting the initiative and referendum powers to the electorate are controlling, or on the other hand, whether statutes delegating the power to zone to municipal legislative bodies and requiring that certain procedures be followed in enacting zoning ordinances should prevail.[109]

Courts that have ruled against zoning through initiative and referendum have often based their decisions on the need for rational planning and comprehensive zoning.[110] These courts[111] have noted that the intent of zoning enabling statutes is to set forth clear-cut and uniform procedures for municipalities throughout a state to enact zoning ordinances, and that zoning decisions must be made by knowledgeable individuals who have the expertise to consider the wide range of community needs and to develop plans that address those diverse needs.[112]

The Standard Zoning Enabling Act, drafted by the U.S. Department of Commerce in 1926, is the common basis for the majority of state zoning enabling legislation.[113] Zoning enabling acts[114] allow states to delegate their police power, from which the concept of zoning stems, to the local governing units.[115] Zoning enabling statutes or ordinances either expressly vest the local legislative body with the power to adopt zoning ordinances, or establish specific requirements or procedures for the passage of any zoning ordinance or amendment.[116]

In Hawaii, the Zoning Enabling Act is contained in Section 46-4 of the Hawaii Revised Statutes.[117] The act grants Hawaii's four counties the power to

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[108] *Use in Zoning*, *supra* note 94, at 101-02.

[109] ZIEGLER, *supra* note 51, § 27.07[3][a][ii], at 27-72.

[110] *Id.*

[111] *See e.g. infra* note 192.

[112] The *Sandy Beach* court uses Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (1969); Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973); and Leonard v. City of Bothell, 87 Wash. 2d 847, 557 P.2d 1306 (1976) to illustrate this proposition. *See infra* notes 149-51.

[113] CALLIES, *supra* note 88, 22.

[114] State zoning enabling acts typically empower municipal corporations to enact zoning ordinances or regulations. Such statutes may authorize municipalities to adopt by ordinance a comprehensive zoning plan, classifying and establishing use, area and height districts, and restrictions. These statutes frequently set forth the purposes of zoning and the considerations to be taken into account in zoning. 8 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.48, at 130 (1983 rev. ed.).

[115] *Id.*

[116] ZIEGLER, *supra* note 51, § 27.07 [1], at 27-70 to 27-71.

[117] HAW. REV. STAT. § 46-6, in relevant part, states:

> Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner.

use zoning as a tool for implementing a long range, comprehensive general plan and for guiding the overall future development of each of the counties.[118]

The counties have discretion in the administration and enforcement of the zoning power, except with regard to the amortization of nonconforming uses.[119] The Zoning Enabling Act also permits administrative bodies, such as zoning boards and planning commissions, or administrative officers, such as planning and land utilization directors, to conduct minor rezoning, even if this function is traditionally considered to be a legislative act, and to require the county council to pass an ordinance.[120]

Pursuant to the zoning power conferred upon the counties by the Zoning Enabling Act, the charters of Hawaii's four counties each provide for a unique approach to zoning and planning.[121] In 1973, the City and County of Honolulu revised its charter to provide for the creation of eight development plans.[122]

Pursuant to the Charter, land use planning and regulation is to be implemented through a three-tiered system consisting of (1) an islandwide General Plan; (2) eight regional development plans; and (3) zoning and subdivision laws, rules, and regulations.[123] The General Plan[124] is designed to guide devel-

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[118] CALLIES, *supra* note 88, 25.

[119] Nonconforming uses have been defined as:

> [those] that were permitted at some past date but fail to conform to the existing land use regulations for the district . . . . Most courts have held that it amounts to an unconstitutional confiscation of property to require immediately the termination of what was previously a lawful use of property because the zoning has changed to prohibit that use in that district. Some jurisdictions have now begun to experiment with "amortization," the termination of a nonconforming use after the end of an arbitrarily determined useful life.

Id. at 23.

[120] *Id.* at 25.

[121] *Id.* at 25-26.

[122] *See* Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. at 182, 767 P.2d at 817, citing Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 546, 735 P.2d 950, 955 (1987).

HONOLULU, HAW., REV. CHARTER art. V, § 5-407 (1984), General and Development Plans, states:

> The purposes of preparing a general plan and development plans are to recognize and state the major problems and opportunities concerning the needs and the development of the city and the social, economic and environmental effects of such development and to set forth the desired sequence, patterns and characteristics of future development. The chief planning officer shall prepare a general plan for the entire city and development plans for particular areas of the city.

[123] 70 Haw. at 182, 767 P.2d at 817.

[124] HONOLULU, HAW., REV. CHARTER art. V, § 5-408 (1984), General Plan, states:

> The general plan shall set forth the city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, State or federal. The statements shall include, but

opment by establishing overall general goals to be achieved in the planning process, while the development plan[125] and the zoning for the area in which the site is located control the actual physical development of the site.[126]

The Charter delegates the responsibility for reviewing the developmental plans annually to the Chief Planning Officer.[127] The Chief Planning Officer refers proposed amendments to the City Planning Commission which reviews the amendments, conducts public hearings, and submits written findings and recommendations to the City Council for its consideration and action.[128] The City Council must also hold a public hearing and issue written findings of fact before adopting any amendment to the developmental plans.[129] The Charter also requires that public hearings on such amendments provide interested persons with a reasonable opportunity to be heard.[130]

In the City and County of Honolulu, zoning is governed by the Land Use Ordinance, Revised Ordinances, chapter 21A.[131] The Charter requires that zon-

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not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[125] HONOLULU, HAW., REV. CHARTER art. V, § 5-409 (1984), Development Plans, states:

"Development plans" mean relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city. A development plan shall include a map of the area of the city to which it is applicable; shall contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces and other purposes and statements of urban design principles and controls; and shall identify areas, sites and structures of historical, archaeological, architectural or scenic significance, a system of public thoroughfares, highways and streets, and the location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage. It shall state the desirable sequence for development and other purposes as may be important and consistent with the orderly implementation of the general plan.

Development plans may contain statements identifying the present conditions and major problems relating to development, physical deterioration and the location of land uses and the social, economic and environmental effects thereof; may show the projected nature and rate of change in present conditions for the reasonably foreseeable future based on a projection of current trends; and may forecast the probable social, economic and environmental consequences of such changes.

[126] 70 Haw. at 182, 767 P.2d at 817, citing Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 548, 735 P.2d 950, 955 (1987).

[127] HONOLULU, HAW. REV. CHARTER art. V, § 5-403 (1984).

[128] 70 Haw. at 183, 767 P.2d at 818; HONOLULU, HAW., REV. CHARTER art. V, §§ 5-406, 5-413(1)(1984).

[129] HONOLULU, HAW., REV. CHARTER art. V, § 5-413(2)(1984).

[130] *Id.* at § 5-413(3).

[131] *See* Land Use Ordinance, Department of Land Utilization, City and County of Honolulu (1988).

ing ordinances conform to and implement the development plan for that area.[132] To meet this requirement, landowners must often seek an amendment to the development plan from the City before requesting a zoning change.[133]

On the state level, the Hawaii State Planning Act, Hawaii Revised Statutes chapter 226, requires that county general development plans (1) be formulated with input from state and county agencies and the general public, (2) take the state functional plans into consideration, and (3) be based on sound rationale, data, analyses and input from state agencies and the general public.[134]

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[132] 70 Haw. at 183, 767 P.2d at 818; HONOLULU, HAW., REV. CHARTER art. V, § 5-412(3)(1984).

[133] 70 Haw. at 183, 767 P.2d at 818, citing CALLIES *supra* note 88, 27.

[134] Relevant sections of HAW. REV. STAT. ch. 226 (1985) are as follows:

Section 226-58. Functional plans; form and submittal. (a) Functional plans shall be prepared to further define and implement statewide guidelines with respect to the goals, objectives, policies, and priority guidelines contained within this chapter.

(b) A functional plan shall be submitted to the policy council for review and evaluation at least ninety days prior to the date designated for submittal to the legislature. The policy council shall submit findings and recommendations to the legislature on each functional plan reviewed.

(c) The functional plans for agriculture, housing, tourism, and transportation, with any findings and recommendations of the policy council, shall be submitted not later than thirty days prior to the convening of the 1979 legislature. The functional plans for conservation lands, education, energy, higher education, health, historic preservation, recreation, and water resources development, with any findings and recommendations of the policy council, shall be submitted not later than thirty days prior to the convening of the 1980 legislature.

(d) Upon receipt by the legislature of a functional plan prepared by the appropriate state agency and submitted by the governor, with the findings and recommendations of the policy council, the legislature shall review, modify, and as appropriate, adopt the functional plan by concurrent resolution.

(e) If the legislature fails to adopt such functional plan by concurrent resolution, it shall revert to the state agency of origin for revision and be resubmitted thirty days prior to the convening of the next legislature.

Section 226-59. Functional plans; implementation.

(a) Functional plans shall not be used as a guide nor as a statement or interpretation of state policy unless said plans shall have been approved by the legislature.

(b) The legislature, upon a finding of overriding statewide concern, may determine in any given instance that the site for a specific project may be other than that designated on the county general plan; provided that any proposed facility or project contained in a county general plan shall not require the actual development or implementation of said facility or project or the inclusion of the same in any state functional plan by any state agency. The implementation of functional plans shall conform to existing laws, rules, and standards, and the provisions of this chapter.

Section 226-61. County general plans. (a) The county general plans and development plans [shall be] formulated with input from the state and county agencies as well as the general public.

County general plans or development plans shall indicate desired population and physi-

C. *Zoning by initiative in Hawaii*

Initiative and referendum are fairly new to Hawaii[135] and have not been used extensively.[136] Two cases in which the Hawaii Supreme Court addressed these issues are *County of Kauai v. Pacific Standard Life Insurance Co.*

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cal development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. The county general plans or development plans shall further define applicable provisions of this chapter, provided that any amendment to the county general plan of each county shall not be contrary to the county charter. The formulation, amendment, and implementation of county general plans or development plans shall take into consideration statewide objectives, policies, and programs stipulated in state functional plans adopted in consonance with this chapter.

(b) County general plans shall be formulated on the basis of sound rationale, data, analyses, and input from state and county agencies and the general public, and contain objectives and policies as require by the charter of each county. Further, the county general plans should:

(1) Contain objectives to be achieved and policies to be pursued with respect to population density, land use, transportation system location, public and community facility locations, water and sewage system locations, visitor destinations, urban design and all other matters necessary for the coordinated development of each county and regions within each county.

(2) Contain implementation priorities and actions to carry out policies to include but not be limited to, land use maps, programs, projects, regulatory measures, standards and principles and interagency coordination provisions.

Section 226-62. State programs. (a) The formulation, administration, and implementation of state programs shall be in conformance with the overall theme, goals, objectives, and policies, and shall utilize as guidelines the priority guidelines contained within this chapter, and the state functional plans adopted pursuant to this chapter.

(b) The director of the department of planning and economic development shall assist the governor in assuring that state programs are in conformance with this chapter.

[135] *See supra* notes 68-71 and accompanying text.

[136] Initiative or referendum was used in the following matters to place issues before the electorate:

Year	*County*	*Issue*	*Outcome*
1974	Hawaii	Are you in favor of fluoridating the county's drinking water?	21,727 - no 5,401 - yes
1978	Kauai	Are you in favor of amending the zoning ordinance to remove the planning commission's authority to grant height limitation variances?	6,682 - no 6,644 - yes
1980	Kauai	Are you in favor of the ordinance	10,794 - no

(*Nukolii*)[137] and *Lum Yip Kee, Ltd. v. City and County of Honolulu* (*Date-Laau*).[138] In the *Nukolii* case, the Hawaii Supreme Court upheld a referendum

		which permits a resort development at Nukolii?	5,718 - yes
1984	Kauai	Are you in favor of the ordinance which permits a resort development at Nukolii?	8,476 - yes 5,917 - no
1984	Honolulu	Are you in favor of rezoning the parcel at Date and Laau streets to low density/apartment with a 40-foot height limitation? And, are you in favor of requiring that residents be notified by mail when a land-use change in their area is being considered?	115,567 - yes 110,937 - no
1986	Hawaii	Are you in favor of repealing the ordinance that exempts the military from the anti-nuclear provision [that no one can store or bring into Hawaii County nuclear materials?	23,818 - no 12,505 - yes
1986	Honolulu	Are you in favor of preserving the open-space character of Fort DeRussy? And, are you in favor of expressly prohibiting the building of a convention center or hotel at Fort DeRussy?	149,285 - no 90,393 - yes
1988	Hawaii	Are you in favor of removing resort zoning for a 32-acre parcel of land overlooking Hapuna Beach where a 350-room hotel is planned?	23,455 - no 18,186 - yes
1988	Honolulu	Are you in favor of rezoning from residential to preservation 31 acres of land near Sandy Beach, the site of a proposed housing project?	165,007 - yes 85,210 - no

KIM, *The Voice of the People*, HONOLULU MAG., Jan. 1989, at 39.

[137] 65 Haw. 318, 653 P.2d 766 (1982). In this case, the voters of the County of Kauai used their referendum power to repeal a zoning ordinance that had authorized resort development at Nukolii, Kauai. Because the referendum in question was certified before any of the development permits had been issued, the Hawaii Supreme Court rejected the argument that development rights had vested and that the county was estopped from repealing the zoning ordinance. The court held that zoning changes are within the referendum power vested in the voters by the Kauai County Charter and it remanded the case with an order to revoke the developer's building permits and to restrain further construction at Nukolii. *Id.* at 339, 653 P.2d at 781.

[138] 70 Haw. 179, 767 P.2d 815 (1989). In this case, the voters of the City and County of Honolulu approved an initiative ordinance rezoning a 5.5-acre of privately-owned land in the

nullifying a zoning ordinance that authorized resort development at Nukolii, Hawaii. The court ruled that the referendum process "is a clear exception to the general reservation of legislative power to the [county council]."[139] In the *Date-Laau* case, the lower court invalidated an initiative ordinance downzoning the tract of land in question on the ground that Hawaii Revised Statutes section 46-4(a) vested zoning power exclusively in the City Council, which was required to accomplish zoning changes within the framework of a long-range comprehensive plan. The Supreme Court did not address the lower court's reasoning with respect to the validity of initiative because it held that a similar downzoning by the City Council was valid.[140]

IV. ANALYSIS

A. *The Reasoning Applied by the Hawaii Supreme Court*

The Hawaii Supreme Court in *Sandy Beach* held that the initiative proposals adopted by the electorate on November 8, 1988, amending the land use development plan and zoning maps of the City, were invalid.[141] In determining that the initiative process is an invalid means of amending the City's land use development plan and zoning maps, the court reasoned that the legislature in enacting the Hawaii Zoning Enabling Act[142] contemplated the development of each county or city in accord with a long-range, comprehensive plan and that zoning by initiative is inconsistent with such a policy.[143]

The court's analysis began with an examination of the legislative intent in enacting Hawaii Revised Statutes section 46-4(a).[144] The court concluded that "[t]he language of the Zoning Enabling Act clearly indicates the legislature's emphasis on comprehensive planning for reasoned and orderly land use development."[145] To further illustrate the legislature's intent to develop the City based on a comprehensive planning process, the court quoted from the statement of

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McCully-Moiliili area from "High Density Apartment" to "Low Density Apartment." The Honolulu City Council subsequently amended the City's development plan by adopting an ordinance that had the same effect as the earlier action by the electorate. The Hawaii Supreme Court affirmed the lower court's ruling that the ordinance passed by the City Council was valid and "therefore [did] not reach the question of the validity of the Initiative Ordinance." *Id.* at 181, 767 P.2d at 817.

[139] 65 Haw. at 324, 653 P.2d at 772.

[140] 70 Haw. at 181, 767 P.2d at 817.

[141] 70 Haw. 480, 777 P.2d 246.

[142] HAW. REV. STAT. § 46-4 (1984 ed.). *See supra* note 117 for pertinent text of the statute.

[143] 70 Haw. at 483, 777 P.2d at 247.

[144] *Id.* at 483-84, 777 P.2d at 246.

[145] *Id.* at 483, 777 P.2d at 246-47.

policy adopted pursuant to enactment of section 46-4.[146] Because of its belief that the language and legislative history of the Act emphasize planning as essential for rational land use development, the court reasoned that "it is abundantly clear that the legislature in its wisdom established a public policy of not effectuating land use zoning through the initiative process."[147] In his dissent, Justice Nakamura took exception to the majority's conclusion.[148]

To illustrate the proposition that zoning by initiative does not take place within the Zoning Enabling Act's requisite framework of long-range, comprehensive planning, the court cited two New Jersey cases, *Smith v. Township of Livingston*,[149] and *Township of Sparta v. Spillane*,[150] and a Washington case,

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[146] *Id.* at 484, 777 P.2d at 247. The policy statement notes:

> The pressure of a rapidly increasing population in the Territory of Hawaii requires an orderly economic growth within the various counties and the conservation and development of all natural resources. Adequate controls must be established, maintained and enforced by responsible agencies of government to reduce waste and put all of our limited land areas, and the resources found thereon, to their most beneficial use.
>
> It is the intent and purpose of the legislature, by means of zoning ordinances and regulations enacted by or under this act, and in accord with a long range, comprehensive general plan, to promote the health, safety, convenience, order, welfare and prosperity of the present and future inhabitants of the Territory.

Act 234, 1957 HAW. SESS. LAWS § 1.

[147] Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. at 483, 777 P.2d at 246.

[148] *Id.* at 491, 777 P.2d at 251.

Justice Nakamura stated:

> Having read what is proffered thereafter as proof of abundant clarity of intent, I cannot, even after viewing HRS § 46-4 and its legislative history in a light most favorable to the cause of legislative wisdom, ascribe much prescience to the legislature. For HRS § 46-4 does not even mention "initiative" or "referendum," there is nothing therein from which it may be inferred that zoning amendments by initiative are interdicted, and the history only confirms that the plain wording of the section accurately reflects legislative intention, which simply is to have zoning accomplished (by ordinance) within the framework of a long range comprehensive general plan. *Id.*

[149] 106 N.J. Super. 444, 256 A.2d 85 (1969). The defendant was the proposed developer of a shopping center on a 58-acre tract. An initiative petition was certified by the township clerk to place an ordinance on the ballot of the next general election amending the present zoning ordinance so that the designation of the developer's land would be changed from "Designed Shopping Center District" to "Office Building and Research Laboratory District." Defendants sought an adjudication that the initiative petition be declared a nullity. The court held that zoning amendments cannot be accomplished by the initiative process. *Id.*

[150] 125 N.J. Super. 519, 312 A.2d 154 (1973). *Spillane* and Township of Mount Olive v. Lakeland Indus. Park were considered together as the cases involved the identical issue.

In *Spillane*, the town council adopted an amendment to its zoning ordinance authorizing a Planned Unit Development to be developed by a corporation owning approximately 2000 acres. After extended public hearings the planning board acted favorably upon the amendatory ordinance. The defendants then filed a petition seeking a referendum, whereupon the Sparta Town-

Leonard v. City of Bothell.[151] The court was cognizant that *Spillane* and *Leonard* both involved referenda but agreed with the New Jersey and Washington courts' reasoning as applied to zoning by initiative and its incompatibility with the planning process.[152]

The court also recognized that that reliance on referenda cases may be inconsistent with the court's decision in *Nukolii*.[153] The *Sandy Beach* court summarily dismissed *Nukolii* as inapposite by declaring that in *Nukolii* it "was not faced with the issue of whether zoning by referendum is permissible in light of HRS § 46-4(a)."[154] Although *Nukolii* relied on the presumption that zoning by referendum is valid, the case merely held that property rights do not vest until the last necessary discretionary permit has been issued.[155]

Justice Nakamura's dissent in *Sandy Beach* contended that the majority's conclusion that the legislature intended with abundant clarity to establish a policy of not effectuating zoning through initiative when enacting Hawaii Revised Statutes section 46-4(a), is inconsistent with *Nukolii*.[156] He reasoned:

> Something as abundantly clear as the majority would have us believe could hardly have escaped the attention of persons whose stake in the development there probably was as great as that of the developer and landowner here. Zoning by referendum was no less a matter of great public import then than zoning by initiative is now. That neither the litigants nor the court noticed the established policy against

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ship sought a declaratory judgment to determine whether the referendum provisions of the Faulkner Act, which gave voters the power of referendum, were applicable to amendments of a zoning ordinance.

In *Mount Olive*, the township council adopted an ordinance amendment which established a new zone denominated "Commercial-Recreational." This classification permitted amusement parks. The owners of two-thirds of the land in the newly created zone intended to construct and operate a major amusement park. The plaintiffs filed a petition for referendum. As in *Sparta*, the township sought a declaratory judgment as to the applicability of the referendum procedures to the ordinance. The court held that the referendum procedures provided for in the Faulkner Act do not apply to amendments to zoning ordinances. *Id.*

[151] 87 Wash. 2d. 847, 557 P.2d 1306 (1976). The city council granted a request by the owner of a 141-acre parcel to rezone the property from "Agricultural" to "Community Business" in order to build a shopping center. A writ of mandamus to compel the city council to order a referendum election to consider the rezoning was denied. The court held that the ordinance was not a legislative policy-making decision and, therefore, was not subject to referendum. *Id.* at 851, 557 P.2d at 1309.

[152] 70 Haw. at 485, 777 P.2d at 247.

[153] 65 Haw. 318, 653 P.2d 766 (1982). For a summary of *Nukolii*, *see supra* note 137.

[154] 70 Haw. at 485, 777 P.2d at 247-48. *Sandy Beach* looks to what *Nukolii* squarely holds and not to the dictum inherent in the ultimate holding.

[155] 65 Haw. at 332, 653 P.2d at 776. Upon certification of the referendum petition, the referendum became the last discretionary permit. *Id.*

[156] 70 Haw. at 493-94, 777 P.2d at 252.

zoning by referendum belies the claim of clarity of legislative intent.[157]

Next, the court concluded that the legislature did not contemplate zoning by initiative when it enacted the Zoning Enabling Act in 1957 because initiative was not available to the electorate at the time.[158] Since there has not been any legislation enacted since 1957 to indicate a change in intent,[159] the court reasoned that Hawaii Revised Statutes section 46-4 does not permit zoning by initiative.[160] As further evidence of the state's aim to have land developed within a long-range, comprehensive plan, and not by initiative,[161] the court examined the enactment of the State General Plan in 1978,[162] the formulation of county general plans and development plans,[163] and the rejection of legislation by initiative at the 1950, 1968, and 1978 Constitutional Conventions.[164]

The court then examined the conflict between the City and County of Honolulu Charter provision, which permits enactment of ordinances through the initiative process,[165] and Hawaii Revised Statutes section 46-4(a).[166] The court concluded that section 46-4(a) supersedes article III, chapter 4 of the City Charter.[167] Under the Hawaii Constitution, when a charter provision conflicts

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[157] *Id.*

[158] *Id.* at 486, 777 P.2d at 248.

[159] *Id.*

[160] *Id.* However, Justice Nakamura did not agree with this conclusion. In his dissent he stated that "[i]f intent is to be inferred at all from legislative inaction, a more logical premise from which to proceed would be the inaction following the referendum on Nukolii and our decision in County of Kauai v. Pacific Standard Life Ins. Co. at 494, 777 P.2d at 252." *Id.*

[161] *Id.*

[162] The State General Plan, HAW. REV. STAT. § 226-1 (Supp. 1988), states:

> Findings and purpose. The legislature finds that there is a need to improve the planning process in this State, to increase the effectiveness of government and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the State.
>
> The purpose of this chapter is to set forth the Hawaii state plan that shall serve as a guide for the future long-range development of the State; identify the goals, objectives, policies, and priorities for the State; provide a basis for determining priorities and allocating limited resources, such as public funds, services, human resources, land, energy, water, and other resources; improve coordination of federal, state, and county plans, policies, programs, projects, and regulatory activities; and to establish a system for plan formulation and program coordination to provide for an integration of all major state, and county activities.

[163] *See supra* note 134 and accompanying text.

[164] *See supra* notes 59-61.

[165] HONOLULU, HAW., REV. CHARTER art. V, § 3-401 (1984). *See supra* note 71 for the text of § 3-401.

[166] Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. at 488-89, 777 P.2d at 249-50.

[167] *Id.*

with a general state law, the general law controls.[168] Only a county's charter provisions respecting its executive, legislative, and administrative structure and organization are superior to statutory provisions.[169] The City argued that the manner in which zoning ordinances are enacted, either by the City Council or through initiative, is a matter of its structure and organization, and, therefore, the charter provision permitting initiative is superior.[170] The court, however, reasoned that Hawaii Revised Statutes section 46-4(a) does not dictate the manner in which rezonings are enacted but is concerned with whether the zoning ordinances comport with long-range planning.[171] Therefore, the *Sandy Beach* court held that section 46-4(a) does not relate to the City's "executive, legislative and administrative structure and organization."[172] Consequently, section 46-4(a) overrides the counties' home-rule authority, and for the reason that it is inconsistent with the Zoning Enabling Act's policy of zoning within the framework of a long-range, comprehensive plan, zoning by initiative is impermissible.[173]

B. *Commentary*

1. *Date-Laau and Sandy Beach*

The Hawaii Supreme Court's decision in *Sandy Beach* was not wholly unpredictable in light of *Date-Laau*.[174] Chief Justice Lum's opinion in *Date-Laau* stressed at great length the importance of the planning process in zoning[175] and perhaps not so unwittingly set the stage for the court's decision four months later in *Sandy Beach*.

The First Circuit Court opinion in *Date-Laau* foreshadowed the reasoning behind *Sandy Beach* with respect to the incompatibility of zoning by initiative and Hawaii Revised Statutes section 46-4(a).[176] When *Sandy Beach* came before the lower court, Judge Robert Klein reiterated his holding in *Date-Laau* in granting in part Kaiser's motion for judgment on the pleadings, by stating that

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[168] HAW. CONST. art. VIII, § 2. *See supra* note 67 for the text of article VIII, § 2.

[169] *Id.*

[170] 70 Haw. at 489, 777 P.2d at 249.

[171] *Id.* at 489, 777 P.2d at 250.

[172] *Id.*

[173] *Id.*

[174] 70 Haw. 179, 767 P.2d 815. For a summary of *Date-Laau*, *see supra* note 138.

[175] *Id.* at 182-83, 767 P.2d 817-18. For a discussion of this detailed process, *see supra* notes 122-34 and accompanying text.

[176] Lum Yip Kee, Ltd. v. City and County of Honolulu, No. 84-2125 (1st Cir. 1984).

> the city zoning authority is subject to, and derived from the Hawaii Zoning Enabling Act which is paramount and superior to the Revised Charter of Honolulu. Section 46-4 vests zoning power within the City and County of Honolulu exclusively in the City Council of the City and County of Honolulu, which is required to accomplish zoning changes within the framework of a long-range comprehensive general plan.[177]

Sandy Beach, however, shrewdly veers from Judge Klein's conclusion that section 46-4 vests zoning power exclusively with the City Council.[178] By emphasizing the planning process and not the City Council's "exclusive" power to zone, *Sandy Beach* avoids prolonged discussion of and any potential conflict with the home-rule provisions of article VIII section 2 of the Hawaii State Constitution.[179]

2. *Planning and initiative*

The pivotal determination in *Sandy Beach* is the court's conclusion that zoning by initiative is inconsistent with the goal of long-range, comprehensive planning.[180] The cases the court cites to support this view, however, can be readily distinguished from *Sandy Beach*. The most apparent difference is that *Smith v. Township of Livingston*[181] is the only one of the three cases cited which involves initiative. Furthermore, *Livingston* and *Township of Sparta v. Spil-*

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[177] Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 87-3133-09 (1st Cir. Mar. 17, 1988). Order Granting in Part and Denying in Part Plaintiff's Motion for Judgment on the Pleadings and Denying Defendant Save Sandy Beach Initiative Coalition's Motion for Dismissal or Summary Judgment.

HAW. REV. STAT. § 46-4, in relevant part, states:

> The zoning power granted herein shall be exercised by ordinance which may relate to:
> (12) Other such regulations as may be deemed by the boards or city council as necessary and proper to permit and encourage orderly development of land resources within their jurisdictions.
>
> The council of any county shall prescribe such rules and regulations and administrative procedures and provide such personnel as it may deem necessary for the enforcement of this section and any ordinance enacted in accordance therewith.

[178] "The thrust of HRS § 46-4(a) is not to dictate the manner in which zoning ordinances are promulgated, but to assure that, however enacted, those ordinances comport with the long-range general plan." Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. at 489, 777 P.2d at 250.

[179] *See supra* note 67.

[180] If zoning by initiative were consistent with comprehensive planning, there would be no conflict between HRS § 46-4 and article III, chapter 4 of the City Charter, except possibly the argument that HAW. REV. STAT. § 46-4 vests zoning exclusively with the county councils. *See supra* notes 177-78 and accompanying text.

[181] 106 N.J. Super. 444, 256 A.2d 85 (1969). *See supra* note 149 for a summary of the case.

lane,[182] were both faced with the issue of resolving the conflict between the New Jersey Zoning Act[183] and the Faulkner Act,[184] which provided for initiative and referendum. However, unlike the Hawaii Zoning Enabling Act, the New Jersey Zoning Act is specific and details the manner in which zoning ordinances may be amended.[185] Hawaii Revised Statutes section 46-4 offers virtually no procedural directives other than that zoning shall be exercised by ordinance.[186]

The New Jersey cases stand strongly for the proposition that zoning by initiative may frustrate comprehensive planning. *Spillane*, quoting *Livingston*, reasons that "if the initiative procedure were allowed to be applied to zoning matters it would disregard the valuable expertise of the planning board, and permit the electorate to defeat the beneficent purpose of the comprehensive zoning ordinance."[187] *Leonard v. City of Bothell*[188] also offers strong language promoting the *Sandy Beach* conclusion that zoning by initiative is inconsistent with comprehensive planning.[189] The Washington Supreme Court in *Leonard*, however, simply held that the ordinance was not a legislative policy-making decision and,

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[182] 125 N.J. Super. 519, 312 A.2d 154 (1973). *See supra* note 150 for a summary of the case.

[183] N.J. STAT. ANN. § 40: 55-30 (West 1967). *See infra* note 186.

[184] N.J. STAT. ANN. § 40:69A-1. Under the initiative provision of the Faulkner Act, N.J. STAT. ANN. § 40:69A-184, the voters may "propose any ordinance and may adopt or reject the same at the polls such power being known as initiative."

[185] The *Sandy Beach* dissent recognized that *Spillane* and *Livingston* turned on the exclusivity and uniqueness of the detailed New Jersey Zoning Act. Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. at 492, 777 P.2d at 251.

Livingston summarizes the Act:

> The [zoning] procedure requires consideration by the municipal planning boards, the opportunity of a property owner to object, and the approval by the governing body. In the event of objection by the property owners involved, a vote of two-thirds of the governing body is required to effect a change in a zoning ordinance. 106 N.J. Super. at 450, 256 A.2d at 89.

[186] The specific zoning procedures in Hawaii are outlined in HAW. REV. STAT. ch. 226 (1984 ed.). *See supra* note 134 for the relevant sections of HAW. REV. STAT. ch. 226 (1984 ed.).

[187] Township of Sparta v. Spillane, 125 N.J. Super. at 525, 312 A.2d at 157, quoting Smith v. Township of Livingston, 106 N.J. Super. at 427, 256 A.2d at 92.

[188] 87 Wash. 2d 847, 557 P.2d 1306 (1976). *See supra* note 151 for a summary of the case.

[189] *Id.* at 851-52, 557 P.2d at 1309-10 (quoting Kelley v. John, 162 Neb. 319, 323-24, 75 N.W.2d 713, 716 (1956)):

> The uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. A single decision by the electors by referendum could well destroy the very purpose of zoning where such decision was in conflict with the general scheme fixing the uses of property in designated areas . . . . It would permit the electors by referendum to change, delay, and defeat the real purposes of the comprehensive zoning ordinance by creating the chaotic situation such ordinance was designed to prevent.

therefore, was not subject to referendum.[190]

The *Sandy Beach* court itself recognized that its reliance on the referendum cases and on the language pulled from all three cases might not be ironclad. "We agree with the reasoning and statements made by the respective courts as applied to the process of zoning by initiative."[191] Thus, while *Livingston*, *Spillane*, and *Leonard* involved decidedly different fact situations and holdings than *Sandy Beach*, the court cited them simply to illustrate its holding that zoning by initiative is inconsistent with comprehensive planning.[192] The reliance on these cases certainly does not weaken the *Sandy Beach* conclusion.[193]

3. *Constitutional reservation of initiative*

The *Sandy Beach* court realized that other jurisdictions have upheld zoning by initiative or referendum despite the existence of laws calling for comprehensive plans.[194] However, in these states constitutional or statutory provisions reserve to the electorate the power of initiative or referendum.[195] *Eastlake*[196] is fairly typical of the line of cases which permit zoning changes by initiative or referendum.[197] Since the power of referendum was specifically reserved to the people of Ohio in its constitution, zoning by referendum was permissible.[198] Apparently, the only case where initiative or referendum was upheld without a

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[190] 87 Wash. 2d at 847, 557 P.2d at 1306.

[191] Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. at 485, 777 P.2d at 247.

[192] *See also*, Gumprecht v. City of Coeur D'Alene, 104 Idaho 615, 661 P.2d 1214 (1983); City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Forman v. Eagle Thrifty Drugs and Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1974); Hancock v. Rouse, 437 S.W.2d 1 (Tex. Civ. App. 1969); Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805 (1954).

[193] Justice Nakamura, however, also addressed the distinctions between the three cases and *Sandy Beach* and concluded that it is not "our practice to decide important questions of law by dicta from unrelated cases" (quoting In re Hawaiian Tel. Co., 67 Haw. 370, 379, 689 P.2d 741, 747 (1984)). He stated that "to say 'we agree with the reasoning and statements made by the respective courts as applied to the process of zoning by initiative[,]' when their decisions are manifestly inapt only underscores the deficit in this court's reasoning." 70 Haw. at 493, 777 P.2d at 252.

[194] 70 Haw. at 487, 777 P.2d at 248.

[195] *See supra* note 56.

[196] 426 U.S. 668 (1976). *See supra* note 102 and notes 105-07 and accompanying text for a summary of the case.

[197] *See, e.g.*, Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 169 Cal. Rptr. 904, 620 P.2d 565 (1980); City of Coral Gables v. Carmichael, 256 So. 2d 404 (Fla. Dist. Ct. App. 1977).

[198] 426 U.S. at 672-74.

constitutional reservation was *Denny v. City of Duluth*.[199]

Hawaii does not have a constitutional or statutory provision reserving the initiative power to the electorate. The initiative power resides solely in the county charters.[200] Because Hawaii lacks a constitutional mandate permitting initiative, *Sandy Beach* appropriately renders inapposite the cases in other jurisdictions allowing initiative and referendum despite comprehensive planning laws.

4. *Initiative and due process*

The *Sandy Beach* court specifically refused to consider whether a landowner's constitutional rights to due process[201] are violated by the initiative process. It was deemed unnecessary in view of the holding.[202] The constitutional issue of due process rights in the initiative process poses an interesting inquiry. If the Hawaii state legislature takes action to restore zoning by initiative,[203] the issue may someday be before the Hawaii Supreme Court.

Although due process is often afforded a landowner when zoning is accomplished by referendum, due process is more difficult to achieve when zoning is enacted by initiative.[204] In a referendum, all procedural requirements prescribed by enabling legislation—for instance, notice and hearing—are met before a measure is adopted by the legislative body and, therefore, before the referendum process is commenced.[205] In the initiative process, however, no opportunity to be heard is afforded to affected property owners except that of the elec-

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[199] 295 Minn. 22, 202 N.W.2d 892 (1972). *Sandy Beach* states in footnote 3 that "[*Denny*] is readily explained by the fact that by state statute, Minnesota provides for municipal referenda." 70 Haw. at 487 n.3, 777 P.2d at 249 n.3.

In *Denny*, a 21.7-acre parcel was rezoned from "single- family residential" to an apartment house zone by the city council. Pursuant to Duluth's charter, a petition was timely filed and presented to the city council demanding that the ordinance be submitted to referendum vote. The city council refused to call for the referendum vote, and an action was brought to enjoin Duluth's building inspector from issuing a permit authorizing construction. The court held that amendments to the boundaries of a comprehensive zoning ordinance were legislative actions and subject to initiative. 295 Minn. at 22, 202 N.W.2d at 892.

[200] *See supra* notes 68-71 for the relevant charter provisions of the County of Maui, County of Hawaii, County of Kauai, and City and County of Honolulu.

[201] The due process clause of the fourteenth amendment reads "nor shall any state deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, § 2.

[202] 70 Haw. at 483, 777 P.2d at 246.

[203] For a discussion of the methods by which the legislature may effectively restore zoning by initiative to the electorate, *see infra* notes 225-30 and accompanying text.

[204] *See supra* note 51 for the fundamental distinction between initiative and referendum.

[205] ZIEGLER, *supra* note 51, § 27.07[2], at 27-71.

tion campaign.[206]

In the City and County of Honolulu, the proposed amendment to the development plan or zoning map is simply placed on the ballot when the requisite number of signatures has been gathered.[207] The procedures providing for written reports and recommendations by the planning commission to safeguard a landowner against arbitrary zoning actions are absent.[208] A landowner does not receive notice or an opportunity to be heard through a public hearing.[209] He is treated differently than other similarly situated property owners and is denied an opportunity for review because an initiative ordinance automatically becomes law ten days following certification of the vote count.[210]

5. *Legislative or quasi-judicial?*

The *Sandy Beach* court failed to address the essential issue in initiative and referendum zoning of whether zoning and rezoning are legislative or quasi-judicial in nature. The initiative and referendum power is only applied to enactments that are deemed legislative in character, not to those that are quasi-judicial or administrative.[211] The *Sandy Beach* decision did not determine whether rezonings in general or the specific rezoning at issue was a legislative or quasi-judicial act.

The court has addressed the distinction between legislative and quasi-judicial acts but has not specifically held that an amendment to a development plan is a legislative act. In *Date-Laau*, the court stressed that "[w]e have recognized that the enactment of and amendments to development plans constitute legislative acts of the City Council."[212] While this is persuasive language, the court merely

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[206] *Id. See also supra* notes 97-103 and accompanying text for discussion of the due process issue.

[207] *See supra* notes 28-29 for HONOLULU, HAW., REV. CHARTER ch. 4, §§ 3-402, 3-403, 3-404 (1984).

[208] These findings must include the relationship of the proposed rezoning to the general and development plans. *See supra* notes 127-30 and accompanying text.

[209] *But see*, Margolis v. District Court, 638 P.2d 297, 305 (Colo. 1981), (discussion, debate, and airing of opposing opinions during the initiative or referendum campaign was an adequate substitution for a public hearing).

[210] HONOLULU, HAW., REV. CHARTER art. V, § 3-405 (1984) states:

1. Adoption and Effective Date of Ordinance. Any proposed ordinance which is approved by the majority of voters voting thereon shall be adopted, and shall become effective ten days after certification of the results of the election, or at the time and under the conditions specified in the ordinance.

2. No Veto. No ordinance adopted by the initiative power shall be subject too mayoral veto.

[211] *See supra* notes 78-80 and accompanying text.

[212] 70 Haw. at 187, 767 P.2d at 820, quoting Kailua Community Council v. City and

"recognizes" and does not hold that map and plan amendments are legislative acts. The two cases do not stand for the broad proposition that amendments to the development plan are *per se* se legislative in nature.

In contrast to *Date-Laau, Town v. Land Use Commission*,[213] suggests that plan amendments and rezonings may be administrative or quasi-judicial. The court held that consideration by the State Land Use Commission of an application for a boundary amendment under Hawaii Revised Statutes chapter 205 was subject to the "contested case" requirements of the Hawaii Administrative Procedure Act.[214] However, *Town*, like *Date-Laau* and *Kailua Community*, does not specifically indicate whether development plan and map amendments are legislative or quasi-judicial acts since it concerned amendments to the Land Use Commission's district boundaries.[215]

Not only should the legislative or quasi-judicial determination have been a logical starting point for the court's analysis in *Sandy Beach*, but it would have been instructive for the court to unequivocally outline the distinction.[216]

6. *Initiative and public policy*

The *Sandy Beach* court also failed to address the policy reasons inherent in some state constitutions, *Eastlake*, and even *Nukolii*, which support direct electorate participation in zoning changes. The referendum is a "basic instrument of democratic government"[217] which serves as a means for direct political participation, much like the traditional town meeting.[218] It is "an exercise by the voters of their traditional right through direct legislation to override the views of the elected representatives as to what serves the public interest."[219] The pur-

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County of Honolulu, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979). *Kailua Community* held that the Chief Planning Officer, in processing applications for amendments or revisions to the general plan or development plans of the city, was not subject to the provisions of the Hawaii Administrative Procedure Act. *Id. See* HAW. REV. STAT. ch. 91 (Supp. 1988).

[213] 55 Haw. 538, 524 P.2d 84 (1974). Appellant objected to the Land Use Commission's delay in deciding a boundary amendment application from agricultural to rural that affected his property and the taking of testimony outside his presence which was in violation of the requirements of the Hawaii Administrative Procedure Act. *Id.* at 542, 524 P.2d at 87.

[214] *Id.* at 548, 524 P.2d at 89. "Contested case" is defined as a "proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HAW. REV. STAT. § 91-1(5) (1984 ed.).

[215] 55 Haw. at 548, 524 P.2d at 89.

[216] The issue is likely to reach the Hawaii Supreme Court in the future. *See infra* note 228 and accompanying text.

[217] *Nukolii*, 65 Haw. at 323-24, 653 P.2d at 771-72 (quoting *Eastlake*, 426 U.S. at 679).

[218] 426 U.S. at 672-73.

[219] *Id.* at 678 (quoting Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

pose of the initiative or referendum process is to give citizens a voice on questions of public policy.[220]

The underlying purposes behind initiative and referendum were not dispositive in *Sandy Beach*. Nevertheless, it is disappointing in light of the overwhelming public interest surrounding the initiative issue in Hawaii, that the court did not discuss the policy arguments in favor of or against[221] zoning by initiative.

V. IMPACT

Did the *Sandy Beach* decision deliver a fatal blow to zoning by initiative in Hawaii? Unless the state legislature amends the state constitution[222] or amends the Zoning Enabling Act and the other zoning statutes, zoning by initiative certainly will not be resurrected.[223]

The public spotlight accorded zoning by initiative pushed the initiative issue to the forefront of the 1990 legislative session. Unfortunately for initiative proponents, the legislature did not pass any bills permitting zoning by initiative. If the legislature decides in subsequent sessions to restore the ability of the electorate to effectuate zoning changes by initiative, the most effective method it could use would be to amend the state constitution.[224] A constitutional reser-

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[220] James v. Valtierra, 402 U.S. 137, 141 (1971).

[221] Central to the court's holding was the idea that zoning by initiative would create piecemeal zoning without any overriding concept, which the planning process is designed to prevent. However, *Sandy Beach* also failed to discuss the theory that zoning through direct vote may cause a "tyranny of the majority" effect which allows an unaccountable, and often unknowledgeable, majority to impose its will on individual landowners.

[222] An amendment to the Hawaii State Constitution may also be proposed through a constitutional convention. *See infra* note 224.

[223] Another possible method to reinstate zoning by initiative in Hawaii would be to create a procedure under the initiative process for determining compliance with the general and development plans.

[224] HAW. CONST. art. XVII, § 1 states that "[r]evisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature."

HAW. CONST. art. XVII, § 3 states:

> The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.
>
> Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.
>
> At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

vation of the initiative power would best protect the state from a suit by a landowner[225] that his due process rights have been violated by an initiative vote.[226] Another method the legislature might use to effectively restore the initiative power to the people would be to amend Hawaii Revised Statutes section 46-4 and all of the zoning statutes that emphasize comprehensive planning as essential for proper zoning. However, the legislature must be very careful in its rephrasing of the statutes. Because *Sandy Beach* stands for the proposition that zoning by initiative is inconsistent with the goal of long-range, comprehensive planning, any provision permitting the initiative process will necessarily conflict with the zoning statutes' emphasis on the planning process. Therefore, the legislature cannot merely add a subsection to section 46-4 allowing zoning by initiative.

If the legislature sufficiently amends the zoning statutes or amends the state constitution, an affected landowner may still argue that his due process rights have been violated[227] or that the amendment was a quasi-judicial act and, therefore, not subject to initiative.[228] The Hawaii Supreme Court will likely be forced to address these issues in the future if zoning by initiative is permitted.

VI. CONCLUSION

In *Kaiser Hawaii Kai Development Company v. City and County of Honolulu*,[229] the Hawaii Supreme Court held that the initiative process was an invalid means of amending the City's land use development plan and zoning maps because zoning by initiative is inconsistent with the Hawaii Zoning Enabling Act's policy of zoning within the framework of a long-range, comprehensive plan.[230] The court examined the language of Hawaii Revised Statutes section 46-4(a) and its legislative history to conclude that the legislature in enacting the Zoning Enabling Act contemplated development of the counties based on a comprehensive planning process. The court determined that zoning by initiative

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The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in section 2 of this article for ratification at a general election.

[225] If a legislative change occurs, it seems inevitable that an initiative petition will eventually be certified against a landowner. The ensuing battle between the electorate and the landowner will likely be lengthy (the *Date-Laau* referendum petition was certified in 1984 and the Hawaii Supreme Court did not decide on the validity of the downzoning until early 1989), culminating in another Hawaii Supreme Court decision.

[226] *See supra* notes 196-201 and accompanying text.

[227] This might be easier for the landowner to claim if the zoning statutes were to be amended rather than the constitution, because then there would be no specific reservation of power by the people.

[228] *See supra* notes 212-18 and accompanying text.

[229] 70 Haw. 480, 777 P.2d 246 (1989).

[230] *Id.* at 484, 777 P.2d at 247.

would jeopardize the goals of section 46-4(a) by fragmenting zoning without any overriding concept. Therefore, until and unless sufficient statutory or constitutional provisions are enacted, the electorate may not use initiative to effectuate zoning changes.

Todd W. Eddins
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Masaki v. General Motors Corp.: Negligent Infliction of Emotional Distress and Loss of Filial Consortium

I. INTRODUCTION

In *Masaki v. General Motors Corp.*,[1] the Hawaii Supreme Court built upon its previous rulings concerning the requirements for establishing a cause of action for negligent infliction of emotional distress.[2] In *Masaki*, the parents of a young adult were told by telephone of an accident that rendered their son a quadriplegic; nine hours later they were permitted to visit him in the intensive care unit of a hospital. The resulting emotional trauma that they experienced was considered a reasonably foreseeable consequence, which the defendants could have anticipated. The fact that the Masakis did not actually witness the accident nor exhibit physical manifestations of emotional distress did not bar recovery. The court held that it was sufficient that the parents resided on the same island and witnessed the consequences of the accident.[3] *Masaki* also established that a cause of action is available to parents for the loss of filial consortium of an adult child who has been severely and permanently injured by the negligence of a third party.[4]

II. FACTS

The case arose from an accident in which Steven Masaki, a 28-year old auto

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[1] 71 Haw. ____, 780 P.2d 566 (1989).

[2] *See* Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981); Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 532 P.2d 673 (1975); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). *See also*, Note, *Campbell v. Animal Quarantine Station: Negligent Infliction of Mental Distress*, 4 U. HAW. L. REV. 207 (1982); R. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1 (1979).

[3] 71 Haw. at ____, 780 P.2d at 576.

[4] *Id.*

mechanic, was injured while working under an unoccupied 1976 Chevrolet van with the engine running. The van slipped into gear, jerked backward, and broke Masaki's neck, rendering him a quadriplegic. Masaki lived with his parents and helped with household chores.[5] His parents learned of the accident by telephone[6] about two hours after it happened[7] and went immediately to the hospital where they were told that Steven was "seriously hurt and he can't walk anymore."[8] At this point, Mrs. Masaki "broke down."[9] They were not permitted to see their son until more than eleven hours after the accident occurred.[10] When they did, Steven was in intensive care, strapped on a rotating bed with tongs in his skull.[11] His father, sickened by the sight, left the room; his mother began screaming and crying.[12] Steven's parents and fiancee kept vigil at the hospital almost 24 hours a day for months.[13] Steven was unable to talk to them for more than four months because of a tube placed in his throat to assist his breathing.[14] He will remain a quadriplegic the rest of his life, requiring constant care.

III. Negligent Infliction of Emotional Distress

A. *Historical Development*

The recognition of the negligent infliction of emotional distress as a separate tort is a fairly recent phenomenon. Historically courts have required that the plaintiff sustain an initial physical impact or be within the zone of danger and thus under a threat or fear of impact.[15] Emotional distress was considered a parasitic cause of action contingent upon the existence of an established tort. Courts were reluctant to recognize emotional distress as a separate tort for fear of fraudulent claims, speculative damage, burdensome liability, a flood of litiga-

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[5] Brief for Defendant-Appellant at 6, Masaki v. General Motors Corp., 71 Haw. ____, 780 P.2d 566 (1989) (No. 85-3112).

[6] *Id.* at 53.

[7] *Id.* at 6.

[8] Brief for Plaintiff-Appellee at 59, Masaki v. General Motors Corp., 71 Haw. ____, 780 P.2d 566 (1989) (No. 85-3112).

[9] *Id.*

[10] The accident happened at 9:45 a.m. Brief for Plaintiff-Appellees *supra* note 8 at 59; the Masakis saw Steven at 9:00 p.m. Brief for Defendant-Appellants, *supra* note 5, at 6.

[11] Brief for Plaintiff-Appellee, *supra* note 8, at 59.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, § 54 (5th ed. 1984) [hereinafter Prosser and Keeton]. Recovery was also available for emotional distress generated by negligent telegraph messages and the mishandling of corpses. *Id.*

tion, and the difficulty of reasonably circumscribing the area of liability.[16] However, medical advances in psychiatry and psychology have diminished the risk of fraudulent claims and speculative damage, and the existence of an inconsequential physical impact or injury often bears no rational relationship to the severity of the emotional injuries.[17] "[E]ven if we assume arguendo that a great deal of difficulty still remains in establishing the causal connection [between the claimed damages and the alleged fright], this still does not represent sufficient reason to deny appellant an opportunity to prove his case to a jury."[18] In addition, the abandonment of an impact requirement by the majority of courts produced no resulting flood of litigation.[19] As Dean Prosser so aptly stated: "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do."[20]

The zone of danger rule grew out of Justice Cardozo's decision in *Palsgraf v. Long Island Railroad*.[21] The decision established the concept of "reasonable foreseeability" in creating a legal duty to any individual plaintiff within a "zone of danger". Duty was defined in terms of the potential risks of harm to the plaintiff which could be reasonably perceived by the defendant.[22] Since the *Palsgraf* facts and holding were limited to physical injury, courts applying the zone of danger rule to cases of emotional distress generally required that the plaintiff also suffer from a physical injury as a result of the trauma.[23]

The first American decision to adopt fully the zone of danger analysis in the

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[16] Tobin v. Grossman, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969). The Tobin court, worried about opening a Pandora's box of unlimited liability, applied a dollars and cents argument against using foreseeability as a sole test, predicting increasing insurance costs. The court's view was attacked in Judge Keating's dissenting opinion, which pointed out that in the past half century "there has been an expanding recognition that the argument concerning unlimited liability is of no merit, yet the aberrations persist." Id. at 620, 249 N.E.2d at 425, 301 N.Y.S.2d at 563. *See* Sinn v. Burd, 486 Pa. 146, 166-74, 404 A.2d 672, 678-684 (1979) (court discusses reasons for rejecting *Tobin*).

[17] *See* Note, *The Negligent Infliction of Emotional Distress: A Critical Analysis of Various Approaches to the Tort in Light of Ochoa v. Superior Court*, 19 IND. L. REV. 809 (1986).

[18] Niederman v. Brodsky, 436 Pa. 392, 408, 261 A.2d 84, 87 (1970).

[19] "Those courts which have relaxed their limitations on recovery of this type have not experienced any substantial increase in litigation." Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248, 1250 (1974).

[20] W. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)

[21] 248 N.Y. 339, 162 N.E. 99 (1928).

[22] Id. at 344, 162 N.E. at 100.

[23] Johnson v. Rogers, 763 P.2d 771, 783 (Utah 1988); Keck v. Jackson, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979).

context of emotional distress was *Waube v. Warrington*.[24] In *Waube*, a mother looking out the window of her house witnessed her daughter being struck by a negligent motorist. Citing the American Law Institute's Restatement of Torts section 313(a) and (b), the court held that there can be no recovery for emotional distress unless the plaintiff was (1) within the zone of physical danger, (2) the shock produced physical injuries, and (3) the plaintiff feared for his own safety, not just the safety of a third person. According to *Waube*, a defendant owed a duty "to use ordinary care to avoid physical injury to those who would be put in physical peril."[25] A defendant did not owe a duty to a bystander witnessing the same accident from outside the zone of danger. This zone of danger concept of liability for emotional distress is essentially reiterated in the Restatement (Second) of Torts.[26] The zone of danger test, however, is nothing more than an requirement designed to limit liability for emotional distress.[27] Its automatic application frequently denies plaintiffs the right to recover for serious and foreseeable mental trauma if they happen to be located outside of an area where they might foreseeably fear for their own safety. It is a particularly inadequate measure of the foreseeable emotional distress experienced by a parent witnessing the negligent injury of a child. Despite the fact that the zone of danger represents only a slightly larger "impact" zone and should be dismissed for all of the reasons that the impact rule was discarded, some jurisdictions still adhere to the zone of danger requirement.[28]

California was the first jurisdiction in the United States to extend liability

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[24] 216 Wis. 603, 258 N.W. 487 (1935).

[25] Id. at 612, 258 N.W. at 500.

[26] The RESTATEMENT explains:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
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> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
>
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

RESTATEMENT (SECOND) OF TORTS § 313 (1965).

[27] The Waube court worried that extending recovery to plaintiffs outside of the zone of physical peril would "put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point." 216 Wis. at 613, 258 N.W. at 501.

[28] *See, e.g.*, Johnson v. Rogers, 763 P.2d 771, 783 (Utah 1988); James v. Harris, 729 P.2d 986, 988 (Colo. App. 1986); Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Vaillancourt v. Medical Center Hosp. of Vermont, Inc., 139 Vt. 138, 141-142, 425 A.2d 92, 95 (1980); Keck v. Jackson, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979).

beyond the zone of danger. In *Dillon v. Legg*[29] the California Supreme Court determined instead to apply "the general rules of tort law, including the concept of negligence, proximate cause, and foreseeability."[30] The *Dillon* case involved a small child who was struck and killed by a car while crossing the street. The accident was witnessed by the child's mother and sister. The trial court had summarily dismissed a cause of action for emotional distress in favor of the mother, but had upheld one in favor of the sister who was a few yards closer and thus arguably within the zone of danger. The Supreme Court found this result untenable and held that it was foreseeable that the mother of such a victim would be in the vicinity and would suffer serious shock.[31] Rejecting the earlier requirement that the plaintiff must be in fear of her own safety, the court held that "[u]nder general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted."[32] Reasonable foreseeability was to be determined on a case by case basis taking into account the following factors:

> (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 resulted 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]

The California Supreme Court, however, confined its ruling to the facts of the *Dillon* case, where the plaintiffs actually witnessed the tort.[34]

Following in *Dillon's* wake, other jurisdictions began to drop the zone of danger requirement and recognize negligent infliction of emotional distress as an independent tort.[35] These courts analyze foreseeability on a case by case basis in

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[29] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

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

[31] *Id.* at 736, 441 P.2d at 917, 69 Cal. Rptr. at 77.

[32] *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[33] *Id.*

[34] *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

[35] *See, e.g.*, Gammon v. Osteopathic Hosp. of Maine, Inc., 534 A.2d 1282 (Me. 1987); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976); D'Amicol v. Alvarez Shipping Co., Inc., 31 Conn. Supp. 164, 326 A.2d 129 (Super.Ct. 1973); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).

order to determine the existence of a duty of care. Depending on the court, the *Dillon* guidelines may be applied as merely factors to consider or as strict requirements. "Foreseeability" has been found where the plaintiff was outside the zone of danger, but witnessed the negligent act, heard sounds that indicated to them the negligent act had occurred, came upon the scene immediately afterwards, or were told of the act and witnessed the consequences some time later.[36] Essential to recovery, especially where the plaintiff did not actually witness the accident, is the third *Dillon* factor that stipulates there must be a close relationship between the plaintiff and the victim. Many courts find this factor critical to a finding of foreseeability.[37]

Generally courts refuse to allow recovery if there is no accompanying physical manifestation of the trauma, although there is no consensus on the degree of physical manifestation required.[38] Some, including Hawaii, allow recovery even though there is no physical evidence of psychological trauma.[39] A few accept layman's testimony on the extent of emotional distress suffered.[40] These juris-

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[36] At least three jurisdictions permit recovery where the plaintiffs first saw their injured child in the hospital: Masaki v. General Motors Corp., 71 Haw. ____, 780 P.2d 566 (1989); Sanchez V. Schindler, 651 S.W.2d 249 (Tex. 1983); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980).

[37] James v. Lieb, 221 Neb. 47, 55, 375 N.W.2d 109, 115 (1987) ("We will require that there be a marital or intimate familial relationship between the plaintiff and the victim."); Ramirez v. Armstrong, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983) ("The existence of a marital or intimate familial relationship is the nucleus of the personal interest to be protected. The tort of negligent infliction of emotional distress is a tort against the integrity of the family unit."); Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980) ("Addressing the Dillon criteria in reverse order, we find the last — the existence of a close relationship — to be the most crucial.") *See also*, D'Ambra v. United States, 354 F. Supp. 810, 819 (D.R.I. 1973); Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 423-24, 301 N.Y.S.2d 554, 560-62 (1969).

[38] Toms v. McConnell, 45 Mich. App. 647, 657, 207 N.W.2d 140, 146 (1973) ("[A] parent may maintain a cause of action for mental anguish resulting in a definite and objective physical injury generated by witnessing the negligent infliction of injuries upon its child."); Corso v. Merrill, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979) ("A further restriction on the issue of liability is the requirement that the mental and emotional suffering, to be compensable, must be manifested by objective symptomatology."); Barnhill v. Davis, 300 N.W.2d 104, 107-108 (Iowa 1981) ("[C]ompensible mental distress should ordinarily be accompanied with physical manifestations of the distress."). *See also*, Prosser and Keeton, supra note 15, § 12, at 64: "In the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character."

[39] "Advancements in modern science lead us to further conclude that psychic injury is capable of being proven despite the absence of a physical manifestation of such injury." Sinn v. Burd, 486 Pa. 146, 160, 404 A.2d 672, 679 (1979). *See also*, Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); Campbell v. Animal Quarantine Station, Etc., 63 Haw. 557, 632 P.2d 1066 (1981); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal.Rptr. 831 (1980); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973).

[40] Gates v. Richardson, 719 P.2d 193, 200 (Wyo. 1986); Leong v. Takasaki, 55 Haw. 398,

dictions consider the requirement of a resulting physical injury nothing more that an extension of the impact rule. They point out that physical injury is not necessarily indicative of serious emotional injury and should be admissable only as evidence of the degree of mental distress suffered.[41] Many of these jurisdictions, however, still require that the emotional distress be serious and debilitating, including as examples neurosis, psychosis, chronic depression, or phobia.[42] The degree of seriousness and the finding of liability and amount of damages is intrusted to the finders of fact, usually a jury. These states generally require that the jury find that a "reasonable man, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."[43] Some courts, supported by commentators, require that the standard of proof be "clear and convincing."[44]

B. Development in Hawaii

Hawaii has broadened the *Dillon* foreseeability standard, allowing bystanders to recover for emotional distress under general principles of negligence liability. The only limitation is that the plaintiff's distress must be foreseeable by the defendant and serious. Generally the Hawaii Supreme Court has held that where serious emotional distress to a plaintiff-bystander is the reasonably foreseeable consequence of the defendant's act, the defendant's conduct is the proximate cause of the plaintiff's mental injury and general tort principles are applied to impose liability.[45]

In 1970 the Hawaii Supreme Court created an independent cause of action

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413, 520 P.2d 758, 767 (1974).

[41] Leong, 55 Haw. at 403, 520 P.2d at 767; Molien, 27 Cal. 3d at 928, 616 P.2d at 821, 167 Cal. Rptr. at 839.

[42] Molien, 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841; Paugh v. Hanks, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983).

[43] "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." Rodrigues v. State, 52 Haw. 156, 173-174, 472 P.2d 509, 520 (1970). *See also*, Paugh v. Hanks, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983); Hunsley v. Giard, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1103 (1976); Leong v. Takasaki, 55 Haw. 398, 403, 520 P.2d 758, 765 (1974); Daley v. LaCroix, 384 Mich. 4, 16, 179 N.W.2d 390, 395 (1970).

[44] *See, e.g.*, Hughes v. Moore, 214 Va. 27, 31, 197 S.E.2d 214, 219 (1973); Note, *Maine Recognizes the Independent Tort of Negligent Infliction of Emotional Distress: Gammon v. Osteopathic Hosp.*, 41 ME. L. REV. 181, 198-99 (1989).

[45] Leong v. Takasaki, 55 Haw. 398, 410, 520 P.2d 758, 764-765 (1974); Rodrigues v. State, 52 Haw. 156, 174, 472 P.2d 509, 520 (1970). The "reasonable foreseeability" standard has apparently also been adopted by English Courts. *See* discussion in Ochoa v. Superior Court (Santa Clara County), 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

for negligent infliction of emotional distress in *Rodrigues v. State*.[46] The court found the highway department negligent in failing to protect a new homeowner from flood damage caused by failure of a blocked culvert to drain surface waters. The plaintiffs were "heartbroken", "shocked", "cried", "couldn't stand to look at" the damaged home they had waited for fifteen years to build, and spent nearly six weeks scraping damaged rubber carpets off the floors with razor blades, but they did not assert any resulting physical injury.[47] The court decided that the best approach for determining the genuineness and seriousness of mental distress was to apply general tort principles on a case by case basis, citing, inter alia, *Dillon*.[48] The court limited recovery to those "foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[49] It also imposed the requirement that both the distress foreseeable to defendant and that actually suffered by the plaintiff be "serious".[50] The court adopted the "reasonable man" standard that the Restatement applied to the intentional infliction of mental distress.[51] It 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] The court thus prohibited a "thin-skulled" plaintiff from recovering.

In *Leong v. Takasaki*[53] a ten-year-old boy witnessed his stepfather's mother being struck and killed by defendant's automobile. The boy was crossing the street with her, saw the car coming and stopped; his stepgrandmother didn't. He claimed that she cared for him as if she were his natural grandmother and that their relationship was extremely close. As a result of the accident the boy suffered "nervous shock to his entire system and injuries to his psyche . . . of a permanent nature," but no resulting physical injuries.[54] The court determined that the lack of resulting physical injury "should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered."[55] Building on *Rodrigues*, the court held that "when it is reasonably foreseeable that 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 proxi-

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[46] 52 Haw. 156, 472 P.2d 509 (1970).

[47] *Id.* at 159, 472 P.2d at 513.

[48] *Id.* at 172-174, 472 P.2d at 519-521.

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

[50] *Id.*

[51] *See* RESTATEMENT (SECOND) OF TORTS § 46 comment j at 77.

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

[53] 55 Haw. 398, 520 P.2d 758 (1974).

[54] *Id.* at 400, 520 P.2d at 760.

[55] *Id.* at 403, 520 P.2d at 762.

mate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act."[56]

Foreseeability in *Leong*, however, proved a problem. The third *Dillon* factor looked to plaintiffs and victims that were "closely related" and some courts have applied this strictly, limiting recovery to blood relatives,[57] persons *in loco parentis*,[58] or "related within the second degree of consanguinity or affinity."[59] Citing Hawaiian-Asian family customs, the *Leong* court found that the absence of a blood relationship between victim and plaintiff-witness should not foreclose recovery.[60] "The 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."[61]

In order to assess damages, the court searched for an objective standard of proof as to the seriousness of the distress. Outlining the difference between primary responses, typified by anger, grief, and shock, and secondary responses, termed traumatic neurosis, which may or may not result in physical injury, the court held that the "plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act," whether or not there was any apparent injury.[62]

One year later, the Hawaii Supreme Court began to worry about unlimited liability. In *Kelley v. Kokua Sales and Supply, Ltd.*,[63] the court denied recovery to a plaintiff in California who was not "located within a reasonable distance from the scene of the accident" despite the fact that the plaintiff died of a heart attack shortly after receiving the news by phone that his daughter and granddaughter had been negligently killed in an automobile accident in Hawaii. Quoting the paragraph in the *Leong* decision that concludes with "the amount of stress with which a reasonable man can be expected to cope is a question for the trial court,"[64] the *Kelley* court worried that this might "be construed to mean that the appellees owe a duty of care from the negligent infliction of serious mental distress upon a person located in any part of the world.[65] The court went on to state that "merely requiring the proof of serious mental dis-

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[56] *Id.* at 410, 520 P.2d at 765.

[57] *See* discussion of familial relationships and illustrative case law in Ochoa v. Superior Court (Santa Clara County), 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

[58] Ramirez v. Armstrong, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983).

[59] Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981).

[60] "It is not uncommon in Hawaii to find several parent-children family units, with members of three and even four generations, living under one roof as a single family." 55 Haw. at 410, 520 P.2d at 766.

[61] *Id.* at 411-412, 520 P.2d at 766.

[62] *Id.* at 413, 520 P.2d at 766-767.

[63] 56 Haw. 204, 532 P.2d 673 (1975).

[64] 52 Haw. at 410, 472 P.2d at 765-766.

[65] 56 Haw. at 208, 532 P.2d at 676.

tress, rather than minor mental distress, does not realistically and reasonably limit the liability of the appellees."[66] The court concluded that "as a matter of law . . . the appellees did not owe a duty to refrain (duty of care) from the negligent infliction of serious mental distress upon Mr. Kelley."[67] Chief Justice Richardson wrote a forceful dissent: "[A]s between an innocent plaintiff and a negligent wrongdoer . . . the latter must bear the loss . . . . In effect the majority reinstates a scheme of arbitrary distinctions as to where liability ends that we expressly rejected in *Rodrigues*."[68] The Chief Justice concluded by quoting the views of Justice Andrews on negligence and duty expressed in his *Palsgraf* dissent:

> [Negligence is not] merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, [it is] a relationship between him and those whom he does in fact injure. If his act has a tendency to harm someone, it harms him a mile away as surely as it does those on the scene.[69]

In *Campbell v. Animal Quarantine Station, Etc.*[70] the Hawaii Supreme Court allowed five of a six-member plaintiff family to recover for emotional distress when Princess, their family dog, died of heat prostration as a result of the negligence of the Animal Quarantine Station. The plaintiffs heard the news by telephone; they did not witness the death nor view the dog's body later. The five that cried at hearing the news recovered damages, although none sought psychiatric or medical treatment for emotional distress.[71] The *Campbell* court found *Rodrigues* and *Leong* dispositive, noting that "*Rodrigues* did not require any threshold showing of physical effects resulting from the distress."[72] In *Campbell*, as in *Rodrigues*, the court held that the trial court had "the discre-

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[66] The Rodrigues court cited W. Prosser, LAW OF TORTS, § 54 at 334 (4th ed. 1971):

> It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person 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 . . . .

Id. [Author's note: this exact language was repeated in Prosser and Keeton, supra note 15, § 54, at 366.]

[67] *Id.*

[68] *Id.* at 213, 532 P.2d at 678.

[69] *Id.* at 213, 532 P.2d at 678, citing Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 349, 162 N.E. 99, 102 (1928).

[70] 63 Haw. 557, 632 P.2d 1066 (1981).

[71] "The testimony consisted of testimony by the plaintiffs relating to the background of their relationship with Princess, the role Princess played in their daily routine, and their respective feelings and the type of loss which each felt upon hearing the news of the dog's sudden death." Id. at 562, 632 P.2d at 1069.

[72] *Id.* at 560, 632 P.2d at 1068.

tionary power to judge the genuineness of a claim."[73] In response to the *Rodrigues* (and *Leong*) requirement of some showing of "serious" distress, the *Campbell* court stated that medical proof should not be a requirement allowing or barring the cause of action. "Once the trial court or the jury is satisfied that the distress is 'serious,' the duration and symptoms of the distress affect the amount of recovery."[74] The court awarded the five plaintiffs a total of $1000, thus limiting liability via the amount of damages awarded.[75]

Acknowledging that *Kelley* imposed as a matter of law a geographical limitation restricting recovery to those "located within a reasonable distance from the scene of the tortious event," the court held that since the plaintiffs and their dog were located within Honolulu, they met the "reasonable distance" standard.[76]

C. *Analysis and Impact*

In *Masaki v. General Motors Corp.* the court found the facts analogous to those in *Rodrigues* and *Campbell*.[77] The plaintiff parents were not present at the scene of the tort, but as in *Rodrigues* they witnessed its consequences and as in *Campbell* they resided on the same island. The court concluded that, unlike *Kelley*, the Masakis' location was not "too remote for defendants to have reasonably foreseen the consequences of their conduct,"[78] and therefore the defendants owed a duty to them. In *Kelley* the court held as a matter of law that a Hawaii defendant owed no duty to a plaintiff living in California, no matter how serious his distress.[79] In *Campbell* and now in *Masaki* it has become presumptively a matter of law that a negligent defendant owes a duty to shield plaintiffs from emotional distress if they live on the same island where the tort is committed. Thus, like many "*Dillon*" courts the Hawaii court has turned one of the *Dillon* foreseeability factors into a requirement: the factor that contemplates whether the plaintiff was located near the scene of the accident.[80] Interestingly, most *Dillon* courts find the third factor, that of the closeness of the relationship between the plaintiff and the victim, as most relevant to foreseeability and thus make it a requirement as a matter of law. The Hawaii Supreme Court has

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[73] *Id.* at 564, 632 P.2d at 1070.

[74] *Id.* at 564, 632 P.2d at 1071.

[75] *Id.* In 1986 Hawaii passed legislation prohibiting recovery for serious emotional distress arising from property damage, unless there was resulting physical injury. HAW. REV. STAT. § 663-8.9.

[76] *Id.* at 561-562, 632 P.2d at 1069.

[77] 71 Haw. ____, ____, 780 P.2d 566, 576 (1989).

[78] *Id.*, citing *Kelley*, 532 P.2d at 676.

[79] 56 Haw. at 209, 532 P.2d at 676.

[80] *See supra* notes 29-34 and accompanying text.

reserved the third *Dillon* factor for the court to decide on a case by case basis.[81] The *Masaki* court considered the Masakis' familial relationship in its filial consortium deliberations and this relationship is discussed in the next section of this note. The *Masaki* court gave the second *Dillon* factor, that of the degree of mental distress suffered, to the jury to decide.

The *Masaki* court concluded that by meeting the *Campbell* same-island location requirement, coupled with the visit to the hospital where the Masakis were given the news that their son would never walk,

> it was reasonably foreseeable for Appellants to have anticipated the Masakis' emotional distress. The fact that the Masakis did not witness the accident is not a bar to recovery, but rather is a factor in determining the degree of mental stress suffered. Whether the degree of stress engendered by the circumstances of this case was beyond that with which a reasonable man can be expected to cope is a question for the jury.[82]

The *Masaki* court leaves unanswered the question of whether parents living on a neighbor Hawaiian island will be eligible for damages due to emotional distress. Clearly it is foreseeable that such parents could be at the hospital bedside of a child injured on Oahu well within the eleven hours that elapsed in *Masaki*, but then so could Mr. Kelly, if he had not died of a heart attack first. In this day of instant communication and rapid travel neither the mode of communication nor the degree of remoteness of the plaintiff should be cast as a requirement for recovery for emotional distress. "[T]he 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."[83] To draw a legal line down the Eastern Pacific Ocean to delineate when a remedy is available for emotional distress seems arbitrary and unrelated to damage suffered.[84] In an attempt to limit liability, the *Kelley* court established a "zone of liability" and the *Masaki* court has reinforced the concept.

Indeed, in *Leong* the Hawaii Supreme Court attempted to still the concerns of those troubled by fears of unlimited liability with the suggestion that recovery be limited to "claims of serious mental distress."[85] In *Kelly*, the resulting

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[81] *See* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758.

[82] 71 Haw. at ____, 780 P.2d at 576.

[83] Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 560 (1969); Dziokonski v. Babineau, 375 Mass. 555, 565, 380 N.E.2d 1295, 1300 (1978).

[84] "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." Miller, *supra* note 2, at 11.

[85] *Leong*, 55 Haw. at 408, 520 P.2d at 764.

death of the plaintiff was sufficient safeguard against unlimited or fraudulent liability. Clearly, the fact that the father and grandfather suffered a heart attack and died within a few hours after receiving news of his daughter's and granddaughter's deaths and while he was attempting to arrange transportation to Hawaii meets the *Leong* requirement of "serious". In *Masaki* there is no discussion of the "serious" requirement, appearing to accept *ipso facto* that if the parents are on the same island as the injured child and visit him on the same day, their distress *per se* will be "serious". Serious distress has been delineated in a number of ways. Factors cited by courts to indicate seriousness in the absence of physical manifestations include "the context in which the trauma occurred, the development of physical ramifications, and the duration and severity of the emotional distress."[86] The *Leong* and *Rodrigues* courts attempted to achieve an objective standard by defining serious mental distress as being properly found where a reasonable person "normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances" of the event.[87] Thus in Hawaii a plaintiff with a "thin skull" will presumably not recover for the independent tort of emotional distress. It remains problematic, however, for the court to discern whether the inability to cope is a result of the horror of the causal event, or is, in fact, a result of a "thin skull". Heart attacks are a case in point. Case law falls both ways in terms of allowing plaintiffs who suffer heart attacks as a result of emotional distress to recover; on the one hand, it is proof positive that serious emotional distress was suffered; on the other, it is also proof positive that the plaintiff had a weak heart and thus was a "thin skulled" plaintiff.[88] Where does one draw a line?

"The purpose of the law of torts is . . . to afford compensation for injuries sustained by one person as the result of the conduct of another."[89] While courts such as *Tobin*[90] and *Kelley*[91] may worry over expanding spheres of liability, the United States District Court in *D'Ambra* pointed in the better direction: "[t]he more appropriate and relevant approach in order to effect justice is to ask whether the defendant or the plaintiff should more properly pay the costs of plaintiff's injuries."[92] If there are in fact injuries, and those injuries are serious,

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[86] Sinn v. Burd, 486 Pa. at 157, 404 A.2d at 683. In Dold v. Outrigger Hotel, 54 Haw. 18, 21, 501 P.2d 368, 371 (1972), the jury was instructed that "[t]here is no precise standard by which to place a monetary value on emotional distress and disappointment, nor is the opinion of any witness required to fix a reasonable amount."

[87] *Leong*, 55 Haw. at 410, 520 P.2d at 765.

[88] *See* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

[89] Prosser and Keeton, *supra* note 15, § 1 at 6.

[90] 24 N.Y.2d 609, 249 N.E.2d 419 (1960).

[91] 56 Haw. 204, 532 P.2d 673 (1975).

[92] D'Ambra v. United States, 354 F. Supp. 810, 821 (D.R.I.1973).

then the defendant should pay, regardless of how, where, or when a plaintiff may receive them. What is left for the court to decide is how to measure them. In order to determine which injuries are serious enough to warrant compensation and how much compensation is due the court must establish some *Dillon*-like guidelines. One such guideline might be to define "serious" emotional distress as that which requires medical attention. Another might be to restrict compensable damages to actual economic loss, as was suggested by Professor Richard Miller, and underscored by Professor John Diamond.[93] Another guideline might limit testimony to that of a court-appointed medical expert,[94] "whose testimony could establish that the plaintiff suffers from a recognizable psychiatric illness of a debilitating nature."[95] Medical records could also be admissable to establish that the emotional distress was serious.

IV. Loss of Filial Consortium

A. *Historical Development*

Tort law has historically been concerned with relational, as well as personal and property interests. While protection was at first only extended to relations between husband and wife, the law has been expanded to protect other types of relationships, including that of parent and child. Recently an increasing number of courts have recognized the right of parents of a negligently killed or injured child to recover damages for loss of that child's consortium.[96] The legal rational for this right was that a parent (historically the father) was entitled to services from his child. If the child was negligently killed or injured, the parent was deprived of those services and could claim compensation. Since the parent was also responsible for an injured child's medical expenses, those were compensable as well. If damages for loss of filial consortium are awarded, they generally are limited to the period of a child's minority,[97] although some courts have ex-

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[93] *See* J. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); R. Miller, *supra* note 2.

[94] T. Herring, *Administering the Tort of Negligent Infliction of Mental Distress: A Synthesis*, 4 CARDOZO L. REV. 487, 512 (1983).

[95] V. Nolan and E. Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 618-19 (1982). RESTATEMENT (SECOND) OF TORTS § 436A comment c suggests that temporary fright, nervous shock, nausea, grief, rage, and humiliation are not compensable; however, long-lasting nausea or headaches may amount to bodily harm and thus be compensable injuries.

[96] *See* Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 ALR 4th 112 (1987). *See also* Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983). The Sanchez court lists those states that allow recovery for loss of companionship and society in a wrongful death action brought by parents. *Id.* at 252-53.

[97] Dymek v. Nyquist, 128 Ill. App.3d 859, 868, 469 N.E.2d 659, 666 (1984); Shockley v.

tended damage to include the period of a child's majority.[98] A few courts have awarded damages to the parents of a dead or injured adult child.[99]

Several jurisdictions recognize the parents' cause of action under a wrongful death statute.[100] Under some wrongful death statutes, the loss of intangibles such as a child's society, companionship or affection is also recoverable as a tort in the surviving parent's own right.[101] A few states have extended the protection of their wrongful death statutes to parents of an injured child[102] and in some instances, where the statute does not expressly provide for it, courts have interpreted their statute as permitting it.[103] Other courts will not allow such compensation without a legislative mandate.[104] Still other courts consider the tort strictly a matter of common law and therefore a matter for courts to decide.[105] Some of these courts permit recovery;[106] others do not.[107]

Prier, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 500 (1975). *See* Prosser and Keeton, *supra* note 15, § 125 at 925-926.

[98] Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); Herbertson v. Russell, 371 P.2d 422 (Colo. 1962).

[99] "[We] do not believe that the age of the child at death should be decisive as to consideration of the loss of society." Prendergast v. Cox, 128 Ill. App. 3d 84, 88, 470 N.E.2d 34, 37 (1984); "Why age 21 should set up a magic barrier baffles understanding in view of the total omission from the statute of any statement of limitation as to age." Currie v. Fiting, 375 Mich. 440, 452-53, 134 N.W.2d 611, 615 (1965). *See also*, Masaki v. General Motors Corp., 71 Haw. ____, 780 P.2d 566 (1989); Ballweg v. City of Springfield, 114 Ill. 2d 107, 499 N.E.2d 1373 (1986); Frank v. Superior Court, 150 Ariz. 228, 722 P.2d 955 (1986); Braun v. Moreno, 11 Ariz. App. 509, 466 P.2d 60 (1970).

[100] *See, e.g.*, Masaki v. General Motors Corp., 71 Haw. ____, 780 P.2d 566 (1989); Bullard v. Barnes, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983).

[101] Norvell v. Cuyahoga County Hospital, 11 Ohio App. 3d 70, 72, 463 N.E.2d 111, 114 (1983). In Sea-land Services, Inc. v. Gaudet, 414 U.S. 573, 586 (1974), the Supreme Court defined "society" as embracing "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."

[102] Hayward v. Yost, 72 Idaho 415, 425, 242 P.2d 970, 977 (1952); Lockhart v. Besel, 71 Wash. 2d 112, 117, 426 P.2d 605, 609 (1967). *See also*, Idaho Code § 5-310 (Supp. 1988); Wash. Rev. Code § 4.24.010 (1988). Both states allow a parent to maintain an action for an injured minor child.

[103] Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983); Schockley v. Prier, 66 Wis. 2d 394, 400, 225 N.W.2d 495, 499 (1975); Fussner v. Andert, 261 Minn. 347, 352, 113 N.W.2d 355, 359 (1962). *See* Prosser and Keeton, *supra* note 15, § 125 at 934-935.

[104] Sizemore v. Smock, 430 Mich. 283, 422 N.W.2d 666 (1988); Beerbower v. State ex rel. Oregon Health Sciences University, 85 Or. App. 330, 736 P.2d 596 (1987).

[105] Reben v. Ely, 146 Ariz. 309, 311, 705 P.2d 1360, 1362 (App. 1985) ("Tort law, like contract law, concerns private relations between parties . . . . [F]ilial loss of consortium due to the negligence of a third party is a function of the courts rather than the legislature . . . ."); Shockley v. Prier, 66 Wis. 2d 394, 397, 225 N.W.2d 495, 497 (1975) ("The rule against [recovery by parents for loss of society and companionship of a minor child] was created by the

Evidence is usually required to establish a close familial relationship, including such factors as whether the plaintiff and victim "have resided together continuously for a substantial period of time prior to the wrongful death or injury and that there has been no absence of either from the common residence for any extended periods of time."[108] Proof of harmonious family relations and participation in family activities may also be required. Some courts still limit recovery to pecuniary damages for loss of services.[109] Others hold that this is an antiquated concept.[110]

B. Development in Hawaii

The Hawaii Supreme Court first recognized a cause of action for "deprivation of society, comfort and fellowship" in *Kake vs. C.S. Horton*.[111] In that case the husband had died a wrongful death and the widow brought an action on the case to recover consequential damages.[112] The jury was instructed to "consider the plaintiff's loss of support, and her deprivation of the society, comfort and fellowship of her husband."[113] The court upheld the jury award of $1100, "sufficient to provide her with the necessities of life."[114]

In 1905, the cause of action adopted in *Kake* was extended in *Ferreira v.*

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courts and not by the legislature and it is as much our responsibility, as the legislature's, to make changes in the law, if the common-law rule no longer fits the social realities of the present day.")

[106] Reben v. Ely, 146 Ariz. 309, 705 P.2d 1360 (App. 1985), Yordon v. Savage, 279 So. 2d 844 (Fla. 1973).

[107] Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (App. 1983); Baxter v. Superior Court of Los Angeles City, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315, (1977).

[108] S. Speiser, RECOVERY FOR WRONGFUL DEATH § 3:50 at 322 (2d ed. 1975).

[109] Sciliano v. Capitol City Shows, Inc., 124 N.H. 719, 475 A.2d 19 (1984). The Sciliano court found that in the absence of "well-defined foreseeability factors" such as those delineated by the Dillon court to evaluate emotional distress, damages due to a purely intangible injury were too difficult to assess and would lead to unlimited liability. *Id.* at 727, 475 A.2d at 23. *See generally*, Love, *Tortious Interference with the Parent-Child Relationships: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976).

[110] "Society and companionship between parents and children have become the principal basis of the parent-child relationship, rather than the child's earning capacity or ability to provide domestic services." Schockley v. Prier, 66 Wis. 2d 394, 400, 225 N.W.2d 495, 499 (1975). *See also*, Reben v. Ely, 146 Ariz. 309, 312, 705 P.2d 1360, 1363 (App. 1985); Bullard v. Barnes, 102 Ill. 2d 505, 517, 468 N.E.2d 1228, 1234 (1984); Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983); Green v. Bittner, 85 N.J. 1, 4, 424 A.2d 210, 211 (1980); Lockhart v. Besel, 71 Wash. 2d 112, 117, 426 P.2d 605, 609 (1967); Fussner v. Andert, 261 Minn. 347, 352-53, 113 N.W.2d 355, 359 (1961).

[111] 2 Haw. 209 (1860).

[112] *Id.*

[113] *Id.* at 226.

[114] *Id.* at 227.

Honolulu Rapid Transit & Land Co.,[115] to include an action by a father for the negligent death of his minor son. Citing *Kake* and other spousal loss of consortium decisions, the *Ferreira* court contended that "the reasoning upon which the decisions were based is equally applicable to actions by parents for the deaths of their children."[116] The jury was instructed that the damage award was to include not only the son's future earnings during his minority, "but the value of his services to the family, including acts of kindness and attention."[117] "Sentimental losses of the father" were not allowed.[118]

In 1947 another action for the wrongful death of a minor child was brought in *Gabriel v. Margah*.[119] Damages awarded by the trial court included "(a) earning capacity during the remaining minority, (b) funeral expenses, and (c) loss of association, comfort and presence of the deceased."[120] The verdict was appealed on the grounds that Hawaii's death statute of 1923, amended in 1931 and 1935,[121] was a comprehensive statute that precluded recovery under common-law principles.[122] The statute provided for recovery for financial loss for persons dependent on the decedent, but did not specify that damages were available for "loss of association, comfort and presence." The Hawaii Supreme Court distinguished *Gabriel*, noting that common-law consortium rights are "fundamental and substantial and are not to be overturned except by clear and unambiguous language. 'A statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required.' "[123] The court stated that the *Kake* case was controlling and noted that in determining the value of "deprivation of society, comfort and fellowship" pecuniary standards were not applicable "nor were they capable of exact estimation except as they might have been directly connected with and a part of the acts of service."[124] The court noted that this same principle had been applied in determining "acts of kindness and attention" in *Ferreira*, and concluded that while "pecuniary damages are the limit of recovery, they include compensation for losses which are difficult of exact estimation and to which no

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[115] 16 Haw. 615 (1905).

[116] *Id.* at 628.

[117] *Id.*

[118] *Id.* at 629.

[119] 37 Haw. 571 (1947).

[120] *Id.* at 572.

[121] REV. LAWS HAW. § 10486 (1945).

[122] 37 Haw. at 572-574.

[123] *Id.* at 580, quoting Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1906). Citing Hall v. Kennedy, 27 Haw. 626 (1923), the Hawaii court noted that the purpose of the revised statute was to create a cause of action, denied under common law, to permit recovery in situations such as where a parent was dependent on the earnings of a deceased adult child. *Id.* at 579.

[124] *Id.* at 582.

standard of value may be applied and the damages for which are and necessarily must be left to the sound discretion of the trier of the facts."[125]

In 1955 the Hawaii State Legislature passed a comprehensive new wrongful death act which codified a cause of action for wrongful death as between husband and wife, and parent and child, or dependents.[126] The statute permitted nonpecuniary damages. As it currently stands, the Hawaii Death by Wrongful Act statute, Hawaii Revised Statutes (HRS) section 663-3,[127] provides for the loss of society, companionship, comfort, consortium, and protection, including loss of filial care or attention in the event of a wrongful death. The statute sets no age requirements for recovery, but it does *not* provide for loss of consortium due to injury short of death.

In *Masaki v. General Motors Corp.*[128] the Hawaii Supreme Court interpreted the wrongful death statute as allowing parents a cause of action "for the loss of consortium of an adult child who has been severely and permanently injured due to the defendant's negligence."[129] The court agreed "with those jurisdictions which have recognized that severe injury may have just as deleterious an impact on filial consortium as death."[130] The court agreed especially with the

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[125] *Id.* While awards for intangible losses do not have to be discounted to present value, the Hawaii Supreme Court ruled in a subsequent case that pecuniary damages must be discounted. *See* Ginoza v. Takai Elec. Co., 40 Haw. 691, 705-706 (1955).

[126] REV. LAWS HAW. § 246-2 (1955).

[127] The statute provides in pertinent part:

> When the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased's legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person causing the death or against the person responsible for the death. The action shall be maintained on behalf of the persons hereinafter enumerated, except that the legal representative may recover on behalf of the estate the reasonable expenses of the deceased's last illness and burial.
>
> In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (1) 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. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damages recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. Any action brought under this section shall be commenced within two years from the date of death of the injured person, except as otherwise provided.

HAW. REV. STAT. § 663-3 (1988).

[128] 71 Haw. ____, 780 P.2d 566.

[129] *Id.* at ____, 780 P.2d at 576.

[130] "These jurisdictions recognize that, in the case of a severely injured child, the quality of the parent-child relationship, as well as the parents' expectations of a normal family life, can be

Arizona Supreme Court in *Frank v. Superior Court*.[131] It found that "it would be anomalous to take the position that, if a child is injured, but does not die, the parents may not recover."[132] The *Masaki* court rejected the view that a cause of action for filial consortium should be restricted to the loss of services of minor children, finding "such reasoning outmoded and illogical."[133] The court noted that today "children are valued for their society and companionship . . . . [S]ervices have become only one element of the consortium action while the intangible elements of love, comfort, companionship, and society have emerged as the predominant focus of consortium actions."[134] The court noted that HRS section 663-3 made no distinction between minor and adult children and saw "no reason why in the cases of severe injury the result should be any different."[135]

C. *Analysis and Impact*

Masaki is a case of first impression for Hawaii; however, in granting the cause of action, the Hawaii Supreme Court's decision is entirely consistent with Hawaii case history and Hawaii common law. In the *Ferreira* case in 1905, Hawaii may have been the first common-law jurisdiction to recognize a parent's cause of action for damages for the loss of *intangible* services to the family as a result of the wrongful death of a child. In each case, the court looked at the realities of modern life and refused to be weighed down by outmoded precedent.

It should be recalled that in *Leong*, the case where a child recovered for the emotional distress at seeing his stepgrandmother struck and killed by a car, the Hawaii Supreme Court noted that "Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family

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seriously impaired." *Id.* at ____, 780 P.2d at 577. *See* cases cited by the Masaki court: Reben v. Ely, 146 Ariz. 309, 705 P.2d 1360 (1985); Yordon v. Savage, 279 So. 2d 844 (Fla. 1973); Dymek v Nyquist, 128 Ill. App.3d 859, 469 N.E.2d 659 (1984); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

[131] 150 Ariz. 228, 722 P.2d 955 (Ariz. 1986). The Arizona court reasoned that "[p]erhaps the loss of companionship and society experience by the parents of a child permanently and severely injured . . . is in some ways even greater than that suffered by parents of a deceased child. Not only has the normal family relationship been destroyed, as when a child dies, but the parent also is confronted with his loss each time he is with his child and experiences again the child's diminished capacity to give comfort, society, and companionship." *Id.* at 231, 722 P.2d at 958.

[132] 71 Haw at ____, 780 P.2d at 577.

[133] *Id.*

[134] *Id.*, citing *Frank*, 150 Ariz. at 232, 722 P.2d at 959.

[135] *Id.* at ____, 780 P.2d at 578.

group . . . . It is not uncommon in Hawaii to find several parent-children family units, with members of three and even four generations, living under one roof as single family."[136] This factor, no doubt, also influenced the *Masaki* court. In this case twenty-eight year old Steven Masaki still lived with his parents and "helped out".[137] Damage to a member of an extended family is damage to the family unit, recognized by common law.[138] Furthermore, the high cost of housing in Hawaii means that many young adults continue to live with their parents well into their twenties, no matter what their cultural background may be. As a result, close parent-child bonds are perpetuated well beyond the age of majority.

Policy objections by courts to extending a cause of action for filial consortium to parents of injured children were voiced by the California Supreme Court in *Baxter v. Superior Court*[139] and the Michigan Supreme Court in *Sizemore v. Smock*.[140] The Baxter court cited "[t]he intangible character of the loss, which can never really be compensated by money damages; the difficulty of measuring damages; the dangers of double recovery of multiple claims and extensive liability . . . ."[141] The *Sizemore* court listed:

> (1) the inadequacy of monetary damages to either compensate the victim for the intangible loss or to deter negligent conduct; (2) the difficulty of measuring damages; (3) the risk of allowing double recovery; (4) the cost to society of paying additional consortium claims; and (5) the need to draw a line terminating liability for consortium claims at some point.[142]

These policy issues are similar to those voiced by *Tobin* and others in the preceding discussion on negligent infliction of emotional distress and should be discounted for similar reasons.

It must be remembered that compensation for the loss of filial consortium is not a parasitic cause of action. The injury complained of is injury to the parent plaintiff, not the child victim. Nowhere is this more apparent than in a fact situation such as presented in *Masaki*. As a result of the defendant's negligence, the Masaki parents must now care for a quadriplegic young adult for the rest of their lives. Through no fault of their own their lives have been massively disrupted. The serious consequences of this tort make arguments for limiting liability absurd. *Masaki* is a perfect illustration of the position taken by Professor

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[136] 55 Haw. at 410, 520 P.2d at 766.

[137] *See supra* notes 5-14 and accompanying text.

[138] Prosser and Keeton, *supra* note 15, § 124.

[139] 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

[140] 430 Mich. 283, 422 N.W.2d 666 (1988).

[141] 19 Cal. at 464, 563 P.2d at 873, 138 Cal. Rptr. at 317.

[142] 430 Mich. at 299, 422 N.W.2d at 674.

Miller and many others that intangible torts such as negligent infliction of emotional distress and filial consortium should be judged on the bases of strict principles of negligence on a case by case basis. However, if the Miller thesis that damages should be limited to purely economic loss is adopted, courts are going to have to return to the approach used by *Kake* and *Ferreira* where intangible losses were considered as "services" having a "pecuniary value" in order to compensate the plaintiffs adequately.

In this light it must also be remembered that, like emotional distress, compensation awarded for loss of filial consortium is not intended at common law to be punitive. Its purpose is to make good the actual loss suffered, not to penalize the wrongdoer. The view of "double recovery" as punitive, however, is inaccurate. The defendant is paying for the damage done to two people, not to one person twice. By injuring Stephen Masaki, General Motors injured those who must alter their lives to care for him. Although the *Masaki* court specifically limited its holding to parents, it is foreseeable that a *Masaki*-type cause of action could be extended to stepparents or even stepgrandparents, depending on the closeness of the relationship. However, "closeness" remains a rebuttable presumption.[143]

V. CONCLUSION

The *Masaki* fact pattern sets a high standard of compensable "seriousness". It is difficult to predict which way the Hawaii courts will go in the future. Perhaps, however, this is as it should be. Following the reasoning of the *Dillon* courts and numerous commentators, cases such as this should be decided on a case by case basis, applying general negligence principles and letting the triers of fact assess the extent of the damage. Liability should be limited by judges and juries, not by blind policy considerations. It is almost never foreseeable, except perhaps by a deity, who will actually be hurt; it is only foreseeable that someone may be hurt. When injury does occur, it should be compensated. The victims should not have to pay for the negligent acts of the wrongdoers. The only thing that remains is for the courts to establish some "seriousness" guidelines that may be applied to each particular type of intangible tort.

> In the decision of whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind the fact that we endeavor to make a rule in each

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[143] *See, e.g.*, Bullard v. Barnes, 102 Ill. 2d 505, 517, 468 N.E.2d 1228, 1234 (1984).

case that will be practical and in keeping with the general understanding of mankind.[144]

Linda M. Paul

[144] W. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 14-15 (1953).

State v. Sherlock: Police Use of a Controlled Purchase of Contraband to Corroborate an Informant's Tip

I. INTRODUCTION

The United States and Hawaii Constitutions require a determination of probable cause before a search warrant can be issued.[1] The use of an informant's tip has long been held to be an adequate basis for a finding of probable cause.[2] Courts in various jurisdictions, however, have set different standards whereby such hearsay information can satisfy the constitutional requirements.

One such standard was recently prescribed by the Hawaii Supreme Court in *State v. Sherlock*.[3] In *Sherlock*, the Hawaii Supreme Court held that police corroboration of an informant's tip through surveillance of a police-controlled purchase of contraband provided an adequate basis for establishing the inform-

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[1] The fourth amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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.

U.S. CONST. amend. IV.

This provision is applicable to the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

The Hawaii Constitution adds the further protection of an individual's right to privacy:

> 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.

HAW. CONST. art. I, § 7 (emphasis added).

[2] *See* Draper v. United States, 358 U.S. 307 (1959) (an informant's tip to a government agent may be used in the determination of probable cause); Jones v. United States, 362 U.S. 257, 272 (1960), *overruled on other grounds*, 448 U.S. 83 (1980), (hearsay information may be the basis for a warrant, "so long as there [is] substantial basis for crediting the hearsay").

The Hawaii Rules of Penal Procedure provide: "The finding of probable cause may be based upon hearsay evidence in whole or in part." HAW. R. PENAL P. 41(c).

[3] 70 Haw. 271, 768 P.2d 1290 (1989).

ant's reliability. By clarifying this ambiguous area of Hawaii's law governing probable cause, the *Sherlock* court's sanction of another method of establishing the credibility of an informant will provide law enforcement officials with greater flexibility in their crime-fighting efforts.

This article reviews and critically analyzes the reasoning of the Hawaii Supreme Court in *Sherlock* and assesses the impact the decision may have on the issuance of search warrants that rely upon hearsay information. Section II of this article describes the facts of *Sherlock*; Section III contains a history of the law governing the establishment of probable cause based upon an informant's tip; Section IV critically reviews the reasoning applied by the Hawaii Supreme Court; and Section V sets forth an assessment of *Sherlock*'s impact.

II. FACTS

In April 1983, an unnamed informant told Honolulu police officer Ronald Kaneta that he had previously purchased cocaine from suspect Jerry Sherlock at Sherlock's residence.[4] Kaneta subsequently arranged for the informant to conduct, under police surveillance, a controlled cocaine purchase from Sherlock.[5] After the purchase, Kaneta submitted the contents of the purchase to the police department's crime laboratory for analysis. The contents were determined to be "possibly cocaine."[6]

Kaneta included the details of the controlled purchase in an application for a warrant to search Sherlock's residence for drugs and other related items.[7] A district court judge issued the search warrant,[8] and Sherlock's indictment was

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[4] *Id.* at 272, 768 P.2d at 1291.

[5] In order to ensure that the informant carried only the contraband and money supplied by the police, the informant was searched prior to making the controlled purchase. The informant drove himself to Sherlock's residence, and Officer Kaneta followed him in a separate car. Kaneta never let the informant out of his sight, except when the informant was in Sherlock's apartment. After the informant left the apartment, Kaneta searched him again. The informant then gave Kaneta a clear, heat-sealed packet containing white powder. *Id.*

[6] *Id.*

[7] *Id.* The Hawaii Rules of Penal Procedure provide:

> A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of an offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing an offense. The term 'property' includes documents, books, papers and any other tangible objects.

HAW. R. PENAL P. 41(b).

[8] The Hawaii Rules of Penal Procedure provide:

> A search warrant authorized by this rule may be issued by any district or circuit judge within the circuit wherein the property sought is located. Application therefor should be made to a district judge wherever practicable.

based in part upon the results of the subsequent search.[9]

The First Circuit Court granted Sherlock's motion to suppress the evidence from the search.[10] The "possibly cocaine" laboratory finding, coupled with the lack of information regarding the informant's previous reliability, led the Circuit Court to conclude that there was insufficient information to support a judicial finding of probable cause.[11] The State appealed, and the Hawaii Supreme Court reversed the decision of the Circuit Court.[12]

III. HISTORY OF THE LAW

This section describes the history and status of the law prior to *Sherlock*. The first part sets forth general guidelines for the determination of probable cause. Part two analyzes *Aguilar v. Texas*,[13] in which the United States Supreme Court first prescribed a two-part test for the determination of probable cause on the basis of an informant's tip. Part three examines the use of police corroboration of an informant's tip in establishing probable cause. This expansion of the *Aguilar* test was first articulated in *Spinelli v. United States*.[14] The fourth part discusses judicial review of search warrants. The final part describes the replacement of the *Aguilar-Spinelli* standard with the "totality of the circumstances" approach of *Illinois v. Gates*.[15]

A. *Guidelines for Establishing Probable Cause*

The fourth amendment constitutional protection against unreasonable searches and seizures requires that the issuance of a warrant be based upon probable cause, supported by oath or affirmation in the form of an affidavit by a law enforcement officer or government official, before a search or seizure can be

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HAW. R. PENAL P. 41(a).

> A warrant shall issue only on an affidavit . . . sworn to before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

HAW. R. PENAL P. 41(c).

[9] 70 Haw. at 272, 768 P.2d at 1291.

[10] *Id.*

[11] State v. Sherlock, Crim. No. 59477 (Haw. 1st Cir. filed Feb. 12, 1988) (order granting motion to suppress evidence).

[12] 70 Haw. at 272, 768 P.2d at 1291.

[13] 378 U.S. 108 (1964).

[14] 393 U.S. 410 (1969).

[15] 462 U.S. 213 (1983).

conducted.[16] Since only the probability of criminal activity,[17] not a prima facie case,[18] is necessary to show probable cause, the required proof is less than what is required for conviction.[19] Such proof may be of a sort that is legally inadmissible in a criminal trial.[20]

In accordance with this lower standard, the United States Supreme Court has held that, in determining probable cause, affidavits for search warrants should be interpreted "in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity . . . have no proper place in this area."[21]

The Hawaii Supreme Court, in *State v. Davenport*,[22] adopted this non-technical interpretation of affidavits: "[P]robable cause exists when 'the facts and circumstances within [one's] knowledge and of which [one] ha[s] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [a crime was being committed].' "[23] The *Davenport* court stated that an analysis of the facts, which are usually included in an affidavit, is the basis for the determination of the constitutionality of the search warrant.[24] "If those facts . . . are substantial enough to engender the

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[16] *See supra* note 1 for the text of the constitutional provision, and note 8 for the text of Hawaii Rule of Penal Procedure 41(c), describing the requirements for an affidavit, and for the issuance and contents of a warrant.

[17] Beck v. Ohio, 379 U.S. 89, 96 (1964) ("it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that a offense has been committed" (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

[18] Locke v. United States, 7 Cranch 339, 348 (1813) (Court rejected the contention that probable cause meant prima facie evidence and stated that probable cause "imports a seizure made under circumstances which warrant suspicion").

[19] Aguilar v. Texas, 378 U.S. 108, 121 (1964) ("information must be more than mere wholly unsupported suspicion but less than 'would justify condemnation' " (quoting *Locke*, 7 Cranch at 348)). *See* State v. Kalai, 56 Haw. 366, 371, 537 P.2d 8, 12 (1975) (affiant does not need to possess information sufficient for conviction).

[20] McCray v. Illinois, 386 U.S. 300, 311 (1967) (standards for affidavits of probable cause are less rigorous than those governing the admissibility of evidence at trial).

[21] United States v. Ventresca, 380 U.S. 102, 108 (1965). *See also* Spinelli v. United States, 393 U.S. 410, 433 (1969) (Black, J., dissenting) ("if we become increasingly technical and rigid in our demands upon police officers, I fear we make it increasingly easy for criminals to operate, detected but unpunished"). *But see Ventresca*, 380 U.S. at 117 (Douglas, J., dissenting) (probable cause must be defined in meticulous ways, otherwise the discretion of police and magistrates will become absolute).

[22] 55 Haw. 90, 516 P.2d 65 (1973).

[23] *Id.* at 93 n.3, 516 P.2d at 68 n.3 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). The *Davenport* court noted, "Certainly this is the most often quoted articulation of probable cause in Hawaiian case law." *Id.*

[24] *Id.* at 92, 516 P.2d at 68.

amorphous state of mind known as 'probable cause,' then the warrant, and hence the search, are at least prima facie constitutional."[25]

If a judge reasonably can infer from the facts in the affidavit that the objects of the search are where they are alleged to be, then there is sufficient basis for a finding of probable cause.[26] Absolute certainty about the location of the objects is not necessary.[27] The rule of probable cause thus balances the need to protect an individual's constitutional right to be secure from unreasonable searches and seizures against the need for flexibility in law enforcement operations.[28]

B. Establishing Probable Cause on the Basis of an Informant's Tip

1. The two-prong test prescribed by Aguilar v. Texas

To guide magistrates in determining whether an informant's tip is sufficient to establish probable cause, the United States Supreme Court developed a two-prong test in *Aguilar v. Texas*.[29] *Aguilar* held that an affidavit based upon information from an informant must include some of the underlying facts and circumstances upon which (1) the informant based his allegation of criminal

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[25] *Id.* at 92-93, 516 P.2d at 68 (footnote omitted).

[26] State v. Kalai, 56 Haw. 366, 371, 537 P.2d 8, 12 (1975) (information about the defendant's clothing and shoes, his presence at the scene of the crime, and identification of the defendant as the assailant were sufficient to establish probable cause to search the defendant's residence). *See also* Monick v. State, 64 Haw. 399, 641 P.2d 1341 (1982) (inferences from facts in affidavit must be legitimate and reasonable in order to support probable cause; inference that the defendant committed Medicaid fraud with respect to 38 persons, when the affidavit identified only four, was unreasonable).

[27] *Kalai*, 56 Haw. at 371, 537 P.2d at 12.

[28] Brinegar v. United States, 338 U.S. 160, 176 (1949). According to the *Brinegar* court, "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id. See* State v. Davenport, 55 Haw. 90, 98, 516 P.2d 65, 71 (1973) ("whatever added protection might be obtained by requiring a stricter standard of proof [of informant reliability] at a preliminary stage would pale in light of the impairment of criminal investigation" (quoting State v. Texeira, 50 Haw. 138, 143-44, 433 P.2d 593, 598 (1967))).

[29] 378 U.S. 108 (1964). The test applies to the information provided by an informant who is involved in criminal activity or has criminal connections. It does not apply to citizen-informants who may be reporting criminal activity for reasons of public duty. *See* United States v. Harris, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting) ("[T]he ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis. 'The latter is likely to be someone who is . . . involved in criminal activity or . . . who enjoys the confidence of criminals.' Government's Brief 14."); State v. Decano, 60 Haw. 205, 211, 588 P.2d 909, 914 (1978) ("information given by an eyewitness is presumed reliable because the simple fact of being an eyewitness gives reasonable assurance of trustworthiness").

activity *and* (2) the affiant based his conclusion that the informant, whose identity need not be disclosed, was credible *or* that his information was reliable.[30] Each of these prongs, referred to as the "basis of knowledge" and the "veracity" prongs respectively,[31] must be satisfied independently.[32]

In *Aguilar*, the United States Supreme Court struck down a search warrant based upon an affidavit which stated in part, "Affiants have received reliable information from a credible person and do believe that . . . narcotics and narcotic paraphernalia are being kept" on the premises to be searched.[33] The Court stated:

> [T]he "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession.[34]

The rationale for the *Aguilar* test was based upon the fourth amendment of the United States Constitution.[35] The fourth amendment requires that affidavits which rely upon hearsay must contain a reasonable basis for assessing the accuracy of the information so that a magistrate can independently[36] determine whether probable cause exists.[37] The magistrate should not serve as a rubber

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[30] *Aguilar*, 378 U.S. at 114.

[31] *See* Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 747 (1974).

[32] Spinelli v. United States, 393 U.S. 410, 415-16 (1969). One commentator has noted that since the two prongs protect fourth amendment rights from different risks, independent compliance with each prong is necessary for a finding of probable cause. The "basis of knowledge" prong protects against a magistrate finding probable cause based simply upon the conclusions of an affiant or informant which are unsubstantiated by a factual basis. The "veracity" prong ensures that there is a reason to trust the informant or his or her information. Recent Developments, *Abandonment of the Two-Pronged Aguilar-Spinelli Test: Illinois v. Gates*, 70 CORNELL L. REV. 316, 328 (1985).

[33] *Aguilar*, 378 U.S. at 109.

[34] *Id.* at 113-14 (quoting Giordenello v. United States, 357 U.S. 480, 486 (1958)).

[35] *Id.* at 110-14.

[36] *Id.* at 111 (the "protection [of the fourth amendment] consists . . . [of its requirement] that . . . inferences [from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime" (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948))).

[37] *Id.* at 111-12 ("Under the Fourth Amendment, an officer [of the court] may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." (quoting Nathanson v. United States, 290 U.S. 41, 47 (1933))).

stamp for the police,[38] nor should he or she merely rely upon the conclusions of the informant or the police.[39]

2. *Compliance with the first prong of the* Aguilar *test — basis of the informant's knowledge*

Under the first prong of the *Aguilar* test, the "basis of knowledge" prong, police officers must first present the magistrate with the facts upon which the informant based his or her allegation of criminal activity. Courts have interpreted this first prong in various ways. Some courts have held that an informant's personal observations are sufficiently reliable.[40] The Hawaii Supreme Court adopted this interpretation in *State v. Davenport*.[41] The *Davenport* court held, "Under the first . . . prong of the *Aguilar* test, the affidavit clearly passes constitutional muster since . . . the basis of the informer's conclusion [regarding] illicit drug activity . . . was his personal observations . . . . "[42] This interpretation was followed in the later Hawaii Supreme Court cases of *State v. Austria*[43] and *State v. Kanda*.[44]

Alternatively, if the affidavit does not describe how the informant received his information, a detailed informant's report may be an acceptable means of showing the basis of the informant's knowledge.[45] The information should be sufficiently detailed so that "the magistrate may know that he is relying on something more substantial than a casual rumor . . . [and] could reasonably infer that the informant had gained his information in a reliable way."[46]

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[38] *Id.* at 111.

[39] *Id.* at 113 (citing Giordenello v. United States, 357 U.S. 480, 486 (1958)).

[40] The *Aguilar* court suggested that this prong could be satisfied by "[an] affirmative allegation that the affiant spoke with personal knowledge of the matters contained [in the tip]." *Aguilar*, 378 U.S. at 113 (quoting *Giordenello*, 357 U.S. at 486). *See also*, Spinelli v. United States, 393 U.S. 410, 425 (1969) (White, J., concurring) ("what is necessary under *Aguilar* is [that] . . . the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it . . . ").

[41] 55 Haw. 90, 516 P.2d 65 (1973).

[42] *Id.* at 95, 516 P.2d at 69.

[43] 55 Haw. 565, 524 P.2d 290 (1974) (informant's personal observation of and participation in gambling activity on several occasions is "all that is required under this first prong of the *Aguilar* test," *Id.* at 569, 524 P.2d at 294).

[44] 63 Haw. 36, 44, 620 P.2d 1072, 1078 (1980) (affidavit failed the *Aguilar* test because it did not include personal observations of the defendants' participation in gambling activities or of gambling paraphernalia at any of the defendants' residences).

[45] Spinelli v. United States, 393 U.S. 410, 416 (1969).

[46] *Spinelli*, 393 U.S. at 416-17 ("[T]he only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from on offhand remark heard at a neighborhood bar." *Id.* at 417). *Spinelli* relied upon Draper v. United States, 358 U.S. 307 (1959), for the proper level

3. Compliance with the second prong of the Aguilar *test — credibility of the informant or reliability of the information*

The second prong of the *Aguilar* test, the "veracity" prong, can be met by establishing either the credibility of the informant or the reliability of the information. Police officers commonly attempt to establish an informant's credibility on the basis of the informant's past performance.[47] A history of past reliability, however, is not the only way to establish credibility.[48] Courts have held that an averment stating that an informant's past tips have led to convictions establishes the informant's credibility.[49] It is not necessary, however, that prior tips have led to convictions.[50] As expressed by the Hawaii Supreme Court in *State v. Austria*,[51] "Many considerations 'having nothing to do with the truth and dependability of the informer's story' may abort prosecutions or convictions, and 'it would be highly technical and unnecessary' to require these results as an indispensable element for a showing of informer reliability."[52]

The second prong of the *Aguilar* test can also be satisfied by establishing the reliability of the informant's tip. Such reliability may be shown by an informant's statement against his or her penal interest. Chief Justice Burger stated in *United States v. Harris*,[53] "Admissions of crime, like admissions against propri-

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of detail. In *Draper*, the informant reported that the suspect Draper would be arriving by train in Denver with three ounces of heroin on one of two specified mornings, wearing certain clothes, carrying a tan zipper bag, and walking fast. *Draper*, 358 U.S. at 309. *See also* Commonwealth v. Kiley, 11 Mass. App. 939, 939, 416 N.E.2d 980, 981 (1981) ("the information . . . contained such detail . . . as to bespeak personal knowledge of the informant").

[47] *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 303-04 (1967) (provision of accurate information fifteen or sixteen times during a year was sufficient to establish credibility); State v. Kanda, 63 Haw. 36, 42, 620 P.2d 1072, 1076 (1980) (affidavit stated that informant gave information about criminal activities at least fifteen times, and that each tip was corroborated).

[48] *See infra* note 63 and accompanying text.

[49] 1 W. LEFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(b) at 628 (2d ed. 1987). *See, e.g.*, United States v. Shephard, 714 F.2d 316 (4th Cir. 1983), *cert. denied*, 466 U.S. 938 (1984) (30 tips led to 25 convictions); State v. Romano, 165 Conn. 239, 332 A.2d 64 (1973) (information led to arrest and conviction of gamblers); State v. Comeau, 114 N.H. 431, 321 A.2d 590 (1974) (information led to five burglary convictions).

[50] *See, e.g.*, State v. Delaney, 58 Haw. 19, 22, 563 P.2d 990, 992 (1977) (statement that informant's prior tips led to nine arrests was sufficient to show reliability); State v. Davenport, 55 Haw. 90, 97, 516 P.2d 65, 70 (1973) ("the informer's prior tips led to the discovery of illegal drug activity on at least eleven occasions and at least seven arrests and prosecutions . . . [this] established the informer's credibility to such a degree that the district judge could properly conclude that his tip was 'probably' accurate").

[51] 55 Haw. 565, 524 P.2d 290 (1974).

[52] *Id.* at 569, 524 P.2d at 294 (quoting United States v. Colon, 419 F.2d 120, 122 (2d Cir. 1969)).

[53] 403 U.S. 573 (1971) (plurality opinion). The *Harris* informant stated that he had purchased illicit whiskey many times over the past two years. "Common sense . . . would induce a

etary interests, carry their own indicia of credibility — sufficient at least to support a finding of probable cause to search."[54]

The Hawaii Supreme Court adopted *Harris* in *State v. Yaw*,[55] holding that "statements implicating the defendant were also admissions against [the informant's] own penal interest, at least to the extent that they had a legitimate tendency to reveal the ongoing nature of [the informant's] engagement . . . in the sale of contraband. Such admissions have been considered a relevant indicia [sic] of an informant's credibility."[56]

C. *Use of Corroboration to Determine Probable Cause*

One of the more important expansions of the two-prong *Aguilar* test came five years later. In *Spinelli v. United States*,[57] the Court held that independent police corroboration of an informant's tip could remedy deficiencies in a tip that failed the *Aguilar* standard.[58] The tip and the corroboration, however, must still pass the *Aguilar* test in order to satisfy the fourth amendment requirement that a neutral and detached magistrate make the finding of probable cause.[59]

Courts have used corroboration to overcome deficiencies in the first,[60] sec-

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prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." *Id.* at 583. *Cf. Harris*, 403 U.S. at 595 (Harlan, J., dissenting). Justice Harlan, joined by Justices Douglas, Brennan, and Marshall, questioned the accuracy of an informant's tip that included a confession to a crime if there was no showing that the informant was not relying on the belief that he would receive immunity in exchange for his tip. The justices also expressed concern that the effect of the *Harris* ruling would lead to a governmental preference for using criminally involved informants rather than others. They claimed that this would be contrary to the premise that criminals are less reliable than law-abiding citizens.

[54] *Id.* at 583.

[55] 58 Haw. 485, 572 P.2d 856 (1977).

[56] *Id.* at 490, 572 P.2d at 860 (citing United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973)).

[57] 393 U.S. 410, 415 (1969).

[58] *Id.* ("If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered."). In his concurring opinion in *Spinelli*, Justice White stated, "[B]ecause an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts." *Id.* at 427 (White, J., concurring).

[59] *Id.* at 415-16 ("A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which — even when partially corroborated — is not as reliable as one which passes *Aguilar*'s requirements when standing alone.").

[60] *See, e.g.*, Ker v. California, 374 U.S. 23 (1963) (affidavit's failure to include the basis of the informant's conclusion that the suspect Ker was buying drugs was corrected by police surveillance); *Spinelli*, 393 U.S. at 417-18 (Police surveillance identified the suspect Draper "whose dress corresponded precisely to [the informant's] detailed description. It was then apparent that the informant had not been fabricating his report . . . since the report was of the sort which

ond,[61] or both[62] prongs of the *Aguilar* standard. In *Sherlock*, the deficiency was in the second prong, since the informant had no history of reliability. In finding probable cause, the *Sherlock* court relied upon *United States v. Harris*,[63] in which the United States Supreme Court held that a statement of the informant's previous credibility was not essential when the warrant was supported by other information.[64]

In *State v. Yaw*,[65] one of the earlier corroboration cases cited by the *Sherlock* court,[66] the police informant's credibility was established by police verification of the information provided by the informant.[67] Although there was a police-arranged drug purchase in *Yaw*, there was no police control of the purchase as there was in *Sherlock*.[68] The arranged purchase did not play a significant role in

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. . . may be recognized as having been obtained in a reliable way . . . . " (referring to Draper v. United States, 358 U.S. 307 (1959))).

[61] *See, e.g.*, United States v. Harris, 403 U.S. 573, 581 (1971) ("Corroboration . . . reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism [sic] . . . . " (quoting Jones v. United States, 362 U.S. 257, 271 (1960), *overruled on other grounds*, 448 U.S. 83 (1980))); United States v. Dauphinee, 538 F.2d 1 (1st Cir. 1976) (corroboration by law enforcement officers of details in the informant's report supported the magistrate's conclusion that the informant was truthful).

[62] *See, e.g., Spinelli*, 393 U.S. at 417. In *Spinelli*, FBI corroboration through independent surveillance of limited aspects of the informant's allegations about illegal gambling activities was insufficient for a finding of probable cause. "At most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." *Id.*

[63] 403 U.S. 573 (1971). The affidavit in *Harris* contained no statement of the informant's reliability. It claimed only that he was "prudent." However, the Court held that the informant's personal observations and confession of guilt, coupled with the affiant's knowledge of the suspect's reputation, provided a basis on which a magistrate could issue a warrant. "Indeed, . . . the inquiry is, as it always must be in determining probable cause, whether the informant's *present* information is truthful or reliable . . . . " *Id.* at 582 (emphasis in original).

[64] *Id.* at 581-83.

[65] 58 Haw. 485, 572 P.2d 856 (1977). In *Yaw*, there were two informants, a police informant and a second informant who was not working with the police, but who was buying drugs from the defendant. Pursuant to arrangements with the police, the police informant purchased heroin from the second informant.

[66] 70 Haw. 271, 274, 768 P.2d 1290, 1292 (1989).

[67] Acting upon the police informant's information, the police observed the activities of the second informant and the defendant's residence. The *Yaw* court upheld the credibility of both informants on the basis of this surveillance and the second informant's statements implicating the defendant, which were also admissions against his own penal interest. *Yaw*, 58 Haw. at 487-88, 572 P.2d at 858-59. *See supra* note 56 and accompanying text.

[68] There was no evidence that the police informant in *Yaw* had been searched prior to or after the arranged drug purchase, or even that he was under police surveillance. *Yaw*, 58 Haw. at 487-88, 572 P.2d at 858-59.

the district judge's finding of probable cause.[69]

D. *Judicial Review of Warrants*

Guided by the *Aguilar-Spinelli* standards, reviewing courts must determine whether a challenged affidavit justifies a finding of probable cause.[70] Courts may consider only the information that was brought to the magistrate's attention.[71] The common sense, realistic, and non-technical guidelines for a magistrate's review of affidavits also apply to reviewing courts.[72] Similarly, acknowledging that tips in an affidavit may be individually insufficient to support the issuance of a warrant, courts have held that an affidavit should be viewed in its totality rather than subjecting its components to hypercritical analysis.[73] Additionally, inaccurate statements in an affidavit which are not material, and which were not made

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[69] Rather, the *Yaw* court concluded that the police informant's four purchases of heroin from the second informant entitled the district judge who issued the search warrant "to conclude that a relationship of some trust existed between the parties [the police informant and the second informant]." *Id.* at 490, 572 P.2d at 860.

It has been noted that corroboration of an informant's tip in the form of delivery of purchased drugs to the police, without the benefit of police control of the purchase, is less satisfying. Such corroboration "indicates that a purchase occurred but does not indicate much about the informant's truthfulness, though courts are inclined to find this corroboration sufficient as well." 1 W. LEFAVE, *supra* note 49, § 3.3(f) at 686 n.317. *See, e.g.*, State v. Hayward, 18 Or. App. 128, 523 P.2d 1278 (1974). In *Hayward*, the informant's delivery to the police of narcotics which he claims to have purchased from the defendant is "persuasive corroborative evidence of his reliability." *Id.* at ____, 523 P.2d at 1280. The *Hayward* court also held that statements against an informant's penal interest are a relevant factor in determining the informant's reliability. *Id.*

[70] State v. Kaukani, 59 Haw. 120, 122, 577 P.2d 335, 338 (1978) ("the purpose of a reviewing court's inquiry is . . . to determine from the facts set forth in the affidavit, along with permissible inferences to be drawn therefrom, whether the district judge's decision to issue the search warrant was arbitrary because the affidavit contains no information which, if credited, is sufficient to establish probable cause" (citing United States v. Giacalone, 541 F.2d 508, 514 (6th Cir. 1976))).

[71] Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964) (since the police did not mention any surveillance in the affidavit, it would be irrelevant if the police indeed had the petitioner's house under surveillance).

[72] United States v. Ventresca, 380 U.S. 102, 109 (1965) ("Where [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.").

[73] Commonwealth v. Kiley, 11 Mass. App. 939, 416 N.E.2d 980 (1981). Some of the informant's tips in *Kiley*, if viewed alone, would not have supported the finding of probable cause. The *Kiley* court upheld the validity of the warrant, however, since those tips "gained force from other tips which corroborated their assertions . . . and which were in turn corroborated by independent police observations." *Id.* at 940, 416 N.E.2d at 982.

deliberately or negligently, do not invalidate a warrant.[74]

In compliance with the fourth amendment constitutional requirement that warrants be issued by neutral and detached magistrates,[75] courts give preference to "the informed and deliberate determinations of magistrates . . . over the hurried action of officers . . . who may happen to make arrests."[76] Thus, the standards for competent evidence are less stringent when a search is conducted with a warrant rather than without one.[77] Furthermore, if the facts in an affidavit and their reasonable inferences support a finding of probable cause, courts may be compelled to uphold that finding, even when other inferences from those facts may lead to a contrary conclusion.[78] These policies encourage police

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[74] *See, e.g.*, United States v. Walker, 575 F.2d 209, 212-13 (9th Cir. 1978), *cert. denied*, 439 U.S. 931 (1978) (validity of the seizure of photographs which were mistakenly described in the affidavit as stolen property was upheld on the grounds that the misstatement was not made deliberately or negligently, and that the inaccuracy was not material and did not vitiate the affidavit). *Cf.* State v. Kealoha, 62 Haw. 166, 177, 613 P.2d 645, 652 (1980) (A reviewing court may disregard challenged statements in a search warrant and determine probable cause on the basis of the remaining averments. In *Kealoha*, portions of the search warrant authorizing a search for and seizure of " 'articles of personal property tending to establish . . . identification . . . ' clearly violated the requirement that a search warrant 'particularly describe things to be seized[,]' " but the remaining portions of the warrant were sufficient to support a finding of probable cause.); Franks v. Delaware, 438 U.S. 154 (1978) (Courts may set aside allegedly false statements in an affidavit supporting a search warrant. If the remaining contents of the warrant support a finding of probable cause, the defendant will not be allowed to challenge the affidavit.).

[75] *See supra* note 36.

[76] Aguilar v. Texas, 378 U.S. 108, 110-11 (1964) (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)). The *Aguilar* court also noted, "A contrary rule . . . 'would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' " *Id.* at 111 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). *See also* State v. Knowlton, 489 A.2d 529, 532-33 (Me. 1985) ("While a restrictive, hypertechnical reading of the affidavit might lead the reader to quibble over whether the facts expressly stated established probable cause . . . in keeping with the deference . . . to the decision of a neutral magistrate . . . the affidavit should be read *positively*, to determine whether it can fairly be read to support the complaint justice's action.") (emphasis in original).

[77] *Aguilar*, 378 U.S. at 111 (citing Jones v. United States, 362 U.S. 257, 270 (1960), *overruled on other grounds*, 448 U.S. 83 (1980)). *See also* United States v. Ventresca, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall" (citing *Jones*, 362 U.S. at 270, *overruled on other grounds*, 448 U.S. 83 (1980))).

[78] State v. Austria, 55 Haw. 565, 568, 524 P.2d 290, 293 (1974). In *Austria*, the inference that an informant is unreliable because the informant's tips did not result in convictions was not controlling in a determination of probable cause since police corroboration of those tips led to the arrest of over twenty individuals. "Presumably the law has been obeyed and the arrests were based on probable cause which the officer states was supplied, at least in part, by the informant." *Id.* at 569, 524 P.2d at 293 (quoting United States v. Shipstead, 433 F.2d 368, 372 (9th Cir. 1970)).

officers to use the warrant process[79] in compliance with the constitutional right to privacy and protection against unreasonable searches.

E. *The Totality of the Circumstances Approach in* Illinois v. Gates

In 1983 the United States Supreme Court abandoned the *Aguilar-Spinelli* standard and substituted a "totality of the circumstances" approach in *Illinois v. Gates*.[80] The Court characterized the *Aguilar-Spinelli* approach as "rigid" and held that *Gates* is more consistent with "the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations . . . . "[81] The *Gates* Court did not completely reject the *Aguilar-Spinelli* tests. Instead, the Court disagreed with the notion that the tests "should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . Rather, . . . they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that . . . evidence is located in a particular place."[82] The Court reiterated long-held propositions that the determination of probable cause deals "with probabilities" that "are not technical," but "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[83]

In *Gates*, the Court found that probable cause was established where federal agents had corroborated information contained in an anonymous letter. The letter indicated that the defendants were violating state drug laws and predicted future criminal activities by the defendants. The Court acknowledged that, standing alone, the anonymous letter would be insufficient to satisfy the *Aguilar-Spinelli* criteria.[84] Recognizing the value of independent police corroboration of an informant's tip,[85] however, the Court concluded that police "corroboration of the letter's predictions . . . indicated, albeit not with certainty, that the informant's other assertions also were true . . . — including the claim regarding the Gateses' illegal activity."[86]

Hawaii courts have not yet adopted the *Gates* approach[87] and continue to

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[79] State v. Davenport, 55 Haw. 90, 98, 516 P.2d 65, 71 (1973).

[80] 462 U.S. 213 (1983).

[81] *Id.* at 233.

[82] *Id.* at 230 (footnote omitted).

[83] *Id.* at 231 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

[84] *Id.* at 227-31 (the anonymous letter gave no indication of the basis of the writer's knowledge of the defendants' activities, and there was no basis on which to conclude that the writer was credible).

[85] *Id.* at 241-42.

[86] *Id.* at 244.

[87] The Hawaii Supreme Court has previously adopted stricter state constitutional standards

use the more stringent *Aguilar-Spinelli* standard.[88]

IV. ANALYSIS

The primary question before the Hawaii Supreme Court in *Sherlock* was whether a police-controlled purchase of contraband can serve as sufficient corroboration to establish the reliability of an informant whose tip was used in an affidavit for a search warrant. The court also addressed the secondary issue of whether the laboratory report that the substance in the controlled purchase was only "possibly" cocaine would support a finding of probable cause. The court answered both these questions affirmatively. This section analyzes the supreme court's decision and comments on the court's reasoning.

A. *The Reasoning Applied by the Hawaii Supreme Court in* Sherlock

The Hawaii Supreme Court began its analysis in *Sherlock* by stating the constitutional requirements for the finding of probable cause necessary for the issuance of a search warrant.[89] The court then reiterated well-established propositions that affidavits supporting a search warrant can be based upon an informant's tip and that the informant's identity need not be disclosed.[90] Acknowledging that it has previously followed the *Aguilar-Spinelli* standard, the court cited the most recent Hawaii Supreme Court case applying this standard,

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than those required by the United States Constitution. *See, e.g.*, State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (Hawaii Constitution affords greater privacy rights than the federal right to privacy; Hawaii Supreme Court is not bound by United States Supreme Court precedents, and may give broader privacy protection than that given by the United States Constitution); Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985) (Hawaii Supreme Court may interpret the Hawaii Constitution to provide greater protection than that afforded by similar federal constitutional provisions); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985) (when warranted by logic and "sound regard" for purposes of constitutional provisions, Hawaii Supreme Court may extend protection by the Hawaii Bill of Rights beyond parallel provisions of the United States Bill of Rights).

[88] *See, e.g.*, State v. Nakachi, 7 Haw. App. ____, 742 P.2d 388 (1987). In *Nakachi*, the Intermediate Court of Appeals of Hawaii upheld a lower court's finding that, based upon an anonymous tip that a gun was involved in a domestic argument, police had reason to fear for their safety and were justified in ordering the defendant to exit his car. The court held that ordering a person to exit his or her automobile is a warrantless seizure of that person, and used the *Aguilar-Spinelli* standard to support its finding of probable cause to seize the defendant in this manner. Reference to the *Aguilar-Spinelli* test was included in a quotation from State v. Ward, 62 Haw. 509, 617 P.2d 568 (1980), which used the *Aguilar-Spinelli* standard. *Nakachi*, 7 Haw. App. at ____, 742 P.2d at 395.

[89] 70 Haw. 271, 273, 768 P.2d 1290, 1291-92 (1989).

[90] *Id.* at 273, 768 P.2d at 1292. *See supra* notes 2 and 30 and accompanying text.

State v. Kanda.[91] In its articulation of the *Aguilar-Spinelli* criteria,[92] the court focused on the "informant's credibility" alternative of the second prong of the *Aguilar* test, and did not discuss either the second prong's "reliability of the information" alternative,[93] or the first prong.[94] Noting that affidavits based upon hearsay are usually derived from an informant who has a history of providing information to the police, the court cited four of its earlier cases, *State v. Kanda*,[95] *State v. Delaney*,[96] *State v. Austria*,[97] and *State v. Davenport*,[98] in which the affiant had provided a record of the informant's credibility.[99]

In its discussion of these cases, however, the court noted that the tips were either corroborated or verified. This focus on corroboration indicated that the court supports corroboration as a factor in establishing an informant's reliability. Moreover, the court did not mention that in each of these cases the tips led to arrests — another indication of an informant's reliability.[100]

Next, the court noted that although the affidavit in *Sherlock* was devoid of any history of the informant's reliability, such a history is not essential to the

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[91] 63 Haw. 36, 41, 620 P.2d 1072, 1076 (1980). *See supra* notes 41 and 44 and accompanying text. The court also cited State v. Davenport, 55 Haw. 90, 516 P.2d 65 (1973), where the Hawaii Supreme Court first applied the *Aguilar* test. *See supra* notes 41 and 42 and accompanying text.

[92] 70 Haw. at 273, 768 P.2d at 1292 ("an affidavit in support of a search warrant where the affiant relies upon an informer 'must reveal an adequate basis for the informer's conclusion regarding the location of the objects sought to be recovered and must further demonstrate that the affiant's trust in the informer's credibility was warranted' " (quoting *Kanda*, 63 Haw. at 42, 620 P.2d at 1076) (quoting State v. Yaw, 58 Haw. 485, 486, 572 P.2d 856, 858 (1977))).

[93] The second *Aguilar* prong can be satisfied by establishing either the credibility of the informant or the reliability of the information. *See supra* Section III. B. 3. of this article.

[94] The first prong of *Aguilar*, regarding the basis of the informant's knowledge, was not an issue in *Sherlock*. The informant's basis for his conclusion was his claim of prior cocaine purchases from the suspect Sherlock, which could be considered a personal observation, and thus sufficient to satisfy the first prong.

[95] 63 Haw. 36, 620 P.2d 1072 (1980) (informant gave tips regarding criminal activities on fifteen occasions, all of which were corroborated).

[96] 58 Haw. 19, 563 P.2d 990 (1977) (the *Sherlock* court stated that the informant in *Delaney* had provided accurate information on at least eleven prior occasions).

[97] 55 Haw. 565, 524 P.2d 290 (1974) (informant gave information concerning illegal activities on at least four occasions where independent verification proved the accuracy of the tips).

[98] 55 Haw. 90, 516 P.2d 65 (1973) (affiant verified eleven of twenty-one tips given by informant).

[99] 70 Haw. 271, 273, 768 P.2d 1290, 1292 (1989).

[100] *See supra* note 50 and accompanying text. *See, e.g.*, *Kanda*, 63 Haw. at 42, 620 P.2d at 1076-77 (at least ten of the informant's tips led to arrests); *Delaney*, 58 Haw. at 22, 563 P.2d at 992 (prior contacts led to nine arrests); *Austria*, 55 Haw. at 567, 524 P.2d at 293 (past tips led to arrest of over twenty persons); *Davenport*, 55 Haw. at 97, 516 P.2d at 70 (prior tips led to at least seven arrests and prosecutions).

determination of probable cause.[101] The court relied upon *United States v. Harris*,[102] in which the United States Supreme Court held that the critical focus was the truthfulness or the reliability of the informant's *present* information and stated that the Court has never suggested that an averment of previous reliability was necessary. The *Sherlock* court, quoting from *United States v. Wong*,[103] explained that in the absence of a history of prior dealings, "the magistrate is entitled to look to the underlying circumstances, including those portions of the information independently verified by police, and to other factors supporting the probable truthfulness of the information."[104]

Finally, relying on cases in which police corroboration was used to support the finding that the informant was reliable,[105] the court concluded that corroboration in the form of surveillance of a police-controlled purchase of contraband was sufficient indication of an informant's reliability.[106] The types of corroboration in the cases cited by the court differed from that in *Sherlock*, but the *Sherlock* court did not make a distinction based upon these differences. Instead, the court focused on the close police control of the informant's drug purchase as an indication that the corroboration was sufficient.[107]

The Hawaii Supreme Court also addressed a secondary issue in *Sherlock*: the

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[101] 70 Haw. at 274, 768 P.2d at 1292.

[102] 403 U.S. 573, 581-83 (1971).

[103] 470 F.2d 129 (9th Cir. 1972). In *Wong*, the court upheld a search warrant based upon an affidavit which indicated that the informant had given reliable information concerning two separate crimes, had personally observed a machine gun and hand grenades at defendant Wong's residence, and had heard Wong say he was going to blow up an apartment near the state prison. Noting that since the informant endangered herself by providing such information to the police, it was unlikely that her allegations were false. The court also mentioned that the type of information, names and specific times concerning illegal activities, was not likely to be based upon rumor.

[104] 70 Haw. at 274, 768 P.2d at 1292 (quoting *Wong*, 470 F.2d at 131).

[105] *Id.* The court relied upon United States v. Dauphinee, 538 F.2d 1 (1st Cir. 1976) (Based upon a detailed tip, a government agent corroborated the informant's tip about the location of illegal explosives by physically locating the apartment. Additionally, based upon his personal experience, the agent noted that gang members seen outside the apartment were frequently associated with firearms and explosives, and that the informant probably saw a specific type of dynamite in the apartment.); State v. Yaw, 58 Haw. 485, 572 P.2d 856 (1977) (police corroborated a police informant's tip by surveillance of a second informant's drug-related activities and the defendant's residence, thus establishing the reliability of both informants); State v. Nakachi, 7 Haw. App. ____, 742 P.2d 388 (1987) (police were reasonable in acting upon an anonymous caller's tip that a gun was involved in an argument, after police observation verified the tip); and United States v. Harris, 403 U.S. 573, 600 (1971) (Harlan, J., dissenting) ("it will always be open to the officer to seek corroboration of the tip").

[106] 70 Haw. at 274-75, 768 P.2d at 1293. The court also noted that the circuit court had found that the informant's purchase from the defendant was adequately controlled.

[107] In *Sherlock*, the informant was searched before and after the purchase, and except when he was in the defendant's apartment making the purchase, he was under continual observation by the police. *Id.* at 272, 768 P.2d at 1291.

circuit court's concern that the laboratory analysis revealed that the white substance in the controlled purchase was only "possibly" cocaine.[108] The supreme court relied upon Hawaii case law to dispose of this issue, reaffirming that affidavits should be read in a "commonsense and realistic," and not "hypertechnical," way, and that "great deference should be accorded to a magistrate's finding of probable cause."[109]

Noting that the laboratory analysis alone would not support a finding of probable cause,[110] the court stated that an affidavit should be read in its totality, and its components should not be separated and subjected to hypercritical analysis.[111] Based upon these guidelines, the court held that the district judge reasonably could have inferred the existence of probable cause from the facts and circumstances in the affidavit.[112]

The court went on to state that the laboratory analysis was not essential to the issuance of a warrant in *Sherlock*, and that even if the laboratory result was deleted from the affidavit, the remaining statements[113] were adequate to sup-

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[108] *Id.* at 275, 768 P.2d at 1293. In its opening brief in *Sherlock*, the State of Hawaii noted that the laboratory report was obtained on the same day that the controlled buy was conducted, and that "there exists a clear inference that . . . [it] was an expedited and preliminary analysis prudently undertaken to bolster probable cause." Opening Brief of the State of Hawaii at 17 n.7, State v. Sherlock, 70 Haw. 271, 768 P.2d 1290 (Crim. No. 59477) (1989).

Further, in its reply brief, the State of Hawaii stated that narcotics enforcement in Hawaii would be "severely crippled" if a conclusive cocaine laboratory analysis was required for search warrant affidavits. The State noted the importance of obtaining search warrants quickly after controlled buys and the amount of time required to obtain a conclusive laboratory analysis. The State also noted that the "vast majority of search warrants in narcotics cases are obtained long before a police laboratory concludes the controlled buy substance was, in fact, in [sic] illicit drug." Reply Brief of the State of Hawaii at 7, State v. Sherlock, 70 Haw. 271, 768 P.2d 1290 (Crim. No. 59477) (1989).

The affiant in *Sherlock* expressed a sense of urgency in his request for a warrant:

> [Y]our affiant has formed the opinion that his experience in the investigation of narcotics and dangerous drugs has shown that possession, consumption, sale and transfer of narcotics and dangerous drugs continue day and night; it therefore is imperative that the aforementioned contraband be seized as soon as possible . . . .

Affidavit in Support of Search Warrant, Attachment No. 1, State v. Sherlock, 70 Haw 271, 768 P.2d 1290 (1989).

[109] 70 Haw. at 275, 768 P.2d at 1293 (quoting State v. Kaukani, 59 Haw. 120, 125, 577 P.2d 335, 339 (1978)).

[110] *Id.*

[111] *Id.* (citing Commonwealth v. Kiley, 11 Mass. App. 939, 939, 416 N.E.2d 980, 981 (1981)).

[112] *Id.*

[113] In its opening brief, the State of Hawaii claimed that collateral facts in the affidavit would have been sufficient to establish probable cause even if the "possibly cocaine" analysis was disregarded. The state said such collateral facts included the following activities by the informant: his previous purchase of a white powder purported to be cocaine, his agreement to use police funds

port the finding of probable cause.[114] The court relied here upon *United States v. Walker*,[115] which held that inaccuracies in an affidavit that were not material and that were not deliberately or negligently made did not render a warrant invalid.[116]

After finding that the informant's reliability was adequately established by corroboration in the form of a police-controlled purchase of contraband and that the uncertainty of the laboratory analysis did not prohibit a finding of probable cause, the court held that the search warrant was valid and reversed the circuit court's order suppressing the evidence.[117]

B. Commentary

Two comments about the *Sherlock* court's reasoning merit attention. First, the holding in *Sherlock* is consistent with prior case law, which sanctions the use of corroboration to support a finding of probable cause.[118] These prior cases, however, are distinguishable from *Sherlock* because in these cases the informants' operations and the police surveillance were not concurrent.[119] In *Sherlock*, the corroboration was stronger because the police and informant worked together. The police controlled the informant's drug purchase and observed the informant's operation.[120] Such close control and surveillance reduced the hearsay effects

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for another such purchase, his statement that he bought "one clear heat sealed packet containing a white powder purported to be cocaine" using the police funds, and his provision of the heat sealed packet to the police. Opening Brief of the State of Hawaii at 17, State v. Sherlock, 70 Haw. 271, 768 P.2d 1290 (Crim. No. 59477) (1989).

[114] 70 Haw. at 275, 768 P.2d at 1293.

[115] 575 F.2d 209, 212-13 (9th Cir. 1978), *cert. denied*, 439 U.S. 931 (1978). *See supra* note 74.

[116] The court could have bolstered its holding by citing those cases which hold that reviewing courts may disregard challenged statements in an affidavit and determine probable cause on the remaining averments. *See supra* note 74.

The court could have also relied upon State v. Kaukani, 59 Haw. 120, 577 P.2d 335 (1978), where the Hawaii Supreme Court upheld a search warrant based upon an affidavit which stated that an informant personally observed "what appeared to be marijuana." The *Kaukani* court found the imprecise description "somewhat bothersome," but found that "it is not always necessary that an informant be certain that which he has seen is in fact contraband material in order to sustain a finding of probable cause." *Id.* at 124, 577 P.2d at 339.

[117] 70 Haw. at 275, 768 P.2d at 1293.

[118] *See supra* note 105.

[119] *See supra* note 105.

[120] *See* State v. Gamage, 340 A.2d 1, 16 (Me. 1975) ("the law officer's physical proximity and active participation in the informant's intrigue is sufficient corroboration at least to provide . . . a factual basis for the magistrate's conclusion that the informant is credible or his information reliable").

of the affidavit and reliance on the informant's credibility.[121]

Second, the court could have decided *Sherlock* on narrower grounds. It could have approved the affidavit based upon police observations of the informant's activities rather than upon the informant's tip.[122] Even though the police in *Sherlock* did not actually observe the informant's drug purchase from the suspect, the court held that the other corroborated facts in the affidavit indicated that the informant engaged in a drug transaction at Sherlock's apartment.[123] Thus, the police observations alone could have been the primary basis for the warrant,[124] and the determination of the informant's reliability would have been unnecessary. Such a holding would be consistent with the court's prior decisions that required a common sense and realistic reading of affidavits, and that set the standard for a finding of probable cause as a probability of criminal activity rather than proof beyond a reasonable doubt.

Furthermore, since courts have held that admissions of crime lend credibility

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[121] *See* State v. Barrett, 132 Vt. 369, 374, 320 A.2d 621, 625 (1974) (purpose of the police escort to the drug purchase location and search of the informant was to eliminate as much of the hearsay aspects of the warrant application as possible, and to reduce the reliance on the veracity of the informant or his tip).

According to one authority,

> Even when the supervision has not been that close, corroboration which shows that the informant was in fact in contact with the person informed upon for some period of time or that the informant was in a position to see what he claims to have seen at some critical point is particularly helpful. Again, it does not totally eliminate the possibility of falsehood, but the risk is minimized by the fact that it is at least known that the informant could have personal knowledge of what he alleges.

1 W. LEFAVE, *supra* note 49, § 3.3(f) at 687 (footnote omitted).

[122] *See, e.g.*, Watt v. State, 412 N.E.2d 90, 96 (Ind. App. 1980) (controlled drug purchase was not "conduct as hearsay," the relevant facts were established by the presence of marijuana on the informant after the controlled purchase and were known to the affiant personally); State v. Sowden, 48 N.C. App. 570, ____, 269 S.E.2d 274, 276 (1980) (affiant's personal observations of a controlled drug purchase was the basis for the affidavit, thus the *Aguilar* test of an informant's reliability was not applicable); State v. Cavegn, 356 N.W.2d 671, 673 (Minn. 1984) (affidavit was not based primarily upon hearsay but on police observation of a controlled purchase).

[123] *See* State v. Barrett, 132 Vt. 369, 320 A.2d 621(1974) (magistrate had sufficient information to support a finding of probable cause where the only activity not observed by the police occurred when the informant entered the premises to purchase LSD); People v. Exline, 98 Ill. 2d 150, 456 N.E.2d 112 (1983) (probable cause was established based upon close surveillance of a supervised drug purchase, despite the fact that the police did not actually observe the informant entering the place subsequently searched); Draper v. United States, 358 U.S. 307 (1959) (government agent had probable cause for believing the defendant was committing a violation of narcotics laws when the agent corroborated an informant's tip detailing the defendant's apparel, luggage, gait, and arrival time).

[124] United States v. Ventresca, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government . . . are plainly a reliable basis for a warrant . . . . ").

to an informant's statements,[125] the court could have chosen to rely upon the informant's confession of his previous cocaine purchase from Sherlock as a means of satisfying the reliability of information alternative of the second prong of *Aguilar*. However, since the affidavit in *Sherlock* provided few details about the informant's admission of guilt,[126] the court may have been reluctant to place much significance on the confession. The court may have decided that since the remaining information[127] in the warrant application was sufficient for a finding of probable cause, it need not raise the issue of the reliability of an informant's tip that includes a confession of guilt.[128]

The *Sherlock* court may have chosen not to rely solely on the police officer's observations or the informant's confession for a finding of probable cause since deciding the case on those narrower grounds would have precluded the court from clarifying this ambiguous area of Hawaii's probable cause law. The court might have intended to sanction the use of a police-controlled drug purchase as a means to corroborate an informant's tip. On the other hand, it might have simply felt that the requirement that affidavits be read in their totality[129] required it to look at that strong factor as well.

Regarding the secondary issue in *Sherlock*, the court's treatment of the "possibly cocaine" analysis in its finding of probable cause reaffirms its support for prior holdings. These decisions held (1) that the finding of probable cause can be based simply upon the probability of criminal activity and does not require the making of a prima facie case[130] and (2) that great deference should be accorded to warrants.[131]

Inaccurate statements in an affidavit or statements not essential to the finding of probable cause, such as the "possibly cocaine" analysis, should not invalidate a search warrant provided they do not contradict statements critical to the probable cause determination. Such invalidation would be inconsistent with prior court rulings supporting a "common sense," not "hypertechnical," reading of

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[125] *See supra* note 53 and accompanying text.

[126] The affidavit stated that the informant "related knowing a caucasian male named 'Jerry Sherlock', who was distributing a white powder purported to be Cocaine from his residence," and that the informant "did make several purchases of the white powder purported to be Cocaine from 'Jerry Sherlock' at his residence . . . . " Affidavit in Support of Search Warrant, Attachment No. 2, State v. Sherlock, 70 Haw. 271, 768 P.2d 1290 (1989).

[127] *See supra* note 111 and accompanying text.

[128] *See supra* note 53 for the dissenting opinion by Justices Harlan, Douglas, Brennan, and Marshall in United States v. Harris, 403 U.S. 573 (1971), expressing concern about the accuracy of an informant's tip which included a confession to a crime. Also note that only four of the nine Justices in *Harris* joined in the portion of the opinion stating that an admission against penal interest supports a finding of probable cause.

[129] *See supra* note 111 and accompanying text.

[130] *See supra* notes 17 and 18 and accompanying text.

[131] *See supra* note 76 and accompanying text.

affidavits supporting probable cause.[132] If a warrant could still be issued on the basis of the remaining averments in the affidavit,[133] granting the search warrant despite the weaknesses in the affidavit would not violate constitutional protections against unreasonable seizures or invasions of privacy.

V. IMPACT

In determining probable cause, courts have balanced the constitutional mandate which protects individuals from unreasonable searches and seizures with the need for flexibility in law enforcement operations.[134] The Hawaii Supreme Court's holding in *Sherlock* also reflects this balance. The use of controlled contraband purchases to corroborate an informant's tip will enhance fourth amendment protection against unreasonable searches and seizures since police involvement in the informant's operation will mean greater reliance on police observations, which carry a presumption of reliability.[135] Such control will reduce the reliance on hearsay information and minimize the possibility of falsehood.[136]

By sanctioning another method of establishing the credibility of an informant who has no past history of reliability, *Sherlock* will have a positive impact on law enforcement in Hawaii. The court's statement regarding this unclear area of Hawaii's probable cause law reaffirms the court's recognition of the need for flexibility in crime fighting. The police-controlled purchase will be particularly useful to law enforcement officers when a first time informant is involved, or when police recognize that an informant's tip may have difficulty withstanding *Aguilar-Spinelli* scrutiny.

While *Sherlock* did not specify standards for an "adequately controlled" purchase of contraband, the search of the informant for possession of contraband and money before and after the purchase, and the continual police surveil-

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[132] *See supra* notes 72 and 73 and accompanying text.

[133] *See supra* note 74 and accompanying text. *See, e.g.*, State v. Kealoha, 62 Haw. 166, 178, 613 P.2d 645, 652 (1980) ("The exclusion of such evidence [i.e. evidence seized through the valid portion of the search warrant] would only hamper law enforcement without reason.").

> The legitimate and substantial public interest in law enforcement may prevail over an individual's interest in privacy in given situations. Where his probable involvement in crime and a likelihood that incriminating evidence may be concealed in a particular place have been demonstrated to a judicial officer, a temporary and limited incursion into his privacy is sanctioned by the Fourth Amendment and Article I, Section 7 of the Hawaii constitution . . . . The invalid portion of the authorization . . . has not contaminated the remainder of the warrant.

Id. at 178, 613 P.2d at 652-53.

[134] *See supra* notes 16-28 and accompanying text.

[135] *See supra* note 124 and accompanying text.

[136] *See supra* note 121 and accompanying text.

lance of the operation (except for the actual purchase within the suspect's residence) clearly provide guidelines for future controlled purchases. Compliance with these parameters will increase the likelihood that an affidavit will be found sufficient to support a finding of probable cause in similar circumstances. This means of corroboration may also be extended to other areas of crime that are conducive to controlled purchases.

If *Sherlock* is broadly interpreted, Hawaii courts may in fact allow lesser degrees of control in police corroboration. Such broad interpretation is likely since other jurisdictions have found police corroboration to be sufficient in cases in which there was no controlled purchase, but where the informant supported his story by delivering the purchased drugs to the police.[137] Furthermore, broad interpretation is likely in light of the modification of the *Aguilar-Spinelli* standard by the *Illinois v. Gates* totality of the circumstances approach,[138] even though Hawaii has not adopted the *Gates* standard.[139]

Finally, court approval of the use of police-controlled purchases for corroboration may result in a defendant raising the defense of entrapment.[140] This defense will not stand, however, unless the defendant can produce evidence demonstrating that the informant induced the defendant to possess or distribute the drugs, or that the defendant did not contemplate such illegal activity.[141]

VI. Conclusion

State v. Sherlock is consistent with decisions from other jurisdictions that address the issue of establishing probable cause on the basis of a tip provided by an informant. The *Sherlock* decision sanctions the use of police-controlled drug purchases as a means of establishing an informant's credibility when the informant has no history of reliability or when the informant's tip may have difficulty meeting the criteria of the *Aguilar-Spinelli* test. In effect, *Sherlock* allows the police more flexibility in obtaining a search warrant while recognizing

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[137] Note, however, that Hawaii courts have not allowed such corroboration as a means to establish an informant's reliability. *See supra* note 69 and accompanying text.

[138] *See supra* notes 80-88 and accompanying text.

[139] *See supra* notes 87 and 88 and accompanying text.

[140] Entrapment is defined as: "The act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him." Black's Law Dictionary (5th ed. 1979).

[141] *See, e.g.*, State v. Barrett, 132 Vt. 369, 372, 320 A.2d 621, 624 (1974) (entrapment was not an issue since there was no evidence indicating that any police activity or action by the informant induced the defendant to possess contraband drugs).

and staying within the limits of the constitutional protection against unreasonable searches and seizures.

Valerie J. Lam

Marsland v. First Hawaiian Bank: Home Rule and the Scope of the County Prosecutor's Power

I. INTRODUCTION

In *Marsland v. First Hawaiian Bank*,[1] the Hawaii Supreme Court held that the Prosecutor of the City and County of Honolulu (prosecutor) derives his authority to conduct investigations of state penal code violations solely from the state attorney general (attorney general). Consequently, the court held that the prosecutor's power to issue subpoenas can be no broader than that exercised by the attorney general pursuant to Hawaii Revised Statutes (HRS) section 28-2.5. Revised Charter of the City and County of Honolulu (Honolulu Charter) section 13-114, which purported to give the prosecutor greater subpoena powers, was not protected by the home rule provision of the Hawaii Constitution[2] because HRS section 28-2.5 is a law of statewide concern which supersedes all conflicting county charter provisions.

Part II of this note states the facts of the case. Part III recounts the history of the relationship between the attorney general and the prosecutor and traces the historical development of home rule[3] in Hawaii. Part IV examines the court's decision in *Marsland*. Part V comments on the significant elements of the opinion. Finally, Part VI considers the impact of the decision on the Office of the Prosecutor and on county autonomy under the state constitution.

II. FACTS

On July 6, 1987, Charles F. Marsland, Jr., the Prosecuting Attorney for the City and County of Honolulu, issued an administrative subpoena duces tecum[4]

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[1] 70 Haw. 126, 764 P.2d 1228 (1988).

[2] HAW. CONST. art. VIII, § 2; *see infra* note 62.

[3] Home rule is a "[c]onstitutional provision or type of legislative action which results in providing local cities and towns with a measure of self government if such local government accepts the terms of the state legislation." BLACK'S LAW DICTIONARY 660 (5th ed. 1979).

[4] A subpoena duces tecum is

> [a]n ancient writ, having for its object the production of evidence to be used, so far as admissible, in a trial. In the modern sense, a subpoena which, in addition to the usual

to the First Hawaiian Bank (FHB).[5] The subpoena sought the release of financial records pertaining to two people who were under investigation for embezzlement and theft of a trust account, but who had not been indicted.[6] FHB did not supply this information, maintaining that the subpoena was suspect because it lacked a judicial file mark and was not signed by the clerk of court.[7] Conse-

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clauses requiring the attendance of the witness in court to testify, contains clauses directing him to produce at the same time for use as evidence in the litigation certain described books, papers, records, and documents.

BALLENTINE'S LAW DICTIONARY 1229 (3d ed. 1969).

[5] Appellants explained the circumstances leading to the issuance of the subpoena.

> In regards to the [FHB] subpoena, [H.P.D.] Detective [Bennie] Atkinson was assigned to work on a case involving embezzlement from a woman's trust account. This occurred in the City and County of Honolulu, State of Hawaii, chargeable [as] theft under the *Hawaii Revised Statutes*, Section 708-831. In that case a master who was an attorney was appointed by the Court to audit the victim's account. The master reported the case to the Honolulu Police Department and turned over his report to the detective. In the report was a xerox of a passbook showing withdrawals from the victim's account by the trustee of the account. The passbook showed approximately 25 unsubstantiated withdrawals between the years 1979 to 1983. These withdrawals included the amounts between $2,000 and $8,000 at a time. Detective Atkinson would testify it was usually about $4,000 for each of the 25 withdrawals. In a civil deposition the suspect stated that he did spend the money fixing his house and to keep his business going. Detective Atkinson, in order to substantiate the confession and to get actual bank records in order to make the State's burden of proof in a criminal case to [prove] the embezzlement and theft, went to the Office of the Prosecuting Attorney to obtain a subpoena to get records from the listed bank account. He informed the prosecutor of the nature of the case and why he desired the issuance of the subpoena.

Opening Brief of the State of Hawaii at 4-5, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529)(brackets in original).

[6] The subpoena commanded First Hawaiian Bank to provide the prosecutor with:

> [A]ny and all signature cards, all account statements; current addresses and phone numbers of all account holders for account #79-020958 in the name of MAR-GO HAWAII TAX SERVICE, MAR-GO HAWAII TRAVEL; RICHARD B[.] GOEAS AND MARGUERITE G. GOEAS. Please include all notes, diaries, correspondence, written instructions from any account holders, written confirmations of verbal instructions of an account holder, authorizations, power of attorney, trust agreements, affidavits, court orders, guardianship of the property documents.
>
> Also, any and all copies of checks, share drafts, cashiers checks, wire transfers and the bank accounts funds were sent to, fund transfers of any kind, written confirmations, receipts, deposit slips, withdrawal slips, debits, credits, offsets, and any other documents pertaining to the above accounts IN THE AMOUNTS EQUAL TO OR GREATER THAN $100.00. Please include documents pertaining to the closing of any of the above accounts.
>
> ALL REQUESTED RECORDS FOR PERIOD JANUARY, 1978 to 1984.

Marsland v. First Hawaiian Bank, 70 Haw. 126, 128, 764 P.2d 1228, 1229 (1988)(brackets in original).

[7] Answering Brief of First Hawaiian Bank at 2, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529).

quently, on July 13, 1987, the prosecutor filed a Motion to Compel Production of Documents in accordance with sections 8-104[8] and 13-114[9] of the Honolulu Charter. On July 22, 1987, FHB filed a Memorandum in Opposition claiming that it was obliged to protect the confidentiality of customer records, that it had an evidentiary privilege to refuse production of the documents, that the subpoena was unconstitutional and void because it exceeded the scope of the prosecutor's power[10] and that a permanent injunction was warranted.[11]

On October 6, 1987, the Hawaii First Circuit Court denied the Motion to Compel Production of Documents because the subpoena was not issued in compliance with HRS section 28-2.5,[12] which the circuit court found to restrict the

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[8] HONOLULU, HAW., REV. CHARTER § 8-104 (1984) provides in pertinent part: "The prosecuting attorney shall:

. . .

(b) Prosecute offenses against the laws of the State under the authority of the attorney general of the State."

[9] HONOLULU, HAW., REV. CHARTER § 13-114 (1984) (emphasis added) provides that:

Every officer or agency of the city authorized to hold hearings or to conduct investigations shall have the power to administer oaths and *to issue subpoenas to compel the attendance of witnesses and the production of documents.* If any person, subpoenaed as a witness or to produce any books or papers called for by the process of the investigating body, shall fail or refuse to respond thereto or refuse to answer questions propounded by any member of the investigating body or its counsel, material to the matter pending before such body, *the proper court, upon request of the investigating body, shall have the power to compel obedience to any process of such body and require such witnesses to answer questions put to such person as aforesaid and to punish, as a contempt of the court, any refusal to comply therewith without good cause shown therefore.*

[10] First Hawaiian Bank argued that, since the prosecutor is a subordinate of the attorney general, his subpoena powers are defined and restricted by HRS § 28-2.5.
Answering Brief of First Hawaiian Bank at 13-19, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529).

[11] *Id.* at 3.

[12] The statute provides:

The attorney general shall investigate alleged violations of the law when directed to do so by the governor, or when the attorney general determines that an investigation would be in the public interest.

(1)(A) When the department of the attorney general conducts a general investigation, the attorney general or a designated subordinate may subpoena witnesses, examine them under oath, and require the production of any books, papers, documents, or objects that are relevant to the inquiry.

(B) When the department of the attorney general serves a subpoena under subparagraph (A), it shall attach to the subpoena a short and plain statement of the recipient's rights and the procedures for enforcing and contesting the subpoena.

(2)(A) *However, when the matter under investigation is the subject of a civil or criminal adjudication, or when the attorney general or a designated subordinate, determines that an adjudication is more probable than not, the office of the attorney general shall be subject to the relevant rules of court and shall exercise subpoena powers no different than those available to*

subpoena power of the prosecutor as well as the attorney general.[13]

The prosecutor appealed. He contended that "the State Legislature 'duly delegated the administration' of criminal prosecutions to the county prosecutor[] [and thus his] . . . powers are . . . no longer delineated by State statute, but are now controled [sic] by *City Charter* provisions . . . . "[14] According to the prosecutor, these charter provisions are superior to statute because they relate to the "administrative structure and organization" of the City and County of Honolulu.[15] The prosecutor claimed that the subpoena was enforceable because it was issued pursuant to a valid charter provision.

In response, FHB argued that the prosecutor receives his prosecutorial power from the attorney general and acts under his direction and control.[16] According to FHB, the prosecutor, as a subordinate, cannot exercise power to conduct

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the probable opposing party.

(B) Upon application by the attorney general, obedience to subpoenas issued by the department of the attorney general may be enforced by the circuit court in the county where the person subpoenaed resides or is found.

HAW. REV. STAT. § 28-2.5 (1986)(emphasis added).

[13] In his Conclusions of Law, Judge Wilfred K. Watanabe of the First Circuit Court reasoned that since the County of Honolulu is a creation of the State of Hawaii and only empowered with delegated authority, its county ordinances or charter provisions cannot conflict with state statutes or the state legislature's power to enact general laws. He also found that, pursuant to HRS § 62-71, the prosecutor is under the control and direction of the state attorney general. Opening Brief of the State of Hawaii, app. B at 3-4, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529).

Thus, according to Judge Watanabe, since the power of the attorney general to issue subpoenas duces tecum is circumscribed by HRS § 28-2.5, it is logical that the prosecutor's power is limited by the same restrictions. *Id.*, app. B at 6. After all, the state legislature intended that HRS § 28-2.5 would curb the largely unchecked subpoena power exercised by the attorney general and his designates in criminal investigations. *Id.*, app. B at 5-6.

The Hawaii Supreme Court in Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988) held that the prosecutor derives his power to conduct criminal prosecutions from the attorney general. The court noted, however, that HRS § 62-71 was inapplicable. *Id.* at 130-31 n.4, 764 P.2d at 1231 n.4. Section 62-71, which has since been repealed (L 1988, Act 263, § 11, effective June 13, 1988), applied only to the counties of Hawaii, Kauai and Maui. The error did not necessitate reversal because under Amemiya v. Sapienza, 63 Haw 424, 629 P.2d 1126 (1981) and HONOLULU, HAW., REV. CHARTER § 8-104(b) (1984) the prosecutor receives his authority to investigate and prosecute state penal law violations from the attorney general.

[14] Opening Brief of the State of Hawaii at 22, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988) (No. 12529).

[15] *Id.* at 23. "[T]he county charters [have] the force and effect of law, and [are] not subject to State legislative approval, modification or amendment as long as the particular charter provision related solely to 'the executive, legislative or administrative structure and organization' of a county agency or official." *Id.*

[16] Answering Brief of First Hawaiian Bank at 10, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529).

criminal investigations that is greater than his superior.[17] Moreover, FHB claimed that Honolulu Charter section 13-114, which granted the prosecutor broader subpoena powers than the attorney general, was invalid because charter provisions are always superseded by conflicting laws of general application throughout the state.[18] HRS section 28-2.5 is applicable statewide. Consequently, according to FHB, the prosecutor's subpoena power is defined by HRS section 28-2.5, and the subpoena duces tecum, issued pursuant to Honolulu Charter section 13-114, was invalid.[19]

III. HISTORY

A. *History of the Relationship Between the Honolulu Prosecutor and the Attorney General*

The territorial legislature established the office of the public prosecutor for the City and County of Honolulu in 1932.[20] The prosecutor was appointed by the mayor but could be removed by the attorney general with the governor's approval.[21] Significantly, the prosecutor was designated a deputy of the attorney general to whom he was required to report.[22] The prosecutor conducted criminal prosecutions on behalf of all the people of the territory,[23] "under the control and direction" of the attorney general.[24]

In 1957, the state legislature amended the law so that the prosecutor was no longer deemed a deputy of the attorney general.[25] The statute required that the prosecutor act "under the authority" rather than "under the control and direction" of the attorney general," who could no longer remove him from office.[26]

The Hawaii Supreme Court addressed the relationship between the attorney general[27] and the prosecutor[28] in *Amemiya v. Sapienza*.[29] In *Amemiya*, the pros-

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[17] *Id.* at 13.

[18] *Id.* at 15.

[19] *Id.* at 14.

[20] Act of Feb. 9, 1932, No. 13, § 1, 1932 Haw. Sess. Laws 18-19.

[21] *Id.*

[22] *Id.*

[23] Territory of Hawaii v. Lucas, 19 Haw. 162 (1908).

The Hawaii Supreme Court held that the county attorney conducts prosecutions in circuit court on behalf of all the people of the territory, not just those of the county.

[24] Act of Feb. 9, 1932, No. 13, § 1, 1932 Haw. Sess. Laws 18-19.

[25] Act of June 3, 1957, No. 233, § 2, 1957 Haw. Sess. Laws 253.

[26] *Id.*

[27] HAW. REV. STAT. ch. 28 (1985) defines the duties and power of the state attorney general.

[28] HONOLULU, HAW., REV. CHARTER art. 8 (1984) defines the duties and powers of the county prosecutor.

[29] 63 Haw. 424, 629 P.2d 1126 (1981).

ecutor appealed an injunction that had been issued by the Hawaii First Circuit Court at the request of the attorney general.[30] This injunction prohibited the prosecutor from participating in the prosecution of criminal acts relating to the Kukui Plaza Project.[31]

The *Amemiya* court held that "the attorney general, as the chief legal officer for the State, shall have the ultimate responsibility for enforcing penal laws of statewide application."[32] The court also held, however, that the prosecutor had been delegated the primary authority to conduct criminal prosecutions within his jurisdiction.[33] Consequently, the attorney general retained only a residual power to act;[34] he could only supersede the prosecutor in "compelling circumstances."[35]

Finally, the *Amemiya* court held that the attorney general could properly supersede the prosecutor because the mayor was a subject of the Kukui Plaza investigation and he was a close political and personal associate of the prosecutor.[36] These factors, combined with the circumstances of the Kukui Plaza controversy, indicated that disqualification was appropriate.[37]

B. History of Home Rule in Hawaii

The Hawaii State Constitution, which became effective in August 1959, provided for the establishment of county government. Article VII set the parameters of home rule. Section 1 of article VII authorized the state legislature to create the counties.[38] Section 2 provided that "[e]ach political subdivision shall have power to frame and adopt a charter for its own self-government within

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[30] *Id.* at 425, 629 P.2d at 1128.

[31] *Id.* The Kukui Plaza Project was under investigation by the City Council regarding "improprieties" allegedly committed by certain public officials. One of the officials under investigation was the mayor, who vehemently denied the charges. The prosecutor had been appointed by the mayor. *Id.* at 428, 629 P.2d at 1130.

[32] *Id.* at 427, 629 P.2d at 1129.

[33] *Id.*

[34] *Id.*

[35] *Id* at 428, 629 P.2d at 1129. The court suggested that compelling circumstances arose "where the public prosecutor has refused to act and such refusal amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act." *Id.*

[36] *Id.* at 428-29, 629 P.2d at 1129-30.

[37] *Id.*

[38] HAW. CONST. art. VII, § 1 (1959) provided that "[t]he legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

This provision is currently numbered HAW. CONST. art. VIII, § 1.

such limits and under such procedures as may be prescribed by law."[39] This provision was not self-executing; the counties could not adopt these charters unless the state legislature enacted a statute authorizing the procedures to govern the adoption process.[40] In 1963, the state legislature enacted the required enabling act.[41]

The state legislature was also empowered to determine the scope of local government powers. Article VII, section 1 provided that "[e]ach political subdivision shall have and exercise such powers as shall be conferred under general laws."[42] Significantly, section 5 provided that the other sections of the home rule provision "shall not limit the power of the legislature to enact laws of statewide concern."[43]

The degree of local autonomy given to the counties under Article VII was defined by the Hawaii Supreme Court in *Fasi v. City and County of Honolulu*.[44]

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[39] HAW. CONST. art. VII, § 2 (1959, amended 1968). This provision was amended in 1968, *see infra* notes 66-72 and accompanying text, and is currently numbered article VIII, section 2.

[40] Fasi v. City and County of Honolulu, 50 Haw. 277, 280, 439 P.2d 206, 208 (1968).

[41] *Id.* This statute, Act 73 of the Session Laws of 1963 and its amendments, are codified at Haw. Rev. Stat. ch. 50 (1985).

Chapter 50 authorizes the mayor of a county to appoint a charter commission to study the existing governmental structure of the county. After completing this study, the commission may recommend the adoption of a charter. If adoption of a charter is recommended, § 50-6 authorizes the commission to draft a charter which "shall set forth the structure of the county government, the manner in which it is to operate, the powers of the county in local affairs, and shall provide for orderly transition from the present government to government under the charter." Upon adoption of the charter, § 50-10 provides that "the charter shall become the organic law of the county and shall supersede any existing charter and all laws affecting the organization and government of the county which are in conflict therewith." However, § 50-15 expressly reserved the right of the state legislature to enact laws of statewide concern. *See* Hawaii Government Employees' Association v. County of Maui, 59 Haw. 65, 78-79, 576 P.2d 1029, 1038-39 (1978).

[42] The Hawaii Supreme Court stated:

> In its broadest sense, the term "general laws," as used in Article VII, Section 1, of the State constitution, denotes laws which apply uniformly throughout all political subdivisions of the State. But a law may apply to less than all of the political subdivisions and still be a general law, if it applies uniformly to a class of political subdivisions, which, considering the purpose of the legislation, are distinguished by sufficiently significant characteristics to make a class by themselves.

Bulgo v. County of Maui, 50 Haw. 51, 58, 430 P.2d 321, 326 (1967). *See* Op. Att'y Gen. No. 61-36 (1961).

[43] HAW. CONST. art. VII, § 5 (1959). This provision is currently numbered article VIII, § 6. The limitations expressed in this provision are codified at HRS § 50-15, which provides that:

> Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith.

HAW. REV. STAT. § 50-15 (1985).

[44] 50 Haw. 277, 439 P.2d 206 (1968).

In *Fasi*, Honolulu residents challenged the validity of salary increases that the council of the City and County of Honolulu had granted to its members by ordinance.[45] These increases were to become effective during the term of the incumbent councilmen. Thus, they appeared to contravene section 3-106[46] of the Honolulu Charter which prohibited council members from receiving salary increases during the term in which they were approved.[47]

The defendants maintained that the salary increases were valid; they claimed that section 3-106 of the Honolulu Charter had been amended by the passage of Act 223 of the Session Laws of 1965.[48] Act 223 had authorized increases in the compensation of city and county officials without the restriction contained in

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[45] Ordinance No. 2711, which was to become effective January 1, 1966, increased the salary of the council chairman from $8,400 to $12,000 per year and each of the council members from $7,200 to $10,500 per year. *Id.* at 278, 439 P.2d at 207 (*citing* Honolulu, Haw., Ordinance 2711 (Oct. 5, 1965)).

[46] Section 3-106 provided that:

> The salary of each councilman shall be $4,200.00 per annum, except that the chairman shall receive an additional sum of $600 per annum. The council may change the salary of councilmen by ordinance *but no increase of salary shall be effective during the term in which an increase is enacted*. No increase of salaries shall be enacted during the period between the date of the city general election and the second day of January following.

HONOLULU, HAW., REV. CHARTER § 3-106 (1959)(emphasis added).

The plaintiffs in *Fasi* claimed that the salary increases, which were approved in October 1965, violated this charter provision because they became effective in January 1966, during the term of the authorizing councilmen which ran from January 1965, through December 1968. *Fasi*, 50 Haw. at 278, 439 P.2d at 207.

[47] *Fasi*, 50 Haw. at 278, 439 P.2d at 207. The plaintiffs argued that a charter which was adopted under the provisions of the state constitution was immune from state legislative tampering. The Honolulu Charter, however, had not been ratified in conformity with constitutional directives. First, it was approved by the governor on June 5, 1959, eleven weeks before the constitution became effective. Second, a constitutionally sanctioned charter could only be adopted in compliance with the enabling statute. *Id.* at 279, 439 P.2d at 208. The necessary statute, later codified as Haw. Rev. Stat. ch. 50, was not enacted until 1963. Thus, the *Fasi* court concluded that the Honolulu Charter was not technically entitled to evaluation under state constitutional analysis. *Id.* at 280, 439 P.2d at 208.

The plaintiffs, aware of this anomaly, argued that the spirit of the constitution required that the Honolulu Charter be accorded the same protections as those adopted under the appropriate enabling legislation. The court declared that this argument was cogent only if charters adopted in accordance with the statutory criteria were "true constitutional charters" insulated from legislative interference, rather than statutory creations subject to the complete control of the legislature. The court's holding that these charters were merely statutory charters, amendable by the state legislature, undercut the plaintiffs' argument. *Id.* at 283-84, 439 P.2d at 210.

[48] *Id.* at 279, 439 P.2d at 207. Section 10 of Act 223 of the Session Laws of 1965 provided for the "[c]ompensation of certain county officials. Any law to the contrary notwithstanding, each county including the City and County of Honolulu by ordinance shall fix the salaries for its officials whose salaries are presently specifically established by statute or ordinance."

section 3-106.[49]

The Hawaii Supreme Court in *Fasi* affirmed the lower court decision upholding the validity of the salary increases.[50] The court held that 1) the state legislature may amend a county charter[51] and 2) a statute that was intended, either expressly or impliedly, to be the sole authority of a field of law amends a conflicting charter provision.[52]

The court asserted that the delegates to the first Constitutional Convention (Con Con) did not intend to grant complete home rule to the counties.[53] Consequently, article VII, section 2 was not self-executing.[54] In essence, the county charters envisioned by the Hawaii Constitution were merely statutory charters and the scope of local self-government remained in the hands of the state legislature.[55] Moreover, article VII, section 1 allowed the legislature to regulate the

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[49] *Id.*

[50] *Id.* at 285-86, 439 P.2d at 211.

[51] *Id.* at 284, 439 P.2d at 210.

[52] *Id.* at 283-86, 439 P.2d at 210-11.

[53] *Id.* at 280-83, 439 P.2d at 208-210. The delegates to the Con Con were presented with three proposals regarding the form of home rule to be incorporated into article VII, § 2 of the Hawaii Constitution. The first proposal maintained the status quo. The legislature would retain complete control over the political subdivisions as it had under the Hawaii Organic Act. The second proposed extending to the subdivisions complete local autonomy, including the power to tax. The third envisioned a middle ground — local government would have greater autonomy than under the existing system but would not have the power to tax.

The Committee on Local Government, which was to make an initial recommendation regarding the form of home rule to be adopted by the Con Con, endorsed the third option and suggested that the political subdivisions be granted the power to frame and adopt their own charters. This suggestion was rejected by the Con Con delegates because "it gave the political subdivisions a greater degree of autonomy than was compatible with the overall sense of local government consistent with our evolving governmental structure, form and practices." *Id.*

The Con Con delegates opted for a home rule provision that maintained the existing degree of legislative control of local units, while providing these units with protection from certain despised legislative practices. One such practice was compelling the counties to pay accrued claims.

The resulting charter provision was not self-executing. Article VII, § 2 did not authorize the counties to create and adopt a charter. The counties could not proceed until the legislature enacted a statute authorizing an adoption procedure. If the legislature chose not to act, article VII was a "dead letter." *Id. See* STAND. COMM. REP. NO. 74, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. at 228-30 (1950); COMM. OF THE WHOLE REP. NO. 21, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. at 332-35 (1950).

[54] The counties were not authorized to frame and adopt charters by article VII, § 2 of the Hawaii Constitution. County charters could not be adopted until the state legislature enacted a statute defining the adoption process. *Fasi*, 50 Haw. at 280, 439 P.2d at 208. *See supra* notes 39-41 and accompanying text.

[55] *Fasi*, 50 Haw. at 283, 439 P.2d at 210 (1968). The Court found that:

> [A] charter contemplated in the constitution is no more than a statutory charter. The constitution merely empowers each political subdivision to frame and adopt a charter "within such limits and under such procedures as may be prescribed by law," thus leaving

powers of the political subdivisions through the enactment of general laws.[56] The court concluded that the legislature had the power to amend charter provisions because it was not expressly prohibited from doing so by the state constitution.[57]

The *Fasi* court thus held that Act 223 of the Session Laws of 1965 amended section 3-106 of the Honolulu Charter.[58] The court found that the Act manifested an intent to exclusively regulate the salaries of a specific class of county employees.[59] In addition, the Act was a general law because it applied uniformly to all counties.[60] Thus, the charter provision was invalid.[61]

In 1968, the delegates to the second Constitutional Convention (Con Con 1968) revised article VII of the Hawaii Constitution.[62] Section 1 was retained in its original form,[63] indicating the continued intent to vest authority to determine county power in the state legislature.[64] Section 5 was also retained un-

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the scope of local self-government to legislative control.

Id.

[56] *Id.* at 284, 439 P.2d at 210. The court asserted that

"[s]ubject to this provision, the legislature is free to enact any legislation affecting the powers of political subdivisions. There is nothing in the constitution which says that the legislature may not amend a charter provision after a political subdivision has once adopted a charter." *Id.*

[57] *Id.* at 284-85, 439 P.2d at 210. In addition, the court reasoned that if a charter adopted in compliance with constitutional provisions was subject to amendment by the state legislature, so was the Honolulu Charter, which was merely a "creature of the legislature." *Id. See supra* note 47.

[58] *Id.* at 285, 439 P.2d at 210.

[59] *Id.* at 284, 439 P.2d at 210.

[60] *Id.*

[61] *Id.* at 286, 439 P.2d at 211.

[62] Article VII, § 2 was amended to read:

> Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.
>
> Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.
>
> A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section.

HAW. CONST. art. VII, § 2 (1959, amended 1968, renumbered 1978).

[63] *See supra* note 38 and accompanying text.

[64] STAND. COMM. REP. NO. 53, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. at 229-30 (1968).

The Standing Committee carefully considered a proposal to grant the counties all residual powers, that is, "all powers not denied by statute, charter or constitution." *Id.* at 229. This proposal was rejected as a "risky venture" which should not be undertaken because the existing system worked well. In the past, the legislature had been sensitive to the needs of county govern-

changed.[65] Section 2, however, was revised.

In response to *Fasi*, the delegates amended section 2 to give a "higher status"[66] to a county charter within a defined area.[67] The amended section accorded "a political subdivision's executive, legislative and administrative structure and organization" greater protection from state legislative intrusion.[68] A county's decisions in these areas were no longer subordinate to all "general laws,"[69] they were only superseded by "general laws allocating and reallocating powers and functions."[70] However, the delegates did not delineate the relationship between this specially protected class of county functions and the power of the legislature to enact "laws of statewide concern," under section 5.[71] The amended article was incorporated into the revised constitution which was ratified by the citizens in a general election and became effective on January 1, 1972.[72]

In *Hawaii Government Employees' Association v. County of Maui (HGEA)*,[73]

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ment and had delegated powers as appropriate. *Id.* at 230.

[65] *Id.* at 232. Although an early proposal recommended deleting § 5 from article VII, this suggestion was rejected because the delegates intended to "recognize[ ] the sovereignty of the State over its political subdivisions and its inherent power to enact laws of statewide concern." *Id.* *See supra* note 43 and accompanying text.

[66] STAND. COMM. REP. NO. 53, *supra* note 64, at 229. The report also noted that "[t]he designated provisions will become of superior authority to a statute." *Id.*

[67] *Id.*

[68] *Id.* Although an early draft of this section, Proposal 241, included the words "personnel" and "procedure," Con Con 1968 deleted them from the final draft of article VII, § 2.

> The word 'personnel' was omitted because your Committee was convinced that the legislature should not be deprived of the power to enact, and maintain in effect, laws such as Act 188, S.L.H. 1961, [As revised] . . . no charter provision could supersede Act 188, S.L.H. 1961, unless the legislature so provided. Moreover, any delegation by the legislature of power as to personnel matters will not be irrevocable.
>
> The word 'procedure' was omitted in order to preserve the authority of statutes such as the Administrative Procedure Act.
>
> As presented by your Committee, therefore, the area which the proposal places beyond legislative control is limited to charter provisions as to the executive, legislative and administrative structure and organization of the political subdivision. For example, the legislature could not change the composition of the legislative body of a county. However, the proposal specifically preserves the authority of the legislature to enact general laws allocating and reallocating powers and functions. This means that the legislature could transfer a function from the county to the state level even if the result would be to eliminate a department of the county government provided for in its charter.

Id.

[69] *See supra* note 42 and accompanying text.

[70] STAND. COMM. REP. NO. 53, *supra* note 64, at 229. *But see infra* notes 78 and 92 and accompanying text.

[71] *See supra* notes 43, 65 and 92 and accompanying text.

[72] Chikasuye v. Lota, 51 Haw. 443, 462 P.2d 192 (1969).

[73] 59 Haw. 65, 576 P.2d 1029 (1978).

the Hawaii Supreme Court examined the relationship between state and county government. In *HGEA*, the Hawaii Government Employees' Association challenged the validity of several provisions of the Revised Charter of the County of Maui (Maui Charter), claiming that they were in conflict with the Hawaii Constitution and the Hawaii Revised Statutes.[74] The court held that the charter provisions relating to the Departments of Water Supply, Police and Liquor Control were valid,[75] but those relating to the staff of the corporate counsel and the prosecuting attorney and mayoral control of the county director of personnel services were not.[76]

The court reasoned that the charter provisions relating to water works, police and liquor control were directly related to the organization and government of the County of Maui.[77] Pursuant to HRS section 50-10,[78] these provisions were superior to all laws, except those of statewide concern.[79] The conflicting state statutes were not of statewide concern but regulated matters of local interest.[80]

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[74] Appellants claimed that various charter provisions regulating: 1) the administration of police, water works and liquor control, 2) the structure and organization of the Departments of Water Supply, Police and Liquor Control, 3) the staff of corporation counsel and the prosecuting attorney, and 4) mayoral appointment and removal of the county director of personnel services were invalid under article VII of the Hawaii State Constitution and HRS § 50-15.

They argued that the Hawaii Constitution did not authorize "true home rule charters;" that local government could not exercise powers which had not been delegated to it by the state legislature by general laws; that the challenged charter provisions and amendments were not part of the "executive, legislative and administrative structure and organization" of the county, and thus were not protected from legislative interference; and that the charter provisions and amendments were in direct conflict with state statutes.

HGEA, 59 Haw. 65, 68-72, 576 P.2d at 1032-1034.

[75] *Id.* at 85, 576 P.2d at 1041.

[76] *Id.* at 87-88, 576 P.2d at 1042.

[77] *Id.* at 85, 576 P.2d at 1041.

[78] HAW. REV. STAT. § 50-10 (1985) provides that:

"[u]pon adoption, the charter shall become the organic law of the county and shall supersede any existing charter and all laws affecting the organization and government of the county which are in conflict therewith." *See supra* note 41 and accompanying text.

[79] *HGEA*, 59 Haw. at 85, 576 P.2d at 1042. *See supra* note 41.

[80] *Id.* at 82-84, 576 P.2d at 1039-41. The Hawaii Supreme Court held that county regulation of water supply, liquor sales and police were not matters of statewide concern. Significantly, the court noted that the state legislature had recognized that these functions were of local concern. The court found that the state legislature had given Maui an autonomous board of water supply. *Id.* at 82-83, 576 P.2d at 1039-1040. Further, the Senate Committee on Judiciary had recognized that the control of the consumption of alcoholic beverages was a local matter. *Id.* at 83, 576 P.2d at 1040 (*quoting* S. STAND. COMM. REP. NO. 101, 1963 HAW. LEG. SESS., SENATE J. 715). Similarly, the State Senate had determined that police protection was primarily a function of local government. *Id.* at 83-84, 576 P.2d at 1040 (*quoting* S. STAND. COMM. REP. NO. 100, 1963 HAW. LEG. SESS., SENATE J. 715).

Therefore, the county charter provisions were valid and enforceable.[81]

Conversely, the court held that the Maui Charter provisions which exempted the staffs of the corporation counsel and the prosecuting attorney from state civil service and authorized the mayor to appoint and remove the county personnel director were invalid.[82] According to the court, article VII, section 2 of the Hawaii Constitution[83] did not completely insulate county government from legislative intrusion.[84] The court asserted that the framers of the constitution had intended the state legislature to be the "final authority" on civil service matters.[85] The civil service merit system was of statewide concern,[86] and its success depended on uniform application. The court concluded that the administrative

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[81] *Id.* at 85, 576 P.2d at 1041. The court also noted that the charter provisions were directly related to the county's executive and administrative structure and organization and thus were superior to state statute. *Id.* at 83-85, 576 P.2d at 1040-41. This finding, which the court did not fully explain, has created some confusion regarding the status of charter provisions pertaining to this type of county function.

Arguably, the court's finding indicates that charter provisions relating to a county's structure and organization are absolutely protected by article VII, § 2 of the Hawaii Constitution because they are solely of local concern. Thus, they are not susceptible to modification by the state legislature under article VII, § 5.

However, a more moderate approach appears to have been adopted by the court. *Before* finding that the Maui charter provisions were related to the county's structure and organization and were superior to statute, the *HGEA* court acknowledged and accepted the state legislative findings that the county functions were matters of local concern. *Id.* at 83-85, 576 P.2d at 1040-41. Thus, the court did not emasculate the state legislature; that body theoretically retained an unqualified power to enact laws of statewide concern, even if the law might modify a charter provision pertaining to a county's structure and organization. In *HGEA*, the state statutes fell because they did not pertain to matters of statewide interest as required by article VII, § 5, not because certain charter provisions are inviolate. Therefore, it appears that the constitutional protection afforded a county's executive, legislative and administrative structure and organization may be ultimately dependent on the actions of the state legislature, not on article VII, § 2, ¶ 2 of the Hawaii Constitution.

However, the court's analysis shifts in City and County of Honolulu v. Ariyoshi, 67 Haw. 412, 420-21, 689 P.2d 757, 764 (1984). *See infra* note 92 and accompanying text.

[82] *HGEA*, 59 Haw. at 87-88, 576 P.2d at 1042-43. MAUI CHARTER §§ 8-2.4 and 8-3.2 (1977) provided that the staff of these departments, except the deputy corporation counsels and the deputy prosecuting attorneys, were exempt from civil service.

[83] *See supra* note 62 and accompanying text.

[84] *HGEA*, 59 Haw. at 85, 576 P.2d at 1041.

[85] *Id.* at 86, 576 P.2d at 1041. The court supported this position by noting that Con Con 1968 had expressly deleted the word "personnel" from the list of county functions which were given added protection by the article VII revisions. *Id.* at 86-87, 576 P.2d at 1042 (*quoting* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. at 422 (1968)). *See also supra* note 68. The court asserted that the objective of Con Con 1968 was to preserve state control of "personnel" laws which are of "statewide application on both the administrative and policy levels." *Id.* The civil service merit system, which was the basis of the laws questioned, was such a law.

[86] *Id.* at 87, 576 P.2d at 1042.

laws necessary to implement this state objective were also of statewide concern.[87] Consequently, charter provisions which were in conflict with state civil service law provisions were held to be invalid.[88]

Similarly, in *City and County of Honolulu v. Ariyoshi*,[89] the Hawaii Supreme Court held that state legislative enactments regulating "personnel" are matters of statewide concern superseding conflicting charter provisions and county ordinances.[90] In *Ariyoshi*, the counties of Honolulu, Hawaii, Maui and Kauai and local public executives challenged the constitutionality of a state act which prohibited specified classes of county employees from receiving salary increases.[91] The court first asserted that county charter provisions or ordinances would be superior to state statutes if they relate to a "county government's executive, legislative or administrative structure and organization."[92] In all other areas, the

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[87] *Id.*

[88] *Id.* at 87-88, 576 P.2d at 1042-43.

[89] 67 Haw. 412, 689 P.2d 757 (1984).

[90] *Id.* at 421-22, 689 P.2d at 764.

[91] *Id.* at 415, 689 P.2d at 760. The plaintiffs challenged the legality of part IV of Act 129 of the Session Laws of 1982. The following statutes were codified from this act.

1) HRS § 46-21.5 "prohibited increases of salaries to county officers and employees exempt from civil service." (The mayor, elected officers and heads of departments were members of the class exempt from civil service.) *Id.*

2) HRS § 78-18.3 "prohibited any salary increases of certain public officers whose salary was directly or indirectly dependent upon the public sector's collective bargaining process." *Id.*

Section 35 of part IV of Act 129 provided that, if the above statutes were deemed invalid, state grants-in-aid funds used to make prohibited salary increases must be returned to the State. *Id.*

[92] *Id.* at 420-21, 689 P.2d at 764. The *Ariyoshi* court suggested that these areas of county government are sacrosanct because they are inherently of purely local concern and thus can not be supplanted by state law under article VIII, § 6 of the Hawaii Constitution.

Early in the opinion the court noted that the home rule provision, article VIII, § 2 of the Hawaii Constitution, did not circumscribe the power of the state legislature to enact laws of statewide concern under article VIII, § 6. *Id.* at 416, 689 P.2d at 761. The court then framed and analyzed the issue presented in *Ariyoshi*. According to the court:

> The conflict between the charter provisions and the statutory provisions requires this court to determine whether this area is one of statewide concern and therefore a permissible area of control reserved for the legislature or if the area is one of local self-government and therefore granted to the counties through the home rule provision in the constitution.

Id. at 417, 689 P.2d at 762.

The court thus impliedly declared that a charter provision that is integral to county self-government is not of statewide concern and is immune from legislative interference. This rationale supports the court's apparent conclusion that the structure and organization of county government are not appropriate subjects for state legislation. *Id.* at 420-21, 689 P.2d at 764.

Ariyoshi signalled a change in the court's analysis. Arguably, in *HGEA*, charter provisions were afforded constitutional protection as part of a county government's structure and organization because the state legislature had recognized their "local" character. *See supra* note 80. In *Ariyoshi*, the court found that a county's structure and organization was inherently of local concern and

state legislature may enact "general laws concerning state matters."[93] The court then reaffirmed that "personnel" matters are not part of a county's "structure and organization,"[94] and consequently are superseded by such general laws.[95]

The *Ariyoshi* court deferred to the findings of the state legislature in upholding the state law. According to the court, the legislators believed that the law was necessary to achieve an integrated statewide compensation structure for state and county employees,[96] concerned "purely personnel matters,"[97] and was of statewide concern and interest.[98] The court concluded that the statute was valid because it was of statewide concern and did not intrude on the protected area of county government.[99]

IV. ANALYSIS OF Marsland

In *Marsland*, the Hawaii Supreme Court held that Honolulu Charter section 13-114[100] was invalid to the extent that it was broader than or inconsistent with HRS section 28-2.5,[101] and accordingly the power of the prosecutor to issue subpoenas duces tecum was limited to the same degree as that of the

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thus protected from state modification. In other words, this type of charter provision was entitled to protection regardless of the actions of the state legislature. *See supra* note 81 and accompanying text.

[93] *Ariyoshi*, 67 Haw. at 420, 689 P.2d at 764.

[94] *Id.* at 420-21, 689 P.2d at 763-64. In support of this conclusion, the court referred to 1) the history of Con Con 1968, *see supra* note 68, and 2) *HGEA*, 59 Haw. at 85-86, 576 P.2d at 1041.

Chief Justice Lum, in his dissenting opinion in *Ariyoshi*, disagreed with this analysis. According to Lum, the county charter provisions at issue were part of the structure and organization of the county government. *Ariyoshi*, 67 Haw. at 424, 689 P.2d at 765 (Lum, C.J., dissenting). They thus supersede Act 129, which is neither a "general law allocating or reallocating powers and functions of the county governments" nor a "law of statewide concern." *Id.* Lum believed any other interpretation rendered the home rule provision of the Hawaii Constitution meaningless. *Id.*

[95] *Id.* at 421, 689 P.2d at 764.

[96] *Id.* The court noted that the purpose of the Act was to alleviate salary inequities and establish an integrated and fair statewide compensation system for government employees. The legislature had determined that this required increasing salaries which had been fixed by statute and freezing those which had not been so limited. "[A] schedule of integrated, equitable, and reasonable salaries among top-level officers of all jurisdictions is necessary to provide for more efficient and effective government." *Id.* (*quoting* Act 129, § 34, 1982 Haw. Sess. Laws 193, 211).

[97] *Ariyoshi*, 67 Haw. at 421, 689 P.2d at 764.

[98] *Id.*

[99] *Id.*

[100] *See supra* note 9.

[101] Marsland v. First Hawaiian Bank, 70 Haw. 126, 136, 764 P.2d 1228, 1231 (1988). *See supra* note 12.

attorney general.[102] The court used a two step analysis. First, it held that since the prosecutor receives his authority to enforce state penal laws from the attorney general,[103] logic requires that his subpoena power be the same as that exercised by the attorney general.[104] Second, the court held that since the Hawaii Penal Code is of statewide concern, the laws governing the investigation of penal code violations by an official acting on behalf of the state are also inherently of statewide concern.[105] Pursuant to article VIII, section 6[106] of the Hawaii Constitution, such laws supersede provisions of the Honolulu Charter.[107]

A. *Subpoena Power of County Prosecutor Is No Greater Than That of State Attorney General*

The Hawaii Supreme Court held that the prosecutor's power to conduct criminal prosecutions is derived solely from the attorney general.[108] Consequently, his subpoena powers are no broader than those exercised by the attorney general.[109] The court asserted that the attorney general, as Hawaii's chief legal officer, is ultimately responsible for enforcing the state penal code.[110] He has delegated to the county prosecutors the "primary authority and responsibility" for prosecuting violations of this code within their jurisdictions.[111] Thus, their authority in this area is derived directly from the attorney general.[112]

The court noted that the attorney general does have the power to issue investigative subpoenas.[113] This power is circumscribed, however, by HRS section 28-2.5[114] which was "expressly designed to prevent the inappropriate use of investigating subpoenas by government officials charged with the responsibility

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[102] *Marsland*, 70 Haw. at 136, 764 P.2d at 1231.

[103] *Id.* at 130-32, 764 P.2d at 1230-32. The court cited Amemiya v. Sapienza, 63 Haw. 424, 427, 629 P.2d 1126, 1129 (1981) and HONOLULU, HAW., REV. CHARTER § 8-104(b) (1984) to support this proposition.

[104] *Marsland*, 70 Haw. at 132, 764 P.2d at 1231.

[105] *Id.* at 133-34, 764 P.2d at 1232.

[106] *See supra* note 43.

[107] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232.

[108] *Id.* at 130, 764 P.2d at 1230-31.

[109] *Id.* at 132, 764 P.2d at 1231.

[110] *Id.* at 130, 764 P.2d at 1230 (*citing* Amemiya v. Sapienza, 63 Haw. 424, 427, 629 P.2d 1126, 1129 (1981)).

[111] *Id.* at 130, 764 P.2d at 1230-31. *See* Amemiya v. Sapienza, 63 Haw. 424, 427, 629 P.2d 1126, 1129 (1981); HONOLULU, HAW., REV. CHARTER § 8-104(b)(1984).

[112] *Marsland*, 70 Haw. at 130, 764 P.2d at 1230.

[113] *Id.* at 130, 764 P.2d at 1231. *See* HAW. REV. STAT. § 28-2.5 (1986); *supra* notes 4 and 12.

[114] *Marsland*, 70 Haw. at 130, 764 P.2d at 1231.

of investigating violations of state law."[115] HRS section 28-2.5(1)(B)[116] provides that when the attorney general serves a subpoena pursuant to a general investigation, he need only attach "a short and plain statement of the recipient's rights and the procedures for enforcing and contesting the subpoena."

On the other hand, if the attorney general has determined that the matter under investigation is likely to result in an adjudication, HRS section 28-2.5(2)(A) provides that he must comply with additional procedures designed to protect the probable opposing party. Under these circumstances, the subpoena can only be issued consistent with the relevant rules of court. Moreover, the attorney general can exercise subpoena powers no different than those available to the probable opposing party.[117]

The court observed that Honolulu Charter section 13-114,[118] which authorizes the prosecutor to issue subpoenas, does not provide parties with the same procedural safeguards with respect to investigative subpoenas as afforded by HRS section 28-2.5.[119] The court held that the prosecutor cannot possess greater subpoena powers than the attorney general from whom he derives his prosecutorial authority.[120] Accordingly, the court held that Honolulu Charter section 13-114, which purported to extend the prosecutor's authority beyond that of the attorney general, was invalid to the extent that it was inconsistent with HRS section 28-2.5.[121] The subpoena issued by the prosecutor was likewise held invalid because it was not issued in compliance with the relevant rules of court,[122] as required by HRS section 28-2.5(2)(A).[123]

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[115] *Id.* In 1986, a Conference Committee reported that:

> The purpose of this bill is to amend § 28-2.5, Hawaii Revised Statutes, to clarify the subpoena powers of the Department of the Attorney General.
>
> Under this bill, the distinction between the Department's prosecutorial and investigatory functions will be better maintained. The bill also provides that persons under investigation and opposing parties will be assured fairness by preventing the inappropriate use of investigating subpoenas.

CONF. COMM. REP. NO. 44, 1986 HAW. LEG. SESS., HOUSE J. 932.

[116] *See supra* note 12.

[117] *Id.*

[118] *See supra* note 9.

[119] *Marsland*, 70 Haw. at 131, 764 P.2d at 1231.

[120] *Id.* at 132, 764 P.2d at 1231.

[121] *Id.*

[122] HAW. R. CIV. P. 45 and HAW. R. PENAL P. 17.

[123] *Marsland*, 70 Haw. at 132, 764 P.2d at 1232.

In *Marsland*, the prosecutor claimed that he never issued a § 13-114 subpoena if he had determined that, more probably than not, an adjudication would occur. Opening Brief of the State of Hawaii at 32, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529). He also claimed that there was no indictment or probable indictment in this case. *Id.*

Yet, the court concluded that the subpoena was invalid for not complying with the relevant

B. HRS Section 28-2.5 Is a Law of Statewide Concern

The Hawaii Supreme Court held that Honolulu Charter section 13-114 was not entitled to protection under the home rule provision of the state constitution because laws of statewide concern are superior to all charter provisions.[124] The court affirmed that article VIII, section 2[125] of the Hawaii Constitution does not completely insulate county government from legislative intrusion.[126] Article VIII, section 6[127] expressly reserved for the state legislature the right to enact laws "of statewide concern."[128] HRS section 50-15,[129] the statutory embodiment of this right, authorizes the state legislature to "enact all laws of general application throughout the state on matters of concern and interest."[130]

The court also held that the Hawaii Penal Code, which is a law of "general application throughout the state,"[131] is a law of statewide concern under article VIII, section 6.[132] According to the court, since the prosecutor investigates and prosecutes violations of state penal law on behalf of all the citizens of the state,[133] the manner in which he conducts these investigations is "inherently . . . a matter of statewide concern constitutionally reserved for the legislature."[134] Moreover, the court asserted that the state legislature intended that the procedural protections afforded by HRS section 28-2.5 be applied uniformly throughout the state in all investigations regarding possible violations of the state's penal laws.[135] Thus, the Hawaii Supreme Court affirmed the decision of the circuit court, holding that the prosecutor's use of subpoenas duces tecum in investigations of possible violations of the state penal law is restricted by HRS section 28-2.5.

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rules of court. This implies that the court found that adjudication was probable. Curiously, the court did not analyze the issue or report the reason for this implied finding.

If, in fact, this subpoena was issued subsequent to a general investigation, the only requirement pursuant to HRS § 28-2.5 was the attachment of a statement explaining the subject's rights. If this information was attached, the subpoena would have been valid. *See supra* note 12.

[124] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232. *See* HAW. CONST. art. VIII, § 6; HAW. REV. STAT. § 50-15 (1985); *supra* note 43 and accompanying text.

[125] *See supra* notes 66-70 and accompanying text.

[126] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232.

[127] *See supra* note 43 and accompanying text.

[128] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232.

[129] *See supra* notes 41 and 43 and accompanying text.

[130] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232. *See supra* note 43.

[131] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232.

[132] *Id.* HAW. REV. STAT. § 701-106 (1985), which defines the territorial applicability of the state penal code, provides that a person may be prosecuted for a code violation if an element or result of an offense occurs within the state or, in specified situations, outside of the state.

[133] *Marsland*, 70 Haw. at 133, 764 P.2d at 1232.

[134] *Id.* at 134, 764 P.2d at 1232.

[135] *Id.* at 134, 764 P.2d at 1233.

V. COMMENTARY

In *Marsland*, the Hawaii Supreme Court clarified two areas of the law. It is now clear that the prosecutor derives his authority to conduct criminal prosecutions from the attorney general. It is also clear that legislative enactments pertaining to matters of statewide concern will always supersede conflicting charter provisions and ordinances.

A. *The Prosecutor Derives His Authority from the Attorney General*

Prior to *Marsland*, the Hawaii Supreme Court had not identified the source of the prosecutor's power to conduct criminal prosecutions within his jurisdiction. In *Amemiya v. Sapienza*,[136] the court addressed the circumstances in which the attorney general could supersede the county prosecutor. In its analysis, the court emphasized that the attorney general only had "residual authority" to intervene in the official duties of the prosecutor.[137] Consequently, the *Amemiya* court held that the attorney general could supersede the prosecutor only in the most compelling circumstances.[138] However, the court did not specify the source of the prosecutor's authority to conduct criminal prosecutions.

In *Marsland*, the prosecutor argued that he received his powers directly from the legislature. He asserted that his powers did not emanate from the attorney general, and thus he was not subject to the statute regulating the attorney general's subpoena power. He claimed that the scope of his power was governed by the Honolulu Charter.[139]

The *Marsland* court clarified *Amemiya* by holding that "[t]he Attorney General . . . has delegated to the county prosecutors the primary authority and responsibility for initiating and conducting criminal prosecutions within their respective county jurisdictions."[140] This clarification made possible the court's holding that the prosecutor's power was derived directly from the attorney general.[141]

B. *The Status of Home Rule in Hawaii*

The relationship between sections 2 and 6 of article VIII of the Hawaii Constitution is of fundamental importance to county government. The degree of

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[136] 63 Haw. 424, 629 P.2d 1126 (1981).

[137] *Id.* at 427, 629 P.2d at 1129.

[138] *Id.*

[139] *See supra* notes 14 and 15 and accompanying text.

[140] Marsland v. First Hawaiian Bank, 70 Haw. 126, 130, 764 P.2d 1128, 1230-31 (1988).

[141] *Id.*

autonomy exercised by the county is dependent on the constitutional protections afforded the county's "executive, legislative or administrative structure and organization" by article VIII, section 2. After *Marsland*, these areas may be more susceptible to state interference.

Prior Hawaii Supreme Court decisions indicated that charter provisions and county ordinances pertaining to a county's structure and organization were superior to state enactments.[142] In 1978, the court found in *HGEA* that charter provisions relating to the executive and administrative structure and organization of the County of Maui were superior to statute.[143] In 1984, the *Ariyoshi* court, in dictum, also indicated that county ordinances regulating these areas were superior to legislative enactments.[144]

Relying on precedent, the prosecutor, in *Marsland*, asked the court to find that Honolulu Charter section 13-114 was related to the administrative structure and organization of the county and thus superior to HRS section 28-2.5.[145] While the court acknowledged this issue in its presentation of the facts,[146] it neglected to define the character of the charter provision. The court bypassed this issue by holding that HRS section 28-2.5, as a law of statewide concern within the meaning of article VIII, section 6 of the state constitution, superseded the conflicting charter provision.

This analysis suggests that the court has changed its position regarding the constitutional protection to be given to county charter provisions pertaining to a county's structure and organization. Implicit in the court's decision not to decide the character of the charter provision is the holding that the issue was not determinative. Arguably, after *Marsland* all charter provisions and ordinances, even those that relate to county structure and organization, are superseded by state laws of statewide concern.[147]

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[142] *See supra* notes 81 and 92 and accompanying text.

[143] Arguably, this holding was premised on the fact that the state legislature had delegated the responsibilities at issue to the county, implicitly recognizing that they were no longer matters of statewide concern. *See supra* note 81.

[144] *See supra* note 92.

[145] Opening Brief for the State of Hawaii at 23, Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (1988)(No. 12529).

[146] Marsland v. First Hawaiian Bank, 70 Haw. 126, 130-31, 764 P.2d 1228, 1230 (1988).

[147] One could argue that this shift in analysis will not effect the status of charter provisions and ordinances relating to the executive, legislative and administrative structure and organization of a county because these areas are purely matters of local concern. Thus, they would never be subject to supersession under article VIII, § 6 because the state has no legitimate statewide purpose in regulating them.

However, if this is true, surely the Hawaii Supreme Court would have specifically held that Honolulu Charter § 13-114 was not related to the structure and organization of the county. This finding would have left the *Ariyoshi* dictum intact — the structure and organization of county government are of purely local concern and superior to all state laws. *See supra* note 92 and

VI. IMPACT

The Hawaii Supreme Court's holding in *Marsland* will directly affect county government in two ways. First, any charter provision or county ordinance which regulates the prosecutor's conduct in investigating or prosecuting state penal code violations must be consistent with the corresponding state regulation. Second, the court's method of analyzing the relationship between county and state law arguably enhances the power of the state legislature to control county government.

The court's holding limiting the prosecutor's subpoena power serves to protect the citizens of Hawaii. After *Marsland*, the power of local legislators and county prosecutors to modify state rules governing criminal investigations is checked. Consequently, the subjects of these investigations should receive equal treatment regardless of where the investigation is initiated.

Moreover, the *Marsland* holding that laws of statewide concern supersede *all* county charter provisions and ordinances diminishes the scope of local autonomy. The history of home rule in Hawaii indicates that county power has depended largely on the actions of the state legislature.[148] However, Con Con 1968 revised article VII, now article VIII, of the state constitution to give heightened protection from legislative intrusion to charter provisions and ordinances relating to a county's structure and organization.[149] In *Ariyoshi*, the court recognized this intent and found that these areas were sacrosanct; charter provisions and county ordinances regarding a county's structure and organization were superior to all legislative enactments because they are of purely local concern.[150] The *Marsland* holding indicates that the state legislature can now intrude in these formerly protected areas if motivated by a statewide concern. This holding gives the state legislature tremendous power to influence local government since legislative expressions of intent are traditionally accepted by the court with minimal scrutiny.

On the other hand, perhaps the court is simply clarifying an ambiguity created by *Ariyoshi*. Undoubtedly, the Con Con 1968 delegates intended to give added constitutional protection to charter provisions regarding a county's structure and organization. These areas were no longer subject to "general laws;" they could only be modified by "general laws allocating and reallocating powers and functions."[151] The delegates, however, limited this protection. They expressly reserved for the state legislature the power to enact laws of statewide

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accompanying text.

[148] *See supra* notes 80, 81 and 92 and accompanying text.

[149] *See supra* notes 66-70 and accompanying text.

[150] *See supra* note 92 and accompanying text.

[151] HAW. CONST. art. VIII, § 2; *see supra* notes 66-70 and accompanying text.

concern.[152] While the Hawaii Supreme Court's opinion in *Ariyoshi* suggested that the state legislature's power under article VIII, section 6 of the Hawaii Constitution was qualified, the *Marsland* opinion has reasserted the supremacy of state government.

VII. CONCLUSION

In *Marsland v. First Hawaiian Bank*, the Hawaii Supreme Court held that the Prosecutor for the City and County of Honolulu derives his authority to prosecute violations of the state penal code solely from the attorney general. More significantly, the court held county charter provisions delineating the prosecutor's subpoena powers were not protected by the home rule provision of the state constitution because the corresponding state statute was of statewide concern.

As a result, the power of the county prosecutor to conduct criminal prosecutions is now defined by the state legislature. In addition, the *Marsland* court has arguably reduced local autonomy by giving the state legislature greater power to control local government.

Catherine Carey

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[152] *See supra* note 43 and accompanying text.