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BOOK REVIEW

Shoreline Setback Regulations and the Takings Analysis

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". . . nor shall private property be taken for public use, without just compensation."[1]

I. Introduction

During the past ten years, coastal states have conducted detailed studies using old and new aerial photographs to determine shoreline erosion rates. The increased analysis of the coastline has led to the estimate that 90% of the U.S. shoreline along the East and Gulf coasts is now in a state of erosion.[2] Over the last 100 years, the Atlantic coast has receded an average of two to three feet per year, while the Gulf Coast shoreline has receded an average of four to five feet annually. In some places, the rate of erosion is much worse. Cape Hatteras, North Carolina is losing twelve to fifteen feet per year and Louisiana thirty to fifty feet per year.[3] In California, approximately 86% of the exposed Pacific shoreline is receding at an average rate of six inches to two feet a year.[4] In Hawaii, beaches differ from their mainland counterparts in that the beach is usually bounded by rocky promontories, and the sand is biogenic in origin. Nevertheless, there are numerous well-documented cases of shorelines with a history of erosion. For example, at the famous surfing beach at Waimea Bay on the North Shore of Oahu, Hawaii, the vegetation line has receded approximately 200-250 feet between 1928 and 1988.[5]

An expected rise in sea level caused by global warming is expected to accelerate coastal erosion. Scientific opinion is that the sea level will rise about a foot in the next century.[6] A one-foot rise in sea level could

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[1] U.S. Const. amend. V. The requirement to pay compensation for the taking of private property for a public use has been applied to the states through the fourteenth amendment. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

[2] N.Y. Times, Aug. 1, 1989, at C1, col. 6.

[3] *Id.* at C1, col. 6. At the current rate of erosion, Louisiana is losing 50 square miles each year to the Gulf of Mexico. Gilbert, *America Washing Away*, Science Digest, Aug. 1986, at 30.

[4] Lemonick, *Shrinking Shores*, Time, Aug. 10, 1987, at 40.

[5] D. Hwang, Beach Changes On Oahu As Revealed By Aerial Photographs, Hawaii Coastal Zone Management Program Technical Supplement Number 22, 21-23 (1981); and Sea Engineering Inc., Oahu Shoreline Study, pt. 1, Data on Beach Changes-1988, at 16-17 (1989).

[6] This estimated rise in sea level has been revised downward from earlier predictions of up to 3 feet over the next century. The Houston Chronicle, Feb. 5, 1990, at 8B, col. 3. At the American Geophysical Union in San Francisco, scientists estimated sea

result in an estimated shoreline retreat of 75 feet in parts of New Jersey, 200 feet along the coast of South Carolina and 1,000 feet along some parts of the Florida coast.[7] Such landward shifts in the coastline have serious implications for coastal property. For example, North Carolina officials estimate that up to 5,000 existing structures in the state may be lost to coastal erosion in the next 60 years.[8]

There are several strategies coastal states have taken to address the receding coastline. The traditional method of hardening the shoreline by the use of seawalls, bulkheads, stone revetments and groins has been criticized for the destructive impact on the sand beach.[9] The high cost of sand replenishment makes this remedial measure impractical for all but the most densely populated coastal areas.[10] The trend for

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level rise over the next 60 years to be about one foot. USA Today, Dec. 8, 1989, at 3a, col. 6. In the century that scientists have measured relative sea level at 900 tide gauge stations around the world, sea level has risen about 6 inches. Gilbert, *supra* note 3, at 35.

[7] J. TITUS, *The Causes and Effects of Sea Level Rise*, in IMPACT OF SEA LEVEL RISE ON SOCIETY, (H. Wind ed. 1987). According to the "Bruun Rule," the amount of erosion from a sea level rise depends on the average slope of the beach profile, and is generally several times the amount of land directly inundated. *Id.* at 113. Dr. Stephen P. Leatherman, director of the Laboratory for Coastal Research at the University of Maryland, stated "There's sort of a rule of thumb that for every foot of sea level rise you see a shore retreat of close to 200 feet." N.Y. Times, *supra* note 2, at C12, col. 6.

[8] Owens, *Where Erosion and Development Meet*, EPA JOURNAL, Sept.-Oct. 1989, at 45.

[9] In its natural state the beach along a receding shoreline doesn't wash away, but simply shifts position. Gilbert, *supra* note 3, at 31. To protect inland property from the receding shoreline, seawalls, stone revetments and bulkheads are often constructed along the shore. While this hardening of the shoreline protects buildings from erosion, the reflection of wave energy off hardened barriers results in loss of sand offshore. Pilkey, *America's Beaches: An Endangered Species?* SEA GRANT TODAY, Nov.-Dec. 1981, at 14. The loss of beaches by shoreline stabilization has been termed by marine geologists and coastal engineers as "New Jersyization." Gilbert, *supra* note 3, at 75. "A seawall is a last Draconian step to save property. You just kiss off the beach." quoting Dr. Leatherman. N.Y. Times, *supra* note 2, at C12, col. 1.

[10] Owens, *supra* note 8, at 45. The Army Corps of Engineers is about to spend up to 100 million dollars of federal and state money to replenish 12 miles of coast at Sea Bright, New Jersey. N.Y. Times, *supra* note 2, at C12, col. 4. California has some 1,100 miles of exposed shoreline, of which 86% is receding. Lemonick, *supra* note 4, at 40. An additional problem with sand replenishment is that artificial beaches often erode faster than their natural counterparts since they have a steeper beach profile. Artificial sand is typically placed on the dry sand beach. However, only about 10% of the active part of the beach is above water. N.Y. Times, *supra* note 2, at C12, col. 4.

an increasing number of coastal states is to plan for the natural variations of the beach by setting back buildings sufficiently inland so that they have a reasonable life span before being threatened by erosion.[11] By anticipating erosion before development, the need for costly sand replenishment or environmentally harmful erosion-control measures can be minimized or even avoided.[12]

With erosion expected to accelerate, planners will need creative solutions and an increased flexibility in regulating shoreline development. Coastal states with a fixed shoreline setback may be required to extend their setback or implement a floating setback strategy. Such changes in zoning may further restrict the property rights of coastal landowners.

Against this backdrop are two landmark decisions announced by the United States Supreme Court in the June of 1987. The Supreme Court's rulings in *Nollan v. California Coastal Commission*,[13] and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[14] have been hailed a victory for the rights of the private property owner and a blow to government officials who regulate land use for the health, safety and welfare of the general public.[15] Given these landmark decisions, coastal planners may be so chilled by the prospect of heightened judicial scrutiny under *Nollan*, coupled with a *First English* temporary takings award, that in their caution to guard the public treasury, they are less than diligent in protecting public lands.[16]

The purpose of this article is to determine what leeway land-use regulators have under the current legal environment to control development along the receding shorelines of the country. In Section II of

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[11] Owens, *supra* note 8, at 45.

[12] *Id.* at 45.

[13] 483 U.S. 825 (1987).

[14] 482 U.S. 304 (1987).

[15] *See, e.g.*, Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 736 (1988) (Noting that editorial commentary was sharply divided over the *First English* and *Nollan* decisions. The L.A. Times saw *First English* as an "instant pall" for land-use planning. L.A. TIMES, June 11, 1987. The Wall Street Journal expressed the "hope [that] the justices will continue along the course [they had just set]." Wall St. J., June 11, 1987).

[16] Finnell, *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C.L. REV. 627, 629-30 (1989). The cost of a few coastal lots could bust the public treasury. In 1986, a one acre lot in East Hampton, New York, not including house, was over $1 million. The same size lot located a mile inland was $60,000 to $70,000. Gilbert, *supra* note 3, at 32.

this article, the reader is introduced to the shoreline setback regulations of selected coastal states. In general the basic zoning strategies employ a fixed or floating setback. In Section III, the various factors that the Supreme Court considers in the takings analysis are presented. These individual factors are then discussed in the context of regulating the shoreline by setbacks. Analytical emphasis is placed on the success of a takings challenge after the recent Supreme Court rulings in *First English*, *Nollan* and *Keystone Bituminous Coal Association v. DeBenedictis*,[17] the third significant land-use case decided by the Court in their October 1986 term.

This article concludes that even in the post *Nollan-First English* era, legislatures should not be intimidated from passing new shoreline regulations due to the threat of a "regulatory takings" challenge. If government officials can demonstrate a true need for strict regulations based on nuisance avoidance, the promotion of public safety, or the preservation of public trust land, then the regulations are likely to be constitutionally defensible. The economic burden of strict regulations on property owners can be alleviated with hardship provisions and the allowance of residual uses in the shoreline area.

Whereas the requirement of compensation for a taking is imposed to protect private property rights, the public trust doctrine is a tool to protect public rights in the coastline. Under the doctrine, the state acting as trustee has a duty to prevent the disappearance of beaches and tidelands caused by imprudent shoreline development. This duty implies that the state regulate structures so that they are set a safe distance from receding shorelines.

II. State Regulations To Control Shoreline Development

Coastal states have enacted various setback strategies to control development along the shoreline. The two major variations require either a fixed setback from the shoreline, or a floating setback that varies with the local rate of erosion. An example of how shoreline setbacks are structured is given for a few representative states.

A. Fixed Setbacks

Maine, Delaware, Alabama and Hawaii have established fixed minimum shoreline setback lines.[18] Fixed setbacks require a certain distance

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[17] 480 U.S. 470 (1987).

[18] Owens, *supra* note 8, at 45.

that new construction or reconstruction must be placed landward of a beach index line, such as a vegetation line, dune line, or mean high tide line.

In 1970, the Hawaii State Legislature amended the Hawaii Land Use Law,[19] with the enactment of the Shoreline Setback Law.[20] The Shoreline Setback Law was the enabling legislation for the individual counties to pass their own setback regulations. In 1986, the shoreline setback provisions in the Hawaii Land Use Law were transferred to the Hawaii Coastal Zone Management Act [hereinafter Hawaii CZM Act], with no significant changes in the substance of the provisions.[21]

According to the Hawaii CZM Act, shoreline setbacks in Hawaii are not less than twenty feet and not more than forty feet inland from the shoreline.[22] The shoreline in Hawaii is defined as "the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."[23]

The county planning departments in Hawaii are required to adopt and enforce shoreline setback rules.[24] The counties may require shoreline setback lines to be established at a distance greater than forty feet.[25] To date, no county has extended their setback.[26]

The Shoreline Setback Rules and Regulations of the City and County of Honolulu fix the shoreline setback at forty feet from the upper reaches of the wash of the waves other than storm and tidal waves, with a twenty foot setback for smaller lots meeting certain criteria.[27]

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[19] HAW. REV. STAT. § 205 (Supp. 1989).

[20] HAW. REV. STAT. § 205-32 (1970) (repealed 1986).

[21] OFFICE OF STATE PLANNING, HAWAII COASTAL ZONE MANAGEMENT PROGRAM (1990).

[22] HAW. REV. STAT. § 205A-43(a) (Supp. 1989).

[23] *Id.* § 205A-1. *See also infra* notes 88-89 and accompanying text.

[24] HAW. REV. STAT. § 205A-43(a) (Supp. 1989).

[25] *Id.* § 205A-45.

[26] Honolulu Advertiser, Nov. 11, 1990, at E1, col. 1.

[27] HONOLULU, HAW., SHORELINE SETBACK RULES AND REGULATIONS OF THE CITY AND COUNTY OF HONOLULU, HAWAII, Rule 9 (1983). The small lot exception applies in the following situations: the average depths of the parcel is less than 100 feet; or the parcel area is less than the minimum lot area required by Chapter 21 of the Revised Ordinances of the City and County of Honolulu; or the parcel is reduced to less than 50% of the parcel area after applying the forty-foot setback and applicable State and County building requirements. *Id.* Rule 9.1.

Generally, no structure or any portion thereof is permitted in the setback zone.[28] Exceptions to the setback requirement may include special structures necessary to protect property from erosion or wave damage,[29] construction to replace or reconstruct a nonconforming use,[30] and certain maritime and recreational facilities approved by the director of the regulating agency.[31] Landowners may also apply for a variance to the setback rules and regulations in the case of hardship or advancement of the public interest.[32]

In 1989, amendments to the Hawaii CZM Act setback provisions were made. The amendments specify added conditions for setback variance approval. In the consideration of hardship for a variance, county zoning changes shall not be considered a factor.[33] In addition, no variances are allowed unless conditions are maintained that insure the safe lateral access to and along the shore; that minimize adverse impacts on the beach; that minimize the risk of structures failing and becoming loose rocks or ruble on public property; and that minimize adverse impacts on public views.[34]

Besides the shoreline setback provisions, the Hawaii CZM Act controls coastal development by the Special Management Area (SMA) permit process. Each of the counties are required to adopt SMA boundaries which extend inland not less than 100 yards from the shoreline.[35] No development is allowed in the SMA without first obtaining a permit in accordance with the SMA guidelines.[36] While the SMA can be effective in the control of large multi-unit developments near an erosion zone, the SMA permit process does not apply to a single family residence that is not part of a larger development.[37] It is the construction of individual dwellings along a receding shoreline which can be especially troublesome since homeowners with limited finances often select the most affordable erosion control measures rather than those with the least environmental impact.

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[28] *Id.* Rule 13.3.
[29] *Id.* Rule 14.1.
[30] *Id.* Rule 14.4.
[31] *Id.* Rule 14.6.
[32] *Id.* Rule 15.3. The variance process requires a public hearing. *Id.* Rule 15.5.
[33] HAW. REV. STAT. § 205A-46(b) (Supp. 1989).
[34] *Id.* § 205A-46(c).
[35] OFFICE OF STATE PLANNING, *supra* note 21, at 11.
[36] HAW. REV. STAT. § 205A-28 (1985).
[37] *Id.* at § 205A-22(3)(B)(i).

In Maine, the state legislature has declared that shoreland areas are subject to special zoning and land-use controls. The shoreland area includes those areas within 250 feet of the "normal high water line" of any great pond, river or saltwater body.[38] Some of the stated purposes for the shoreland controls include the maintenance of safe and healthful conditions and the protection of buildings and lands from flooding and accelerated erosion.[39] The Maine Board of Environmental Protection is required to adopt minimum guidelines for municipal zoning in the shoreland area. The minimum guidelines are to include provisions governing building size as well as setback and location.[40] Individual municipalities are then required to prepare and submit to the Board for approval, land use ordinances which are consistent with, and no less stringent than, the minimum guidelines adopted by the Board.[41] In one respect, the Maine zoning regulations are similar to Hawaii in that minimum setback guidelines are mandated by the state with the option by local government to adopt more stringent controls.

Property owners in Maine have challenged the constitutionality of fixed setback requirements in the municipal zoning ordinances. In *Mack v. Municipal Office of Town of Cape Elizabeth*,[42] the Macks were denied a building permit to build on a small peninsula in Cape Elizabeth, because the proposed house failed to meet the required setback. The Cape Elizabeth Zoning Ordinance required a fifty foot setback from the "normal high water mark," which is defined as "that line on the shore of tidal waters which is the apparent extreme limit of the effect of [the] high tides, *i.e.*, the top of bank, cliff, or beach above the tide."[43] According to the ordinance, reduced setbacks were allowed if several criteria were met, in particular, the smaller setback would not result in unsafe or unhealthful conditions.[44]

The Macks filed a six-count complaint in which count V alleged the zoning ordinance, as applied, deprived the landowner of property without just compensation, in violation of the United States and Maine Constitutions. The Supreme Judicial Court of Maine held there was sufficient evidence to find wave action could make the proposed house

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[38] ME. REV. STAT. ANN. tit. 38, § 435 (1989 & Supp. 1990).

[39] *Id.* at § 435.

[40] ME. REV. STAT. ANN. tit. 38, § 438-A(1) (1989).

[41] ME. REV. STAT. ANN. tit. 38, § 438-A(2) (1989 & Supp. 1990).

[42] 463 A.2d 717 (Me. 1983).

[43] *Id.* at 721.

[44] *Id.* at 719.

unsafe for its inhabitants, and therefore, the Macks did not qualify for the reduced setback variance under the Cape Elizabeth ordinance.[45] The court did not rule on the takings issue in the absence of consideration of this issue by the lower court, and need for more thorough briefing and oral argument.[46]

B. Floating Setbacks

New York, Florida, New Jersey, North Carolina, South Carolina, Pennsylvania, Michigan and Ohio have implemented a floating setback strategy. These states require that new construction be set-back 30 to 100 times the annual erosion rate from the shoreline.[47]

New York requires the establishment of a coastal erosion hazard area. The boundaries of the area are defined "by starting at the bluff edge or most landward point of active erosion and measuring along a line which is normal to the line of mean high water a distance which is forty times the long-term average annual rate of shoreline recession. . . ."[48] Any activities or development in the erosion hazard area may be restricted or prohibited to prevent or reduce erosion impacts.[49]

Individual cities, towns or villages are required to submit to the commissioner for approval, an erosion hazard area ordinance or local

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[45] *Id.* at 720.

[46] *Id.* at 722.

[47] Owens, *supra* note 8, at 45. Average erosion rates are usually determined by the analysis of historical data, primarily aerial photographs taken over different time intervals. Dr. Leatherman stated at a recent congressional hearing, "We now have the technology [using aerial photographs] to make accurate, inexpensive and court-defensible predictions of erosion." Houston Chronicle, Jul. 30, 1990, at 6B, col. 2. In South Carolina's Beachfront Management Act, the average annual erosion rate is based upon the best historical and scientific data adopted by the South Carolina Coastal Council. S.C. CODE ANN. § 48-39-280(B) (Law. Co-op. 1990). The use of an average annual erosion rate is useful for shorelines with a continuous history of erosion. In Hawaii, however, there are some beaches which have experienced a cycle of alternating erosion and accretion over a multi-yearly period. Setbacks for these unstable areas may be based on the documented range in a shoreline position over a specified time interval, say for example forty years. Hwang, *supra* note 5, at 139. Alternatively, a setback for shorelines with a history of alternating erosion and accretion may be based on statistical and probability analysis of the historic shoreline data. SEA ENGINEERING INC., OAHU SHORELINE STUDY, PT. 2, MANAGEMENT STRATEGIES, A-1 (1989).

[48] N.Y. ENVTL. CONSERV. LAW § 34-0103(3)(a) (McKinney 1984). A bluff is defined as a high, steep bank, as by a river, or by the sea. BLACK'S LAW DICTIONARY 90 (abr. 5th ed. 1983).

[49] N.Y. ENVTL. CONSERV. LAW § 34-0102(2) (McKinney 1984).

law within six months after the final identification of an erosion hazard area is filed with the clerk of a city, town or village.[50] If a city, town or village fails to submit an erosion hazard area ordinance or local law on time, the commissioner shall notify the legislative body of the county in which the city, town, or village is located. Within six months of such notification, the county shall submit an erosion hazard area ordinance or local law to the commissioner.[51] If the city or county fails to submit an approvable erosion hazard ordinance, the commissioner shall adopt regulations which impose minimum standards and criteria to be applied in the denial, condition or modification of a proposed action, if necessary, to implement the policies and purposes of the regulation.[52]

In South Carolina's Beachfront Management Act, a baseline is established at the location of the crest of the primary oceanfront sand dune.[53] A setback is then established landward of the baseline a distance which is forty times the average annual erosion rate based upon historical and scientific data.[54] All construction between the baseline and setback line, except for a pool, habitable structure or erosion control device require a permit from the coastal council.[55] Habitable structures seaward of the setback line must be no larger than 5,000 square feet of heated space, and must be located as far landward on the property as practicable.[56]

If an existing habitable structure seaward of the setback is destroyed beyond repair due to natural causes, several requirements are placed on the landowner in order to replace the structure. The total square footage of the replaced structure seaward of the setback line must not exceed the total square footage of the original structure seaward of the setback line.[57] Where possible the replaced structure must be moved landward of the setback line or, if not possible, as far landward as practicable.[58]

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[50] *Id.* § 34-0105(1).

[51] *Id.* § 34-0106(1).

[52] *Id.* § 34-0107(1), § 34-0108(3).

[53] S.C. CODE ANN. § 48-39-280(A)(1) (Law. Co-op. 1990).

[54] *Id.* § 48-39-280(B). For stable shorelines, in no instance is the setback to be less than 20 feet. *Id.*

[55] *Id.* § 48-39-290(B)(4).

[56] *Id.* § 48-39-290(B)(1)(a)(i).

[57] *Id.* § 48-39-290(B)(1)(b)(iv)(a). In addition the linear footage of the replaced structure along the coast must not exceed the linear footage of the original structure along the coast. *Id.*

[58] *Id.* § 48-39-290(B)(1)(b)(iv)(c). The provision to replace habitable structures

The South Carolina Act prohibits new erosion control structures or devices seaward of the setback line.[59] Preexisting erosion control devices may not be repaired or replaced if destroyed beyond a certain percentage.[60] The restriction on erosion control devices and other structures within the setback area are consistent with South Carolina's policy of retreat from the shoreline.[61] Landowners who oppose such restrictions may petition the circuit court to determine if their property has been taken without just compensation.[62]

Florida's Beach and Shore Preservation Act contains an elaborate system of zonation to deal with issues of sand replenishment, beach restoration, shoreline erosion, and destruction of buildings due to storm or hurricanes. The Florida approach integrates two floating zones, one based on the local rate of erosion, and the other on predictions of the impact to the beach-dune system from a 100 year storm surge, storm waves or other weather conditions. Four lines of significance along the coast have been established:

1) The "erosion control line" is established by survey and serves to fix the boundary between sovereignty lands of the state and the upland properties adjacent thereto.[63] Once an erosion control line is established, "common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial [processes]."[64] The purpose of the erosion control line is to fix the property boundary before the state undertakes a beach replenishment or restoration project which builds the beach seaward.[65]

2) In 1970, the Florida legislature established an interim statewide coastal construction setback line. Construction within 50 feet of the

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destroyed beyond repair by natural causes was modified after Hurricane Hugo struck the South Carolina coast on September 22, 1989. The old provision was more stringent and required that the landowner replenish the beach in front of the property with an amount of sand equal to one and one-half times the yearly volume of sand lost to erosion. S.C. CODE ANN. § 48-39-290(B)(7) (Law. Co-op. 1988)(amended 1990). In addition, the owner was required to obtain approval from the local zoning and building authorities. *Id.* § 48-39-290(B)(4).

[59] S.C. CODE ANN. § 48-39-290(B)(2)(a) (Law. Co-op. 1990).

[60] *Id.* § 48-39-290(B)(2)(a).

[61] *Id.* § 48-39-250(6).

[62] *Id.* § 48-39-305(A).

[63] FLA. STAT. ANN. § 161.191(1) (West 1990).

[64] *Id.* at § 161.191(2).

[65] *Id.* at § 161.141(1).

mean high water line requires a waiver or variance.[66] The interim setback remains in effect pending the establishment of the coastal counties' construction control lines.[67]

3) In 1971, the legislature directed the Department of Natural Resources to establish Coastal Construction Control Lines [hereinafter CCCLs] on a county basis along the sand beaches of the state.[68] After an engineering study, topographic study and public hearing, CCCLs are established which define "the portion of the beach-dune system subject to severe fluctuations based on a 100 year storm surge, storm waves or other predictable weather conditions."[69] A CCCL is set after consideration of "ground elevations in relation to historical storm and hurricane tides, predicted maximum wave uprush, beach and offshore ground contours, the vegetation line, erosion trends, the dune or bluff line, if any exists and existing upland development. . . ."[70]

The legislature grants counties the authority to establish coastal construction zoning and building codes and for local administration of the CCCL, however the Department of Natural Resources may revoke the authority if the county administers the program inadequately.[71] The Department may allow construction seaward of the CCCL only upon an application from the property owner and consideration of numerous factors, including shoreline stability, design structure of the proposed building, and impacts of the location of the structure on the beach-dune system.[72] It appears the major thrust of the CCCL is to define the area which requires special structural design consideration to protect the beach-dune system rather than to define a seaward limit for upland structures.[73]

4) In addition to the CCCL, there are restrictions on shoreline development based solely on the local rate of shoreline erosion. After October 1, 1985, the Department of Natural Resources, or the enabled county agency, shall not issue any permit for a structure which, based

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[66] *Id.* at § 161.052(1)-(2).
[67] *Id.* at § 161.053(11).
[68] *Id.* at § 161.053(1).
[69] *Id.* at § 161.053(1)-(2).
[70] *Id.* at § 161.053(2).
[71] *Id.* at § 161.053(4).
[72] *Id.* at § 161.053(5).
[73] *Id.* at § 161.053(1). *See also* Town of Longboat Key v. Mezrah, 467 So. 2d 488, 490 (Fla. Dist. Ct. App. 1985).

on the department's projection for erosion in the area, will be seaward of the seasonal high-water line within thirty years after the date of application for such permit.[74]

In summary, the Florida Beach and Shore Preservation Act is one of the most comprehensive shoreline regulatory schemes. The Act contains: (1) an "erosion control line" to address property issues after sand replenishment; (2) an interim fixed setback of fifty feet; (3) a floating zone based on the predicted effects of the 100 year storm surge on the beach-dune system and; (4) one floating setback based on the local rate of erosion.

As coastal states with fixed setbacks encounter increased erosion along the shoreline, the trend may be to extend fixed setbacks or implement floating setback strategies similar to those in New York, South Carolina, or Florida. The advantage of a floating setback is that it is stringent enough to protect the beach-dune system and inhabitants on unstable coastlines, while the restrictions may be relaxed where the shoreline is relatively stable.

The validity of the Florida Beach and Shore Preservation Act has been challenged by coastal landholders. In *Town of Indialantic v. McNulty*, the property owner McNulty applied for a permit to build a single family residence on two of the four lots he previously purchased.[75] Pursuant to the Beach and Shore Preservation Act, the town of Indialantic passed a zoning ordinance which required a setback of fifty feet from the mean high water line or twenty-five feet from the bluff line, which ever is greater. Because McNulty had to set back the building twenty-five feet from the street and twenty-five feet from the bluff line, there was no possible way to construct a residence on the beachfront lots.[76] McNulty alleged that the ordinance was invalid on its face and as applied to his property. With regard to the facial

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[74] FLA. STAT. ANN. § 161.053(6)(b) (West 1990). Exceptions are allowed for single family dwellings under the following conditions: the parcel was platted or subdivided before the effective date of this section; the landowner does not own an adjacent parcel immediately landward of the parcel for which the dwelling is proposed; the dwelling is located landward of the frontal dune; and the dwelling is as far landward as is practicable without being located seaward of or on the frontal dune. *Id.* at § 161.053(6)(c).

[75] 400 So. 2d 1227 (Fla. Dist. Ct. App. 1981).

[76] The width of McNulty's property from the street to the high water line was 122 feet. The bluff line was located 20 feet from the street. *Id.* at 1229.

challenge, the District Court of Appeals of Florida held that the ordinance was not arbitrary or discriminatory since it applied to all properties fronting the ocean.[77] In addition, the court held that the ordinance was not more severe or strict than necessary to achieve the valid police power purpose of protecting the environment.[78] With regard to the challenge as applied, the court balanced the harm to the property owner versus the harm intended to be prevented to the public. The court held that the harm to be prevented was substantial, which raised the burden on the landowner to prove his intended use will not cause the harm intended to be prevented by the ordinance.[79] Because McNulty failed to meet that burden, the Florida Court of Appeals ruled there was not a taking of his property without compensation.

After the Florida court decision, McNulty reapplied in 1981 for a variance to the setback ordinance in order to build a two-story twelve unit condominium on his property.[80] With the proposed complex, the estimated value of McNulty's property was raised from $80,000 to $600,000. The local Board of Adjustment denied the variance and the town council upheld the denial. McNulty then brought suit in the United States district court alleging his property had been taken without due process or just compensation in violation of the fifth and fourteenth amendment. In a decision announced in December of 1989, the district court analyzed the 1987 trio of land-use cases by the United States Supreme Court in their consideration of the takings issue as applied to McNulty's property. Further reference to the district court's analysis in *McNulty* is included in Section III of this article.

Before leaving the discussion on various setback strategies it is important to distinguish shoreline boundaries for the purpose of land-use regulation from shoreline boundaries which separate public from private property. The seaward boundaries for the regulated zone in Hawaii, New York and South Carolina are found at or along the upper portion of the dry sand beach. In Hawaii's CZM Act, the shoreline setback and SMA boundaries are measured from the shoreline, which is defined as along the upper reaches of the wash of the waves, and usually evidenced by a vegetation line or debris line.[81] The seaward boundary of New York's erosion hazard area is at the bluff edge or

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[77] *Id.* at 1230.

[78] *Id.* at 1232.

[79] *Id.* at 1233.

[80] McNulty v. Town of Indialantic, 727 F. Supp. 604, 607 (M.D. Fla. 1989).

[81] *See supra* note 23 and accompanying text.

most landward point of active erosion.[82] In South Carolina's Beachfront Management Act, the seaward boundary of the regulated zone is the crest of an ideal primary dune.[83] In contrast to the above statutes, the seaward land-use boundaries in Florida's Beach and Shore Preservation Act are all related to the mean high water line, which is controlled by tidal action.[84] Vegetation lines, debris lines, dune lines and the bluff edge are usually located further inland than a tide line such as the mean high water line. This is of significance in that a 40 foot setback measured from the vegetation line would be further inland than a similar setback measured from the high water line.

With regard to property boundaries, many coastal states have the seaward limit of privately owned land at the high water line. For example, in the Florida Coastal Mapping Act of 1974, the legislature declared the boundary between state sovereignty land and uplands subject to private ownership as the mean high-water line.[85] Similarly, in New Jersey, private title extends to the high water line.[86] In other coastal states, such as Massachusetts, private titles may extend all the way to the low water line.[87] Thus, in many coastal states, it is possible for large stretches of the dry sand beach to be privately owned.

In Hawaii, the seaward limit of private property rights is complicated by the use of different boundary descriptors in land grants. Further complication arises from different interpretations of the same boundary descriptor. The term most commonly used in land conveyances, either as an original descriptor, as a translation of an original Hawaiian-language descriptor, or as an interpretation of an original descriptor is

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[82] *See supra* note 48 and accompanying text.

[83] *See supra* note 53 and accompanying text.

[84] *See supra* notes 66, 74 and accompanying text. The high water line is "the intersection of the tidal plane of mean high water with the shore." FLA. STAT. ANN. § 177.27(16) (West 1987). Mean high water is the average height of the high waters over a 19 year period. *Id.* at § 177.27(15). The "seasonal high water line" is defined as the "intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water." FLA. STAT. ANN. § 161.053(6)(a) (West 1990).

[85] FLA. STAT. ANN. § 177.26 (West 1987).

[86] Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265 (1955). The high water mark in New Jersey is synonymous with the high water line. The New Jersey court recognized that tide-flowed land lying between the mean high and low water marks is owned by the State in fee simple. The seaward limit of private title extends only to the mean high water line. *Id.* at 367-68, 117 A.2d at 267-68.

[87] Finnell, *supra* note 16, at 640.

the "high water mark."[88] Although interpretations in the past have varied, the high water mark in Hawaii has generally been defined as the upper reaches of the wash of the waves, as evidenced by the vegetation line and debris line.[89] Since the debris line and vegetation line are at or near the upper portion of the dry sand beach, most Hawaiian beaches are not subject to property rights of private parties.

On first impression, the location of a property boundary along the shore may be of significance in the takings analysis. For example, a shoreline owner in New Jersey, who owns title to the high water line, apparently has lost more by a stringent regulation than a landowner in Hawaii, who owns title to the vegetation line or debris line. This distinction, however, loses significance with regard to shoreline setbacks. Setback regulations control or prohibit development along the shore. Even in states where the beach is privately held, development rarely occurs on the dry sand beach.[90] Therefore, a forty foot setback from the vegetation line in Hawaii would be no more burdensome than a similar setback in New Jersey since development on the New Jersey Beach would be restricted even without a setback regulation.[91]

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[88] D. Cox, Shoreline Property Boundaries In Hawaii, Hawaii Coastal Zone Management Program Technical Supplement 21, 111, (1980).

[89] *See, e.g., In re* Sanborn, 57 Haw. 585, 594, 562 P.2d 771, 777 (1977). (The Hawaii Supreme Court reaffirmed that in Hawaii, the true measure of the high water mark is the upper reaches of the wash of the waves. (usually evidenced by a vegetation or debris line)); and County of Hawaii v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61-62 (1973) (holding that after erosion, the Sotomura's seaward title boundary described as along the high water mark runs along the upper annual reaches of the waves, usually evidenced by the vegetation line). However, in Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Haw. 1978), the federal district court for Hawaii held that the fixing of the location of the high water mark as the seaweed or limu line, with the approval of the state surveyor, and subsequent registration in the Land Court was res judicata. The federal district court's holding on the interpretation of the high water mark in *Sotomura* may be applicable only to land previously registered in Land Court. For example, four years later, the Supreme Court of Hawaii recognized that the upper boundary of the public beach is "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or the line of debris." Littleton v. State, 66 Haw. 55, 65, 656 P.2d 1336, 1343 (1982)(citation omitted). *See also* Cox, *supra* note 88, at 111-14.

[90] There are several reasons why development is not normally found on the dry sand beach. Private title to the beach may be burdened by preexisting public rights. *See, e.g., infra* note 128 and accompanying text. The unstable nature of the beach would provide a poor foundation to support development. In addition, a littoral owner who constructs on the beach loses the main value of living near the shore - the use of the beach for recreation.

[91] *See, e.g.*, Matthews v. Bay Head Improvements Ass'n, 95 N.J. 306, 471 A.2d

III. SHORELINE SETBACK REGULATIONS AFTER *FIRST ENGLISH*, *NOLLAN* AND *KEYSTONE*

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[92] the Supreme Court considered the remedy to the landowner when a court finds there has been an unconstitutional regulatory taking. In that case, the First English Evangelical Lutheran Church operated a campground, known as "Lutherglen," near the banks of the Middle Fork of Mill Creek in the Angeles National Forest. In February, 1978, a severe rainstorm caused the Mill Creek area to flood, resulting in the drowning of ten people, the destruction of bridges and buildings and the loss of millions in property damage. In response to the flood, the County of Los Angeles adopted Interim Ordinance No. 11,855, which prohibited reconstruction of the buildings at Lutherglen. The ordinance provided, "A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon. . . ."[93] The church sought damages alleging that the Interim Ordinance denied the appellant all uses of Lutherglen.

Both the trial court and the California Court of Appeals dismissed the complaint based on the California Supreme Court's decision in *Agins v. Tiburon*.[94] Under *Agins*, compensation is not required until the challenged regulation is declared excessive in an action for declaratory relief or a writ of mandamus and the government decides to continue the regulation or ordinance in effect.[95]

In *First English*, Chief Justice Rehnquist writing for the majority, reversed the California courts, stating that "'temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[96] The majority held that,

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355, *cert. denied*, 469 U.S. 821 (1984) (under the public trust doctrine, where use of the dry sand is essential to the enjoyment of the ocean, the public has use of the dry sand subject to the accommodation of the owner).

[92] 482 U.S. 304 (1987).

[93] *Id.* at 307.

[94] 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

[95] *Agins*, 157 Cal. Rptr. at 375, 598 P.2d at 28. *See also*, *First English*, 482 U.S. at 308-09.

[96] *First English*, 482 U.S. at 318.

assuming the ordinance was unconstitutional, the invalidation of the ordinance without payment of fair value for use of the property would be a constitutionally infirm remedy.[97]

Both the majority and minority in *First English* recognized the chilling effect the award of damages for a temporary regulatory taking may have on land-use planners. Rehnquist wrote, "our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences . . . flow from any decision upholding a claim of constitutional right. . . ."[98] Justice Stevens, writing for the minority, stated, "[c]autious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area."[99]

It is important to emphasize that the Supreme Court decision in *First English* was restricted to the remedies issue. Whether Interim Ordinance No. 11,855 actually denied the appellant of all uses, and if it did, whether it passed muster as a public safety regulation, were questions left open for decision on remand.[100]

While the Supreme Court's ruling in *First English* may be considered a landmark decision, the case did little to clarify or modify the takings analysis. In the past, coastal planners showed little concern for over-regulation, since the only remedy to the landowner would have been invalidation of the regulation. If a regulation was struck down, government officials could simply repeal the regulation and impose another one. After *First English*, however, the burden on public officials will be to formulate a constitutionally valid regulation on the first pass. Planners can continue to protect public rights but they must be careful to understand when a regulation has gone too far.[101]

The threshold question of whether a regulation has gone too far to constitute a taking still remains one of the most difficult questions in property law.[102] The Supreme Court has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the

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[97] *Id.* at 319.

[98] *Id.* at 321.

[99] *Id.* at 340-41.

[100] *Id.* at 313.

[101] The Houston Post, June 10, 1987, at 12A, col. 4.

[102] Finnell, *supra* note 16, at 654.

Government, rather than remain disproportionately concentrated on a few persons.[103]

There are several factors that the Supreme Court usually considers in the analysis of the takings issue.[104] Some important factors with regard to coastal regulations include:

(A) What is the "character of the government action." In particular, is there a physical occupation of the property which may lead to a per se compensable taking?[105]

(B) Does the regulation "substantially advance legitimate state interests?"[106]

(C) What is the economic impact of the regulation? Economic impact includes the interference with "distinct investment backed expectations,"[107] the extent of diminution of value,[108] whether the regulation

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[103] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[104] Professor Finnell at the University of Houston comments on the factors that the Supreme Court considers in their multi-factored balancing. *Supra* note 16, at 654-55. A list of factors is also found in *Penn Central*, 438 U.S. at 124-25.

[105] In *Penn Central*, Justice Brennan wrote, "A taking may more readily be found when the interference with property can be characterized as a physical invasion by Government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted). Leading authority on this factor is also found in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). The Supreme Court cited Professor Michelman of Harvard University, "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use or 'permanently' occupy, space or a thing which therefore was understood to be under private ownership." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) (footnotes omitted).

[106] The *Penn Central* majority noted that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127. This factor was further developed in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); and *Nollan*, 483 U.S. at 834.

[107] *See, e.g.*, *Penn Central*, 438 U.S. at 124. The Court has rarely found that government action interferes with distinct investment backed expectations due to the dictum in *Penn Central* and the reluctance to find expectations based upon regulatory regularity. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1, 39 (1989). With regard to investment backed expectations, in no case has the Court defined this term or given guidance to lower courts as to its meaning. Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 758 (1988).

[108] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). While diminution in value is an important factor in the takings analysis, it is not conclusive.

denies an owner all "economically viable use" of the land,[109] and the extent the regulation achieves an average reciprocity of benefit and burden.[110]

(D) What is the nature of the government regulation? Does the regulation prevent a public harm (similar to nuisance prevention and safety protection) or confer a public benefit?[111]

(E) Is the regulation just and fair?[112]

(F) What is impact of the regulated activity on public trust lands?[113]

The above factors are now considered with regard to shoreline setback regulations. Constitutional challenges to a zoning regulation can be facial or as applied. Without a specific fact pattern, an as applied analysis would be difficult, especially with regard to the economic impact of the regulation. This problem is alleviated by a reliance on case law from the different coastal states as well as assumptions which are included in the analysis below. Furthermore, several factors in the takings analysis related to public safety, nuisance prevention, and protection of public trust land mitigate the need for an exact determination of the economic impact of a challenged regulation.[114]

A. Character of The Government Action

In analyzing the "character of the government action," the Court has traditionally focused on the presence or absence of a physical

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The Supreme Court has upheld zoning restrictions which have diminished property values by up to 87.5% without effecting a taking. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[109] *See, e.g., Penn Central*, 438 U.S. at 138 n.36. Denial of economically viable use of the land is a key factor in Agins v. City of Tiburon, 447 U.S. at 260. The Supreme Court has failed to provide guidance as to when a land-use regulation deprives a property owner of all economically viable use of his land. Berger, *supra* note 107, at 758.

[110] *See, e.g., Pennsylvania Coal Co.*, 260 U.S. at 415; and *Keystone*, 480 U.S. at 491.

[111] *See, e.g., Keystone*, 480 U.S. at 488. *See also*, Finnell, *supra* note 16, at 655 n.216.

[112] *See, e.g., Penn Central*, 438 U.S. at 123.

[113] In Illinois Central R. Co. v. Illinois, 146 U.S. 387 (1892), the Supreme Court held revocation of a conveyance of public trust land, in order to restore the public interest was available without the necessity of operating under the eminent domain power or takings analysis. Development on lands subject to the public trust doctrine may be restricted without exposure to the restrictive "takings" analysis. *See, e.g.* Deleo, *Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U.L. REV. 571, 597 (1989).

[114] *See, e.g., infra* notes 185, 210, 218, 272 and accompanying text.

intrusion on the landowner's property.[115] This is an important consideration since a regulation which involves a permanent physical occupation of property may result in a per se compensable taking as the Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*[116] The New York statute at issue in *Loretto* required landlords to permit the installation of television cables on their buildings so that tenants could receive cable service. The Supreme Court held that the requirement to install cables on the landlords building was a taking. The *Loretto* court stated that "when the character of the government action is a permanent physical occupation of property our cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner."[117] Thus, once there is a permanent physical invasion of the property, a taking is often found without regard to any of the other factors listed above.[118]

Shoreline setback regulations do not appear to involve a physical occupation or appropriation of the landowner's property. The regulations do not involve the installation of equipment such as cables onto the property of another such as in *Loretto*. There is no required dedication of a public accessway or easement such as the California Coastal Commission demanded in *Nollan*.[119] Nor is there an invasion of airspace which interferes with property rights below, such as occurred during the military overflights at issue in *United States v. Causby*.[120]

It could be argued that shoreline setback regulations interfere so drastically with the landowner's fundamental right to possess property and exclude others that there is a per se physical taking. However, setback regulations do not force the occupation of the landowner's property by persons not already in residence as the Single Room Occupancy (SRO) ordinance in *Seawall Associates v. City of New York*[121]

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[115] *See, e.g.*, Wilkins, *supra* note 107, at 45.

[116] 458 U.S. 419 (1982).

[117] *Id.* at 434.

[118] *Id.* at 426. *See also*, Leavitt, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis-A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 606 (1988).

[119] In *Nollan*, the Supreme Court held that the condition that the Nollans grant a lateral accessway along the beach as a condition to build a new house constituted a permanent physical invasion. 483 U.S. at 832.

[120] 328 U.S. 256 (1946).

[121] 544 N.Y.S.2d 542, 74 N.Y.2d 92, 542 N.E.2d 1059 (Ct. App. 1989). In *Seawall*, the (SRO) ordinance, required landowners to lease every unit at controlled rents. The

required. Setback regulations neither increase the public use of the landowner's property, nor take away the property owners right to evict others as in *Fresh Pond Shopping Center, Inc. v. Callahan*.[122] The coastal regulations in question simply prohibit certain uses within a specified distance from the shoreline.

The District Court of Appeal of Florida addressed this very issue when they considered whether Coastal Construction Control Lines (CCCLs) involved a physical occupation of the coastal landowner's property. In *Saint Joe Paper v. Department of Natural Resources*,[123] the property owner claimed the CCCL established on his land by the Department of Natural Resources improperly imposed on his property an easement. In an action to "quiet title," the District Court of Appeal of Florida held that:

> The CCCL does not constitute a cloud on St. Joe's legal title or possessory interest, and does not entitle the Department, or the State of Florida, or its citizens to use St. Joe's property. It does constitute a limitation on St. Joe's use of the property, in the nature of a zoning ordinance.[124]

In the *McNulty* case, the United States district court considered McNulty's claim that the setbacks from the street and the bluff line were an attempt by the town to appropriate property as an extension of an existing public beach. The court found no merit in the claim and held there was no physical invasion of the property.[125]

While coastal setback regulations do not expressly permit public usage of a landowner's property, there may be an indirect effect which could result in more public intrusions on the dry sand beach, which in many states may be privately held.[126] For example, a reduction in coastal construction may increase visual access to the shoreline, thereby increasing public demand to reach the ocean. Or reduced coastal construction may decrease the need for beach narrowing erosion control

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N.Y. court recognized that "the right to exclude, thus taken from the owner, is one of the most essential sticks in the bundle of rights that are commonly characterized as property" *Id.* at 547, 74 N.Y.2d at 104, 542 N.E.2d at 1064 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176, 180 (1979)).

[122] *See, e.g.*, Rehnquist dissent in *Fresh Pond*, 464 U.S. 875 (ban on evicting tenants is analogous to Loretto physical invasion).

[123] 536 So. 2d 1119 (Fla. Dist. Ct. App. 1988).

[124] *Id.* at 1124.

[125] 727 F. Supp. at 614.

[126] *See supra* notes 85-89 and accompanying text.

devices, such as seawalls. With a wider beach, the public demand to use the beach would increase. However, even in these hypothetical situations, the setback controls do not grant public use of the dry sand beach in the nature of an easement. Although public demand to use the shore may increase, the littoral owner's right to evict unwanted intruders is not affected by the setback controls.

Another argument against a physical invasion for the indirect intrusions on privately held beaches is that private title to the beach may already be burdened by preexisting public rights.[127] Between the vegetation line and high water line, the public may already have the right to use the beach by the doctrines of implied dedication, prescriptive easement, custom and the public trust doctrine.[128] If the public already has a preexisting right to use the beach, then the courts would be even more hesitant to find a physical invasion from the indirect effects of a coastal setback regulation. Since shoreline setback ordinances do not involve a physical occupation or appropriation of property, the regulations do not appear to be a per se compensable taking under the *Loretto* threshold test.

B. Relationship Between the Regulation and Legitimate State Interests

The Supreme Court in *Nollan* held that the required dedication of a lateral accessway along the private beach was a permanent physical occupation of the property.[129] However, the Court held there was no per se taking because the granting of the easement was not an outright

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[127] *See supra* note 16, at 630, for Professor Finnell's exposition on common law doctrines to perfect public access rights.

[128] *Id.* at 633. *E.g.*, in the Texas Open Beach Act, the public has an unrestricted right of ingress and egress in those beaches where the public has acquired an interest in the dry sand beach by prescription, implied dedication or custom. TEX. NAT. RES. CODE ANN. § 61.011-.025 (Vernon 1978 & Supp. 1990). *See also* Moody v. White, 593 S.W. 2d 372 (Tex. Civ. App. 1979) (if the elements of adverse possession are met the public may acquire beaches by prescription); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964) (*writ ref'd n.r.e*); Gion v. City of Santa Cruz and Dietz v. King, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (cases consolidated) (holding that the public perfected easements by implied dedication); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (the court relied on custom in upholding the public's use of the dry sand beach). Public accessway easements acquired by either prescriptive easement, custom, implied dedication or otherwise, should be treated as held by the state in trust for the public. Finnell, *supra* note 16, at 650.

[129] 483 U.S. at 832.

requirement, but was to be conveyed as a condition for a land-use permit.[130] The Court reasoned that a permit condition that serves the same legitimate police power purpose as a denial of the permit should not be held to be a taking if the refusal to issue the permit is not a taking.[131]

The Court's analysis next considered the extent to which the permit condition imposed by the California Coastal Commission "substantially advances legitimate state interests."[132] The California Coastal Commission claimed that the larger residential structure proposed by the Nollans would block "visual access" to the shore, thus creating a "psychological barrier" to people who wish to use the beach.[133] The Court held that the relationship between the state interest and the condition of the permit was non-existent. The Court stated:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.[134]

Having failed the nexus test, the Court held that the Coastal Commission's demand for public access was a taking that required just compensation.

The Supreme Court's close scrutiny of whether the permit condition substantially advances legitimate state interests is viewed as a departure from the normal deferential level of scrutiny.[135] The heightened level

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[130] *Id.* at 832-34.

[131] *Id.* at 834-36.

[132] *Id.* at 838. "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose." *Id.* at 834 (citing *Penn Central*, 438 U.S. at 127).

[133] *Nollan*, 483 U.S. at 838.

[134] *Id.* at 838.

[135] Finnell, *supra* note 16, at 658 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (The standard of review for a substantive due process facial challenge is the "fairly debatable" test). For equal protection challenges, the usual standard of review is the "rational basis" test. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.)); *See also*, Michelman, *Takings* 1987, 88 COLUM. L. REV. 1600, 1606 (1988) (noting of the "rational basis" test that the Supreme Court has applied for the last half-century to land-use ordinances).

of scrutiny in *Nollan* appears to be triggered by the threat of a permanent physical invasion of the subject property.[136]

As discussed in Section III-A, shoreline setback regulations do not involve a physical invasion or appropriation of the coastal landowners property.[137] Therefore, it is unlikely that such regulations will trigger heightened judicial scrutiny. With regard to coastal setback ordinances, the *Nollan* case should have a minimal impact on the takings analysis. Assuming that heightened scrutiny is required, would shoreline setback regulations substantially advance a legitimate state interest? The preamble of most coastal zoning regulations outline the state policy and particular interest to be achieved by the ordinance. The following objectives have been cited in various legislation relating to the coast:

(1) Safety - many states have emphasized the importance of safety in regulating the coast. For example, South Carolina's Beachfront Management Act states that the beach-dune system "protects life and property by serving as a storm barrier which dissipates wave energy. . . ."[138] The New York legislature stated, "coastal erosion causes extensive damage to publicly and privately owned property and to natural resources as well as endangering human lives."[139] In Hawaii's CZM Act, one objective is to reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, and subsidence.[140]

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[136] Professor Finnell wrote, "*Nollan* is best read as standing for the proposition that all use regulations purporting to license permanent physical occupations by the public will be subjected to higher judicial scrutiny." *See supra* note 16, at 658. Professor Michelman wrote "a litigant can challenge state regulatory action 'as' a taking, and thereby obtain intensified judicial scrutiny of the regulation's instrumental merit or urgency, if and only if the challenged regulation has the effect of imposing a permanent physical occupation on an unwilling owner." Michelman, *supra* note 135, at 1613-14. However, some commentators suggest that heightened scrutiny may be required for all regulatory takings cases. *See, e.g.*, Krueger, *Keystone Bituminous Coal Association v. DeBenedictus: Toward Redefining Takings Law*, 64 N.Y.U.L. REV. 877, 905 (1989); Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 755 (1988); *The Supreme Court, 1986 Term-Leading Cases*, 101 HARV. L. REV. 119, 247 (1987); and *Doran, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles and Nollan v. California Coastal Commission: The Big Chill*, 52 ALB. L. REV. 325, 344 (1987).

[137] *See supra* notes 119-25 and accompanying text.

[138] S.C. CODE ANN. § 48-39-250(1)(a) (Law. Co-op. 1990); *See also*, FLA. STAT. ANN. § 161.053(1) (West 1990); and GA. CODE ANN. § 12-5-231 (1988).

[139] N.Y. ENVTL. CONSERV. LAW § 34-0101 (McKinney 1984).

[140] HAW. REV. STAT. § 205A-2(b)(6) (1985). In the Shoreline Setback Rules and Regulations of the City and County of Honolulu, it is noted that, "the Hawaiian

(2) Preserving Public Access - several states have observed that property owners on eroding shorelines construct hardened barriers such as seawalls, revetments and groins which can destroy the beach and public access. One purpose of the Florida Beach and Shore Preservation Act is to prevent imprudent construction which could interfere with public beach access.[141] An objective of the Hawaii CZM Act is to "provide coastal recreational opportunities accessible to the public."[142]

(3) Environmental Protection - the South Carolina Act has, as one of its goals, the protection of the beach-dune system, which provides a natural habitat for species of plants and animals, several of which are threatened or endangered.[143] Similarly, Hawaii's CZM Act strives to "protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems."[144]

(4) Economic Preservation - one objective of the South Carolina Act is to preserve beaches which form the basis for the tourism industry. "[T]ourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues."[145] The New York legislature stated that coastal erosion causes significant economic loss, "either directly through property damage, or indirectly through loss of economic return. Large public expenditures may also be necessitated for the removal of debris and damaged structures and replacement of essential public facilities and services."[146]

The four objectives above are legitimate state interests, but do shoreline zoning regulations substantially advance these interests? Given the likelihood of accelerated shoreline erosion from a sea level rise,[147]

Islands are subject to tsunamis and high waves which endanger residential dwellings and other structures which are built too close to the shoreline." HONOLULU, HAW., SHORELINE SETBACK RULES AND REGULATIONS OF THE CITY AND COUNTY OF HONOLULU, HAWAII, Rule 2 (1983).

[141] FLA. STAT. ANN. § 161.053(1) (West 1990).

[142] HAW. REV. STAT. § 205A-2(b)(1) (1985). A goal of the Shoreline Setback Rules and Regulations of the City and County of Honolulu, is to prevent, "[c]oncrete masses along the shore [which] are contrary to the policy for the preservation of the natural shore and open space." HONOLULU, HAW., SHORELINE SETBACK RULES AND REGULATIONS OF THE CITY AND COUNTY OF HONOLULU, HAWAII, Rule 2 (1983).

[143] S.C. CODE ANN. § 48-39-250(1)(c) (Law. Co-op. 1990).

[144] HAW. REV. STAT. § 205A-2(b)(4) (1985).

[145] S.C. CODE ANN. § 48-39-250(1)(b) (Law. Co-op. 1990).

[146] N.Y. ENVTL. CONSERV. LAW § 34-0101(2) (McKinney 1984).

[147] *See supra* notes 6-7 and accompanying text.

the deleterious effects from hardening of the shoreline,[148] and the prohibitive cost of sand replenishment,[149] it appears that states have few alternatives other than to control development along the shore.

Indeed, the preamble in several setback regulations note that imprudent construction can jeopardize the stability of the beach-dune system and accelerate or exacerbate coastal erosion problems.[150] The South Carolina legislature pronounced:

> Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. The space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.[151]

In general, a shoreline setback is the most effective solution to prevent the destruction of property, the endangerment of life, the loss of public access and the degradation of the coastal environment. For most beaches, an adequate shoreline setback may be the only option that simultaneously prevents all of these coastal problems. Therefore, it would be surprising for the courts to find that such zoning regulations fail the *Nollan* nexus test by not substantially advancing a legitimate state interest.[152]

C. Economic Impact of the Regulation

Depending on the particular coastal setback regulation, and the facts of each case, the economic impact on a landowner's property may

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[148] *See supra* note 9 and accompanying text.

[149] *See supra* note 10 and accompanying text.

[150] FLA. STAT. ANN. § 161.053(1) (West 1990); N.Y. ENVTL. CONSERV. LAW § 34-0101(3) (McKinney 1984). The Setback Regulations for the City and County of Honolulu note the "numerous cases of encroachment of structures upon the shore. Many of these structures have disturbed the natural processes and caused erosion of the shore." HONOLULU, HAW., SHORELINE SETBACK RULES AND REGULATIONS OF THE CITY AND COUNTY OF HONOLULU HAWAII, Rule 2 (1983).

[151] S.C. CODE ANN. § 48-39-250(6) (Law. Co-op. 1990).

[152] In *McNulty*, the town of Indialantic premised the police power to prohibit coastal construction on the goal of preserving the dune for the safety and general welfare of the public. The United States district court, held that the 25 foot setback from the bluff line, and the denial of a variance to construct closer to the shore were actions substantially related to the advancement of a legitimate state interest. 727 F. Supp. 604, 607 (M.D. Fla. 1989).

range from slight to severely intrusive. A fixed setback of twenty to forty foot from the vegetation line, such as in Hawaii, may be no more intrusive than a setback for a sideyard or street. For example, in *McNulty*, the property owner was prevented from building on his lots because of the required twenty-five foot setback from the street, and the twenty-five foot setback from the bluff line.[153] Since McNulty could not build any structure on his lots, it appears that the diminution of his property value was great. In this situation, however, the shoreline setback was no greater in distance than the street setback.[154] Although street setbacks can severely interfere with the economic utility of property, the Supreme Court long ago upheld the validity of building setback ordinances from a property line.[155]

It is difficult to distinguish a fixed shoreline setback from the more traditional setbacks for a street or other property boundary. One distinction is that the boundary along the shore is constantly in motion and, along most sections of the U.S. coast, in a long term state of erosion. The unstable nature of the coast should allow planners more flexibility in designing setbacks along the shoreline than for establishing setbacks from a street or building.[156]

Due to the unique character of the coast, courts should be reluctant to recognize "distinct investment backed expectations" to develop unrestricted along the shore. A property owner's expectations are required to be "reasonable."[157] However, the permanence of position

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[153] Town of Indialantic v. McNulty, 400 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 1981).

[154] In analyzing the economic impact of the challenged ordinances, the district court in *McNulty* did not compare the burden on the landowner from the street setback versus the shoreline setback. Instead the analysis concentrated on whether the homeowner was denied economically viable use of his property and the interference with his reasonable investment backed expectations. 727 F. Supp. 604, 608-12 (M.D. Fla. 1989).

[155] *See, e.g.*, Gorieb v. Fox, 274 U.S. 603 (1927).

[156] Legislation and judicial decisions have recognized that the unique nature of coastal land requires that it be treated differently from inland property. Carmichael, Sunbathers Versus Property Owners: Public Access to North Carolina Beaches, 64 N.C.L. Rev. 159, 161 (1985); *See also*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) ("The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands."); Adams v. Department of Natural & Economic Resources, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978) (the "irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment.").

[157] Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre

of the shoreline is a false expectation of the shore of a barrier island.[158] Understandably, the United States district court in *McNulty* found no "reasonable investment backed expectations" of the property owner stating:

> The fact of regulation at the time of purchase, however, put McNulty on notice that the property was subject to restrictions on development. By purchasing property with regulatory impediments and waiting to develop it, he took the risk that regulation would become more harsh in the face of increasing concern over dune ecology.[159]

The district court thus served notice to coastal landowners in Florida that they should not base investment expectations on absolutely static shoreline regulations. Applying the rationale in *McNulty*, if a state, on the basis of new evidence, tries to extend a fixed setback or implement a floating setback strategy, the economic impact of the regulation should be based on the substance of the law, and not the hardship to the landowner due to an unreasonable reliance on never changing shoreline controls.[160]

In addition to reasonable investment backed expectations, two factors cited by the United States Supreme Court in their analysis of the economic impact of a zoning regulation are the extent of diminution in value, and whether the regulation deprives the landowner of all "economically viable use" of the land. With regard to diminution in value, the Court has held that even severe loss in value does not necessarily constitute a taking.[161] The required percentage loss in property value before a taking is found is usually determined after weighing the state interest advanced by the regulation. For example, regulations which prevent a public nuisance may be upheld even if the economic consequences to the property owner are severe.[162] The ques-

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DAME L. REV. 1, 40 (1989) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986), "The final inquiry suggested for determining whether the Act constitutes a taking under the Fifth Amendment is whether it has interfered with reasonable investment backed expectations.").

[158] Pendergrast, *The Georgia Shore Assistance Act*, 17 NAT. RESOURCES LAW 397, 398 (1984) (citing W. KAUFMAN & O. PILKEY, THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE 13 (1979)). *See also, supra* notes 2-5 and accompanying text.

[159] *McNulty*, 727 F. Supp. at 612 (M.D. Fla. 1989).

[160] Recent amendments to the Hawaii CZM Act specify that a county zoning change by itself should not be considered a factor to determine hardship to the landowner. HAW. REV. STAT. § 205A-46(b) (Supp. 1989).

[161] *See supra* note 108 and accompanying text.

[162] *See infra* note 185 and accompanying text.

tion whether shoreline setback restrictions fall into the nuisance category of regulation is discussed in the next section of this article.

Related to the diminution in value factor, but nevertheless analytically separable, is whether the regulation deprives an owner of all economically viable use of the land. The Supreme Court has failed to clarify this term or provide guidance as to its application.[163] The district court in *McNulty*, stated that the phrase "should not be read to assure an owner will be able to use property to earn a profit or to produce income. Rather, it assures an owner will be able to make some use of property that economically can be executed."[164] Under this definition, the district court found that the fixed setback ordinance did not deprive the landowner of all economically viable use since the landowner could still construct "walkovers, boardwalks, sand fences, gazebos, a viewing deck, snackbar, stairways and other structures considered expendable under wind and wave forces."[165] Although no residence or condominium could be built on McNulty's lot, the existence of residual uses satisfied the district court that the setback ordinance did not prevent all economically viable use of the property.[166].

The United States district court in *McNulty* scrutinized only the fixed setback requirement of 25 feet from the bluff line. The floating setback requirement in the Florida Beach and Shore Preservation Act was never challenged since it was enacted after McNulty's application for a variance to construct a condominium was denied.[167] Potentially more intrusive than a fixed shoreline setback would be the floating setbacks based on the local rate of erosion. A local rate of erosion of ten feet per year could result in construction setbacks from the shoreline of 300 feet in Florida, and 400 feet in New York or South Carolina. The total economic impact of such large setbacks vary with the hardship provisions in the shoreline ordinance.

In Florida's Shore and Preservation Act, an exception to the setback may be made for a single family dwelling if the proposed structure is located landward of the frontal dune, the parcel is platted or subdivided before the effective date of the section, and the landowner does not

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[163] Berger, *supra* note 107, at 762. The Court has not decided a case, facial or as applied, on the sole ground that the regulation left a landowner with insufficiently viable economic use of the property. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 411 (1988).

[164] *McNulty*, 727 F. Supp. at 608 (M.D. Fla. 1989).

[165] *Id.* at 608.

[166] *Id.* at 608.

[167] *See supra* notes 74, 80, 227 and accompanying text.

own an adjacent parcel immediately landward of the parcel for which the dwelling is proposed.[168] The effect of this hardship provision is to prevent the total diminution of property value for the landowner who subdivided the property before the effective date of the Act, with the distinct investment backed expectation of constructing a single family residence. If the landowner has two adjacent parcels, the requirement that he build on the most landward parcel does not destroy the economic value of the most seaward parcel. In *Keystone*, the Supreme Court held that the diminution in value analysis does not apply to discrete segments of the owner's property, but to the property taken as a whole.[169]

The hardship provision in Florida's Act makes a shoreline setback less onerous on residential construction, but does not alleviate the economic impact on commercial construction. Commercial developers, however, have the option of building closer to the shore by undertaking a sand replenishment project which reduces the extent of the 30 year erosion setback zone.[170] Thus, at increased cost to the developer, the setback burdens can be alleviated or eliminated. The cost of sand replenishment is analogous to the requirement that the subdeveloper install streets or sidewalks as a normal condition for subdivision approval. The extra cost of sand replenishment is due to the unique location of the subdivision along the coast. Florida should be careful not to tailor the replenishment project with the objective of increasing lateral beach access or they run into the problems encountered in *Nollan*.[171]

In South Carolina's Beachfront Management Act, exceptions to the setback are allowed for habitable structures no larger than 5,000 square feet and located as far landward on the property as practicable.[172] In New York's coastal setback regulation, variances are allowed for private

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[168] FLA. STAT. ANN. § 161.053(6) (West 1990).

[169] The Court stated that the coal which was required to be left in the ground under the Pennsylvania Subsidence Act would not be treated as a separate parcel of property as to which all value had been lost. 480 U.S. 470, 498 (1987). In addition, the support estate was not viewed as a separate parcel of property for takings purposes, since the support estate was always linked either with the mineral or surface estate. *Id.* at 500-01.

[170] FLA. STAT. ANN. § 161.053(5) (West 1990).

[171] Instead the replenishment should be specifically tailored to prevent the endangerment of permitted structures by erosion. Thereby, the permit condition to replenish the beach serves the same police power purpose as a denial of a permit to build closer to the shore. *See supra* note 131 and accompanying text.

[172] S.C. CODE ANN. § 48-39-290(B)(1)(a)(i) (Law. Co-op. 1990).

development if the following criteria are met: no reasonable prudent alternative site is available, all means to mitigate adverse impacts on the natural system are incorporated, the development will be reasonably safe from flood and erosion damage, and the variance is the minimum necessary to overcome the practical difficulty or unnecessary hardship.[173] The South Carolina and New York hardship provisions insure that value in the landowner's property is not totally extinguished.

Any economic impact of shoreline setback regulations may be reduced by an average reciprocity of benefit and burden. In *Keystone*, the Court noted that the hesitance to find a taking when the state merely restrains uses of property that are tantamount to a public nuisance is consistent with the notion of average "reciprocity of advantage."[174] The Supreme Court wrote that "[u]nder our system of government, one of the [s]tate's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we in turn, benefit greatly from the restrictions that are placed on others."[175]

While shoreline setback regulations place a heavy burden on individual property owners, those burdened owners benefit from the restrictions on imprudent construction placed on their neighbors. For example, structures placed landward of the erosion zone do not need erosion control devices for their protection. Therefore, the deleterious effects on adjacent properties when one owner tries to stabilize the shoreline are prevented.[176]

In summary, shoreline setback regulations do place an economic burden on the landowner. However, some of the shorter fixed setbacks are no more intrusive than traditional setbacks from streets or other property boundaries. Larger fixed setbacks interfere in the same way, if not to the same extent, with setback regulations for traditional property boundaries. Given the unique nature of the coastline, government officials should be given greater flexibility in regulating coastal property as compared to inland property.

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[173] N.Y. ENVTL. CONSERV. LAW § 34-0108(4) (McKinney 1984).

[174] 480 U.S. at 491.

[175] *Id.* at 491.

[176] Flank erosion occurs to the sides of seawalls and revetments; and structures such as groins, which trap sand from shoreline currents, deprive the downcurrent side of the groin and worsen the erosion problem. Gilbert, *supra* note 3, at 35. *See also supra* note 9 and accompanying text.

There are several strategies coastal states may employ in their floating and fixed setback regulations which prevent a total diminution in value and allow some economically viable use of the land. These include a small lot exception,[177] other hardship provisions or variances,[178] and the allowance of residual uses in the setback area.[179] Small lot exceptions and hardship provisions are favorable to the property owner since residential development in a setback zone may still be allowed. More economically burdensome is the reliance on residual uses to control erosion problems along the coast. Nevertheless, the United States district court in *McNulty* upheld such a provision.

Since the coastline is inherently unstable, courts should be hesitant to recognize reasonable investment backed expectations to develop in a setback zone when traditional investment expectations are based on a permanent, fixed property boundary. Furthermore, in consideration of a setback strategy, courts should consider the extent the economic impact of a burdened landowner is reduced by the reciprocity of advantage obtained from restrictions placed on adjacent property owners.

D. Public Harm versus Public Benefit

An important consideration in the takings analysis is the purpose or objective of the state regulation. In *Graham v. Estuary Properties Inc.*,[180] the Supreme Court of Florida wrote, "[i]f the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power."[181] In *Keystone*, Justice Stevens, writing for the majority, stated that "[m]any cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."[182]

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[177] *See, e.g.*, *supra* note 27 and accompanying text. The small lot exception in Honolulu's Shoreline Setback regulation is favorable to the landowner, but fails to relate the size of the setback area with the extent of the erosion problem. Therefore, the effectiveness of this provision to control concrete masses along the shore and to safeguard homeowners against tsunami or high surf is questionable.

[178] *See supra* note 168-73 and accompanying text. With the hardship exceptions, the shoreline regulations may be more effective in controlling development on large tracts of land which have not been subdivided as opposed to smaller tracts which have already been platted.

[179] *See supra* note 165 and accompanying text.

[180] 399 So. 2d 1374 (Fla. 1981).

[181] *Id.* at 1381. *See also* Just v. Marinette County, 201 N.W.2d. 761, 767 (1972)

Stevens then quoted Justice Harlan, from *Mugler v. Kansas*,[183] that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." The Supreme Court in *Keystone* thus reaffirmed the long standing nuisance exception to the regulatory takings analysis.[184] Under this exception, the regulation of uses classified as harmful or nuisance like will not be held a taking despite especially onerous consequences they may carry for the regulated owner.[185]

Would a shoreline zoning ordinance fall under the nuisance exception? Federal and state courts are split on this issue. The United States district court in *McNulty* held that the shoreline setback restriction was a nuisance regulation since the setback prevented destruction of the coastal dune which served as a buffer zone from winter storms and hurricanes.[186] Because the setback regulation prevented a harm to the community at large, the ordinance was upheld even though the landowner could not build a single family residence or condominium on the property. However, in *Annicelli v. Town of South Kingstown*,[187] the landowner Annicelli was prevented from constructing a single-family residence on a lot when the town of South Kingstown designated segments of the shoreline High Flood Danger zones. The Supreme Court of Rhode Island stated that the ordinance did not prevent a harmful use such as the discharge of "waste and pollutants into a precariously balanced environment."[188] Although one objective of the

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(citing Professor Freund in his work on the Police Power § 511, at 546-47, "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.").

[182] 480 U.S. at 488.

[183] 123 U.S. 623, 668-69 (1887).

[184] The Supreme Court was unanimous on the existence of the nuisance exception. Justice Rehnquist for the dissent wrote, "The nature of these purposes may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner form using his property to injure others without having to compensate the value of the forbidden use." *Keystone*, 480 U.S. at 511.

[185] Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1602 (1988). The rationale behind the exception is that no landowner has the right to use his property so as to create a nuisance, and the state has not taken anything when it enjoins the nuisance-like activity. *Keystone*, 480 U.S. at 491 n.20.

[186] *McNulty*, 727 F. Supp. at 610 (M.D. Fla. 1989).

[187] 463 A.2d 133, 135 (R.I. 1983).

[188] *Id.* at 141.

ordinance was to "Secure safety from . . . flood . . . and other dangers from natural . . . disaster," the Rhode Island court held that the main purpose of the ordinance was to benefit the public welfare by protecting vital natural resources and preserving them for prosperity.[189] Because the regulation was found to secure a public benefit rather than prevent a nuisance, the court held that there was a taking which required the payment of compensation.[190]

In *First English*, Justice Stevens, writing for the dissent, gave a few examples of regulations falling under the nuisance exception. He stated that:

> government may condemn unsafe structures, may close unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas, for example, land on which radioactive materials have been discharged, land in the path of a lava flow from an erupting volcano, or land in the path of a potentially life threatening flood.[191]

Regulations which control development in an area threatened by erosion should also fall under the nuisance exception for two independent reasons. First, shoreline setback regulations serve the state's utmost concern for public safety. Second, the setback regulations prevent harm to established property rights of the public and to adjacent landowners.

It appears that one key criterion in the nuisance exception is the concern for public safety. In *Keystone*, both the majority and minority agreed on the existence of the nuisance exception. The major disagreement was whether the Pennsylvania Subsidence Act fell under the exception. Justice Rehnquist, writing for the dissent, felt the nuisance doctrine did not apply because the Act was based primarily on economic rather than public safety concerns.[192] Thus, even under Rehnquist's narrow view of the nuisance doctrine, a regulation based on public safety appears to fall under the nuisance umbrella.

Apparently, the stronger the evidence that a zoning ordinance advances public safety, the greater the probability that the ordinance will survive a takings challenge. As discussed in Section III-B, the preamble

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[189] *Id.* at 140.

[190] *Id.* at 141.

[191] 482 U.S. at 325-26.

[192] Stating that the central purposes of the Act were a concern for preservation of buildings, economic development and maintenance of property values. *Keystone*, 480 U.S. at 513.

in the coastal legislation of several states stress the important objective of public safety. For example, the South Carolina code states the beach-dune system "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner."[193] The Florida legislature found that imprudent construction can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, and endanger adjacent properties.[194] New York's code states, "Coastal erosion causes extensive damage to publicly and privately owned property and to natural resources as well as endangering human lives."[195] In Georgia, the legislature found that sand dunes, beaches, sand bars, and shoals comprise an interacting network, called the sand sharing system that acts as a buffer to protect property and natural resources from the damaging effects of floods, winds, tides, and erosion.[196]

One serious safety problem along the coast is the placement of permanent, immovable structures near an eroding shoreline which leads to the eventual construction of a seawall or revetment to protect property. Although hardening of the shoreline can temporarily protect property, it often narrows the protective beach in front.[197] During a storm, waves that wash over these structures can lead to catastrophic failure of the seawall, leaving the property and inhabitants defenseless.[198] South Carolina, New York, Florida and Georgia have apparently acknowledged this important safety concern as indicated by the preamble in their shoreline setback regulations.

In *Mugler v. Kansas*, the Supreme Court espoused the vital principle that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[199] The potential harm to community property rights from imprudent

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[193] S.C. CODE ANN. § 48-39-250(1)(a) (Law. Co-op. 1990).

[194] FLA. STAT. ANN. § 161.053(1) (West 1990).

[195] N.Y. ENVTL. CONSERV. LAW § 34-0101(2) (McKinney 1984).

[196] GA. CODE ANN. § 12-5-231 (1988).

[197] *See supra* note 9 and accompanying text.

[198] Gilbert, *supra* note 3, at 34. Due to the adverse affects on the protective beach and the false sense of security given to homeowners, North Carolina and Maine have outlawed seawalls, jetties, groins, or other permanent structures. *Id.* at 78.

[199] 123 U.S. at 665. The majority in *Keystone* cited *Mugler* as supporting their holding that the Pennsylvania Subsidence Act fell under the nuisance exception. *Keystone*, 480 U.S. at 491-92.

shoreline development is the second reason why setback regulations should fall under the nuisance exception.

Poorly placed development along the shore often leads to the building of a seawall or revetment which may result in flank erosion,[200] narrowing or disappearance of the dry sand beach,[201] and concurrent steepening of the beach profile seaward of the high water line.[202] The impact on other property rights from such effects is substantial. The adjacent neighbor, who may have prudently located his building, suddenly experiences increased erosion on the flanks of the erosion control devices. Citizens may be deprived of all use of public beaches, as well as private beaches where the public has established pre-existing rights to the dry sand area under the doctrines of prescriptive easement, implied dedication, custom and the public trust.[203] Even if there are no preexisting public rights in the dry sand beach, a seawall or revetment that extends into the swash zone interferes with the unquestioned public right to use the beach seaward of the mean high water line.[204]

If the property owner chooses not to build a seawall or revetment and erosion continues, then the eventual intrusion of any building onto the dry sand beach or further into the swash zone could also be classified a public nuisance. Such an intrusion would interfere with the public right to swim, fish or walk along the shore.[205] In addition the intrusion would pose a serious safety problem.

For most coastal landowners, the alternative of sand replenishment to prevent intrusion of a building onto the public portion of the beach would be economically prohibitive.[206] The sand emplaced is highly

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[200] Gilbert, *supra* note 3, at 34.

[201] *See supra* note 9 and accompanying text.

[202] Pilkey, *supra* note 9, at 16.

[203] *See supra* notes 127-28 and accompanying text. In Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988), the Supreme Court recognized that public rights protected by the public trust doctrine can include swimming, bathing, recreation, fishing and mineral development.

[204] The *Phillips* Court reaffirmed that lands subject to the ebb and flow of the tide are subject to the public trust doctrine. 484 U.S. at 476.

[205] In Arrington v. Mattox, 767 S.W.2d 957 (Tex. Ct. App. 1989) the order to remove obstacles blocking access along the shore placed after Hurricane Alicia moved the vegetation line landward of the owner's property was not a taking without compensation since the Texas Open Beaches Act merely enforced a pre-existing easement obtained through prescription, implied dedication and custom.

[206] *See supra* note 10 and accompanying text.

migratory and may be transferred offshore or alongshore. It would be difficult to imagine a single homeowner, or even a few, with the economic capability to replenish an entire beach segment. For most of the U.S. coast, the only feasible way to prevent an interference with the property rights of the community would be to set back buildings a reasonable distance from the shoreline. Because shoreline setback regulations prevent a harm to established community rights and promote public safety, it is suggested that such regulations fall under the nuisance exception to the taking guarantee. The Florida legislature is in agreement, stating that, "any coastal structure erected, or excavation created, in violation of the provisions of this section is hereby declared a public nuisance; and such structures shall be forthwith removed."[207]

Having established that shoreline setback regulations are likely to qualify under the nuisance exception, the next step in the analysis is to determine the extent to which such rules can intrude on property rights before the courts will find a taking. Most confusing on this issue is the apparent inconsistent statements of Chief Justice Rehnquist in *First English* and *Keystone*. In the *Keystone* dissent, Rehnquist stated, "[t]hough nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation."[208] Yet, in Justice Rehnquist's majority opinion in *First English*, there is crucial language which indicates an ordinance could prohibit all uses if it substantially advances the public interest in health and safety.[209] Rehnquist wrote:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. . . . These questions, of course, remain open for decision on the remand we direct today.[210]

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[207] FLA. STAT. ANN. § 161.053(7) (West 1990). In the Georgia Shore Assistance Act, the legislature stated, "Any activity in violation of this part or of any ordinance or regulation adopted pursuant hereto shall be a public nuisance; and such activity may be enjoined or abated. . . ." GA. CODE ANN. § 12-5-244 (1988).

[208] *Keystone*, 480 U.S. at 513. Citing Mugler v. Kansas, 123 U.S. 623 (1887); Miller v. Schoene, 276 U.S. 272 (1928); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 126, (1978); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[209] *First English*, 482 U.S. at 313.

[210] *Id.* at 313. (citing *Mugler*, *Goldblatt*, and Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

On the remand of *First English* to the California Court of Appeals, Justice Johnson, writing for the majority, shed light on Rehnquist's apparently conflicting statements. While the California Court of Appeals held that the Lutheran Church was not denied all uses of their property, they discussed the validity of the ordinance assuming it prohibited "all uses."[211] Justice Johnson discussed the hierarchy of state interests, from safety regulations which preserve life, to aesthetic values which frequently are outweighed by property rights. The court stated the zoning regulation challenged in the instant case involves the highest of public interest, "the prevention of death and injury both on and off the appellant's property."[212] "Given the serious safety concerns demonstrated by the May 1978 flood, the county might well have been justified in prohibiting entirely any human occupancy."[213]

The California court noted that in *Agins v. Tiburon*,[214] the United States Supreme Court declared a land use regulation does not effect a taking if it substantially advances legitimate state interest and does not deny an owner economically viable use of his land. In other words, landowners are entitled to compensation if they are deprived of "all uses" of their property, even if the regulation substantially advances legitimate state interest.[215] However, Rehnquist in *First English* suggested all uses could be extinguished for a public safety regulation.[216]

Justice Johnson of the California Court reconciled the seemingly different formulations in *Agins* and *First English* based on the hierarchy of state objectives. In *Agins*, the Supreme Court might have difficulty in finding that the purpose to prevent premature urbanization would justify depriving a landowner of "all use" of his land.[217] In *First*

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[211] First English v. County of Los Angles, 210 Cal. App. 3d, 1353, 1366-67, 258 Cal. Rptr. 893, 901-02 (Cal. Ct. App. 1989).

[212] *Id.* at 1373, 258 Cal. Rptr. at 905.

[213] *Id.* at 1367, 258 Cal. Rptr. at 902.

[214] 447 U.S. 255, 260 (1980). In *Agins*, the zoning ordinance in question limited landowners to one residence on each acre of land. The Supreme Court stated that the objective to prevent premature urbanization was a "legitimate state interest" and that the ordinance substantially advanced that interest. *Id.* at 261.

[215] *First English*, 210 Cal. App. 3d at 1365, 258 Cal. Rptr. at 901.

[216] *See supra* note 210 and accompanying text. On the remand of *First English*, Justice Johnson wrote, "the Supreme Court majority clearly stated the land use regulation involved in this case . . . would not constitute a compensable 'taking' if the regulation did not deprive First English of 'all use' of its property or even assuming it prohibited 'all uses' if that deprivation of 'all uses' promoted public safety." 210 Cal. App. 3d at 1366, 258 Cal. Rptr. at 901.

[217] *First English*, 210 Cal. App.3d at 1366, 258 Cal. Rptr. at 901.

English, "the Supreme Court recognized the public purpose . . . is far different - the preservation of lives and health. . . . So it makes perfect sense to deny compensation for the denial of 'all uses' where health and safety are at stake but require compensation for the denial of 'all uses' where the land use regulation advances lesser [interests]."[218]

Perhaps Rehnquist's apparently conflicting statements in *First English* and *Keystone* are explained by the fact that public safety regulations occupy the highest rung in the hierarchy of state objectives, as compared to other nuisance regulations not related to public safety.[219] Thus, a nuisance not related to public safety, may be substantially regulated to the point where there is a substantial reduction in value, but all uses may not be extinguished.[220] On the other hand, a public safety regulation may in some cases prevent essentially all uses of the landowners property.[221]

Several cases have considered nuisance and public safety issues in upholding the validity and enforcement of shoreline setback regulations. In the *Town of Indialantic v. McNulty* case, the District Court of Appeal of Florida, stated that "the wetlands and coastal areas are places of critical concern because of their important role in protecting the inland regions against flooding and storm danger."[222] On the as applied challenge, the court stated the harm to be prevented by the setback ordinance was substantial-the prevention of a nuisance.[223] Because of the substantial harm, the homeowner had the heavier burden to show his proposed use would not cause the dangers intended to be prevented by the ordinance.[224] The court rejected McNulty's as applied challenge because he failed to meet the heavier burden, even though it was

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[218] *Id.*

[219] There are numerous examples of nuisance regulations not related to public safety. For example, a regulation prohibiting raising cattle near a residential area to prevent the spread of obnoxious farm odors would not be related to the public safety of local residents.

[220] *See supra* note 208 and accompanying text.

[221] *See supra* notes 210, 213, 218, and accompanying text. *See also*, Lawrence, *Regulatory Takings Beyond the Balancing Test*, 20 URB. LAW. 389, 414 (1988)(arguing that the Supreme Court has upheld the complete destruction of property interest in the sake of harm prevention and citing United States v. Caltex, Inc., 344 U.S. 149 (1952) (oil terminal facility demolished to prevent it from falling into enemy hands) and Bowditch v. Boston, 101 U.S. 16 (1879) (place of business blown up to stop the spread of fire)).

[222] 400 So. 2d 1227, 1232 (Fla. Dist. Ct. App. 1981).

[223] *Id.* at 1233.

[224] *Id.*

shown that the ordinance prevented him from building on his ocean-front lot.[225] Eight years later, under slightly different facts which made the setback ordinance more economically burdensome, the United States district court upheld the setback ordinance as a safety regulation.[226] The district court stated, "[b]ecause of the danger that the proposed construction would pose to others by destroying the dune, the town would be within its police power to prohibit that use, even if it denies all economically viable use."[227]

In *Mack v. Municipal Officials of Town of Cape Elizabeth*, the Supreme Judicial Court of Maine stated that, "[t]he record contains sufficient evidence to support the Board's finding that wave action could make the house unsafe for its inhabitants and could damage the entrance drive, leaving the inhabitants isolated in a dangerous position."[228] Thus, the court affirmed the denial of a shoreline setback variance from the Cape Elizabeth Board of Zoning Appeals.

A persuasive reason for the classification of a shoreline setback ordinance as a public safety regulation is by analogy to the flood ordinance in *First English*. It would be difficult to distinguish buildings inundated by flood waters from property inundated by storm waves along the coast. In both cases, private property and human lives are threatened by predictable natural hazards. On the remand of *First English*, the California Court of Appeals classified the flood ordinance as a public safety regulation.

If the analogy between zoning regulations on the floodplain and along the coast is valid, the California court's holding in *First English* is significant. The ordinance at issue prohibited reconstruction of buildings which were destroyed by raging flood waters. The California court ruled there was not a taking by the flood ordinance.[229] Coastal regulations which limit redevelopment of structures destroyed within the setback zone may be valid for the same reason, the concern for public safety.

In summary, since shoreline setback regulations prevent a harm to established community rights, and promote public safety, they are likely to fall under the nuisance exception to the taking guarantee.

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[225] *Id.*

[226] McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D. Fla. 1989).

[227] *Id.* at 610. The United States district court relied on the analysis of Justice Johnson in the remand of *First English* to the California Court of Appeals. *Id.* at 609.

[228] 463 A.2d 717, 720 (Me. 1983).

[229] 210 Cal. App. 3d at 1373; 258 Cal. Rptr. at 905.

Under this exception, nuisance-like uses of the property may be prohibited by public authority without any compensation, despite large loses representing significant devaluation of the property.[230] Arguably, shoreline zoning ordinances can be classified as a public safety regulation. Support for such a classification comes from the safety concerns in the preamble of coastal zoning regulations,[231] scientific evidence on the dangers of imprudent construction on an eroding shoreline,[232] the holdings of shoreline setback cases such as in *Mack*, and *McNulty*,[233] and by analogy to the floodplain ordinance in *First English*. It is possible that all uses of property could be prohibited for a valid public safety regulation, although this question remains unanswered by the United States Supreme Court.[234]

E. Justice and Fairness

In *Armstrong v. United States*,[235] Justice Black wrote that the fifth amendment guarantee "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." And, in *Penn Central*, Justice Brennan stated that the Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the [G]overnment, rather than remain disproportionately concentrated on a few persons."[236]

Professor Michelman, a leading authority on "just compensation" law, stated that "fairness resists being cast into a simple, impersonal, easily stated formula."[237] Michelman wrote:

> what fairness (or the utilitarian test) demands is assurance that society will not act deliberately so as to inflict painful burdens on some of its members unless such action is "unavoidable" in the . . . long-run

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[230] Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1191 (1967). *See also*, *supra* note 208 and accompanying text.

[231] *See supra* notes 193-96 and accompanying text.

[232] *See supra* notes 197-98 and accompanying text.

[233] *See supra* note 222-28 and accompanying text.

[234] *See supra* note 210 and accompanying text.

[235] 364 U.S. 40, 49 (1960).

[236] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[237] Michelman, *supra* note 230, at 1250.

> general well-being. Society violates that assurance if it pursues a doubtfully efficient course and, at the same time, refuses compensation for resulting painful losses."[238]

Shoreline setback regulations may inflict painful burdens on coastal landowners. However, given the fact that the majority of the U.S. coastline is in a long term trend of erosion,[239] with no method to stop erosion for most of the coastline,[240] a prohibition on unrestrained coastal development appears unavoidable. Furthermore, it is unquestioned that coastal zoning regulations advance the general well-being of the community. Society benefits from increased safety brought about by preservation of the beach-dune system, which serves as an important storm buffer zone. In addition, preservation of the beach-dune system insures: (1) protection of established community rights below the mean high water line; and (2) protection of community rights above the mean high water line for public beaches, as well as for private beaches where a public easement has been obtained by the doctrines of implied dedication, prescriptive easement, custom and the public trust. Because shoreline setback regulations are "unavoidable in the long-run general well-being of society," there appears to be no obvious violation to Michelman's fairness demands.[241]

F. Impact of the Regulated Activity on Public Trust Lands.

The public trust doctrine is a relevant factor in resolving some taking disputes, especially as it pertains to water rights.[242] The doctrine is derived from the principle in English common law that all land covered by tidal waters is held by the sovereign for the common use of the people. Under this doctrine, the state acting as trustee, has a duty to protect certain uses on public trust lands from interference by private individuals and the government. The public trust doctrine has also

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[238] *Id.* at 1235. Michelman defines an efficient process as one which maximizes the total amount of welfare, of personal satisfaction, in society. *Id.* at 1173.

[239] *See supra* notes 2-5.

[240] Gilbert, *supra* note 3, at 34. *See also*, *supra* notes 9-10, 198 and accompanying text.

[241] Professor Michelman also proposed a utilitarian test based on "efficiency gains," "demoralization costs," and "settlement costs." *Supra* note 230, at 1214-15. This test was not utilized by the United States Supreme Court in their 1987 takings cases.

[242] Finnell, *supra* note 16, at 663.

been used by citizens as a tool to enforce the public's rights against government itself.[243]

Traditional uses that have been protected under the public trust doctrine include navigation, commerce and fishing. For example, in the leading authority on the scope of the public trust doctrine, *Illinois Central Railroad Co. v. Illinois*,[244] the Supreme Court stated that title to soil under navigable waters:

> is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[245]

American courts have since expanded the scope of the public trust doctrine to include protection in nontraditional areas such as for recreation or ecological preservation.[246]

Geographically, the public trust doctrine includes all tidelands. In *Phillips Petroleum Co. v. Mississippi*,[247] the Supreme Court reaffirmed long-standing precedents which hold that upon entry into the Union,

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[243] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970).

[244] 146 U.S. 387 (1892).

[245] *Id.* at 452. In King v. Oahu Ry. & Land Co., 11 Haw. 717, 723-25 (1899), the Hawaii Supreme Court followed the lead in *Illinois Central* and held that lands under the navigable waters in and around the territory of the Hawaiian Government are impressed with a trust for the public uses of commerce, navigation, and fishing.

[246] In Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988), the United States Supreme Court recognized that public rights protected by the public trust doctrine can include swimming, bathing, recreation, fishing and mineral development. See also, State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) (the Hawaii Supreme Court recognized recreation as valid public trust use); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976) (the Illinois Supreme Court found that recreational uses such as bathing, swimming and other shore activities were protected under the public trust). Neptune City v. Avon-by-the Sea, 61 N.J. 296, 309; 294 A.2d 47, 54 (1972) (The Supreme Court of New Jersey stated that public trust protection encompasses recreation). *See also*, Strom, *New Applications of the Public Trust Doctrine to Waterfront Property*, 4 ZONING & PLAN. LAW. REP. 169 (1981); Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 465 (1989). Melville, *Sunbathers v. Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. REV. 160, 178 (1985).

[247] 484 U.S. 469 (1988).

States receive ownership of all lands subject to the ebb and flow of the tide.[248] The Supreme Court has held that the public trust doctrine includes not only tidelands but also inland navigable lakes and streams.[249]

The dry sand beach, between the vegetation line and mean high water line, is not exposed to tidal action and, traditionally, has not been subject to the public trust doctrine. However, there are exceptions to this general rule. *In re Sanborn*, the Supreme Court of Hawaii reaffirmed prior precedent that land below the high water mark is held in trust for the public and defined the high water mark as the upper reaches of the wash of the waves as evidenced by the vegetation and debris lines.[250] Because the vegetation and debris lines are located at or near the upper portion of the beach, the dry sand area in Hawaii is covered by the public trust doctrine.

In *Matthews v. Bay Head Improvement Association*,[251] the Supreme Court of New Jersey extended the reach of the public trust doctrine and found that, "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interest of the owner."[252] Thus, in New Jersey, the need for access to the tidelands and ocean required extending the public trust umbrella to certain nonpublic beaches. Other beaches on the continental U.S. protected under the public trust include those dry sand beaches purchased by the government as public parks for recreational purposes.[253] In addition, a public accessway easement over the dry sand beach obtained by implied dedication, custom or prescriptive easement should be treated as held by the state in trust for the public.[254]

It is not unusual for the state to implicate the public trust doctrine to uphold regulations for land adjacent to public trust lands. Courts

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[248] *Id.* at 476; *See also*, Shively v. Bowlby, 152 U.S. 1 (1894).

[249] *Illinois Central*, 146 U.S. 387 (1892). *See also*, Corfield, *Sand Rights: Using California's Public Trust Doctrine to Protect Against Coastal Erosion*, 24 SAN DIEGO L. REV. 727, 739 (1987).

[250] 57 Haw. 585, 593-94; 562 P.2d 771, 777 (1977). *See also* supra note 89 and accompanying text. A 1978 addition to the Hawaii Constitution required that "All public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1 (Supp. 1982).

[251] 95 N.J. 306, 471 A.2d. 355, *cert. denied*, 469 U.S. 821 (1984).

[252] *Id.*

[253] Corfield, *supra* note 249, at 739 (citing DUCSIK, SHORELINE FOR THE PUBLIC 118 (1974)).

[254] Finnell, *supra* note 16, at 650.

have upheld such regulations from a takings challenge to prevent a harm to public trust rights.[255] For example, in *Just v. Marinette County*,[256] the prohibition on filling swampland adjacent to a navigable lake was upheld in order to protect public trust lands from pollution, and to preserve the public uses of fishing and recreation. In implicating the public trust doctrine, the Supreme Court of Wisconsin emphasized the interrelationship of the wetlands, swamps, and shorelands and how a change in one of these environments may affect water quality, navigation, fishing and scenic beauty in the other geographical areas.[257] In *Graham v. Estuary Properties, Inc.*,[258] the Supreme Court of Florida embraced the interconnected environment rationale in *Just* and reiterated that, "an owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."

Although the activities at issue in *National Audubon Society v. Superior Court of Alpine City*[259] involved a municipality rather than a private landowner, the Supreme Court of California extended public trust protection to nonnavigable tributaries feeding water into a navigable lake when diversion of the tributaries had a harmful ecological and scenic impact on Mono Lake. The California court declared that "the continuing power of the state as administrator of the public trust, . . . extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."[260] The court added further, the "principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[261] Applying the reasoning of the courts in *Just*,

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[255] *Id.* at 678.

[256] 56 Wis.2d 7, 201 N.W.2d 761, 768 (1972).

[257] *Id.* at 18-19, 201 N.W.2d at 769.

[258] 399 So. 2d 1374, 1382 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981) (citing *Just*, 56 Wis. 2d at 17, 201 N.W.2d at 768). *See also*, Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062, 1083 (1987), *cert. denied*, 486 U.S. 1022 (1988) (citing with favor the rationale in *Just*).

[259] 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1984). The reduced lake level raised water salinity, and thereby reduced the population of brine shrimp and sea gulls. 189 Cal. Rptr. at 352-53, 658 P.2d at 715-16.

[260] 189 Cal. Rptr. at 360, 658 P.2d at 723.

[261] *Id.* at 364, 658 P.2d at 727.

Estuary Properties, and *National Audubon Society*, it appears the public trust doctrine can burden all property owners whose property-related activities have harmful spillover effects onto public trust lands.[262]

Property immediately inland of the dry sand beach is not normally subject to the public trust doctrine.[263] It is this area which is the focus of restrictions on construction found in shoreline setback regulations. Although the setback area does not include public trust land, the doctrine can still be implicated to protect trust land due to the harmful spillover effects on the dry sand beach and tidelands which result from the construction of permanent, nonmovable structures near an eroding shoreline.

Legislatures and the judiciary have recognized that sand dunes, beaches, offshore sandbars and shoals all comprise an interacting network which can be affected by slight changes anywhere in the system.[264] Given the interrelationship of various components of the coastal system, it is to be expected that a permanent, immovable structure, imprudently placed near an eroding shoreline, will eventually require the protection of erosion control devices which interfere with public trust uses.

Hardened barriers to protect immovable buildings, such as seawalls or revetments, may result in loss of the dry sand beach, and steepening and narrowing of the beach profile seaward of the mean high water line.[265] The increased water depth and turbulence caused by wave

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[262] See also, Dwyer, *The Public Trust Doctrine: Accommodating The Public Need Within Constitutional Bounds—Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S.Ct. 1996 (1988).*, 63 WASH. L. REV. 1087, 1105 (1988).

[263] Berryhill & Williams, *Taking Precedents in the Tidelands: Refocusing on Eminent Domain*, 18 U. RICH. L. REV. 453, 467 (1984).

[264] *See, e.g.*, GA. CODE ANN. § 12-5-231 (1988) (Dunes, beaches, sandbars and shoals comprise the sand-sharing system); Rolleston v. State, 266 S.E.2d 189, 192 (Ga. 1980) (holding that denial of a permit to build a bulkhead for erosion protection was not unconstitutional since the wall could have adverse effects on the beach). Klausmeyer v. Makaha, 41 Haw. 287 (1956) (finding that removal of sand from any portion of the beach in excess of the rate of sand production would result in shifts of sand from adjacent parts and hence erosion of the entire beach).

[265] Pilkey, *supra* note 9, at 16. The best examples of beach loss through shoreline stabilization are along the South Florida and New Jersey shores but examples of significant beach narrowing and steepening are increasing in all coastal states. *Id.* at 14. At Sea Bright, New Jersey the 300 foot beach that existed in front of the seawall is completely gone. N.Y. Times, *supra* note 2, at C12, col. 1. In Oahu, Hawaii, areas along the coast where beaches have been lost near seawalls, groins or stone revetments

reflection off these barriers may prevent traditional public trust uses such as fishing within the tidal zone, passage along the shore, and the placement of boats on tidelands. Nontraditional trust uses, related to recreation such as sunbathing, swimming or camping would also be lost. Thus, when a state knowingly allows development in a location which is likely to require shoreline stabilization during the lifetime of a proposed structure, there appears to be a clear violation of public trust duties.

Having determined that spillover effects from imprudent shoreline development are likely to implicate the public trust doctrine, the next issue is to determine the extent to which the state can regulate inland property rights to prevent such harmful effects. Can the state as trustee decide that a private landowner's interest to develop land in the setback area outweigh the right of the public to preserve the dry sand beach and tidelands? Dr. Pilkey, Professor of Geology at Duke University, asks a related question more succinctly: "Does a community have a right to destroy its own beach?"[266] Case law and logic suggests not.

In *Illinois Central*, the Illinois legislature conveyed soil under Lake Michigan, along the Chicago waterfront to the Illinois Central Railroad.[267] The issue was whether the legislature could revoke the grant. The Supreme Court held that the conveyed lands were impressed with an inalienable public trust and that revocation of the conveyance to restore the public interest was available without the necessity of operating under the eminent domain power or the takings analysis. The Court stated:

> [t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . trusts connected with public property, or property of a special character, like lands under navigable waters, . . . cannot be placed entirely beyond the direction and control of the State.[268]

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include Swanzy Beach Park; areas along the Kamehameha Highway near Kualoa; the northwest and south ends of Lanikai; and the north end of Waimanalo. Hwang, *supra* note 5, at 57, 62, 75, 77. *See also*, NODA AND ASSOC. INC. & DHM INC., HAWAII SHORELINE EROSION MANAGEMENT STUDY, VOLUME 1, OVERVIEW AND CASE STUDY SITES, at 4-70, (1989). *See also, supra* note 9 and accompanying text.

[266] Pilkey, *supra* note 9, at 15.

[267] 146 U.S. 387 (1892).

[268] *Id.* at 453-54. Case law in the different states has consistently held that the public

When a state allows construction which triggers a predictable chain of events leading to the narrowing, steepening, and eventual disappearance of the beach and tidal zone, the state is impairing public trust land. Due to the steepened beach profile, the tidal zone is reduced in area and will likely disappear if the profile continues to steepen so that waves lap against an erosion control barrier during low tide.[269] In this instance, abdication of public trust land is not by specific conveyance, but by adopting construction policies adjacent to trust land which eventually harm or destroy the beach and tidal zone. Such policies appear to be a clear violation of the holding in *Illinois Central*, that public trust land cannot be substantially impaired, abdicated or placed outside the direction and control of the state.[270]

In *Just v. Marinette County*,[271] restrictions on the use of a citizen's property were upheld from a takings challenge based on the negative impact of proposed activities on a nearby navigable lake. The Wisconsin Supreme Court stated, "while loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the natural character of the land at the expense of

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trust uses cannot be significantly impaired. Neither the Supreme Court nor any state courts have disavowed the prohibition against "substantial impairment of public rights of navigation, commerce and fishing announced in Illinois Central and Shively v. Bowlby." Wilkinson, *supra* note 246, at 464. In *Orion*, 747 P.2d 1062, 1073, the Supreme Court of Washington held that the Orion Corporation could not use tidelands in a manner which would substantially impair the trust uses of navigation, commerce, fishing and recreation. In King v. Oahu Ry. & Land Co., 11 Haw. 717 (1899), the Hawaii Supreme Court held that control of the public trust waters can never be lost except as such disposals that will not impair the interest in the lands and waters remaining. In *National Audubon Society*, 33 Cal.3d at 441, 189 Cal. Rptr. at 361; 658 P.2d at 724, the Supreme Court of California stated that the public trust duty to protect certain natural resources could be surrendered "only in rare cases when abandonment of that right is consistent with the purposes of the trust." In People *ex rel.* Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976), the Supreme Court of Illinois held that the state cannot grant tidelands free of the trust, simply because it advances general public objectives such as increasing employment or placing a property in commercial use.

[269] For example, no beach exists in front of the seawall in Sea Island, Georgia during high tide. It is expected that in the near future, there will be little beach during low tide. Pilkey, *supra* note 9, at 15.

[270] The suggested extreme limit of constraint on the states is that no state may grant trust land to private parties in such a manner that the state will have given up its authority to govern. Sax, *supra* note 243, at 488.

[271] 56 Wis.2d 7, 201 N.W.2d 761 (1972).

harm to public rights is not an essential factor or controlling. . . . "[272] Thus, in order to prevent a harm to public trust land, the *Just* court belittled a key factor in the takings analysis relating to the economic impact of the regulation on the landowner. In *Estuary Properties*, the Supreme Court of Florida subscribed to the rationale in *Just* and rejected the regulatory takings claim of the private landowner because of the harm to public trust land in close proximity to the proposed development.[273]

The holdings in *Just* and *Estuary Properties* suggest that the state right to protect trust land may be equal to, if not superior than, the right of the landowner to develop nontrust land in a manner which has harmful spillover effects onto the public trust. These cases indicate courts will look with considerable skepticism on a regulatory takings claim when the regulation at issue protects public trust uses from the harmful activities of private landowners.[274] Accordingly, shoreline setback regulations which protect tidelands and the dry sand beach from imprudent coastal development should be given the same deferential treatment as any other regulation protecting trust land from harmful spillover activities.

The public trust doctrine is more than just a factor to be considered in the takings analysis. The trust doctrine helps to clarify the roles of the public, the judicial system and the state and local government in managing the coastal zone.

With regard to the state, the duties of a trustee in land subject to the public trust may be governed by the same principles applicable to the administration of trusts in general.[275] Therefore, it is important to

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[272] *Id.* at 17, 201 N.W.2d at 768.

[273] 399 So. 2d 1374, 1382 (1981), *cert. denied*, 454 U.S. 1083 (1981). *See also*, *Orion*, 109 Wash. 2d 621, 659-60; 747 P.2d 1062, 1082-83 (1987), *cert. denied*, 486 U.S. 1022 (1988). In *Orion* the disputed activity was on public trust land rather than on adjacent land in close proximity. The Supreme Court of Washington dismissed the regulatory taking claim of Orion Corp, stating that the public trust burden, "precluded any use of the land incompatible with the public trust, even if Orion were denied all economically viable use of the land." The *Orion* court cited with favor the rationale in *Just* and left open the possibility of expansion of the public trust to adjacent nontrust land. Dwyer, *supra* note 262, at 1106-08.

[274] *See also*, Sax, *supra* note 243, at 490 (noting the skepticism of the courts on any government actions which restrict public trust uses or subject public uses to the self interest of private parties).

[275] *See, e.g.*, Idaho For. Indus. v. Hayden Lk. Watershed Imp., 112 Idaho 512, 733 P.2d 733 (1987) (citing Bogert & Bogert, Law of Trusts, § 6 (1973). *See also*, State v.

distinguish between the government's ability to regulate land-use under the police power and the more demanding and rigorous obligation that the state has as trustee of natural resources.[276] Traditional duties of a trustee include the exercise of reasonable care and skill, and the duty to retain control of and preserve trust property.[277] The duty to preserve trust property requires that the trustee does not allow coastal construction in a manner that eventually leads to the loss of a beach and tidal zone through shoreline stabilization. For new coastal development, state officials should ask the important question, will the proposed structures require the protection of hardened barriers along the shore during their lifetime? If the answer is "yes" and the development proceeds, then the state may have breached its fiduciary duty.

The trustee duty to exercise reasonable care and skill implies that the coastal states make informed development decisions. Since shoreline instability is the rule rather than the exception,[278] it would appear reasonable to require coastal states to determine erosion rates for the purposes of land-use planning. A violation of trust duties may occur if a state approves a development project under the assumption of shoreline stability, while no attempt has been made to analyze available historical data on the coast.

The duties imposed on the state as trustee may also apply to local government agencies and counties as well. In *Borough of Neptune v. Borough of Avon-By-The-Sea*,[279] the municipality of Avon, New Jersey, wished to charge user fees at a higher rate for non-residents than residents for a municipally-owned beach dedicated for public beach purposes. The Supreme Court of New Jersey recognized that the municipality of Avon, was a political subdivision and creature of the state. The court held that under the public trust doctrine, user fees had to be the same for all members of the public and that any contrary state or municipal action was impermissible.[280] Thus, the municipality

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Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974) (the Supreme Court of Wisconsin recognized that under the public trust doctrine the state has the usual powers of a trustee).

[276] Sax, *supra* note 243, at 478.

[277] 2 SCOTT ON TRUSTS, §§ 169-185 (3d ed. 1967).

[278] *See supra* notes 2-5 and accompanying text.

[279] 61 N.J. 296, 294 A.2d 47 (1972).

[280] *Id.* at 308-09, 294 A.2d at 54. *See also*, Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978)(holding that under the public trust doctrine, the municipality of Deal in Monmouth County, New Jersey could not restrict the use of the dry sand beach to members of the Deal Casino).

of Avon could not claim exemption from public trust duties under the guise that their activities were unrelated to the state.

The public trust doctrine is an important tool for citizens to protect their rights in the shore. Since the beneficiaries of the trust are the public, courts have held that citizens have standing. In *Gould v. Greylock Reservation Commission*,[281] the Supreme Judicial Court of Massachusetts entertained a suit by five citizens, suing as beneficiaries of the public trust, to stop the lease of public park land to private investors who wished to build a ski development. And, in *Robbins v. Department of Public Works*,[282] the same court entertained a suit by citizens who tried to block the transfer of wetlands to the Department of Public Works for highway use. In these cases, and many others,[283] citizens have sought judicial recognition of their rights in public land against the government officials who were supposedly guarding the trust.

Finally, the courts play an important role in public trust management since they recognize and uphold the legal rights of the public in certain natural resources. In the *Robbins* case, the fact that the Supreme Judicial Court of Massachusetts entertained a citizens suits may reflect the court's skepticism over administrative discretion which restricts public trust uses.[284] Case law has shown that the courts will defend the rights of a diffuse majority of people against self interested parties who may have undue influence on the public resource decisions of a state legislature or an administrative body.[285]

To summarize, although setback regulations control development on non-trust land, this area should not be viewed in isolation. The backshore area, dry sand beach and tidelands are all interrelated and part of the same coastal ecosystem.[286] Because of this interrelationship, the public trust doctrine can be implicated due to the harmful spillover effects onto the beach and tidelands from poorly placed construction on a receding shoreline.[287]

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[281] 350 Mass. 410, 215 N.E.2d 114 (1966).

[282] 355 Mass. 328, 244 N.E.2d 577 (1969). *See also*, Marks v. Whitney, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971) (individuals as well as the government may enforce the trust).

[283] Sax, *supra* note 243, at 473.

[284] *Id.* at 501.

[285] *Id.* at 560. Professor Sax has noted that the courts have generally shown more insight and sensitivity to the problems of resource management than have any other branches of government. *Id.* at 566.

[286] *See supra* note 264 and accompanying text.

[287] *See supra* note 265 and accompanying text.

The introduction of the public trust doctrine has three important implications. First, a vital factor related to the protection of public trust uses is added to the takings analysis. Courts have looked with considerable skepticism on government actions which restrict public trust uses, or subvert these uses to the self-interest of private parties. Second, the trust doctrine clarifies the duties of government officials and the role of the judicial system in managing coastal resources. Finally, the doctrine provides a vehicle for the public to demand protection of their rights in the coastline.

IV. Conclusions

Given recent documentation on the extent of shoreline erosion in the country, and the prediction of a further sea level rise which would accelerate shoreline retreat, it is likely that coastal states may be forced to extend or modify their setback and coastal zoning regulations. However, the Supreme Court decisions in *Nollan* and *First English* may deter government officials from actively passing legislation which preserves public rights or insures proper safety along the coast. This article suggests that *Nollan* and *First English* need not be an insurmountable hurdle to the enactment of new coastal setback regulations.

Once a regulation is found to involve a permanent physical occupation of the property, a taking is often found without regard to any of the other factors in the takings analysis. Shoreline setback regulations do not involve a physical occupation or appropriation of the landowner's property. Therefore, the courts are unlikely to find a per se compensable taking under the *Loretto* threshold test.

Commentators are split on whether the *Nollan* nexus requirement providing that the regulation substantially advances legitimate state interests, represents a second threshold test in the takings analysis. Some commentators suggest that heightened scrutiny of the nexus requirement is triggered by a physical invasion of the landowners property.[288] According to this interpretation, it is unlikely the courts will apply heightened judicial scrutiny for shoreline setback regulations since no permanent physical invasion is involved. Other interpreters suggest that heightened scrutiny is required for all regulatory takings cases and that failure to meet the nexus requirement will result in a taking without further analysis of other factors.[289]

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[288] *See supra* note 136 and accompanying text.

[289] *See supra* note 136 and accompanying text.

Assuming that strict scrutiny is required, the coastal states can satisfy close examination of the nexus requirement by carefully drafting their setback regulations. Data should be collected and presented which support the particular state interest outlined in the preamble of the setback regulation. Pertinent data regarding coastal zoning regulations might include, historical erosion rates, storm frequency along the coast, storm surge data, number of injuries incurred during high surf, property damage estimates, miles of shoreline stabilized by erosion control devices, and miles of shoreline where the beach has been lost during high tide and low tide by shoreline stabilization.

Once legitimate police power interests have been identified, documented, and articulated the state should carefully draft regulations which are specifically tailored to advance those interests. Agencies should use their expertise to demonstrate a specific and logical connection between the burdens of a proposed development and the regulation designed to alleviate the burden. The regulations should not be sweeping prohibitions and should be no more burdensome than necessary to advance the outlined state objectives. As a precautionary measure, it is recommended that the drafting of new coastal setback regulations follow this procedure. This is especially important given the Supreme Court's holding in *First English*, which provides incentive for legislatures and zoning officials to draft constitutionally valid regulations on the first pass.

Depending on the particular regulation, and the facts of each case, shoreline setback regulations could be a significant economic burden on coastal landowners. However, a fixed setback of 20 to 40 feet from the shoreline may be no more burdensome than a setback for a street or other property line. The Supreme Court has long upheld the validity of traditional setback ordinances from a property line.

Larger fixed setbacks and floating setbacks have the potential to cause the most economic interference. Generally, such regulations should not be viewed as extinguishing property values or denying economically viable use of the land for several reasons. First, the coastal landowner secures an average reciprocity of benefit and burden when all development along the coast is prudently placed. Second, the regulations may have hardship provisions which allow relaxation of the setback for properties platted or subdivided before the effective date of the regulation. With the hardship provisions, the setback ordinances are more effective in controlling development in large tracts of undivided land as opposed to smaller tracts already designated for residential use. Even without hardship provisions, states can prevent devaluation

of coastal property by allowing residual uses in the setback zone. For example, the construction of movable or expendable structures would allow some property use, while eliminating the need for shoreline stabilization should the structures be threatened by erosion.

Because of the inherent instability of a shoreline, government officials should be given greater flexibility in regulating coastal property as compared to inland property. For the same reason, courts should be hesitant to recognize reasonable investment backed expectations to develop in an erosion setback zone when most property expectations are based on a permanent fixed boundary.

Shoreline setback regulations should fall under the nuisance exception to the taking guarantee for two independent reasons. First, the regulations advance the important state interest in public safety. Second, by preventing imprudent construction, the regulations prevent an interference with established property rights of adjacent landowners and the community.

The possibility exists of a public safety exception to the taking guarantee which is a higher priority subset of the nuisance exception. Regulations which advance public safety have a high probability of passing muster even when the economic burden on the coastal landowner is especially burdensome. It is recommended that states that modify their setback regulations stress the public safety factor, and back their assertions with careful records and documentation on the dangers those states have experienced due to imprudent coastal construction.

Still open is the question whether a state can pass a public safety regulation which burdens the landowner to the extent that all uses of the property are prohibited. The Supreme Court has not unequivocally ruled on this issue. Lower courts, however, have provided guidance on this matter. On the remand of *First English* to the California Court of Appeals, it was stated that all uses of a property could be denied without payment of compensation for a public safety regulation. The United States Supreme Court denied certiorari of this California case. In *McNulty*, the United States district court embraced the California Court of Appeals rationale in *First English* and stated that all economically viable use could be prohibited for a safety regulation. For these two cases, the nuisance doctrine reaffirmed in the Supreme Court's 1987 *Keystone* decision played a major role in the outcome, while the higher Court's holdings in *Nollan* and *First English* were less influential.

Despite the California decision in *First English* and the United States district court holding in *McNulty*, coastal states may wish to take further

precaution to avoid a regulatory takings damage award. As further protection, coastal states can continue to use the hardship provisions in the setback regulation or allow residual uses in the setback zone to insure all uses in a property are not lost.

Under the public trust doctrine, states have an inalienable duty to protect public trust uses such as commerce, navigation and fishing from interference by the government or private landowner. Courts have extended this doctrine to activities on nontrust land which have harmful spillover effects onto trust land. Due to the interconnected nature of the beach-dune system and the harmful impact of uncontrolled development on a receding beach and tideland, courts should view shoreline setback regulations as a necessary measure by the state to protect public trust land. Therefore, a thorough analysis of the takings issue as it pertains to shoreline zoning regulations should consider the impact of the regulated activities on traditional and nontraditional public trust uses.

As trustee of public coastal resources, the state's duty to prevent the disappearance of beaches and tidelands may require the passage of effective shoreline setback controls. The public, as beneficiaries of the trust, should demand such action to protect infringement on their rights in the shoreline.[290]

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[290] Just before this article was sent to the pubisher, two relevant cases from the South Carolina Supreme Court were filed. Shoreline setback regulations in the South Carolina Beachfront Management Act were upheld from a takings challenge based on the nuisance exception to the takings guarantee. Lucas v. South Carolina Coastal Council, No. 23342 (S.C. Feb. 11, 1991) (LEXIS, States library, South Carolina file). In a separate case, the South Carolina Supreme Court upheld the denial of a permit to build a bulkhead on beachfront property based in part, on the potential of serious public harm. Beard v. South Carolina Coastal Council, No. 23362 (S.C. Mar. 11, 1991) (LEXIS, States Library, South Carolina file). The holdings of the South Carolina court in *Lucas* and *Beard* support the analysis in Sections III-C and III-D of this article.

Rule 11 and State Courts: Panacea or Pandora's Box?

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INTRODUCTION

Panacea: Rule 11 helps everyone; it eliminates the "pure heart, empty head" excuse for sloppy lawyering. *Pandora's Box*: Rule 11 intensifies in-fighting and spawns litigation; it is a "major threat" especially to individual litigants and small law firms. How might state courts concerned about wasteful litigation address these colliding views of Rule 11? Let's begin with two stories.

Story #1. Imagine a clear day. A well-traveled private road. An adult male driving his jeep. 5:00 p.m. Sun setting outside of driver's line of vision. He drives over an ordinary speed bump at fifteen miles an hour and, he asserts, sustains serious injuries. His grandmother passenger is uninjured. The speed bump is in plain view. He had previously driven over that same speed bump at least eighty times. Several years earlier the driver had received a $25,000 settlement arising out of an unrelated auto incident.

Driver finds an attorney to file suit in 1989. Two-and-a-half page bare-bones complaint. Ultimate claim for lost wages exceeds $70,000. Negligent design, placement and maintenance of the speed bump. Driver knew its location. He tells the attorney that the sun reflected off a man-hole cover; he could not see the bump; a warning sign was needed. Attorney conducts no independent investigation before filing.

Discovery commences. Interrogatories, document requests, plaintiff's deposition. The case is dismissed for plaintiff's failure to timely file a pretrial statement, then reinstated. Seventeen months after service, defendant files its summary judgment motion. Eighteen page memo in support, three exhibits, three affidavits. Defendant's expert engineer's affidavit states that the manhole cover's shape and finish prevented sunlight reflection. Defendant's expert meteorologist's affidavit states that the sun set that day out of plaintiff's sight line.

The motions judge grants summary judgment. Plaintiff pays nothing to its attorney. Defendant pays its attorneys full fare. No appeal.[1]

End of story.

Story #2. Imagine a breach of contract action. Critical issue—what the parties' contemplated regarding defendant's performance obliga-

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[1] This story is a hypothetical composite of various cases. It does not recount the actual conduct of any particular parties.

tions. Ambiguous written language. Conflicting oral statements. Part way through discovery, defendant files a summary judgment motion asserting plaintiff's lack of evidence on the issue of "intent." Three page memorandum. Defendant proffers no specific evidence in support. Clear loser. Plaintiff must nevertheless respond by producing, organizing and arguing *all* evidence (including plaintiff's evidence not yet discovered by defendant) in support of plaintiff's position, and couch its arguments in the context of plaintiff's legal theories.[2] Defendant's summary judgment motion is denied. Inexpensive and potentially valuable discovery for defendant. Considerable headache and expense for plaintiff and plaintiff's counsel. Substantial court time.

End of story.

* * *

But no longer. The stories have an epilogue. Former Rule 11's subjective bad faith standard for sanctioning "frivolous" filings has been replaced with an objective reasonableness standard. In all likelihood, the new standard, as interpreted by most federal courts, would authorize sanctions against plaintiff's counsel, and possibly the plaintiff, in our first story and sanctions against defendant's counsel in our second story.

What about state courts such as Hawaii's that have recently adopted the federal version of Rule 11?[3] Would sanctions be appropriate? Desirable? What are the immediate and long-term benefits and problems? What can be learned by state courts from federal court experience with Rule 11?

Eight years have passed since the amendment of federal Rule 11. Federal court experience with Rule 11 during those years has generated considerable inquiry and commentary. The debate has sometimes been heated. No definitive description of the impact of federal Rule 11 on law practice has emerged. Available empirical data and inquiry into values underlying Rule 11, however, point to general conclusions about federal court experience that might guide state courts in the interpretation and application of Rule 11.

Rule 11 in federal courts deters careless and ill-conceived filings to a measurable extent.[4] Rule 11 has made attorneys "stop, look and

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[2] *See* Munoz v. Yuen, 66 Haw. 603, 670 P.2d 825 (1983).

[3] The Hawaii Supreme Court adopted the federal version of Rule 11, effective September 1, 1990.

[4] Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988) [hereinafter

inquire" before filing.[5] That is for the better. Fewer meritless positions are asserted and litigated. Groundless motions and nuisance value claims are discouraged. The system no longer need tolerate the baseless summary judgment motion or the personal injury claim for the negligent placement of an ordinary, visible speed bump over which plaintiff had previously driven 80 times.

Federal Rule 11's curb on "litigation abuse," however, has come at an apparently steep price. Judges, attorneys, litigants and scholars complain about excessive Rule 11 litigation,[6] about heightened adversariness, about Rule 11 as a strategic weapon, about the inhibition of creative lawyering and about diminished access to the courthouse for "marginal" litigants.[7] In particular, early empirical research suggests a disproportionate impact upon small plaintiffs and plaintiffs' attorneys.[8] For example, an attorney in a small plaintiffs-oriented firm recently faced six Rule 11 motions in litigating various employment discrimination cases in federal and state courts. The sanction requests were filed by defense counsel from large firms as one paragraph tag-alongs

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Schwarzer, *Revisited*] (Rule 11 "has certainly deterred some frivolous, wasteful or abusive litigation"); *accord* Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L.L. REV. 341, 362 nn.100-02 (1990) [hereinafter Yamamoto, *Efficiency's Threat*).

[5] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 362.

[6] Vairo, *Rule 11: A Critical Analysis*, 1118 F.R.D. 189, 199 (1988). Professor Vairo notes that "[p]rior to 1983, there were only a handful of reported Rule 11 decisions. Between August 1, 1983 and December 15, 1987, 688 Rule 11 decisions have been reported, 496 district court opinions and 192 circuit court opinions." According to Judge Schwarzer, aside from the reported decisions, "there are presumably many more unreported rulings granting or denying sanctions under rule 11." Schwarzer, *Revisited*, *supra* note 4, at 1013. Similarly, a search through LEXIS reveals that since 1989, 294 decisions dealing with Rule 11 have been handed down in the federal circuit courts alone. (LEXIS, Genfed library, Cir files). *See* Section III(A), *infra*.

[7] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 365, 370 (quoting Judge Carter, "Rule 11 has not been wielded neutrally and . . . applications of the rule evince 'extraordinary substantive bias' against certain minority claims"). Another commentator "argues that courts have applied amended rule 11 too broadly as a tool for docket management and that they have thus, in many cases, undermined the value of open access to court embodied in the liberal pleading regime of the Federal Rules of Civil Procedure." Notes, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987). Similarly, Professor LaFrance states that "Rule 11 now represents a direct challenge to congressional policy, of nearly fifty years' duration, that the courts should be open, not closed, to the public." LaFrance, *Federal Rule 11 And Public Interest Litigation*, 22 VAL. U.L. REV. 331, 345 (1988).

[8] *See infra* text accompanying note 232-41.

at the end of defendants' memos in opposition to motions filed by the attorney. The attorney actually prevailed on some of the underlying motions. All sanction requests against the attorney were denied.[9] All drained resources from the attorney's firm. Most, to some extent, placed the firm's survival at risk. The attorney characterized those "routine" sanction requests as "major threats" against individual litigants and small firms.[10]

Rule 11's identified problems in federal courts are traceable to several sources. Three are particularly relevant to state courts. First, several federal courts have established low thresholds for finding Rule 11 violations, thereby encouraging Rule 11 litigation;[11] second, disagreements among the federal circuits about the construction and application of the rule have inhibited the development of uniform standards about technical aspects of the rule;[12] and third, conflicts about values of court access have led to sharply divergent conceptions of the appropriate impact of the rule upon "marginal" social and political groups and attorneys likely to represent them.[13] For these reasons, Judge Schwarzer commented that "[i]n interpreting and applying rule 11, the federal courts have become a veritable Tower of Babel."[14]

These problems have compelled some commentators to advocate repealing the federal rule entirely.[15] Others strongly urge guidelines to restrict Rule 11's application.[16] Still others perceive the rule's overall

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[9] The prematurely filed Rule 11 motions themselves would appear to be subject to Rule 11 sanctions. *See infra* text accompanying notes 139-40.

[10] Interview with attorney licensed to practice in the state of Hawaii, November 26, 1990.

[11] *See generally* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 361 *et seq.* For a discussion see *infra* Part III(A).

[12] Schwarzer, *Revisited*, *supra* note 4, at 1013 (citing lack of predictability and the excessive amount of litigation the rule generates as the two major problems associated with Rule 11); *accord* Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 508 (1988) ("inconsistent application has fostered unpredictability, while lack of predictability and the willingness of lawyers to employ rule 11 for strategic purposes and to recoup attorney's fees have led to excessive litigation and corresponding delay and waste").

[13] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 345, 370; LaFrance, *supra* note 7, at 333; Tobias, *supra* note 12, at 487.

[14] Schwarzer, *Revisited*, *supra* note 4, at 1015.

[15] Tobias, *supra* note 12, at 524. *See also* LaFrance, *supra* note 7, at 354.

[16] Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385 (1990) [hereinafter Nelken, *Chancellor*] (advocating amendment); Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988) (suggesting possible guidelines).

operation as salutary and encourage only minor tinkering.[17] The Federal Rules Advisory Committee itself has formally called for comments on several Rule 11 issues, and amendments to amended federal Rule 11 may be in the offing.[18]

Is Rule 11 a pancea or pandora's box? And what does all this mean for state courts adopting federal Rule 11? Simply put, how can state courts draw upon federal court experience to realize the benefits and minimize the problems of Rule 11? Federal and state courts differ in many respects. Some federal court experiences will shed little light on likely state court experience. Other federal court experiences, however, address the heart of interpretive problems likely to be encountered by state courts. One premise of this article is that state courts can learn from but need not recreate federal court experience with Rule 11. This article addresses potential state court experiences with Rule 11 by focusing on the Hawaii state court system. The Hawaii court system has a special opportunity to remake Rule 11 in its own image.[19]

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[17] *See generally* Schwarzer, *Revisited*, *supra* note 4.

[18] Advisory Committee's Call for Comments on Rule 11 (July 24, 1990). The joint comments submitted by section leaders of the Litigation Section of the American Bar Association provide a flavor of the response to the call. Eighty percent of the section leaders responding to a questionnaire indicated that the cost of Rule 11 proceedings, both financial and professional, had exceeded its benefit. Around half favored amending the rule. Thirty-seven percent favored outright repeal. Only ten percent favored retaining the rule as is. 16 A.B.A. LITIG. NEWS 4 (Feb. 1991).

[19] There are only two reported Rule 11 cases from the Hawaii state courts, both arising prior to the recent amendment to the rule. *See* Tobosa v. Owens, 69 Haw. 305 (1987), 741 P.2d 1280 (1987); Salud v. Financial Sec. Ins. Co., Ltd., 7 Haw. App. 329, 763 P.2d 9 (1988). A third case, Coll v. McCarthy, No. 14105 (Haw. Jan. 11, 1991), decided by the Hawaii Supreme Court, cites new Rule 11 without discussion and without employing it as the basis of decision.

The recent Rule 11 cases discussed in this article are from the several federal circuits. Reported Hawaii cases emanating out of the Ninth Circuit include Maisonville v. F2 Am., Inc., 902 F.2d 746 (9th Cir. 1990) (sanctions affirmed for a frivolous motion for reconsideration); Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772 (9th Cir. 1990), *cert. denied*, 110 S.Ct. 3216 (1990) (sanctions affirmed for filing a second removal petition); Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989) (sanctions affirmed against client for a good faith mistake of law and for premature filing of an action); *In re* Hawaii Federal Asbestos Cases, 871 F.2d 891 (9th Cir. 1989) (sanctions affirmed for a motion for summary judgment not well grounded in facts and law); Soules v. Kauaians For Nukolii Campaign Committee, 849 F.2d 1176 (1988) (sanctions against plaintiff reversed despite plaintiff's similar unsuccessful arguments in opposition to developer's intervention in a similar prior state court action).

Reported Rule 11 cases from the United States District Court for the District of

In 1987, Professor Yamamoto discussed the potential role of managerial judges in the Hawaii state court system.[20] Hawaii's court-annexed arbitration program and other alternative dispute resolution programs siphon away many of the smaller, less complicated cases formerly handled by the circuit courts, leaving the courts with a greater proportion of cases suited potentially to some type of qualitative judicial management. Yamamoto viewed the federal version of Rule 11 potentially as one aspect of civil judges' managerial powers.[21]

> Rule 11 provides the managerial judge with the authority to control "unreasonable" filings (pleadings and motions) through the application of a tighter standard for sanctioning frivolous filings . . . . By design, this modestly heightens attorney responsibility to conduct an initial investigation, reduces stress on the court and litigants and minimizes costly future fighting over meritless positions. *Assuming a sensitive judicial touch*, this can be achieved without returning to the byzantine intricacies of a code pleading system and without limiting access to the courts or . . . inhibiting the assertion of novel yet plausible theories of law.[22]

According to this view, Rule 11 may bear potential managerial benefits for Hawaii's courts, provided that the rule is properly conceived and sensitivity applied. In Part III of this article, we draw upon approaches of the Third, Fifth and Ninth Circuit Courts of Appeal and develop our view of a "proper conception" of Rule 11—that it is most appropriately viewed as an extraordinary remedy to be cautiously employed; that its operation is salutary if, but only if, the rule is limited to deterring clearly ill-conceived or improperly motivated fil-

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Hawaii include National Consumer Coop. Bank v. Madden, 737 F. Supp. 1108 (D. Haw. 1990); Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1458 (D. Haw. 1990); *In re* Anthony Greco, 113 Bankr. 658 (D. Haw. 1990); GWC Restaurants, Inc. v. Hawaiian Flour Mills, 691 F. Supp. 247 (D. Haw. 1988); Robinson v. Ariyoshi, 676 F. Supp. 1002 (1987); Lapin v. United States, 118 F.R.D. 632 (1987); All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. 645 (1987); Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612 (1987); Bush v. Rewald, 619 F. Supp. 585 (D. Haw. 1985).

The foregoing list of cases is based upon a LEXIS search and an examination of additional sources. The list is not exhaustive.

[20] Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395 (1987) (hereinafter, Yamamoto, *Case Management*).

[21] *Id.* at 455.

[22] *Id.* at 405. (emphasis added).

ings.[23] As the Ninth Circuit recently stated, sanctions should be "reserve[d] . . . for the rare and exceptional case where an action is clearly frivolous . . . or brought for an improper purpose."[24] Rule 11 is "not a panacea intended to remedy all manner of attorney misconduct."[25]

Much has changed since Yamamoto's 1987 article, and more information is available now. One goal of this article, therefore, is to update and rethink technical aspects of Yamamoto's 1987 article.[26] Another

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[23] This conception of Rule 11 is one of several. It places high value on court access. Reasonable arguments can be advanced for other conceptions that encourage more frequent use of the rule. We endeavor to address those arguments throughout Sections II and III.

Other state courts have generally embraced this limited conception of the sanctioning process. California and Illinois state courts, for example, have experienced substantial sanctioning litigation. Both court systems generally have adopted an "extraordinary remedy" approach to sanctions in part to minimize sanctioning litigation and its adverse effects.

California courts have interpreted California's statute authorizing sanctions for "bad faith actions" or "frivolous tactics" to require a finding of bad faith in all instances. Summers v. City of Cathedral City, 225 Cal. App. 3d 1047, 275 Cal. Rptr. 594 (Cal. App. 4 Dist. 1990). Frivolousness is thus equated to bad faith. The rationale for this limiting approach is that: "(a) an action that is simply without merit is not by itself sufficient to incur sanctions; (b) an action involving issues that are arguably correct, but extremely unlikely to prevail should not incur sanctions; and (c) sanctions should be used sparingly in the most egregious conduct situations." *In re* Marriage of Flaherty, 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179 (1982). Even those decisions defining frivolousness as something less than subjective bad faith recognize a high threshold for sanctioning. *See* On v. Cow Hollow Properties, 222 Cal. App. 3d 1568, 272 Cal. Rptr. 535 (Cal. App. 1 Dist. 1990) (applying an objective test to determine whether the filing was totally and completely without merit or for the sole purpose of harassment).

The Illinois court system's sanctioning rule initially followed Federal Rule 11. It was amended as Rule 137 in 1989 to soften its harsh effects. The amendment made the imposition of sanctions discretionary upon a finding of a violation of the reasonableness standard—the federal rule mandates sanctions. In addition, the Illinois courts have imposed procedural safeguards to prevent strategic misue of the sanctioning rule. *See* Geneva Hosp. Supply, Inc. v. Sanberg, 172 Ill. App. 3d 960, 527 N.E.2d 611 (1988) (requiring the party seeking sanctions to support its motion with specific facts and argument). As a practical matter, Illinois courts have employed Rule 137 and its predecessor sparingly. Timberlake & Plonk, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 Loy. U. Chi. L.J. 1027, 1048 (1989). We thank Norman Kato for his research on these issues.

[24] Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336 (9th Cir. 1988).

[25] Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

[26] The 1987 article's generally salutary although somewhat cautious tone is trans-

goal is to offer a conception of Rule 11 for the state courts that addresses salient criticisms of federal Rule 11.

Part I provides a brief history and discusses the purposes of federal Rule 11. Part II attempts to clarify selected Rule 11 technical issues, to reconcile conflicting federal circuit court positions on those issues and to suggest an interpretive path for the Hawaii courts.

Part III addresses two problematic consequences of Federal Rule 11: 1) excessive Rule 11 litigation and heightened adversariness, and 2) the inhibition of common law development and the discouragement of court access. To address these problems Part III suggests that state courts such as Hawaii's quickly adopt firm guidelines for Rule 11 *and* embrace the concept of Rule 11 as an exceptional remedy for only clearly inappropriate filings.

I. History And Purpose: An Emphasis On Deterrence

What are Rule 11's purposes? Three different purposes have been espoused: deterrence, compensation and punishment.[27] Is one purpose more important than the others? An early study revealed that many judges tended to ascribe multiple purposes to Rule 11 and that, as a partial result of the purpose emphasized, the sanctions selected varied in type and severity.[28]

The United States Supreme Court clarified recently that the central purpose of federal Rule 11 is to "deter baseless filings."[29] This deterrence rationale is consistent with the views of most of the federal circuits,[30] the comments of the Advisory Committee[31] and the overall

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formed here into an approach of substantial caution. More problems have materialized than initially anticipated. *See* Yamamoto, *Case Management*, *supra* note 20.

[27] Untereiner, *supra* note 16, at 905. (citations omitted).

[28] *See* Kassin, *An Empirical Study of Rule 11 Sanctions* (Federal Judicial Center 1985); *see also* Untereiner, *supra* note 16, at 906.

[29] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2454 (1990).

[30] Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *In re* Kunstler, 914 F.2d 505, 522 (4th Cir. 1990); Thomas v. Capital Sec. Inc., 836 F.2d 866 (5th Cir. 1988) (*en banc*); Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987); Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990) (*en banc*); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *But see* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 934 (1988).

[31] The Advisory Committee's note states that "[t]he word 'sanctions' in the caption . . . stresses a deterrent orientation in dealing with improper pleadings, motions, and other papers." Fed. R. Civ. P. 11 advisory committee's note.

efficiency emphasis of federal procedural reforms.[32] Commentators also generally agree that deterrence, rather than compensation or punishment, should be the rule's primary goal.[33] A consensus has thus developed that the federal rule's primary purpose is to make attorneys "stop, think and inquire" before filing, not to shift litigation expenses from winner to loser, and not to inflict punishment. Of course, a sanction in the form of attorneys' fees may be compensatory in effect, and any sanction will be viewed as a form of punishment of the rule violator. Compensation and punishment, however, are now viewed in federal courts as incidents to sanctions imposed to make attorneys think and inquire before filing.

To achieve its purpose the federal rule was amended in 1983 to create a sharp "disincentive for careless or abusive filings."[34] The Advisory Committee commented then that the rule's new objective reasonableness standard for defining frivolousness "is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation."[35] There is no longer a "pure heart, empty head" excuse for misfilings.[36]

The rule change attempted to address a multitude of apparent litigation sins. The connecting thread among those sins: the use of tenuously grounded filings to gain a strategic litigation advantage. This encompassed a plaintiff's filing of a completely meritless complaint to generate nuisance value as well as a powerful defendant's blitzkrieg of unnecessary motions and discovery filings to overwhelm a plaintiff (and plaintiff's attorney) possessing limited resources.

The rule change also emphasized attorneys' dual loyalties—as zealous advocates on behalf of clients *and* as officers of the court in pursuit of justice.[37] By clarifying attorneys' loyalties and by focusing on attorney

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[32] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4; Tobias *supra* note 12; Yamamoto, *Case Management*, *supra* note 20.

[33] For commentators in accord, see Schwarzer, *Revisited*, *supra* note 4, at 1020; Vairo, *supra* note 6, at 203; LaFrance, *supra* note 7, at 351; Untereiner, *supra* note 16, at 904; and Nelken, *Chancellor*, *supra* note 16, at 399.

[34] Yamamoto, *Case Management*, *supra* note 20, at 432. For a discussion of the history of amended federal Rule 11, see *id.* at 428-31.

[35] *Id.* at 432.

[36] Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

[37] *See* Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 842 (1st Cir. 1990)("While [a lawyer] must provide 'zealous advocacy' for his client's cause, we encourage this only as a means of achieving the court's ultimate goal, which is finding the truth")(elipses

conduct, the rulemakers hoped to employ Rule 11 along with other amended rules to achieve the larger goal of improved systemic efficiency.[38]

II. Technical Issues

The text of Rule 11 raises three "interconnected and interpretive issues." Specifically, 1) *What* conduct is sanctionable? 2) *Who* should be sanctioned? 3) *Which* type of sanction is appropriate.[39] These primary issues, referred to here as "technical issues," will be addressed in turn along with other subsidiary Rule 11 issues concerning the timing of sanction motions, due process, the standard of appellate review, frivolous appeals, voluntary dismissals, malpractice and removal.

A. Sanctionable Conduct

Rule 11 scrutiny is triggered when an attorney or party signs and files a "pleading, motion or other paper."[40] Under amended Rule 11:

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in original); Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987)("while enthusiasm and innovation in advocacy are to be encouraged, an attorney is under a correlative obligation to conduct himself in a manner consistent with the proper functioning of the judicial system"); Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir. 1989)(*en banc*)("The legal system creates duties to one's adversary and to the legal system. . . . The duty to the legal system . . . is to avoid clogging the courts with paper that wastes judicial time and thus defers the dispositions of other cases or, by leaving judges less time to resolve each case, increases the rate of error.").

[38] Rule 11 is now to be viewed as part of the "general effort by the courts and Congress to address delay and expense in civil proceedings caused by various inappropriate litigation tactics." Zaldivar v. City of Los Angeles, 780 F.2d 823, 829, n.5 (9th Cir. 1986). Federal Rules 16 and 26 were also amended in 1983 to address problems of delay and excessive cost. *Id.* Hawaii Rules of Civil Procedure 26(b)(1), 26(f) and 26(g) were amended in 1990 along with Rule 11 to conform to the amended federal rules.

[39] Untereiner, *supra* note 16, at 905.

[40] The term "other paper" is not one that will generally cause confusion in applying Rule 11. However, what constitutes an "other paper" merits some attention simply because Rule 11 was not meant to govern every aspect of a litigation. The Ninth Circuit attempted to clarify the scope of papers governed by Rule 11 in *Zaldivar*, 780 F.2d at 830, by discussing when Rule 11 should not apply. The Court noted that Rule 11 is not "properly used to sanction the inappropriate filing of papers where other rules more directly apply." For example, Rule 26(g) is the appropriate vehicle to sanction abusive discovery requests and Rule 56(g) deals with affidavits for motions for summary judgment. The court cautioned that "[t]o apply Rule 11 literally to all papers filed in the case, including those which are the subject of special rules, would risk the denial of the protection afforded by those special rules."

> The signature of the attorney constitutes a certificate by the signer that the signer has read the pleading, motion or other paper, that to the best of the signer's knowledge, information and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[41]

By *signing* a pleading, motion, or other paper, the attorney or party *certifies* two things: 1) she has conducted reasonable inquiry and determined that the filing is well grounded in fact and warranted by prevailing law or a plausible argument for change in law (sometimes referred to as the "frivolousness" clause of the rule); *and* 2) the filing is not filed for a purpose that is "improper" (sometimes referred to as the "improper purpose" clause of the rule).[42]

The key to sanctionable conduct under Rule 11 is thus the "frivolousness" and "improper purpose" certification requirements.[43] The attorney or party who signed the filing is sanctionable if she signed the filing in violation of either certification requirement.[44] In *Zaldivar v. City of Los Angeles*, the Ninth Circuit observed that since Rule 11 provides that a filing must be "well grounded in fact and . . . warranted by existing law . . . *and* [must not be] interposed for any improper purpose," the two clauses operate independently and the violation of either constitutes a violation of the rule.[45]

The initial inquiry, therefore, is what conduct violates the "frivolousness" or the "improper purpose" clauses of the rule.

1. What conduct violates the "frivolousness" clause?[46]

An attorney or party violates the frivolousness clause if she fails to inquire reasonably into the factual and legal bases of a filing. By filing,

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[41] FED. R. CIV. P. 11. (emphasis added).

[42] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

[43] Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("the key to rule 11 lies in the certification flowing from the signature to a pleading, motion, or other paper in a law suit. . . . [R]ule 11 . . . deals with the signing of particular papers in violation of the implicit certification invoked by the signature"). *Accord* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988); United Energy Owners v. United Energy Management, 837 F.2d 356, 365 (9th Cir. 1988).

[44] *Zaldivar*, 780 F.2d at 832. *See also* Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987).

[45] *Zaldivar*, 780 F.2d at 832.

[46] We use "frivolousness" as a shorthand reference. Rule 11 does not use the word

she certifies that she has conducted a reasonable inquiry and that the filing is "well-grounded in fact" and is "warranted by law" or a plausible argument for change in law. The following is a brief conceptual sketch of the separate aspects of the frivolousness clause. It builds upon, often quoting from, the more detailed 1987 article.[47] Other recent articles and studies provide additional depth and guidance.[48]

a. Reasonable inquiry

Rule 11 imposes an affirmative duty to reasonably investigate the basis of a claim, defense or motion before filing. Judicial inquiry on a Rule 11 motion focuses initially on what investigative steps the attorney took before certifying the filing. Whether the investigation was "reasonable" depends on the circumstances of each situation. Relevant factors include:

> [H]ow much time for investigation was available to the signer; whether [s]he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper, whether the pleading, motion or other paper was based on a plausible view of the law; or whether [s]he depended on forwarding counsel or another member of the bar.[49]

The level and type of experience and the resources of the attorney might also be pertinent.[50] The reasonableness standard embodied in Rule 11 thus is flexible. It is to be applied in a manner that accom-

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frivolous. HAW. REV. STAT. § 607-14.5 (Supp. 1990) uses "frivolous" as the standard for attorneys fees awards against *parties* (not attorneys). Coll v. McCarthy, No. 14105, (Haw. Jan. 11, 1991), equates the statutory term "frivolous" with "bad faith." *Id.* at 11. Bad faith was the standard embodied by Rule 11 prior to its recent amendment.

[47] *See* Yamamoto, *Case Management*, *supra* note 20, at 432-38 for a more thorough discussion.

[48] *See* Vairo, *supra* note 6; Schwarzer, *Revisited*, *supra* note 4; Tobias *supra* note 12.

[49] FED. R. CIV. P. 11 advisory committee's note.

[50] Yamamoto, *Case Management*, *supra* note 20, at 433. At least two federal courts have identified the level and type of legal experience of counsel as a relevant factor. *See, e.g.*, McQueen v. United Paperworkers Int'l Union Local 1967, No. C-1-84-1196 (S.D. Ohio, Feb. 26, 1985) (inquiry into expertise attorney may aid court in assessing reasonableness of counsel's conduct under rule 11); Huerrig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctions appropriate where the two attorneys who signed the complaint had seven and twelve years experience and held themselves as labor law specialists, thus raising strong inference that their bringing of action was for improper purpose).

modates the realities of law practice and should not impose unduly onerous or unrealistic investigative burdens upon counsel.[51]

b. Well-grounded in fact

For most filings, reasonable factual inquiry includes thorough discussions with the client and important witnesses[52] and a review of available documents.[53] Rule 11 is designed to eliminate the "file first, ask later" approach, it does not, however, require the equivalent of substantial discovery before filing. Where a party and attorney are unable to obtain important information through informal investigation, they have discharged their duty of reasonable inquiry.[54] It is the omission or misstatement of material fact, avoidable through ordinary investigation and analysis that is the focal point of the reasonable factual inquiry requirement.[55]

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[51] How will judges actually account for the realities of law practice in the context of Rule 11 standards? The answer touches upon several interrelated variables: the judge's commitment to Rule 11's purposes, the judge's perception of the demands of law practice and the judge's sense of what was fair to have asked of the particular attorney in light of his experience and resources. Yamamoto, *Case Management*, *supra* note 20, at 433.

[52] Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983) (personal interviews with client and key witnesses).

[53] Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984).

[54] *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)(reasonableness of plaintiff's factual inquiry must be assessed in light of the availability of relevant information); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)("The amount of investigation required by Rule 11 depends both on the time available to investigate and the probability that more investigation will turn up important evidence; the Rule does not require steps that are not cost justified."); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (*en banc*)("The determination of whether a reasonable inquiry into the facts has been made in a case will, of course, be dependent upon the particular facts; however, the district court may consider such factors as the time available to the signer for investigation . . . [and] the feasibility of a prefiling investigation. . . . "); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 262 (E.D. Mich. 1985)("The difficulty of investigating prior to the initiation of a lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the 'reasonable inquiry' standard.").

[55] *See* S.A. Auto Lube, Inc. v. Juffy Lube Int'l, Inc., 842 F.2d 946, 949 (7th Cir. 1988)(sanctions affirmed on appeal for frivolous removal petition where counsel had ample time, opportunity, and readily available sources to discover the actual corporate

c. Warranted by law or a good faith argument for change in law

Rule 11's frivolousness clause also requires reasonable inquiry to determine whether the filing is warranted by law or a good faith argument for a change in the law. If a filing is *either* "warranted by law" *or* supported by a plausible argument for change in law, the filing is deemed legally reasonable. The attorney need not specify whether her position is based an existing law or on an argument to change the law.[56]

(i) warranted by law

In *Zaldivar v. City of Los Angeles*,[57] the Ninth Circuit addressed the standard for determining whether a pleading or motion is warranted by law. The court noted that under Rule 11's "warranted by law" requirement, the pleader "need not be correct in [her] view of the law."[58] She need only advance a plausible interpretation of the law.[59] Frivolousness will be found only if "it is patently clear that a claim has absolutely no chance of success under existing precedents."[60]

(ii) plausible argument for change in law

Advocacy of positions foreclosed by prevailing precedent does not itself constitute a Rule 11 violation. "[G]ood faith argument[s] for the

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citizenship of one of its co-defendant corporations); *In re* Haw. Fed. Asbestos Cases, 871 F.2d 891, 896-97 (9th Cir. 1989)(motion for summary judgment not well-grounded in fact because testimony by critical witnesses clearly created a disputed issue of material fact); Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772, 775 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3235 (1990)(second petition for removal not well-grounded in fact where prior petition based on same arguments was previously rejected; Ninth Circuit stated that "[a] second presentation of the same, previously rejected, theory to the same court fairly defines 'frivolous'").

[56] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

[57] 780 F.2d 823 (9th Cir. 1986).

[58] *Id.* at 830.

[59] *Id.* at 833.

[60] Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1986), *cert. denied*, 484 U.S. 918 (1987).

The Seventh Circuit states that "[i]n most cases the amount of research into legal questions that is 'reasonable' depends on whether the issue is central, the stakes of the case, and related matters that influence whether further investigation is worth the costs"). Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932-33 (7th Cir. 1989) (*en banc*).

extension, modification, or reversal of existing law" fall squarely within the bounds of permissible conduct.[61] This good faith standard is a marked departure from the subjective intent standard of former Rule 11. "Good faith arguments" are to be measured objectively: Did counsel, following reasonable inquiry, have *any reasonable basis* for her arguments to change the law?[62]

The interpretive key is the meaning attributed to "any reasonable basis."[63] Some federal courts have interpreted the concept narrowly, implying that an argument for change in law that is not likely to succeed is unreasonable and therefore sanctionable.[64]

That interpretation tends to create problems of chilling creative advocacy and inhibiting common law development and court access—problems discussed more fully in Section III.

Those Rule 11 problems have compelled some commentators to urge and other courts to adopt a much higher sanctioning threshold.[65] Counsel's legal arguments need not bear a high probability of success so long as they are objectively defensible; that is, they have some plausible basis in developing lines of legal or social thought.[66] This interpretation of "any reasonable basis" and "good faith," objectively measured, is consistent with the Advisory Committee's stated intent. Recognizing the importance of access for people with potentially mer-

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[61] FED. R. CIV. P. 11.

[62] *See generally Eastway*, 762 F.2d 243.

[63] Many interpretations have emerged. One commentator asserts that this is "[b]ecause judges have not been guided by a general theory for evaluating the plausibility of legal arguments, they have depended on their own individual notions of good legal argumentation and have produced varied and inconsistent results." Notes, *Plausible Pleadings*, *supra* note 7, at 638.

[64] *See, e.g.*, Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988); *See also* Notes, *Plausible Pleadings*, *supra* note 7, at 639, citing Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13 (1984).

[65] *See* Yamamoto, *Case Management*, *supra* note 20, at 437; Note, *The Dynamics of Rule 11*, 61 N.Y.U. L. REV. 300, 324 (1986); Schwarzer, *Revisited*, *supra* note 4, at 1018; Notes, *Plausible Pleadings*, *supra* note 7, at 644-51; Nelken, *Chancellor*, *supra* note 16, at 405; LaFrance, *supra* note 7, at 354; Untereiner, *supra* note 16, at 914; Tobias, *supra* note 12, at 518.

See also Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) *cert. denied*, 480 U.S. 918 (1987); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987)(*en banc*); Operating Eng'rs v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988)(*en banc*).

[66] Yamamoto, *Case Management*, *supra* note 20, at 437.

itorious although unconventional claims or novel defenses, the comments to the amended federal rule specifically note that Rule 11 is not meant to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories"[67]

2. What conduct violates the improper purpose clause?

Rule 11's second clause prohibits filing for an improper purpose. This certification requirement has generated conflict over appropriate standards for judging attorney conduct.

a. Objective standard

An objective test is to be employed for evaluating whether a filing was for an improper purpose. No inquiry need be made into the attorney's or party's subjective state of mind.[68] Instead, courts are to "inquire[] into whether the signer's actions under the circumstances, as objectively measured, manifested a desire to harass or delay.[69]

The focus of inquiry is not on the actual consequences of the signer's act or the subjective intent of the signer. It is on whether reasonable people would agree that under the circumstances the signer "was misusing judicial procedures as a weapon for personal or economic harassment."[70] Several of the federal circuits have adopted the objective standard to decide improper purpose violations.[71] This is the approach we suggest for the Hawaii courts.

b. Relationship of frivolousness and improper purpose clauses

Cases from the Fourth, Fifth, and Ninth Circuits collectively yield the following guide: filings that satisfy the requirements of the frivo-

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[67] FED. R. CIV. P. 11 advisory committee's note.

[68] In determining reasonableness according to an objective standard, a court may consider as a relevant circumstance the signer's subjective beliefs "*if* such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed nonetheless." *In re* Kunstler, 914 F.2d 505, 519 (4th Cir. 1990) (emphasis added).

[69] FED. R. CIV. P. 11 advisory committee's note.

[70] Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986).

[71] *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); *In re* Kunstler, 914 F.2d 505, 519 (4th Cir. 1990); Sheets v. Yamaha Motors Corp., U.S.A., 891 F.2d 533 (5th Cir. 1990); *Zaldivar*, 780 F.2d 823 (9th Cir. 1986).

lousness clause are rarely sanctionable under the improper purpose clause.[72] Only in unusual circumstances should the filing of a pleading or motion which is well-grounded in fact and law constitute sanctionable conduct, even though one of the filer's motive for filing may have been other than to advance the merits of the asserted position. Thus, for example, the "political inspiration" for a suit "does not necessarily mean that the action is 'improper.'"[73]

Complaints particularly are to be scrutinized with extreme caution.

> [T]he reason . . . is that the complaint is . . . the vehicle through which [plaintiff] enforces his substantive legal rights. Enforcement of those rights [also] benefits . . . the public, since bringing meritorious lawsuits by private individuals is one way that public policies are advanced. As we recognized in *Zaldivar*, it would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.[74]

The Ninth Circuit has outlined two of the relatively rare situations where "non-frivolous" filings might nevertheless be deemed sanctionable harassment. First, the "filing of excessive motions . . . even if each is well grounded in fact and law, may under particular circumstances be 'harassment' under [r]ule 11."[75] Second, the "filing of [an] action in federal court, after the rejection in state court of its legal premise" might constitute harassment "under the second prong" of Rule 11, provided that there "exist[s] an identity of parties in the successive claims, and a clear indication that the proposition urged in the second claim was resolved in the earlier one."[76]

3. What is the time frame for assessing sanctionable conduct?

Whether an attorney's conduct is sanctionable is determined by the attorney's conduct up to the time of filing. This "measuring point" is

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[72] *See generally* Westlake N. Property Owners v. Thousand Oaks, 915 F.2d 1301 (9th Cir. 1990); Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990) (*en banc*); Sheets v. Yamaha Motors, Corp., U.S.A., 891 F.2d 533, 538 (5th Cir. 1990); *In re* Kunstler, 914 F.2d 505, 518 (4th Cir. 1990).

[73] *Zaldivar*, 780 F.2d at 834.

[74] *Townsend*, 914 F.2d at 1140. *See also Kunstler*, 914 F.2d at 520 (urging courts to "exercise special caution when evaluating a signer's purpose under Rule 11).

[75] Yamamoto, *Case Management*, *supra* note 20, at 440.

[76] *Id.* The Fifth Circuit has similarly held that "[a]lthough the filing of a paper for an improper purpose is not immunized from rule 11 sanctions simply because it is well grounded in fact and law, only under unusual circumstances—such as filing of excessive motions—should the filing of such a motion constitute sanctionable conduct." Sheets v. Yamaha Motors Corp., U.S.A., 891 F.2d 533, 538 (5th Cir. 1990).

suggested by the language of the rule[77] and is consistent with the Advisory Committee's comment that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable . . . at the time the [filing] was submitted."[78]

The certification requirements of new Rule 11 are thus tested at the time of filing.[79] State courts such as Hawaii's are therefore encouraged not to impose a continuing obligation to reevaluate a pleading, motion, or other paper after filing. This position is consistent with the Advisory Committee's comment and the rulings of federal courts generally.[80] Imposing a continuing obligation to reevaluate would encourage Rule 11 motions whenever later discovery contradicts earlier stated positions.

Rule 11 does embody an indirect reevaluation requirement. Rule 11 requires that reasonable inquiry support each filing.[81] A party or attorney is sanctionable for *subsequent* filings that continue to assert a claim, defense or argument that has proven, through subsequent discovery or investigation, to be completely meritless.

4. Must the entire filing be "frivolous"?

Professor Yamamoto posed the following questions in 1987:

> Must every allegation in a complaint (or every argument in a motion) fail the reasonable inquiry test before rule 11 is violated? Or does an "unreasonable" claim (or argument) in an otherwise well-grounded filing constitute a rule 11 violation as to the unreasonable part?[82]

In his answer to these questions, Professor Yamamoto rejected the then Ninth Circuit approach that the "entire pleading, motion, or other

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[77] Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

[78] FED. R. CIV. P. 11 advisory committee's note. *See* Yamamoto, *Case Management*, *supra* note 20, at 437.

[79] Yamamoto, *Case Management*, *supra* note 20, at 437.

[80] *Oliveri*, 803 F.2d at 1274; Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (*en banc*); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990); Corporation of the Presiding Bishop v. Associated Contractors, 877 F.2d 938, 942 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1133 (1990).

[81] *Thomas*, 836 F.2d at 874. *See also* Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987).

[82] Yamamoto, *Case Management*, *supra* note 20, at 438.

paper must fail" before sanctions are to be imposed.[83] Instead, he argued that even though some of the assertions in a filing met the reasonable inquiry requirement, those that did not should be subject to Rule 11 sanctions.[84] Yamamoto reasoned that this approach better addressed the problem of "undue litigant and court costs arising out of the shotgun method of litigating."[85]

The Ninth Circuit has since reversed its position, as has Professor Yamamoto.[86] In *Townsend v. Holman Consulting Corp.*, a majority of the court, sitting *en banc*, recently overruled *Murphy v. Business Cards Tomorrow, Inc.*[87] which advanced the "pleading as a whole" rule. The majority held that each aspect of a filing must pass Rule 11 muster, explaining that "[i]t would ill serve the purpose of deterrence to allow, as does *Murphy*, a 'safe harbor' for improper or unwarranted allegations."[88] *Townsend* brought the Ninth Circuit into accord with the Second and Seventh Circuits.[89]

Judge Canby's concurring opinion in *Townsend* articulates a contrary approach, one that we now suggest the state courts seriously consider. Judge Canby opted for the "pleading as a whole" approach.[90] Based on a literal reading of the rule, which provides that the attorney signing a document certifies that "it" is well grounded in fact and law, he concluded that the language of the rule requires that the filing be read in its entirety.[91] Sanctions are appropriate only if the "filing as a whole" can be viewed as frivolous.

Judge Canby recognized that the *Murphy* rule was subject to abuse by attorneys who might file one plausible claim amidst several frivolous

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[83] *Id.* at 438 (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986)).

[84] Yamamoto, Case Management, *supra* note 20, at 438-39 (citing Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985)).

[85] *Id.* at 439.

[86] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990)(*en banc*).

[87] 854 F.2d 1202 (9th Cir. 1988).

[88] *Townsend*, 914 F.2d at 1142.

[89] *See* Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209 (7th Cir. 1990).

[90] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1145 (9th Cir. 1990)(*en banc*)(Canby, J., joined by Pregerson, J., concurring).

[91] *Id.* at 1146.

ones. He nevertheless concluded that the *Murphy* rule constituted a lesser evil than the majority's approach.[92]

> A party against whom a well-founded claim has been pleaded must, in any event, come into court and defend against that claim. The major goal of Rule 11, to avoid wholly unjustified litigation, has been achieved. . . . It may be an inconvenience for such a defendant to have to address other, frivolous claims, but that can be done by motion, usually without great hardship. Often the facts will be clearer at the time of such a motion, and if the plaintiff persists in opposing dismissal or summary judgment when it is apparent that a claim is without foundation, that is the time to consider sanctions.[93]

Judge Canby evinced special concern about the effects of majority's approach—that it would chill vigorous advocacy and stimulate satellite litigation by encouraging attorneys to scrutinize every filing "to find isolated deficiencies that may lead to a shifting of fees."[94]

> An attorney or litigant who files a complaint with several well-founded claims may be subjected to sanctions for tacking on an additional claim that is determined to be not well-founded. Such a flexible rule invites after-the-fact scrutiny of pleadings to find isolated deficiencies that may lead to a shifting of fees. . . . [T]he lack of a "bright line" rule is sure to lead to widely varying standards being applied by trial courts, and to greatly increased satellite litigation over sanctions.[95]

Judge Canby's comments are insightful, perhaps compelling. At the same time, the majority's view is understandable—that the "pleading as a whole" rule tolerated, and arguably even encouraged, the inefficient shotgun approach to litigation. The call is a close one. Our suggestion is that the state courts, such as Hawaii's, follow Judge Canby's approach essentially for the reasons he articulated.[96] In addition

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1146 (9th Cir. 1990)(*en banc*)(Canby, J., joined by Pregerson, J., concurring).

[96] The counter-argument can be summarized as follows. Under Rule 11, the attorney signing certifies that she has made reasonable inquiry into her document's factual and legal foundations. Rule 11 mandates, therefore, reasonable inquiry as to each claim or argument asserted. The burden thereby imposed should not be undue because Rule 11 also takes into consideration various factors which define "reasonable" inquiry under the unique circumstances of each case. Moreover, since courts are instructed to focus on what was reasonable at the time of filing, the document "reasonably" well-founded at the time of filing but later discovered to be meritless is insulated from Rule 11 sanctions.

to those reasons, the "pleading as a whole" approach is consistent with the conception of Rule 11 as an extraordinary remedy for clear misfilings.[97] The high threshold reflected in this approach is likely to discourage nitpicky scrutinizing of each filing and dampen potential attorney tendencies toward commonplace use of Rule 11. It focuses inquiry onto the prefiling conduct of the attorney in justifying the filing as a whole. And it does not discourage the common and seemingly appropriate practice of asserting one solidly grounded position along with one that "pushes the envelope."[98]

B. Persons Sanctionable

According to Rule 11, sanctionable persons include "the attorney, the party, or both."[99] When should the attorney be sanctioned? The client/party? Or both? If the attorney is sanctioned, can her firm also be sanctioned? We start with a premise not readily apparent from the text of Rule 11: the person responsible for the frivolous filing should be the person sanctioned.[100]

1. The attorney, the party or both

The attorney normally is, and should be, the person sanctioned. In most instances, the attorney prepares and signs the document filed.

When is a client/party sanctionable? Reported decisions imposing sanctions against a client alone are rare.[101] Sanctions against a client/party are imposed even though the client itself did not sign the document filed.[102] Client sanctions thus run counter to the notion that Rule 11 imposes obligations upon the *signer* of the filing. This apparent inconsistency is resolved by agency theory.[103] The signing attorney is acting as an agent of the client.

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[97] *See infra* Section III.

[98] *See The Right Stuff* (the movie). *See infra* Section III about Rule 11's potential for chilling vigorous advocacy.

[99] FED. R. CIV. P. 11.

[100] *See* Untereiner, *supra* note 16, at 910.

[101] Vairo, *supra* note 6, at 227.

[102] Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 569-70 (1986); Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989).

[103] "Even though it is the attorney's signature that violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497 (2d Cir. 1989). *See generally* Link v. Wabash, 370 U.S. 626 (1962) (client bound by attorney's decisions under agency theory).

Problems arise, however, with agency theory. Client control over a filing is usually minimal. The attorney selects the legal arguments, sorts relevant from irrelevant facts and prepares the filing. The attorney usually decides whether to file and what to assert. For this reason, the Second Circuit has limited the application of agency theory. It has held that the district courts may not sanction a client unless the party moving for sanctions shows that the client had "actual knowledge that filing the paper constituted wrongful conduct."[104] We encourage serious consideration of this approach.[105] Caution is thus in order whenever a court is contemplating sanctions against a client/party.[106]

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[104] Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989). Relying upon a statutory prohibition against "frivolous" filings, the Hawaii Supreme Court recently held that sanctions against a *party* are appropriate if the filing is "so manifestly and palpably without merit, so as to indicate bad faith on the [pleader's] part such that argument to the court [is] not required." Coll v. McCarthy, No. 14105, slip op. at 11 (Haw. Jan. 11, 1991).

In addition, the Eleventh Circuit has held that if sanctions against a client are proposed, specific notice to the client must be given, because the client is probably unaware that Rule 11 even exists. Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)(*en banc*).

[105] The Ninth Circuit's approach differs: the circuit applies a strictly objective standard to both attorneys and clients. Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989). Sanctions imposed on a client/party were thus affirmed on an appeal from an order of the United States District Court for the District of Hawaii, even though the client apparently made a good faith mistake regarding the law. *Lloyd*, 884 F.2d 409. *Lloyd* involved alleged copyright infringements. However, the transfers of the copyrights were not filed with the United States Copyright Office prior to the commencement of the suit. The Ninth Circuit stated that "[t]he fact that Lloyd himself made a good faith error of law provides no refuge." *Id.* at 413.

Apparently, Lloyd's attorney did not conduct any independent research to verify whether the copyright laws had in fact been complied with before suit was filed. The opinion is unclear, however, as to whether Lloyd's attorney was also sanctioned for merely relying on his client's representations. If only the client was sanctioned in *Lloyd*, then this case should be viewed as an anomaly which should not be followed by the Hawaii courts.

Again, we urge the Hawaii courts to adopt, or at least to seriously consider, the Second Circuit's more cautious approach. It is noteworthy that the United States Supreme Court has recently granted *certiorari* to review the appropriateness of the objective standard as applied to clients/parties. *See* Business Guides, Inc. v. Chromatic Communications Enter., Inc. and Michael Shipp, 892 F.2d 802 (9th Cir. 1989), *cert. granted*, 110 S.Ct. 3235 (1990).

[106] Parties sanctionable under Rule 11 also include persons who proceed *pro se*. The circuits do not appear to have carved out any exception for *pro se* these types of litigants. *See* Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)(Rule 11 by

The court should, as a preliminary matter, determine which clause of Rule 11 has been violated and then determine responsibility for the violation.[107] When a filing is not warranted by law, the attorney should generally be the person sanctioned. In these situations, the client would not normally be in a position to judge the validity of, or to urge the attorney to make, questionable legal arguments.[108]

When, however, a filing is not well-grounded in fact, the attorney or client, or both, can properly be sanctioned. In these situations, the court will generally have to make a more detailed inquiry into responsibility for factually unsupported filings. If a client knowingly provides false information, then the client might properly be sanctioned. The attorney would also be sanctionable if under the circumstances she failed to inquire sensibly about the client's sources of information.[109]

2. *The law firm*

In *Pavelic & LeFlore v. Marvel Entertainment Group*,[110] the district court imposed Rule 11 sanctions on an attorney and that attorney's firm after finding that the forgery claim in plaintiff's complaint had been insufficiently investigated by counsel.[111] The Supreme Court reversed the order of sanctions as to the law firm.[112] The Court reasoned that sanctions against a signer's law firm conflicted with the clear language of the rule imposing sanctions upon "the *person* who signed [the paper]."[113]

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its terms applies to *pro se* parties); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990) (Rule 11 applies to anyone who signs a paper).

This treatment is consistent with the Advisory Committee Notes which state that "[a]mended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper." FED. R. CIV. P. 11 advisory committee's notes. However, the Advisory Committee Notes also appropriately provide that "[a]lthough the standard is the same for unrepresented parties . . . the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations." *Id.*

[107] *See* Untereiner, *supra* note 16, at 914-16 (establishing guidelines for deciding which party should be sanctioned).

[108] *Id.* at 914.

[109] *Id.* at 915-16.

[110] 110 S.Ct. 456 (1989).

[111] *Id.* at 457.

[112] *Id.* at 460.

[113] *Id.* at 459.

C. Types Of Sanctions

What type of sanction is appropriate for a Rule 11 violation? This question has vexed the rule's drafters,[114] the circuit courts[115] and commentators.[116] The confusion is traceable initially to the text of Rule 11. The rule mandates sanctions for violations. It also, however, gives the trial court enormous discretion to fashion an "appropriate" sanction.[117]

The rule provides little guidance to the trial court about what constitutes an "appropriate" sanction. The only type of sanction identified is "a reasonable attorney's fee."[118] Perhaps for that reason the federal courts have tended to impose monetary sanctions.[119] The absence of other types of sanctions in the text of Rule 11 is unfortunate. Out of sight, out of mind may be the operative principle. Courts rarely impose sanctions in the form of apologies, reprimands, community service or continuing education. The federal courts' emphasis on monetary sanctions and the sizeable amount of well-publicized awards[120]

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[114] The Advisory Committees's Call for Comments on Rule 11, at 4 (July 24, 1990). Question #6 of the Call specifically addresses the "appropriateness" of the range of sanctions imposed.

[115] The sheer volume of circuit court opinions addressing the appropriateness of the type of sanction is indicative of the confusion. *See, e.g.*, Oliveri v. Thompson 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 (1987); *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988)(*en banc*); Foval v. First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126 (5th Cir. 1988); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209 (7th Cir. 1990); Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986)(subsequent history omitted); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987)(*en banc*).

[116] *See* LaFrance, *supra* note 7; Untereiner, *supra* note 16; Tobias, *supra* note 12; Schwarzer, *Revisited*, *supra* note 4; Nelken, *Chancellor*, *supra* note 16; Vairo, *supra* note 6; Yamamoto, *Case Management*, *supra* note 20.

[117] FED. R. CIV. P. 11. "If a . . . paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose . . . an *appropriate* sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." (emphasis added).

[118] *Id.*

[119] *See* Untereiner, *supra* note 16, at 911; Tobias, *supra* note 12, at 499.

[120] *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990) ($123,000); Blue v. United States Dept. of the Army, No. 88-1364 (4th Cir. 1990)($85,000); Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986) (subsequent history omitted)($250,000); Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989)(approximately $1,000,000); Harris v. Marsh, 679 F. Supp. 1204 (E.D. N.C. 1987)($84,000).

have exacerbated Rule 11's potential for chilling vigorous advocacy.[121] Small firm and public interest attorneys are especially impacted.[122] The emphasis on monetary sanctions has also encouraged some courts to view Rule 11 as essentially a fee-shifting device.[123]

The Fifth Circuit has offered an apparently productive approach to the problem of selecting an appropriate sanction. In its *en banc* decision in *Thomas v. Capital Security Services, Inc.*,[124] the Fifth Circuit acknowledged that attorney's fees *may* be the appropriate sanction in a given case. The court observed, however, that a district court's broad discretion in choosing a sanction was designed as a "safety valve" to reduce the pressure imposed by the rule's mandatory sanctioning provision.[125] The court recognized judges' understandable favoring of monetary sanctions in light of the rule's textual reference to attorney's fees.[126] The court nevertheless rejected routine reliance on attorneys' fees as "the appropriate" sanction. It emphasized that a sanction should be fashioned in a manner that furthers the rule's purpose. Since the rule's primary purpose is to make attorneys stop, think and investigate before filing, and not to compensate, the court "specifically adopt[ed] the principle that the sanction imposed should be the least severe sanction adequate" to that purpose.[127]

Examples of "appropriate" non-monetary sanctions are "a warm friendly discussion on the record, a hard-nosed reprimand in open

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[121] Professor Nelken argues that "[b]ecause attorney's fees have so dominated the sanctions picture under Rule 11, and the fees awarded have often been substantial, the chilling effect of the rule's mandatory sanctions provisions is magnified. . . . As long as fees remain the sanction of choice, lawyers will ask for them; and both the volume of sanctions litigation and its chilling effect are unlikely to decline markedly." Nelken, *Chancellor*, *supra* note 16, at 399. *See also* Tobias, *supra* note 12, at 500-01.

[122] *See infra* Section III(B)(2).

[123] *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1988), *cert. dismissed*, 485 U.S. 901 (1988); Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1985) ("Rule 11 is a fee-shifting statute"). Professor Vairo comments that "as the awards under Rule 11 become greater, the rule will be seen as a fee-shifting device. As that occurs, there will be a natural increase in Rule 11 motions." Vairo, *supra* note 6, at 204. According to Professor Tobias, "the willingness of attorneys to employ Rule 11 for strategic purposes and to recoup attorney's fees has led to excessive litigation and has created corresponding delay and waste." *See* Tobias, *supra* note 12, at 508; Schwarzer, *Revisited*, *supra* note 4, at 1015-18.

[124] 836 F.2d 866 (5th Cir. 1988)(*en banc*).

[125] *Id.* at 877.

[126] *Id.* at 878.

[127] Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988)(*en banc*).

court, [and] compulsory continuing legal education."[128] As the *Thomas* court noted, "[s]anctions should also be educational and rehabilitative in character and, as such, tailored to the particular wrong. . . . [T]he district court should carefully choose sanctions that foster the appropriate purpose of the rule, depending upon the parties, the violation, and the nature of the case."[129] We suggest that state courts seriously consider the Fifth Circuit's approach in *Thomas*.

Where a fee award is deemed appropriate, the court should explain the basis of the award so that a reviewing court may determine whether the sanction imposed was appropriate.[130] Several factors are relevant: 1) the reasonableness of the fees sought;[131] 2) the minimum sanction necessary to deter future misconduct;[132] 3) the party/attorney's ability to pay;[133] and 4) other "factors relevant to the severity of the Rule 11

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[128] *Id.*

[129] *Id.* at 877. This approach is also advocated by Professor Tobias. "Courts also should levy the kind of sanctions which are the least severe necessary, keeping in mind that there are many alternatives less onerous than attorney's fees, especially non-monetary ones." Tobias, *supra* note 12, at 521. *See also* Vairo, *supra* note 6, at 204. Professor Nelken also asserts that "[t]he Fifth Circuit's formulations of the primacy of deterrence in choosing sanctions under Rule 11 and the importance of fashioning the sanction chosen so that the least 'severe sanction adequate' to the violation is used are essential to mitigating the rule's potential chilling effect." Nelken, *Chancellor*, *supra* note 16, at 398.

[130] *In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990); Matter of Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986) (subsequent history omitted).

[131] *Kunstler*, 914 F.2d at 523 (The factors in this analysis were enumerated in this order in White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990), and were relied upon by the Fourth Circuit in this case.). The Ninth Circuit has stated that "an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fees," and, thus, "[r]ecovery should never exceed those expenses and fees that were reasonably necessary to resist the offending action." *Yagman*, 796 F.2d at 1185; *see also* Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990).

[132] *Kunstler*, 914 F.2d at 523, 524 (noting that "[i]t is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice"); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)(*en banc*); *White*, 908 F.2d at 684-85.

[133] Professor Vairo observes that "most courts are trying to insure that the sanctions are fair, reasonable, and bear some relation to the party or attorney's ability to pay and responsibility for the offending litigation." Vairo, *supra* note 6, at 229. The Fourth Circuit has even stated that "a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion." *In re* Kunstler, 914 F.2d

violation."[134] In addition, where fees are sought, the moving party has a duty to mitigate expenses.[135]

D. Related Issues

In addition to what constitutes sanctionable conduct, who should be sanctioned and which types of sanctions are appropriate, other technical issues warrant at least brief discussion.

1. When should a Rule 11 motion be filed?

No set guidelines exist for determining when a sanctions motion is to be brought.[136] One federal circuit has held that equitable considerations are the only limits to the trial court's discretion.[137] Another circuit has emphasized that the party moving for Rule 11 sanctions must make the motion within a "reasonable time."[138]

505, 524 (4th Cir. 1990).

The following circuits consider the party's ability to pay a proper factor in determining a fee award: Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) (subsequent history omitted) ("ability to pay, in our view, is a relevant factor in determining reasonableness"); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)("it is well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay"); *White*, 908 F.2d at 685.

[134] *Kunstler*, 914 F.2d at 523 (such other factors include "the offending party's history, experience, and ability, the severity of the violation . . . [and] the risk of chilling the type of litigation involved. . . ."). *Id.* at 524-25; *see also*, *White*, 908 F.2d at 685. This list is not exhaustive.

[135] The duty to mitigate is actually a sub-issue of the "reasonableness" requirement imposed when attorney's fees are sought. The Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have adopted the mitigation requirement. *See In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988)(*en banc*); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990); *Yagman*, 796 F.2d at 1185; White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990). *See also* Tobias, *supra* note 12, at 521; Vairo, *supra* note 6, at 229.

[136] The text of Rule 11 states only that the court shall impose sanctions on a violating party "upon motion or upon its own initiative." FED. R. CIV. P. 11.

[137] Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165, 1167 (4th Cir. 1986)("In the absence of an applicable local rule in the district court, the only time limitation arises out of those equitable considerations that a district judge may weigh in his discretion.").

[138] Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988) ("Of course, a party should make a Rule 11 motion within a reasonable time.").

The United States Supreme Court recently provided additional guidance. It indicated that the Advisory Committee anticipated that for pleadings the sanctions issue should generally be determined at the end of the litigation, and that for a motion, a reasonable time after the motion is decided.[139]

According to these guidelines, an attorney should not make a Rule 11 request until the allegedly frivolous or improperly motivated filing has been dismissed or denied. For example, a motion to dismiss a complaint should not be accompanied by a Rule 11 request. The tag-along Rule 11 request is premature and inappropriate. The court may find the complaint sufficient and deny the 12(b)(6) motion, in which case the defendant's Rule 11 request itself would be wasteful and possibly sanctionable.[140] At a minimum, we suggest that all Rule 11 requests be raised by motion with supporting memorandum—that a one sentence request at the end of a memorandum without citation or argument be deemed insufficient to trigger an obligation to respond.

A variant of the guidelines offered by the Supreme Court, and one that we suggest that state courts consider, is that all Rule 11 motions be filed at the *end of the litigation.*[141] There are several potential benefits. First, the trial/motions judge will see a complete rather than piecemeal picture of ostensible Rule 11 activity. Second, the time involved in briefing and hearing the motions will likely be considerably less if the motions are consolidated rather than separately pursued. Third, case settlements will likely obviate the need for sanction's motions in many cases.

The principal problem with this "end of litigation" approach is that it may in some instances distort settlement negotiations. The threat of collective Rule 11 motions may occasionally be a strong bargaining chip. Negotiations may be distorted because Rule 11 bargaining will usually address an *attorney's liability* rather than the client's, creating a

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[139] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[140] In concept, this type of tag-along Rule 11 motion may or may not be unreasonably grounded in fact or law. Since the plaintiff's complaint is evaluated according to plaintiff's conduct at the time of filing, defendant technically could file a Rule 11 motion anytime after plaintiff filed. The defendant's tag-along motion, however, is still "unreasonable" in another sense. It wastes everyone's time and resources whenever the underlying dispute is resolved against the defendant.

[141] Note, however, that requiring Rule 11 motions to be filed at the end of litigation *does not* abrogate the court's or opposing counsel's responsibility to provide reasonable notice to the offending party that such a motion is being contemplated. *See infra* text accompanying notes 142-48.

potential conflict between attorney and client during settlement negotiations with the opposing party about the *client's* best interests.

It is a close call, warranting careful scrutiny.

2. What process is due?

The Federal Rules Advisory Committee stated that procedure for the imposition of sanctions must satisfy due process.[142] The Advisory Committee did not, however, specify what process is due. Instead the committee noted:

> The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.[143]

As might be expected the type of process due under Rule 11 varies from circuit to circuit. Several federal circuits hold that Rule 11 does not require a formal sanction hearing.[144] Even those circuits, however, hold that due process requires that the violating party receive notice of the motion for sanctions and an opportunity to "present opposing argument."[145]

In addition to the notice of the motion for sanctions and an opportunity to respond, both of which are required by due process, the Advisory Committee and some circuit courts have addressed another type of notice. They encourage if not require notice to the Rule 11 violator of the violation *before the filing* of a sanctions motion, thereby giving the violator the chance to withdraw the filing or to remedy its

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[142] FED. R. CIV. P. 11 advisory committee's note.

[143] *Id.*

[144] Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)("The rule does not contemplate elaborate procedural requirements and does not require a hearing in every case."); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 107 (1987)(noting that due process must be afforded in Rule 11 cases, the court concluded that "[t]his does not mean, necessarily, that an evidentiary hearing must be held"); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)(*en banc*)("Rule 11 does not require that a hearing separate from trial or other pretrial hearings be held on Rule 11 charges before sanctions can be imposed.").

[145] *Bryer*, 915 F.2d 1556("[w]hat is required is notice and an opportunity to present opposing argument"); *Donaldson*, 819 F.2d at 1560, ("The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions.").

defects.[146] Early notice is encouraged to eliminate the need for later sanctions motions.

> Such early notice . . . will serve to warn the attorney that he risks incurring substantial sanctions, which will in turn increase the likelihood that meritless claims and motions will be abandoned and additional money and judicial resources will be saved. This procedure administers the paramount aim of deterrence and, simultaneously, eliminates the danger of an unsuspected punitive award.[147]

Early notice, in any reasonable form,[148] makes eminent sense.

3. Must the judge record findings?

Must the judge record findings if she imposes Rule sanctions? The answer is no and yes. No, findings are not required by the language

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[146] The Advisory Committee Notes state explicitly that "[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." Notice can from the opposing party, the court, or both. FED. R. CIV. P. 11 advisory committee's note.

In Matter of Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986) (subsequent history omitted), the Ninth Circuit stressed the *court's* duty to provide early notice to a violating party. In this particular case, the district court imposed a $250,000 sanction against an attorney for the attorney's misconduct throughout the entire litigation process without once providing notice that the court was contemplating sanctions. The Ninth Circuit reversed and remanded stating that "in situations where a complaint or other paper is obviously and recognizably frivolous when filed, or as circumstances lead the court to strongly suspect that a filed paper may not be well-grounded in fact or law, the court should *at a minimum* provide notice to the certifying attorney that Rule 11 sanctions will be assessed at the end of trial if appropriate." *Id.* at 1183-84 (emphasis in original). *See also Donaldson*, 819 F.2d at 1560.

[147] *Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986). *See also Donaldson*, 819 F.2d at 1560 ("An attorney or party should be given early notice that his or her conduct may warrant Rule 11 sanctions"). *See also Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 879 (5th Cir. 1988) (*en banc*) (Fifth Circuit's linking of a duty to mitigate damages with a duty to notify early the violator of the violation to allow for self-correction).

[148] *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (*en banc*) ("We see no basis for requiring that in all instances notice be in writing and with the formality of pleadings."). *See also Thomas*, 836 F.2d at 880 ("In mandating prompt notice, we do not mean to impose upon litigants a duty of notification that requires written notice or notice through the formality of pleadings; nor do we specify a particular time frame in which notice must be given by counsel. Notice may be in the form of a personal conversation, an informal telephone call, [or] a letter. . . ."). The *Thomas* opinion also indicates that a timely Rule 11 motion would satisfy the early notice requirement. However, for the reasons previously discussed in Section II(D)(1), *supra*, tag-along Rule 11 motions should be discouraged.

of Rule 11. Yes, the federal circuits addressing this issue implicitly require findings as a basis for review. Those federal circuits adhere to the view that trial judge findings are essential to appellate review.[149]

The Fifth and Ninth Circuits, for example, take the position that if findings are not made, and the reasons for imposing or rejecting sanctions are not apparent from the record, the case will be remanded.[150] Even circuits that do not specifically adopt the Fifth and Ninth Circuits' approach to a lack of findings require a statement of reasons "when the reason for the decision is not obvious from the record."[151]

Thus, although findings and a statement of reasons are not required by the language of Rule 11, they are deemed necessary for appellate review, "demonstrating that the trial court exercised its discretion in a reasoned and principled fashion."[152] Findings serve additional functions. "[T]hey help to assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation; and . . . their publication enhances the deterrent effect of the ruling."[153]

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[149] *See In re* Ruben 825 F.2d 977, 990-91, (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988)("A district judge faced with a sanction motion must make certain findings determining an award is appropriate. Careful analysis and discrete findings are required, no matter how exasperating the case.").

For circuit court opinions not explicitly requiring findings, but nevertheless, deeming findings essential for appellate review *see* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 882-83 (5th Cir. 1988)(*en banc*); Lloyd v. Schlag, 884 F.2d 409, 413 (9th Cir. 1989)(on appeal from the United States District Court for the District of Hawaii).

[150] *See Thomas*, 836 F.2d at 883. As the Ninth Circuit in Townsend v. Holman Consulting Corp. explained, "[d]istrict courts have broad fact-finding powers in this area to which appellate courts must accord great deference. But we must know to what we defer; when we are not certain of the district court's reasoning, or when we cannot discern whether the district court considered the relevant factors, we must remand." 914 F.2d 1136, 1144 (9th Cir. 1990)(*en banc*).

[151] *See* Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)("In aid of appellate review, 'we do require a statement when the reason for the decision is not obvious from the record'"); *Szabo Food*, 823 F.2d at 1084 ("A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand. This motion was serious; it should have received serious attention; Canteen [the moving party] and this court are entitled to explanations").

[152] Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988)(*en banc*)(quoting Schwarzer, *Rule 11* 104 F.R.D. at 199 [hereinafter Schwarzer, *Rule 11*]).

[153] *Thomas*, 836 F.2d at 883 (quoting Schwarzer, *Rule 11*, *supra* note 152, at 199).

We therefore encourage state courts such as Hawaii's to make findings mandatory. Not only would this aid in appellate review and reduce the need for remands, it would likely encourage careful and deliberate use of the rule.[154]

4. What is the standard of review on appeal?

Professor Yamamoto wrote in 1987 that appellate review has become an important element of judicial efforts to clarify Rule 11 standards.[155] The three-tiered federal standard of review in place in 1987[156] has since been abrogated by the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*[157]

An abuse of discretion standard is now the applicable standard of review for all aspects of a federal district court's Rule 11 decision.[158] *Cooter* proffered two main reasons for the encompassing abuse of discretion standard of review. First, the imposition or denial of sanctions necessarily involves fact-intensive inquiry into the circumstances of the alleged Rule 11 violation. "[O]nly deferential review [gives] the district court the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[159] Second, Rule 11's efficiency goals support an abuse of discretion standard.

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[154] Professor Vairo asserts that "requiring the district court to make findings may lessen the arbitrary use of the rule by leading relatively zealous judges to be more circumspect in finding violations and imposing substantial sanctions." Vairo, *supra* note 6, at 224.

[155] Yamamoto, *Case Management*, *supra* note 20, at 441.

[156] Professor Yamamoto stated that the conceptual "standard of appellate review of Rule 11 decisions is divided into three degrees of deference. First, de novo review is appropriate if the dispute centers upon the legal conclusion that the uncontroverted facts constituted a violation of rule 11. Second, if the facts relied upon by the court are disputed on appeal, review is appropriate under rule 52(a) clearly erroneous standard. Finally, the abuse of discretion standard is applicable to challenges to the appropriateness of the type and extent of the sanctions." *Id.*

In a recent case not involving Rule 11, the Hawaii Supreme Court announced that bad faith determinations are "mixed questions of fact and law," and that fact findings are to be reviewed under the clearly erroneous standard. Coll v. McCarthy, No. 14105, slip op. at 10 (Haw. Jan. 11, 1991). The court also stated, without explanation, that "we review the denial of attorney's fees under the abuse of discretion standard." *Id.*

[157] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[158] *Id.* at 2461.

[159] *Id.* at 2460 (quoting Pierce v. Underwood, 487 U.S. 552, 561-62 (1988)).

> Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.[160]

These reasons, according to the Supreme Court, argue for broad trial court discretion and rely upon the wisdom and front line judgment of district court judges. It is noteworthy that the Federal Rules Advisory Committee and various commentators are now questioning whether too much discretion has been invested in district judges.[161]

5. Does Rule 11 Apply on Appeal?

The United States Supreme Court recently ruled that Rule 11 does not authorize an appellate court to award sanctions on appeal.[162] In *Cooter*, the court of appeals held that respondents were entitled to reimbursement for attorney's fees incurred in defending against a frivolous appeal of a sanctions award. The Supreme Court reversed.

The Court held that Rule 11 by its terms did not apply to appellate proceedings.[163] The Court reasoned that "Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level."[164] The Court also noted that the Federal Rules of Appellate Procedure placed a natural limitation on Rule 11's scope.[165] And limiting Rule 11's ap-

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[160] *Cooter*, 110 S.Ct. at 2460.

[161] Untereiner, *supra* note 16, at 912; *see also* Advisory Committee Call for Comments on Rule 11 (July 24, 1990).

[162] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[163] The Court stated that:

> [Rule 11's] provision allowing the court to include "an order to pay to the other . . . parties . . . reasonable expenses" must be interpreted in light of Federal Rule of Civil Procedure 1, which indicates that the rules only "govern the procedure in the United States district courts." Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings.

Id. at 2461.

[164] *Id.*

[165] On appeal, litigant conduct is governed by Federal Rule of Appellate Procedure 38. The rule provides: "'If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.'" *Id.* at 2461-62.

plication to violations in the district courts served the dual policies of not discouraging meritorious appeals and reducing satellite litigation.[166] Finally, the Court observed that risking one's Rule 11 award in the course of defending it was "a natural concomitant of the American Rule."[167]

In contrast, and for specific reasons, the Ninth Circuit continues to impose Rule 11 sanctions for frivolous appeals.[168] In *Partington v. Gedan*, the Ninth Circuit reviewed its own earlier decision to impose Rule 11 sanctions on appeal.[169] Despite *Cooter*, the court affirmed its imposition of Rule 11 sanctions for an unreasonable appeal. The court deemed *Cooter* inapplicable because *Cooter* did not prohibit a circuit from incorporating Rule 11 standards into its own appellate rules. This the Ninth Circuit had done.[170] The court concluded that Rule 11 sanctions were proper because: 1) Rule 11 was not used as an independent basis of sanctions; and 2) the sanctions awarded were under Rule 11 only insofar as it was incorporated into the Ninth Circuit's Rules of Court.[171]

We suggest rejection of the Ninth Circuit's approach. Incorporating Rule 11 into appellate court rules unnecessarily extends the scope of Rule 11 and generates a conflict with existing appellate rules. Hawaii Appellate Rule 38, for example, already authorizes sanctions to curb "frivolous" appeals.[172]

6. *Removal?*

Removal from state to federal court raises three issues. First, whether federal or state Rule 11 sanctions can be imposed when a state court case is removed and subsequently dismissed by the federal court as frivolous; second, whether sanctions may be imposed when a defendant improperly removes an action; and third, whether federal Rule 11 applies when frivolous or improper papers are filed subsequent to a proper removal.[173]

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[166] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2462 (1990).

[167] *Id.* at 2462.

[168] *See* Partington v. Gedan, 914 F.2d 1349 (9th Cir. 1990) (per curiam).

[169] *Id.* at 1349. The Supreme Court had specifically remanded the case to the Ninth Circuit in light of *Cooter*.

[170] 9TH CIR. R. 1-1.

[171] 914 F.2d at 1350.

[172] HAW. R. APP. P. 38.

[173] The structure of this sub-section is patterned after Professor Vairo's discussion. Vairo, *supra* note 6, at 212.

This first issue is well-settled. Rule 11 does not apply to cases removed from the state courts which are subsequently dismissed by the federal courts as frivolous.[174] In *Kirby v. Allegheny Beverage Corp.*, the Fourth Circuit held that a Rule 11 violation occurs at the time the frivolous paper is "signed".[175] Where a complaint is prepared and signed for state court proceedings, the signer is not subject to the Federal Rules of Civil Procedure at the time of signing.[176] And since later removal divested the state court of jurisdiction, the state court cannot apply its own Rule 11 to impose sanctions after dismissal of the case.[177]

With respect to the second issue, federal Rule 11 does reach improperly removed cases.[178] For example, in *S.A. Auto Lube Inc., v. Jiffy Lube International, Inc.*, the defendant petitioned for removal, wrongly asserting diversity of citizenship.[179] The Seventh Circuit reversed the district court's denial of sanctions, finding defense counsel's pre-filing investigation deficient. The court noted that defense counsel was not pressed for time and did not need to rely on the representations of two other attorneys—simple and readily available sources would have supplied the correct information. "More was required of counsel"[180] prior to removal.

Finally, the law governing the third removal issue is clear: federal Rule 11 governs papers subsequently filed in a properly removed action.[181]

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[174] *See* Kirby v. Allegheny Beverage Corp. 811 F.2d 253 (4th Cir. 1987); Foval v. First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126 (5th Cir. 1988); Schoenberger v. Oselka, 909 F.2d 1086 (7th Cir. 1990); Vairo, *supra* note 6, at 212-13.

[175] *Kirby*, 811 F.2d at 257. *See also* Vairo, *supra* note 6, at 212.

[176] Vairo, *supra* note 6, at 212 ("Because the complaint was not prepared for a federal action, it was not 'signed' in violation of the rule, and therefore could not be the basis for sanctions").

[177] *Kirby*, 811 F.2d at 257. This approach creates an anomaly. If the defendant chose not to remove the case and instead obtained dismissal by the state court, the state Rule 11 would authorize sanctions.

[178] *See* Unanue v. Unanue, 898 F.2d 839 (1st Cir. 1990); Davis v. Veslan Enters., 765 F.2d 494 (5th Cir. 1985); S.A. Auto Lube Inc., v. Jiffy Lube Int'l, Inc., 842 F.2d 946 (7th Cir. 1988). *See also* Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3216, where the Ninth Circuit affirmed the imposition of Rule 11 sanctions against an attorney for improperly petitioning for removal in a Hawaii case.

[179] *S.A. Auto Lube*, 842 F.2d. at 947-48.

[180] *Id.* at 949.

[181] *See* Schoenberger v. Oselka, 909 F.2d 1086, 1088 (7th Cir. 1990). *Cf.* Foval v.

7. Voluntary dismissal?

Can Rule 11 sanctions be imposed after a plaintiff voluntarily dismisses her claim pursuant to Rule 41(a)(1)? The United States Supreme Court recently answered, yes.[182]

In *Cooter*, the Court's majority first decided that a voluntary dismissal under Rule 41(a)(1) does not deprive the district court of jurisdiction to impose Rule 11 sanctions.[183] The majority then announced that Rules 41(a)(1) and 11 are compatible, reasoning that if litigants are allowed to purge their Rule 11 violation by simply dismissing baseless claims, litigants would lose incentive to "'stop, think, and investigate more carefully before serving and filing papers.'"[184]

Justice Stevens dissented, observing that the majority's opinion "vastly expands the contours of Rule 11, eviscerates Rule 41(a)(1), and creates a federal common law of malicious prosecution inconsistent with the limited mandate of the Rules Enabling Act."[185] Justice Stevens contended that Rule 11 and Rule 41(a)(1) work in tandem[186] and that

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First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126, 130 (5th Cir. 1988) ("Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court unless, their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform to Rule 11"). *See also* Vairo, *supra* note 6, at 213.

[182] *See* Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[183] *Id.* at 2457.

[184] The *Cooter* majority stated:

> Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints . . . without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. . . . Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal.

Id.

[185] *Id.* at 2463. (Stevens, J., dissenting).

[186] [Rule 11 and Rule 41(a)(1)] . . . should work in conjunction to prevent the prosecution of needless and baseless lawsuits. Rule 11 requires the court to impose an "appropriate sanction" on a litigant who wastes judicial resources by filing a pleading that is not well grounded in fact and warranted by existing law or a good faith argument for its extension modification or reversal. Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and avoid further proceedings on the basis of that complaint.

Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2463 (1990) (Stevens, J., dissenting).

courts are not unduly burdened by frivolous complaints subsequently withdrawn.[187] Justice Stevens concluded, "when a plaintiff has voluntarily dismissed a complaint pursuant to Rule 41(a)(1), a collateral proceeding to examine whether the complaint is well grounded will stretch the matter long beyond the time in which either the plaintiff or defendant would otherwise want to litigate the merits of the claim."[188] Finally, he predicted that the only result of the majority's holding would be to encourage Rule 11 motions and to discourage voluntary dismissals.[189]

The majority's approach is consistent with the text of Rule 11; a violation occurs at the time a paper is signed.[190] It is also likely to serve the rule's general deterrent purpose. The majority's approach is problematical, however, because it seems to encourage Rule 11 litigation and discourage voluntary dismissals. The majority failed to distinguish between complaints that are known to be meritless at the time of filing and those that are subsequently discovered to be meritless. This omission is likely to encourage defense counsel to file Rule 11 motions whenever a plaintiff dismisses her suit under Rule 41(a)(1).

The arguments about both approaches cut in favor and against. It is a close call. In the context of our premise of establishing high rather than low sanctioning thresholds wherever prudent, we suggest that state courts seriously consider following Justice Stevens' approach and not allow Rule 11 sanctions for complaints voluntarily dismissed under Rule 41(a)(1).

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[187] The filing of a frivolous complaint which is voluntarily withdrawn imposes a burden on the court only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden. By definition, a voluntary dismissal under rule 41(a)(1) means that the court has not had to consider the factual allegations of the complaint or ruled on a motion to dismiss its legal claims.

Id. at 2464.

Justice Stevens also observed that "[i]n those rare cases in which the defendant properly incurs great cost in preparing a motion to dismiss a frivolous complaint, he can lock in the right to file a Rule 11 motion by answering the complaint and making his motion to dismiss in the form of a Rule 12(c) motion for judgment on the pleadings." *Id.* at 2464 n.2.

[188] *Id.* at 2464.

[189] "An interpretation that can only have the unfortunate consequences of encouraging the filing of sanctions motions and discouraging voluntary dismissal cannot be a sensible interpretation of Rules. . . ." *Id.*

[190] *See supra* notes 40-45 and accompanying text.

8. Is a Rule 11 violation also attorney malpractice?

Has the sanctioned attorney by definition committed legal malpractice, exposing her to suit by her own client? Has the sanctioned attorney by definition committed the tort of abuse of process, exposing her to suit by the opposing party. The immediate response that comes to mind is, "of course not." Yet the low threshold sanctioning approach of the Seventh Circuit raises these issues.[191]

For example, in *Hays v. Sony Corp. of America*, the Seventh Circuit observed that Rule 11 itself "defines a new form of legal malpractice" because it "[i]n effect . . . imposes a negligence standard" on the signing attorney.[192] In another case the court stated that Rule 11 "effectively picks up the torts of abuse of process . . . and malicious prosecution."[193] In a third case the court *en banc* noted that "[a]s in tort law, the event sometimes speaks for itself. That is, Rule 11 no less than common law recognizes the doctrine of res ipsa loquitur."[194]

Undoubtedly, this low threshold sanctioning approach of the Seventh Circuit should be rejected. It encourages clients to sue their attorneys and parties to sue opposing counsel. It creates unnecessary conflict in an already highly adversarial process. The mere filing of a Rule 11 motion would place client and attorney in a conflict of interest, since a judge's finding of the attorney's violation of Rule 11 would expose the attorney to an automatic client malpractice action.[195]

III. Avoiding The Pitfalls: Rule 11 As An Extraordinary Remedy To Be Cautiously Employed[196]

Specific Rule 11 concerns have emerged from federal court experience. The Advisory Committee recently called for comments about the excessive cost of Rule 11 litigation and the chilling effects of Rule 11's

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[191] *See* Nelken, *Chancellor*, *supra* note 16, at 388. *See also* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Hays v. Sony Corp. of Am., 847 F.2d 412 (7th Cir. 1988); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*).

[192] *Hays*, 847 F.2d at 418; *accord Mars Steel*, 880 F.2d at 932; *see also* Nelken, *Chancellor*, *supra* note 16, at 388 n.27.

[193] *Szabo*, 823 F.2d at 1083; *see* Nelken, *Chancellor*, *supra* note 16, at 388 n.27.

[194] *Mars Steel Corp.*, 880 F.2d at 932.

[195] *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 570 (E.D.N.Y. 1986).

[196] *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988).

application.[197] The purpose of this section is to describe these concerns and to offer a conception of Rule 11 that may minimize these problems. The concept we offer is a rule that authorizes sanctions only in "exceptional circumstances." It is a concept now generally embraced by the Second, Third, Fifth and Ninth Circuits. If state courts such as Hawaii's establish early and firmly that Rule 11 only addresses clearly careless or wasteful filings, that it is not to be employed routinely and that it is not meant to inhibit thoughtful and creative lawyering or judicial access for the unpopular or disadvantaged, then Rule 11 may still be a valuable tool of the civil litigation judge.

A. Excessive Rule 11 Litigation And Heightened Adversariness

Responding to wide-spread complaints about excessive Rule 11 litigation, the Federal Rules Advisory Committee recently issued a call for comments about cost and benefits of Rule 11: "Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to 'stop and think?'"[198]

No definitive answer is yet forthcoming. Some poignant insights, however, may be drawn from preliminary empirical research on federal court experience with the rule.

Statistics paint a picture of substantial Rule 11 litigation. Between August 1, 1983 and December 15, 1987, the federal circuit courts of appeals and federal district courts reported 688 Rule 11 decisions.[199] This number is much lower than the actual Federal Rule 11 activity.[200] Since 1989 the federal circuit courts of appeals formally reported 294 decisions.[201] One recent article estimates that there have been more than 3000 Rule 11 decisions since the rule's amendment in 1983.[202] Many more Rule 11 motions have been filed or threatened and resolved without formal court action.

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[197] Advisory Committee's Call For Comments On Rule 11 (July 24, 1990).

[198] *Id.* at 3.

[199] *See* Vairo, *supra* note 6, at 199.

[200] Judge Schwarzer notes that, aside from the reported decisions, "there are presumably many more unreported rulings granting or denying sanctions under Rule 11." *See* Schwarzer, *Revisited*, *supra* note 4 at 1013. *See also* Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Procedure 11* (1989).

[201] LEXIS, Genfed library, Cir files.

[202] *See* Joseph, *Supreme Court Shapes Rule 11*, 65 TRIAL (Sept. 1990).

This volume of federal cases is explainable on several grounds. Three are prominent. First, some courts have encouraged wide-ranging use of Rule 11 by adopting low thresholds for finding Rule 11 violations. Second, until recently, many Rule 11 standards have been ambiguous. Third, some courts have appeared to use Rule 11 to signal disfavor for the substance of certain types of filings. As an apparent collective result, Rule 11 litigation in some circuits has proliferated.[203] In those circuits Rule 11 might be characterized generally as a fee-shifting mechanism rather than as an extraordinary remedy for clearly ill-conceived or improperly motivated filings. Attorneys are there encouraged to wield the threat of sanctions as a new strategic litigation weapon.

"Low thresholds," as the term is used here, describes court interpretations of Rule 11's technical requirements that encourage findings of Rule 11 violations even in situations where the filing is not clearly ill-conceived or improperly motivated and where the imposition of sanctions runs counter to other established values. For example, some federal courts' interpretations of Rule 11's reasonable inquiry clause threaten to undermine liberal notice pleading standards.[204] Those courts employ Rule 11 to demand pleading with greater specificity of fact and with an earlier commitment to a definite legal theory than the federal rules regime otherwise requires.[205] Rule 11 in those situations encourages a sanctions motion despite a litigant's pre-filing difficulty in obtaining information and despite the notice pleading philosophy of the rules.

For another example, several federal courts have adopted the position that if any single part of a filing violates Rule 11's reasonable inquiry clause, sanctions are appropriate.[206] This position establishes a low threshold for sanctions; it encourages Rule 11 litigation. As discussed earlier,[207] if each part of each filing is subject to potential Rule 11 sanctions, then both the prevailing and losing party in every case will be encouraged to scrutinize every filing in search of some aspect of

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[203] A recent LEXIS search revealed that in the last year-and-a-half the Sixth and Seventh Circuits have reported one hundred and four appellate decisions. (LEXIS, Genfed library, 6Cir and 7Cir files).

[204] Notes, *Plausible Pleadings*, *supra* note 7, at 633.

[205] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 371-72; Notes, *Plausible Pleadings*, *supra* note 7, at 633.

[206] *See supra* text accompanying note 87-89.

[207] *Id.*

any filing that might support a sanctions motion. Applying such a low threshold would undoubtedly stimulate Rule 11 litigation.

For a third example, some courts allow Rule 11 motions to accompany filings addressing the pending underlying dispute. These premature tag-along motions intensify Rule 11 activity.[208]

One attractive approach to the looming problem of excessive Rule 11 litigation is for state courts to embrace the Ninth Circuit's conception of the rule, articulated in *Operating Engineers Pension Trust Co. v. A-C Co.*, as an "extraordinary remedy" to be "exercised with extreme caution"[209]—that is, to adopt high thresholds in interpreting the Rule's frivolousness clause so that wide-ranging Rule 11 litigation and strategic use of the rule during negotiations of the underlying claim are discouraged. Rule 11 motions need not and should not be the norm. High sanctioning thresholds reflect that policy and still authorize sanctions against the attorney who fails files long after the expiration of the statute of limitations, the attorney who files in state court asserting less than the requisite amount in controversy, the attorney who uses a summary judgment motion simply as a discovery tool and the party who deceives counsel and court about critical facts.

Empirical research indicates that even high sanctioning thresholds function to further the deterrence purpose of the rule. The Third Circuit's year-long study of all sanctioning activity in its district courts revealed that the circuit generally employs high sanctioning thresholds (limiting sanctions to "exceptional" cases of frivolousness) and that Rule 11 still has "effects on the pre-filing conduct of many attorneys in this circuit of the sort hoped for by the rule makers."[210]

High thresholds are also likely to decrease sharply the number of sanction requests, minimizing satellite litigation.[211] One example of a high threshold is the principle that the filing "as a whole" (rather than any aspect of a filing) must fail the frivolousness standard to trigger Rule 11 sanctions.[212] Another example is the principle that there should

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[208] *See supra* text accompanying note 139-40.

[209] Operating Eng'rs Pension Trust Co. v. A-C Co., 859 F.2d 1336, 1345 (9th Cir. 1988).

[210] Burbank, *supra* note 200, at 61-62.

[211] The perception that sanctions requests will decrease as a result of high thresholds is premised on the argument that once attorneys realize that only clearly careless or wasteless filings are sanctionable, they will be less inclined to file sanctions motions. Moreover, a sanctions motion that fails the reasonable inquiry test is itself subject to Rule 11 sanctions. *See* Yamamoto, *Case Management*, *supra* note 20, at 441.

[212] *See supra* text accompanying notes 90-98.

be no continuing obligation to reevaluate the reasonableness of documents already filed. Imposing such an obligation would increase the potential for Rule 11 litigation by encouraging parties to seek sanctions whenever a filing turns out to be less substantially supported by fact or law than initially anticipated.[213]

A third example of a high threshold is an expansive definition of "any reasonable basis" for an argument to change the law.[214] The value justification for these and other high thresholds is discussed in greater depth in the next section (Chilling Access to Courts). The interpretive suggestions in Section II regarding technical issues are formed in part by the preference stated here for high rather than low sanctioning thresholds.

Ambiguous standards also contribute to Rule 11's potential to generate satellite litigation. If Rule 11 standards are unclear, litigation will be encouraged because each party will understandably assert the view of Rule 11 most advantageous to it. Trial court time will be required to resolve the conflicts over standards in each case. For example, if the courts ascribe a compensatory rather than deterrent purpose to the rule and emphasize monetary sanctions, Rule 11 may be seen as essentially a fee-shifting device, encouraging sanctions motions as every prevailing party attempts to recoup its attorney's fees.[215]

Similarly if ambiguity persists about whether there exists a continuing obligation to reevaluate a filing, sanctions litigation will be encouraged whenever subsequent discovery reveals the inadequacy of the initial filing. The increase in Rule 11 litigation will, in turn, increase the likelihood of appeals as the lower courts and litigants attempt to ascertain the standards for Rule 11 application.

The statistics available suggest an overabundance of sanctions motions in certain federal courts. One apparent result is cost that exceeds benefit. Another is that Rule 11 threats among attorneys abound, intensifying already intense adversarial relationships. Still another result is public perception that the bar has simply created another "cottage industry" for lawyers.[216] Excessive Rule 11 litigation would likely pose a very real threat to the resources and integrity of a state's judicial system. The questions, therefore, are whether overuse will continue in

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[213] *See supra* text accompanying notes 77-81.

[214] *See supra* text accompanying notes 61-67.

[215] *See supra* text accompanying notes 118-23.

[216] Vairo, *supra* note 6, at 199.

some federal courts and, more important, whether overuse will characterize Rule 11 in state courts such as Hawaii's.

The answer to these questions appears to be yes, unless Rule 11 is interpreted and applied in the "exceptional" manner suggested by *Operating Engineers*.

B. Chilling Effects

Rule 11's asserted chilling effect has two distinct dimensions.[217] First, the rule, it is argued, inhibits vigorous and creative lawyering, thereby stifling the development of the common law;[218] and second, the rule poses special threats to small plaintiffs' attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups, especially those asserting novel legal theories or reordered social understandings in the form of legal rights.[219]

Judge Schwarzer questions whether federal Rule 11 has chilled advocacy.[220] Others caution that it is either too soon to discern the implications of available statistics or unwise to over-rely on them.[221] The data and commentary of numerous observers, however, indicate that federal Rule 11 has to some extent chilled creative advocacy and disproportionately affected certain types of litigants and attorneys.[222]

Federal and state courts, of course, differ in many respects, and federal question litigation may more often than state litigation navigate through the thicket of social policy issues. State courts, nevertheless, are being called upon increasingly to resolve such issues in the context of environmental conflicts, wrongful job terminations, state law discrimination claims, initiative and referendum challenges, tort and insurance reforms and the like. The impact of Rule 11 on vigorous and creative advocacy and on the accessibility of state courts is likely to be a Rule 11 issue, if not the Rule 11 issue, for the 1990s.

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[217] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 352.

[218] *Id.* at 351, 362; *see also* LaFrance, *supra* note 7, at 342.

[219] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 352; *see also* Tobias, *supra* note 12.

[220] Schwarzer, *Revisited*, *supra* note 4, at 1017.

[221] Tobias, *supra* note 12, at 489 ("It is too soon to discern all of the implications of judicial enforcement for civil rights litigants and attorneys, while caution should be exercised in relying primarily on reported decisions"); Burbank, *supra* note 200, at 99 (caution should be used in relying on statistics of published cases).

[222] *See* Yamamoto, *Efficiency's Threat supra* note 4, at 363; Tobias, *supra* note 12, at 489; Vairo, *supra* note 6, at 201; LaFrance, *supra* note 7, at 353; Notes, *Plausible Pleadings*, *supra* note 7, at 631; *Nelken*, *Chancellor*, *supra* note 16, at 386.

1. Chilling vigorous advocacy and development of common law

"The genius of the common law," according to Professor LaFrance, "has been the capacity to grow and change, and litigation serves a vital role in this process."[223] The development of the many facets of the doctrine of strict products liability is a classic example. LaFrance perceives Rule 11 as interfering with "the healthy process of growth in the law."[224] Indeed, the Third Circuit's recent empirical study noted that Rule 11 has "changed the role of the attorney" and that it tends to reduce the "threshold probability that a lawyer will take a case or pursue an argument."[225] The Federal Rules Advisory Committee was aware of this potential problem from the outset, and it urged that Rule 11 not be applied in a manner that inhibited creative lawyering.[226] Low sanctioning thresholds, however, appear to have that inhibitory effect. Noting that a readily imposed sanction has "implications well beyond [the] particular matter," the Ninth Circuit in *Operating Engineers* observed that such a sanction

> would imply that attorneys in general should exercise little, if any, creativity in their representation of clients, that they should not argue for new but plausible interpretations of agreements, and that they should not read ambiguous cases in the way most favorable to their clients.[227]

The mere receipt of a Rule 11 motion by an attorney and client drives a wedge between them. Client confidence is undermined. The motion suggests to the client that its attorney has acted frivolously. The attorney may respond that she was only trying to push the bounds of the law to help the client; and the motion has simply been filed, not granted. Doubt may nevertheless linger. At worst, has the attorney malpracticed? At best, has the attorney exercised questionable judgment? The effect is chilling.

To minimize Rule 11's chill, the Ninth Circuit in *Operating Engineers* restricted sanctions to the "rare and exceptional case" that is "clearly frivolous." Rule 11, the court indicated, "must not be construed so as to conflict with the primary duty of an attorney to represent his or

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[223] LaFrance, *supra* note 7, at 342.

[224] *Id.*

[225] Burbank, *supra* note 200, at 7.

[226] FED. R. CIV. P. 11 advisory committee's note.

[227] Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988).

her client zealously;" the law is "constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution."[228] The court drew support for its view from Justice Stevens' concurring opinion in *Talamani v. All-State Insurance Co.*[229] That opinion articulated values of court access and recognized a "strong presumption" against the imposition of sanctions for invoking legal process:

> Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self-help . . . The strong presumption is against the imposition of sanctions for invoking the processes of the law.[230]

State courts have evinced similar concern. The Hawaii Supreme Court recently acknowledged, in imposing a statutory assessment of attorney's fees for a manifest case of frivolousness, that fee awards "may have a chilling effect in deterring the filing of lawsuits based on innovative theories or to modify, extend, or reverse existing law."[231]

2. Discouraging court access for "marginal" litigants

There is a second dimension to Rule 11's apparent chill—a dimension that also implicates values of court access. The Advisory Committee's 1990 Call For Comments on Rule 11 evinces special concern for the Rule's disproportionate impact. The Call elicited comments on the following question: "Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties?"[232]

Professor Nelken's study found that plaintiffs were sanctioned four times as often as defendants.[233] The study also revealed that although civil rights filings comprised only 7.6% of the filings for 1983-1985,

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[228] *Id.*

[229] 470 U.S. 1067 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, JJ., concurring).

[230] *Operating Eng'rs*, 859 F.2d at 1344 (quoting *Talamani*, 105 S.Ct. at 1827-28).

[231] Coll v. McCarthy, No. 14105, slip op. at 16 (Haw. Jan. 11, 1991). The court also noted that potential chilling effects had to be balanced against legislative intent to "compensate" victims of frivolous filings. *Id.*

[232] Advisory Committee's Call For Comments On Rule 11, at 4 (July 24, 1990).

[233] Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1328, nn. 96-97 (1986) [hereinafter Nelken, *Sanctions*].

civil rights plaintiffs comprised 22.3% of the Rule 11 cases during that period.[234] Professor Vairo's study similarly suggested that Rule 11 is being used disproportionately against plaintiffs, particularly in "civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies."[235] That study found that 28.1% of reported Rule 11 cases involved civil rights and employment discrimination cases.[236]

The Third Circuit's recent study acknowledged that sanctions were not routine in the circuit. It nevertheless found that Rule 11 had a markedly disproportionate impact on plaintiffs, especially civil rights plaintiffs.[237] Civil rights plaintiffs and their attorneys were sanctioned at a "considerably higher rate" (47.1%) than other plaintiffs in other cases (8.45%).[238]

This empirical research indicates that ready use of Rule 11 has had a disproportionate impact on federal court plaintiffs generally and on non-mainstream claimants particularly. More frequent sanctions against plaintiffs, the initiators of litigation, might be expected. Some judges and commentators have concluded, however, that Rule 11 has not been wielded neutrally,[239] and that federal court applications of the rule have discriminated against certain classes of plaintiffs and attorneys.[240] In particular, sanctions are more likely to be imposed against claimants who are perceived as socially or politically marginal and against "public interest" attorneys or attorneys representing unpopular clients or causes.[241]

Consider a suit against the city by a Filipino immigrant, now Hawaii resident, asserting discriminatory refusal to hire because of his foreign accent. Lowest level clerk position in the Motor Vehicles Licensing Division. The applicant was educated as an attorney in the Philippines in English and had distinguished military and business careers (speaking regularly in English) before moving to Hawaii. He finished first of 721

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[234] *Id.* at 1327.

[235] Vairo, *supra* note 6, at 200.

[236] *Id.*

[237] Burbank, *supra* note 200, at 61-62, 69.

[238] *Id.* at 69.

[239] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 365 (quoting Judge Carter: "'Rule 11 has not been wielded neutrally' and . . . applications of the rule evince 'extraordinary substantive bias' against certain minority claims").

[240] LaFrance, *supra* note 7, at 353 ("It is not only certain classes of *cases* which are being discriminated against but also certain classes of *attorneys*"). (emphasis in original).

[241] *See* Notes, *Plausible Pleadings*, *supra* note 7, at 631.

Civil Service exam takers for the position. He rated first among short list of eligibles. Ten minute interview. The city administrator and secretary decided not to "recommend him because of his accent." (He later established his communication ability by successfully performing at a mid-level state job requiring detailed information gathering over the phone).

Suit is based on antidiscrimination law.[242] Tough claim. Some unresolved legal questions: Is accent an attribute of race or ancestry? Settled law cuts against applicant: Communication ability is a bona fide job requirement and inability to communicate justifies refusal to hire, and the employer effectively decides whether the applicant can communicate. The applicant must argue for an extension of or change in existing law based on reordered social understandings—that if the best qualified applicant can communicate in English, the employer cannot refuse employment even though the general public dislikes hearing his accent. The majority's preference for a familiar accent is an impermissible basis for refusal to hire.

Publicity. Interest grows. Discovery. The applicant loses at trial. The trial judge apparently rejects discrimination theory of inappropriate reliance on mainstream listener preference.[243]

Should Rule 11 sanctions be imposed upon the applicant and his attorney for filing a claim not "warranted by law" or a plausible argument for change in the law? Should this and similar "marginal" cases be discouraged through the use of sanctions? Some federal courts would probably answer yes to both questions, even though sanctions in the form of an attorneys fees award might bankrupt a struggling public interest firm or solo practitioner.[244]

Why have some federal courts embraced such a stringent approach, adopting low sanctioning thresholds? One possible reason is efficiency—a desire to rid the system of "wasteful" suits not based squarely on settled legal norms. Another possible reason is political outlook—a

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[242] *See, e.g.*, HAW. REV. STAT. § 378-2.

[243] This is a modified account of Fragante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1811 (1990). Fragante filed suit in the Hawaii federal district Court alleging violations of federal antidiscrimination law. Fragante's claims could now be brought in state court under state antidiscrimination law. *See* HAW. REV. STAT. § 387 *et seq.* For a discussion of *Fragante* and Rule 11 see Yamamoto, *Efficiency's Threat*, *supra* note 4, at 6.

[244] *See* Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Harris v. Marsh, 679 F. Supp. 1204 (E.D.N.C. 1987).

judicial disfavoring of challenges to established public and private institutional authority. Professor Yamamoto has also argued elsewhere that the seemingly harsh application of Rule 11 reflects deeply held values about court access and the significance of the judicial forum for people of lesser power in society who are seeking to restructure social and political relationships.[245]

The choice between high and low Rule 11 sanctioning thresholds may be characterized, in its simplest form, as a choice between competing values of court access. We will not here repeat the arguments for open court access other than to note that in addition to adjudicating recognized "rights," accessible judicial forums at times have served as part of a needed foundation for community-building, for public education, for participation in the negotiation over social values and for the quest for human decency.[246] Justice Stevens perhaps said it best in *Talamani*:

> Freedom of access to the courts is a cherished value in our democratic society. . . . There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.[247]

We suggest that Rule 11 be viewed in this context by state courts when applied to "marginal" litigants seeking reordered social understandings based on modified or new legal principles.[248] Otherwise, the Rule may well disproportionately impact upon small firms and public interest organizations,[249] resulting in "over-deterrence."

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[245] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 379 ("A value judgment is discernible: in a system based on efficiency, plaintiffs outside society's political and cultural mainstream asserting marginal claims are expendable. Their participation in governmental process through litigation is of insufficient value to warrant systemic openness.").

[246] *Id.*

[247] Talamani v. All-State Ins. Co., 470 U.S. 1067 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, JJ., concurring).

[248] *See generally* Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) ("It is essential that free access to the judicial system be maintained; Rule 11 was not intended to impede such access.").

[249] Rule 11 sanctions escalate the professional and financial risk of litigating cases that are important to bring but difficult to win. Contingent fee, reduced fee,

> It has been urged that to require a lawyer to bear the adversary's full legal expenses through discovery and trial because of the lawyer's signing of a pleading with inadequate pre-signing investigation could in some cases be excessive, resulting in "over-deterrence" causing lawyers to be reluctant to assert even marginally well-founded contentions for fear of a sanction colossal in relation to potential benefit to the client served.[250]

The one million dollar sanction against the "public interest" Christic Institute and its attorneys provides poignant illustration of the "colossal" risk.[251]

We have urged the adoption of high sanctioning thresholds in response to potential problems of disproportionate impact and over-deterrence that so worry the Advisory Committee and commentators.[252] Ultimately, whether the courts choose high rather than low Rule 11

> and pro bono lawyers and public interest firms are most likely to represent minorities raising difficult issues. In so doing, they accept a financial risk. If their clients lose, and they often will, the attorneys receive little or no compensation. For a small firm or public interest law organization, the risk can be significant. If losing, however, also means not only uncompensated time spent but also out-of-pocket payment of defendant's attorney's fees, the risk expands exponentially.

Yamamoto, *Efficiency's Threat*, *supra* note 4, at 370.

[250] Advisory Committee Call For Comments On Rule 11, at 4-5 (July 24, 1990). Professor Yamamoto argues that "what has emerged among many lawyers, judges and commentators is the perception that Rule 11's disproportionate impact on civil rights and other public interest cases dissuades attorneys and litigants from contemplating these types of lawsuits. Sanctions in civil rights cases are sometimes imposed in 'very close cases' and are often imposed for plaintiffs' attorneys' assertions of novel legal theories that courts determine to be unfounded." Yamamoto, *Efficiency's Threat*, *supra* note 4, at 363-64 nn. 107-09. *See also* Tobias, *supra* note 12, at 501. Professor Tobias notes that "sizeable awards in even a few cases, especially those involving civil rights, can discourage individuals and lawyers from commencing and continuing civil rights suits because their lack of resources makes them unusually vulnerable." *Id.* at 501.

Similarly, Professor Nelken observes that the central controversy about Rule 11's mandatory sanctioning provision is the potential chilling effect that that provision has exerted on novel or unpopular claims. She acknowledges the sensitive efforts of the circuit courts to avoid chilling vigorous advocacy. She nevertheless found that the "sheer size of some of the sanctions awards affirmed on appeal must concern all but the most self-sacrificing of lawyers. . . ." Nelken, *Chancellor*, *supra* note 16, at 393.

[251] *See* Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989).

[252] Tobias, *supra* note 12, at 501; LaFrance, *supra* note 7, at 342; Yamamoto, *Efficiency's Threat*, *supra* note 4, at 363; Nelken, *Chancellor*, *supra* note 16, at 386; Vairo, *supra* note 6, at 200.

sanctioning thresholds is likely to turn upon value judgments: that court access should not be sharply impeded by the quest for an efficient, streamlined litigation system; that attorney and litigant fear of creative and vigorous advocacy should not be a price for curbs on careless lawyering; that the legal system should not create another strategic litigation weapon or drive a wedge between attorneys and their clients, heightening the adversariness of an already overly adversarial process. People's value preferences may differ and people may therefore disagree about the appropriateness of high rather than low sanctioning thresholds. We have endeavored to frame the larger debate in terms of values and practical effects to aid in the examination of Rule 11's technical aspects and its long-term appropriateness.

IV. Concluding Thoughts

We have suggested that state appellate and trial courts, such as Hawaii's, quickly and firmly establish high rather than low sanctioning Rule 11 thresholds. In doing so, we embraced certain values and minimized others. Section III described our value ordering and endeavored to explain it in the context of problematic federal court experiences with Rule 11 (excessive sanctioning litigation, the creation of a new strategic litigation weapon, heightened adversariness, disproportionate impact, chilling common law development and court access). Section II examined troublesome "technical aspects" of the rule and offered interpretive paths generally consistent with that value ordering. Some judges, attorneys and commentators may disagree with the values we emphasized and, therefore, the suggestions we made. We encourage response. The symbolic and practical impact of new Rule 11 in Hawaii courts and other state courts is likely to be far-reaching and perhaps irreversible. We have written to stimulate debate within a meaningful context.

That context includes developments in procedural theory that suggest what many judges and litigators sense but what traditional legal theory tends to ignore—that seemingly neutral procedures are not always neutral in collective application and that rules of procedure sometimes markedly affect the outcome of cases and the relationships of parties and attorneys.[253] Procedure has social consequences. Rule 11 particu-

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[253] Burbank, Book Review, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1472-74 (1987); Yamamoto, *Efficiency's Threat*, *supra* note 4, at 393.

larly must be interpreted, applied and evaluated with this in mind. Literal readings of the rule's myriad phrases, narrow citation of isolated doctrinal statements by waffling federal courts, and strategic uses of the rule simply to gain bargaining leverage are a-contextual approaches to Rule 11. They assume that procedure is merely a game, a technical nicety without social consequence. They ignore the impact of procedure on the tenor of relationships of litigants, on the interactions of attorneys and clients, on the availability of legal services, on the public's perception of the legal system, and on the accessibility of courts as instruments of justice.

Rule 11's purpose is to make attorneys and parties "stop, think and investigate" before filing. That is for the better. State appellate and trial courts might best achieve that purpose, without significant adverse side-effects, by insisting upon *Operating Engineers'* concept of Rule 11 as an extraordinary remedy for only clearly ill-conceived or ill-motivated filings. Consistent with that concept, we believe that attorneys need to "stop, investigate and hesitate" before threatening or filing Rule 11 motions, lest Rule 11's promise be transformed into a destructive force. We suggest, for example, that firms create internal Rule 11 screening committees, of three or so experienced attorneys, to evaluate all potential uses of the rule.

Rule 11's impact on state courts is likely to be felt in myriad ways. State courts such as Hawaii's are in a particularly advantageous position to remake federal court experience in their own image.

Deportation of Alien Military Service Personnel

by Ira L. Frank*

I. Introduction

The disposition of criminal cases involving military personnel who are aliens, *i.e.*, individuals neither citizens nor nationals of the United States,[1] poses certain unique problems to both the Armed Forces and the Immigration and Naturalization Service (INS), a component of the United States Department of Justice.

Aliens do serve in the enlisted ranks of the United States Armed Forces. As with every other segment of our society, occasionally an individual within this group is charged with a criminal offense. Prior to the passage of the Immigration Act of 1990,[2] the decision whether to prosecute the serviceman or servicewoman in a court-martial or in a non-military criminal court, could make the difference whether or not deportation from the United States occurred.

It will be shown that with the enactment of the Immigration Act of 1990 (1990 Act), court-martial convictions can be utilized to deport military personnel not possessing United States citizenship or nationality for every ground of deportation that requires a criminal conviction.

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All views expressed herein are those of the author alone and not necessarily those of the U.S. Department of Justice or the Immigration and Naturalization Service.

[1] Immigration and Nationality Act of 1952, § 101(a)(3), 8 U.S.C.A. § 1101(a)(3) (West Supp. 1990) (as amended).

[2] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

However, where their conviction in a court-martial occurred prior to the revision of the law, there is still a need to understand how alien members of the military are to be treated under the immigration laws.

There are military personnel, not citizens or nationals of the United States, convicted in a court-martial prior to the change in the law, whose amenability to deportation differs from those alien members of the military convicted subsequent to the 1990 Act. Soldiers, sailors and airmen convicted in a court-martial of a crime involving moral turpitude prior to the 1990 Act can avoid deportation whenever such a crime serves as the basis for the deportation charge. The views of the various government agencies (INS, State Department, the Army and other branches of the Armed Forces) regarding whether the conviction can be used to establish deportability, remain relevant. In instances where the crime involves moral turpitude, the court-martial conviction will not be able to be used for the purposes of deportation. However, not all components of the federal government agree on this point.

Prior to the advent of the 1990 Act, views differed regarding whether a court-martial conviction could be utilized as a basis for deportation under certain provisions of the Immigration and Nationality Act of 1952 (1952 Act), popularly known as the McCarran-Walter Act.[3] The military justice system and the United States Department of State favored the view that a court-martial conviction could be the basis for an order of deportation notably when the ground for deportation, requires a conviction for a crime involving moral turpitude.[4] The INS and the civilian federal court system have restricted the use of court-martial convictions to particular grounds of deportation, not including the ground that required conviction of a crime involving moral turpitude.

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[3] Immigration and Nationality Act of 1952, ch. 477, 6 Stat. 163 (codified as amended at 8 U.S.C.A. §§ 1101-1557 (West Supp. 1990)).

[4] The term "moral turpitude" was cited with approval by the Attorney General in his opinion of October 13, 1933:

> It is defined as anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not merely be mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude. . . .

37 Op. Att'y Gen. 293 (1933).

This article will explore the ability of the United States government to deport aliens whose convictions existed prior to passage of the Immigration Act of 1990 and its ability to do so subsequent to the effective date of the new law.

This article contends that, although the military may maintain that a court-martial conviction for a crime involving moral turpitude can be the basis of deportation under 8 U.S.C. § 1251(a)(2)(A) both before and after the passage of the 1990 Act,[5] such a conviction cannot be used for cases arising prior to the enactment of the 1990 Act.

II. Jurisdiction of the Court-Martial

Until approximately two years ago, the prosecution of a military offender for a crime committed off a military post was virtually within the exclusive jurisdiction of a civilian court. This changed with the historic United States Supreme Court decision in *Solorio v. United States*.[6]

Prior to *Solorio*, the exercise of subject-matter court-martial jurisdiction depended upon a finding of "service-connection" for the charged offenses.[7] In *Solorio*,[8] the Court overruled this requirement as previously found in *O'Callahan v. Parker*[9] and *Relford v. Commandant, United States Disciplinary Barracks*,[10] based on article I, section 8, clause 14 of the United States Constitution which "grants to Congress the power to make rules for the government and regulation of the land and naval forces."[11] The Court held that the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (UCMJ) to try a member of the United States Armed Forces depends on one factor—the military status of the accused—and does not depend on the service connection of the offense charged.[12] *Solorio* substituted a "status"

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[5] Immigration Act of 1990, § 602(a)(2)(A). This provision replaced § 241(a)(4)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1251(a)(4)(A) (West Supp. 1990) (as amended).

[6] 483 U.S. 435 (1987).

[7] O'Callahan v. Parker, 395 U.S. 258, 272 (1969).

[8] *Id.* at 436.

[9] 395 U.S. 258 (1969).

[10] 401 U.S. 355 (1971).

[11] *Solorio*, 483 U.S. at 438. For a more detailed discussion of *Solorio*, see Morrow, *Solorio v. United States: The Death and Burial of "Service-Connection" Jurisdiction*, 28 A.F.L. Rev. 201 (1988).

[12] *Id.* at 436-39.

test for the old "service-connection" requirement.[13] The result of this decision is that subject-matter jurisdiction depends solely on whether the accused is a military member. The rationale behind the *Solorio* decision is not the central theme of this article and need not be further explored.

The practical effect of *Solorio* is that cases which were previously tried before a civilian criminal court now can be tried before a court-martial. Thus, a threshold decision has to be made whether to try the accused in a civilian criminal trial or by a court-martial. Military and civilian prosecutors will have to evaluate their options and set guidelines to determine in which tribunal charges should be brought.

In determining the guidelines, commentators suggest that civilian and military prosecutors will have to examine several issues:

> [1] Maximum sentence impact in military versus civilian courts.
>
> [2] Whether the civilian court will expend resources to extradite military defendants or incur associated witness fees, if necessary.
>
> [3] Whether civilian law enforcement agencies will relinquish investigative authority over off-base offenses by military subjects to military investigators.
>
> [4] Which judicial system will process the case in a more expeditious manner if the time factor is critical.
>
> [5] The fact that military court-martial does not require prosecution in the same area where the crime was committed.
>
> [6] The ability to prosecute the defendant by military court-martial, as well as in civilian state court without constituting "double-jeopardy."[14]

A component in the decision-making process that may have been overlooked by prosecutors was whether or not the accused military offender was an alien. If prior to the 1990 Act, a conviction for a crime involving moral turpitude could only be used in deportation proceedings when obtained from a non-military court, then failure of the prosecutorial authorities to file charges in the civilian court foreclosed the INS from deporting the alien serviceperson convicted of the crime involving moral turpitude.

III. Grounds for Deporting an Alien Criminal

There are various grounds for deportation based on the criminal activity of the alien. For example, any "alien who at any time after

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[13] *Id.*

[14] Conroy & Lockett, *Implications of* Solorio v. United States *to Military and Civilian Law Enforcement*, 55 The Police Chief 36, 37 (1988).

entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable.''[15] An alien who has been convicted of a violation of any provision of the Military Selective Service Act[16] or the Trading With the Enemy Act[17] is likewise deportable.[18]

Aliens convicted of a crime or crimes involving moral turpitude may face deportation.[19] The basic statutory mandate reads:

> (i) Crimes of Moral Turpitude.—Any alien who—
>
> (I) is convicted of a crime involving moral turpitude committed within five years after the date of entry, and
>
> (II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer is deportable.
>
> (ii) Multiple Criminal Convictions.— Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless

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[15] Immigration Act of 1990 § 602(a)(2)(B)(i), 8 U.S.C.A. § 1251(a)(2)(B)(i) (West Supp. 1991) (21 U.S.C. § 802 (Supp. 1990) defines controlled substances). Section 602(a)(2)(B)(i) replaced § 241(a)(11) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1251(a)(11) (West Supp. 1990) (as amended), which read as follows:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -
>
> . . . .
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

8 U.S.C.A. § 1251(a)(11) (West Supp. 1990).

Section 1751(b) of the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570, 100 Stat. 3207-47 (1986)) amended this paragraph to substitute a reference to controlled substances, effective for convictions occurring before, on, or after October 27,1986. *See* section 343(a) of the Public Health Service Act (42 U.S.C. § 259(a)) for deportation of drug dependent aliens upon their discharge from Public Health Service facilities.

[16] 50 U.S.C. app. §§ 451-473 (1990).

[17] 50 U.S.C. app. §§ 1-44 (1990).

[18] Immigration Act of 1990 § 602(a)(2)(D)(iii), 8 U.S.C.A. § 1251(a)(2)(D)(iii) (West Supp. 1991). This provision replaced § 241(a)(17) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1251(a)(17) (West Supp. 1990) (as amended).

[19] Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991). This provision replaced Immigration and Nationality Act of 1952, § 241(a)(4)(A), 8 U.S.C.A. § 1251(a)(4)(A) (West Supp. 1990) (as amended).

of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated Felony.— Any alien who is convicted of an aggravated felony at any time after entry is deportable.[20]

The term "aggravated felony" means "murder, any illicit trafficking in any controlled substance,"[21] including "any drug trafficking crime,"[22] or "any illicit trafficking in any firearms or destructive devices,"[23] any "offense relating to laundering of monetary instruments"[24], or "any crime of violence"[25] which results in a prison sentence of at least five years.[26] Any attempt or conspiracy to commit such acts have the same effect as the commission of these aforementioned crimes.[27] The term aggravated felony applies to the stated offenses notwithstanding whether it is a violation of state or federal law.[28] The term aggravated felony

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[20] Prior to the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991), the provision for deporting an alien convicted of a crime or crimes involving moral turpitude was found in the Immigration and Nationality Act of 1952, § 241(a)(4)(A), 8 U.S.C.A. § 1251(a)(4)(A) (West Supp. 1990) (as amended). It read as follows:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (4)[(A)] is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; or (B) is convicted of an aggravated felony at any time after entry.
>
> The "(A)" designation was omitted by error. Clause (B) was inserted by section 7344(a)(2) of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690, 102 Stat. 4470 (1988)), applicable to any alien who has been convicted, on or after November 18, 1988, of an aggravated felony.

A list of the most common crimes involving moral turpitude can be found in DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL § 40.7(a)(9), n. N2.3 (1990); 22 C.F.R. § 40.7(a)(9) (1990).

[21] *See* 21 U.S.C.A. § 802 (West Supp. 1990) for the definition of controlled substances.

[22] *See* 18 U.S.C.A. § 924(c)(2).

[23] *See* 18 U.S.C.A. § 921.

[24] *See* 18 U.S.C.A. § 1956.

[25] *See* 18 U.S.C.A. § 16 (West Supp. 1990) (not including a purely political offense).

[26] Immigration Act of 1990 § 501(a), 8 U.S.C.A. § 1101(a)(43) (West Supp. 1991). This provision replaced Immigration and Nationality Act of 1952, § 101(a)(43), 8 U.S.C.A. § 1101(a)(43) (West Supp. 1990) (as amended).

[27] *Id.*

[28] *Id.*

also applies to the offenses enumerated above which result in a violation of foreign law.[29] In foreign law cases the term of imprisonment must be completed within the previous fifteen years to be considered an aggravated felony.[30]

The Board of Immigration Appeals ("BIA" or "Board"), is a quasi-judicial body responsible only to the Attorney General.[31] It is located within the Executive Office for Immigration Review.[32] The Board has appellate jurisdiction to review deportation proceedings.[33] A final decision of the BIA is binding upon the INS.[34]

The BIA has recently defined the term "conviction" as it applies to immigration proceedings. In *Matter of Ozark*,[35] the Board stated that:

> As a general rule, a conviction will be found for immigration purposes where all of the following elements are present:
>
> (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
>
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . . ; and
>
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge.[36]

The Uniform Code of Military Justice ("UCMJ") establishes the judicial rights, procedures, and obligations to be utilized in adjudicating cases before military tribunals.[37] Under this statute, there are three types of courts-martial in each of the Armed Forces: general courts-martial, special courts-martial, and summary courts-martial.[38] Each court-martial is created and staffed in accordance with the UCMJ, and must follow the procedural requirements set forth therein. For example,

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[29] *Id.*

[30] *Id.*

[31] 8 C.F.R. § 3.1(a)(3) (1990). *See* Immigration and Nationality Act of 1952, § 101(a)(5), 8 U.S.C.A. § 1101(a)(5) (West Supp. 1990) (as amended), for the definition of Attorney General.

[32] 8 C.F.R. § 3.1(a)(1) (1990).

[33] 8 C.F.R. § 3.1(b)(2) (1990).

[34] 8 C.F.R. § 3.1(d)(2) (1990).

[35] No. 3044 (BIA 1988) (interim decision).

[36] No. 3044 at 9-10 (BIA 1988) (interim decision).

[37] 10 U.S.C.A §§ 801-940 (West Supp. 1990).

[38] 10 U.S.C.A. § 816.

the court must "announce its findings and sentence to the parties as soon as determined."[39] Such an announcement in effect is the equivalent a civilian court's formal entry of judgment.[40] Accordingly, each determination of guilt by a court-martial will meet the standards of legal sufficiency set forth in *Ozark*, since the alien will have had a formal judgment of guilt entered by a court.

IV. Judicial Recommendation Against Deportation

"Deportation is not a criminal proceeding and has never been held to be punishment."[41] However, deportation itself is a drastic measure. Justice Learned Hand wrote that deportation is to many "exile, a dreadful punishment, abandoned by the comment consent of all civilized peoples."[42]

The 1952 Act and the 1990 Act provide for amelioration or relief from deportation in various instances.[43] Thus, even though an alien is found to be deportable, deportation can be avoided. One such form of relief that is central to the issue of whether or not a court-martial conviction can be used to deport an alien, is known as a judicial recommendation against deportation.[44] This provision, however, has been eliminated by section 505 of the 1990 Act.[45] For cases arising before the elimination of the availability of judicial recommendations against deportation, it is important to thoroughly understand this provision. Aliens granted a judicial recommendation against deportation prior to the 1990 Act retain the benefit. The statute pertaining to judicial recommendations against deportation read:

> The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . (2) if the court

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[39] 10 U.S.C.A. § 853.

[40] Legal Opinion of the Office of General Counsel, Immigration and Naturalization Service (Oct. 6, 1989) (citing United States v. Hitchcock, 6 M.J. 188 (C.M.A. 1979)).

[41] Carlson v. Landon, 342 U.S. 524, 537 (1952).

[42] Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926).

[43] *See* 8 U.S.C.A. § 1158 (West Supp. 1990) (asylum); 8 U.S.C.A. § 1253(h) (West Supp. 1990) (withholding of deportation); 8 U.S.C.A. § 1254(a) (West Supp. 1990) (suspension of deportation); 8 U.S.C.A. § 1254(e) (West Supp. 1990) (voluntary departure); 8 U.S.C.A. § 1255 (West Supp. 1990) (adjustment of status).

[44] Immigration and Nationality Act of 1952, § 241(b)(2).

[45] Section 505 of the Immigration Act of 1990 took effect on the date of the enactment of the 1990 Act and applies to convictions entered before, on, or after such date. This provision removed Immigration and Nationality Act of 1952, § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990) (as amended).

> sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.[46]

The federal government has traditionally reserved the power to deport undesirable aliens.[47] From 1917 until passage of the 1990 Act, the immigration laws have allowed for a judicial recommendation against deportation to be made by a judge (state or federal) sentencing an alien for a crime involving moral turpitude.[48] Prior to the 1990 Act, a state or a federal court judge, by making a recommendation against deportation, could cause an otherwise deportable alien to become nondeportable at least insofar as the crime(s) of moral turpitude pending before that particular court.[49] At the time of sentencing or within thirty days thereafter, the court was able to recommend against deportation.[50] Notice had to be given to the interested parties.[51] The interested parties included the INS, the prosecutor and state officials.[52] Each party had the opportunity to make recommendations in the matter.[53] The recommendation had to be made "at the time of first imposing judgment or passing sentence, or within thirty days thereafter."[54] If this limitation was not met, the recommendation was invalid.[55]

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[46] Immigration and Nationality Act of 1952, § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990) (as amended). The "(a)(4)" stated in the statute relating to judicial recommendations against deportation concerns 8 U.S.C.A. § 1251(a)(4) (West Supp. 1990), the ground for deportation relating to aliens convicted of a crime or crimes involving moral turpitude. The "(a)(11)" refers to the ground of deportation relating to aliens convicted of offenses regarding controlled substances found in 8 U.S.C.A. § 1251(a)(11) (West Supp. 1990).

[47] Appleman, *The Recommendation Against Deportation*, 58 A.B.A. J. 1294 (1972).

[48] *Id.*

[49] Immigration and Nationality Act of 1952, § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.* and 8 C.F.R. § 241.1 (1990). A recommendation against deportation must

It is essential to understand that the term "recommendation against deportation" is a misnomer. When all the procedural requirements of notification have been met and a timely recommendation made by the sentencing court, the "recommendation" absolutely binds the Attorney General.[56] Hence, the INS cannot not use the particular crime as a basis for deporting the alien. Congress vested in the sentencing judge "conclusive authority" to decide whether a particular conviction should be disregarded as basis for deportation.[57] The sentencing court's recommendation, if made in accordance with the statute, must be followed.[58] It is worth noting that if a favorable recommendation against deportation was made, the INS was not precluded from deporting the alien under any other applicable ground of deportation.[59]

In *Janvier v. United States*,[60] the court said:

> [W]hile § 1251(b) speaks in terms of the sentencing court's making a 'recommendation,' it is a recommendation that is binding on the Attorney General, for the section has consistently been interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation. . . . Those in charge of the deportation process, the immigration judge, the INS, the Attorney General, are given no authority to reject or disregard the recommendation; if the sentencing judge, having followed the procedures prescribed by the section, 'recommends' against deportation, the Attorney General is simply not allowed to use the conviction as a basis for deportation.[61]

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be made at the time of judgment or sentencing, or within 30 days thereafter. This statutory requirement has been held to be mandatory. *See, e.g.*, Velez-Lozano v. INS, 463 F.2d 1305, 1308 (D.C. Cir. 1972); Marin v. INS, 438 F.2d 932, 933 (9th Cir.), *cert. denied*, 403 U.S. 923 (1971); Piperkoff v. Esperdy, 267 F.2d 72, 74-75 (2d Cir. 1959); Matter of Plata, 14 I. & N. Dec. 462, 463 (BIA 1973).

[56] Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968); Velez-Lozano v. Immigration and Naturalization Service, 463 F.2d 1305, 1308 (D.C. Cir. 1972).

[57] Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986).

[58] Haller v. Esperdy, 397 F.2d at 213; Velez-Lozano v. Immigration and Naturalization Service, 463 F.2d at 1308.

[59] Oviawe v. Immigration and Naturalization Service, 853 F.2d 1428, 1431-33 (7th Cir. 1988)(alien granted judicial recommendation against deportation for two crimes involving moral turpitude, but deported because he overstayed period of admission as a nonimmigrant).

[60] 793 F.2d 449, 452 (2d Cir. 1986).

[61] 793 F.2d at 452.

It is clear that a judicial recommendation against deportation is not merely a recommendation, but a decision that binds the Attorney General. It is an extraordinary form of relief, likened to a full and unconditional pardon granted from the governor of a state or President of the United States. Realizing the consequences, the sentencing judge should have exercised restraint in deciding whether to grant a recommendation.[62]

By its express language, the judicial recommendation against deportation had no application to narcotics offenses.[63] Convictions relating to carrying or possessing firearms have been held not to involve moral turpitude.[64]

Congress, by inserting clause (B) into section 241(a)(4) of the 1952 Act,[65] muddied the waters. That clause [66] is applicable to any alien who has been convicted, on or after November 18, 1988, of an aggravated felony.

Prior to the 1990 Act, an aggravated felony included the crimes of murder, drug trafficking and illicit trafficking in firearms or destructive devices. Congress by grouping these crimes in the provision concerning deportation for the conviction of crimes involving moral turpitude,[67] may have inadvertently invited motions for judicial recommendations against deportation where the crime, *e.g.*, firearm trafficking, is one not involving moral turpitude. The INS's attorneys undoubtedly argued that judicial recommendations against deportation could not be granted where the charge under 8 U.S.C. § 1251(a)(4)(B)[68] involved trafficking in drugs, firearms or destructive devices based on Congress having

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[62] *See* U.S. v. Berumem, 24 M.J. 737, 741 n.2 (ACMR 1987).

[63] Immigration and Nationality Act of 1952, § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990).

[64] *See, e.g., ex parte* Saraceno, 182 F. 955, 957 (S.D.N.Y. 1926); United States *ex rel.* Andreacchi v. Curran, 38 F.2d 498, 499 (S.D.N.Y. 1926); *In re* Granados, 16 I. & N. Dec. 726, 728 (BIA 1979).

[65] 8 U.S.C.A. § 1251(a)(4)(B) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A)(iii), 8 U.S.C.A. § 1251(a)(2)(A)(iii) (West Supp. 1991).

[66] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4470, (1988). Clause (B) was inserted by § 7344(a)(2) of the Anti-Drug Abuse Act of 1988.

[67] Immigration and Nationality Act of 1952, § 241(a)(4), 8 U.S.C.A. § 1251(a)(4) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251 (a)(2)(A) (West Supp. 1991).

[68] Immigration and Nationality Act of 1952, § 241(a)(4)(B). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(iii), 8 U.S.C.A. § 1251(a)(2)(iii) (West Supp. 1991).

traditionally barred drug offenses from being considered for a judicial recommendation against deportation and because trafficking in weapons is a crime that does not involve moral turpitude.[69] With the 1990 Act's elimination of judicial recommendations against deportation, the potential problem has been abolished prospectively. However, there could be an issue advanced by an alien facing deportation for conviction of a weapons or drug trafficking charge as to whether a judicial recommendation for a crime other than one involving moral turpitude could be validly granted during the approximate two year period commencing with the effective date of the Anti-Drug Abuse Act of 1988 until the date enacting the 1990 Act.

Since permanent residence is a requirement for military enlistment, aliens found in the enlisted ranks will consist almost entirely of those whom have been lawfully admitted for permanent residence.[70] The

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[69] *See, e.g.*, *ex parte* Saraceno, 182 F. at 957; United States *ex rel.* Andreacchi v. Curran, 38 F.2d at 499; *In re* Granados, 16 I. & N. Dec. at 728.

[70] *See* 10 U.S.C.A. § 3253 (West Supp. 1990) (requiring an alien enlisting in the Army during peacetime to be a legal permanent resident). The Air Force has the same requirement which can be found in 10 U.S.C.A. § 8253 (West Supp. 1990). The Navy has a requirement found in 10 U.S.C.A. § 510 (West Supp. 1990) that a reservist be a United States citizen or an alien lawfully admitted for permanent residence unless the individual has previously served in the Armed Forces or in the National Security Training Corps. The Navy has no statutory requirement concerning citizenship for the regular naval forces. However, enlistment in the regular Navy is restricted to United States citizens or aliens lawfully admitted for permanent residence. An exception to this policy is the enlistment in the Navy of Filipino citizens in the Philippine Islands. Citizens of the Independent Republic of the Marshall Islands and the Federated States of Micronesia may enlist in the regular Navy. These requirements are published in the Navy Recruiting Manual, cited as COMNAVCRUITCOMINST 1130.8C. The Coast Guard normally enlists only United States citizens or nationals. The commandant may, however, authorize the enlistment of certain aliens. Immigrant aliens with no prior military service, who have been admitted to the United States for permanent residence may be enlisted in the regular Coast Guard. However, immigrant aliens are not entitled to reenlist in the Coast Guard. The Coast Guard Recruiting Manual § 3-A-8 rather than the United States Code, sets forth the Coast Guard policy.

There are some Filipinos serving in the Navy who are not legal permanent residents. *See* Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases, Mar. 14, 1947, United States-Philippines, art. XXVII, 61 Stat. 4019, T.I.A.S. No. 1775, at 68, as amended by Enlistment of Philippine Citizens in the United States Navy, Dec. 13, 1952, United States-Philippines, 5 U.S.T. 373; T.I.A.S. No. 2931; Enlistment of Philippine Citizens in the United States Navy, Jun. 21, 1954, United States-Philippines, 5 U.S.T. 1714, T.I.A.S. No. 3047; Enlistment of Philippine Citizens in the United States Navy, Sept. 2, 1954, United States-Philippines, 5 U.S.T. 2006, T.I.A.S. No. 3067.

1952 Act defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."[71]

A legal permanent resident will normally not encounter deportation proceedings unless charged with one of the criminal provisions among the various grounds for deportation. This differs somewhat from aliens who are not legally admitted for permanent residence. Although nonresident aliens may be deported pursuant to a ground of deportation relating to criminals, it is more likely that such aliens will be deported for entering the United States without inspection,[72] violating the terms of their nonimmigrant admission,[73] or overstaying their authorized nonimmigrant admission to the United States.[74] When convicted of a crime involving moral turpitude, the granting of a judicial recommendation may eliminate the only ground for deporting the alien who has been legally admitted for permanent residence.

V. The Use of a Court-Martial Conviction to Deport an Alien

The Judge Advocate General of the Army wrote a memorandum dated December 7, 1938, asserting that a conviction by court-martial has the same force and effect as a conviction by a civilian court at least insofar as it renders an alien inadmissible to the United States. The Department of State has adopted the Army's position. Unfortunately, this memorandum cannot be located either by the Department

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[71] Immigration and Nationality Act of 1952, § 101(a)(20), 8 U.S.C.A. § 1101(a)(20) (West Supp. 1990) (as amended).

[72] Immigration Act of 1990 § 602(a)(1)(B), 8 U.S.C.A. § 1251(a)(1)(B) (West Supp. 1991). This provision replaced Immigration and Nationality Act of 1952, § 241(a)(2), 8 U.S.C.A. § 1251(a)(2) (West Supp. 1990) (as amended).

[73] Immigration Act of 1990 § 602(a)(1)(C)(i), 8 U.S.C.A. § 1251(a)(1)(C)(i) (West Supp. 1991). This provision replaced Immigration and Nationality Act of 1952, § 241(a)(9), 8 U.S.C.A. § 1251(a)(9) (West Supp. 1990) (as amended). A nonimmigrant is defined in the Immigration and Nationality Act of 1952, § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (West Supp. 1990) (as amended).

[74] Immigration Act of 1990 § 602(a)(1)(B), 8 U.S.C.A. § 1251(a)(1)(B) (West Supp. 1991). This provision replaced Immigration and Nationality Act of 1952, § 241(a)(2), 8 U.S.C.A. § 1251(a)(2) (West Supp. 1990) (as amended).

of the Army or the Department of State.[75] The views of the Department of State and the Department of the Army are contrary to some federal civilian court cases.

In a district court case, *Gubbels v. Del Guercio*,[76] the alien, a native of Belgium and citizen of the Netherlands, was admitted to the United States as a legal permanent resident at the age of twelve.[77] He was ordered deported from the United States on the ground that after entry into the United States, he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct pursuant to 8 U.S.C. § 1251(a)(4).[78] One crime was for larceny and the other was for robbery. His appeal was dismissed by the Board of Immigration Appeals.[79] The United States district court likewise dismissed the appeal.[80] The district court held that "although military tribunals form no part of the judicial system of the United States, they possess the same full, complete and plenary power over offenses committed within their jurisdiction as the civilian courts of the country do in theirs."[81] Congress knew the distinctions between military tribunals and civilian courts and it made no distinction between convictions in civilian courts and military courts and intended none.[82] The district court explained that if Congress had not intended for court-martial convictions to come within the meaning of the 1952 Act, it would have excluded them.[83] The district court relied in part on the case of *Grafton v. United States*.[84] Mr. Justice Harlan, speaking for the Court in *Grafton* stated:

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[75] DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL § 40.7(a)(9), n. N3.4-3 (1990); 22 C.F.R. § 40.7(a)(9) (1990). A request for a copy of the memorandum was made to the Department of State and the Department of the Army pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552 (West Supp. 1990). The document could not be located.

[76] 152 F. Supp. 277 (C.D. Cal. 1957).

[77] *Id.* at 278.

[78] *Id.* at 278. Immigration and Nationality Act of 1952, § 241(a)(4). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991).

[79] *See* Gubbels v. Hoy, 261 F.2d 952, 953 (9th Cir. 1958), which reversed and remanded the district court's opinion in Gubbels v. Del Guercio, 152 F. Supp. 277 (1957).

[80] 152 F. Supp. 277.

[81] *Id.* at 279.

[82] *Id.* at 278-79.

[83] *Id.* at 278.

[84] *Id.* at 279 (citing Grafton v. United States, 206 U.S. 333, 345 (1907)).

> It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance.[85]

The key case in the debate whether or not an alien can be deported for a crime or crimes involving moral turpitude by utilization of a conviction by court-martial, was decided by the Ninth Circuit Court of Appeals in *Gubbels v. Hoy*.[86] The Ninth Circuit reversed the decision in *Gubbels v. Del Guercio*.[87] The court in *Hoy*, noted that the qualifying provisions for judicial recommendations against deportation are an important part of the legislative scheme expressed in 8 U.S.C. § 1251(a)(4)[88] for deportation of an alien convicted of a crime or crimes involving moral turpitude.[89] If a court makes a judicial recommendation, the provisions of subsection (a)(4) do not apply.[90] The judicial recommendation against deportation provision extends an important right or privilege to the alien. In most cases, the alien's counsel would call this provision to the attention of the sentencing court. If a military court's structure and procedures does not permit it to consider a judicial recommendation against deportation, then the court of appeals felt that convictions of crimes involving moral turpitude in military courts should not be used as a basis for deporting aliens.[91]

In *Hoy*, The court of appeals found nothing in the legislative history to throw any light upon the intention of Congress.[92] The contention was that, when the provision for deportation based on conviction of crimes involving moral turpitude is read in conjunction with the section concerning judicial recommendations against deportation, the court

> must hold that it refers only to sentences imposed by ordinary criminal courts and that sentences imposed by military courts or courts-martial are not within the contemplation of this provision; that the act and the section here in question must be given a strict and narrow construction

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[85] 206 U.S. at 345.

[86] 261 F.2d 952 (9th Cir. 1958).

[87] *Id.* at 956; *see also*, 152 F. Supp. 277.

[88] Immigration and Nationality Act of 1952, § 241(a)(4). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991) (as amended).

[89] 261 F.2d at 954.

[90] *Id.* at 954.

[91] *Id.*

[92] *Id.*

> so that all doubts be resolved in favor of the person sought to be deported.[93]

The appellant (the alien) asserted in *Hoy* that a court-martial is not in a position to act upon a motion for a judicial recommendation against deportation,[94] and the court agreed.[95]

The court continued by noting that court-martial prosecutions differ significantly from civilian court prosecutions.[96] The comparisons were generally not favorable to the military court system. The court deemed it significant that the court-martial is an ad hoc body.[97] The court stated:

> Certainly in times of emergency an accused tried in Germany in one week may find two weeks later that of the five members of his general court-martial one may then be in Korea, another in Lebanon, a third in Formosa, a fourth in Japan and a fifth in the United States. In such a case, before the expiration of the thirty days provided in subsection (b)(2) the recommendation there referred to would have become a practical impossibility.[98]

The court did not believe that the convening authority or the board of review were meant to decide the motion under subsection (b)(2) for a judicial recommendation because neither the convening authority nor the board of review would have the opportunity to observe the alien's demeanor. They would be making a decision based on the cold record.

In reversing the decision of the court below, the court of appeals decided to construe the statute generously to the alien, since deportation is a drastic measure and at times the equivalent of banishment or exile.[99] It regarded it evident that court-martial procedures were not well adapted to the practical working of the procedures contemplated by the law regarding judicial recommendations against deportation. The court held that the sentence of a court-martial may not be a basis for deportation for conviction of a crime involving moral turpitude under subsection (a)(4).[100]

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[93] *Id.*

[94] *Id.* at 953-54.

[95] *Id.* at 956.

[96] *Id.* at 954.

[97] *Id.* at 955.

[98] *Id.*

[99] Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

[100] 261 F.2d at 956.

In an unrelated case, the Court of Appeals for the Sixth Circuit made note of the holding in *Hoy*, that a court-martial conviction for a crime involving moral turpitude cannot be utilized to deport an alien, because "administratively it is impossible" for a court martial to satisfy the statutory requirements of the 1952 Act.[101]

In *Costello v. Immigration and Naturalization Service*,[102] the Supreme Court held that the statute[103] permitting the deportation of an alien who at any time after entry is convicted of two crimes involving moral turpitude, did not apply to a person who was a naturalized citizen at the time of the convictions. The Court stated:

> Yet if § 241(a)(4) were construed to apply to those convicted when they were naturalized citizens, the protective provisions of § 241(b)(2) [judicial recommendation against deportation] would, as to them, become a dead letter. A naturalized citizen would not 'at the time of first imposing judgment or passing sentence,' or presumably 'within thirty days thereafter,' be an 'alien' who could seek to invoke the protections of this section of the law. Until denaturalized, he would still be a citizen for all purposes, and a sentencing court would lack jurisdiction to make the recommendation provided by § 241(b)(2).[104]

The Court in *Costello* quoted from *Hoy* stating

> that the qualifying provisions of subsection (b) are an important part of the legislative scheme expressed in subsection (a)(4). While that section makes a conviction there referred to ground for deportation, it is qualified in an important manner by the provision of subsection (b)(2) that if the court sentencing the alien makes the recommendation mentioned, then the provisions of subsection (a)(4) do not apply.[105]

The Court wrote: "In [*Hoy*] the Court of Appeals for the Ninth Circuit held that court-martial convictions could not provide a basis for deportation under section 241(a)(4) because a military court is not so constituted as to make the privilege accorded by section 241(b)(2) available to a convicted alien."[106] Therefore, *Costello* illustrates that if

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[101] United States v. Lee, 428 F.2d 917, 920 (6th Cir. 1970).

[102] 376 U.S. 120 (1964) (reversing 311 F.2d 343 (2d Cir. 1962)). *See In re* C., 9 I. & N. Dec. 524 (BIA 1962).

[103] Section 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(4) (West Supp. 1990) (as amended).

[104] 376 U.S. at 127.

[105] *Id.* (citing 261 F.2d at 954).

[106] *Id.* at 127 n.11.

the individual was somehow barred from applying for a judicial recommendation against deportation, the underlying conviction(s) cannot be used as a basis for deportation. In *Costello*, this bar was due to the individual being a United States citizen at the time of sentencing for a crime involving moral turpitude.[107] Therefore, the individual was unable to move that a judicial recommendation against deportation be approved. In *Hoy*, the alien was unable to apply for a judicial recommendation against deportation because the military court was not constituted to pass upon the motion.[108]

In a case decided by the BIA, *In re Rossi*[109] the respondent was convicted of unlawfully conspiring and selling narcotics.[110] The convictions occurred while the respondent was a naturalized United States citizen.[111] Later, respondent was denaturalized.[112] The convictions for the two offenses constituted the basis for the two charges expressed on the order to show cause stating why the respondent should be deported.[113] The special inquiry officer (SIO)[114] sustained the two charges.[115] The BIA dismissed the appeal.[116] The Board noted that "even if the respondent had not been a citizen but had been an alien for all purposes at the time of the convictions, . . . the sentencing court could not have made a valid recommendation against deportation"[117] due to the specific bar in section 241(b)(2) of the 1952 Act[118] from granting a judicial recommendation against deportation where the charge relates to a narcotics conviction.[119]

The case of *Costello v. Immigration and Naturalization Service* was similar to *Rossi* with respect to the fact that both individuals were naturalized

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[107] *Id.* at 127.

[108] 261 F.2d at 956.

[109] *In re* Rossi, 11 I. & N. Dec. 514 (BIA 1966).

[110] *Id.* at 514-15.

[111] *Id.* at 514.

[112] *Id.*

[113] *Id.* at 515.

[114] The term "special inquiry officer" means immigration judge and may be used interchangeably. *See* 8 C.F.R. § 1.1(l) (1990).

[115] *In re* Rossi, 11 I. & N. Dec. 514, 515 (BIA 1966).

[116] *Id.*

[117] *Id.* at 517.

[118] 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990). Judicial recommendations against deportation have been eliminated by section 505 of the Immigration Act of 1990.

[119] Immigration and Nationality Act of 1952 § 241(a)(11), 8 U.S.C.A. § 1251(a)(11) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(B)(i), 8 U.S.C.A. § 1251(a)(2)(B)(i) (West Supp. 1991).

United States citizens, were then convicted of crimes and subsequently denaturalized. Thus, in *Rossi*, the deportability of the alien was sustained because of an inability to receive consideration for a judicial recommendation against deportation in a narcotic offense.[120] The citizenship or alienage of Rossi at the time of conviction and sentencing would not have caused a difference in the possible outcome of the case.[121] The decision in *Costello* differed because the crimes involved moral turpitude and a judicial recommendation against deportation could have been entered on behalf of the defendant had he been an alien.[122] *Rossi* can be also differentiated from *Hoy*. However, the alien serviceman in *Hoy* might have been able to receive a judicial recommendation had he been tried in a civilian criminal court rather than by court-martial. Because of the nature of the offense (narcotics conviction), *Rossi* was completely barred by statute from being considered for a judicial recommendation against deportation.[123]

A differing view was expressed in *United States v. Berumen*.[124] In that case, an Army private first class, was found guilty of rape and forcible sodomy pursuant to his pleas.[125] He appealed his case to the United States Army Court of Military Appeals, which denied his petition for review.[126]

Grounds for the appeal in *Berumen* included the charge that the accused was deprived of effective assistance of counsel because his lawyer at trial failed to advise him that he could be deported if he pled guilty to crimes involving moral turpitude.[127] The court rejected this argument.[128] Furthermore, appellant argued that his conviction should be overturned because the military judge did not inform him that he could be deported or refused citizenship if he pled guilty.[129] The court rejected this argument also.[130]

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[120] *In re* Rossi, 11 I. & N. Dec. 514, 516 (BIA 1966).

[121] *Id.* at 517.

[122] *Id.*

[123] *Id.*

[124] 24 M.J. 737 (A.C.M.R. 1987), *petition for review denied*, 26 M.J. 67 (C.M.A. 1988).

[125] 24 M.J. at 739.

[126] United States v. Berumen, 26 M.J. 67 (C.M.A. 1988).

[127] 24 M.J. at 740.

[128] This argument was rejected for reasons that are not pertinent to the topic of this article. *See* 24 M.J. at 742-43.

[129] 24 M.J. at 740-41.

[130] 24 M.J. at 741 ("the military judge did not have a duty to advise appellant that

In dicta, the court did hold that a military judge has the discretion in an appropriate case to recommend against the deportation of an alien convicted by a court-martial.[131] In a footnote the court stated:

> We agree with counsel for appellant that the decision of the Court of Appeals for the Ninth Circuit in *Gubbels v. Hoy* . . . is dated and no longer of precedential value. Contrary to the holding of *Gubbels v.* [*Hoy*], we have no doubt that a general court-martial conviction may be the basis for the deportation of an alien [for crimes involving moral turpitude] . . . . From an administrative prospective, it is no longer impossible for a court-martial to comply with the clemency subsections of the statute, assuming arguendo that such an impossibility existed at the time *Gubbels v.* [*Hoy*] was decided. From the perspective of guaranteeing the defendant a scrupulously fair trial and affording him a full panoply of rights, which, during peacetime, are only minimally curtailed by military necessity, today's military justice system compares favorably with the Federal justice system, as well as the most enlightened of State systems. A military accused may elect to be tried by military judge alone rather than by court members, and, not infrequently, the military judge makes a clemency recommendation in the event the accused is convicted. Thus, in an appropriate case, we believe a military judge has the authority to recommend, should he choose to do so, against the deportation of an alien convicted by court-martial . . . . However, as always where collateral matters are concerned, the exercise of judicial restraint is paramount.[132]

The court based its authority to be able to recommend against deportation on the Rules for Courts-Martial ("R.C.M.") relating to clemency recommendations.[133] The Army Court of Military Review rejected many of the underlying premises of the *Hoy* decision including the negative connotations concerning military justice.[134] The Army Court of Military Review appeared unhappy with the citation in *Hoy* to the United States Supreme Court case of *Reid v. Covert*,[135] which in part described the military justice system negatively.[136] Speaking for

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he possibly could be deported or denied United States citizenship as a direct result of his plea of guilty").

[131] 24 M.J. at 741.

[132] 24 M.J. at 741 n.2 (citations omitted).

[133] R. Cts. Martial 1105(b)(4) (1984).

[134] 24 M.J. at 741 n.2.

[135] 354 U.S. 1 (1957).

[136] *Id.* at 39.

four members of the Court when announcing the Court's decision in *Reid*, Justice Black said:

> It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to military law - law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.[137]

Justice Black concluded that "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[138] Clearly, the Army Court of Military Review's assessment of the quality and fairness of military justice stated in the *Berumen* footnote, markedly differs from that of the Supreme Court.

VI. Rules for Court-Martial

In *Berumen*, the Court of Military Appeals suggested that, if the ability to grant clemency did not exist at the time of the *Hoy* decision, it certainly exists today.

The Rules for Courts-Martial permit the accused to submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision to disapprove any findings of guilty or to approve the sentence including clemency recommendations by any member, the military judge, or any other person.[139] The defense may ask any person for a clemency recommendation.[140]

The *Manual For Courts-Martial, 1951*, concerning duties after trial, specifically, the clemency petition, stated:

> At the close of the trial or as soon thereafter as practicable, if the accused is found guilty, the defense counsel shall, in a proper case, prepare a recommendation for clemency setting forth any matters as to clemency which he desires to have considered by the members of the court or the reviewing authority. He shall secure the signatures of those members of the court who have indicated their willingness to sign the

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[137] *Id.* at 38.
[138] *Id.* at 39 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).
[139] R. Cts. Martial 1105(b)(4) (1984).
[140] R. Cts. Martial 1105(b)(4) (1984).

> recommendation, and shall submit it to the trial counsel for attachment to the record of trial.[141]

At the time of the *Hoy* decision, the rules set forth in the *Manual For Courts-Martial, 1951*, were in effect. Thus, the ability to make a clemency recommendation was essentially the same at the time *Hoy* was decided as it is today. If the ability to grant a clemency recommendation is tantamount to the ability of a military tribunal to recommend against deportation, then that authority existed when the Ninth Circuit rendered its decision in *Hoy*.

In *Berumen*, the court decided that *Hoy* was dated and no longer of precedential value.[142] However, the Court of Military Appeals did not justify its holding. The court merely made sweeping unsubstantiated statements praising the military justice system. The only attempt at supporting its conclusion that a court-martial has the authority to make a judicial recommendation against deportation was the statement that "from an administrative perspective, it is no longer impossible for a court-martial to comply with the clemency subsections of the statute, assuming arguendo that such an impossibility existed at the time [*Hoy*] was decided."[143]

As noted above, clemency was obtainable at the time of the *Hoy* case, in accordance with the *Manual for Courts-Martial, 1951*. The *Manual for Courts-Martial, 1984*, continues the practice. The Court of Military Appeals failed to note that the Supreme Court had harsh words for the military justice system as reflected in the statements made in the *Reid* and *Toth* cases. The Court of Military Appeals did not cite more recent Supreme Court cases to demonstrate the Supreme Court having recanted from its early opinions in *Reid* and *Toth*, should any such retraction exist. Nor did the Court of Military Appeals address the Supreme Court's decision in *Costello v. Immigration and Naturalization Service*,[144] where the Court mentioned of the Ninth Circuit holding in *Hoy* that court-martial convictions cannot provide a basis for deportation for crimes involving moral turpitude because a military court is not so constituted as to make the privilege accorded by the statute permitting

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[141] MANUAL FOR COURTS-MARTIAL ch. IX, ¶ 48(j)(1) (1951).

[142] 24 M.J. at 741 n.2.

[143] 24 M.J. at 741 n.2 (citing judicial recommendation against deportation, 8 U.S.C. § 1251(b)(2)).

[144] 376 U.S. 120 (1964).

judicial recommendations against deportation available to a convicted alien member of the Armed Forces.[145]

In an annotation concerning the deportation of convicted aliens, it was stated that: "It has been held that a court-martial conviction does not constitute a 'conviction' for purposes of 8 U.S.C.S. § 1251(a) such as to authorize deportation."[146] The *Hoy* decision is cited in the annotation, however, no mention of the *Berumen* case is made.[147]

An unanswered problem was how in particular prosecutions, a case brought before a court-martial would comply with the statutory mandate that prior to making any recommendation, notice be given to the representatives of the interested state.[148] When a crime is committed outside the United States and the court-martial is convened overseas, there is no "interested" State.[149] This lends supports to the notion that court-martial convictions were not intended to support deportation proceedings.

The INS Office of General Counsel rendered a legal advisory opinion that a court-martial conviction satisfies the legal definition of a "conviction" and that it may generally be utilized as a ground for deporting an alien under section 241(a) of the 1952 Act.[150] Accordingly, a court-martial conviction for an offense relating to controlled substances can

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[145] 376 U.S. at 127 n.11.

[146] Annotation, *What Constitutes "Convicted" Within Meaning of § 241(a)(4, 11-16, 18) of Immigration and Nationality Act (8 U.S.C.S. § 1251(a)(4, 11, 14-16, 18) Providing That Alien Shall Be Deported Who Has Been Convicted of Certain Offenses*, 26 A.L.R. FED. 709, 730 (1976 & Supp. 1990).

[147] *Id.*

[148] The term "state" includes (except as used in section 310(a) of title III; 8 U.S.C. § 1421(a)) the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States. Immigration and Nationality Act of 1952, as amended, § 101(a)(36); 8 U.S.C. § 1101(a)(36). Section 506(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, deems the North Mariana Islands a part of the United States and a state for purposes of immediate relative status determinations and judicial naturalization, effective upon the establishment of the Commonwealth of the Northern Mariana Islands. On October 24, 1986, the United States informed the United Nations that November 3, 1986, was the date the Covenant would enter fully into force under Public Law 94-241.

[149] The term "United States" is defined in Immigration and Nationality Act of 1952, § 101(a)(38), 8 U.S.C.A. § 1101(a)(38) (West Supp. 1990) (as amended).

[150] Legal Opinion of the Office of General Counsel, Immigration and Naturalization Service (Oct. 6, 1989) (citing 8 U.S.C.A. § 1251(a) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a), 8 U.S.C.A. § 1251(a) (West Supp. 1991)).

be utilized for deporting aliens under section 241(a)(11) of the 1952 Act.[151] The Office of General Counsel accepts the *Hoy* decision as controlling and is of the opinion that, owing to the language in section 241(b)(2) of the 1952 Act regarding judicial recommendations against deportation, a court-martial conviction cannot be used to deport an alien for conviction of a crime or crimes involving moral turpitude in accordance with section 241(a)(4) of the 1952 Act.[152] Although not specifically addressed in the INS legal opinion, it is fair to assume that a court-martial conviction can be used to deport aliens for weapon offenses[153] and for prostitution or commercialized vice.[154]

There is a regulation whose breach permits the deportation of a nonimmigrant alien for failure to maintain status resulting from the nonimmigrant having committed a crime of violence.[155] An order of deportation resulting from a violation of this regulation, would likely

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[151] 8 U.S.C.A. § 1251(a)(11) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(B)(i), 8 U.S.C.A. § 1251(a)(B)(i).

An alien convicted of a narcotic offense is specifically barred from being granted a judicial recommendation against deportation per the wording of the statute, Immigration and Nationality Act of 1952, § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West Supp. 1990) (as amended). *See In re* Y-M-, 8 I. & N. Dec. 94 (BIA 1958); *In re* Rosen, 11 I. & N. Dec. 514 (BIA 1966).

[152] Legal Opinion of the Office of General Counsel, Immigration and Naturalization Service (Oct. 6, 1989) (citing 8 U.S.C.A. § 1251(a)(4) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991)).

[153] Legal Opinion of the Office of General Counsel, Immigration and Naturalization Service (Oct. 6, 1989) (citing Immigration and Nationality Act of 1952 § 241(a)(14), 8 U.S.C.A. § 1251(a)(14) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(C), 8 U.S.C.A. § 1251(a)(2)(C) (West Supp. 1991)).

[154] Legal Opinion of the Office of General Counsel, Immigration and Naturalization Service (Oct. 6, 1989) (citing Immigration and Nationality Act of 1952 § 241(a)(12), 8 U.S.C.A. § 1251(a)(12) (West Supp. 1990)). Prostitution is a crime involving moral turpitude. *In re* W., 4 I. & N. Dec. 401 (BIA 1951). If charged under subsection (a)(12), the alien can be deported even if a judicial recommendation against deportation is approved. However, if an attempt is made to utilize the prostitution conviction to effect deportation as a crime involving moral turpitude under subsection (a)(4), a favorable judicial recommendation against deportation will bar use of the conviction. Prostitution was deleted from the 1990 Act as a ground of deportation (INS has, however, requested that Congress enact a technical amendment to the 1990 Act to reinstate prostitution as a ground for deportation). However, an alien can still be excluded from the United States for prostitution per § 601(a)(2)(D) of the Immigration Act of 1990, 8 U.S.C.A. § 1182(a)(2)(D) (West Supp. 1991).

[155] 8 C.F.R. § 214.1(g) (1990).

survive appeal despite a favorable ruling on a motion for a judicial recommendation against deportation, since the ground for deportation was under section 241(a)(9) of the 1952 Act[156] rather than under section 241(a)(4).[157] Judicial recommendations against deportation apply solely to charges under section 241(a)(4)[158] and not section 241(a)(9).[159]

VII. Conclusion

With passage of the Immigration Act of 1990, judicial recommendations against deportation have been removed as a form of relief from deportation that an alien can seek. As a result, court-martial convictions can be used to deport an alien when the crime or crimes is usable as a basis for deportation under one of the provisions of the deportation statute. This includes crimes involving moral turpitude. However, prior to the effective date of the 1990 Act, the court-martial conviction cannot be used as a ground for deportation under section 241(a)(4) of the 1952 Act[160] when the conviction is for a crime involving moral turpitude because a court-martial was not empowered to make a judicial recommendation against deportation. This failure to be able to act upon a motion for a judicial recommendation against deportation is a corollary of a court-martial being an ad hoc tribunal.

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[156] Immigration and Nationality Act of 1952, § 241(a)(9), 8 U.S.C.A. § 1251(a)(9) (West Supp. 1990) (as amended). This was replaced by the Immigration Act of 1990 § 602(a)(1)(C)(i), 8 U.S.C.A. § 1251(a)(1)(C)(i).

[157] 8 C.F.R. § 214.1(g) reads:

> *Criminal Activity.* A condition of a nonimmigrant's admission and continued stay in the United States is obedience to all laws of the United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under section 241(a)(9) of the Act [8 U.S.C.A. § 1251(a)(9) (West Supp. 1990)].

8 U.S.C.A. § 1251(a)(4) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A) (West Supp. 1991).

[158] *Id.*

[159] 8 U.S.C.A. § 1251(a)(9) (West Supp. 1990). This provision was replaced by Immigration Act of 1990 § 602(a)(1)(C)(i), 8 U.S.C.A. § 1251(a)(1)(C)(i) (West Supp. 1991).

[160] 8 U.S.C.A. § 1251(a)(4) (West Supp. 1990). This provision was replaced by the Immigration Act of 1990 § 602(a)(2)(A), 8 U.S.C.A. § 1251(a)(2)(A) (West Supp. 1991).

In any attempt to deport an alien member of the United States Armed Forces based upon a court-martial conviction, the INS will have to closely examine the date of the conviction(s) involving moral turpitude. The court-martial conviction can only be utilized for convictions entered on or after November 29, 1990, the effective date of the 1990 Act. A court-martial conviction for a crime involving moral turpitude existing prior to the 1990 Act, cannot be used for the purpose of deportation. Clearly, the Immigration Act of 1990 has finally placed court-martial convictions on equal footing with convictions generated by civilian courts when being employed for deporting an alien member of the United States Armed Forces from the United States.

Trademark Law: Equity's Role in Unfair Competition Cases

I. Introduction

"If it is true that we live by symbols, it is no less true that we purchase goods by them."[1] With that statement, the United States Supreme Court summed up the reason why a body of common and statutory law has developed to protect the symbols we categorize as "trademarks:" they are valuable to the seller and relied upon by the buyer.

This article assesses the degree of judicial tolerance afforded those who copy trademarks. Part II lays the foundation by providing a basic understanding of trademark law. Part III explores how the Supreme Court strikes a balance between the protective function of trademark law and the need for our free market to encourage competition. Part IV and Part V review theories that tip the balance in favor of trademark protection during the early stages of a product's life in the marketplace. Part VI concludes that the outcome of trademark infringement cases hinges on a court's subjective appraisal of the alleged infringer's motives. If adjudged as dishonorably inclined, the accused feels the legal force behind our society's scorn for cheaters.

The focus of this article lies on the concept of secondary meaning. Trademarks and trade dress generally must be shown to have secondary meaning, or distinctiveness, before the law will afford them protection. A mark or trade dress gains secondary meaning either through its own uniqueness or through a process whereby the public gradually associates the mark with the manufacturer. When brand new products hit the market, their uniqueness is often subject to question and the public

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[1] Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

still needs time to associate the product's mark or wrappings with a manufacturer.

It is during the vulnerable early stages of a product's life when infringement is likely to occur. Despite a weak showing of secondary meaning, courts still endeavor to protect against infringement. This article illustrates how and why equity prevails over the rule of law to shelter the fledgling product kicked out of the entrepreneur's nest.

II. Fundamentals of Trademark Law

A. Trademarks Defined

A trademark is a distinctive mark, symbol, or emblem used by a producer or manufacturer to identify his goods, thereby distinguishing his goods from those of others.[2] Just about any symbol or "mark" can function as a trademark.[3] Included among trademarks, for instance, are such instantly recognizable symbols as LEVI'S jeans, NABISCO cookies and APPLE computers.[4]

B. Secondary Meaning, Or Acquired Distinctiveness, As It Relates to the Law of Unfair Competition

Trademarks show harried consumers the way to a quick and easy selection from a wide array of goods by identifying and distinguishing various products. Trademarks accomplish this by enabling consumers to recognize a product by associating it with its maker, or source.

Frequently, when consumers glance at a trademark affixed to a product, they recognize the maker of the product before looking at the product itself. For instance, the image of a girl holding an umbrella while walking in the rain, set against a dark blue label, will instantly bring MORTON SALT to mind. In addition to whatever meaning customers normally would attach to such an image, they are absorbing

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[2] Educational Dev. Corp. v. Economy Co., 562 F.2d 26, 28 (10th Cir. 1977).

[3] Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1017 (8th Cir. 1985) ("shift kit" as trademark for valve body kit). *See, e.g.*, Stewart Paint Mfg. Co. v. United Hardware Distrib. Co., 253 F.2d 568, 569-70 (8th Cir. 1958) (code numbers as trademarks for shades of paint colors); Standard Brands, Inc. v. Smidler, 151 F.2d 34, 37 (2d Cir. 1945) ("V-8" as trademark for vegetable juice cocktail).

[4] *See generally* Evans, *A Primer on Trademarks and Service Marks*, 18 St. Mary's L.J. 137, 148-152 (1986).

an additional, or "secondary" meaning. The little girl and her umbrella mean MORTON. Trademark law signifies that the mark has acquired secondary meaning: the consuming public associates the mark primarily with the maker of the product rather than with the product itself.[5] It is this subtle connection in a consumer's mind between product and maker that animates the concept of "secondary meaning."

Whether or not secondary meaning exists is a question of fact[6] that turns upon such factors as length and exclusivity of use,[7] "nature and effect of advertising, promotion and sales,"[8] consumer testimony and surveys[9] and "conscious imitation."[10] These factors measure the trademark's strength or distinctiveness, which in turn "determines both the ease with which it may be established as a valid trademark and the degree of protection it will be accorded."[11]

The likelihood that a trademark will be deemed valid and accorded protection increases with the perceived strength of the mark.[12] Trade-

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[5] This definition comes from an often-quoted passage in Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 118 (1938) (to establish secondary meaning for a mark, or "term," the proponent "must show that the primary significance of the term in the minds of the consuming public is not the product but the producer"). Other courts have tried to distill secondary meaning into a phrase. *See, e.g.*, Volkswagenwerk AG v. Hoffman, 489 F. Supp. 678, 681 (D.S.C. 1980) ("words which have primary meaning of their own, such as bug, may by long use in connection with a particular product come to be known by the public as specifically designating that product"); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1015 (9th Cir. 1985) ("name becomes legally protectible [sic] as an identification symbol" when "a mental recognition occurs among purchasers" who associate the name with the source); American Television v. American Communications, 810 F.2d 1546, 1549 (11th Cir. 1987) (mark designates to the consumer "a single thing coming from a single source").

[6] *See American Television*, 810 F.2d at 1549 (clearly erroneous standard on review).

[7] *See Transgo*, 768 F.2d at 1015 (finding that "shift kit" symbol for valve body replacement kits had been exclusively used by the plaintiff for about six years before defendant copied the symbol).

[8] *See American Television*, 810 F.2d at 1549 (finding "insufficient" plaintiff's evidence of its own advertising press releases, media coverage and annual reports of its parent company).

[9] *See id.* (consumer testimony and surveys suggested by court as means by which secondary meaning could have been shown).

[10] *See* RJR Foods, Inc. v. White Rock Corp., 603 F.2d 1058, 1060 (2d Cir.1979) (conscious imitation of RJR's HAWAIIAN PUNCH label by White Rock creates presumption that RJR had created "customer recognition").

[11] McGregor-Doniger Inc. v. Drizzle, Inc., 599 F.2d 1126, 1131 (2d Cir. 1979).

[12] The strength of a trademark is gauged by "its tendency to identify the goods sold under the mark as emanating from a particular, although possibly anonymous, source." *Id.*

mark law affords protection to marks once they have "acquired distinctiveness," or achieved secondary meaning. Trademark law thus equates secondary meaning with acquired distinctiveness.

The question of whether secondary meaning exists may be dispositive when trademark owners litigate to protect their marks from competitors, who covet the marks for their strong recognition value. Trademarks attract public attention, thereby serving as invaluable devices for advertising products and encouraging consumer loyalty. In the aggressive world of advertising, established symbols that consumers associate with particular producers provide those producers with a competitive edge in the battle for market share. Lesser-known competitors may give in to the temptation to soften the leading producer's edge by adopting trademarks that closely resemble their rival's established, better-known trademark. From this state of affairs, the law of unfair competition developed.[13]

C. The Lanham Act's Dual Purpose: Protecting the Public and the Trademark Owner Against Unfair Competition

Within the broad field of "unfair competition," a common law protecting trademarks arose among the separate states.[14] Traces of this common law appeared in a series of federal trademark statutes beginning with the Trade-Mark Act of 1870[15] and culminating in the

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[13] In a landmark case, the Supreme Court described the principle behind unfair competition by referring to the old adage that one should not reap where one has not sown. International News Service v. Associated Press, 248 U.S. 215, 239 (1918).

[14] *See* A. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS 13 (4th ed. 1979).

[15] In United States v. Steffens, 100 U.S. 82 (1879), the Supreme Court held the Trade-Mark Act of 1870 unconstitutional. The decision hinged on the fact that the Constitution, although expressly providing for a federal system for patents and copyrights, is silent on trademarks. In drafting the Act of 1870, Congress had confused "trade identity" rights with patent rights, instead of correctly basing federal authority to regulate trademarks on the Commerce Clause of the Constitution. The Court pointed out that trademarks gain recognition only through use, not through the "sudden invention" which patents represent. *Id.* at 94. The patent and copyright clause of the Constitution, which encompasses inventions and discoveries, would therefore not apply to trademarks. *See* U.S. CONST. art I, § 8, cl.3 and U.S. CONST. art I, § 8, cl.8. For a brief overview of the development of trademark law, *see* Comment, *Trademark Infringement: The Irrelevance of Copying to Secondary Meaning*, 83 NW. U.L. REV. 473, 480-81 (1989).

Trademark Act of 1946 ("Lanham Act"),[16] which, although revised,[17] still governs federal trademark law.

Forty years after the Lanham Act became law, the Trademark Review Commission submitted its Report and Recommendations to the United States Trademark Association (USTA).[18] The Commission determined that the Lanham Act still met the statutory objectives promulgated by the Committee on Patents in 1946:[19]

> The purpose underlying any trademark statute is two-fold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trademark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trademark owner.[20]

The dual purpose of protecting both the public and the trademark owner also appears in section 45 of the Lanham Act. The section states, in part, that the intent of the Act is to make actionable the "deceptive and misleading use of marks" in commerce and "to protect persons engaged in such commerce against unfair competition."[21] The Trademark Commission, however, cautions that this dual purpose meets just one of the federal government's "public policy objectives." Other objectives include promoting quality of goods and services, stimulating marketing and advertising innovations and fostering "healthy competition."[22]

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[16] *See* Trademark Act of 1946, Pub. L. No. 99-489, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051-1127 (1982)). The statute was enacted on July 5, 1946, and became effective one year later.

[17] *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, 102 Stat. 3935.

[18] *See* Trademark Review Commission, *The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors*, 77 TRADEMARK REP. 375 (1987).

[19] *Id.* at 386.

[20] *See* S. REP. No. 1333, 79th Cong., 2d Sess. 3 (1946).

[21] 15 U.S.C. § 1127 (1982).

[22] *See* Trademark Review Commission, *supra* note 18, at 387 (the Act fosters competition because it "preserves good will and investment in product quality and promotion, and reduces the distortions of competition which would result from purchases based on confusion or deception and from the unjust enrichment of unfair competitors.")

Whether the Lanham Act is viewed as primarily protecting the trademark owner's investment or protecting the public, the Act ultimately protects against deception. Judge Learned Hand captured the essence of deception as it applies to trademark law when he observed that "[t]he law of unfair trade comes down very nearly to this - as judges have repeated again and again - that one merchant shall not divert customers from another by representing what he sells as emanating from the second [merchant]."[23] The Lanham Act guards against unfair trade with several key provisions that shield both registered and unregistered trademarks.

D. Registration as a Means of Protecting Trademarks Under the Lanham Act

Section 1 of the Lanham Act establishes a procedure by which a trademark owner can apply to register his or her trademark on the "principal register" maintained by the United States Patent and Trademark Office (PTO).[24] The applicant must verify that he or she actually uses the mark in commerce ("actual use" provision) or intends to use the mark within six months after registering ("intent to use" provision).[25] In addition, the applicant must verify ownership of the mark and assert exclusive use.[26]

After examining both the mark and the statement of use, the PTO usually registers the mark. The PTO will deny registration only if the mark closely resembles a mark already registered or fits into a few enumerated exceptions (such as depicting "immoral, deceptive, or scandalous matter").[27] The federal registration lasts ten years, subject

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[23] Yale Elec. Corp. v. Robertson, 26 F.2d 972, 973 (2d Cir. 1928).

[24] 15 U.S.C. § 1051 (1982).

[25] *See id.* The Trademark Law Revision Act of 1988 added the "intent to use" provision, permitting the applicant to reserve a mark before actually using it. Within six months granted under the "intent to use" provision, the applicant must file with the PTO a "verified statement" that the mark is actually being used in commerce. Upon request, the PTO Commissioner may extend the intent to use period another six months, or, upon a showing of good cause, the Commissioner may grant additional periods not collectively exceeding 24 months. *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, §§ 103(b), 103(d)(1), 103(d)(2), 102 Stat. 3935, 3935 (amending 15 U.S.C.A. § 1051 (1982)).

[26] *See id.* § 103(a), 102 Stat. at 3935 (amending 15 U.S.C. § 1051 (1982)).

[27] Other marks barred from registration include those that consist of a U.S. flag, a "name, portrait, or signature identifying a particular living individual," and marks which are "merely descriptive" or "deceptively misdescriptive" of the goods to which they are affixed. *See id.* § 104(a)-(e), 102 Stat. at 3937 (amending 15 U.S.C. § 1051(1982)).

to renewal, and entitles the owner to place the familiar letter "R" (within a circle) superscript next to the protected mark.[28]

Federal registration protects a trademark on a nation-wide basis. The Lanham Act provides that, contingent on registration, the filing of the application itself "constitute[s] constructive use of the mark, conferring a right of priority, nationwide in effect."[29] The Act also provides that a certificate of registration "shall be prima facie evidence of the validity of the registered mark . . . and of the registrant's exclusive right to use the registered mark in commerce."[30] Registration also confers "incontestability" on registered marks that have been in "continuous use for five consecutive years" after registration.[31] Federal trademark law thus builds a wall of notice and exclusivity around registered trademarks which protects them from infringement by competitors.[32]

The Lanham Act, however, excludes from registration marks which are "merely descriptive or deceptively misdescriptive" of the applicant's goods.[33] This exclusion necessitates that an applicant determine whether the mark offered for registration includes a term normally used to describe the corresponding product.[34]

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[28] *Id. See also* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, §§ 110, 111 and 125, 102 Stat. at 3939, 3943 (amending U.S.C. §§ 1058(s), 1059 and 1111 (1982)).

[29] *See* Trademark Law Revision Act, § 109(c), 102 Stat. 3935, 3938 (amending 15 U.S.C. § 1057(1982)).

[30] *Id.* §§ 109 and 128(a), 102 Stat. 3935, 3938, 3944 (amending 15 U.S.C. §§ 1057(b) and 1115(a) (1982)).

[31] *Id.* §§ 116 and 128(b), 102 Stat. at 3941, 3944-45 (amending 15 U.S.C. §§ 1065 and 1115(b) (1982)). "Incontestability" means that, subject to certain exceptions such as fraudulent registration or abandonment of the mark by the owner, a competitor is foreclosed from challenging the owner's exclusive right to use his or her own mark.

[32] *See* 15 U.S.C. § 1114(1) (1982) (authorizing civil action by a registrant against any person who reproduces, counterfeits, copies or colorably imitates a registered mark with the knowledge "that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive").

[33] 15 U.S.C. § 1052(e) (1982). *See also* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 104(2), 102 Stat. 3935, 3937 (amending 15 U.S.C. § 1052(e) (1982)).

[34] *See, e.g.*, Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 379-80 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976)(court analyzes the mark EVEREADY, noting that it is "closely analogous as applied to batteries . . . [and] suggests the quality of long life, but no one in our society would be deceived into thinking that this type of battery would never wear out or that its shelf life was infinite.")

A new cereal maker, for instance, would concede that RAISIN-BRAN includes terms normally used to describe his raisin and bran cereal.[35] Clearly, he would be barred under the Lanham Act from registering RAISIN-BRAN at this point. Despite this setback, a cereal maker could register RAISIN-BRAN if he went a step further to show that the descriptive mark had "become distinctive of the applicant's goods in commerce."[36] In other words, the cereal maker must show that his mark has acquired distinctiveness, or secondary meaning.

E. The Relation Between a Trademark's Strength and its Registerability

The common law divides potential trademarks into four categories: arbitrary or fanciful, suggestive, descriptive and generic.[37] These four categories, listed from strongest to weakest, have been compared to bands along a spectrum which seem to "merge imperceptibly from one to another."[38] The ease with which a trademark owner may register his mark depends upon the category to which it belongs.

1. Arbitrary (or fanciful) and suggestive marks: registerable without proof of distinctiveness

Arbitrary or fanciful marks are "inherently distinctive," and therefore require no independent proof of distinctiveness to be registerable.[39]

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[35] *See* Skinner Mfg. v. Kellogg Sales Co., 143 F.2d 895 (8th Cir. 1944) (finding that RAISIN-BRAN is descriptive mark).

[36] 15 U.S.C. § 1052(f)(1982). *See also* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 104(3), 102 Stat. at 3937 (amending 15 U.S.C. § 1052(f)) ("The Commissioner may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.")

[37] *See, e.g.*, Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1183 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); Abercrombie & Fitch v. Hunting World, Inc., 537 F.2d 4, 9-11 (2d Cir. 1976).

[38] The Vision Center v. Opticks, Inc., 596 F.2d 111, 115 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

[39] Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 939 n.5 (10th Cir. 1983). Fanciful marks are "coined" words which are "made up" just to serve as trademarks. Examples include CLOROX and KODAK. Arbitrary marks are words or symbols that represent actual images but are arbitrarily assigned to a product. Examples include CAMEL cigarettes and GODIVA chocolate. For a succinct description of the distinctiveness spectrum, *see* Evans, *supra* note 4, at 148-53. *See also* Abercrombie & Fitch v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976) (J. Friendly).

Both arbitrary and fanciful marks "bear no relationship to the product or services with which they are associated."[40] Prior to the invention of YUBAN to identify a brand of coffee, for instance, no one would think of the term while thinking about coffee.

Suggestive marks, like arbitrary or fanciful marks, are distinctive enough to be registerable without separate evidence of distinctiveness. Suggestive marks only "suggest" a quality of the good, without actually describing it.[41] CHICKEN OF THE SEA qualifies as a valid suggestive mark, for instance, because the mark suggests a quality of tuna approximating chicken.

The distinctiveness spectrum comprises a classification system of trademarks that determines whether or not there should be protection against unfair competition by the Lanham Act through registration. Comfortably residing at the strong end of the distinctiveness spectrum, arbitrary or fanciful marks and the slightly less powerful suggestive marks thus benefit from a common law presumption that they are distinctive. Why other marks fail to automatically qualify for registration[42] and what, if any, circumstances will afford them protection under the Act is next considered.

2. *Generic marks are not registerable*

On the weakest band of the spectrum, generic marks will lose in a bid for registration as trademarks. Generic marks routinely meet the same fate when a litigant claims trademark protection in court.[43] The

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[40] *Soweco*, 617 F.2d at 1184.

[41] *See, e.g.*, *Vision Center*, 596 F.2d at 115-16 (suggestive mark suggests a characterization of the goods to which it is applied, yet requires imagination to make the connection). Examples include COPPERTONE suntan oil and SURE deodorant.

[42] The Lanham Act, which refers to descriptive marks as "merely descriptive or deceptively misdescriptive," denies such marks registration unless they have "become distinctive of the applicant's goods in commerce." *See* 15 U.S.C. §§ 1052(e), 1052(f) (1982). Formerly labeled as "common descriptive names" under the Lanham Act, generic marks are now specifically designated "generic names" in the cancellation of registration and incontestability provisions of the statute. *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, §§ 115(4), 116(3), 102 Stat. 3935, 3940-41 (amending 15 U.S.C. §§ 1064(c), 1065(4) (1982)) (permitting petitions for cancellation of a registered mark if it "becomes the generic name for the goods or services" and forbidding acquisition of an incontestable right in a generic name).

[43] *See, e.g.*, Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80 (7th Cir.), *cert. denied*, 434 U.S. 1025 (1977) (LITE BEER); Bayer Co. V. United Drug

apparent lack of protection for generic marks stems from the central fact that generic marks name the product itself.[44] The very commonness, or familiarity, that these marks have achieved through everyday usage precludes other terms from effectively identifying the products to which the generic marks are affixed.[45]

Judge Learned Hand provided a famous example when, presiding over a courtroom battle between competing drug companies, he ruled that ASPIRIN had become a generic term.[46] In his view, ASPIRIN identified a drug, not a drug company.

If Judge Hand had permitted a single drug company to register ASPIRIN for exclusive use in labeling its product (acetylsalicylic acid), competing companies would face a marketing dilemma: they would be forced to label their identical product without using the actual name of the product. Customers looking for "aspirin" would not recognize it under another name. Competitors forced to employ another label would therefore be unable to sell their product.

Because this predicament looms as a possibility whenever a single producer wishes to appropriate generic marks, courts and Patent and Trademark Office (PTO) commissioners do not grant trademark protection for such marks. To do so would be to inhibit the healthy competition the framers of the Lanham Act sought to encourage.[47]

3. *Descriptive marks are registerable only upon a showing of secondary meaning*

Between generic and suggestive marks in the spectrum[48] are descriptive marks that describe the product's ingredients, qualities or char-

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Co., 272 F.505, 510-11 (S.D.N.Y. 1921) (ASPIRIN). *But see* Henri's Food Prods. Inc. v. Tasty Snacks, Inc., 817 F.2d 1303, 1306 (7th Cir. 1987) (reversing lower court's ruling that TAS-TEE was a generic mark for salad dressing - the appellate court reclassified it as "merely descriptive").

[44] *See* Comment, *Trademark Infringement: The Irrelevance of Copying to Secondary Meaning*, 83 Nw. U.L. Rev. 473, 484 n.70 (1989).

[45] For examples of how a mark can become generic through use, *see* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 116, *reh'g denied*, 305 U.S. 674 (1938) (SHREDDED WHEAT); National Conf. of Bar Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 488 (7th Cir. 1982) (MULTISTATE BAR EXAM).

[46] *See* Bayer Co. v. United Drug Co., 272 F.505, 510-11 (S.D.N.Y. 1921).

[47] *See supra* note 18, at 387 (Lanham Act "fosters healthy competition" by preserving good will and investment in quality of products and reducing "distortions of competition" that result when purchasers are confused or deceived.)

[48] *See supra* notes 37 and 38 and accompanying text.

acteristics.[49] Like generic marks, descriptive marks are likely to be used by any producer in identifying a corresponding product. Unlike generic marks, however, descriptive marks derive their utility from the fact that they tell the customer something about the product. For instance, strong hints appear in descriptive marks such as CHAPSTICK, ANIMAL CRACKERS and REALEMON.[50]

Secondary meaning attaches to fanciful or arbitrary and suggestive marks "inherently or by virtue of the very nature of the design."[51] Descriptive marks, on the other hand, must earn secondary meaning through use. To obtain registration for his mark, the trademark owner must show that he has exclusively and continuously used his mark in commerce for five years prior to his bid for registration. Whether earned or inherent, secondary meaning exists once the PTO or the court is satisfied that the consuming public associates the trademark primarily with the trademark owner, not the product itself.

F. Litigation as a Way of Protecting Unregistered Trademarks Against Infringement under the Lanham Act

As discussed above, registration provides strong protection for a mark. Because a registered mark displays the familiar "R" within a circle and is recorded in a national registry, prospective infringers are effectively given "hands off" notice. Unregistered marks will present an easier target.

The Lanham Act, however, provides for the protection of unregistered marks against infringers. In section 43(a), the Act allows an action for infringement of an unregistered mark.[52] The Act authorizes

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[49] *See* Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 939-40 (10th Cir. 1983). Compare with suggestive marks, *supra* note 41, which suggest characteristics of a product without actually identifying them.

[50] *See* Evans, *A Primer on Trademarks and Service Marks*, 18 ST. MARY'S L.J. 137, 151 (1981).

[51] In Union Mfg. Co., Inc. v. Han Baek Trading Co., Ltd., 763 F.2d 42, 46-47 n.8 (2d Cir. 1985), the jury charge read in part as follows:

> The ultimate question is whether the product is distinctive and how it achieved that distinctiveness, that is, inherently or by virtue of the very nature of the design, being arbitrary or fanciful or by usage, and if you conclude that it has acquired such distinctiveness, it is immaterial whether the distinctiveness arose by virtue of its inherent nature or by usage.

[52] *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132(a), 102 Stat. 3946 (amending 15 U.S.C. § 1125(a) (1982)):

"any person" to file a civil suit against an infringer who misrepresents a product's origin in such a way that is "likely to cause confusion, or cause mistake, or to deceive."[53]

1. Use of the likelihood of confusion test in trademark infringement actions

Section 43(a) thus introduces a new basis for infringement liability: the "likely to cause confusion" standard. This phrase, which also appears in the statutory provision dealing with registered trademark infringement,[54] provides further insight into the relationship between the distinctiveness requirement and protective registration. If a mark is distinctive, customers are not likely to confuse the mark with those marks used by competitors to identify their products. Therefore, registration of a distinctive mark and the resulting withdrawal from general use does not limit the right of competitors to effectively identify their own products.[55]

Similarly, protection of an unregistered mark will not impede competition if that mark is distinctive. The rights of a distinctive trademark owner are accordingly protected by statutory remedies against infringing competitors. Infringement occurs when an infringer copies a distinctive mark so closely that customers are likely to confuse the imitative mark with the original distinctive mark. Such confusion leads customers to believe that the product with the imitative mark is actually manufactured by the original trademark owner. The distinctive trademark

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(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, symbol, or device, or any combination thereof, or any false designation or origin, false or misleading description of fact, or false or misleading representation of fact, which

(1) is likely to cause confusion, or cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

The Lanham Act also provides remedies for infringement of a registered mark. *Compare* 15 U.S.C. § 1114(1) (1982).

[53] *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132(a)(1), 102 Stat. 3946 (amending 15 U.S.C. § 1125(a)(1) (1982)).

[54] 15 U.S.C. § 1114(1) (1982).

[55] *See generally* Dratler, *Trademark Protection for Industrial Designs*, 1988 U. ILL. L. REV. 887, 896-904.

owner therefore needs remedies that preserve the integrity of his mark, upon which a loyal consuming public relies.

To determine whether infringement has occurred, courts apply a "likelihood of confusion" test which considers a list of factors. These factors vary from circuit to circuit, but generally include (1) the visual, verbal and intellectual similarity between the distinctive and imitative mark; (2) the class of goods in question; (3) the evidence of actual confusion through surveys and market data; (4) the intent of the alleged infringer; and (5) the strength or weakness of the mark.[56]

2. *Elements of a trademark infringement action*

Because section 43(a) cites the likelihood of confusion test as the means for determining trademark infringement, courts sometimes overlook the fact that a trademark must first be ruled valid before infringement can be assessed. As dissenting Justice Stevens admonished in *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*,[57] trademark protection mandates two inquiries: (1) whether the original user's mark had distinctiveness; and (2) whether consumers were likely to be confused between the original mark and the allegedly infringing mark.[58]

Thus, as to unregistered marks that are merely descriptive, secondary meaning or acquired distinctiveness marks a threshold inquiry. If a product's descriptive mark lacks secondary meaning, trademark law will afford it no protection and the likelihood of confusion question is not even asked. The product's mark can be used at will by others.

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[56] Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1015-16 (9th Cir. 1985).

[57] 469 U.S. 189, 220 (1985). *See also* Comment, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 Nw. U. L. Rev. 473, 484-85 (1989).

[58] A trademark infringement action under § 43(a) begins by establishing the validity of the mark: is it worthy of protection? The court accomplishes this task by classifying the mark as arbitrary or fanciful, suggestive, descriptive or generic. If the court finds that the mark is descriptive, the plaintiff must show that the mark has acquired secondary meaning. If the court rules that the mark is valid, the plaintiff must then prove a likelihood of confusion between the plaintiff's mark and the defendant's mark. For a clear application of this two-step process (as applied to a trademark), *see* American Television v. American Communications, 810 F.2d 1546, 1548-50 (11th Cir. 1986). *Compare* Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1015 (9th Cir. 1985) ("secondary meaning can also be established by evidence of likelihood of confusion").

G. Trade Dress Defined

Trade dress refers to the "total image" of a product created by packaging, design or label.[59] For example, the yellow color, "F"-shape design, label, logo, plastic texture and gallon size of PRESTONE II antifreeze jugs collectively constitute trade dress.[60]

Both trademarks and trade dress symbolize the producer, or source of the goods, in the mind of the consumer. The Lanham Act[61] illustrates this important point with a trademark definition which also encompasses trade dress: "any word, name, symbol, or device, or any combination thereof - (1) used by a person . . . to identify his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[62] The "combination thereof" portion of the definition alludes to trade dress.

1. Elements of a trade dress infringement action

Just as the Lanham Act links trademarks and trade dress within a single definition, so do courts often muddle the terms and use them interchangeably in their opinions. This tendency stems from the fact that trademarks and trade dress share many principles.

Trade dress, however, is different from trademarks in one very important aspect: to succeed in a trade dress infringement action, a plaintiff faces a heavier burden of proof than that imposed in trademark actions. In addition to showing distinctiveness, or secondary meaning, and likelihood of confusion, the plaintiff must establish that the trade dress features are primarily nonfunctional.[63] This element of proof is added to respect the common law view that "functional symbols (those

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[59] John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983)(trade dress includes "factors such as size, shape, color or color combinations, textures, graphics, or even particular sales techniques").

[60] First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381-82 (9th Cir. 1987).

[61] Trademark Act of 1946, Pub. L. No. 99-489, 60 Stat. 427 (codified as amended at 15 U.S.C.A. §§ 1051-1127 (1982)).

[62] *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 134(3), 101 Stat. 3935, 3948 (amending 15 U.S.C. § 1127 (1982)).

[63] *See* CPG Products Corp. v. Pegasus Luggage, Inc., 776 F.2d 1007, 1017 (Fed. Cir. 1985), *quoting with approval* Black & Decker Co. v. Everready Appliance Mfg. Co., 518 F. Supp. 607, 616 (E.D.Mo. 1981), *aff'd*, 684 F.2d 546 (8th Cir. 1982).

that are essential to a product's use as opposed to those which merely identify it) are not protected under section 43(a)."[64]

Courts view trade dress in totality to decide if features of a product's trade dress are primarily non-functional.[65] The RAISIN-BRAN cereal maker, for instance, contains his cereal in a rectangular cardboard box featuring a tab-in-slot lid and picturing a bowl of cereal.

If the cereal maker launched a section 43(a) trade dress infringement action, alleging that a competitor marketed the same product in a similar box, he would be hard-pressed to show that the features of his RAISIN-BRAN cereal box were primarily non-functional. The cereal package, as a whole, comprises features which are necessary for containing and dispensing cereal. Different or additional features forced on a competitor might fail to maintain the quality of the cereal or force the cost of packaging above that expended for RAISIN-BRAN.[66] In the interest of fostering competition, therefore, the court would likely withhold trade dress protection and rule that the plaintiff must content himself with the RAISIN-BRAN trademark to distinguish his product on the shelf.[67]

III. Policy Concerns: The Sears/Compco Decisions

The classification and registration scheme or section 43(a) infringement action can deter "the deceptive and misleading use of marks" in commerce and "protect persons engaged in commerce against unfair competition."[68] Courts must strike a balance between those protective interests and the need to foster healthy competition.[69] The United

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[64] *See* LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 75 (2d Cir. 1985), *quoting with approval* Warner Bros., Inc. v. Gay Toys, Inc. (Warner II), 724 F.2d 327, 330 (2d Cir. 1983). *See also* Brooks Shoe Mfg. Co., Inc. v. Suave Shoe Corp., 716 F.2d 854, 857 (11th Cir. 1983) (". . . to prevail in a trade dress infringement claim under § 43(a) of the Lanham Act, a plaintiff must prove that its trade dress has acquired secondary meaning, that features of its trade dress are primarily nonfunctional, and that the defendant's product has trade dress which is confusingly similar to its own trade dress").

[65] *See, e.g.*, *CPG Products Corp.*, 776 F.2d at 1013; First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987).

[66] *See* Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 850-51 n.10 (1982).

[67] *See CPG Products Corp.*, *supra* notes 63 and 65, for a thorough application of the functionality test, as applied to competing lines of luggage.

[68] 15 U.S.C. § 1127 (1982).

[69] *See* Trademark Review Commission, *supra* notes 18, 22.

States Supreme Court, in the *Sears/Compco*[70] decisions, appeared to favor free competition.

A. The Sears/Compco Debate: Promoting Competition vs. Protecting the Original Product Design

The *Sears/Compco* cases concerned state unfair competition claims that unpatented product designs had been copied by predatory competitors and "palmed off" as the originals.[71] The Court forcefully presented its position on the value of copying: "Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all - and in the free exercise of which the consuming public is deeply interested."[72]

The battle lines were thus drawn. Favoring competition, the Court held in *Sears/Compco* that unpatented designs could be freely copied because they were left in the public domain.[73] Favoring design protection, the plaintiffs alleged that their competitors had unfairly competed by palming off original designs as their own. The Court's decision rested on consideration of the strong competing values associated with copying.

B. The Role of Intent in the Sears/Compco Decisions

The "likelihood of confusion" test[74] played an important analytical part in the *Sears/Compco* decisions. The Supreme Court focused on the factor of intent when applying the test. In *Sears*, for instance, the Court grudgingly allowed that "precautionary steps" such as labeling a product might be appropriate in some cases to "prevent customers

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[70] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[71] The dispute in Sears, Roebuck & Co. v. Stiffel Co. arose out of Sears' copying of a "pole lamp" that had been designed and successfully marketed by Stiffel Co. Similarly, in Compco Corp. v. Day-Brite Lighting, Compco's predecessor had copied a reflector designed, produced and sold by Day-Brite. In both cases, the lower court had held that the design patents were invalid. *Sears*, 376 U.S. at 226; *Compco*, 376 U.S. at 235. Both cases presented the same issue: how far can state law go toward protecting a design which is not protected by federal patent laws?

[72] Kellogg v. National Biscuit Co., 305 U.S. 111, 122 (1938) (quoting *Sears*, 376 U.S. at 231).

[73] *Compco Corp.*, 376 U.S. at 237.

[74] *See supra* note 56 and accompanying text.

from being misled as to the source."[75] In *Compco*, a concurring Justice Harlan further opened the door for infringement relief by remarking that if copying is "undertaken with the dominant purpose and effect of palming off one's goods as those of another or of confusing customers as to the source of such goods, I see no reason why the State may not impose reasonable restrictions on the future copying itself."[76]

The *Sears/Compco* decisions thus presented an enigma: on one hand, the Court permitted copying and extolled the virtues of free competition; on the other hand, the Court condoned reasonable restrictions when copying is done with the intent of palming off one's goods as those of another. In *CPG Products Corp. v. Pegasus Luggage, Inc.*,[77] a dissenting Judge Rich hinted at what really troubled the Court in *Sears/Compco*. Central to an analysis of trademark infringement law, he observed, is

> [t]he underlying principle involved in anti-trust law: competition in the marketplace is to be encouraged and to that end copying - even outright, deliberate copying - is permitted as beneficial to consumers except where it is forbidden by patent law or deemed "unfair" because it involves explicit or inherent falsification of some kind.[78]

Judge Rich's point is that copying, in itself, is not inherently wrong,[79] but copying with bad intent imposes a basis for trademark infringement liability.[80] A tension thus arises between good copying that can be beneficial to society and bad copying that can be exploitative to manufacturers. The Supreme Court's recognition of this tension explains why it equivocated in *Sears/Compco*: while copying is not inherently wrong, the Court disdains acts of bad faith.

Bad faith "contemplates a state of mind affirmatively operating with furtive design or ill will."[81] An affirmative, deliberate act of copying,

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[75] *Sears*, 376 U.S. at 232.

[76] *Compco Corp.*, 376 U.S. at 239.

[77] *CPG Products Corp.*, 776 F.2d at 1016.

[78] *Id.* at 1016.

[79] *Id.* at 1016-17.

[80] *Id.* at 1016-18.

[81] BLACK'S LAW DICTIONARY 127 (5th ed. 1979). Courts seldom use the term "fraud" in an opinion dealing with unfair competition, although Black's Law Dictionary defines "fraud" as synonymous with "bad faith." *Id.* at 594. This hesitancy may stem from the basic elements of fraud: "false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damages resulting to plaintiff from such misrepresentation." *Id.* Because a plaintiff in an unfair com-

done with deceitful purpose, therefore, justifies an infringement claim according to the formula laid out in *Sears/Compco*. Thus, the Court elevated intent to a new level as a factor to be considered in trademark infringement actions.

C. The Mixing of State Substantive Law and Federal Trademark Law in Cases Following Sears/Compco

In light of this *Sears/Compco* formula, it is not surprising that plaintiffs usually win unfair competition cases in which intentional copying has been found along with an inference of bad faith.[82] As the Supreme Court recognized, copying serves a useful purpose. The copying of an aptly phrased descriptive mark, for instance, may actually inform customers about a product, rather than confuse them.[83] Bad faith, however, turns copying into the common law tort of unfair competition, or, as it is variously known, passing (or palming) off.[84] Many courts share the Supreme Court's distaste for acts of bad faith and will thus rule against the passer-off.

The role that passing off plays in an infringement action often hinges on whether the plaintiff relies on the Lanham Act to assert a section 43(a) claim or relies instead on state common law to assert an unfair competition claim. Section 43(a) actions often require a showing of secondary meaning before the court will consider an injunction against

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petition actions is usually the party whose trademark is allegedly being infringed, such plaintiff cannot be said to have acted in reliance upon the defendant's actions. A customer would have better standing to allege fraud, since the customer relies on the falsely represented trademark in making a purchase.

[82] *See* P.F. Cosmetique, S.A. v. Minnetonka Inc., 605 F. Supp 662, 670 (S.D.N.Y. 1985) ("finding of deliberate copying effectively decides the case in favor of the plaintiff").

[83] *See* G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 1000 (7th Cir. 1987) ("when the term copied is descriptive, copying is consistent with an inference that the copier wanted merely to inform customers about the properties of its own product").

[84] *See* Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 694, 611 (7th Cir. 1986)("Passing off means fraud; it means trying to get sales from a competitor by making customers think that they are dealing with that competitor, when actually they are buying from the passer-off"). *See also* Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg. Co., 510 F.2d 1004, 1010 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) (unfair competition when defendant found to be "passing off his goods or services as those of the plaintiff by virtue of substantial similarity between the two").

the alleged infringer.[85] State common law places more emphasis on whether passing off is involved.[86] Plaintiffs often make claims under both the federal law of trademarks, citing section 43(a), as well as state common law when bringing an infringement action.

Analysis of unfair competition cases thus leaves one searching in vain for the precise legal ground upon which the injunction is granted. Regardless of whether a trademark or trade dress is at stake, the plaintiff may bring a "plethora of claims" in a single suit under section 43(a) to bear upon a single defendant.[87] The plaintiff variously describes the cause of action as "unfair competition," "false designation of origin," "false representation" or "infringement." Noting the potential for confusion, most courts agree that the various section 43(a) claims are subsumed under the broader field of "unfair competition." Commentators and courts regard section 43(a) as creating a federal law of unfair competition which extends the protective umbrella of the Lanham Act over unregistered marks and trade dress.[88]

In sum, courts face a confusing mix of claims in trademark infringement actions. Plaintiffs make claims under both state and federal law. The specific causes of action are given different descriptive headings. Inconsistent results amongst the various circuits predictably follow. The

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[85] *See supra* notes 58 and 64.

[86] *See infra* Part IV. for cases in which the common law of New York allows for action against bad faith copiers regardless of an actual finding of secondary meaning.

[87] "The plethora of claims brought under section 43(a) . . . often results in a muddled use of terms to describe the various causes of action. Claims such as false designation of origin are often referred to as federal unfair competition claims. These federal actions are distinct from common law unfair competition claims, which are creatures of state law." A.J. Canfield Co. v. Concord Beverage Co., 629 F. Supp. 200, 206 n.2 (E.D.Pa. 1985).

[88] The Trademark Review Commission comments that § 43(a) has become a potent, far-reaching, commercial Bill of Rights for the honest businessman. Section 43(a) has now reached almost towering stature as a weapon to combat unregistered trademark and trade dress infringement and many other types of unfair competition. As a result, the doctrine of Erie Railroad Co. v. Tompkins that there is no federal common law, has virtually no remaining effect on unfair competition law. Today, under the rubric of Section 43(a), there is in every way but name only a federal common law of the major branches of unfair competition.

See Trademark Review Commission, *supra* note 18, at 376. *See also* LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71,75 (2d Cir. 1985) ("Section 43(a) . . . establishes a federal law of unfair competition by providing a statutory remedy to a party injured by a competitor's 'false designation of origin' of its product, whether or not the aggrieved party has a federally registered trademark").

Second Circuit, in particular, has contributed to this inconsistency by granting protection to trademarks even when secondary meaning is not shown.[89]

IV. The Second Circuit: The Primacy of Intent in Unfair Competition Claims

An infringement action typically requires that the plaintiff show that a trademark is distinctive. One way the plaintiff accomplishes this is by proving that the mark is arbitrary or suggestive. The other way available to plaintiffs is to show that a merely descriptive mark has acquired distinctiveness, or secondary meaning. Once the plaintiff establishes the mark's distinctiveness, the court applies the likelihood of confusion test.[90] A showing of distinctiveness thus assures that protection is deserving to the mark and not too limiting to the marketplace competition. The Second Circuit, however, minimizes the distinctiveness analysis by moving directly to the likelihood of confusion test - when it finds that the alleged infringer has intentionally copied a mark.[91]

A. The Legacy of the Santa's Workshop Cases

The Second Circuit's preoccupation with intent traces back to the "Santa's Workshop cases"[92] — a line of New York decisions setting the course of common law trademark protection since the 1950's. When comparing the plaintiff's original trademark with the defendant's mark in these cases, the Second Circuit made little effort to investigate whether the original mark had secondary meaning. Instead, the court made two inferences: (1) because the marks looked alike, the defendant must have intended to deceive; and (2) because the defendant intended

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[89] *See, e.g.*, Perfect Fit Indus., Inc. v. Acme Quilting Co., 618 F.2d 950 (2d Cir. 1980); Harlequin Enterprises Ltd. v. Gulf & Western Corp., 644 F.2d 946 (2d Cir. 1981).

[90] *See supra* note 58.

[91] *See* Comment, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 Nw. U.L. Rev. 473, 487-88 (1989).

[92] The "Santa's Workshop cases" take their name from Santa's Workshop, Inc. v. Sterling, 153 N.Y.S.2d 839 (1956), *aff'd*, 163 N.Y.S.2d 986 (1957). Other cases include Norwich Pharmacal Company v. Sterling Drug, Inc., 271 F.2d 569 (1959); Electrolux Corp. v. Val-Worth, Inc., 190 N.Y.S.2d 977 (1959); and Flexitized, Inc. v. National Flexitized Corp., 335 F.2d 774 (1964).

to deceive, the marks were similar enough to create a likelihood of confusion.[93]

Flexitized, Inc. v. National Flexitized Corp.,[94] one of the Workshop cases, exemplifies the Second Circuit's circular reasoning as well as articulating the policy behind this approach. Flexitized, a manufacturer of flexible collar stays,[95] granted the defendant, National Flexitized Corporation (NFC), exclusive distribution rights to Flexitized stays under the FLEXITIZED mark. Unbeknownst to Flexitized, however, NFC wasted little time before selling collar stays bearing the FLEXITIZED mark manufactured by others.[96] Flexitized responded by seeking a permanent injunction under the Lanham Act, as well as money damages by reason of unfair competition under state law.[97]

The Second Circuit Court of Appeals affirmed the lower court's finding that FLEXITIZED was merely descriptive. Therefore, although the mark was registered, the district court did not err in holding that it was invalid and not deserving of protection under the Lanham Act.[98]

Turning to the plaintiff's unfair competition claim, the court determined that New York state law applied which permitted relief against unfair competition even where secondary meaning was not established.[99] Accordingly, the court found that, although the FLEXITIZED mark had not acquired secondary meaning, "the name had nevertheless acquired a familiarity among prospective purchasers" and NFC had deliberately exploited this familiarity.[100] The court then affirmed the trial court's permanent injunction against further use of the FLEXITIZED mark by NFC.[101]

The *Flexitized* court relied on a theory of property right misappropriation in finding NFC guilty of unfair competition.[102] Asserting that "[o]ne may not misappropriate the results of the skill, expenditures and labors of a competitor," the court stressed the fact that NFC had

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[93] *See* Comment, *supra* note 91, at 488.

[94] 335 F.2d 774 (1964).

[95] "A stay is a strip of bone, plastic or metal used to stiffen a garment or part, as a corset or shirt collar." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1260 (New College ed. 1975).

[96] *Flexitized, Inc.*, 335 F.2d at 777-78.

[97] *Id.* at 774.

[98] *Id.* at 779-80.

[99] *Id.* at 781.

[100] *Id.* at 782.

[101] *Id.*

[102] *Id.* at 781.

clearly attempted to profit at the expense of Flexitized by passing off stays under the FLEXITIZED mark.[103] Because NFC used the FLEXITIZED mark on products not made by Flexitized, it must have intended to deceive. Because NFC intended to deceive, it must have counted on a likelihood among consumers that they would be unable to distinguish Flexitized's stays from those manufactured by others.

Fifteen years later, in *Perfect Fit Industries, Inc. v. Acme Quilting Co.*,[104] the Second Circuit cited *Flexitized* to back up its assertion that "under New York law, an injunction will issue against confusingly similar trade dress, even though no secondary meaning is shown."[105] Perfect Fit, an established mattress pad manufacturer, successfully marketed a fully-quilted "BedSack" pad packaged in a clear plastic bag. The BedSack featured a cardboard ("J-Board")[106] insert depicting a negligee-clad blonde woman lounging on a bed.

Within four months after the BedSack filled the shelves, Acme Quilting Co. introduced its own fully quilted pad in a plastic bag with a J-Board insert. The blonde in a negligee on Acme's J-Board wrapper bore a strong resemblance to Perfect Fit's blonde. The similarity was not accidental. Acme had commissioned an artist to copy the design and layout of Perfect Fit's J-Board from a sample.[107]

Perfect Fit brought a trade dress infringement action against Acme under section 43(a) and the New York unfair competition law.[108] The district court, concluding that secondary meaning had to be shown under either federal or state law, found that Perfect Fit had not established secondary meaning for its trade dress.[109] Therefore, Perfect was not entitled to injunctive relief.[110]

On appeal, the Second Circuit echoed *Flexitized* by concluding that New York law applied. Since New York law did not require a showing a secondary meaning, the court proceeded to the likelihood of confusion

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[103] *Id.*

[104] 618 F.2d 950 (2d Cir. 1980).

[105] *Id.* at 953.

[106] "The bottom portion of a J-Board bends to a 90-degree angle over the end of the packaged product so that a portion of the board is visible to the prospective purchaser whether the packages are laid end-to-end on a table or stacked on a shelf." *Id.* at 951.

[107] *Id.* at 951-52.

[108] *Id.* at 951.

[109] *Id.* at 952.

[110] *Id.*

test and held that Perfect Fit had made a sufficient showing to merit injunctive relief.[111]

The *Perfect Fit* appellate court emphasized that "by dint of its own skill, efforts and expenditures, Perfect Fit had gained a commercial advantage over Acme."[112] Acme had misappropriated the results of Perfect Fit's labor - the "distinctive and memorable" packaging concept. Because Acme misappropriated through conscious imitation of a rival's trade dress, the court presumed that Acme intended to create a likelihood of confusion among consumers and succeeded in doing so.[113]

B. The Burden Faced By Intentional Copiers: Overcoming a Presumption of Bad Faith

As it has evolved within the Second Circuit, therefore, the common law appears to favor a presumption that an alleged infringer intends to confuse customers whenever he willfully copies trade dress. The court penalizes this implied bad faith with the further presumption that copying breeds confusion. If customers are unable to distinguish between the original trade dress and the imitative trade dress, many will purchase the imitator's product, and thereby reward infringement. The equities of this scenario prompted the Second Circuit to apply a test that did not reward the scheming imitator.

Aside from equitable considerations, however, a circumstantial rationale also exists to justify the Second Circuit's focus on intentional copying as the basis for its presumptions. As the *Perfect Fit* court explains, the "honest business man" can so easily "select from the entire material universe" those trappings with which he wishes to identify his product, that courts "look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them."[114]

Moreover, as a "second comer" to a market, the honest businessman has both a duty and an opportunity to scrupulously avoid likelihood of confusion between his product and that of the established "first comer."[115] The second comer is on notice as to what the first comer's

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[111] *Id.* at 952, 955.
[112] *Id.* at 954.
[113] *Id.*
[114] *Id.* at 953.
[115] *Id.*

product looks like. If he nonetheless persists in copying the look of the first comer's product, the businessman's honesty becomes suspect. The court will therefore infer bad faith from his conduct.

Another way of analyzing the Second Circuit's focus on intentional copying is to compare trademarks and trade dress. As to trade dress, a second comer can easily arrange the symbols, shape, color and coverings of a product without having to match the same exact combination constituting the first comer's trade dress. The first comer's trade dress can therefore be protected without imposing undue hardship on competitors who later seek to market the same product.

Comparing trade dress to trademarks, the *Perfect Fit* court asserted that *nonfunctional* features of trade dress would probably fit into the strong end of the trade mark distinctiveness spectrum, along with arbitrary and suggestive marks.[116] Like these strong marks, trade dress that is primarily nonfunctional can be protected without inhibiting the second comer's ability to effectively identify his product.

In some cases, however, undue hardship might arise if a second comer were prohibited from copying *functional* features of trade dress. Just as generic and descriptive marks can be copied without infringement because the product cannot be identified without them, strictly functional aspects of trade dress can be copied without infringement because the product cannot work, or function, without them. Primarily functional trade dress cannot be protected without inhibiting the second comer's ability to introduce a similar competing product.

The Second Circuit analysis thus lends itself to three separate rationales for strict scrutiny of intentional copiers: (1) bad faith that motivates intentional copying constitutes a basis of liability; (2) the honest businessman, on notice as to what his rival's products look like, will take steps to distinguish his product; and (3) the honest businessman's burden to distinguish his product is light because he can avail himself to an infinite combination of marks, symbols and coverings.

In light of these rationales, a businessman who intentionally copies the features of a competitor's trade dress needs to overcome a presumption that he is copying in bad faith. His best defense is to show that any similarity in appearance is born of necessity. In other words, he copied in good faith because the copied trade dress was primarily functional. He simply could not create a similar product without incorporating functional features of his rival's product.

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[116] *Id.*

In sum, the common law of New York, provides equitable rationales for ruling against competitors without even addressing the concept of secondary meaning as it relates to trademarks or trade dress. New York law does not require plaintiffs to show secondary meaning. Plaintiffs can bypass this element of proof and proceed directly to the likelihood of confusion test. The Second Circuit weighs bad faith copying very heavily as a factor in finding unfair competition when applying the likelihood of confusion test. A showing of bad faith can lead directly to a finding of likelihood of confusion, which in turn validates an unfair competition claim.

C. Loosening of Strictures Against Intentional Copying in New Product Situations

As applied to intentional copiers, the common law of New York seems to assume that the products being copied have been around long enough for second comers to be on notice as to what the products look like. The Second Circuit recognizes, however, that a form of good faith copying takes place in the business world in cases where a product has just been introduced. For instance, the trier of fact may make at least two inferences which put the second comer's intent in a good light. First, the fact-finder may assume that the second comer came up with a similar idea independently at about the same time as the plaintiff. Second, the fact-finder may presume that the plaintiff suffered little harm because new products usually have little secondary meaning. If the public does not yet associate the product's trade dress with a particular company, then it does not matter if competitors join the fray.[117]

Like the fact-finder, the second comer may not see the harm in copying an unregistered mark or trade dress which has not yet acquired secondary meaning. The second comer is clearly not acting in bad faith. The Second Circuit nonetheless remains solicitous for the first comer even in this situation. Accordingly, the court looks to the theory of "secondary meaning in the making" to protect the first comer's investment.

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[117] *See* Bayer Co. v. United Drug Co., 272 F.505, 510-11 (S.D.N.Y. 1921). In holding that ASPIRIN had become generic, Judge Learned Hand explained: "What do the buyers understand by the word for whose use the parties are contending? If they understand by it only the kind of good sold, then, I take it, it makes no difference whatever effort the plaintiff has made to get them to understand more." *Id.* at 509. *See also* Evans, *supra* note 4, at 149-50.

D. Secondary Meaning in the Making

The phrase "secondary meaning in the making" originated in a treatise on trademarks and unfair competition by commentator Rudolf Callmann.[118] Callmann asserted that a mark with "secondary meaning in the making" should be protected "at least against those who appropriate it with knowledge or good reason to know of its potential in that regard, or with an intent to capitalize on its goodwill."[119] Application of Callmann's secondary meaning in the making to protect trademarks has proved difficult. An adequate definition has eluded the courts.

Callmann's "secondary meaning in the making," or "incipient secondary meaning" as one commentator rephrased it,[120] implies an element of "bad intent" of a competitor. For example, a producer of chocolate-covered ice cream bars creates a striking, shiny silver package with blue letters for his product. The producer, or first comer, introduces his eye-catching new line into the market with much fanfare funded by advertising dollars.[121] Customers take note, and the process of associating the shiny wrapper with the producer begins. Secondary meaning, in other words, is "in the making." Unfortunately, however, a rival producer (second comer) in the same market may also take note. Soon a suspiciously similar line of ice cream bars in shiny wrappers appears in the supermarket freezer alongside the originator's bars.

The first comer's ice cream bar wrappers, in the above example, have not yet had time to acquire secondary meaning. However, the first comer has still invested time, energy and cash in marketing the product. Under the secondary meaning in the making doctrine, the originator's investment should therefore be protected now, not later.

Secondary meaning in the making thus appears to stave off unfair competition. Secondary meaning in the making runs contrary to traditional federal trademark analysis because, at least to descriptive

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[118] *See generally* 3 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 77 (3d ed. 1969).

[119] *Id.* § 77.3.

[120] *See generally* Scagnelli, *Dawn of a New Doctrine? - Trademark Protection for Incipient Secondary Meaning*, 71 TRADEMARK REP. 527 (1982).

[121] *See* Ambrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1533-35 (11th Cir. 1986)(court held that Kraft infringed on trade dress, or wrapper design, of competitor's ice cream bars).

marks, it lends a potential for protection to marks that arguably should remain available to other producers. As the following analysis of key cases reveals, courts (1) shy away from expressly adopting the doctrine or giving it legal force, and (2) find other ways of achieving equitable results.

1. The Southern District of New York cases

Secondary meaning in the making doctrine first appeared in *National Lampoon, Inc. v. American Broadcasting Cos., Inc.*,[122] in the Southern District Court of New York. In the early 1970's, plaintiff *National Lampoon* flourished as a satirical humor magazine.[123] Encouraged by the magazine's success, its founders launched "related enterprises" such as record albums and closed-circuit television variety shows. Impressed, defendant ABC met with National Lampoon to investigate the "translating of National Lampoon creativity into television."[124] However, the negotiations trailed off indeterminately after five months. ABC instead struck a deal with the creator of "Laugh-In." As a result of this new collaboration, ABC planned to go ahead with a weekly television series called "Lampoon."[125]

Meanwhile, National Lampoon had begun seeking ways to create its own television series entitled "National Lampoon." Upon learning of ABC's competing plans, National Lampoon sued ABC for trademark infringement under section 43(a) and the common law of unfair competition. At issue before the court was whether NATIONAL LAMPOON had been around long enough to have acquired the distinctiveness which would prevent ABC from appropriating the name for its new television series.

"Trash though it may be," the court observed, "plaintiff's magazine does have a consistent product quality . . . and consumer identification with the mark obtained through expensive and difficult efforts over a period of years" has engendered good will which ABC may not

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[122] 376 F. Supp. 733 (S.D.N.Y. 1974).

[123] The court found that the magazine had "substantial national acceptance, or good will," estimating a national pass-along readership of one and one-half million. *Id.* at 738.

[124] *Id.* at 740.

[125] ABC later proposed "ABC National Lampoon" as an alternate title, in an apparent attempt to distinguish their work from that of National Lampoon. *Id.* at 744.

exploit.[126] In granting an injunction against ABC under section 43(a), therefore, the court expressed a rationale based on its finding that customers identified NATIONAL LAMPOON with the plaintiff. Association between the mark and the producer would suggest secondary meaning. The court, however, stopped short of expressly finding secondary meaning.

Instead, the *National Lampoon* court ruled that ABC intended to "trade upon the national acceptance and reputation built up by National Lampoon and to pass off its program as a National Lampoon Product."[127] The court proceeded to raise the presumptions that ABC, as a passer-off, intended to confuse customers and succeeded in doing so.[128] In addition, the court expressly stated that such passing off was evidence of secondary meaning. Therefore, under section 43(a), both elements of an infringement action were satisfied. Since New York common law did not require a showing of secondary meaning, these presumptions were more than sufficient to establish National Lampoon's right to relief under its unfair competition claim.[129]

The *National Lampoon* court thus engaged in some sleight-of-hand when finding for plaintiff. It did not expressly state that NATIONAL LAMPOON had secondary meaning. Rather, the court found evidence of secondary meaning. Implicitly acknowledging the weakness of this approach, the court also asserted that "even assuming that secondary meaning had not yet come to full fruition," [130] Callmann's theory of secondary meaning in the making would apply. After all, "[p]iracy should no more be tolerated in the early stages of development of quality than in the later."[131]

Five years later, in *Orion Pictures Co., v. Dell Publishing Co.*,[132] a motion picture producer filed a section 43(a) unfair competition claim against a paperback publisher. Defendant Dell Publishing Co. ("Dell") had noted the publicity swirling around the upcoming movie *A Little Romance*[133] and attempted to negotiate a "tie-in" with plaintiff Orion

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[126] *Id.* at 750.
[127] *Id.* at 746.
[128] *Id.* at 747.
[129] *Id.* at 747.
[130] *Id.*
[131] *Id.*
[132] 471 F. Supp. 392 (S.D.N.Y. 1979).
[133] At the time of trial, Orion claimed it was in the process of spending over four million dollars to promote the film. *Id.* at 396 n.10.

Pictures. Dell proposed publishing the English translation of the book upon which the movie was based, if Orion would grant permission for Dell to change the title to match the movie. After being rebuffed by Orion,[134] Dell went ahead with the book's publication and distribution anyway. The book not only substituted the title "*A Little Romance*" for the book's original title, but it also bore a cover illustrated with people resembling the stars of the movie.[135] Orion Pictures promptly moved for a preliminary injunction to restrain Dell from using the title, alleging that Dell had violated section 43(a) by taking a "free ride" at the expense of Orion Pictures' advertising budget.

Dell's defense prodded the soft underbelly of secondary meaning theory. Because the book came out before the movie, Dell argued, A LITTLE ROMANCE had not yet had time to acquire secondary meaning. Therefore, as a mark, A LITTLE ROMANCE lacked the distinctiveness required for protection under section 43(a).[136]

A perfect opportunity thus arose for the court to cite Callmann's secondary meaning in the making theory, which was devised to protect marks during their vulnerable early stages. The court availed itself of this opportunity, quoting Callmann, but then granted an injunction against Dell by applying the same reasoning that prevailed in *National Lampoon*.

The *Orion Pictures* court found that, due to pre-release publicity, A LITTLE ROMANCE was "sufficiently identifiable with the plaintiff's film" to merit trademark protection.[137] The court concluded that because Dell's book gave the impression that it was the authorized novel version of the film, Dell had "misled the public."[138] As in *National Lampoon*, passing off led to a presumption of likelihood of confusion, as well as secondary meaning.[139]

The *National Lampoon* and *Orion Pictures* courts conceded that, under section 43(a), secondary meaning must be shown in a trademark

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[134] Orion had obtained a screenplay so markedly different from the book, to which Orion had obtained the motion picture rights, that it felt publishing the book with the movie's title would misrepresent the movie. *Id.* at 393.

[135] The front cover also advised book browsers that the book was "NOW A MAJOR MOTION PICTURE" - a fact which Dell cited in its own publicity releases as likely to "boost sales." *Id.* at 394.

[136] *Id.* at 395.

[137] *Id.* at 396.

[138] *Id.* at 397.

[139] *Id.* at 396.

infringement action.[140] In each case, the court pulled evidence of secondary meaning, as well as proof of likelihood of confusion, from its finding that the defendant had passed off the plaintiff's trademark. To buttress this weak inferential showing of secondary meaning, the court cited Callmann's secondary meaning in the making as justification. Even if secondary meaning had not been established as firmly as it might have been, Callmann's theory was there to back it up.

It is important to note that neither decision rested entirely on the section 43(a) holding. Both courts pointed to New York law for their unorthodox holding that secondary meaning need not be shown on the unfair competition claim. Common law claims thus provided the latitude necessary for the Second Circuit to rule in favor of the plaintiffs without a strong showing of secondary meaning.

Like the two cases just reviewed, other Second Circuit cases follow the curious pattern of mentioning the secondary meaning in the making theory and then resolving the issues on other grounds.[141] This tentative approach to secondary meaning in the making means that it remains mere dicta, without real precedential value.[142] Despite this weakness, courts may refer to the theory anyway in recognition of the basic inequities that pervade the cases in which the theory is mentioned. Secondary meaning in the making, after all, would protect trademarks and trade dress against "intentional, deliberate attempts to capitalize on a distinctive product."[143] Even without decisional force, the theory nonetheless adds moral force to a court's opinion when dealing with particularly egregious conduct by an unscrupulous second comer.[144]

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[140] *National Lampoon*, 376 F. Supp. at 749; *Orion Pictures*, 471 F. Supp. at 395.

[141] For another example of how the Second Circuit brings up secondary meaning in the making yet decides on the basis of intent, *see* Jolly Good Indus., Inc. v. Elegra Inc., 690 F. Supp. 227 (S.D.N.Y. 1988) (plaintiffs won preliminary injunction against company which planned to mimic the design of its beverage dispenser).

[142] In 1981, a court reviewing the Southern District of New York "secondary meaning in the making" cases, noted that in the cases cited by the plaintiff in support of the doctrine, the "court found that there actually was secondary meaning, and the proposition that secondary meaning in the making might also be protectible was only dicta. Plaintiff has cited no cases which actually protected secondary meaning in the making. . . ." Black & Decker Mfg. v. Ever-Ready Appliance, 518 F. Supp. 607, 616 (E.D.Mo. 1981). *aff'd*, 684 F.2d 546 (8th Cir. 1982). *Accord* A.J. Canfield Co. v. Concord Beverage Co., 629 F. Supp. 200, 211 (E.D.Pa. 1985).

[143] *See* Metro Kane Imports, Ltd. v. Federated Dept. Stores Inc., 625 F. Supp. 313, 316 (S.D.N.Y. 1985), *aff'd sub nom.*, 800 F.2d 1128 (2d Cir. 1986).

[144] Courts sometimes analogize secondary meaning in the making to the "second

A.J. Canfield Co. v. Concord Beverage Co.,[145] a federal district court opinion in the Third Circuit offered the explanation that the value of competition lies behind courts discounting the legal force of secondary meaning in the making. The "mere notion" of the theory, the court concluded, is "inimical to the purpose of the doctrine of secondary meaning, which is to protect designations once they are indicative of a product's origin."[146] By permitting exclusive use of a mark or trade dress even before the consuming public begins to associate it with the producer of the goods, the doctrine denies other manufacturers the means by which they can promote their own products.[147] Without the ability to effectively promote their products, the other manufacturers cannot compete on equal terms. Consequently, a prominent goal of the Lanham Act - to encourage "healthy competition"[148] - may be frustrated.

In sum, because secondary meaning in the making is antithetical to the traditional Lanham Act balance, it falls short in protecting the originator of a product during the early stages of the product's development, when secondary meaning has not yet attached to its trademark or trade dress. However, in cases where a "bad faith" second comer has intentionally copied a highly distinctive mark or trade dress, courts may refer to the doctrine as a method of acknowledging the unfairness of the second-comer's conduct.

V. Inherent Distinctiveness

Another line of cases produced a second concept which attempts, like secondary meaning in the making, to bypass the secondary meaning threshold for success in a section 43(a) infringement action. This line of cases views "inherent distinctiveness" as a key factor in trade dress infringement actions.

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comer doctrine, which states that "[a] senior user in possession of a distinctive mark has a right not to have a likelihood of confusion between the two marks in an attempt to exploit the reputation of the senior user's mark, since this would deprive the first user of control over its reputation and goodwill." Thompson Medical Co. v. Pfizer, Inc., 753 F.2d 208, 214 (2d Cir. 1985).

[145] 629 F. Supp. 200 (E.D.Pa. 1985).

[146] *Id.* at 212.

[147] *Id.*

[148] *See* Trademark Review Commission, *supra* notes 18, 22.

A. Introduction

The "inherently distinctive" doctrine first appeared in *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*[149] In 1966, plaintiff Seabrook Foods, a major manufacturer of frozen vegetables, registered a "stylized leaf design" with SEABROOK FARMS centered within it. Several years later, defendant Bar-Well applied to register a similar design for packages of ARCTIC GARDEN frozen vegetables. Bar-Well admitted having "general knowledge" of Seabrook's packaging design.

Seabrook opposed Bar-Well's application for registration. The court framed the issue as whether Seabrook's design was "inherently distinctive" or had acquired secondary meaning. If Seabrook's design passed either test set forth by the court, then Seabrook would prevail in protecting its design as well as its SEABROOK FARMS logo.[150]

The *Seabrook* court began by setting up a list of factors for evaluating whether the design was "arbitrary or distinctive." The *Seabrook* factors comprised:

> whether [the design] was a "common" basic shape or design, whether it was unique or unusual in a particular field, whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or whether it was capable of creating a commercial impression distinct from the accompanying words.[151]

The court focused on whether Seabrook's design was capable of creating a commercial impression apart from the words. Affirming a lower court's dismissal of Seabrook's opposition, the appellate court classified Seabrook's design as a "decorative panel" which was not "visually outstanding in relation to everything else on the package."[152] From this subjective assessment, the court inferred that the design lacked secondary meaning and inherent distinctiveness.

A dissenting Judge Rich took the majority to task for ignoring the fact that Bar-Well had "inexcusably copied an inherently distinctive, origin-indicating feature of opposer's registered trademark which could

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[149] 568 F.2d 1342 (C.C.P.A. 1977).
[150] *Id.* at 1343-45.
[151] *Id.* at 1344.
[152] *Id.* at 1345.

only have been done for the purpose of creating purchaser confusion."[153] He argued that the purpose of a prominent design is to connect it in the consumer's mind with a "specific origin."[154]

Upon seeing Seabrook's leaf design on a package of frozen food, customers would automatically think of the same origin (Seabrook) for the product. In other words, the customers would associate the inherently distinctive design with the producer, rather than with the product. Secondary meaning also arises when a mark is associated with a producer, rather than the product itself.[155]

Because inherently distinctive marks create the same consumer reaction as marks with secondary meaning, Judge Rich emphatically asserted that "secondary meaning need not be proved with respect to inherently distinctive marks."[156] The rationale behind Judge Rich's dissenting opinion thus points out the difficulty in distinguishing between secondary meaning and inherent distinctiveness, as well as the questionable utility of attempting to do so.

After the *Seabrook* decision, the Fifth Circuit applied the inherent distinctiveness concept to a section 43(a) trade dress infringement action in *Chevron Chemical Co. v. Voluntary Purchasing Group*.[157] Decisions following *Chevron* are primarily in the Fifth and Eleventh Circuits.[158] In

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[153] *Id.* at 1346.

[154] *Id.* at 1348.

[155] *See* cases cited *supra* note 5.

[156] *Seabrook*, 568 F.2d at 1348.

[157] 659 F.2d 695 (5th Cir. Unit A 1981).

[158] On October 1, 1981, the Eleventh Circuit came into being as a result of a split of the Fifth Circuit. Not surprisingly, therefore, the Eleventh Circuit looks to Fifth Circuit cases for guidance and precedent in formulating its own decisions. Fifth Circuit cases decided prior to October 1, 1981, are binding on the Eleventh Circuit. Fifth Circuit Unit A cases, like Chevron, decided after such date are only "persuasive authority." *See* Brooks Shoe Mfg. Co., Inc. v. Suave Shoe Corp., 716 F.2d 854, 857 n.9 (11th Cir. 1983).

In John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 981 n.25 (11th Cir. 1983), the court noted that the inherent distinctiveness approach "has merit," but decided the case on other grounds. However, the Eleventh Circuit proceeded to adopt the doctrine as applied to § 43(a) trademark and trade dress infringement actions. *See* University of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535, 1540-41 (11th Cir. 1985) (trademarks and service marks); Ambrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1536 n. 13 (11th Cir. 1986) (trade dress).

Other courts outside the Fifth and Eleventh Circuits have adopted the inherent distinctiveness doctrine, citing *Chevron*. *See, e.g.*, Marker Intern v. deBruler, 635 F. Supp. 986, 997 (D. Utah 1986); Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d

addition to the *Chevron* case, two key cases within these circuits are next explored to see how the doctrine works.

B. The Chevron Formulation

In 1971, the plaintiff in *Chevron* ("Ortho") adopted red and yellow banded labels for wrapping bottles and cartons of its pesticides, weed killers and fertilizers. Three years later, defendant Voluntary Purchasing Group ("VPG") introduced its own line of lawn and garden products with similar trade dress. The similarity was no accident. VPG had consulted an attorney to determine how closely it could copy Ortho's trade dress without violating the law. After VPG failed to substantially revise its trade dress, Ortho filed a section 43(a) action for "false designation of origin" and "false representation."[159]

In its formulation of inherent distinctiveness, the *Chevron* court simply applied trademark law to trade dress. The court reasoned that arbitrary features of trade dress, like arbitrary trademarks, were "sufficiently distinctive" to identify the producer. Just as arbitrary marks deserve protection without a showing of secondary meaning, so did the arbitrary features of Chevron's trade dress.[160]

The next case of the trilogy is *Brooks Shoe Manufacturing. Co., Inc. v. Suave Shoe Corp.*[161] Plaintiff Brooks Shoe had been selling athletic shoes for nearly sixty years when, in 1973, it began featuring shoes with a "V" design along the sides. Sales of Brooks shoes climbed as Brooks invested heavily in promoting the new look. In 1979, defendant Suave Shoes began selling a line of inexpensive shoes with "V" markings. Brooks responded by bringing an action against VPG alleging, among other things, trade dress infringement under section 43(a).[162]

Citing *Chevron* for the rule that secondary meaning need not be proven when features of trade dress are inherently distinctive, Brooks contended that its "V" design was inherently distinctive. The court ruled in favor of defendant Suave Shoes, after reviewing the *Seabrook* factors for inherent distinctiveness. According to the court, the trade

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604, 608 (7th Cir. 1986). *But see* Union Mfg. Co., Inc. v. Han Baek Trading Co., Ltd., 763 F.2d 42, 48 (2d Cir. 1985) (unregistered, non-verbal marks, such as designs, always require proof of secondary meaning).

[159] *Chevron*, 659 F.2d at 696-97, 699.

[160] *Id.* at 702.

[161] 716 F.2d 854 (11th Cir. 1983).

[162] *Id.* at 856.

dress in *Chevron*, comprised various hues, geometric designs and printing styles arranged together to create a "distinctive visual impression," while the "V" design in the instant case constituted a simple geometric design which could also be construed as an arrow or a "7."[163]

A year after *Brooks*, the Fifth Circuit again decided a section 43(a) trade dress infringement claim in *Sicilia Di R. Biebow & Co. v. Cox*.[164] *Sicilia* arose out of a dispute between former business partners. After ten years of distributing lemon and lime juice for plaintiff ("Sicilia"), Cox broke a covenant not to compete and began selling "Pompeii" lemon and lime juice to his former Sicilia customers. Sicilia filed an infringement claim against its former partner because of a strong resemblance between "Sicilia" squeeze bottles and "Pompeii" squeeze bottles.[165]

The *Sicilia* court looked at the "total effect" of the two competing squeeze bottle designs, but, finding the record insufficient, could not decide whether Sicilia's trade dress exhibited sufficiently distinctive features to identify Sicilia as the producer. The court therefore remanded the case.

Only *Chevron* itself explicitly found trade dress to be inherently distinctive. Having thus established the validity of the trade dress, the *Chevron* court next evaluated the likelihood of confusion. The court particularly noted that defendant VPG had consulted an attorney to see how close it could come to Ortho's trade dress without breaking the law. This, the court concluded, evidenced VPG's intent to "cash in" on Ortho's good will. The court then inferred an intent to cause likelihood of confusion and presumed that VPG succeeded in doing so.[166]

Similarly, the *Sicilia* court inferred bad faith and likelihood of confusion from the fact that Cox gave a "Sicilia" squeeze bottle to the "Pompeii" bottle designer and told him to copy it as closely as possible without infringing.[167] Whatever the lower court decided regarding functionality, the court declared, "we think intent to infringe should weigh strongly against Cox."[168]

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[163] *Id.* at 858.
[164] 732 F.2d 417 (5th Cir. 1984).
[165] *Id.* at 423.
[166] 659 F.2d at 703-04.
[167] 732 F.2d at 430.
[168] *Id.* at 434.

In contrast, the *Brooks* court noted that the court below had held that defendant Suave had not "palmed off" its shoes as those of the plaintiff.[169] The *Brooks* court no doubt felt constrained to leave this holding undisturbed, especially in light of the fact that Suave demonstrated good faith by "voluntarily" complying with a letter to stop production sent by the plaintiff's attorney. Unable to ascribe bad faith from Suave's intentional copying, the court refrained from entering into a likelihood of confusion analysis and ruled in favor of the defendant.[170]

In sum, the law as advanced by the *Chevron* line can be stated as follows: in a section 43(a) trade dress infringement action, where features of the trade dress are arbitrary enough to indicate origin and yet not functional enough to be needed for effective competition, the legal analysis will bypass secondary meaning and go directly to the likelihood of confusion test. Intent then becomes dispositive.

VI. Conclusion

When a person places a product in the market with features closely resembling the distinctive trademark or trade dress of a competitor's product, a court looks at that person with suspicion. Indeed, the court may infer that the person intentionally copied the trappings of a rival's product. If the court so finds, it may further infer that the act of copying evidences a bad faith attempt to capitalize on the good will earned by the producer whose mark or trade dress is being copied.

Secondary meaning in the making and inherent distinctiveness doctrines purport to aid plaintiffs in protecting themselves against bad faith competitors. The doctrines address the vulnerable early stages of a product's life, when courts will be hard pressed to declare that the product's marks or trade dress have had time to acquire distinctiveness, or secondary meaning.

Central to a court's analysis of an infringement claim is a finding of secondary meaning or its equivalent. When products have not firmly established themselves in the marketplace, however, courts cannot logically assert that the products have achieved the acquired distinctiveness which equates to secondary meaning. Inherent distinctiveness and secondary meaning in the making lack the decisional force to authorize such an assertion.

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[169] 716 F.2d at 859.

[170] *Id.* at 859, 862.

Cases citing secondary meaning in the making actually turn on a finding of secondary meaning. The inherent distinctiveness doctrine is strictly illusory, for lurking in the "inherently distinctive" concept is the same requirement of indicating origin that secondary meaning sets forth. Without even these theoretical underpinnings to support a finding of secondary meaning, courts are left contemplating the equities of the infringement claim. Yet courts in this situation often rule in favor of plaintiffs.

The explanation for court rulings which bypass substantive law to reach the equities can be found in the lesson of *Sears/Compco*. If the court believes the defendant must copy the plaintiff's mark to effectively compete, it will conclude that such copying advances healthy competition and should therefore be tolerated. If the court believes that the defendant copied in a predatory attempt to deceive customers, it will grant restrictive measures to protect both the honest businessman and the customers harmed by such conduct.

The issue of intent thus permeates trademark infringement actions. If allowed to run rampant, bad faith copiers would soon run off with every hot new idea left cooling on a shelf. No incentive would remain for entrepreneurs to take the risk of trying out a new concept in the marketplace. Trademark law, surprisingly imbued with strong moral force, thus steps in to reward creativity and the competition it ultimately fosters.

Andrew D. Smith

Hawaii's Quarantine Laws: Can Spot Come Home?

I. Introduction

Since 1912, Hawaii has required that domestic animals such as dogs and cats entering the islands must be quarantined for 120 days in a state-run facility in order to prevent the spread of human and animal diseases including rabies.[1] The law makes no exceptions, not even for guide dogs.[2]

The 120-day quarantine rule is now being heavily criticized on both legal and scientific grounds as being unnecessarily stringent. During the 1990 Hawaii legislative session, critics of the current regulation (hereinafter Opponents) offered an alternative to the current regulation in Senate Bill No. 2685.[3] The bill proposed to replace the 120-day

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[1] Section 142-2 of the Hawaii Revised Statutes states that:

> [T]he department of agriculture may make and amend rules for the inspection, quarantine, disinfection, or destruction, either upon introduction into the State or at any time or place with the State . . . [i]ncluded therein may be rules governing the control and eradication of transmissible diseases of animals . . . The department may also prohibit the importation into the State from any foreign country or other parts of the United States or the movement from one island within the State.

Haw. Rev. Stat. § 142-2 (1989).

The department of agriculture requires that "[d]ogs, cats . . . be confined in the animal quarantine station, Honolulu, for a period of one hundred twenty days or a longer period as the head of the animal industry division shall deem necessary to prevent the introduction of rabies." Haw. Admin. Rules, tit. 4. ch. 18, § 4-18-7 (1981).

[2] In December 1983, the Honolulu Star-Bulletin reported that a blind woman, Loretia, spent her honeymoon at the animal quarantine station instead of her prearranged suite at the Hale Koa Hotel. Because the state mandated that Misty, Loretia's seeing guide dog, be quarantined for 120 days, Loretia could not tolerate the separation from her "eyes" and friend. Honolulu Star Bulletin, Dec. 5, 1983, at A5, col. 1.

[3] Senate Bill No. 2685 "Relating to a Modified Quarantine System for the Importation of Animals." S. 2685, 15th Leg., Reg. Sess. (1990).

quarantine with a seven-step procedure which included[4]: 1) two pre-entry vaccinations; 2) an entry permit; 3) veterinarian license attesting that an identifying micro-chip has been implanted in the dog or cat or an identification number has been permanently tattooed on the dog or cat; 4) post-entry vaccination; 5) post-entry rapid fluorescent focus inhibition test conducted by the department of agriculture; 6) two-month quarantine if a positive antibody titer results; and 7) home confinement for two months.[5]

Scientifically, the main concern is whether the required procedures will ensure that the entering animal is rabies-free. Legally, the issue is whether the state's policy on entering animals is unduly burdensome in view of what is reasonably necessary or whether the state has exceeded its state police power and infringed upon the rights of animal owners under the federal and Hawaii constitutions. Despite the criticism that the state lacks authority to continue the quarantine, current regulations are justified scientifically and are not legally excessive. Because complicated scientific and conflicting data on rabies often lead to false or misleading information, this analysis will commence with a simplified account of rabies. It will then examine the constitutional issues and conclude with possible alternatives to the current four-month quarantine.

II. Background Information — The Facts About Rabies

A. What is Rabies?

Rabies is a bullet-shaped virus with at least five known strains and more than seventy-five related rabies-like viruses.[6] Rabies generally cannot live in the environment freely and must reside in a host to survive.[7] Because of its frailness, disinfectants such as household soap

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[4] The proposed bill would have applied to animals entering from the United States. S. 2685, 15th Leg., Reg. Sess. § 2 (1990).

[5] S. 2685, 15th Leg., Reg. Sess. § 2 (1990).

[6] D. Fishbein, L. Sawyer, & W. Winkler, Rabies Concepts for Medical Professionals 11 (2d ed. 1986) [hereinafter Fishbein].

[7] *Id.* at 60. Survival of the rabies virus outside the host depends on several factors including temperature, sunlight, pH, and moisture. As a rule of thumb, scientist conclude that it is reasonable to assume that the infection lacks vitality if the saliva has dried. *Id.*

can easily inactivate the free virus.[8] Once in the host, the virus moves slowly from the point of entry to the central nervous system, and finally to the brain.[9]

B. Who Can Catch Rabies and How is it Transmitted?

The rabies virus affects most warm-blooded animals including bats, skunks, foxes, dogs, cats, cattle, horses, and humans.[10] The majority of reported rabies cases emanate from the bite of a rabid animal.[11] In order for the transmission to ensue, the virus must be delivered into the saliva at the same time the biting animal becomes furious.[12] The transmission normally takes place while the animal appears clinically sick.[13] Some species such as dogs, cats, foxes, and skunks, also known as incubatory carriers, can spread the disease a few days prior to the onset of the clinical symptoms.[14] The incubation period for dogs varies from nine to 182 days and for cats, nine to fifty-one days.[15] However, the majority of cases reveal that the clinical symptoms surface within twenty to sixty days after exposure.[16] Factors that contribute to the transmission of rabies include: 1) severity and location of the bite;[17] 2) amount and presence of the virus in the saliva;[18] 3) status of the

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[8] *Id.*

[9] *Id.* at 13.

[10] *Id.* at 11-12.

[11] M. BURRIDGE, L. SAWYER & W. BIGLER, RABIES IN FLORIDA 8 (1986) [hereinafter BURRIDGE] and RABIES PREVENTION & CONTROL 2 (HER MAJESTY'S STATIONARY OFF. 1988) [hereinafter RABIES PREVENTION]. Although rare, doctors have reported a case of the aerosol transmission of rabies in special conditions involving high concentrations of the virus. FISHBEIN, *supra* note 6, at 50. Despite its rarity, human to human transmission of rabies has occurred. Scientists have traced the rabies virus to a corneal transplant from a person who died of undiagnosed rabies. 28 MORBIDITY & MORTALITY WEEKLY REP. 109 (1979).

[12] FISHBEIN, *supra* note 6, at 14.

[13] *See infra* section C; BURRIDGE, *supra* note 11, at 9.

[14] BURRIDGE, *supra* note 11, at 9.

[15] BURRIDGE, *supra* note 11, at 10.

[16] *Id.* at 9. A few reports indicate that the animals did not show clinical signs of the rabies during its illness. Eng, *Epidemiologic Factors, Clinical Findings, and Vaccination Status of Rabies in Cats and Dogs in the United States in 1988*, 197 J. AM. VET. MED. A. 205 (1990).

[17] RABIES PREVENTION, *supra* note 11, at 2.

[18] *Id.*

animal's health;[19] 4) age of the recipient; and 5) properties of the virus strain involved.[20]

C. What Are the Signs, Means of Diagnosing, and End Results For the Cats, Dogs, and Humans Exposed to Rabies?

In cats and dogs, clinical signs appear when the virus reaches the brain.[21] At first, the animal proceeds through the prodromal stage, during which signs of irritableness, uneasiness, and a compulsive tendency to bite the original wound are manifested.[22] Next, during the excitement stage, the animal continues with acts of irritableness and also exhibits a sagging jaw, changes in the voice, copious salivation, and the propensity to bite.[23] Finally, the animal moves through the paralytic stage where it develops paralysis, respiratory distress, coma, and death.[24] Once the clinical signs materialize, death normally occurs within ten days[25] and recovery is very rare.[26]

Procedures to detect the rabies virus include postmortem and antemortem techniques. Although a variety of tests to detect rabies in a dead animal are available, the combination of a fluorescent antibody test[27] in conjunction with a mouse inoculation test[28] is currently believed to be the most accurate method of detection because of its reliability and sensitivity.[29]

When these two tests are performed in conjunction, all rabies-infected animals can be accurately diagnosed.[30] For diagnosing an animal while

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[19] World Health Organization, Who Expert Committee on Rabies 29 (1984) [hereinafter Who].

[20] Rabies Prevention, *supra* note 11, at 2.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 3.

[26] Burridge, *supra* note 11, at 10-11.

[27] *Id.* at 65. Small portions of tissue from the hippocampus, the cerebellum and the medulla oblongata of the brain are dissected and submitted for testing. Each tissue is placed on a slide to create a smear. All slides are fixed in acetone and later flooded with antirabies serum labeled with fluorescein isothiocyanate. The slides are bathed, dried, and examined under a fluorescent microscope. *Id.* at 65-66.

[28] *Id.* at 66. Tissue from the brain is prepared in physiological saline, containing horse serum, penicillin, and streptomycin, and injected into five weanling mice. The animals are observed daily for signs of rabies for a period of 30 days. *Id.* at 67.

[29] *Id.* at 63.

[30] *Id.* at 63, 67.

it is alive and prior to the onset of clinical signs, doctors perform a cornea test and/or a skin biopsy;[31] however, these tests sometimes lack sensitivity.[32] The *Journal of American Veterinary Medical Association* (JAVMA), on the other hand, reports that no reliable method exists for detecting rabies infection in a live animal.[33] However, most scientists rely on the Rabies Fluorescent Focus Inhibition Test (RFFIT)[34] for detecting rabies in a live animal. The RFFIT test measures the rabies antibody in saliva, serum, and cerebrospinal fluid.[35] Unfortunately, scientists cannot distinguish between antibodies which have been introduced as a result of an infection and those introduced through a vaccination.[36] The utility of these tests has little significance for the infected animal since the animal will die and no known cure exists on the market. However, these tests provide valuable information for the treatment of rabies in man.

In humans, the outcome depends primarily on the timely injection of post-exposure immunization. If the victim fails to seek medical attention or receives the rabies treatment after the onset of the clinical signs of rabies, he will die.[37]

The clinical signs for rabies in human are similar to those in animals. During the initial incubation stage the patient experiences symptoms referable to the bite trauma.[38] Symptoms in the second stage, prodrome, usually include malaise, fatigue, headache, anorexia, cough, chills, anxiety, irritability, depression, and insomnia.[39] The next stage, the acute neurologic phase, starts with hyperactivity, disorientation, hallucinations, seizures, or paralysis.[40] This stage normally lasts two to

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[31] *Id.* at 68. The cornea test requires a smear from the suspected animal's eyes which is fixed in acetone, stained, and examined as in the fluorescent antibody test. Sensitivity of the cornea test is as low as 42%. The skin biopsy test requires frozen sections of the facial skin in cryostat and stained and examined as in the fluorescent antibody test. *Id.* at 68-69.

[32] *Id.* at 68.

[33] Clark, *Rabies*, 192 J. AM. VET. MED. A. 1404, 1406 (1988).

[34] BURRIDGE, *supra* note 11, at 69. This test involves a combination of serum and a rabies challenge virus in tissue culture, incubated, rinsed in phosphate-buffered saline and acetone, and examined. *Id.*

[35] FISHBEIN, *supra* note 6, at 40.

[36] *Id.* at 47.

[37] THE LANCET 917 (1988).

[38] FISHBEIN, *supra* note 6, at 44.

[39] *Id.*

[40] *Id.*

ten days.[41] Following the acute neurologic phase, a victim then slips into a coma and dies.[42] Treatment after the clinical signs appear, though futile,[43] consists primarily of intensive supportive care to maintain respiratory and cardiovascular support.[44]

Prevention of rabies in humans entails immunization before any signs of the disease appear. The decision to treat, however, is contingent upon the detection of rabies in the suspected animals. As stated earlier, the animal can undergo antemortem and postmortem tests. These tests are reliable indicators if positive, for rabies infection of the central nervous system; however, negativity does not imply the absence of the disease.[45]

D. What Devises Are Available for Preventing the Spread or Introduction of the Virus?

Vaccination for animals and humans tends to be the primary tool for preventing rabies. In humans, this means pre-exposure or post-exposure treatment if necessary. The United States currently authorizes two types of vaccinating products: vaccines and globulins.[46] When the vaccine is used, antibodies take seven to ten days to develop, but last for two or more years.[47] Globulins, on the other hand, provide rapid passive immune protection, but remain effective for twenty-one days.[48]

Doctors prefer to administer the pre-exposure prophylaxes to high risk persons such as veterinarians and persons who work with the live virus in vaccine production or research laboratories.[49] Pre and/or post vaccination should not be administered indiscriminately because of: 1) the cost, $380-$500 per injection; 2) the fact that pre-exposure does not negate the necessity for post-exposure treatment for those suspected of contracting the virus; and 3) the possible side effects.[50] In addition, the effectiveness of vaccines is questionable. There are two well docu-

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[41] *Id.*
[42] *Id.* at 45.
[43] *Id.* at 46.
[44] *Id.* at 47.
[45] *Id.* at 60.
[46] *Id.* at 49.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 52.
[50] *Id.* at 51-53. Possible side effects may include an allergic reaction, pain, erythema, itching, swelling, nausea, and dizziness. Two cases of neurologic illness were reported. *Id.* at 53.

mented cases in which persons who reveived pre-exposure vaccination developed rabies;[51] while *JAVMA* reports a new pre-exposure vaccine that offers 100% immunity.[52]

The preventative measures for animals primarily include pre-exposure vaccines. Two types of vaccines exist on the market: the modified live virus (MLV) and the inactivated or killed virus.[53] Both stimulate the immune system to develop antibodies against rabies. In areas where there is a rabies epidemic, scientists typically administer the MLV.[54] The inactivated vaccine is preferred in areas where the rabies virus remains under control.[55] The effectiveness of the vaccines continues to be controversial. Despite the United States Drug Administration/Food and Drug Administration's insistence upon 85% efficacy rate[56] under laboratory conditions, the federal regulation does not take into consideration variables that may reduce the effectiveness of the vaccine outside "laboratory conditions."[57] The effectiveness of the rabies vaccines is also tainted with the possibility of vaccine-induced rabies. According to *JAVMA*, several reports attribute rabies induced virus to the MLV.[58]

E. What Is the Current Status of Rabies in the United States?

The United States has experienced a decline in rabies within the past two decades due to the introduction and use of effective rabies

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[51] FISHBEIN, *supra* note 6, at 52.

[52] 190 J. AM. VET. MED. A. 847 (1987).

[53] WHO, *supra* note 19, at 18.

[54] *Id.*

[55] *Id.*

[56] Fishbein, *Rabies Prevention in Hawaii* 49 HAW. MED. J. 98 (1990). 9 C.F.R. states that twenty-five or more animals shall be used as vaccinates. Each shall be administered a dose of the vaccine. Ten or more additional animals shall be held as controls. On days 30, 90, 180, 270, and 365 all the test animals shall be tested for the neutralizing antibodies to the rabies virus. Eighty percent of the controls must die, while 22 of the 25 test animals, or its percent equivalent must remain well for a period of 90 days." *9 C.F.R. § 113.129(b)(3)(v) (1989).*

[57] Interview with Dr. R. Nakamura, Professor at the University of Hawaii (Jan. 25, 1990); telephone interview with Dr. A. Miyahara, veterinarian in Honolulu, Hawaii (Feb. 7, 1990); telephone interview with Dr. Lyons, USDA veterinarian, in Honolulu, Hawaii (Feb. 9, 1990) [hereinafter Interviews]. These variables include: 1) handling and storing; 2) administration; 3) and manufacture of the vaccine. *Id.*

[58] Bellinger, *Rabies Induced in a Cat By High-Egg-Passage Flurry Strain Vaccine,* 183 J. AM. VET. MED. A. 997 (1983); Whestone, *Use of Monoclonal Antibodies to Confirm Vaccine Induced Rabies in Ten Dogs, Two Cats and One Dog,* 185 J. AM. VET. MED. A. 285 (1984); Esh, *Vaccine Induces Rabies in Four Cats,* 180 J. AM. VET. MED. A. 1336 (1982) and Pedersen, *Rabies Vaccine Virus Infection in Three Dogs,* 172 J. AM. VET. MED. A. 1092 (1978).

vaccines.[59] Approximately two million incidences of animals biting humans occurred each year,[60] with an average of two human rabies cases reported per year.[61] During a 1981 surveillance of 20 states, the majority of rabies cases involved wild animals, while only 4% of the cases involved cats and 2% involved dogs.[62]

Out of the 20,000 person who received a post-exposure vaccine in the United States, 66% credited the source of exposure to rabies to a domestic animal and out of the 66% only 13% proved rabid.[63] Conversely, 28% of the 20,000 persons who received post-exposure treatment attributed the possible exposure to wild animals, with 87% of these people testing positive for rabies.[64]

F. Rabies Prevention Measures

The prevention of rabies entails more than the administration of vaccines. The World Health Organization (WHO) suggests five basic measures for the control of rabies in domestic animals: 1) epidemiological surveillance; 2) community education and participation; 3) immunization; 4) animal control; and 5) organization and implementation.[65] For the transfer of animals to a country or state considered rabies free,[66] WHO recommends an extended quarantine of at least four months.[67]

III. Analysis

Although much advancement in the way of vaccines has occurred in the past several decades, the State of Hawaii maintains its 120-day quarantine requirement. Three legal issues arise when analyzing Ha-

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[59] Fishbein, *supra* note 6, at 17.

[60] *Id.* at 9.

[61] *Id.* at 17-18. The average was based upon 23 reported cases of human rabies in a 10-year span. The data did not indicate if the human rabies was the result of a domestic or wild animal bite. *Id.*

[62] *Id.* at 33.

[63] *Id.*

[64] *Id.* Data based on reports from 20 states.

[65] WHO, *supra* note 19, at 35.

[66] Because WHO defined "rabies free" as the area in which no case of indigenously acquired rabies has occurred in man or any animal for two years and Hawaii has not documented any cases of rabies, Hawaii is considered rabies-free. *Id.* at 53.

[67] *Id.*

waii's animal quarantine restriction. First, does Hawaii's 120-day regulation constitute a valid/reasonable exercise of its police power to protect the health, safety, and welfare of its citizens from the introduction of rabies into Hawaii? Second, does the state's regulation infringe upon the Commerce Clause of the United States Constitution?[68] Third, does treating owners of large domestic animals and service dogs differently from owners of small domestic animals violate the Equal Protection Clause of the United States Constitution?[69] Does the treating of handicapped persons differently from non-handicapped people violate the Equal Protection Clause of the United States Constitution?

A. Whether the State's Action Constitutes a Valid Exercise of Its Police Power

Hawaii's law requiring a 120-day quarantine is justified as an exercise of the state's police power in preventing the spread of communicable disease.[70] A state's right to exercise its police power is inherent in every sovereignty.[71] The United States Supreme Court recognized such a right as early as 1904 when it held that it is within the state's police power to enact a compulsory vaccination law for the prevention of small pox.[72] It is generally recognized that the state has inherent authority to enact reasonable laws to protect and preserve public order, safety, health, and morals with possible encroachment upon private interest.[73] Logic dictates that the state's attempt to prevent the spread of rabies falls within the state's police power to regulate health aspects.

Once it has been established that the state may act under section 142-2 as an exercise of police power, the next question is whether the state is acting within the scope of its power. The Hawaii

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[68] U.S. CONST. art. I, § 8, cl. 3. The Congress shall have Power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

[69] U.S. CONST. amend. XIV, § 1. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[70] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1904). Many courts, educators, and philosophers agree that the state's police power exists not within the direct translation of the constitution, but inheres in, and springs from, the nature of our institutions. 16A AM. JUR. 2D *Constitutional Law* § 361 (1983).

[71] 16A AM. JUR. 2D *Constitutional Law* § 361, at 31 (1983).

[72] Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1904).

[73] Goldblatt v. Hempstead, 369 U.S. 590, 592-94 (1962).

Supreme Court, in *State v. Cotton*,[74] developed the test for a valid exercise of police power: "the *interests of the public* . . . require such interference; and, second, that the means are *reasonably necessary* for the accomplishment of the purpose, and not *unduly oppressive*."[75] Therefore, in Hawaii, in order for a law to constitute a valid exercise of police power, the two *Cotton* components must be satisfied.

1. Interest of the public generally

"Interest of the public generally" can include both potential and real hazards to society. In *Cotton I*, for example, the court held that the regulation requiring a motorcycle rider to wear a helmet was in the best interest of society as a whole because helmets shield cyclists from foreign objects which might cause loss of control thus endangering the safety of other users of the highways.[76] The court upheld the state's action primarily on the theory that helmet laws limit the extent of motorcycle injuries and curtail public expenditure for emergency and hospital costs.[77] However, the dissenting opinion stated that the law was unconstitutional because the statute is not concerned with the preservation of public safety.[78]

Peculiar as it may seem, the dissent in *Cotton I* wrote the majority opinion in *Cotton II* upholding the state's requirement of motorcycle riders to wear goggles as a valid exercise of police power because it did not stifle fundamental personal rights of liberty.[79] The court concluded that the "distinct possibility that wind-blown objects . . . could strike the eyes of a motorcyclist and cause him to lose control of his motorcycle, and thereby endanger the safety of other users of highways"[80] renders the regulation to be in the best interest of the general public.

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[74] 55 Haw. 148, 516 P.2d 715 (1973). The defendant in Cotton represented himself resulting in the court's issuance of two separate opinions. The first opinion dealt with the constitutionality of requiring a motorcycle rider to wear a helmet and is located at 55 Haw. 138, 516 P.2d 709 [hereinafter referred to as *Cotton I*]. The second opinion addressed the question of whether requiring a motorcycle rider to wear goggles is constitutional and is located at 55 Haw. 148, 516 P.2d 715 [hereinafter designated as *Cotton II*].

[75] *Cotton II*, 55 Haw. at 155, 516 P.2d at 720 (emphasis added).

[76] *Cotton I*, 55 Haw. at 139, 516 P.2d at 710.

[77] *Id.* at 140, 516 P.2d at 710.

[78] *Id.* at 147-48, 516 P.2d at 714-15.

[79] *Cotton II*, at 155, 516 P.2d at 720.

[80] *Id.* at 154, 516 P.2d at 719 (emphasis omitted).

The Colorado Supreme Court in *Winkler v. Colorado Department of Health*[81] issued an opinion with a similar rationale based on a fact pattern relating to the issue at hand. The petitioners asked the court to find that the department of health's prohibition on the importation of pets for resale from states with less stringent licensing and regulation laws constituted an abuse of its police power.[82] The Colorado court ruled that the regulation embraced a legitimate state interest of protecting the public against the spread of parasites and communicable diseases which could be transmitted by imported animals to humans.[83]

2. Reasonable necessity which is not unduly burdensome and cannot be more narrowly achieved

The United States Supreme Court in *Goldblatt v. Hempstead*[84] stated that the Court has generally refrained from announcing a specific criterion for determining the reasonableness of a state's exercise of police power,[85] but would "evaluate . . . the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."[86] In *Goldblatt* the Court held that a state regulation prohibiting the excavation below the water table demarcation and the requirement of fences was a valid exercise of police power.[87] The Court's affirmation of the ordinance was based on the need to protect children from the attractive nuisance and the lack of data to show that the ordinance would impose a financial burden on the appellants.[88]

The Court in *Dean Milk v. Madison*[89] ruled that an ordinance is unduly burdensome, if the means can be more narrowly achieved and the means of obtaining the goal are reasonable.[90] In *Dean Milk* the City of Madison, Wisconsin, regulated the selling of milk and milk products pasteurized within a five mile radius from the central square of

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[81] 193 Colo. 170, 564 P.2d 107 (1977).
[82] *Id.* at 173, 564 P.2d at 108.
[83] *Id.* at 173, 564 P.2d at 109.
[84] 369 U.S. 590 (1962).
[85] *Id.* at 594.
[86] *Id.* at 595.
[87] *Id.* at 592, 596.
[88] *Id.* at 595.
[89] 340 U.S. 349 (1951).
[90] *Id.* at 354.

Madison.[91] The Court held that the ordinance was unduly burdensome in light of available alternatives and that the means of ensuring purity of the milk for its citizens were unreasonable.[92] The Court held that pasteurization site inspections by state officials constituted an available alternative that would not increase costs and produce the same result.[93] The Court also concluded that the goal of ensuring the purity of milk was hindered by excluding milk and milk products pasteurized in plants that maintained higher pasteurization standards.[94] Therefore, under *Dean Milk*, if less burdensome ways to achieve the goal fo the regulation exists, the law is an unconstitutional exercise of police power.

3. Hawaii's rabies regulation satisfies the Cotton test

The current regulation satisfies the two part *Cotton* analysis requiring: 1) interest of the general public and 2) means reasonably necessary for the accomplishment of the purpose that cannot be more narrowly achieved. The current regulation can be said to be in the public interest because it is much like the regulation validated by the Colorado Supreme Court in *Winkler v. Colorado Dept. of Health*.[95] The Colorado court noted that: "in adopting the regulation, the Board of Health acted on evidence that such animals can carry diseases and parasites communicable to human beings. Public protection from this hazard constitutes, of course, a legitimate state objective and interest."[96] Hawaii's less stringent 120-day quarantine can be said to be as much in the public interest as Colorado's total ban because of Hawaii's objective of preventing the spread of rabies. The public interest is also apparent from the fact that the Opponents offered an elaborate alternative to the four month proposal, which included a two-month state quarantine and at least two vaccinations.

The current regulation also satisfies the second *Cotton* requirement of a method reasonably necessary that cannot be more narrowly achieved. Unlike the regulation in *Dean Milk*, there does not appear to be a less stringent way to achieve the goal of keeping Hawaii free of rabies. Scientific evidence shows that the 120-day quarantine is rea-

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[91] *Id.* at 350.
[92] *Id.* at 354.
[93] *Id.* at 354-55.
[94] *Id.* at 355.
[95] 193 Colo. 170, 564 P.2d 107 (1977).
[96] *Id.* at 173, 564 P.2d at 109.

sonably designed to further the objective of preventing the introduction of rabies. Dr. John M. Gooch, the state's veterinarian in 1983,[97] calculated a 78% probability of detecting the virus in an animal confined for 120 days.[98] Consistent with Dr. Gooch, the United Kingdom has projected that a 120-day quarantine maintains an efficacy rate of approximately 76%.[99] Dr. K. Shimada, a researcher from Japan,[100] on the other hand, determined that with 98 known cases of rabies, 95% of the animals in quarantine manifested the clinical signs of the disease within 120 days. These statistics support the reasonableness of the current regulation. The percentages indicate that the regulation, in fact, prevents the majority of rabies cases from entering the state without requiring a total ban on the importation of animals, which might be construed as unduly oppressive.

On its face, the Opponents' proposal appears to be a viable alternative in a *Cotton* analysis reflecting *Goldblatt's* cost component and availability of less drastic protective steps. However, it is not reasonable because the costs to implement the proposal and the methods used are in fact more burdensome than the current regulation. As discussed in a later section,[101] the cost to execute the proposal would average $691.239 for thirty days.[102] Other factors that contribute to the inadequacies of the proposal include: ineffectiveness of the vaccines; if the animal's RFFIT antibody titer test produces a negative result the animal must be quarantined the entire four months anyway; and regardless of whether the animal remains in confinement for two to four months, the quarantine station must still maintain a full staff to care for the animals.

The Opponents' elaborate alternative illustrates that the current regulation offers a simplistic approach that achieves the same or better results. Also, the fact that the Opponents agreed that an animal should be quarantined for the full four months if the animal does not possess the required titer implies that the four-month quarantine has some validity.

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[97] D.V.M and M.P.H.

[98] Sasaki, *Cost Effectivenss of Hawaii's Anti-Rabies Quarnatine Program*, 42 HAW. MED. J. 157, 160 (1983) [hereinafter Sasaki].

[99] Interview with Dr. R. Nakamura, Professor at the University of Hawaii (Jan. 25, 1990) [hereinafter Interview with Dr. Nakamura].

[100] *Id.*

[101] *See* section 2, *infra*.

[102] Sasaki, *supra* note 98, at 159 (1983).

B. *The Current Regulation Does Not Infringe Upon Rights Under the Commerce Clause*

The broad power to establish and enforce regulations and/or laws in order to protect the public's health is a vital exercise of the state's police power.[103] The fact that a state regulation may affect commerce does not render the regulation invalid unless the federal government preempts the state regulation or the burden on interstate commerce outweighs local interest.[104]

Opponents argue that the current regulation is unreasonable because, although it protects the human and animal populations against rabies, it erects an obstacle to the free flow of interstate commerce. No one disputes that some of the animals involved are commercial products because they are imported for the purpose of breeding, showing, and sale. The Commerce Clause[105] permits the states to exercise their police power for health, safety, and morals, despite the effects on interstate commerce if certain conditions are satisfied.[106]

1. *Federal preemption*

Because the free flow of commerce is guaranteed by the federal constitution, the state's use of police power must yield to the federal power in a situation where there is a conflict with a federal statute,[107] or where the federal government preempts the state's power.[108] The United States Supreme Court in *Mintz v. Baldwin*[109] held that "[t]he purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred" unless its intention to do so has been made definite and clear.[110] As it pertains to rabies prevention, Congress failed to make such a clear and definitive dec-

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[103] 16A AM. JUR. 2D *Constitutional Law* § 417, at 164-65 (1983).

[104] *Id.*

[105] U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause of the Constitution grants to the federal government the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[106] Maine v. Taylor, 477 U.S. 131, 138 (1986).

[107] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1904).

[108] Winkler v. Colorado Dept. of Health, 193 Colo. 170, 175, 564 P.2d 107, 111 (1977).

[109] 289 U.S. 346 (1933).

[110] *Id.* at 350.

laration.[111] Regarding the importation of animals "among the states,"[112] because Congress failed to promulgate a statute on the issue, no conflicts arise with federal statutes, and thus the state regulation may prevail.

2. Incidental burden and affirmative discrimination

Even when the state acts in congruence with or in absence of a federal statute, the state's exercise of police power is not absolute when it affects commerce. Generally speaking, anything that can be bought and/or sold is a subject of commerce.[113]

The United States Supreme Court in *Maine v. Taylor*[114] expressed the standard that would determine whether a state statute would violate the Commerce Clause:[115]

> [T]his Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits" . . . statutes in the second group are subject to a more demanding scrutiny . . . the burden falls on the state to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.[116]

The Court expressed two types of burdens on commerce: 1) incidental burden and 2) affirmative discrimination.

The ban on importing pets in *Winkler v. Colorado*[117] was held by the Colorado Supreme Court to be an incidental burden. The *Winkler* court held:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,

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[111] Congress has authorized the Federal Department of Agriculture to promulgate a rule which provides that local and state laws should govern the admission of dogs and cats entering the state from a foreign nation. 42 C.F.R. § 71.51(c) (1989).

[112] U.S. CONST. art. I, § 8, cl. 3.

[113] 15A AM. JUR. 2D *Commerce* § 36, at 367 (1983).

[114] 477 U.S. 131 (1986).

[115] *Id.* at 138.

[116] *Id.*

[117] 193 Colo. 170, 564 P.2d 107 (1977).

> it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[118]

In *Winkler*, the plaintiffs-appellants argued that the state's regulation prohibiting commercial pet importers but not breeders or personal pet owners from importing pets from states with less stringent licensing regulations was invalid.[119] The *Winkler* court upheld the regulation, noting that the facts failed to show an incidental burden om commerce. The court found that the regulation applied even-handedly because all persons engaged in the sale of pets were affected and the facts failed to show an incidental burden on commerce.[120]

Maine v. Taylor involved a case of affirmative discrimination, but it, too was upheld.[121] The *Maine* Court concluded that the state properly exercised its police power in regulating the importation of live fish bait regardless of the affirmative discrimination.[122] The Court reasoned that Maine's concerns for preventing the introduction of fish parasites into the wild fish population were legitimate, and that inconclusive testing methods for parasite detection did not equate with an "available means."[123]

In Hawaii, the legitimate public interest is expressed in section 142-2 because it focuses on preventing the spread of rabies and protecting the public's health, and like *Winkler*, the current quarantine regulation applies to all cats and dogs, including dogs for the handicapped. Therefore, the burden on commerce amounts to a mere incidental burden, even less so than *Winkler*, because the current regulation only temporarily restrains the sale of animals and is not a total ban. Section 142-2 is a valid exercies of police power because even if the burden reached an incidental burden demarcation, the local benefit of defending against the spread of rabies — avoiding unwarranted pain and suffering and unnecessary deaths — outweighs loss of profit from the sale of dogs or cats. Unlike the Court in *Maine* that found the importation ban discriminated on its face[124] against interstate trade and thus was

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[118] *Id.* at 175, 564 P.2d at 110. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

[119] *Id.* at 172, 564 P.2d at 108.

[120] *Id.* at 175, 564 P.2d at 111.

[121] 477 U.S. 131, 138-40, 151-52 (1986).

[122] *Id.* at 151-52.

[123] *Id.* at 147-48.

[124] *Id.* at 138 (1986).

subject to strict requirement, Hawaii's regulation, is not a total ban but only a temporary detainment.

Assuming *arguendo* that the current regulation resulted in affirmative discrimination as mentioned in *Taylor*, the Hawaii law nonetheless passes the affirmative discrimination test. The test first compels the state to demonstrate that the regulation serves a legitimate local purpose.[125] The legitimacy of a state's attempt to protect against the spread of disease was validated in *Winkler*.[126] As stated earlier, the fact that the Opponents offered an elaborate rabies proposal suggests a significant possibility of the spread of rabies. Similarly, the court in *Winkler*[127] and the Court in *Reid v. Colorado*[128] echoed the same sentiments for regulations prohibiting the transportation of dogs and horses and cattle, respectively, to prevent the spread of Texas fever, the Spanish Itch, and other contagious diseases.

The second part of the analysis in a case of affirmative discrimination requires that the state's purpose could not be served as well by available nondiscriminatory means.[129] Opponents have proposed an alternative, however, after an analysis of the scientific data, costs, and emotional factors, Opponents' alternative is in fact more burdensome and equal to or more discriminatory than the current regulation.

On the one hand, Opponents of the system claim that the proposed bill theoretically renders a 99.6% efficacy rate.[130] In support of the Opponents' claim, R.L. Sharpee, researcher at Norden Laboratories, considers rabies vaccines for animals at least 95% effective.[131] In addition to the vaccination proviso, the proposal by the Opponents

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[125] *Id.*

[126] 193 Colo. 170, 173, 564 P.2d 107, 109 (1977).

[127] 193 Colo. 170, 564 P.2d 107 (1977).

[128] 187 U.S. 137 (1902).

[129] Maine v. Taylor, 477 U.S. 131, 138 (1986).

[130] Senate Bill No. 2685 "Relating to a Modified Quarantine System for the importation of Animals" requires that two killed rabies vaccines shall be administered to the dog or cat exiting the continental United States. S. 2685, 15th Leg., Reg. Sess. § 2 (1990). The combination of two vaccinations and the federal regulation's requirement that each vaccine must be at least 85% effective results in a 99.66% efficacy rate. Fishbein, *Rabies Prevention in Hawaii*, 49 HAW. MED. J. 98 (1990). The 99.66% figure was based on the author's calculations. For example, out of 100 animals, the first injection produces eighty-five protected and fifteen unprotected animals. The second pre-entry injection reduces the number of unprotected animals to 2.25 animals, and 85% of those animals will be protected with the post-entry vaccination resulting with an efficacy rate of 99.6%.

[131] RABIES IN THE TROPICS 265 (E. Kuwert Ed. 1985).

calls for a two-month state quarantine and a two-month home quarantine.[132] According to Dr. Gooch's probability chart[133] a two-month quarantine results in 58% of the animals exhibiting signs of rabies. Dr. Shimada projects a 95% efficacy rate for a 60-day quarantine,[134] while the U.K. report speculates that a 60-day quarantine results in 54% efficacy rate.[135] Opponents conclude that even with the remote possibility that the three vaccines would be ineffective, the combination of the vaccines, RFFIT testing, two-month quarantine, and two-month home quarantine would be more effective than the 78% offered now with the present system. Opponents cite that in 1988 out of 52 million dogs only 128 cases of canine rabies were reported.[136] The percent of rabid dogs to the general dog population calculates to .00024%[137] and the likelihood of a dog entering the state with rabies after inoculation is further reduced. Based on the above statistics, Opponents assert that the numbers indicate a possible alternative that the state could employ to achieve the same or better results without delaying the importation of animals into the state, thus limiting the affect on commerce.[138] Opponents claim the state's regulation sweeps too broadly in light of the above facts.[139] Furthermore, to bolster the Opponents' position, the proposed system would cost half ($73,229) as much of the current costs ($146,457).[140] The construction price tag for the laboratory necessary in the Opponents' proposal would be a one time fee and any maintenance cost could be passed to the animal importer in the form of a user fee.[141] However, in addition to the legal issues lurk emotional

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[132] Senate Bill No. 2685 "Relating to a Modified Quarantine System for the Importation of Animals" S. 2685, 15th Leg., Reg. Sess. § 2 (1990).

[133] J. Gooch, Hawaii's Anti-Rabies Quarantine Program, (internal document prepared for the State of Hawaii) (1971).

[134] Interview with Dr. Nakamura, *supra* note 99. With 98 known rabies cases, 78 of the animals showed signs within six to 30 days (85%), 15 animals within 31 to 60 days (15%), and five within 61 to 150 days (5%). *Id.*

[135] *Id.*

[136] Fishbein, *Rabies Prevention in Hawaii*, 49 HAW. MED. J. 98, 99 (1990). The journal does not indicate whether the animals that had rabies were vaccinated.

[137] Author's calculation based on the percent of infected animals with the total dog population. 128 infected dogs out of 52 million dogs is .00024%.

[138] *Relating to a Modified Quarantine System for the Importation of Animals: Hearings on S. 2685 Before the Department of Agriculture*, 15th Leg., Reg. Sess. (1990).

[139] *Id.*

[140] Sasaki, *supra* note 98, at 160. The $73.229 was the result of dividing the cost for a full quarantine stay in half.

[141] *Relating to a Modified Quarantine System for the Importation of Animals: Hearings on S. 2685 Before the Department of Agriculture*, 15th Leg., Reg. Sess. (1990).

considerations. During the current 1990 legislative session, numerous individuals turned out to give testimony for Senate Bill No. 2685 and a related bill, Senate Bill No. 2479.[142] Several supporters expressed their feelings of incompleteness because of the long term separation from their pets and voiced their concerns about the lack of health care for the animals while quarantined.[143] Besides contracting the typical fleas and ticks, some animals develop skin problems, kidney damage, internal parasites, and other ailments.[144] Opponents proffer the availability of a regulation that would produce the same results with less time, money, and hardship.[145]

However, scientifically, there are faults in the proposed alternative. First, the efficacy rate of the vaccines may be 85% under laboratory conditions, but in reality, the effectiveness of the vaccine decreases significantly due to improper manufacturing, handling, administering, and storing.[146] Also, the vaccination renders no value if injected after exposure.[147] Second, the cost to the taxpayers would increase in comparison to the 120-day quarantine. The taxpayers' share of the estimated cost for the 120-day quarantine runs approximately $146,457.[148] A 30-day quarantine, with the lab and field surveillance, would run the taxpayers approximately $691,239 annually.[149] The proposal requires the state to maintain the quarantine station, highly technical laboratory, equipment, personnel, and sera. There are also emotional costs in the proposal to consider because of the higher risk of rabies exposure. In 1983, California reported that one rabid dog cost the community approximately $105,790 for the administration of seventy human vaccines and 2,000 dog vaccines and 300 destroyed dogs and cats.[150] The state projected that an outbreak of rabies in Hawaii would

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[142] Senate Bill No. 2479 "Relating to the Quarantine of Resident Guide Dogs, Signal Dogs, and Service Dogs." S. 2479, 15th Leg., Reg. Sess. (1990). Senate Bill No. 2685 "Relating to a Modified Quarantine Systemm for the Imporation of Animals." S. 2685, 15th Leg., Reg. Sess. (1990).

[143] Testimony on Proposed Senate Bill No. 2685: Christy Enright; Nina Buchanan; Joanie Spates; Marion Follmer; and Michael and Jan Rand.

[144] *Id.*

[145] *See* S. 2685, 15th Leg., Reg. Sess. (1990).

[146] Interviews, *supra* note 57. In support of the ineffectiveness of the vaccines, the United Kingdom has reported cases of rabies after the injection of two vaccines. RABIES PREVENTION, *supra* note 11, at 13.

[147] Fishbein, *Rabies Prevention in Hawaii*, 49 HAW. MED. J. 98 (1990).

[148] Sasaki, *supra* note 98, at 159.

[149] *Id.*

[150] 30 MORBIDITY & MORTALITY WEEKLY REP. 527 (1981).

cost the state, the local animal owners, and owners of imported animals $5,349,230.[151] Third, the proposal requires the execution of two RFFIT tests. The RFFIT test calls for the use of a live virus which increases the possibility of human exposure.

In the end, it appears that Senate Bill No. 2685 does not provide for an alternative that would be "as well as" the current regulation. The Court in *Maine v. Taylor*[152] announced that "an abstract possibility of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an available nondiscriminatory alternativ[e]."[153] Opponents assertion for a violation of the Commerce Clause has no weight based on a *Taylor* analysis especially with the many ambiguities of the effectiveness of vaccines.

C. The Current Regulation Does Not Violate the Equal Protection Clause

During testimony at the 1990 legislative session, Opponents raised another issue related to the state's exercise of its police power: the disparate treatment between owners of small domestic animals (dogs and cats), large domestic animals (horses and cattle) and domestic service dogs (guide dogs for the handicapped), as well as the disparate treatment between handicapped and non-handicapped persons.[154]

The concept of equal protection made its appearance in the Fourteenth Amendment, which provides "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[155] Primarily, two standards of review exist: strict scrutiny and reasonable basis.[156] The strict scrutiny analysis applies in situations where there is a suspect category, that is, discrimination based on race or ethnic minorities[157] or when a fundamental

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[151] Sasaki, *supra* note 98, at 159.

[152] 477 U.S. 131 (1986). The United States Supreme Court in *Taylor* was asked to determine if Maine's statute, regulating the importation of live fishbait, infringed on the Commerce Clause.

[153] *Id.* at 147. (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

[154] Citizens For Quality Quarantine, Questions To Ask Regarding Hawaii's Rabies Prevention Policy (1990).

[155] U.S. CONST. amend. XIV, § 1.

[156] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 16, at 591 (2d. ed. 1983) [hereinafter NOWAK].

[157] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (2d. ed 1988) [hereinafter TRIBE].

right has been violated.[158] The standard for strict scrutiny requires the state to demonstrate a compelling interest and no available alternative.[159] The reasonable basis test applies primarily to social or economic situations.[160] Under this test, absent a legitimate objective and a rational relationship between the regulation and the objective, the state's actions violate the Equal Protection Clause.[161] Based on the above standards, the state's compelling interest to prevent the spread of rabies among the human and animal population, and the questionable effectiveness of vaccines, the current regulation does not appear to violate either standard under the Equal Protection Clause.

1. Small v. large domestic animals

The reasonable basis test is applicable in this situation because the interests involved are economic.

The Colorado Supreme Court in *Winkler v. Colorado Department of Health*[162] applied the reasonable basis standard and ruled that the health standard imposed on all commercial sellers did not violate the Equal Protection Clause even though breeders and personal importers were held to a lower health importation standard.[163] At the outset, the court determined that the issue lacked a fundamental right or suspect category and applied the reasonable basis test based on the conclusion that the regulation constituted a form of economic regulation.[164] The reasonable basis test requires that the regulation be rationally related to a legitimate state interest. The court found a presumption of statutory validity and held that the regulation was rationally related to a legitimate interest because the regulation achieved the goal of preventing parasites and disease entering the state.[165]

The distinction between large and small domestic animals can be shown to have a rational basis. As explained earlier, the transmission of the virus depends largely on the animal's biting habits[166] and the

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[158] Winkler v. Colorado Dept. of Health, 193 Colo. 170, 173, 564 P.2d 107, 109 (1977).

[159] NOWAK, *supra* note 156, at 592.

[160] *Id.* at 591.

[161] *Id.*

[162] 193 Colo 170, 564 P.2d 107 (1977).

[163] *Id.* at 173, 564 P.2d at 109-10.

[164] *Id.*

[165] *Id.* at 172, 564 P.2d at 109.

[166] FISHBEIN, *supra* note 6, at 12.

physical relationship with other animals and man. In 1984 and 1985, mid-Atlantic state officials recorded ten and fifteen cases, respectively, of livestock rabies, twenty-five and thirty-three cases, respectively, of dog and cat rabies, and forty-nine cases of horse rabies affecting 131 persons.[167] In support of the theory that cattle and horses contribute to rabies, another record indicated that 66% of person receiving post-exposure treatment claimed that the possible exposure stemmed from contact with a domestic animal (large and small), of which 13% of those animals proved rabid.[168] Although cattle and other non-dog or cat domesticated animals contributed only 11% to those person who received treatment, 6% of those animals tested rabid.[169] Cats and dogs, on the other hand, contributed 55% of all persons receiving post-exposure treatment, but only 6% proved rabid.[170] While the large domestic animal population affected fewer people than domestic animals, it had an equivalent percent of animals testing positive for rabies.

Even though in 1982 more horse and cattle rabies (367) were reported than dog and cat rabies (362) in Florida,[171] Hawaii's regulation for large domestic animals tends to be less strict then for small domestic animals, despite the same objective of preventing the spread of communicable disease. The Department of Agriculture requires that horses remain in isolation on the owner's premise until retested for equine infection and cattle must be quarantined at a state facility or at a state-approved private facility, normally the importer's ranch,[172] until the completion of further testing. Neither regulation defines the length of confinement.[173]

The current facts on rabies encompass complex issues in protecting the human and animal populations. As discussed in section IIa above, the state possesses a legitimate interest in preventing the spread of disease. The debatable question is whether the disparate treatment is rationally related to the goal. Notwithstanding the fact that horses normally bite less often than dogs in their healthy state, while infected

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[167] *Id.* at 27. In 1981, data from 20 states revealed 49 cases of horse rabies affecting 131 persons. *Id.* at 33.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Burridge, *supra* note 11, at 43. Florida statistic were cited because Hawaii has no recorded statistics pertaining to rabies.

[172] HAW. REV. STAT. § 142-2; HAW. ADMIN. RULES, tit.4, subtit. 3, ch. 23, subch. 2; HAW. ADMIN. RULES, tit. 4, subtit. 3, ch. 16, subch. 1.

[173] *Id.*

with a disease, the horse's propensity to bite humans and nonhumans increases as does the likelihood of incredible fits of fury to any perceived threat or restraint.[174] Because the current Department of Agriculture's regulation fails to require the separation of horses, the probability of transmitting the virus multiplies. Cattle also transmit the virus through gagging fits.[175] Dr. Nakamura revealed that cattle often gag as a result of rabies and farmers/ranchers instinctively attempt to dislodge the object from the pathway unknowingly exposing themselves to the virus.[176] In addition, Dr. Daniel Burridge, consultant to the Hawaii Task Force on Rabies and rabies expert, stated that "[c]attle are highly susceptible to rabies virus infection."[177]

Nevertheless, the language in *Williamson v. Lee Optical of Oklahoma*[178] suggests that as long as one legislator finds the regulation rationally related to the goal, then no violation of the Equal Protection Clause has occurred.[179] One legislator could conclude that the stricter requirements for large domestic animals are unwarranted because of the minimal contact with society. The Colorado Supreme Court, in *Winkler*, held commercial sellers to a similar standard as the current regulation because of the direct contact the animal has with the public.[180] Unlike some owners of dogs and cats, owners of large domestic animals do not allow their animals to roam society freely, thus minimizing the potential for a rabies outbreak.

As the scientific data indicates, section 142-2's distinction between large and small domestic animals is rationally related to the state's legitimate interest in protecting against the spread of rabies.

2. *Service dogs v. small domestic animals*

Senator Donna Ikeda, chairperson for the Department of Agriculture, declined to recommend passage of Senate Bill No. 2685, but recommended Senate Bill No. 2479, a modified quarantine requirement for

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[174] BURRIDGE, *supra* note 11, at 48.

[175] *Id.*

[176] Interview with Dr. Nakamura, *supra* note 99.

[177] BURRIDGE, *supra* note 11, at 48.

[178] 348 U.S. 483 (1955).

[179] *Id.* at 487-91.

[180] Winkler v. Colorado Dept. of Health, 193 Colo. 170, 174, 564 P.2d 107, 110 (1977).

resident service dogs.[181] Senate Bill No. 2479 exempts service and signal dogs (dogs for the handicapped) traveling from Hawaii to the continental United States and back from quarantine upon verification of certain conditions.[182] These conditions are: (1) the dog must be vaccinated with a killed vaccine between fifteen to thirty days of departure; (2) a certified veterinarian must attest to the health, administration of the vaccine and the insertion of a micro-chip for identification; (3) prior to departure from Hawaii, the animal must show a positive rabies antibody titer result; and (4) the handler must produce documentation of his/her handicap and that the team, the dog and its handler, completed training.[183]

Assuming a legitimate state interest, the legal issue boils down to whether the disparate treatment between service dogs with other small domestic animals is rationally related to that interest. Strict scrutiny is not applicable because no fundamental right is at issue. Therefore, under a reasonable basis analysis the key issue is whether a less drastic alternative exist. Although not stated in the proposed bill, the purpose of the modification would be to enhance the mobility of the physically impaired, while protecting against the spread of rabies. Persons requesting the exemptions claim that the use of effective vaccines and the handler's high degree of awareness of the animal's general health and locality, accomplishes the implied purpose.[184] However, in light of current scientific data and in comparison with Senate Bill No. 2685, the service dog exemption fails to provide adequate protection. One shot and one RFFIT test for service dogs hardly compares to three vaccinations, one RFFIT test, and two months of quarantine. One could argue for the possibility that the veterinarian administered the shot improperly or that the manufacturer produced a "bad batch" of serum. The requirement of three shots spread out over a period of time decreases the possibility that all three shots came from a single batch of "bad" serum.

However, if an exemption for resident service dogs is passed, no equal protection violation will emerge because the state also possesses

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[181] Senate Bill 2479 defines "service dog" as dog trained to impart motion to a person confined in a wheel chair or assist a physically handicapped person in performing certain essential activities of daily living. S. 2479, 15th Leg., Reg. Sess. § 1 (1990).

[182] *Id.* at 2-4.

[183] *Id.*

[184] *Relating to the Quarantine of Resident Guide Dogs, Signal Dogs, and Service Dogs: Hearings on S. 2479 Before the Department of Agriculture*, 15th Leg. Reg. Sess. (1990).

a legitimate interest in providing personal mobility,[185] while taking some precautionary measures to prevent the spread of rabies. Similarly, if the exemption for the service dogs fails to be passed, no violation would have occurred because the courts afford wide latitude to legislative deference in the exercise of police power.[186]

Assuming that the state exempts service dogs, supporters of the current regulation fear the inevitable erosion of the current regulation in favor of a less strict regulation for police dogs, military animals, show animals, and finally no quarantine at all.[187]

3. *Handicapped vs. non-handicapped*

The discussion thus far has focused primarily on the disparate treatment among the different types of animals. However, there should be some concern for the disparate treatment between a handicapped person's and non-handicapped person's right to travel. The theory behind a handicapped person's claim is that without their service dog, they are prohibited from travelling to Hawaii because the animal must remain in quarantine.[188]

Because the issue focuses on the right to travel, a fundamental right, the United States Supreme Court has ruled that the applicable test requires the state to demonstrate a compelling interest with no alternative available.[189] In *Shapiro v. Thompson*[190] the appellee a 19 year-old unwed mother had resided in Connecticut for less than one year. Appellee was denied welfare assistance because she did not meet the one year residency requirement.[191] The Court held that the regulation had a chilling effect on the right to travel[192] and that the state's assertion of preserving fiscal integrity and preventing fraud was not a sufficiently compelling interest.[193]

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[185] NOWAK, *supra* note 156, at 807.

[186] 193 Colo. 170, 173, 564 P.2d 107, 110 (1977).

[187] As of the date of the publication of this commentary, the Hawaii Legislative Session did not pass Senate Bill No. 2479 (1990).

[188] *Relating to the Quarantine of Resident Guide Dogs, Signal Dogs, and Service Dogs: Hearing on S. 2479 Before the Department of Agriculture*, 15th Leg., Reg. Sess. (1990).

[189] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[190] 394 U.S. at 618 (1969).

[191] *Id.* at 623.

[192] *Id.* at 631.

[193] *Id.* at 627, 631.

Here, the state would not violate the equal protection clause even when applying the stricter test. Unlike the Connecticut's assertion of fiscal integrity as a compelling interest in *Shapiro*, the compelling interest under these circumstances is to protect the health and safety of the entire population. The Court in *Shapiro* also focused on the severity of the impact that the regulation had on the individual.[194] The Court recognized that classification of resident and non-resident welfare recipients affected the families means to subsist— food, shelter, and other necessities of life.[195] Handicapped persons could claim that the impact of Hawaii's regulation is devastating in that they are prohibited to travel. However, it could also be said that, in light of the unreliability and costliness of the alternative proposed by Opponents, there are no alternatives to the current regulation. In addition, a handicapped person's right to travel is not totally obstructed because the handicapped person may travel with a companion to help as a guide or resort to using a cane. It should be noted that Australia's quarantine law does not allow any exemptions not even for service dogs.[196]

D. Alternative Programs to Prevent the Spread of Rabies

Although the current regulation withstands constitutional analysis, is there, perhaps, a more reasonable alternative to the current law? Programs to prevent the spread of rabies, especially in a state that benefits from a rabies-free environment,[197] range from total prohibition of the importation of animals to allowing free entry.

The World Health Organization[198] suggests that animals imported from rabies infected areas should be totally prohibited from entering a rabies-free environment, such as Hawaii.[199] The total ban on the importation of dogs or cats may place a burden on commerce so excessive that it would fail the affirmative discrimination test for the

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[194] *Id.* at 627.

[195] *Id.*

[196] Telephone conversation with Dr. Peter Beers, Senior Veterinary Officer from Australia. Dr. Peters stated that pursant to AUSTRALIA, IMPORTATION OF CATS AND DOGS INTO AUSTRALIA — Extract From the Commonwealth of Australia Gazette No. G1, Jan. 13, 1987, dogs for the handicapped are given no special exemptions. *Id.*

[197] State of Hawaii, Study of the Animal Quarantine System State of Hawaii (1990).

[198] WHO, *supra* note 19, at 53. The definition of rabies free is that area which had no incidents of rabies within the past two years. *Id.*

[199] *Id.*

Commerce Clause[200] as well as the state's exercise of police power based on the tests earlier developed. A total ban is overly oppressive in light of the availability of extended quarantine requirements. If a total ban is impossible to implement, then WHO recommends a prolonged quarantine, preferably four months or more.[201] In addition, WHO suggests a two month home confinement and pre-entry vaccination.[202] Unlike WHO's previous suggestion, this alternative would place no more of a burden on commerce than what already exists in Hawaii. The additional protection from a pre-entry vaccine outweighs the minimal added expenditure of the vaccination. The rationale for finding the four-month *WHO* suggestion, as mentioned above, valid would echo the Court's reasoning that "[i]t is difficult at best to say that financial losses should be balanced against the loss of lives and limbs."[203]

Similar to WHO's second proposal, the United Kingdom prescribes quarantine for six months and a pre-entry vaccination.[204] However, this would not be a reasonable alternative to the current regulation. This alternative would place additional burdens on the owner emotionally and financially, the taxpayers who must foot the bill for a possible 15% increase in efficacy the proposal provides,[205] and most importantly the animals.

The Australian government's length of quarantine depends on the country of exportation. In some instances, quarantine may last up to nine months depending on the country of export with the visitation rights limited to once a month.[206] This alternative also lacks feasibility because of the burdens on pet owners, tax payers, and pets.

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[200] Maine v. Taylor, 477 U.S. 131 (1986).

[201] WHO, *supra* note 19, at 53.

[202] *Id.*

[203] Fireman v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 140 (1968). The United States Supreme Court held that the Arkansa law requiring a "full crew" when operating a line of 50 miles to haul more than 25 five cars as a valid exercise of its power and does not violate the Commerce Clause. *Id.* at 131, 144. Although the appellees stressed the excessive cost in maintaining a "full crew", the Court held that such a law was justified as a matter of safety. *Id.* at 138-40.

[204] RABIES PREVENTION, *supra* note 11, at 7.

[205] Sasaki, *supra* note 98, at 160. It is estimated that the probability in detecting rabies in a 30 day period has an efficacy of 44%, a 120 day quarantine 78%, and 285 day quarantine has an efficacy rate of 95%. *Id.*

[206] AUSTRALIA, IMPORTATION OF CATS AND DOGS INTO AUSTRALIA — *Extract From the Commonwealth of Australia* GAZETTE No. G1, Jan. 13, 1987.

A possible viable alternative to the current quarantine system which would place no additional hardship on the animal or the owners, involves five changes to the current system. First, pre- and post-entry vaccinations could be required to insure against the spread of the disease. Second, the 120-day quarantine could be reduced to ninety days. Dr. Gooch's chart projects a 65% efficacy rate,[207] the U.K. 66% effectiveness, and Dr. Shimada's experiments a 95% efficiency for a 90-day quarantine.[208] In support of a 90-day quarantine, Dr. Burridge stated that most animals exhibit clinical signs of rabies within sixty days.[209] Third, home confinement should be strongly enforced with bimonthly examinations. Fourth, the physical structure and operating system of the quarantine could be modified to become more humane. Visiting hours for pet owners could be extended from the current four hours on Tuesday, Wednesday, Thursday, Saturday, and Sunday.[210] The quarantine administrators could research the possibility of extending the hours to include morning (6:00-8:00), lunch (12:00-1:00), and after work (4:30-6:00) because most pet owners work during the posted visiting hours. Besides extending the visiting hours, the quarantine could consider expanding the size of the cages. Admittedly the current size of the cages are larger than most commercial kennels; for dogs the size varies from 16' x 6' x 7' to 26' x 6' x7' and for cats 10' x 5' x 7',[211] but the fact that an animal is constantly confined to that area is a compelling reason to expand the size of the cages. The cage itself could also be reconstructed to provide adequate relief from the elements of nature. Finally, the addition of an educated staff may reduce the negative perception held by the animal/owner community. A major concern of pet owners is the return of the animal in a state of health worse then when the animal first entered the quarantine. Medical training for the animal handlers or the creation of veterinarian assistant positions would reduce the number of such complaints. The trained personnel could detect early signs of ailments such as mange, ear mites, injured limbs, and others.

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[207] J. Gooch, Hawaii's Anti-Rabies Quarantine Program (Internal document prepared for the State of Hawaii) (1971).

[208] Interview with Dr. Nakamura, *supra* note 99.

[209] BURRIDGE, *supra* note 11, at 9.

[210] State of Hawaii Department of Agriculture, Division of Animal Industry (Nov. 2, 1989).

[211] State of Hawaii, Department of Agriculture, Division of Animal Industry, (Jan. 9, 1990).

IV. Conclusion

Approximately 2,800 animals enter Hawaii each year. Because of Hawaii's current quarantine regulation, each animal must spend at least four months in quarantine regardless of previous vaccination. Opponents of the regulation, for the past several years, have urged legislators to modify the regulation because of its effects on the relationship between the animal and its owner as well as the selling and breeding of animals.

Neither side admits that the other has valid arguments for their position in maintaining or modifying the regulation. On the one hand, Opponents claim that rabies in the domestic animal population is rare and unlikely to travel to Hawaii and that vaccinations with minimal time spent in quarantine can protect the population without interfering with commerce. Supporters of the current law, however, assert that the vaccinations have not proven to be adequate, that the current system has enabled Hawaii to maintain a rabies-free status, and that the benefits of preserving the health of human and animal population outweigh the inconvenience of quarantine.

Unfortunately, the motivating factor for some of the Opponents is not the need or love for the animal, but the ability to make money off the selling, breeding, showing, or even the administration of vaccines. No one denies that the current regulation places hardship on the animal owner, but the real concern should be for the welfare of the entire animal population. Scientists and Hawaii's legislators find the fear of rabies reasonably grounded in fact, and based upon current scientific knowledge, the current Hawaii law is reasonable and constitutional. In each of Commerce Clause, police power, and Equal Protection Clause analyses, there are two basic requirements for the regulation to be valid. First, the state must, and did, prove that it had a *compelling interest*, as well as a legitimate interest under the commerce and police power clause, to protect the general human and animal population from the spread of rabies. Second, the means to achieve its goal were *reasonable* and without available alternative. Scientific data support the proposition that no vaccine on the market can guarantee that the animal would not contract rabies and in fact, some vaccines have been reported to induce rabies.

Although the current quarantine law is constitutionally valid, if society truly considers the animal as a part of the family, then the facts support, at the very least, a change in the operation of the quarantine station to make the animal's stay more tolerable.

Ginger G.U. Chong

Maha'ulepu v. Land Use Commission: A Symbol of Change; Hawaii's Land Use Law Allows Golf Course Development on Prime Agricultural Land by Special Use Permit

I. INTRODUCTION[1]

In *Maha'ulepu v. Land Use Commission*,[2] the Hawaii Supreme Court held that a 1985 amendment[3] to Hawaii's Land Use Law[4] did not repeal the authority of the Kauai County Planning Commission and the State Land Use Commission to issue special use permits for golf course developments on prime[5] agricultural land.[6] Although the court based its decision on an essentially straightforward statutory analysis,

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[1] The author acknowledges the following individuals for providing commentary or background materials: David L. Callies, Esq., Professor of Law, William S. Richardson School of Law; David A. Feller, Esq., Case & Lynch, Honolulu, Hawaii; Mary Lou Kobayashi, Hawaii Office of State Planning; and Valerie J. Lam, University of Hawaii Law Review.

[2] 71 Haw. 332, 790 P.2d 906 (1990).

[3] Act 298, 1985 Haw. Sess. Laws 658 (codified as amended at HAW. REV. STAT. § 205-2 (1985)). *See infra* notes 54-68 and accompanying text.

[4] HAW. REV. STAT. ch. 205 (1985) is referred to throughout this casenote as "Hawaii's Land Use Law." The Land Use Law created the state Land Use Commission and classified the entire state into four use districts. *See infra* part III for a history of the Land Use Law.

[5] "Prime" agricultural land describes areas rated A or B by the Land Study Bureau. Lands are classified A, B, C, D, or E; with A denoting the highest, or most productive, classification. The classifications are based on factors such as slope of land, water, soil conditions, and current uses. The rating provides an index of the land's overall productive capacity. LAND STUDY BUREAU, DETAILED LAND CLASSIFICATION — ISLAND OF OAHU 19-20 (1972).

[6] 71 Haw. at 339, 790 P.2d at 910.

the implications of *Maha'ulepu* for land use policy in Hawaii, an island state "with the most complex and heavily regulated land use systems in the United States"[7] potentially are far-reaching. The *Maha'ulepu* decision indirectly raises questions concerning basic assumptions about Hawaii's land use scheme, the need for an agricultural district, and the future of Hawaii's economy. The case demonstrates that the Land Use Law, altered by annual amendments,[8] needs fundamental revision.

Currently, developers and landowners are considering at least 70 new golf course projects for Hawaii.[9] If all are developed, the number of golf facilities statewide will more than double.[10] Hawaii's economy depends on its visitor industry. And while tourism has grown, pineapple and sugarcane — once the staples of the island economy — have declined.[11] Proponents of golf course development point out the importance of new courses to the continued growth of the state economy. Hawaii's climate and resort infrastructure provide a natural blend for continued growth of an industry in a state with the potential to be a

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[7] Goodin, *The Honolulu Development Plans: An Analysis of Land Use Implications for Oahu*, 6 U. HAW. L. REV. 33, 34 (1984). *See also* Mandelker & Kolis, *Whither Hawaii? Land Use Management in an Island State*, 1 U. HAW. L. REV. 48 (1979).

[8] The Legislature amended the Land Use Law in 20 of the 29 years since the Law's enactment.

[9] N. ORDWAY, S. GILBERT, & M. GRADY, ANALYZING THE MARKET AND ENVIRONMENTAL IMPACTS OF THE GOLF INDUSTRY IN HAWAII 114 (1990). Another study states that as of the beginning of 1990, 88 golf courses were planned or proposed. DECISION ANALYSTS HAWAII, INC., HAWAII GOLF COURSES: IMPACTS AND BENEFIT ASSESSMENT at ix (1990) (hereinafter HAWAII GOLF COURSES).

[10] Hawaii currently has 63 golf courses. The number varies depending upon how one counts courses. For example, a traditional golf course consists of 18 holes. Some resorts may be counted as having two courses even though one of the courses has only nine holes. Other autonomous courses have nine holes. N. ORDWAY, S. GILBERT, & M. GRADY, *supra* note 9, at 115. Another study puts the figure at 57.5 operational courses at the beginning of 1990. HAWAII GOLF COURSES, *supra* note 9, at ix.

[11] *See, e.g., King Sugar Keeps Toppling Off Once-Dominant Throne*, Sunday Honolulu Star Bulletin & Advertiser, Sept. 2, 1990, at A1, col. 2. This casenote should not be construed to condemn the continued viability of agriculture in Hawaii. Many are pursuing other crops such as coffee and macadamia nuts which may be feasible as a major Hawaiian agricultural industry. The viability of the sugar industry is a complicated topic, a function of federal subsidies and foreign competition. Indeed, the Hawaii State Plan mandates planning for the continued growth and development of agriculture. HAW. REV. STAT. § 226-7 (Supp. 1989). *See infra* Part III. Proponents, however, feel strongly that golf courses, as a major element of a viable visitor industry, are a better economic use of the land. HAWAII GOLF COURSES, *supra* note 9. The state faces this dilemma of achieving the proper balance of tourism and agriculture.

world-wide "golf mecca." Opponents see new courses as precursors of unnecessary urban development on agricultural land.[12]

Furthermore, foreign developers are planning many of the proposed courses[13] on large open space areas previously in agricultural use. Foreign investment and new tourism-related growth combined seek to replace large-scale agriculture as dominant users of Hawaii's land. Foreign-owned golf courses where once was sugarcane: a distinct symbol of the changes Hawaii's economy has been undergoing since the 1960's, and of where it is heading in the 1990's.

Part II of this casenote reviews the facts of *Maha'ulepu*, Part III reviews pertinent provisions of Hawaii's Land Use Law and the law's relationship to the Hawaii State Plan,[14] Part IV analyzes the Hawaii Supreme Court's reasoning in *Maha'ulepu*, and Part V comments on *Maha'ulepu's* impact and implications for land use in Hawaii as the state struggles to cope with changing and conflicting demands on the land imposed by the dissimilar goals of development and agriculture.

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[12] N. ORDWAY, S. GILBERT, & M. GRADY, *supra* note 9, at 109.

> Proponents [of golf course development] . . . have a deep concern about the ability of the state to prosper and improve the quality of life for its people. These proponents want to keep our visitor industry viable by increasing the amenities available. Some of these proponents see golf courses as desirable forms of art which enhance the aesthetics of the human environment.
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> . . . .
>
> [Some] opponents are concerned about traditional cultural values and the preservation of remaining vestiges of Hawaii's old plantation based economy. They find the sugarcane fields and the rural housing as ways to preserve the aesthetics and cultural values of the human environment. Golf courses, they feel, are ugly intrusions into Hawaii's natural vistas.

Id. at 109-10.

Opponents are also concerned about availability of water, potential introduction of chemicals to the environment from fertilizers and pesticides, and the conversion of land from viable agricultural uses into what they feel is an "elitist" recreational activity. *Id.* at 110.

Proponents, however, respond with claims that golf courses actually introduce *fewer* chemicals into the environment than large-scale agriculture. They advocate golf courses as ideal uses to preserve open space, and believe golf courses can actually help preserve agricultural lands because the land is not reclassified and is essentially still available for agricultural uses should the need arise (compared with, for example, construction of a subdivision). They believe golf courses make positive contributions to the environment by cleansing air and recharging water tables, serving as bird sanctuaries, preserving archeological sights, and serving as buffer zones. *Id.*

[13] HAWAII GOLF COURSES, *supra* note 9, at xix.

[14] HAW. REV. STAT. ch. 226 (Supp. 1989) (*See infra* Part IV).

II. Facts

In April 1988, Ainako Resort Associates and Grove Farm Properties, Inc. ("the developers") petitioned the Kauai County Planning Commission ("Planning Commission") for a special use permit[15] to develop a golf course facility on 210 acres of land partially classified agricultural and rated "prime."[16] The developers planned the golf course in conjunction with and adjacent to the proposed Hyatt Regency Kauai resort in the Poipu resort community.[17] At the time, Poipu was developing into a major resort area with over 1,800 hotel rooms and apartment condominiums, together with commercial facilities, residential subdivisions, and beach parks.[18] McBryde Sugar Company, Ltd. leased a portion of the 210 acres and had sugarcane planted on approximately 50 acres of the leased area.[19]

The Planning Commission announced public hearings as required by Planning Commission rules.[20] Malama Maha'ulepu ("Malama"),[21]

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[15] A special use permit provides relief from restrictive zoning. *See infra* Part III.

[16] Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 334, 790 P.2d 906, 908; Land Use Commission, Findings of Fact, Conclusions of Law, and Decision and Order SP88-369, at 6,7 (November 23, 1988) (hereinafter LUC Findings).

The productivity of the land in question is rated B, D and E according to the Land Study Bureau's Detailed Land Classification scheme. LUC Findings at 7. *See supra* note 5. Grove Farm Company, Inc. owns the 210-acre area — part of a larger parcel of 1229.262 acres. LUC Findings at 6. Grove Farm Company Inc. authorized Grove Farm Properties, Inc., its subsidiary, to act on its behalf to develop the property. Ainako Resort Associates was the proposed lessee of the property. Planning Commission of the County of Kauai, Findings of Fact, Conclusions of Law, and Decision and Order, SP-88-6; Use Permit U-88-31; Special Management Area Use Permit SMA(U)-88-10; Class IV Zoning Permit Z-IV-88-39, at 2 (August 10, 1988) (hereinafter Planning Commission Findings).

[17] The Hyatt resort is located in a state-classified urban district. Planning Commission Findings, *supra* note 16, at 6.

[18] *Id.* at 8.

[19] *Id.* at 7.

[20] Kauai County Code §§ 8-19-6 and 8-20.6 (1987) require the Planning Commission to hold at least one public hearing. The special use permit process requires hearings and other due process procedures because the process is "quasi-judicial" rather than "legislative." *See* 3 Anderson, American Law of Zoning § 21.17, at 706 (3d ed. 1986) ("A board of adjustment entrusted with authority to grant or deny special permits exercises a quasi-judicial function.").

[21] "Malama Maha'ulepu" in the Hawaiian language is literally "protect Maha'ulepu." Malama means "to protect, care for, keep." Elbert, Spoken Hawaiian 228 (1971). Maha'ulepu is a coastal area on the southern shore of Kauai, near the Poipu area, known for its scenic beaches and archeological features. Conrow, *Tourism's Foot in the Door on the Southside*, Honolulu, Sept. 1990, at 72.

an unincorporated citizens group representing residents of the Koloa-Poipu-Kalaheo areas of Kauai, intervened. Some of the residents used coastal areas adjacent to and including the 210-acre parcel.[22] Malama alleged the golf course would have negative environmental, ecological and aesthetic consequences to the coastal area.[23]

After a May 25, 1988 public hearing, the Planning Commission conducted a series of meetings, "pre-hearings", and public "contested case" proceedings.[24] Malama requested discovery of documents from the developers which purportedly showed that the golf course was essential to the hotel's viability.[25] The Planning Commission denied the discovery request in part.[26] After the public hearings, on August 10, 1988,[27] the Planning Commission approved the developer's application for a special use permit.[28]

Pursuant to Hawaii Revised Statutes section 205-6 and Hawaii Administrative Rules section 15-15-95,[29] the State Land Use Commission ("LUC") reviewed the decision of the Planning Commission.[30]

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[22] Appellant Malama Maha'ulepu's Reply Brief at 6, Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 790 P.2d 906 (1990) (hereinafter Appellant's Reply Brief).

[23] Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 334, 790 P.2d 906, 908 (1990).

[24] Planning Commission Findings, *supra* note 16, at 3-5.

[25] Malama sought economic feasibility studies, plans and projections for the hotel site and physical hotel building, and documents containing negotiations and agreements with potential and actual hotel operators and financial backers. Appellees Ainako Resort Associates and Grove Farm Properties Answering Brief, Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 790 P.2d 906 (1990) (hereinafter Appellee's Answering Brief) at 31. Malama had already obtained at least one golf course demand study from the developers indicating an unsatisfied demand for golf courses on Kauai. Appellant's Opening Brief, Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 790 P.2d 906 (1990) (hereinafter Appellant's Opening Brief) at 28.

[26] Appellant's Opening Brief, *supra* note 25, at 4. The Planning Commission denied the discovery request for all documents relating exclusively to the hotel, but allowed Malama other documents. *Id.*

[27] Planning Commission Findings, *supra* note 16, at 47. The reported *Maha'ulepu* decision cites the approval date as August 11, 1988, 71 Haw. at 334, 790 P.2d at 908, as does Malama Maha'ulepu's opening brief. Appellant's Opening Brief, *supra* note 25, at 6. Apparently the findings were approved on August 10 and filed on August 11. Appellee State Land Use Commission's Answering Brief, Maha'ulepu v. Land Use Comm'n, 71 Haw 332, 790 P.2d 906 (1990), at 3.

[28] The Planning Commission approved the permit subject to 28 different conditions. Planning Commission Findings, *supra* note 16, at 39-46.

[29] *See infra* note 69.

[30] 71 Haw. at 335, 790 P.2d at 908. HAW. REV. STAT. § 205-6 (1985) states in

The LUC permitted Malama to appear as a party to oppose the petition but approved the permit on November 23, 1988.[31] Malama appealed the LUC approval to the Circuit Court of the Fifth Circuit, State of Hawaii,[32] which affirmed the LUC decision on March 16, 1989.[33]

Malama in turn appealed the Fifth Circuit decision to the Hawaii Supreme Court on April 6, 1989, naming as defendant-appellees the LUC, the Planning Commission, the developers, and the Kauai County Planning Department.[34] Malama asserted (1) because Hawaii Revised Statutes sections 205-2 and 205-4.5[35] prohibit golf courses on A- and B-classified lands, a special use permit was the incorrect method for relief from the zoning ordinance, and (2) it was denied due process by, among other things, being unable to present relevant evidence because of the Planning Commission's partial denial of Malama's discovery request.[36]

In an April 9, 1990 unanimous decision, the Hawaii Supreme Court held that, despite what appears to be prohibitory language in Hawaii Revised Statutes sections 205-2 and 205-4.5 against golf course developments on agricultural lands rated A or B, the Land Use Law as a whole grants local county governments and the State LUC power to issue special use permits for such developments.[37] The court also ruled

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part: "Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission." Since the proposed golf course development was 210 acres, the Planning Commission finding was subject to review by the LUC. *See infra* Part III for a discussion of Hawaii's Land Use Law.

[31] 71 Haw. at 335, 790 P.2d at 908. The LUC approved SP88-369 for a Special Permit to establish an 18-hole golf course, driving range, putting green, clubhouse and parking, and accessory related uses and structures. LUC Findings, *supra* note 16, at 41.

[32] The Fifth Circuit has jurisdiction over Kauai County.

[33] 71 Haw. at 335, 790 P.2d at 908.

[34] *Id.* at 332, 790 P.2d at 906.

[35] HAW. REV. STAT. § 205-2 (1985) specifies that golf courses are permitted uses on agricultural lands rated C, D, or E, but not on lands rated A or B. HAW. REV. STAT. § 205-4.5 (1985) excludes golf courses as a permitted use on prime agricultural lands. *See infra*, discussion in Part III.

[36] 71 Haw. at 335-39, 790 P.2d at 909-10.

[37] *Id.* at 339, 790 P.2d at 910. The controversy centered on the 1985 amendment. It is undisputed that prior to the amendment, special use permits could be granted for golf course development on any grade of agricultural land. Appellant's Reply Brief, *supra* note 22, at 3. *Cf.* 71 Haw. at 338, 790 P.2d at 909 ("The LUC has granted special use permits for courses on B soils on several occasions since 1975."). *See infra* note 68 and accompanying text.

that the Planning Commission did not abuse its discretion in denying Malama's discovery request.[38]

III. History of the Law

A. Hawaii's Land Use Law: Enacted to Protect Agriculture[39]

Act 187 of the 1961 Hawaii Session Laws created Hawaii's Land Use Law, notable as the first statewide[40] zoning law in the country.[41]

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[38] 71 Haw. at 339, 790 P.2d at 910.

[39] Haw. Rev. Stat. § 205 (1985). "Hawaii's Land Use Law (Act 187) is one of the most analyzed, summarized, eulogized, and criticized statutes in the country. Islander, mainlander, visitor — all have taken a crack at explaining its meaning, extolling its virtues, and deploring its shortcomings." Callies, Regulating Paradise: Land Use Controls in Hawaii 6 (1984) (hereinafter Regulating Paradise). *See, e.g.*, F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1972) (hereinafter The Quiet Revolution); D. Mandelker, Environmental and Land Control Legislation (1976); P. Myers, Zoning Hawaii: An Analysis of the Passage and Implementation of Hawaii's Land Classification Law (1976) (hereinafter Zoning Hawaii); Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979); and Mandelker & Kolis, *supra* note 7.

[40] Act 187 is significant because zoning has traditionally been an activity for local government. Passage of the Hawaii Land Use Law exemplifies the relatively recent trend of state governments taking back some of their power which they delegated to local governments via zoning enabling legislation. This trend has aptly been characterized a "quiet revolution" in land use control. The Quiet Revolution, *supra* note 39, at 1.

> This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law. It is a quiet revolution and its supporters include both conservatives and liberals. It is a disorganized revolution, with no central cadre of leaders, but it is a revolution nonetheless.
>
> The *ancien regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.

Id. See also Zoning Hawaii, *supra* note 39, at 7 ("[Hawaii's] land-use law has come to be recognized as the forerunner of a national movement in which states are asserting a regulatory role in the management of their limited physical resources.").

[41] Government zoning of private land has been controversial. Such regulation could constitute a taking of property without compensation in violation of the fifth amendment to the United States Constitution. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393,

The Land Use Law established the Hawaii State Land Use Commission[42] and directed it to classify state land into four use districts: urban, agricultural, conservation, and rural.[43] Depending upon the classification, the state, through the LUC, either retains complete power over the land's use or shares[44] or delegates control[45] to the counties.[46]

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415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). However, in the landmark case of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the United States Supreme Court established a constitutional basis for zoning by upholding a zoning ordinance when it is not arbitrary or unreasonable and relates to the public health, safety, morals, or general welfare.

[42] HAW. REV. STAT. § 205-1 (1985).

[43] HAW. REV. STAT. § 205-2 (1985). As originally enacted in 1961, there were only three classifications: agricultural, conservation, and urban. Act 205, 1963 Haw. Sess. Laws 315, added the rural classification.

[44] The State Department of Land and Natural Resources controls conservation land, while the counties and state share control over agricultural and rural land. Counties maintain true local zoning control only over urban-classified land. REGULATING PARADISE, *supra* note 39, at 7.

[45] If the state delegates land use controls to the counties, the counties may adopt more stringent restrictions than those outlined in the Land Use Law. Thus, a state classification sets up the most permissive use. For example, an urban classification means only that counties *may* use such lands for urban uses. "Counties can and do zone land that the state has classified as urban for low-intensity use." REGULATING PARADISE, *supra* note 39, at 7. Thus, in areas classified urban, traditional local zoning is the norm.

> Although the legal and planning literature of the 1970s was filled with gleeful requiems for local zoning, the "*ancien regime*" of land use controls is not only alive but increasingly robust . . . . While states and federal agencies may have promoted, often successfully, regional and statewide land use management and control systems . . . these were in addition to, rather than a substitute for, local zoning.

Id. at 21.

[46] The state of Hawaii has four counties. Hawaii County consists of the island of Hawaii; the City and County of Honolulu consists of the island of Oahu; Maui County consists of the islands of Maui, Molokai, and Lanai; and Kauai County consists of the islands of Kauai and Niihau. The federal government controls Kaho'olawe, the eighth Hawaiian island.

Each county has the power delegated from the Constitution of the state of Hawaii (power of "home-rule") to set up its own zoning ordinances, consistent with the Land Use Law and the Hawaii State Plan. HAW. CONST. art. VIII, § 2 ("Each political subdivision [e.g., county] 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."). Article VIII, § 2 serves as state enabling legislation for local zoning. *See generally*, REGULATING PARADISE *supra* note 39, ch. 3.

A unique confluence of factors created Hawaii's revolutionary Land Use Law. The combination of a new state[47] undergoing a political and economic transformation,[48] an island state with acclaimed shorelines and mountains,[49] and a state with a unique land-use history,[50] created a special need to control land use.[51] Indeed, the original purpose of the law was primarily to protect Hawaii's prime agricultural land and agricultural lifestyle as a response to what was perceived as rapid and uncontrolled development.[52]

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[47] Hawaii gained statehood in 1959, just two years before passage of the Land Use Law.

[48] *See* G. COOPER & G. DAWS, LAND AND POWER IN HAWAII (1985) (studying the growth of the Democratic party in Hawaii after statehood and the party's derivation of power from land use controls).

[49] Commentators have noted:

> At no other place in the United States is the land management imperative as demanding as it is in the Hawaiian islands. A series of volcanic cones rising from the depths of the ocean floor, the islands cradle a growing population and a rising tourism industry that press heavily on its limited land resources.

Mandelker & Kolis, *supra* note 7, at 48.

[50] Hawaii was once a sovereign nation with the land was controlled by a high chief, the "ali'i nui". Until The Great Mahele of 1848 divided the land, there was no private ownership of land. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 232 (1984). This history has created a land regulation system still sprinkled with remnants of this society (*e.g.*, a land title system traceable to awards and grants from the King). With an economy once dominated by sugar and pineapple plantations under control of a few landowners and estates, the state is still dominated by a leasehold land system. *Id.* For a detailed historical overview of Hawaiian land history, see J. CHINEN, THE GREAT MAHELE (1958).

[51] *See* Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 8 (1985) ("[T]here is no place in the country where the clash between conservation of natural environment and development for housing or commercial purposes is more sharply drawn.").

[52] S. STAND. COMM. REP. No. 580, 1961 HAW. LEG. SESS., HOUSE J. 883, describes the purpose of Act 187:

> The purpose of this bill is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes and to facilitate sound and economical urban development . . . .
>
> . . . .
>
> . . . There is a special need to protect productive agricultural lands from urban encroachment, to prevent scattered and premature development, to limit land speculation of urban areas, and to protect the unique natural assets of the state. . . .
>
> . . . .
>
> . . . If exclusive agricultural zones are not established to preserve and protect

It is also notable that the constitutionality of the state Land Use Law itself might be questionable, although the LUC's authority to classify state land into districts has never been directly challenged.[53]

B. Guidelines for Uses in the Agricultural District.

1. Hawaii Revised Statutes Section 205-2

Hawaii Revised Statutes section 205-2 provides guidelines for the LUC for classifying land by describing permitted uses in each type of district. It outlines numerous permitted uses in the agricultural district. Prior to 1985, section 205-2 did not permit golf courses in the agricultural district specifically, but stated that "open air recreation facilities" were compatible with the agricultural district.[54] Act 298 of the 1985 Hawaii Session Laws amended section 205-2, explicitly designating golf courses as an "of right" permitted use in an agricultural district on the condition that the golf courses not be located within lands classified A or B. Act 298 added the following language to the

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> prime agricultural land from infringement by none-agricultural [sic] uses, the possibilities of land speculation through inflated or artificial land prices may jeopardize the existence of major agricultural companies or activities. The most effective protection for prime agricultural lands, preservation of open space and direction from urban growth, is through state zoning.

Id. at 883.

For in-depth discussion and history of the Land Use Law, See D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION, ch. VII (1976); REGULATING PARADISE, *supra* note 39, at 6; and ZONING HAWAII, *supra* note 39, ch. 1; G. COOPER & G. DAWS, *supra* note 48, ch. 3.

[53] REGULATING PARADISE, *supra* note 39, at 10. An attack on the Land Use Law's constitutionality might arise because under the Land Use Law the Legislature delegates authority to classify land to a "zoning commission." By vesting such power in the Land Use Commission with relatively standardless discretion, it could be argued that the Legislature may be unlawfully delegating its zoning authority. 1 ANDERSON, AMERICAN LAW OF ZONING § 4.09 (3d ed. 1986).

[54] Prior to the 1985 amendment, HAW. REV. STAT. § 205-2(d) (1976) stated in part:

> Agricultural districts shall include activities or uses as characterized by [traditional agricultural uses]; wind generated energy production. . .; services and uses accessory to the above activities . . . .; wind machines and wind farms; agricultural parks; and open area recreational facilities.

list of permitted uses enumerated in Hawaii Revised Statutes section 205-2(d) quoted in note 54:

> [Agricultural districts shall include . . . open area recreational facilities,] including golf courses and golf driving ranges, provided that they are not located within agricultural district lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B.

Interpreting the intent of this amendment is the heart of the court's analysis in the *Maha'ulepu* decision.

The enactment of Act 298 in 1985 was not without controversy.[55] Although the Act's purpose was to allow golf course development without the need for a district boundary amendment, variance, or special use permit,[56] legislators also considered other competing interests in the land. Legislators questioned the wisdom of specifically permitting golf courses on agricultural land without the need for a special use permit.[57]

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[55] The Senate passed the act by a 14-11 vote against the recommendations of the State Land Use Commission, the State Department of Planning and Economic Development, the Hawaii Farm Bureau Federation, and the City and County of Honolulu. DEBATE ON HOUSE BILL NO. 1063, 1985 HAW. LEG. SESS., SENATE J. 689-90, 702 (testimony of Senator Charles Toguchi). *See also infra* note 57. The Act has survived attempts to repeal the provisions added by Act 298. *See, e.g.*, H.R. STAND. COMM. REP. NO. 559-88, 1988 HAW. LEG. SESS., HOUSE J. 1048 (proposal to delete language including golf courses as permitted uses within agricultural district lands). *See also infra* note 117.

[56] The stated purpose of the Act was to:

> permit golf courses and golf driving ranges in agricultural districts, provided that these recreational uses are not located on lands with soil classified by the Land Study Bureau's [classification] Class A or B.
>
> [The] [c]ommittee [on Economic Development] . . . believes that allowing these limited recreational uses on non-prime agricultural lands will protect prime agricultural lands.

S. STAND. COMM. REP. NO. 983, 1985 HAW. LEG. SESS., SENATE J. 1331.

Additionally, when asked to state the primary purpose of House Bill 1063, which became Act 298, Senator James Aki, the Bill's primary supporter, replied in Senate debate: "to avoid the state permit process." DEBATE ON HOUSE BILL NO. 1063, 1985 HAW. LEG. SESS., SENATE J. 695 (testimony of Senator James Aki).

[57] Ostensibly, by enumerating golf courses specifically as a permitted use on non-prime agricultural lands, the Act gave golf courses priority over other uses of land such as housing development, which are required to go through the permit process. Such priority was hotly debated. An exchange between Senators James Aki and

The practical effect of Act 298 has been to transfer decisions about golf courses to the counties. Currently all Hawaii counties have ordinances restricting in some manner golf courses on agriculturally-classified land regardless of the productivity rating, effectively rendering Act 298 moot.[58]

2. Hawaii Revised Statutes Section 205-4.5

In addition to Hawaii Revised Statutes section 205-2, section 205-4.5[59] provides further guidance for the LUC to classify agricultural

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Benjamin Cayetano exemplifies the controversy:

> [Senator Cayetano:] I've always wondered why the Democratic Party chose the jackass as a symbol while the Republicans chose the elephant, and after listening to the debate today, I've come to the conclusion that with the jackass it's easier to kick yourself in the ass. That's what we're doing by passing this bill . . . . [T]hat's what we're doing when we elevate golf courses, a game in which one spends hours hitting a little white ball, when we elevate that to the level of priority that we don't even give housing[.] . . . [W]ho is this bill for?;
>
> [Senator Aki:] This bill is for all of us, for all of Hawaii, for economic development, for jobs.
>
> . . . .
>
> [Senator Cayetano:] Well, Mr. President [referring to the Senate President moderating the exchange], I think I asked [Senator Aki] this question in the caucus, behind closed doors. . . .when I asked, and I asked expressly and let me quote myself verbatim: 'Who is this bill for?' And the answer was 'some developer in my district.'
>
> I find all of this incredible. . . . [T]his bill . . . will now raise the development of golf courses to a level of priority which is higher than housing and maybe it's on the level of geothermal energy.

DEBATE ON HOUSE BILL NO. 1063, 1985 HAW. LEG. SESS., SENATE J. 697-98.

[58] *See* Maui County, Haw., Ordinance 1940 (Sept. 20, 1990) (Extending moratorium on golf course construction until January 13, 1991); Hawaii County, Haw., Ordinance 90-105 (Sept. 13, 1990) (Requiring Hawaii County Use Permit in order to establish a golf course in an agricultural district); City and County of Honolulu, Haw., Bill 108 (1990) (Proposal for one year moratorium on approval of permits for golf courses); KAUAI COUNTY, HAW., CODE § 8-7.3 (1985) (Construction of golf courses in an agricultural district requires a County Use Permit).

[59] HAW. REV. STAT. § 205-4.5 (1985) reads in pertinent part:

> (a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:
>
> . . . .
>
> (6) Public and private open area types of recreational uses . . . *but not including*

lands. Section 205-4.5 specifically covers land with productivity ratings A or B. Thus, sections 205-2 and 205-4.5 apparently both cover prime land, with section 205-2 providing general guidance. Prior to 1976, the Land Use Law did not distinguish between different grades of agricultural land in describing permitted uses. The Legislature enacted section 205-4.5 in 1976[60] in response to concerns that landowners were subdividing prime agricultural lands for residential use despite Land Use Law restrictions.[61]

Although section 205-4.5 specifically excludes golf courses from permitted uses, it nevertheless allows exceptions to restrictions on permitted uses by obtaining a special use permit.[62] Prior to the *Maha'ulepu* decision, the LUC twice granted special use permits for golf courses under section 205-4.5,[63] both covering the same parcel of land. The

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. . . *golf courses, golf driving ranges*, country clubs, and overnight camps.

. . . .

(b) Uses not expressly permitted in subsection (a) shall be prohibited, *except the uses permitted as provided in section 205-6* [by special use permit] . . . . (emphasis added).

For agricultural land rated C, D, E, and U, the more general permitted-use provisions of section 205-2 are applicable. *Maha'ulepu*, 71 Haw. at 336 n. 3, 790 P.2d at 908-09 n. 3.

[60] Act 199, 1976 Haw. Sess. Laws 369 (codified as amended as HAW. REV. STAT. § 205-4.5 (1985)).

[61] S. STAND. COMM. REP. No. 662-76, 1976 HAW. LEG. SESS., SENATE J. 1177 provides:

> The purpose of the agricultural district classification is to control the uses of the land for agricultural purposes. This purpose is being frustrated by the development of urban type residential communities in the guise of agricultural subdivisions. To discourage abuse of this purpose, the bill, as amended, more clearly defines the uses permitted within the agricultural district. Except for such uses permitted under special use permits in Section 205-6, and for nonconforming uses permitted in Section 205-8, uses not permitted by this bill shall be prohibited.

Additionally S. CONF. COMM. REP. No. 2-76, 1976 HAW. LEG. SESS., SENATE J. 836 provides:

> [T]his bill is not intended to change the existing permitted uses on lands within the agricultural district which are classified other than A or B. Rather, the intent of this bill is to give *additional* protection to those lands within the agricultural district which are classified as A or B. (emphasis in original).

[62] HAW. REV. STAT. § 205-6 (1985) governs procedures for special permits. *See infra* Part C.

[63] Land Use Commission, Finding of Fact, Conclusions of Law, and Decision and Order, SP86-360 (October 27, 1986) (redesign of existing golf course for Hemmeter/VMS Kauai Company III at the Westin Kauai Resort); Land Use Commission, Finding of Fact, Conclusions of Law, and Decision and Order, SP86-361 (January 7, 1987) (additional golf course at the same resort).

LUC found in those situations that golf courses are an unusual and reasonable use on A and B rated land, provided the developers complied with conditions imposed by the permit.

C. Special Use Permits: Relief From Permitted Uses

A special use permit ("SUP"), also known as a conditional use[64] permit or special exception,[65] is a well-established land use device used to provide a landowner relief from a zoning ordinance upon the fulfillment of specified conditions.[66] A SUP affords flexibility in the application of rigid restrictions of a zoning ordinance which other devices such as district boundary amendments or variances do not allow.[67]

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[64] Conditional use permits are not "conditional zoning." Conditional zoning is a reclassification of land, either through a rezoning ordinance or a district boundary amendment, upon fulfillment of specified conditions by the landowner. "Conditional use," in contrast, is a permitted deviation from the zoning designation upon compliance with specified conditions. The subject land, however, is not rezoned. ANDERSON, *supra* note 20 § 21.04, at 637.

The major difference between the two becomes apparent when conditions are breached. If the conditions for a special or conditional use permit are breached, the permit is revoked and the use of the land automatically is limited to the uses permitted in the zoned district. In the case of conditional zoning, in the event of breach the land cannot automatically revert to previous zoning without legislative action. Because of the common word "conditional," the two land use devices are often confused. *See infra* note 71 for an example of apparent confusion.

[65] D. CALLIES & R. FREILICH, CASES AND MATERIALS ON LAND USE 98 (1986).

[66] Treatises and encyclopedias explain the need for special permits:

> Special-permit procedures are a product of the need for flexibility in the administration of the zoning regulations, a need which was felt at an early date. . . . [V]ariance procedures were incapable of converting an essentially rigid system of Euclidian zoning into a flexible tool for the accommodation of unlike and sometimes incompatible uses of land.

ANDERSON, *supra* note 20 § 21.01, at 631-32.

> The function of a special permit is to bring some flexibility to the rigid restrictions of a zoning ordinance while at the same time controlling troublesome or somewhat incompatible uses by establishing, in advance, standards which admit the use only under certain conditions or circumstances.

82 AM. JUR. 2D, *Zoning and Planning* § 281 (1976).

[67] Similarly, a land use district boundary amendment does not provide the necessary flexibility. As with conditional zoning, a major difference between a boundary amendment and a special use permit becomes apparent if the permit is retracted. With a SUP, unlike a boundary amendment, the underlying zoning classification is not altered and the land automatically is restricted to zoned uses. Neighborhood Bd. No. 24

Hawaii's SUP provisions are codified at Hawaii Revised Statutes section 205-6.[68] According to section 205-6, county planning commissions and the State LUC grant SUPs only if a proposed use is "unusual and reasonable." Planning commissions and the LUC in turn apply guidelines set forth in LUC rules to determine whether a proposed use is "unusual and reasonable" in specific fact situations.[69]

(Waianae Coast) v. State Land Use Comm'n, 64 Haw. 265, 270-71, 639 P.2d 1097, 1102 (1982). *See infra* note 74 and accompanying text.

In Hawaii's complex scheme of local county and state controls, a landowner might have an underlying motivation to seek a special use permit in agricultural land rather than a district boundary amendment changing the land's classification to urban. In the agricultural zone, the state government controls the land whereas, if the land is reclassified to urban, the county government exercises control. A landowner or developer wanting to avoid county regulations could thus seek a SUP rather than a boundary amendment to effectively "forum shop" for either state or county control.

[68] HAW. REV. STAT. § 205-6 (1985) reads in part:

> The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. . . .
>
> The county planning commission may under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter. . . .
>
> Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission . . . .

[69] HAW. ADMIN. RULES § 15-15-95 (1986) ("LUC guidelines") provides in part:

> (b) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an "unusual and reasonable use"
>
> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205(a), HRS, and the rules of the commission;
>
> (2) The desired use would not adversely affect surrounding property;
>
> (3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends and needs have arisen since the district boundaries and rules were established;
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.
>
> . . . .
>
> (d) The petitioner shall comply with all of the rules of practice and procedure of the county planning commission in which the subject property is located.

Prior to the *Maha'ulepu* decision, the Hawaii Supreme Court had twice ruled on aspects of section 205-6. In *Perry v. Planning Commission of the County of Hawaii*,[70] the court upheld conditions imposed on the landowner who sought a SUP to operate a quarry on urban land. The court found that imposing conditions in exchange for the permit was not unduly burdensome either on the permit holder or on potential adverse parties to the landholder.[71]

In *Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission*,[72] the Hawaii Supreme Court for the first time overruled a circuit court decision upholding a ruling of the LUC affirming a county planning commission approval of a SUP. The court found that a large recreational theme park was not an "unusual and reasonable" use of agriculturally-classified land and that the LUC's approval of a SUP for such a purpose was contrary to the purposes of the Land Use Law.[73]

The *Neighborhood Board* court differentiated various devices available for relief from a district classification or zoning ordinance. In distinguishing a special permit, the court stated:

> Unlike a district boundary amendment, which is analogous to a rezoning in its effect of reclassifying land, and unlike a variance, which permits a landowner to use his property in a manner forbidden by ordinance or statute, a special permit allows the owner to put his land to a use

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[70] 62 Haw. 666, 619 P.2d 95 (1980).

[71] *Id.* at 682-84, 619 P.2d at 106-07. *Perry*, however, is also noteworthy because the court appears to have confused conditional use permits with conditional zoning. The court found "[t]he grant and approval of the special permit may be characterized for present purposes as 'conditional zoning' since it 'is an appropriate phrase to describe a zoning change which permits use of a particular property subject to conditions not generally applicable to land similarly zoned.'" *Id.* at 681, 619 P.2d at 105-06 (quoting Scrutton v. County of Sacramento, 275 Cal. App. 2d. 412, 417, 79 Cal. Rptr. 872, 876 (1969))

To support the proposition, the court in *Perry* also cited Goffinet v. County of Christian, 65 Ill. 2d 40, 357 N.E.2d 442 (1976), a case clearly confusing conditional zoning with conditional use permits. In *Goffinet* the court stated:

> [W]e conclude that when a finding is made . . . that the restrictions imposed by a special use permit or the conditions placed upon a rezoning amendment, *which we find to be indistinguishable*, were not complied with, no other interpretation can be given but that the special use and conditional zoning would terminate and the property would again have the prior zoning classification.

65 Ill. 2d at 53-54, 357 N.E.2d at 449 (emphasis added). *See supra* note 64.

[72] 64 Haw. 265, 639 P.2d 1097 (1982).

[73] *Id.* at 273, 639 P.2d at 1103.

> expressly permitted by ordinance or statute on proof that certain facts and conditions exist, without altering the underlying zoning classification.[74]

Recognizing that a landowner should not use a special use permit in place of a district boundary amendment[75] or variance to obtain relief from a zoning ordinance,[76] the court concluded that operating a major theme park on agriculturally-classified land would require the developers to secure a district boundary amendment instead of a special use permit.[77] Thus, one can interpret the court's differentiations between zoning-relief methods to mean that a special use permit may not be granted for a use specifically prohibited by statute.[78]

Neighborhood Board No. 24 is also significant for the court's interpretation of the provisions of Hawaii's Land Use Law which enumerate permitted uses in agricultural districts. The court clearly delineated the difference between sections 205-2 (which effectively controls only non-prime agricultural lands — areas rated C, D, E, or U) and 205-4.5 (which control prime lands — areas rated A or B).[79] Given this interpretation, it is logical to conclude that Act 298, the 1985 amend-

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[74] *Id.* at 270-71, 639 P.2d at 1102.

[75] Judicial proceedings for district boundary amendments are required primarily as a result of a 1974 Hawaii Supreme Court decision in Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974) (LUC findings regarding boundary amendments involve a "contested-case" ruling on legal rights of property interests and thus are quasi-judicial proceedings requiring basic procedural safeguards).

[76] The *Neighborhood Bd. No. 24* court reasoned that "unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes." 64 Haw. at 272, 639 P.2d at 1102-03 (citations omitted).

[77] 64 Haw. at 273, 639 P.2d at 1103.

[78] Indeed, the *Maha'ulepu* court made such an interpretation. The court stated: "The LUC may exercise only those powers granted to it by statute . . . and may not grant a special permit unless the proposed use is permissible under Chapter 205." *Maha'ulepu*, 71 Haw. 332, 336, 790 P.2d 906, 908 (1990) (citing *Neighborhood Bd. No. 24*) (other citation omitted).

[79] In *Neighborhood Bd. No. 24* the court noted:

> Agricultural lands containing soil classified by the Land Study Bureau's Detailed Land Classification as Overall Productivity Rating Class A or B are restricted to the uses described in HRS § 205-4.5, while permissible uses on those lands having soil with a productivity rating of C, D, E or U are set forth in HRS § 205-2.

64 Haw. at 269 n.7, 639 P.2d at 1101 n.7.

ment to section 205-2, while declaring an exclusion of golf courses on *prime* agricultural lands, was intended only to allow golf courses on *non-prime* lands "of right" without a need for a special use permit. To have changed regulation of uses on prime lands, the Legislature needed to amend section 205-4.5 as well.

D. The Relationship of Zoning to the Hawaii State Plan

Another aspect of Hawaii's scheme of land use regulation is the relationship of the Land Use Law to the Hawaii State Plan. The Hawaii State Plan, in theory, directs the state economy and provides direction for socio-cultural as well as environmental concerns. In general, the existence of a concrete plan is critical because zoning ostensibly should always be in conformance with a more general comprehensive "plan."[80] In practice, however, "the judiciary has often interpreted planning requirements so broadly as to make them nearly meaningless."[81]

Hawaii, in theory, is different from other states. It is not only unique in having a state-wide zoning law, but it is the only state to have enacted a statute codifying a state plan.[82] Not only is the Land Use Law required to conform to the state plan, but the plan itself is the law.[83] Although now largely symbolic because the plan consists of broad policy statements[84] which could conceivably be used to justify any type of reasonable activity or development, "[t]he writing of the plan into the statutory code had the effect of transforming what is usually a policy document into a set of preeminent legal requirements."[85] For example, The LUC is legally prohibited from adopting district boundary amendments which are not in conformance with the state plan.[86]

Hawaii's State Plan consists of three major parts: Part I, the overall theme, goals, objectives and policies;[87] Part II, planning coordination and implementation;[88] and Part III, priority guidelines.[89] Two major

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[80] REGULATING PARADISE, *supra* note 39, at 12.

[81] *Id.* at 24.

[82] *Id.* at 12.

[83] Act 100, 1978 Haw. Sess. Laws 136 (codified as amended at HAW. REV. STAT. ch. 226 (1985)).

[84] See *infra* notes 87-89 and accompanying text.

[85] REGULATING PARADISE, *supra* note 39, at 12.

[86] HAW. REV. STAT. § 205-16 (1985).

[87] HAW. REV. STAT. §§ 226-1 to 226-27 (Supp. 1989).

[88] HAW. REV. STAT. §§ 226-51 to 226-63 (Supp. 1989).

[89] HAW. REV. STAT. §§ 226-101 to 226-107 (Supp. 1989).

objectives and policies regarding agriculture are designed to ensure its continued viability.[90] Additionally, the Hawaii State Constitution mandates protection of agricultural lands and promotion of diversified agriculture.[91] Thus, Hawaii is obligated by law to protect agriculture as a viable industry.

Hawaii's State Plan, however, also mandates a concerted effort to nurture a viable visitor industry.[92] *Maha'ulepu*, thus, is symbolic of the inevitable clash in the State Plan's goals between a commitment to agriculture as a prime industry and a corresponding commitment to the growth of tourism in Hawaii.[93] Clearly, if the state plan is to have

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[90] HAW. REV. STAT. § 226-7 (Supp. 1989) states:

Planning for the State's economy with regard to agriculture shall be directed towards achievement of the following objectives:

(1) Continued viability in Hawaii's sugar and pineapple industries.

(2) Continued growth and development of diversified agriculture throughout the State.

[91] HAW. CONST. art. XI, § 3 reads:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

[92] HAW. REV. STAT. § 226-8(a) (Supp. 1989) reads:

Planning for the State's economy with regard to the visitor industry shall be directed towards the achievement of the objective of a visitor industry that constitutes a major component of steady growth for Hawaii's economy.

[93] One commentator, when analyzing the state plan's commitment to agriculture, observed:

The state [c]onstitution, state law and state and county plans all say that agriculture should remain in Hawaii. But the lawbooks mean little when an executive sits down in a corporate board room and sees a bottom line written in red ink.

. . . .

What [David] Murdock [Chairman of Castle and Cooke, Inc. who announced plans to end pineapple cultivation on the island of Lanai and commented that all large-scale agriculture in Hawaii is dead] has done — in fairly blunt fashion — is force local policy-makers to confront the reality of their philosophical commitment to agriculture as a way of life in Hawaii.

Burris, *Preserving Plantations: Who's Prepared to Pay?*, Sunday Honolulu Star-Bulletin & Advertiser, Sept. 9, 1990, at C3, col. 1.

any real effect as a law, the plan should reflect the emphasis and direction of the state's economy, but also resolve conflicts in general goals within the plan.

IV. Analysis

A. Interpreting the Provisions of the Land Use Law.

The Hawaii Supreme Court confined its ruling in *Maha'ulepu* to a narrow issue. In conducting a straightforward statutory analysis, the court restricted its opinion[94] essentially to determining the intent of Act 298 in amending Hawaii Revised Statutes section 205-2. Was Act 298 limited only to adding to the specifically permitted uses on non-prime agricultural land? Or, while doing so, did the Legislature implicitly *repeal* the county planning commission's and the LUC's authority to issue special use permits by specifically *prohibiting* golf courses on land in agricultural districts rated A or B?[95]

Malama argued that, under the court's analysis in *Neighborhood Board 24*,[96] special use permits may not be issued for uses specifically prohibited by statute.[97] Malama sought to prove that Act 298, combined with the explicit language in Hawaii Revised Statutes section 205-4.5 that golf courses and driving ranges are not permitted uses on prime agricultural land, prohibits the issuance of special use permits in this case.[98] If so, the special use permit granted for the developer's golf course would consequently be void.

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[94] 71 Haw. 332, 790 P.2d 906 (1990). The *Maha'ulepu* court did not comment on whether Malama Maha'ulepu, an unincorporated citizens group, had standing to bring the claim against the developers, although the developers contested the issue. Appellee's Answering Brief *supra* note 25, at 12. While basic constitutional law dictates that a plaintiff must show "injury in fact" in order to have standing, *see, e.g.*, Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989) (plaintiff must show he has suffered injury in fact), Hawaii's courts have consistently liberalized standing requirements in cases involving environmental, aesthetic, and recreational concerns. *See, e.g.*, Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982); Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982); Protect Ala Wai Skyline v. Land Use and Controls Comm., 6 Haw. App. 540, 735 P.2d 950 (1987).

[95] 71 Haw. at 337, 790 P.2d at 909.

[96] 64 Haw. 265, 639 P.2d 1097 (1982). *See supra* note 74 and accompanying text for discussion of the case.

[97] Appellant's Reply Brief, *supra* note 22, at 1. *See also* Agsalud v. Blalack, 67 Haw. 588, 699 P.2d 17 (1985) (agency may not approve what is prohibited by statute).

[98] 71 Haw. at 337, 790 P.2d at 909.

The Hawaii Supreme Court, however, reasoned that if it interpreted Act 298 as repealing existing[99] statutory authority possessed by county planning commissions and the LUC to authorize SUPs for golf courses on prime lands, section 205-2 would then contradict section 205-6 which allows for issuance of special use permits.[100] The court relied on the principle that "repeals by implication are not favored and that if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is intended to remain in force and that the later statute did not repeal it."[101] It thus concluded that Act 298 merely amended section 205-2 to permit golf courses "of right" on non-prime agricultural land "while reiterating their non-permitted status on A and B lands."[102] According to the court's logic, "non-permitted" is distinct from "prohibited."

The court reasoned that if the Legislature had intended to prohibit golf courses on prime agricultural lands, "it would have done so unequivocally by prohibiting the issuance of permits [under section] 205-4.5(b), or by employing clearly prohibitory language in Act 298."[103] Thus, the court held that the Planning Commission and the LUC retained authority to issue special use permits for golf courses on agricultural districts rated A or B, and upheld the issuance of the SUP to the developers.[104]

In a broader sense, the court also upheld the power and flexibility of the special use permit procedure. Although the standards in section 205-6 are relatively imprecise and general, a landowner or developer may still obtain a special use permit despite a specifically enumerated non-permitted use. If the Planning Commission and the LUC find a potential use "unusual or reasonable," apparently a landowner can obtain a special use permit for any use of his land. Although standards exist, no "bright line" separates the situation where a special use permit is no longer available from that in which a district boundary amendment or a variance is instead the proper method of obtaining relief from a land use classification.

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[99] The LUC had twice issued SUPs for golf courses on prime agricultural land after enactment of section 205-4.5. *See supra* note 63.

[100] 71 Haw. at 337, 790 P.2d at 909. *See supra* Part III.

[101] *Id.* at 337-38, 790 P.2d at 909 (quoting State v. Gustafson, 54 Haw. 519, 521, 511 P.2d 161, 162 (1973)).

[102] 71 Haw. at 338, 790 P.2d at 910.

[103] *Id.* at 339, 790 P.2d at 910.

[104] *Id.*

B. The Discovery Ruling: Are Golf Courses "Urban"?

Maha'ulepu is also notable for issues that were not addressed by the court but were implicit in the arguments before it. The court disposed of Malama's due process claims with terse non-explanatory statements.[105] Malama had contended that it was denied due process when the Planning Commission partially denied Malama's request for discovery of documents relating to the adjoining hotel's alleged dependence on the proposed golf course.[106] While the court had no obligation to expand on its rationale, by ruling as it did, the court passed up the opportunity to address the issue of whether building a golf course, while not an urban use per se, is normally a precursor of urban development so as to be itself characterized as an urban use.

Malama had sought to show that this particular golf course development was, in essence, an urban use because of its relationship to the adjoining hotel.[107] Are golf courses which adjoin resort hotels inherently linked to the hotels and other urban uses so as to mean the courses themselves are "urban"? More broadly, are golf courses appropriate uses of agriculturally-rated lands?

It is not surprising that the court chose not to address the "golf course as urban" question. Malama did not raise the issue, nor attack the substantive findings of the Planning Commission or the LUC, challenging instead their power under the Land Use Law. The court specifically noted the non-challenge, stating "[t]he Planning Commission found that the proposed golf course use was an unusual and reasonable use of the land, and *Malama does not challenge that finding on appeal.*"[108] The court, then, was not directly presented with the opportunity to venture into the "golf courses as urban" question, and chose not to address it. Given, however, the current controversy regarding golf course developments, some judicial comment would have been welcome. Arguably, however, the question whether golf courses should be considered urban uses is a legislative concern that may not even be an appropriate topic for judicial review unless a direct ruling is nec-

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[105] 71 Haw. at 339, 790 P.2d at 910. The court only stated that, "Upon a review of the record, we cannot conclude that the KPC [Kauai County Planning Commission] abused its discretion in denying discovery of the issue." *Id.*

[106] Appellant's Opening Brief, *supra* note 25, at 28-32.

[107] *Id.*

[108] 71 Haw. at 337, 790 P.2d at 909 (emphasis added).

essary. Because Malama did not raise the issue, the court constrained its ruling.

Although the Legislature has found that golf courses are appropriate uses of agriculturally-classified lands (at least on land rated C, D, E, or U),[109] such a finding begs more fundamental questions. As Hawaii's economy changes away from an agriculturally-based system, what is the purpose of the agricultural district? Given the amount of the land zoned but not being used for traditional agricultural purposes,[110] it appears that the agricultural district is functioning merely as a holding classification for land eventually to be converted to urban use. If so, since the reason for which Hawaii created the Land Use Law — the protection of agriculture — seems to no longer exist, has the Land Use Law become irrelevant as Hawaii's economy changes? In a larger sense, has the Land Use Law outlived the purpose for which it was enacted? And if large-scale agriculture dies, should the Land Use Law die with it? These are questions the Hawaii state government, the Legislature, indeed the people of Hawaii, need to address.[111]

V. IMPACT

Public reaction toward the number of proposed golf courses in Hawaii has generally been negative.[112] As a dominant political issue, state and

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[109] The opening paragraph of Act 298 reads in part:

> Inasmuch as golf course and golf driving range activities are primarily day-time recreational activities, do not generate noise, and do not require extensive permanent improvements on the land so as to render it irretrievabl[y] lost for future agricultural uses, the legislat[ure] finds that golf course and golf driving range activities are compatible recreational uses in an agricultural district. Certain counties have long recognized that a golf course use is a compatible and permitted use within an agricultural district.

[110] According to one source, only 256,000 acres of land are under cultivation now out of about 1.96 million acres classified as agricultural. *Land-Use Bills Differ Over 'Open' Space District*, Sunday Honolulu Star-Bulletin & Advertiser, March 3, 1991, at A18, col. 1 (hereinafter *Land Use Bills Differ*).

[111] The state has been working since 1983 on the Land Evaluation and Site Assessment (LESA) program that would reclassify "important agricultural lands" and rewrite major portions of the Land Use Law. *See infra* Part V.

[112] *See, e.g.*, *Most Voters Oppose More Island Golf Links*, Honolulu Advertiser, Aug. 11, 1990, at A3, col. 1 ("three-fourths of the voters think building more golf courses is a bad idea") (citing an Advertiser-Channel 2 News poll).

local governments are making golf course development more difficult.[113] The court decided *Maha'ulepu* in the midst of this fray. And the *Maha'ulepu* decision itself has generated controversy.[114] Although the decision is statutorily defensible in that it upheld the workings of the Land Use Law and the flexibility of the special permit device to enable "unusual and reasonable" uses of land despite non-permitted status, the court seems to have ignored another statutory rule of interpretation. Ordinarily, specific provisions of a statute (such as Hawaii Revised Statutes section 205-4.5 specifying golf courses) control over general provisions (such as section 205-2 covering the agricultural zone in general).[115] Given the court's reasoning that if the Legislature intended

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[113] *See supra* note 58. Also, the City and County of Honolulu is currently considering assessing "impact fees" of as high as $100 million in return for necessary permit approval. It is difficult to justify $100 million as an impact fee without constituting a "taking" in violation of the fifth and fourteenth Amendments of the United States Constitution. Callies, *City Shouldn't Cash in on Golf Course Impact Fees*, Honolulu Star-Bulletin, Sept. 6, 1990, at A-25, col. 2. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ("essential nexus" required between government condition and legitimate state objective).

At least one court has condemned payment in exchange for approval of land use control devices. In Nunziato v. Planning Bd. of Borough of Edgewater, 225 N.J. Super. 124, 541 A.2d 1105 (1988), an applicant for a variance, after negotiations with the planning board, donated $203,000 for affordable housing to the Borough of Edgewater. *Id.* at 1108. Plaintiffs challenged the granting of the variance. *Id.* at 1106. On appeal, the court reversed, stating:

> Without legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited. Approvals would be granted or withheld depending upon the board members' arbitrary sense of how much an applicant should pay. . . .
>
> We conclude that the kind of free-wheeling bidding under review is grossly inimical to the goals of sound land use regulation. The intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale.

Id. at 1110.

[114] For example, a representative of the Hawaii Chapter of the Sierra Club, which consists of over 4,000 members, commented, "[w]hile the court [in *Maha'ulepu*] pretends to engage in pure statutory analysis, the opinion is laden with clear policy choices favoring urbanization of agricultural land." Interview with David Kimo Frankel, Legislative Coordinator of the Hawaii Chapter of the Sierra Club (October 15, 1990).

[115] State v. Coney, 45 Haw. 650, 662, 372 P.2d 348, 354 (1962) ("It is the generally accepted rule of statutory construction that unless a legislative intention to the contrary clearly appears, special or particular provisions control over general provisions. . . . It is also elementary that specific provisions must be given effect notwithstanding the general provisions are broad enough to include the subject to which the specific provisions relate.") (citations omitted).

to prohibit golf courses on prime agricultural lands, it would have done so unequivocally,[116] the Legislature should now in turn clarify its intent.

If the Legislature wishes to prohibit the development of golf courses on prime agricultural lands, it must modify sections 205-4.5 and 205-6 of the Land Use Law to do exactly what the court in *Maha'ulepu* thought was required, that is ***unequivocally*** prohibit the issuance of special permits for such uses.[117] If it agrees with the court's reasoning in *Maha'ulepu*, the interplay between sections 205-2 and 205-4.5 ought to be clarified. A more appropriate legislative response, however, would be to approach the question from a larger perspective and rethink the entire Land Use Law.

The Hawaii Office of State Planning initiated a program referred to as LESA (Land Evaluation and Site Assessment) which grew out of a 1983 legislative resolution to identify "important agricultural lands."[118] The LESA project could result in new land use districts: either an elimination or addition of classifications.[119]

The Hawaii Office of State Planning introduced a bill in the 1991 legislative session which would have added a fifth state land use category entitled "open space" to preserve lands without the necessity of keeping the land in an "agricultural zone."[120] Under this bill, a new "open space" district functions similar to those areas now rated as non-prime agricultural (thus allowing golf courses in the proposed open space district by special permit).[121] In the new agricultural district, golf courses

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[116] *See supra* note 103.

[117] A 1988 bill attempted, but failed, to repeal Act 298. H.R. STAND. COMM. REP. No. 559-88, 1988 HAW. LEG. SESS., HOUSE J. 1048. A bill in the 1991 Hawaii legislative session renewed the attempt to repeal Act 298. H.R. 891, 16th Leg. (1991). But even if the Legislature enacts House Bill 891, thus requiring SUPs for golf courses on land rated C, D, or E, the related issue of whether golf courses should be allowed by SUP on *prime* agricultural land would remain open.

[118] The Legislature enacted the LESA program by Act 273, 1983 Haw. Sess. Laws, pursuant to article XI, § 3 of the Hawaii Constitution. H.R. STAND. COMM. REP. No. 326, 1983 HAW. LEG. SESS., HOUSE J. 980.

[119] As a result of the LESA initiative, Senate Bill 1250 was introduced in the 1987 legislative session. The Bill would have rewritten major portions of the Land Use Law by changing the state district classifications from the four existing districts into "important agricultural lands," "urban," and "other uses." Although the Legislature did not pass the bill, revisions to the Land Use Law are still being planned via the LESA initiative.

[120] Hawaii Office of State Planning (Draft Bill Relating to Land Use (Jan. 8, 1991)).

[121] *Id.*

are not allowed even by special permit.[122] A developer would need a district boundary amendment.

An alternative LESA bill, introduced by Senator Richard Matsuura, would have also added a new "open space" district. The alternative version includes golf courses as a permitted use in the open space district and allows them by special permit in the agricultural district until July 1993.[123] This bill puts the counties in control of the open district and, on its face, seems to open up land for golf course development.[124] Each county, however, would be free to restrict golf courses as it sees fit. An underlying battle, then, is county "home rule" versus state government control.[125]

Under either version, because current agriculturally-classified lands would be reclassified as either agricultural or open space, the fight would shift to the initial reclassification. A landowner, recognizing restrictions imposed by the different districts, might attempt to have the classification meet the desired use, rather than have the use determined by the classification.

The 1991 Legislature enacted neither version.[126]

VI. Conclusion

In *Maha'ulepu v. Land Use Commission*,[127] the Hawaii Supreme Court held that the Kauai County Planning Commission and State Land Use Commission have authority to issue special use permits for golf courses on prime agricultural land. Appellant Malama Maha'ulepu did not question, and thus the court did not address or comment on the findings of the Planning Commission and Land Use Commission that the Kauai Hyatt Regency golf course was a proper "unusual and reasonable" use of prime agricultural lands.

With over 70 proposed golf courses for the state, the question whether golf courses are proper open space uses of agricultural lands should be addressed by Hawaii's Legislature. The Legislature should consider

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[122] *Id.*

[123] *Land Use Bills Differ*, *supra* note 110; Honolulu Advertiser, March 21, 1991, at A15, col. 2 (letter to editor from Harold Masumoto, Director, Office of State Planning).

[124] *Land Use Bills Differ*, *supra* note 110.

[125] *See supra* notes 46 and 67.

[126] *Lease to Fee July 1, 9191?*, Sunday Honolulu Star-Bulletin & Advertiser, March 17, 1991, at A10, col. 1.

[127] 71 Haw. 332, 790 P.2d 906 (1990).

golf course development within the larger framework of the direction of Hawaii's economy and address the continued viability of agriculture along with other competing interests for the use of agricultural land. Changes to the Land Use Law are needed, if not inevitable. If nothing else, the Legislature should clarify the intent of Hawaii Revised Statutes sections 205-2 and 205-4.5, to determine if golf courses should be allowed on prime agricultural lands without a district boundary amendment.

The *Maha'ulepu* decision is central to the larger tide of golf course development initiative and a considerable amount of unavoidable political backlash. The court's decision indirectly questions the viability of Hawaii's unique land use scheme itself. And because each county has enacted restrictive local ordinances,[128] the status of golf course development is currently in a state of flux and unpredictability. This uncertainty above all else causes frustration for developers and opponents alike.

New golf course development is per se probably not harmful to the state; it needs, however, to be properly managed. Hawaii needs a comprehensive policy taking golf course developments into consideration along with a revised State Plan and a rewritten Land Use Law; a forward-looking policy with a coherent vision of Hawaii's economy. Regardless of the direction chosen, however, landowners, developers, politicians, and environmentalists alike are on notice that fundamental changes in Hawaii's unique Land Use Law may be inevitable.

Hawaii's state motto, *Ua mau ke ea o ka aina i ka pono,*[129] expresses the values and traditions of the island state; the essence of Hawaii is its land. Future changes in policies and law regulating land use, taking into consideration basic questions concerning the use of land, will in turn dictate the economic and cultural future of Hawaii's people and values.

We have been here before. In 1985, Professor Allan Smith observed:

> Some five years ago, Professor Daniel Mandelker of Washington University surveyed the laws and procedures [of Hawaii] in force and found them wanting in many particulars. No significant modifications have taken place since then. There are differing levels of regulations, and specific developmental plans are subject to a variety of approval requirements, but it is not clear that the policy basis for decisions is articulated

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[128] *See supra* note 58.

[129] "The life of the land is perpetuated in righteousness."

> adequately for decisionmakers' guidance, and it is not clear that the procedures will secure wise decisions. Considering the fact that Hawaii has such a limited amount of land, that it has a peculiarly fragile environment; that the pressures of economic development and population growth are very large; and that pressures for insuring 'non-exclusive' benefits in the islands are also growing, it would be well if further steps could be taken to strengthen the potential for wise resolution of the conflict.[130]

These same remarks ring true today. As Hawaii enters a new decade, it is time to make the necessary commitment and reshape a Land Use Law based on Hawaii's future, not its past.

Douglas K. Ushijima

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[130] Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 12 (1985) (footnote omitted).

Estes v. Kapiolani Women's and Children's Medical Center: State Action and the Balance Between Free Speech and Private Property Rights in Hawaii

I. INTRODUCTION

In *Estes v. Kapiolani. Women's and Children's Hospital*,[1] the Hawaii Supreme Court interpreted the state and federal constitutional guarantees of free speech[2] and concluded that a private hospital could lawfully prevent public interest organizations from protesting on its property.[3] The private hospital, Kapiolani Women's and Children's Medical Center ("Hospital"), requested a group of anti-abortionists who were soliciting on one of its interior walkways to leave or risk arrest for trespass.[4] As article I, section 4 of the Hawaii Constitution is nearly identical to the first amendment of the United States Constitution,[5] the Hawaii Supreme Court relied primarily upon a collection of United States Supreme Court decisions which interpret the federal constitution as denying activists the right to expressive speech[6] on

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[1] 71 Haw. 190, 787 P.2d 216 (1990).

[2] HAW. CONST. art. I, § 4 states, in pertinent part, "[N]o law shall be enacted . . . abridging the freedom of speech[.]"

[3] 71 Haw. at 191-92, 787 P.2d at 218; *see infra* notes 25-27 and accompanying text.

[4] *Id.* at 191-92, 787 P.2d at 218.

[5] The first amendment of the United States Constitution states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I.

[6] *See generally* Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression*, 64 WASH. L. REV. 133 (1989). "Expressive" activities refer to "activities of individuals who seek to communicate private opinions to the general public. Such activities include demonstrations, distribution of literature, solicitation of signatures, and political activity." *Id.* at 133 n.1.

private property being operated without the presence of "state action."[7] State actions are actions which "may fairly be treated as [those] of the State itself."[8] The Hawaii Supreme Court, although it recognized elements of state control in the character of the Hospital such as state funding, state regulation and public purpose, nevertheless concluded that because the Hospital was a private institution it had not acted in a manner violating the state constitution.[9]

The Hawaii court did not apply an economic analysis in *Estes*, which might have considered factors such as property values or business conduct of private enterprise. The court did not balance the competing constitutionally protected interests involved. Nor did it ostensibly concern itself with the value or content of the protestors' anti-abortion message or the character of the property and the time, place and manner restrictions that may be applied to public fora. Instead, the court's analysis embraced a long, yet erratic line of United States Supreme Court cases which attempt to define the limits of state action.[10]

This line of federal cases shows that the Court has developed increasingly restrictive criteria which must be met before the Court will find state action.[11] The Hawaii Supreme Court's *Estes* decision adopted the restrictive federal precedent with little explanation.[12] It did so while citing cases that allow the state to deviate from the types of criteria contained in the current federal standards for finding state

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[7] Only government action allows individuals to invoke the constitutional right of free speech.

> Nearly all of the Constitution's self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action. Accordingly, when litigants claim the protection of such guarantees, courts must first determine whether it is indeed government action—state or federal—that the litigants are challenging.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1 at 1688 (1988). *See also infra* notes 28-145 and accompanying text.

[8] Denver Welfare Rights Org. v. Public Util. Comm'n, 190 Colo. 329, 547 P.2d 239 (1976). *See also* BLACK'S LAW DICTIONARY 1262 (5th ed. 1979) ("state action").

[9] *See* 71 Haw. 190, 194, 787 P.2d 216, 219 (1990).

[10] *Id.* at 197, 787 P.2d at 221; *see infra* notes 28-109 and accompanying text.

Estes primarily cites federal cases, and distinguishes California case law (Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)), and Hawaii case law (Silver v. Castle Memorial Hosp., 53 Haw. 475, 497 P.2d 564 (1972)).

[11] *See infra* notes 72-109 and accompanying text.

[12] 71 Haw. at 197, 787 P.2d at 221; *see infra* notes 191-211 and accompanying text.

action.[13] These deviations, however, may potentially limit the court's flexibility when attempting to apply the state action doctrine in the future.[14]

This note analyzes the Hawaii Supreme Court's application of the state action doctrine in *Estes*, surveys two overlapping but ultimately distinct tests used to find such action, and considers constitutional concerns relevant to state action doctrine. Section II of this note reviews the factual history of *Estes*. Section III discusses the long-standing conflict between private property rights and the right of free speech, the history of the state action requirement, and the United States Supreme Court's evolving application of the tests defining the doctrine. In Section IV, this note analyzes the Hawaii Supreme Court's application of the federal interpretation of state action to the circumstances involved in *Estes*. Finally, Section V examines the impact of the *Estes* decision on the future of free and expressive speech in Hawaii and the decision's concomitant impact on private property owners seeking to exclude free speech activities from their premises.

II. FACTS

On two occasions, four individuals attempted "to distribute leaflets and otherwise express anti-abortion views on the interior walkway adjacent to one of the main entrances to Kapiolani Hospital."[15] These individuals did not physically interfere with or disrupt the patients and visitors entering or leaving the premises.[16] They did not have the Hospital's permission to be there, however, and "security guards asked them to leave."[17] When the anti-abortionists refused to leave, the

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[13] *See infra* notes 143-51 and accompanying text.

[14] *See infra* notes 238-48 and accompanying text.

[15] 71 Haw. at 191, 787 P.2d at 218. Kapiolani Women's and Children's Medical Center specializes primarily in human reproductive and pediatric medical practice.

[16] *Id.*

[17] *Id.* The Hospital apparently required protestors to obtain permission to solicit on its grounds. The opinion's brief recitation of facts does not make clear what, if any, procedures the Hospital prescribes for persons wishing to obtain permission to solicit patients, visitors, and other persons entering or leaving its premises, or whether the no-solicitation policy is enforced without exception.

The Hospital had not posted its policy at the time of the incidents. The policy was apparently written to apply primarily to vendors and solicitors whose interests were largely commercial and was invoked at the direction of the institution's chief executive

Hospital summoned police assistance.[18] The police warned the protestors that by remaining on Hospital grounds they risked arrest for trespass; subsequently, the protestors left.[19]

The protestors first filed an action in the United States District Court for the District of Hawaii for injunctive relief against the Hospital, asserting that they had the right to conduct their activities under article I, section 4 of the Hawaii Constitution.[20] Specifically, they sought to enjoin the Hospital from enforcing its no-solicitation policy, claiming that the policy infringed their right to free speech.[21] The district court dismissed the case on the ground that no state action requiring federal review was involved.[22]

The protestors then filed a similar cause of action in the First Circuit Court of the State of Hawaii.[23] The circuit court also dismissed the action, holding that no state action was involved and that the Hospital was not "public property" upon which the protestors could actively conduct their expressive activities.[24]

The Hawaii Supreme Court affirmed this dismissal.[25] It found that the Hospital was not a state agency, that no state statutes or directives were involved, and that the police department's involvement in enforcing the Hospital's no-solicitation policy was insufficient to transform

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officer, Richard Davi.

The Hospital's security guards invoked Hawaii's trespass laws by informing the petitioners that they would be considered trespassers and that police would be summoned to remove them if they did not leave.

The protestors had conducted their activities on the public sidewalks surrounding the hospital for approximately three and a half years before deciding that these locations were "ineffective" for presenting their message to patrons, doctors, and medical students training at the Hospital. Telephone interview with Edward Bybee, Attorney for Appellants (Jan. 14, 1991).

[18] *Id.*

[19] *Id.* at 191-92, 787 P.2d at 218.

[20] *Id.* at 192, 787 P.2d at 218. *See supra* note 2 for text of this section of the Hawaii Constitution.

[21] 71 Haw. at 192, 787 P.2d at 218.

[22] *Id.*

[23] *Id.* The First Circuit Court, in part, has jurisdiction over all criminal cases, and civil cases involving appeals from administrative agency decisions, state constitutional issues, or, in general, cases where the amount in controversy is $10,000 or more. HAW. REV. STAT. §§ 603-21.5-.8 (1985); § 604-5 (Supp. 1990).

[24] 71 Haw. at 192, 787 P.2d at 218.

[25] *Id.*

the Hospital's action into a state action.[26] According to the court, the absence of state action was fatal to the protestors' constitutional challenge, as article I, section 4 of the Hawaii Constitution "'erects no shield against merely private conduct, however discriminatory or wrongful.'"[27]

III. History of the Law

A. Introduction

Following adoption of the thirteenth, fourteenth, and fifteenth amendments to the federal constitution, the federal courts attempted to resolve conflicts between free speech and private property rights primarily by determining whether the offending action constituted state action.[28] The interplay between the first and fourteenth amendments[29] inevitably gave rise to conflicts between private property owners attempting to protect their privacy against members of the public attempting to disseminate their ideas. This conflict provided one of the major foundations for development of the current state-action doctrine.[30]

It is now well settled that "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[31] To enforce this guarantee against abridgment by the government, the federal judiciary developed a method for determining whether government action caused the alleged infringement in a given situation.

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[26] *Id.* at 194, 787 P.2d at 219. In addition to the Hospital, the suit named as defendants Richard Davi, Chief Executive Officer and President of Kapiolani Women's and Children's Medical Center, and the Honolulu Police Department. *Id.*

[27] *Id.* at 193, 787 P.2d at 219 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

[28] Known as the civil war amendments, these constitutional provisions prohibited slavery, required just compensation and governmental due process when seizing private property, as well as equal protection under the law and the guarantee of the right to vote. U.S. Const. amends. XIII, XIV, XV.

[29] The fourteenth amendment to the United States Constitution states, in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . . ." U.S. Const. amend. XIV.

[30] Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. Fla. L. Rev. 737, 755-58 (1985).

[31] Hudgens v. NLRB, 424 U.S. 507, 513 (1975). *See also* Columbia Broadcasting, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

In the *Civil Rights Cases*,[32] the Supreme Court ruled on the constitutionality of federal statutes which prohibited discriminatory policies governing access to private property. The Court restrictively defined state action as being direct action by governmental agents.[33] Later United States Supreme Court decisions effectively retreated from and gradually returned, within the past twenty years, to this restrictive definition.[34] In the process, two related tests have emerged by which courts determine state action: the public function test and, its more limiting later progeny, the sufficiently close nexus test.[35]

B. Development of the Public Function Test

The public function test primarily concerns access to channels of communication.[36] It emerged from decisions during the decades following the turn of the century, when the United States Supreme Court continued to give greater weight to the right of free speech over private property rights.[37] In *Martin v. Struthers*,[38] for example, the Court struck down as unconstitutional a municipal ordinance making it a criminal offense to solicit private residences.[39] "Freedom to distribute informa-

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[32] 109 U.S. 3 (1883).

[33] The United States Supreme Court held as unconstitutional laws requiring "full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances . . . , theatres and other places of public amusement." The Civil Rights Cases, 109 U.S. at 9. The Court's rationale was that under the fourteenth amendment such laws amounted to a public taking of private property without due process or just compensation. *Id.*

[34] *See* Schneider, *supra* note 30, at 737-38. Schneider's analysis presents two competing objectives addressed by the Court in its state action decisions. These two objectives are federalism and public expectations. Schneider asserts that the choice of objective to be addressed is determined by the relative weight given by the Court to issues associated with "federalism" (and, by implication, corollary concerns identifying states' rights issues) as opposed to those issues associated with "satisfaction of public expectations." She argues that the former group of interests prevailed in the majority opinion in the Civil Rights Cases and has experienced new vitality during the Warren and Rehnquist courts, while the latter group prevailed in decisions leading up to, and during, the two decades immediately following World War II (notably those of the Burger court). *Id.*

[35] *See infra* notes 72-109 and accompanying text.

[36] *See* Marsh v. Alabama, 326 U.S. 501 (1946); *see infra* notes 45-57 and accompanying text.

[37] *See* Schneider, *supra* note 30, at 757-58.

[38] 319 U.S. 141 (1943).

[39] *Id.* at 149.

tion to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."[40] The Court held that the ordinance (the passage of which could be construed as state action) denied individuals the freedom of speech and press guaranteed by the first amendment.[41]

In *Smith v. Allwright*,[42] the Court extended the concept of state action to include action taken by a private organization which performed a "public function".[43] According to the Court, while the government remained free to delegate public functions to private entities, it could not abrogate its duty to regulate those entities in ways that would ensure that their activities met constitutional requirements.[44]

The United States Supreme Court interpreted state action doctrine even more expansively in *Marsh v. Alabama*,[45] the seminal case in the development of the public function test for state action.[46] In *Marsh*, the

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[40] *Id.* at 146-47.

[41] *Id.*

[42] 321 U.S. 649 (1944). In *Smith*, the Texas Democratic Party denied a black man's request for a ballot to vote in the party's primary election. Texas law delegated to political parties the administration of their primary elections, including determination of policies governing voter eligibility. The Texas Democratic Party required voters in its primary election to be members of the party and restricted membership to whites. The United States Supreme Court held that the party's denial of a ballot for this reason was state action and declared it unconstitutional under the fifteenth amendment. *Id.*

[43] *Id.* at 664-65. The Court held that delegation of primary election voting procedures to political parties made those private parties' actions state actions; that the Texas statutes prescribing the procedures to be followed in the selection of candidates made the political parties agencies of the state; that the state's requirement that candidates pay for the elections constituted state action; and that the state had endorsed, adopted and enforced the Texas State Democratic Party's discriminatory policy. *Id.* at 663-65.

[44] Extending this doctrine in Terry v. Adams, 345 U.S. 461 (1953), the Court held: "It violated the Fifteenth Amendment for a state . . . to permit . . . the use [by a private organization which was actively affiliated with the Democratic party in administering the party's primary elections] of any device that produced an equivalent of the prohibited election." *Id.* at 469.

[45] 326 U.S. 501 (1946).

[46] One commentator has suggested that the *Marsh* opinion was not a public function decision at all. "Ironically, . . . although it coined the phrase, [*Marsh*] was not on its own terms a true public function decision. . . . Justice Black's majority opinion did not concern itself, as a genuine public function opinion would have, with whether the streets of the town's central business district should be deemed 'public property,' . . . ." L. TRIBE, *supra* note 7, § 18-5 at 1708 (citations omitted).

constitutionally challenged actions—prohibiting solicitation and enforcing criminal sanctions for solicitation in the business district of a company-owned town—were entirely private.[47] Yet, the Court held that the actions constituted "state action" because of "the statutory and constitutional rights of those who use[d the town]."[48] Because no alternative fora were available for such activities, the Court held that the rights of individuals to receive ideas or information were paramount.[49] This holding complements *Martin v. Struthers*,[50] in which the Court found a municipally enacted and enforced ordinance constitutionally offensive.

In *Marsh*, police had arrested individuals who had been distributing religious pamphlets outside the post office of a privately owned company town.[51] Focusing on the "fundamental liberties" of disseminating and receiving ideas, the Supreme Court held that the pamphleteers' constitutional rights had been abridged.[52] The Court likened the town to privately owned bridges and railroads, and reasoned that "[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it [sic] is subject to state regulation."[53] The *Marsh* Court's determinative concern was not for the private ownership interests of the corporation,[54] but rather for "the functioning of the community in such manner that the channels of communication remain free."[55] As articulated in *Marsh*,[56] the public function test addressed not only the rights of protestors, but the right of citizens to be exposed to and receive ideas and communications.

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[47] 326 U.S. at 502-04.

[48] *Id.* at 507.

[49] *Id.* at 506-08.

[50] 319 U.S. 141 (1943); *See supra* notes 38-41 and accompanying text.

[51] 326 U.S. at 502.

[52] *Id.* at 509.

[53] *Id.* at 506. The *Marsh* court stressed that except for the private ownership, the town "has all the characteristics of any other American town" in that the corporation provided everything from sewers to "a business block." *Id.* at 502.

Later in the opinion, the Court stated that had the town been a private municipality, constitutional violation would have been clear. *Id.* at 504.

[54] The company's private ownership interests enabled it to prescribe the policies and regulations of those living in and entering the town. The plaintiff was a Jehovah's Witness who attempted to distribute leaflets to passersby and thus contravened a no-solicitation regulation enforced under color of Alabama's state trespass laws. *Id.* at 504.

[55] *Id.* at 507.

[56] *Id. See supra* notes 52-55 and *infra* note 57 and accompanying text.

The *Marsh* court asserted that "[w]hen we balance the constitutional rights of owners of private property against those of the people to enjoy freedom of the press and religion . . . we remain mindful of the fact that the latter occupy a preferred position."[57]

The Court followed this reasoning in *Shelley v. Kraemer*,[58] slightly expanding the limits of the doctrine as outlined in *Marsh* by defining state action as including judicial action that enforces privately made discriminatory policies.[59] Although private actions, "however discriminatory or wrongful," might not themselves be unconstitutional,[60] any action to enforce them constituted state action according to the *Shelley* Court.[61]

In light of the public function doctrine, courts' opinions increasingly focused on the connection between free speech activities and the premises on which they occurred. This focus developed from the Supreme Court's statement in *Marsh* declaring that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[62] This broad concept of state action became the battleground for many future Supreme Court opinions in which the Court strove to protect individuals' access to alternative channels of communication.[63]

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[57] 326 U.S. at 509 (footnote omitted) (citing Jones v. Opelika, 316 U.S. 584, 608 (1942)).

[58] 334 U.S. 1 (1947). *Shelley* concerned racially restrictive covenants attempting to bar blacks from home ownership in an exclusive neighborhood of St. Louis, Missouri. It is among those federal cases concerned with deprivation of fourteenth amendment rights based on race, which, Schneider observes, helped motivate the United States Supreme Court's focus on the objective of satisfying public expectations concerning the Court's interpretation of constitutional rights. Schneider, *supra* note 30, at 740-41.

[59] 334 U.S. at 14.

[60] The fourteenth amendment has been held to apply only to government action abridging the due process and equal protection rights of private citizens. *See generally Shelley*, 334 U.S. 1 (1947) (involvement of the state in actions abridging free speech infringes constitutionally protected right).

[61] *See infra* notes 191-202 and accompanying text for discussion of misapplication of *Shelley* in *Estes*.

[62] *Marsh*, 326 U.S. 501, 506 (1946).

[63] It is interesting to note that a full articulation of the public function test and its application emerged during a period in American history when the nation was clearly the world's economic superpower. The development of the test reached its broadest definition in cases involving shopping centers, arguably one of the most distinctive

Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.[64] was the first and most dramatic of the Supreme Court's decisions which closely examined the commercial character of certain types of private premises. Cases involving privately-owned commercial premises are significant because they involve an invitation to the public to congregate, which often provides opportunities for open communication. This communication may have little to do with the character of the commercial premises themselves.

In *Logan Valley*,[65] the United States Supreme Court, relying on *Marsh*,[66] held that a private shopping center open to the general public was "clearly the functional equivalent of the business district in [the town] involved in *Marsh*."[67] The Court reversed the state supreme court's decision granting the shopping center owner's request for an injunction on grounds of trespass, but limited the exercise of first

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hallmarks of American consumer society. While the concurrence of these phenomena may be coincidental, it can also be argued that the expansive economic opportunity afforded by rapid development of a consumer society occasioned concern that all groups in society be able to benefit from this growth. To the extent that economic opportunity afforded a broad perspective on society during this period of American history, the development of a broad definition of public function ensured that protection of free speech would be equated with patriotic values perceived as having produced a thriving economy and that private property interests would not be allowed to abridge these historically important values. *See generally* Amalgamated Food Employees Union v. Logan Valley, 391 U.S. 308, 324 (1968) (the Court discussed the increasingly important role of shopping centers in modern American life and the attendant obligation of private shopping center owners to not unreasonably limit free speech on their commercial premises).

Not surprisingly, perhaps, a retreat from this broad definition of the public function test and its replacement by the newly articulated and more restrictive definition of a sufficiently close nexus test began to emerge in shopping center cases just as the United States began to feel competitive threats to its preeminent position as the world's economic superpower. Increasingly faced with more difficult economic choices, the nation's attention during the past two decades has returned, at least in part, to the relative value of private property and the need to protect private property rights. It can be argued that this concern has occasioned a more difficult balancing of interests when constitutional rights protecting private property and free speech conflict with each other.

[64] 391 U.S. 308 (1968).

[65] *Id.*

[66] 326 U.S. 501 (1946); *see supra* notes 45-57 and accompanying text.

[67] 326 U.S. at 318. In *Logan Valley*, a union was picketing a specific store which was located in a private shopping center and which employed wholly non-union employees. *Id.*

amendment rights to "a manner and for a purpose generally consummate with the use to which the property is actually put."[68]

The *Logan Valley* Court noted that activities of the picketers were directed at a specific store in the Plaza and that an alternative forum for their protest did not exist.[69] The Court determined that the nonviolent protest was an exercise of free speech rights that could not be abridged by the state's enforcement of a private property owner's right against trespass.[70] *Logan Valley* was one of the Court's most liberal interpretations of the public function requirement. Later, the Court would restrict the broad scope of *Logan Valley*.[71]

C. *The Demise of the Public Function Test*

The broad scope of the public function test as defined in *Logan Valley*[72] emphasized individual rights over the rights of private property owners to such a degree that issues of due process inevitably demanded a reexamination of the doctrine. Courts initially began to more restrictively apply the doctrine and eventually articulated the sufficiently close nexus test.

Logan Valley's public function interpretation of state action did not fade quickly. Limiting *Logan Valley*[73] to its facts, the Supreme Court distinguished a similar shopping center case, *Lloyd Corp. v. Tanner*,[74]

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[68] *Id.* at 319-20. The *Marsh* decision provides the foundation for balancing tests involving time, place, and manner to judge the reasonableness of restrictions placed on free speech; *see supra* notes 45-57 and accompanying text.

[69] 326 U.S. at 322-23. The Court stressed that the impact of the message, because aimed at a single store, would be seriously curtailed if the picketers were forced to use the public sidewalk which surrounded the shopping center, as it was over 300 feet away. *Id.*

[70] "[T]he State may not delegate the power through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises." *Id.* at 319.

[71] Justice Black wrote a strong dissent, stating that the *Logan Valley* court was misinterpreting the *Marsh* decision. "*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town . . . I think it fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama." *Id.* at 330-31.

[72] *Id.*

[73] *Id.*

[74] 407 U.S. 551 (1971). *Lloyd* involved the distribution of anti-war pamphlets within a privately owned shopping center. The pamphleteers' first amendment rights were found not to have been infringed by the center's injunction against them.

by emphasizing that the first amendment activity in the latter was not directly related to any particular store in the shopping center.[75] Moreover, the Court noted that the pamphleteers in *Lloyd* could have utilized a number of alternative fora.[76] This aside, the Court still repudiated the basic premise of *Logan Valley*—that a private shopping center held open to the public came within the purview of the public function doctrine.[77] The *Lloyd* Court stated that "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use . . . [P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes."[78]

The Court's analysis in *Lloyd* presaged a return to more case-specific balancing of conflicting constitutional interests.[79] Because its analysis focused on the public function test, the Court's move toward a more narrowly defined balancing test was not immediately apparent.

The *Lloyd* Court did not explicitly overrule *Logan Valley*. Instead, the Court attempted to distinguish the two cases. Four justices dissented vigorously, contending that *Lloyd* could not be distinguished from *Logan Valley*.[80] Writing for the dissent, Justice Marshall opined, "one may

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[75] *Id.* at 564-65.

[76] *Id.* at 566-67.

[77] 391 U.S. 308 (1968); *see supra* notes 64-71 and accompanying text.

[78] 407 U.S. at 569. The Court went on:

> Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

Id.

[79] The *Lloyd* Court further declared that:

> [T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

Id. at 568.

The Court's majority opinion merely sought to distinguish *Lloyd* from *Logan Valley* on the basis that it addressed the legal question not at issue in *Logan Valley*, whether free speech activities unconnected with private property on which they were conducted afforded recourse to enforcement of no-solicitation policies under color of state trespass statutes. *Id.* at 552.

[80] Justices Douglas, Brennan and Stewart joined in Justice Marshall's dissent. *Id.* at 570.

suspect from reading the opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome."[81]

The Court confirmed Justice Marshall's opinion that *Lloyd* and *Logan Valley* were inconsistent just four years later in another shopping center case, *Hudgens v. NLRB*.[82] The Court maintained that striking employees who picketed particular stores had no first amendment right to trespass on their employer's private property, despite the obvious relationship between their activities and the locations picketed.[83] The Court expressly held that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."[84] The *Hudgens* Court also discussed what it termed a "misleading" citation in its *Lloyd* opinion to *Logan Valley* regarding use of the public function test to find state action.[85] The *Hudgens* Court noted that the handbilling in the mall in *Lloyd* was unrelated to mall activities[86] and that alternative channels of communication existed on public spaces through which patrons entered and left the center.[87]

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[81] *Id.* at 584 (Marshall, J., dissenting). The dissenters felt that Lloyd Center was more analogous to a business district than was Logan Valley Plaza. "From [Lloyd Center's] inception, the city viewed it as a business district" of the city and depended upon it to supply much-needed employment opportunities. . . . It is plain, therefore, that Lloyd Center is the equivalent of a public 'business district' within the meaning of *Marsh* and *Logan Valley*." *Id.* at 576.

[82] 424 U.S. 507 (1976). As later decisions made clear, however, *Lloyd* was not only inconsistent with *Logan Valley* on a factual basis but had actually overruled *Logan Valley*'s basic premise that the connection between free speech activities and the private property on which they were conducted could create a public interest that would justify free speech infringement of private property interests. *Id.*

[83] *Id.* at 520-21. The Court reasoned that if protesters in *Lloyd* did not have a first amendment right to solicit customers on the grounds of a private enclosed shopping center, neither did striking employees have a right to picket stores of their employer. The Court's rationale shows a nearly 180 degree turnaround from *Logan Valley*, and drew a strong dissent from Justices Marshall and Brennan who argued that *Lloyd* had merely addressed a question not presented in *Logan Valley* and should not be overruled. *Id.* at 535-43 (Marshall, J., dissenting).

[84] *Id.* at 518.

[85] *Id.* "Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, 407 U.S., at 562-563, 565; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley* . . . ." *Id.*

[86] The handbilling protested the Vietnam War. *Id.* at 517.

[87] The mall allowed various activities on its premises, upon granting of permits. Though it prohibited political activities, it had actively invited presidential candidates from both national political parties to speak on its premises. *Lloyd*, 407 U.S. at 555.

The center had made "no open-ended invitation to the public to use the Center for

Hudgens ostensibly overruled *Logan Valley*[88] and its employment of public function as the determinative factor in finding state action. Although the *Hudgens* Court spoke only in terms of public function, it implicitly set forth the "sufficiently close nexus test" as being the appropriate test for finding state action. The Court accomplished this by stressing that alternative channels of communication were available to the protestors, and by refusing to allow the public function doctrine to exclusively define an overly liberal scope of state action as set forth in *Logan Valley*.[89]

D. The Ascendancy of the Sufficiently Close Nexus Test

The Supreme Court had already begun to restrict the scope of state action doctrine in other contexts before *Hudgens*.[90] In cases involving regulated business activity, the Court more clearly articulated the sufficiently close nexus test.

Jackson v. Metropolitan Edison Co.[91] involved the termination of a customer's electric service following a procedure approved by the Pennsylvania Utility Commission (PUC), a government agency. Although the PUC had found the procedure permissible under state law, the Court held that termination did not constitute state action.[92]

The decision marked a retreat from the public function principles applied in the *Shelley* case,[93] and strengthened one of the underlying

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any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." *Id.* at 565. Therefore, the mere fact that the center had invited the public onto its premises for commercial purposes, did not mean that the center's private property interests had become public property for purposes of free speech.

Justice Marshall's strong dissent pointed out that the center was essential to many of Portland's citizens and functioned much like the business district of the company town in *Marsh*. *Id.* at 570-86 (Marshall, J., dissenting).

[88] *See supra* notes 64-71 and accompanying text.

[89] 392 U.S. 308 (1968); *see supra* notes 65-70 and accompanying text.

[90] *See infra* notes 91-95 and accompanying text.

[91] 419 U.S. 345 (1974).

[92] *Id.* at 357.

Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action'.

Id.

[93] *See supra* notes 58-61 and accompanying text.

rationales in *Lloyd* that actions by private entities, even when implicitly condoned by government regulatory agency actions, did not become state actions for purposes of constitutional analysis absent clear and convincing proof of state intervention.[94] The *Jackson* Court found no state action, because it failed to find "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter [could] fairly be treated as that of the state itself."[95]

In *Flagg Bros., Inc. v. Brooks*,[96] the Court narrowed still further its interpretation of the nexus test of state action doctrine.[97] *Flagg* involved a private storage company's threatened disposition of personal property following procedures of New York State law which incorporated Uniform Commercial Code provisions.[98] While acknowledging "'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act,'"[99] the Court asserted that it "has never held that a State's mere acquiescence in a private action converts that action into that of the State."[100] The Court found no state action, thus undermining its holding in *Shelley* that the judicial endorsement of private actions may constitute state action.[101] The Court's holding in *Flagg* also suggested that the Court would require affirmative acts by the legislative or executive branch before it would recognize state action.

In *Blum v. Yaretsky*[102], the Supreme Court applied the narrower nexus state action doctrine outlined by *Flagg*.[103] *Blum* consolidated several

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[94] The Court held that "the requisite nexus between the challenged termination procedure and the governmental action in creating and maintaining such a [public utility] monopoly was absent." *Id.* at 352. *See also* Schneider, *supra* note 30, at 774-75.

[95] 419 U.S. at 351 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. at 176).

[96] 436 U.S. 149 (1978). The statute at issue allowed warehousemen to sell stored goods to satisfy overdue rental charges. Brooks claimed that the statute violated the due process and equal protection clauses of the fourteenth amendment. *Id.*

[97] *See supra* notes 72-95 and accompanying text.

[98] N.Y. Uniform Commercial Code § 7-210 (McKinney 1964) (allowing sale of stored goods for failure to pay a storage account). The Court stated that:

> the crux of the respondent's complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

436 U.S. at 166 (emphasis in original).

[99] 436 U.S. at 164 (quoting Adickes v. S.H. Kress, 398 U.S. 144, 170 (1970)).

[100] *Id.*

[101] *See supra* notes 58-61 and accompanying text.

[102] 457 U.S. 991 (1982).

[103] 436 U.S. 149 (1978); *see supra* notes 96-101 and accompanying text.

related cases of Medicaid patients who challenged the constitutionality of the decision-making processes used by private nursing homes to alter the level of care provided to each patient.[104] The nursing homes' determinations led the state to decrease patients' Medicaid benefits, allegedly without providing them due process.[105] The Court held that state regulation did not convert the facilities' decisions into state actions, despite the fact that the state decreased patients' benefits based on the nursing homes' decisions.[106]

According to the *Blum* Court, the purpose of the sufficiently close nexus requirement was "to assure that the constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains."[107] The Court held that the nursing homes did not perform a function traditionally performed by the state, thereby defeating the petitioners' claim that a required nexus was established between the state and the challenged action.[108] The *Blum* Court articulated the current federal definition of state action: "a State normally can be held responsible for private decisions only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the *choice* must in law be deemed to be that of the State."[109]

The post-1960's articulation of the sufficiently close nexus test altered and eventually superseded the public function test. Thus, the federal

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[104] 457 U.S. at 993-95.

[105] *Id.* at 993.

[106] *Id.* at 1003-05. Note that such an action on the part of the state is arguably a more affirmative act than the constructive failure to act alleged as the result of the legislation at issue in *Flagg* that merely allowed private action. In *Blum*, an administrative agency within the executive branch was not only allowing a private entity's action but responding to it in an affirmative basis.

[107] *Id.* at 1004 (emphasis in original).

[108] *Id.* at 1010-12.

[109] *Id.* at 1004 (emphasis added). The *Blum* Court conceded that if the state truly "affirmatively command[ed]" the transfer of patients felt to be at the wrong level of care, "we would have a different question before us." *Id.* at 1005.

Even a substantial level of public funding does not itself constitute "coercive power" or "such significant encouragement" that actions of a nominally private institution become those of the state. The United States Supreme Court in the employment rights case of Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982), ruled that a Massachusetts private school's receipt of public funding did not convert the school's staffing decisions into state action. *See also* Silver v. Castle Memorial Hosp. 53 Haw. 475, 497 P.2d 564 (1972); *see also infra* notes 122-26 and accompanying text.

interpretation of state action doctrine appears to have come full circle; the Court's broad interpretations in cases which expanded the scope of the public function test gave way to the more restrictive interpretation of state action cases which developed and applied the sufficiently close nexus test.

E. State Court Approaches to State Action

A number of state court decisions have addressed state action.[110] Of particular relevance to the Hawaii Supreme Court's decision in *Estes* are its earlier decision in *Silver v. Castle Memorial Hospital*[111] and the United States Supreme Court's decision in *Pruneyard Shopping Center v. Robins*.[112]

Given the Supreme Court's retreat from the expansive interpretations of the state action doctrine laid down in *Logan Valley*,[113] the case of *Pruneyard Shopping Center v. Robins*[114] seemed to reconsider the narrower interpretations of state action doctrine tending to favor private property interests. Ultimately, *Pruneyard* simply supported the proposition that a

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[110] A state supreme court following federal case law disallowed a court-made compromise created to resolve the tensions between free speech and private property rights. *See* Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984) (lower court's limited injunction prescribing the manner and location by which a women's group could solicit signatures and distribute literature in a newly opened, privately owned shopping center invalidated).

Occasionally, courts have effectively balanced conflicting interests by applying entirely different areas of the law. *See* Oklahomans for Life, Inc. v. State Fair of Okla., 634 P.2d 704 (Okla. 1981) (contract between State Fair corporation and a pro-life group for a concession booth effectively waived constitutional free speech rights).

Where conflict between private property and free speech interests is more direct, states have drawn on federal case law to provide precedent for examining the case-specific nature of the interests involved. *See* Horn v. Stone, 139 Wis. 2d 473, 407 N.W.2d 854 (1987) (in view of the nature and location of a private medical facility, anti-abortion activities on its grounds not protected under the Wisconsin constitution).

A more obvious application of the nexus test occurred in Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wash. 2d 413, 780 P.2d 1282 (1989). Construing a state constitutional guarantee of free speech essentially similar to Hawaii's, the Supreme Court of Washington held that the state's constitution governed only the relationship between the people and their government.

[111] 53 Haw. 475, 497 P.2d 564 (1972).

[112] 447 U.S. 74 (1980).

[113] 391 U.S. 308 (1968); *see supra* notes 72-109 and accompanying text.

[114] 447 U.S. 74 (1980).

state may adopt constitutional protections which are more expansive than those provided by the federal constitution.[115]

In *Pruneyard*, the management of a private shopping center suggested that high school students distributing Zionist literature on its premises move to a public sidewalk.[116] In its decision, the United States Supreme Court interpreted California's constitutional guarantee of free speech,[117] which, unlike the federal first amendment, is not confined to actions constituting abridgment of citizens' rights by government.[118] The Court held that "a State . . . may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."[119] Applying *Pruneyard*, a state may prevent property owners from using trespass laws to abridge the free speech rights of otherwise peaceful protestors.[120] Notwithstanding California's liberal free speech guarantee, the Court adhered to the more restrictive federal policy on state actions involving constitutional rights, as illustrated two years later in *Blum v. Yaretsky*.[121]

When the Hawaii Supreme Court decided the employment rights case of *Silver v. Castle Memorial Hospital*,[122] it focused on the public

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[115] *Id.* at 81. Even when the state constitutional provision is identical to that in the federal constitution, a state may interpret its provision more expansively. State v. Schmid, 84 N.J. 535, 557, 423 A.2d 615, 626-27, n.8 (1980) (private university's solicitation regulations devoid of reasonable standards designed to protect both institution's own interests and those of individual exercising free speech rights so that eviction pursuant to such regulations violated state constitutional guarantee of free speech).

[116] 447 U.S. at 77. For an in-depth treatment of state decisions since *Pruneyard*, see Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment*, 69 B.U.L. Rev. 929 (1989).

[117] 447 U.S. at 79. The Court granted review pursuant to 28 U.S.C. § 1257 and held that California's broader constitutional protection of free speech was not "repugnant to the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1257(2) (1988).

[118] Art. I, § 2 of the California Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. 1, § 2. *Cf.* the narrower effect of the federal constitution's less detailed wording of free speech rights. U.S. Const. amend. I; *see supra* note 5.

[119] 447 U.S. at 81.

[120] *Id.* at 82-83.

[121] 457 U.S. 991 (1982). *See supra* notes 102-09 and accompanying text.

[122] 53 Haw. 475, 497 P.2d 564 (1972).

function test alone.[123] In *Silver*, the court held that the action of the administrative board of a private hospital in denying a physician's hospital staff privileges was subject to judicial review.[124] Although it was a private institution, the hospital received significant public funding.[125] The court held that these were sufficient grounds to establish that the hospital owed a fiduciary duty to the public and made judicial review of the constitutionality of its hiring procedures appropriate.[126]

Silver's emphasis on the public function test reflected judicial concern with employment rights and demonstrated the flexibility of that test. The public function test as first laid out in *Martin v. Struthers*[127] and more broadly defined in *Shelley v. Kraemer*[128] supported judicial review of actions infringing individual's property rights without due process. The flexibility of the test can be seen as an outgrowth of public expectations that individuals should enjoy equality of opportunity to property, *e.g.*, in employment and housing, and that when the exercise of free speech rights was needed to obtain such equality, they would be protected vigorously against limitations in any way imposed or sanctioned by the state.

Most important to the *Silver* court was that the fiduciary powers of a hospital were to be exercised reasonably and for the public good.[129] The *Silver* court inferred that private employment decisions made by an institution serving a community interest should not be immune from judicial review simply because the institution was private.[130]

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[123] *See supra* notes 36-71 and accompanying text. Not all states' application of the nexus test have precluded concurrent application of the public function test abandoned by the United States Supreme Court since *Hudgens*. In State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), receipt of public funds did not convert the actions of a private, unregulated university into state actions. However, the Supreme Court of New Jersey held that the state still had an affirmative duty under the state constitution to protect fundamental individual rights. These included the free speech rights of a non-student protestor arrested for contravening unreasonable university regulations against noninjurious political protest. *Id.* 84 N.J. at 559, 423 A.2d at 632-33.

[124] 53 Haw. at 479, 497 P.2d at 568.

[125] "The 'quasi public' status is achieved if what would otherwise be a truly private hospital was constructed with public funds, is presently receiving public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public." *Id.* at 481-82, 497 P.2d at 569 (footnote omitted).

[126] *Id.* at 482-83, 497 P.2d at 570.

[127] 319 U.S. 141 (1943); *see supra* notes 38-41 and accompanying text.

[128] 334 U.S. 1 (1947); *see supra* notes 58-61 and accompanying text.

[129] 53 Haw. at 480, 497 P.2d at 568-69.

[130] The *Silver* court stated:

Although the hospital's only direct connection to the state was receipt of limited public funding, the public function doctrine afforded the means by which the court could hold that this was sufficient to expose its decisions to judicial scrutiny.

IV. Analysis

A. Narrative

In *Estes*, the Hawaii Supreme Court held that a private hospital did not violate the first amendment rights of an anti-abortion group protesting on one of its interior walkways when hospital officials asked them to leave.[131] The protestors argued that the Hospital was a quasi-public institution within the scope of the state action doctrine because of its extensive contacts with the state which included extensive public funding, state regulation, the state's grant to the hospital of a virtual monopoly for certain services, and the hospital's lease of space to the University of Hawaii medical school, a public institution.[132]

The Hawaii Supreme Court attempted to apply the uncertain and shifting parameters of state action doctrine in *Estes*.[133] The court relied upon recent United States Supreme Court decisions that interpret and define the state action doctrine to determine whether the hospital fell within the doctrine's purview.[134] Citing *Blum v. Yaretsky*,[135] the court stated that "'when the state directs, supports, and encourages those private parties to take specific action, that is state action.'"[136] The court

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> While reasonable and constructive exercises of judgment [by hospital officials] should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good.

Id. at 480-81, 497 P.2d at 569.

[131] 71 Haw. 190, 197, 787 P.2d 216, 221 (1990); *see supra* notes 15-27 and accompanying text.

[132] 71 Haw. at 192, 787 P.2d at 218.

[133] For a theoretical view explaining the sources and effects of the different dynamics underlying state action doctrine, *see* L. Tribe, *supra* note 7, § 18-1 at 1688.

[134] 71 Haw. at 195-97, 787 P.2d at 220-21.

[135] 457 U.S. 991 (1982).

[136] 71 Haw. at 193, 787 P.2d at 219.

also specifically adopted the sufficiently close nexus test as the standard for state action determination.[137]

Referring to a number of state action decisions,[138] the court held that the protestors had not shown by clear and convincing evidence that the State "in any way directed, encouraged, or supported the Hospital's no-solicitation policy."[139] In addition, the protestors failed to show a sufficiently close nexus "between the Hospital's no-solicitation policy and its funding, regulation, or business relationship between the Hospital and the State."[140] Examining public function factors, the court held that the Hospital was a private entity, that state law or regulation did not direct or control the Hospital's no-solicitation policy, and that the police were not sufficiently involved in enforcing the Hospital's policy to create state action.[141]

The court applied a foundational premise of the United States Supreme Court's analysis in *Shelley v. Kraemer*: that the Constitution does not protect individuals from private actions.[142] The *Estes* court specifically adopted "the federal cases construing the first amendment

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[137] *Id.* (citing Blum v. Yaretsky, 475 U.S. 991, 1004 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974)).

[138] The *Estes* opinion directs the reader to Rendall-Baker v. Kohn, 457 U.S. 830 (1982) (fact that a private school received more than 90 percent of its funding from the state did not convert school decisions into state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (actions of a heavily regulated utility with governmentally protected monopoly status not treated as actions of the state); State v. Marley, 54 Haw. 450, 462, 509 P.2d 1095, 1104 (1973) ("But it has never been held that the carrying on of even massive amounts of business activity with the government converts a private corporation into something called a 'quasi-public' corporation."). 71 Haw. at 193-94, 787 P.2d at 219.

[139] *Id.* at 193, 787 P.2d at 219.

[140] *Id.* at 194, 787 P.2d at 219. The requirement of clear and convincing proof of a sufficiently close nexus emerged in *Jackson*, 419 U.S. 345 (1974); *see supra* notes 91-95 and accompanying text.

[141] 71 Haw. at 194, 787 P.2d at 219 (citing Hernandez v Schwegmann Bros. Giant Supermarkets, Inc., 673 F.2d 771 (5th Cir. 1982); Tauvar v. Bar Harbor Congregation, 633 F. Supp. 741 (D. Me. 1985)). The *Hernandez* Court held that an arrest based on information gained by the police from a private citizen (the defendant storeowner), who was a witness to shoplifting, did not convert the action of the citizen into state action, nor made the citizen a state actor. To establish state action, the plaintiff would have had to prove that there existed a conspiracy in regards to the arrest of suspected shoplifters between the police and the defendant. 673 F.2d at 772.

[142] 334 U.S. 1 (1948). The United States Supreme Court in *Shelley* held that the constitutional free speech provision "erects no shield against merely private conduct, however wrongful or discriminatory." *Id.* at 13.

rights to free speech of our U.S. constitution . . .''[143] which tend to support the right of private property owners in a position similar to that of the Hospital to promulgate policies prohibiting on-premise protest. Emphasizing that a hospital is not a location ''historically or traditionally associated with the exercise of free speech rights,''[144] the Hawaii Supreme Court ruled that this was not a case where private property rights must give way to free speech rights.[145]

The *Estes* court also distinguished Hawaii's constitutional guarantee of free speech from California's,[146] declaring that Hawaii's is ''a guarantee only against abridgement by government.''[147] Specifically, the *Estes* court was concerned with *Robins v. Pruneyard Shopping Center*,[148] the California Supreme Court's decision holding that the California Constitution protects expressive activity in shopping malls even if the activity is unrelated to commercial purposes.[149] The Hawaii Supreme Court distinguished *Robins*, explaining that California courts have more vigorously protected free speech in light of California's broader constitutional provisions.[150] In contrast, the Hawaii Constitution mimics the language of the federal first amendment almost exactly.[151]

In addition, the *Estes* court examined Hawaii precedent which established the court's power to review the actions of an allegedly quasi-public hospital.[152] The court distinguished *Silver*, stating that judicial

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[143] 71 Haw. at 197, 787 P.2d at 221. *Estes* concerned interpretation of the Hawaii Constitution's guarantee of free speech, not the federal constitution's first amendment, but noted that the two use nearly identical language. *Id. See supra* notes 2, 5 and accompanying text.

[144] 71 Haw. at 196, 787 P.2d at 220. The precise location was ''the interior walkway to the main entrance to the Hospital . . . .'' *Id.*

[145] *Id.* at 195, 787 P.2d at 220.

[146] *Id.* at 196-97, 787 P.2d at 220-21; *see supra* notes 2, 118.

[147] 71 Haw. at 192-93, 787 P.2d at 218-219 (citing Hudgens v. NLRB, 424 U.S. 507, 513 (1976)).

[148] 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[149] 23 Cal.3d at 902-08, 592 P.2d at 343-45, 153 Cal. Rptr. at 856-58.

[150] 71 Haw. at 196-97, 787 P.2d 220-21.

[151] *Id.* at 197, 787 P.2d at 221. *See supra* notes 2, 5.

[152] 71 Haw. at 194-95, 787 P.2d at 219-20. The *Estes* court specifically reexamined the decision in Silver v. Castle Memorial Hosp., 53 Haw. 475, 497 P.2d 564 (1972).

The *Estes* court held, ''Neither have Appellants shown a clear and sufficient nexus between the Hospital's no-solicitation policy and its funding, regulation, or business relationship between [*sic*] the Hospital and the State.'' 71 Haw. at 194, 787 P.2d at 219-20.

review of actions taken by a private institution did not alter the institution's private character.[153] The court disagreed with the protestors' argument that the Hospital was a quasi-public institution due to the indicia of public function which had supported the court's power of review in *Silver*,[154] and, instead, held *Silver* inapplicable to the facts in *Estes*.[155]

The court did acknowledge that in some circumstances privately owned property may be used by the public for first amendment activities.[156] The court required, however, that the property must be of the type which is "'so historically associated with the exercise of First Amendment rights that access to [it] for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.'"[157] The *Estes* court held that the appellants failed to meet this requirement.[158] To support its determination that the hospital was not traditionally associated with free speech, the court pointed to its determination in *Silver* that "a hospital's 'existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public.'"[159]

B. Commentary

1. Introduction

The *Estes* court focused on the private nature of the property on which the free speech activities occurred and made it the leading factor for the court's interpretation of Hawaii's constitutionally guaranteed free speech rights. In doing so, the decision provided precedent relevant to only a narrow class of property owners, which limits the opinion's

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[153] Even though "*the actions of* [the hospital] *are subject to judicial review, we do not mean to characterize* [the hospital] *as anything other than a private hospital.*" 71 Haw. at 195, 787 P.2d at 220 (citing Silver v. Castle Memorial Hosp., 53 Haw. 475, 482, 497 P.2d 564, 570 (1972))(emphasis in original).

[154] *Id.* at 194-95, 787 P.2d at 219-20; *see supra* notes 122-30 and accompanying text.

[155] 71 Haw. at 195, 787 P.2d at 220.

[156] *Id.* at 195-96, 787 P.2d at 220.

[157] *Id.* at 196, 787 P.2d at 220 (quoting Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968)).

[158] *Id.* at 193-94, 787 P.2d at 219.

[159] *Id.* at 194, 787 P.2d at 219-20 (quoting *Silver*, 53 Haw. at 480, 497 P.2d at 568.)

future applicability. While the court endorsed free speech rights,[160] it did not consider the relationship between these case-specific free speech interests[161] and the specific private property interests encumbered by their exercise, although it did hold that the the balancing of interests in some circumstances is necessarily relevant.[162] Despite the *Estes* court's recital about balancing of interests, it virtually ignored the factors—*e.g.*, time, place and manner—relevant to determining when private property rights must give way to free speech rights.

Time, place and manner restrictions are traditionally examined in cases concerned with the character of the forum and the extent to which it must be open to the public.[163] The court declined to consider the character of the Hospital as a possible public forum.[164] Instead, in a cursory discussion of "traditional public channels of communication,"[165] the court held that the interior walkway to the main entrance to the Hospital was not historically nor traditionally associated with the exercise of free speech rights.[166]

By basing its decision on the absence of any state connection to the Hospital's actions, the court insulated itself from the difficult, and, in this instance, inevitably controversial task of balancing the conflicting constitutional interests at issue. Upon reflection, the court may have been attempting to distance itself from taking an active role in the abortion controversy or, alternatively, from overruling its *Silver* decision dealing with factors defining a quasi-public institution. In either case,

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[160] *Id.* at 195, 787 P.2d at 220.

> There are circumstances, however, in which private property rights must give way to free speech rights of citizens. In Marsh v. Alabama, 326 U.S. 501 (1946), the United States Supreme Court held that under some circumstances, privately owned property can be treated, for First Amendment purposes, as though it were publicly held.

Id.

[161] *Id.* In this case, the free speech interests were those of anti-abortionists, though one could generalize to apply the decision to those of health care advocates who might find hospitals and medical centers to be appropriate locations for solicitation and protest designed to affect the availability and delivery of medical treatment.

[162] *Id.* at 195-96, 787 P.2d at 220.

[163] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

[164] For discussion of the public forum analysis, *see infra* notes 175-89 and accompanying text.

[165] *Id.* at 196, 787 P.2d at 220 (citing Hudgens v. NLRB, 424 U.S. 507, 539 (1976) (Marshall, J., dissenting)).

[166] *Id.*

the court still maintained its judicial prerogative to examine opposing constitutional interests in other contexts.

2. *Distinguishing* Pruneyard v. Robins *and an alternative approach to delineating boundaries between free speech and private property rights*

From one perspective, the court's analysis favors the private interests which benefit most from Hawaii's elevated property values and, secondarily, non-profit interests or quasi-public institutions affected by public expenditures. The court's decision allows these private property owners relatively free license to dictate how their property will be used by the public.[167] Even if these property owners choose to utilize their property for purposes that are public in nature, the property remains private and, as such, immune to encroachments by free speech activists. By favoring private property interests, the *Estes* court appears to have been more strongly influenced by the economic value of private property ownership in Hawaii than by free speech interests of the community at large. But, the court drew no bright line. The court's analysis presents, at best, an ambiguous and ad hoc formula for "delineating the boundaries"[168] between free speech and private property rights, and the formula is one based on the historical association of the private property with free speech.

It is interesting to note that California's constitution states an ad hoc formula more directly. California's formula delineates the boundary between free speech and private property rights on the basis of a balancing of interests. Although application of the formula may lead to only slightly less ambiguous results than the Hawaii formula, the California formula states that, regardless of the indicia of state action, as long as a person's exercise of free speech does not infringe on others' private property rights, that exercise is legal.[169]

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[167] Such a right can be described as a common law right to arbitrarily exclude or eject others from one's own private property. At common law, such a right was often seen as being inherent in the ownership of property and therefore protected by the state even if this protection involves discrimination against patrons, let alone protestors. For an interesting treatment of the rationales underlying different legal theories involved in issues addressing access to property, see Note, *Patron's Right of Access to Premises Generally Open to the Public*, 1983 U. ILL. L. REV. 533 (1983).

[168] 71 Haw. at 195-96, 787 P.2d at 220.

[169] *Id.* at 197, n.1, 787 P.2d at 220-21 n.1. *See* Robins v. Pruneyard, 23 Cal.3d 899, 910-11, 595 P.2d 341, 347-48, 153 Cal. Rptr. 854, 860-61. *See also supra* note 119 and accompanying text.

The Hawaii Supreme Court refused to adopt either such a flexible formula as that authorized by California's constitution or the California Supreme Court's expansive protection of free speech found in *Robins v. Pruneyard Shopping Center*.[170] Instead, the court held that the Hawaii Constitution protects free speech only from abridgement by government, not by private actions.[171] This accords with the current federal standard for the state action doctrine, but the *Estes* court failed to take advantage of the United States Supreme Court's recognition that states are free to adopt more expansive interpretations of their own state constitutional provisions.[172]

Had it chosen to do so, the Hawaii Supreme Court could merely have distinguished *Robins* on its facts because the expressive activities at issue there took place in a shopping center which attracted 25,000 people a day.[173] Instead, the *Estes* court expressly adopted federal precedent, thereby constructing ostensibly solid footing for state precedent on which the Hawaii court may decide future cases regarding the state action doctrine. The *Estes* court could have chosen to narrowly apply federal precedent, particularly in light of the nebulous nature of the federal state action doctrine and the evolving position taken in federal court cases; such application might have afforded the court a more expansive interpretation of the state constitutional guarantee of free speech, and more flexibility in the future to protect individual free speech rights against private action.[174]

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[170] 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[171] *See supra* notes 146-51 and accompanying text.

[172] *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967) (state is allowed to impose a higher standard for evidentiary searches and seizures than required by the Federal Constitution). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[173] 23 Cal.3d at 910-11, 592 P.2d at 347, 153 Cal. Rptr. at 860.

The number of visitors daily could have been cited as a reason for assertion of a rebuttable presumption that the center constituted a channel of communication historically associated with the exercise of free speech.

[174] Wm. Burnett Harvey notes that the New Jersey Supreme Court in its post-*Pruneyard* decision of State v. Schmid, 84 N.J. 535, 563, 423 A.2d 615, 630 (1980) (non-student's right to distribute literature on private campus of Princeton University upheld), developed three lines of inquiry to determine "whether public entitlement to use private property for expressive purposes had accrued." Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard* Assessment, 69 B.U.L. REV. 929, 936 (1989). These inquiries are

(1) what is the nature, purpose, and primary use of the property, (2) what is

A clearer, albeit potentially more restrictive, approach to the facts of *Estes* could have been effectuated through adoption of federal precedents concerning free speech restrictions in public fora. That the shopping center in *Pruneyard* attracted 25,000 people a day is the type of fact examined in federal cases addressing the question of whether a particular forum is appropriate for free speech activities.

In *Heffron v. International Society for Krishna Consciousness*,[175] the United States Supreme Court overturned a Minnesota Supreme Court's decision that a rule promulgated by a public corporation, the Minnesota Agricultural Society, was unconstitutional because it prohibited unrestrained distribution of merchandise including printed materials to the more than 100,000 daily visitors to the publicly-owned state fairgrounds.[176] *Heffron* illustrates the principle that even where affirmative action by a public corporation is undertaken pursuant to a statute enacted by the legislature,[177] state action need not be found.[178] Rather than relying on the state action doctrine, the *Heffron* Court emphasized the critical aspects of a public forum.[179] The Court held that although a forum may be associated with traditional channels of communication, the state's countervailing interests in an orderly movement and control of crowds at a state fair outweigh the interests of activists exercising free speech rights as part of a religious ritual.[180]

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the nature and extent of the invitation to the public to use the property, and (3) what is the purpose of the expressive activity for which constitutional protection was claimed in relation to both the normal private use and the invited public use of the property.

Id. (discussing State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980)).

[175] 452 U.S. 640 (1981).

[176] *Id.* at 643. Minnesota State Fair Rule 6.05 provides, in relevant part, that "[s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society, and/or from a duly licensed location shall be a misdemeanor." *Id.* (cited in *Heffron*, 452 U.S. at 643).

[177] The Minnesota Agricultural Society, a public corporation responsible for administering the Minnesota State Fair, is authorized to make "bylaws, ordinances, and rules, not inconsistent with law, which it may deem necessary or proper for the government of the fairgrounds . . . ." MINN. STAT. § 37.16 (1980) (cited in *Heffron*, 452 U.S. at 463).

[178] 452 U.S. at 654.

[179] *Id.* at 654-55. "The Minnesota State Fair . . . exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious or political, to a large number of people in an efficient fashion." *Id.* at 655.

[180] *Id.* at 649-50.

Extending the public forum rationale further, the Court stated in *Perry Education Association v. Perry Local Educators' Association*[181] that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[182] *Perry* involved access to a public school district's internal mail system by rival teachers' unions.[183] In holding that the school could preclude access to all unions but the one currently representing the teachers, the Court noted that the right to restrict access on the basis of subject matter and speaker identity is implicit in the concept of a nonpublic forum.[184]

Just months later, the Court decided *United States v. Grace* in which it struck down a statute prohibiting certain elements of protest on the sidewalks and grounds of the Supreme Court.[185] While sweeping aside the statutory restrictions, the Court reaffirmed the underlying principle that free speech rights are not absolute[186] and stated that "[t]he government, 'no less than a private owner of property, has the power

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[181] 460 U.S. 37 (1983). This was a 5-4 decision.

[182] *Id.* at 44. The Court clarified that the first amendment does not require "equivalent access to all parts of [the] school building in which some form of communicative activity occurs." *Id.*

The Court outlined three categories of public property and the standards by which the constitutionality of restrictions on free speech must be judged. These categories are (1) streets and parks; (2) public property which has been opened for use as a place for expressive activity; and (3) public property which is not by tradition or designation a forum for public communication. In the former two categories of public property, the government may enforce content-based restrictions only if it shows that the regulations "serve a compelling state interest and [are] narrowly drawn to achieve that end" or content-neutral time, place and manner regulations if the government shows they "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." The state may enforce time, place and manner restrictions on speech in the third type of public forum or may reserve such fora for their intended purpose "as long as the regulation . . . is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 44-45 (citations omitted).

[183] *Id.* at 38-41.

[184] *Id.* at 49. Justice Brennan disagreed. Writing for the dissenters, he felt that the Court had disregarded "the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic." *Id.* at 57.

[185] 461 U.S. 171 (1983).

[186] *Id.* at 177-78. *Grace* was decided by a 7-2 vote in which Justice Brennan, who had authored the dissent in *Perry*, sided with the majority; *see supra* note 184.

to preserve the property under its control for the use to which it is lawfully dedicated.'"[187]

The walkways and entrance to a hospital, whether public or private, do not have the public character of the sidewalks and grounds of the Supreme Court or the walkways of a shopping center such as the one in *Pruneyard* and, arguably, are inappropriate for expressive activities.[188] If a hospital is considered a nonpublic forum because of its character, then, under the public forum analysis set forth in *Perry* and *Grace*, access may be restricted to those "who participate in the forum's official business."[189]

Distinguishing *Pruneyard* on the basis of the differences between the Hawaii and California constitutions, the *Estes* court neglected the analysis of public forum contained in the line of federal cases including *Heffron*, *Perry* and *Grace*. In doing so, it ignored strong precedential analysis by which it could have stated that a hospital, even if public or quasi-public, simply is not an appropriate forum for expressive activities. By way of a sometimes cryptic state action analysis, however, the court reached essentially the same result by refusing to include the main entrance to the Hospital as an area traditionally associated with channels of communication.[190]

3. Adoption of federal precedents

The Hawaii Supreme Court relied upon *Shelley v. Kraemer*[191] to establish the principle that "private action is immune from [the State's constitutional] restrictions,"[192] but failed to fully acknowledge the United States Supreme Court's actual holding in *Shelley*.[193] The *Estes* court's opinion infers that the United States Supreme Court in *Shelley* held

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[187] *Id.* at 178 (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

[188] "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Id.* at 177.

[189] 460 U.S. 37, 53 (1983) (footnote omitted).

[190] 71 Haw. 190, 196, 787 P.2d 216, 220 (1990). Application of public forum analysis would have allowed the *Estes* court to broadly protect the entire Hospital from expressive activities due to the purpose for which the Hospital is dedicated. The court's state action analysis limited its inquiry to whether free speech activities could be carried out on the interior walkway, foregoing more complete examination of the Hospital's character as a whole.

[191] 334 U.S. 1 (1947). *See supra* notes 58-61 and accompanying text.

[192] 71 Haw. 190, 193, 787 P.2d 216, 219 (1990).

[193] 334 U.S. at 14. *See supra* notes 59-61 and accompanying text.

that enforcement of a private residential neighborhood's racially restrictive covenant does not constitute state action.[194] The *Shelley* court held otherwise,[195] a fact the *Estes* court overlooked when it cited *Shelley* as the preface to recognizing the question which "admits of no easy answer" of "whether particular conduct is 'private' . . . or 'state action'. . . ."[196] The *Estes* court applied the current federal standard for state action based on application of the sufficiently close nexus test, yet discussed its rationale for not finding state action in terms of *Shelley*, which actually was based on a public function analysis.[197]

Notably, the *Estes* court appeared to overlook the fact that the state assisted the Hospital in enforcing its policy just as the judiciary in *Shelley* had assisted the neighborhood in enforcing its racially restrictive covenant, which assistance was found unconstitutional. Under a public function analysis, when police removed the protestors at the Hospital's request and cited the state's trespass laws, and when the federal and state courts judicially enforced the Hospital's no-solicitation policy through dismissal of the petitioners' request for an injunction, the state was arguably involved. Under *Shelley*, such actions could have been grounds sufficient to establish state action.[198]

The Hawaii Supreme Court's interpretation of *Shelley* is both ambiguous and fails to explain the court's holding. In *Estes*, the court held that "the police involvement in enforcing the Hospital's right against trespass does not convert this into a state action."[199] In so holding, the *Estes* court adopted the federal approach disfavoring an emphasis

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[194] 71 Haw. at 193, 787 P.2d at 219.

[195] *See supra* notes 59-61 and accompanying text. For discussion of the Court's historical refusal to accord *Shelley* an expansive reading, see Schneider, *supra* note 30, at 753-55.

[196] 71 Haw. at 193, 787 P.2d at 219 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974)). Presumably, the alleged state action was not only the existence of the Hospital's no-solicitation policy but, specifically, its enforcement under color of the state trespass law.

[197] *See supra* notes 36-63 and accompanying text.

[198] *See supra* notes 59-61 and accompanying text. That state action is no longer invoked as a rationale for protection of constitutional rights against private actions involving such government involvement, one author has suggested, is due, at least in some circumstances, to the "privatization of government functions." Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1152-53 (1985).

[199] 71 Haw. at 194, 787 P.2d at 219 (citing Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc., 673 F.2d 771 (5th Cir. 1982); Tauvar v. Bar Harbor Congregation, 633 F. Supp. 741 (D. Me. 1985)).

on police action as an important factor for establishing state action,[200] although *Shelley* had defined state action to include enforcement of private policies through such common law actions. By doing so, Hawaii has joined other states that have declined to find state action when the police enforce trespass laws to the detriment of free speech rights.[201] The Hawaii Supreme Court's less than comprehensive application of *Shelley* could be said to have rationalized the court's holding that the protestors failed to meet their "burden of showing by clear and convincing evidence that the State in any way directed, encouraged, or supported the Hospital's no-solicitation policy."[202]

Although the *Estes* court's treatment of *Shelley* was less than ideal, the opinion was more successful in its interpretation of precedents which set forth the sufficiently close nexus test: *Jackson*,[203] *Blum*[204] and *Hudgens*.[205] To the extent that *Estes* focuses on channels of communication historically associated with the exercise of free speech, it implicitly adopted a limited concept of public function as set forth in *Marsh*.[206] However, though *Estes* expressly adopted the sufficiently close nexus test, its approach in doing so resembled the Supreme Court's interpretation presented in the *Hudgens* decision.[207] *Estes* thus illustrates how

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[200] The Fifth Circuit in Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc. held that a police officer's removal of a customer suspected of shoplifting did not constitute adequate evidence of state action. 673 F.2d at 771-72 (5th Cir. 1982).

In Tauvar v. Bar Harbor Congregation of Jehovah's Witnesses, a federal district court held that the police arrest of an alienated parishioner did not constitute state action. Additionally, the officers arresting the parishioner at the request of the congregation and its elders were entitled to qualified immunity against claims of violation of constitutional rights. 633 F. Supp. at 748-50 (D. Me. 1985).

[201] *See* Comment, *State Constitutional Law: "State Action" and Free Expression in Shopping Malls*, 9 HARV. J.L. & PUB. POL'Y 760 (1985).

[202] 71 Haw. at 193-94, 787 P.2d at 219. The opinion establishes the principle that there must be a "sufficiently close nexus between the State and the challenged action so that the action of the private entity may be fairly treated as that of the State itself." *Id.* (citing Blum v. Yaretsky, 457 U.S. at 1004-05).

[203] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see supra* notes 91-95 and accompanying text.

[204] Blum v. Yaretsky, 457 U.S. 991 (1982); *see supra* notes 102-09 and accompanying text.

[205] Hudgens v. NLRB, 424 U.S. 507 (1976); *see supra* notes 82-89 and accompanying text.

[206] Marsh v. Alabama, 326 U.S. 501 (1946); *see supra* notes 45-57 and accompanying text.

[207] In *Hudgens* the United States Supreme Court, while focusing on the public

courts can apply the sufficiently close nexus test in a manner that effectively supersedes the public function test. Application of the test in this manner mirrors a federal trend which has created a higher burden for plaintiffs trying to show the presence of state action.

This concept was first presented federally in the 1978 opinion of *Flagg Bros., Inc. v. Brooks*.[208] The *Flagg Bros.* Court's restriction of the state action requirement marked the emergence of the new trend in the state action doctrine's most basic application by nullifying the argument that a state's legislative involvement in adoption of a statute and the statute's subsequent enforcement necessarily fall into the category of state action.[209]

Flagg thus appreciably raised the barriers to finding state action. The Supreme Court no longer examined the character of the governmental entity as a whole to determine if there was state action, *i.e.*, the extent of state regulation, funding, and control, as it had in the cases involving the public function test.[210] Instead, by using variations of the nexus test, the Court now specifically focused on the constitutionally challenged action alone, and whether the action itself could be attributed to the state.[211]

This is not to say that the nexus and public function tests are mutually exclusive. They are, in fact, variations of each other, as illustrated by *Flagg*. Examination of all the factors which point to the existence of state action, as a whole, is the essence of the public

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function test, implicitly applied the sufficiently close nexus test to determine whether state action was present. *See supra* notes 82-109 and accompanying text for treatment of these federal cases.

[208] 436 U.S. 149 (1978); *see supra* notes 96-101 and accompanying text.

[209] *See supra* notes 96-101 and accompanying text.

[210] *See supra* notes 36-63 and accompanying text.

[211] *See, e.g.*, Jackson v. Metropolitan Edison Co, 419 U.S. 345, 351 (1974); Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 164-65 (1977).

The following passage of the *Flagg* opinion illustrates this new approach of examining indicia of state action separately, rather than as a whole:

> It is quite immaterial that the State has embodied its decision not to act in statutory form. . . . A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

436 U.S. at 165.

function test; examination of each of those factors *on its own*—does that single factor show a significant relationship between the entity and the state—characterizes the sufficiently close nexus test. This distinction determines the basic reason why the results obtained from the application of the nexus test are usually so clearly distinguishable from those obtained from application of the public function test, and why the barrier to finding state action is so much higher in the courts today.

The *Estes* court followed this new trend by examining each aspect of the state's involvement in Hospital administration separately, and found that none showed the requisite nexus.[212] Had the court considered all the factors together—the big picture—to determine whether the Hospital's actions bore indicia of state action, its conclusion, or at least its analysis, might have been quite different. Instead, the *Estes* court confined itself to the narrower ambit of the sufficiently close nexus test, thus raising the barriers to protestors' successful assertion of state action in cases involving private property.

4. Silver v. Castle Memorial Hospital

Estes necessarily required consideration of state precedent established by *Silver v. Castle Memorial Hospital*.[213] The court's summary treatment of *Silver* suggests, however, that it may be as uncomfortable with its reasoning in that decision as the United States Supreme Court was with its *Logan Valley* decision.[214] In a statement which appears to be contradictory to the *Estes* decision, the *Silver* court addressed the issue of fiduciary duty as a basis of state action and held that fiduciary duty establishes sufficient grounds for judicial review of private actions.[215] The *Silver* court declared:

> if the proposition that *any* hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, *then the rationale for any distinction between public, "quasi public" and truly private*

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[212] 71 Haw. 190, 192-94, 787 P.2d 216, 218-19 (1990). The court examined each of the factors set forth by the appellants separately and eliminated them one-by-one rather than looking at them as a single body of state characterizations affecting the Hospital: the public funding, state regulation, virtual monopoly status and lease of space to the University of Hawaii. *Id.*

[213] 53 Haw. 475, 497 P.2d 564 (1972).

[214] *See supra* notes 80-81 and accompanying text.

[215] 53 Haw. at 482-83, 497 P.2d at 570.

> *breaks down and becomes meaningless*, especially if the hospital's patients are considered to be of primary concern.[216]

This quote seems to infer that the Hospital's actions in *Estes* should have been subject to judicial review. Yet, the court did not apply this proposition, which was advanced by the protestors, and chose not to focus on the purpose or fiduciary duties of the Hospital.[217]

In addition, the court ignored critical language it quoted from *Silver*,[218] stating that *Silver* was "obviously" inapplicable.[219] In part, the court stated that although public support may justify government regulation of private institutions, such regulation does not transform a private institution into a public entity.

> [W]e are in concurrence with the reasoning that "a private nonprofit hospital which receives part of its funds from public sources and through public solicitations, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it functioned [sic], it is a 'private hospital' in the sense that it is nongovernmental, *but that it is in no position to claim immunity from public supervision and control because of its private nature.*"[220]

Yet, despite this language, the *Estes* court held that the Hospital's actions *were* immune from judicial review because it found no state connection with the Hospital's actions.[221]

The *Estes* court could have distinguished *Silver* on firmer ground without resort to a brusque, and perhaps ineffectual, dismissal of the precedent. The factors which most seem to differentiate *Silver* and *Estes* are that the earlier decision involved employment rights/due process issues and was decided when *Logan Valley* was still good precedent, while *Estes* involved free speech/due process issues following the pre-

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[216] *Id.* at 482, 497 P.2d at 570 (emphasis added).

[217] *Id.* at 194-95, 787 P.2d at 219-20.

[218] *See infra* note 220 and accompanying text.

[219] *Estes*, 71 Haw. 190, 195, 787 P.2d 216, 220.

[220] *Id.* at 195, 787 P.2d at 220 (quoting *Silver*, 53 Haw. 475, 482, 497 P.2d 564, (1972) (quoting Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 250, 250 N.E.2d 892, 895 (1969))) (emphasis added). The *Silver* court admitted that "the majority of jurisdictions have held that a private hospital, as opposed to a public hospital, has the absolute right to exclude any physician from practicing therein . . . not subject to judicial review," yet specifically adopted the minority position allowing judicial review, as "the better rule." 53 Haw. at 476-77, 479, 497 P.2d at 568.

[221] 71 Haw. at 195-96, 787 P.2d at 219-20.

cedents which overruled *Logan Valley*.[222] Very different interests were involved in each case. In *Silver*, the denial of the physician's employment privileges would probably have had a severe impact on his ability to pursue his profession, which was also important to society.[223] In *Estes*, by contrast, the protestors were merely inconvenienced by being excluded from one small forum; there were other fora available. The protestors were not denied their means of livelihood, and, of additional significance, the emotional well-being of patients was arguably served. The two cases are readily distinguishable on the basis of the rights at issue, yet the court omitted such an ultimately subjective or, at least, unpredictable method of analysis from its opinion.

Additionally, that a private hospital's staffing decisions should remain subject to judicial review while another's no-solicitation policy should escape review may illustrate a basic dual standard in the state's interpretation of the fourteenth amendment's due process clause.[224] In *Silver*, the property rights protected were those of the plaintiff physician; in *Estes*, the disputed property rights allegedly infringed upon belonged to the defendant hospital. In citing *Silver*, and yet failing to address the different property interests at stake, the *Estes* court made its

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[222] Notably, the earlier case directly involved employment rights while *Estes* indirectly involved the uncertain impact of the United States Supreme Court's decisions on the thorny issue of legalized abortion and difficult public forum questions.

[223] 53 Haw. at 484, 497 P.2d at 571.

[224] Under views advanced by one author, such a dual-standard of due process may well accord with the federal state action doctrine as applied by the United States Supreme Court in cases involving due process concerns:

> In determining whether state action is present in a given case, the Court balances the interests of the parties as it searches for formal links between the state and a private actor. If the interest asserted by the party claiming discrimination is a fundamental one, such as the right to buy property asserted in *Shelley*, the Court will go to great lengths to find state action. However, when the party *defending* against a charge of discrimination has substantial interests, the Court may fail to find state action, even in the face of formal links between the state and the private actor.
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> . . . .
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> The Court approaches state action cases in an 'unprincipled' manner, that is, in a flexible manner, without applying strict rules regardless of the facts of the case. This permits the realm of the fourteenth amendment to expand or shrink according to the particularities of each case, with due consideration paid not only to formal government involvement in the challenged action, but also to the interests of all parties involved, and to the type of challenge presented.

Davis, *The Supreme Court: Finding State Action . . . Sometimes*, 26 How. L.J. 1395, 1422-23 (1983)(emphasis in original).

distinction of the cases unnecessarily broad and disregarded the option of establishing a principle for finding state action based on an evaluation of these interests or at least a simple categorization of them. Ultimately, the *Estes* court failed to discuss the significance of the fact that in both cases, a hospital, under public forum analysis,[225] could be considered an inappropriate forum for expressive activities by those not participating in the forum's official business.[226] This would have enabled the court to protect the rights of the physician in *Silver* as well as those of the Hospital in *Estes* and would have obviated the need to even distinguish the cases.

Arguably, however, the court cannot be faulted for restricting the reasoning behind *Silver* to its specific facts, especially in light of judicial developments in the state action doctrine during the intervening eighteen years. The emergence of the nexus test in 1974,[227] two years after the *Silver* decision, dramatically increased the extent of state involvement needed to constitute state action. The *Estes* court's choice to follow federal cases on state action while implicitly retiring the public function rationale of a seasoned state opinion was consistent with the federal precedent. This strategically difficult course would not have been necessary for adjudication of the issues involved had the court followed the federal line of cases outlining public forum analysis.

5. Preservation of public function considerations

By adopting the federal interpretation of the state action doctrine that the state constitutional guarantee of free speech applies only to government action,[228] and finding that the hospital was a private entity,[229] the *Estes* court further protected the Hospital's private property rights under a due process theory. The court cited *Logan Valley* as support for its holding that private property rights must give way to free speech rights of citizens only when the property constitutes a traditionally or historically recognized public forum.[230]

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[225] *See supra* notes 175-89 and accompanying text.

[226] United States v. Grace, 460 U.S. 37, 53 (1983); *see supra* note 189 and accompanying text.

[227] *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see supra* notes 91-95 and accompanying text.

[228] 71 Haw. 192-93, 787 P.2d at 218-19.

[229] *Id.* at 194, 787 P.2d at 219; *see supra* notes 26-27 and accompanying text.

[230] 71 Haw. at 196, 787 P.2d at 220 (citing Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 591 U.S. 308, 315 (1968)).

The court, however, did not address the fact that the Supreme Court has overruled *Logan Valley*[231] and that the *Logan Valley* case did not involve utilization of state trespass laws to enforce a private entity's no-solicitation policy. Immediately following its cite to *Logan Valley*, the court also cited Justice Marshall's dissent in *Hudgens v. NLRB*.[232]

This use of federal case law suggests that the Hawaii Supreme Court is establishing a two-part test to determine whether to allow infringement of private property rights. While the first part of the test requires petitioners to establish clear and convincing evidence of a sufficiently close nexus between the state and the challenged action,[233] the second part of the test is tied to the definition of "traditional public channels of communication" and shifts the focus to the location, community use, and nature of the property. The second-part of such a test inevitably involves a balancing of interests commonly found in judicial consideration of constitutional issues, but does so only after clearing the restrictive thresholds established by the federal precedent delineating the sufficiently close nexus criteria.

By preserving the community function aspects of *Logan Valley*,[234] and through its emphasis on the *Hudgens* dissent, Hawaii chose to disregard earlier federal decisions which generally rejected the balancing-of-interests approach to determining the boundary between free speech and deprivation of private property rights without due process. Although *Estes* raised formidable hurdles to be surmounted in order to find state action, thus conforming to current federal standards, the decision ultimately preserved the court's right to examine the balance between constitutional interests when they conflict. The *Estes* decision did so, however, without specifying when or how this balancing would be exercised. The two-tier test implied in *Estes* stops short of incorporating public forum analysis by which the court could have outlined the process for exercising this balancing of interests.

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[231] *See supra* note 84 and accompanying text. *See generally* Lloyd Corp. v. Tanner, 407 U.S. 551 (1971), and Hudgens v. NLRB, 424 U.S. 507 (1976).

[232] "The underlying concern . . . [is] that traditional public channels of communication remain free, regardless of the incidence of ownership." 424 U.S. at 539 (Marshall, J., dissenting).

[233] *See supra* note 137 and accompanying text.

[234] These include the nexus between location and specific free speech activities as well as the traditional use criteria applied to locations. *Logan Valley*, 391 U.S. 308, 321-25 (1968).

V. Impact

The Hawaii Supreme Court's opinion in *Estes* attempted to at least acknowledge the need to balance competing first amendment and private property rights. As the United States Supreme Court stated in *Lloyd*, the competing rights deserve equal evaluation.

> The Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution *certainly did not think these fundamental rights of a free society are incompatible with each other*. There may be other situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy.[235]

Overall, the court's restriction of the state action doctrine to exclude decisions of a private hospital in this difficult situation shows sound judgment. Although the courts have traditionally given greater weight to first amendment rights,[236] perhaps because of our nation's history,[237] the federal trend in state action decisions supports the proposition that it is time private property rights were given due accord.

A. Impact on Property Interests

The *Estes* court, while purportedly "adopting the holdings of federal cases",[238] cited to dated federal precedents.[239] This reliance on older federal precedents may effectively protect property owners who do not

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[235] 407 U.S. 551, 570 (1971) (emphasis added).

[236] *See* Marsh v. Alabama, 326 U.S. 501 (1945); *see supra* notes 45-57 and accompanying text.

[237] The motivational forces behind the Declaration of Independence aside, one commentator has stated that:

> the great expansion in the concept of state action from the 1940's until the 1970's has often been explained by the connection between the state action question and the equal protection claims made by blacks. The Court sought to provide the lower federal courts with a tool to alleviate the devastating impact of racial discrimination. To achieve this goal, the Court expanded the range of private activity that would be viewed as state action and subject to judicial scrutiny under the fourteenth amendment. The Court's aversion to racial discrimination made it unsympathetic to the private actor's interest in freedom of choice and less sensitive to principles of federalism.

Schneider, *supra* note 30, at 740-41.

[238] 71 Haw. 190, 197, 787 P.2d 216, 221 (1990).

[239] *See supra* notes 191-202 and accompanying text.

invite the public onto their premises for commercial or other reasons traditionally associated with community purposes and activities. Hospitals and medical centers may use this decision to prevent protest activities. Nonprofit cultural and research institutions serving sensitive community and social interests, such as museums displaying collections of native American art or research facilities conducting animal experiments, might also attempt to use the decision to extend protections against protest to their private property interests. Such organizations could conceivably argue that they do not serve critical community concerns associated with commerce and that they have never been considered traditional channels of communication.[240]

The *Estes* opinion implicitly invites the legislature to consider a number of options when addressing concerns of private property owners. The legislature may, for example, mandate "trespass zones" around certain types of private institutions to wholly or partially exclude disruptive free speech activities.[241] This would prevent protestors from coming within a certain distance of the facility and its patrons. Boulder, Colorado, intending primarily to protect abortion clinic patients from harassment, adopted such a "bubble zone" ordinance for licensed medical facilities.[242]

Most significantly, the *Estes* decision allows a private entity to exclude a party from its property based on the property's lack of historical or traditional association with the exercise of first amendment rights. The

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[240] For a discussion of the traditional concern with fostering public debate and concerns about "first amendment counterproductivity . . . in [cases] in which the state intervenes to enhance public debate," see Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1420 (1986).

[241] Hawaii already has imposed such legislative restrictions on free speech activities conducted near polling centers. *See* HAW. REV. STAT. § 11-132 (1985).

Hawaii's criminal trespass statutes protect dwellings, apartment buildings, hotels, schools, areas that are fenced or enclosed to exclude intruders, and commercial premises. *See* HAW. REV. STAT. §§ 708-813 & 814 (1985).

Notably, the protection for commercial premises exempts "any conduct or activity subject to regulation by the National Labor Relations Act." *Id.* § 708-814(1)(b). Constitutional law scholar Jon Van Dyke has noted that this exemption may subject the statute to constitutional challenge under the equal protection clause as interpreted by the United States Supreme Court in Police Dept. of Chicago v. Mosley, 407 U.S. 92 (1972) (regulations on picketing based on content held discriminatory and unconstitutional). Interview with Jon M. Van Dyke, Professor of Law at Wm. S. Richardson School of Law (Mar. 18, 1991).

[242] Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1857-58 (1988).

decision does not foreclose all access to existing private property venues traditionally associated with free speech,[243] yet in a comparatively young and still quickly growing state, the court's focus on the past may prove to be another hurdle for free speech activists.[244] Simply by virtue of being a new commercial or private non-profit institution or by operating in a way not traditionally or historically associated with free speech, private property owners may be able to exclude speech activists from their premises. For instance, by emphasizing its traditional function of providing lodging and meeting facilities, a private hotel—despite affording the public access to its shops and restaurants—might argue that it is entitled to exclude free speech activists from its premises, *i.e.*, when protestors attempt to target a group that is utilizing the hotel's meeting facilities.[245]

Another instance where the *Estes* decision may produce unexpected results may be situations involving property of organizations assuming government functions, *e.g.*, due to privatization of government services. While such a ruling may provide relief for owners of property on which socially controversial activities occur, it limits the shrinking physical arena for grassroots airing of different viewpoints nominally protected by constitutional guarantees of free speech.

Although federal case law has not always and uniformly suggested a stringent standard for proving state action, the *Estes* court chose to apply such a standard.[246] The Hawaii standard requires plaintiffs to present clear and convincing evidence of a nexus between state and

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[243] "There is no dispute, however, that the right of access onto private property is premised on the fact that these places, such as sidewalks, streets, parks, and retail business districts 'are historically associated first amendment rights.'" 71 Haw. at 196, 787 P.2d at 220 (footnotes omitted).

[244] Yet another hurdle might be presented by the court's focus on federal state-action precedents, which one author suggests serve very different purposes than should a State's state-action doctrine. As a reason for asserting such a proposition, the author cites the fact that state courts have a broader array of legal theories available to them than does the United States Supreme Court and, accordingly, should develop their own more limited state action doctrines. At the same time, the author urges the Court to develop a more coherent federal state-action doctrine. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327 (1990).

[245] Emphasizing its functional character, the hotel could enforce regulations by invoking HAW. REV. STAT. § 708-813 (criminal trespass in the first degree for trespass on hotel premises) or, by emphasizing its commercial character, it could invoke § 708-814 (criminal trespass in the second degree for entry on commercial premises) to preclude free speech activities on its premises. *Id.* (1985). *See supra* note 241.

[246] *See supra* notes 191-212 and accompanying text.

private actions, which greatly increases the burden of proof carried by plaintiffs.[247] The clear and convincing standard is consistent, however, with the standard applied in some types of cases alleging violation of first amendment rights.[248]

As a preliminary test to bringing claims of free speech infringement against private property owners, these restrictive interpretations of state action may dampen the free exchange of ideas.[249] Grassroots communications channels, such as leafletting, picketing, and oral advocacy, which are often critical to organizations lacking funding for more sophisticated media campaigns, may be most affected.

Nevertheless, the court's decision acknowledges the principal stated in *Marsh* that private property interests must sometimes give way to free speech rights of citizens.[250] The *Estes* court thus preserves for future use *Marsh*'s principle concerning community function and its holding that the private character of property does not categorically immunize it to free speech activities. But, as set forth in *Estes*, community function criteria do not require an evaluation of the content of particular free speech messages nor do they require an evaluation, as a whole, of the time, place and manner of free speech activities. This holding allowed the court to avoid discussion of such a polarized issue as abortion while, at the same time, preserving some protections for free speech interests. Such an approach obviates the court's obligation to evaluate the messages giving rise to claims involving constitutional rights challenged by free speech activists.

B. Balancing Considerations

Even though the *Estes* court protected private property interests, the decision, if limited to its facts, would not seriously curtail existing

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[247] 71 Haw. at 193, 787 P.2d at 219.

[248] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 967 (1964) (plaintiff alleging libel and defamation must show clear and convincing evidence of malice in publication).

[249] One author aggressively argues that:

> the state action requirement is harmful because it permits infringements of important individual rights; that the doctrine is anachronistic when judged by its original purpose; that the Constitution's language and history indicate that there should be no such requirement; and that under any theory of rights, it is wrong to protect liberties from only governmental interference.

Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. Rev. 503, 535 (1985).

For the contrary position arguing that the state action doctrine, especially at the state level, has been undervalued, *see*, Cole, *supra* note 244.

[250] 326 U.S. 501, 505-06 (1946); *see supra* notes 52-57 and accompanying text.

rights to free and expressive speech. If the court had chosen to use a public forum analysis, free speech rights would have been more sharply curtailed; while the Estes decision expands the right of owners to prohibit use of their property by others, it does not shield them from communication directed at their property because of its character.[251] Those individuals who engage in leafletting, picketing, or oral advocacy are attempting to direct a message. By choosing a particular forum, *i.e.*, soliciting in close proximity to a specific hospital, that message may have more impact.[252] That impact is not distinctively lessened, however, by directing the protestors to conduct their activities on the public sidewalk which surrounds a hospital.

A public sidewalk is a traditional, well-protected forum for first amendment activities.[253] Given the size and prominence of a hospital, protestors cannot argue that the message sought to be conveyed will not be associated with the hospital in any way. Also, they cannot assert that the people entering and exiting will not be affected simply because the expression takes place a hundred feet further from the hospital's entrance. Patients still have to pass through or at least come within sight and earshot of the forum if they are to receive medical care; the message will still be received.

Creating a buffer zone between protestors and patients is especially important, however, given the unique and private nature of personal health. The United States Supreme Court has recognized that expressive speech may interfere with the health and recovery of patients:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, relaxing, and helpful

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[251] *See supra* notes 175-89 and accompanying text, for discussion of public forum analysis. Public forum analysis focuses on the character of the property at issue, and the appropriateness of the expressive activity being exercised. The *Estes* court, on the other hand, used state action analysis to limit its inquiry to the more general issue concerning the association of property with traditional channels of communication.

[252] *See generally* Note, *Too Close for Comfort, supra* note 242.

[253] Areas traditionally associated with the exercise of First Amendment rights include public streets, sidewalks and parks. Lloyd Corp. v. Tanner, 407 U.S. 551, 559 (1971). To this list might be added the "business district," as the trend of federal cases suggests.

> atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed.[254]

A private hospital acting in the best interests of its patients by deciding to enforce a strict no-solicitation policy on its privately owned land should not be subject to an expansive interpretation of state involvement. The constitution guarantees that government will not interfere with fundamental private rights.[255] The Hawaii Supreme Court's decision in *Estes* ensures that government will not interfere with private property owners' right to restrict speech activities on their premises, unless a traditional channel of public communication is threatened.[256]

Through its focus on state action, the *Estes* court leaves open for decision the question of whether a public hospital may restrict expressive activities on its premises. The public/private distinction emphasized in *Estes* obscures the court's casual reference, in its examination of *Silver*, to the public-service nature of a hospital.[257] Given this nature, and the uniqueness of a hospital's position as a place of emotional and physical trauma and healing, the question remains: Would protestors be entitled to exercise their free speech rights outside Tripler Army Medical Center/Hospital, a public institution? Had the *Estes* court used a public forum analysis, this question would have been clearly answered based on the inherent character of a hospital, rather than on the basis of the hospital's ties to government. The outcome of *Estes* illustrates that under either public forum or state action analysis a private hospital may restrict expressive activities on its premises based on its private property rights. *Estes* implies, however, that a public hospital's property rights are not so patent.

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[254] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring). *See also* Note, *Too Close for Comfort, supra* note 242, at 1865.

[255] *See supra* note 7. This raises the issue which we and the court have avoided and with which the protestors' were ultimately concerned: Roe v. Wade, 410 U.S. 113 (1973), and whether these rights vest at birth or at conception.

[256] The *Estes* court declined, however, to impose judicial compromises that other courts have employed, such as trespass zones, which allow individuals limited access to private property for free speech purposes. *See* Comment, *Speech Activists in Shopping Centers, supra* note 6, which examines judicial and statutory measures forcing private shopping centers to accommodate free speech activists; and Note, *Too Close for Comfort, supra* note 242, which explores the issue of proximity and ordinances establishing minimum trespass zones around medical facilities.

[257] 71 Haw. 190, 194, 787 P.2d 216, 219-20 (1990). *See supra* notes 213-27 and accompanying text.

In the context of relating a private hospital's property to a traditional channel of communication, Hawaii has, instead of answering the public hospital question, partially implemented a balancing element much like that providing the foundation for California's constitutional free speech provisions.[258] It is not only the private character of the Hospital's property, but the third-party interests associated with it and the lack of any role the Hospital might have as a traditional channel of communication which facilitated the court's result in *Estes*. Despite the fact that the *Estes* precedent involves balancing interests outside those of the parties to the controversy, it still precludes consideration of the message itself,[259] thereby insulating the court from social controversy and political pressures.

C. Precedential Value

The lack of a precise formula for applying Hawaii's state action doctrine will undoubtedly create confusion, and some inconsistency, in future decisions. The limits of the doctrine remain judicially flexible, and Hawaii courts, like their federal counterparts, will have to determine the existence of state action on a case-by-case basis.[260] However, the approaches taken by Hawaii and the federal courts are not identical. Despite having "adopted" the federal standard, finding state action in Hawaii is arguably easier because the *Estes* court has retained both the public function and sufficiently close nexus tests, albeit in a seemingly two-tiered system. Whether only one or both tests will apply in cases

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[258] The California constitutional interpretation allows the exercise of free speech rights as long as they do not infringe on other constitutionally protected rights, *i.e.*, private property rights. Robins v. Pruneyard Shopping Center 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). *See supra* notes 117-20 and accompanying text.

[259] The court's citation of Marsh v. Alabama reflects the *Marsh* Court's concern with the rights of members of the community to receive communications regardless of their specific content. *Estes* infers that this should continue to be a prominent factor to be balanced with the competing interests of the parties themselves. *See Marsh*, 326 U.S. 501, 508-09 (1945); *see supra* notes 45-57 and accompanying text.

[260] The *Estes* court arguably utilized a two-prong approach, by applying first the public function test of *Silver* and secondly, the sufficiently close nexus test now favored by the federal courts. An affirmative finding under either test results in a determination of state action; however, failure to find state action under the public function test does not end the inquiry. This seems to contrast with the current federal approach which concentrates exclusively on the sufficiently close nexus test. *See, e.g.*, Hudgens v. NLRB 424 U.S. 507 (1975); *see supra* notes 82-89 and accompanying text.

involving state action, however, is not clear because the *Estes* court did not define the factors relevant to determining when circumstances will require a balancing of interests. These factors are the subject of public forum analysis, which the court did not consider.

Perhaps it is fortunate for future advocates that the boundaries of the state action doctrine remain indefinite, as the resulting flexibility may allow the doctrine to continuously adapt to society's changing needs and expectations. The United States Supreme Court supports this flexible approach. In describing its lack of a precise formula for determining state action, the Court has stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[261]

VI. Conclusion

In *Estes*, the Hawaii Supreme Court avoided formulating an explicit formula for balancing what are often sharply conflicting interests in constitutional rights to free speech, on the one hand, and due process considerations tied to private property, on the other. The court adopted federal case law that limited the scope of actions which can be defined as state action. Rather than emphasize, as other state courts have, disclaimers of state action arising from enforcement of trespass laws by the state, the court placed on plaintiffs a burden of producing clear and convincing evidence of a sufficiently close nexus between the state and challenged actions.

As a compensating gesture toward reaffirming the position of those with free speech interests, the *Estes* court also preserved a line of generally dated federal analysis that, overall, emphasizes the importance of traditional channels of public communication. Under these federal precedents, the determining factors in balancing free speech activities and private property rights are details relating to the time, place, and manner of free speech activities conducted on private property. This approach acknowledges the difficult but important task of balancing public interests in constitutional rights. It also anticipates some fluctuation in the focus of speech activities connected to important issues of public concern.

Notably, the court did not utilize public forum analysis. Had it done so, the court could have elaborated on the significance of the time,

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[261] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

place and manner of expressive activities. This would have provided a stronger framework and greater predictability for future case analysis regarding delineation of the boundaries between free speech and private property interests.

It remains to be seen whether the *Estes* approach invites discretionary case-specific judicial determinations based on each message of free speech activists in light of the particular private property on which the activists wish to convey their message, or whether *Estes* invites legislative action defining protected zones of proximity around certain types of private and quasi-public institutions. If nothing else, *Estes* has preserved these options for the future.

The *Estes* decision applies the sufficiently close nexus test while focusing on the definition of historical channels of communication, which was stressed in the earlier federal decisions articulating the public function test. In doing so, *Estes* hints that the nature of arenas qualifying for free speech activities will be subject to careful scrutiny before the court will engage in a balancing of interests. The *Estes* opinion implies that, in the future, the number of such arenas may be significantly limited. This result will make it more difficult for plaintiffs to show that their activities occurred within a traditionally recognized channel of community communication.

On the whole, the *Estes* decision favors private property owners, particularly the narrow class of medical facilities which are privately owned. The court's adoption of federal restrictions on state action may even protect the private property interests associated with more commercial premises including, under certain circumstances, shopping centers and airports as well as public spaces more traditionally identified as channels of public communication and the premises of newly privatized activities historically associated with government.

Although the *Estes* court made a good faith effort to clarify the state action doctrine in Hawaii, future attempts to apply the decision may lead to inconsistent results due to the court's awkward use of federal precedent and its casual treatment of Hawaii precedent. The court can address these potential inconsistencies by elucidating its emphasis on traditional and historical channels of communication with the balancing criteria and standards of review to be found in public forum analysis. The results of future state action cases may be uncertain, but *Estes* invites application of more rigid restrictions on the availability of fora for free speech activities.

Lisa A. Laun and Mark D. Lofstrom

State v. Levinson: Limitations on a Criminal Defendant's Use of Peremptory Challenges

I. Introduction

The Hawaii Supreme Court, in *State v. Levinson*,[1] held that the right to serve on a jury[2] is a privilege of citizenship, guaranteed by the Hawaii State Constitution,[3] and that neither the defense nor the prosecution, through the use of peremptory challenges based solely upon race, religion, sex or ancestry, can deny a citizen this privilege.[4] Moreover, the court ruled that the exclusion of women from jury service on the basis of their gender violates the Equal Protection Clause of article I, section 5 of the Hawaii Constitution.[5]

In so ruling, the Hawaii Supreme Court drew from and extended its prior holding in *State v. Batson*,[6] which followed an opinion of the United States Supreme Court.[7] The *Levinson* decision breaks new legal ground in two respects: 1) the exercise of peremptory challenges by a criminal defendant is subject to the same limitations imposed upon the prosecution; and 2) the Equal Protection Clause of the Hawaii Constitution prohibits gender, as well as racial, discrimination in jury selection.[8]

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[1] 71 Haw. 492, 795 P.2d 845 (1990).

[2] The right to serve on a jury is provided for by statute. *See infra* notes 64-65.

[3] 71 Haw. at 499, 795 P.2d at 849.

[4] *Id.*, 795 P.2d at 850.

[5] *Id.*, 795 P.2d at 849-50. *See infra* note 37.

[6] 71 Haw. 300, 788 P.2d 841 (1990). *See infra* notes 33-40 and accompanying text.

[7] *See* Batson v. Kentucky, 476 U.S. 79 (1986). *See infra* notes 26-32 and accompanying text.

[8] In a recent decision, the Ninth Circuit Court of Appeals has also ruled that a defendant may not peremptorily challenge a juror on the basis of gender, thus adopting the same conclusions as the Hawaii Supreme Court in *Levinson*. *See* United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990). *See infra* notes 78-79, 81.

II. Background

The peremptory challenge has "very old credentials,"[9] its roots firmly grounded in ancient common-law tradition.[10] While no constitutional right to peremptory challenges exists,[11] there is a "widely held belief that [the] peremptory challenge is a necessary part of trial by jury,"[12] and " 'one of the most important of the rights secured to the accused.' "[13] The function of the peremptory challenge is

> not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' "[14]

Unlike challenges for cause, where one can exclude potential jurors only on the basis of provable and legally cognizable partiality, peremptory challenges allow one to exclude potential jurors "for a real or imagined partiality that is less easily designated or demonstrable."[15]

> It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of

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[9] Swain v. Alabama, 380 U.S. 202, 212 (1965). *See infra* notes 18-25 and accompanying text.

[10] For a discussion of the history of the peremptory, *see generally Swain*, 380 U.S. 202; *See* Van Dyke, *Peremptory Challenges Revisited*, Nat'l Black J. (forthcoming); and J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Juries [hereinafter Jury Selection Procedures], 147-50 (1977).

[11] Batson v. Kentucky, 476 U.S. at 91; *Swain*, 380 U.S. at 219 (citing Stilson v. United States, 250 U.S. 583, 586 (1919)).

[12] *Swain*, 380 U.S. at 219 (citing Lewis v. United States, 146 U.S. 370, 376 (1892)).

[13] *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

Although many believe that peremptory challenges constitute a necessary and important right, this view is certainly not unanimous. Justice Marshall argues that peremptory challenges should be banned altogether. In so arguing, he notes that the right to peremptory challenges is not constitutionally mandated and that racial discrimination and violations of the Equal Protection Clause can seep into the jury selection process through the use of peremptory challenges despite the procedures adopted in Batson v. Kentucky (*see infra* notes 26-32, 100 and accompanying text). *See* Batson v. Kentucky, 476 U.S. at 102-08 (Marshall, J., concurring).

[14] *Swain*, 380 U.S. at 219 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

[15] *Id.* at 220 (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887) (holding that a statute allowing the state 15 peremptory challenges in capital cases in cities with a population over 100,000, as opposed to the eight allowed in cases elsewhere in the state, did not deny the accused his equal protection rights).

> another," upon a juror's "habits and associations," or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment." It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.[16]

Traditionally, the essential nature of peremptory challenges lay in the fact that one could exercise such challenges without providing any reason at all.[17]

Despite the recognized importance of peremptory challenges in a trial by jury, the exercise of the challenge has not gone unfettered. In *Swain v. Alabama*,[18] the United States Supreme Court recognized that the Equal Protection Clause[19] placed limits on the prosecution's exercise of peremptory challenges.[20] Swain, a black man convicted of rape and sentenced to death, argued on appeal that the prosecution had discriminated

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[16] *Swain*, 380 U.S. at 220-21 (citations omitted).

[17] *Id.* at 220 (citing State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378 (1892)).

[18] 380 U.S. 202 (1965).

[19] U.S. CONST. amend. XIV, § 1 (The Equal Protection Clause) provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

[20] While *Swain* was the first case in which the United States Supreme Court recognized that the Equal Protection Clause placed limits on the prosecutor's use of racially discriminatory peremptory challenges, there were previous cases in which the Court ruled that the Equal Protection Clause prohibited other forms of racial discrimination in the jury selection process. The earliest case, Strauder v. West Virginia, 100 U.S. 303 (1879), involved overt statutory discrimination, rather than racially discriminatory peremptory challenges. In that case, a venire composed of white males was summoned to try Strauder, a black man charged with murder. Only white males were allowed to serve on the jury pursuant to a West Virginia statute. Observing that the "very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine, "the United States Supreme Court held that the trial court had denied Strauder equal protection under the laws guaranteed by the fourteenth amendment to the United States Constitution. *Id.* at 308, 310. While the Equal Protection Clause did not guarantee Strauder the right to a jury of his racial peers, it did guarantee that the State would not deny him the rights afforded to a white person — the right to be tried "by a jury selected from persons of his own race . . . without discrimination against his color. . . ." *Id.* at 309.

against him on the basis of race by excluding all blacks from the jury in his case and by systematically and consistently exercising peremptory challenges in previous cases to prohibit blacks from ever serving on any trial juries.[21]

Although it found that the petitioner had failed in his evidentiary burden to establish discrimination, the United States Supreme Court stated that:

> when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted.[22]

The Court held, however, that in any one particular case, the prosecutor is presumed to be exercising his peremptory challenges to obtain a fair and impartial jury, and that the Equal Protection Clause does not require an explanation for the prosecutor's exercise of his challenges.[23] The defendant could overcome the presumption only by examining the prosecutor's conduct in other cases to circumstantially prove that the prosecutor used peremptory challenges to deny the black population the right and privilege of jury service enjoyed by the white population.[24] This burden imposed on the defendant soon proved to be impossible to bear. The *Swain* decision became virtually meaningless because few, if any, defendants were able to overcome the presumption.

In reaching its decision, the Court also noted that a criminal defendant is not constitutionally entitled to a jury composed of a proportionate number of his or her race, nor is the defendant entitled to a jury that constitutes "a perfect mirror of the community or [that] accurately reflect[s] the proportionate strength of every identifiable group."[25]

A later case, *Batson v. Kentucky*,[26] reversed a portion of *Swain* in an important procedural aspect, outlining a new test to establish discrimi-

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[21] *Swain*, 380 U.S. at 223.

[22] *Id.* at 223-24 (citation omitted).

[23] *Id.* at 222.

[24] *Id.* at 224.

[25] *Id.* at 208.

[26] 476 U.S. 79 (1986).

nation. Noting that peremptory challenges enable " 'those to discriminate who are of a mind to discriminate,' "[27] the United States Supreme Court reversed the portion of *Swain* concerning the evidentiary burden placed upon a defendant who claims that the prosecution has denied him his equal protection rights through the use of peremptory challenges. Few black defendants had been able to meet *Swain's* heavy evidentiary burden, and consequently black defendants in many jurisdictions stood no chance of having members of their race on their jury.[28] Under *Batson v. Kentucky*, no longer must a defendant look to other cases to demonstrate that the prosecution has systematically excluded members from the jury on the basis of race. Instead, a defendant may now establish a prima facie case of discrimination based solely on evidence at his particular trial by showing: 1) that he is a member of a cognizable racial group; 2) that the prosecutor exercised his peremptory challenges to exclude members of the defendant's race; and 3) that the surrounding facts and circumstances raise an inference that the prosecutor excluded the potential jurors on account of their race.[29]

Once the defendant establishes a prima facie case of discrimination, the State must come forward with a racially neutral explanation for challenging each minority juror.[30] The trial court must then determine whether the defendant has established purposeful discrimination. If the State cannot provide a satisfactory explanation, the trial court must deny the State's peremptory challenge.[31]

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[27] *Id.* at 96 (quoting Avery v. Georgia 345 U.S. 559, 562 (1953)).

[28] *See* Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1203 (1987); JURY SELECTION PROCEDURES, *supra* note 10, at 166-67; P. DIPERNA, JURIES ON TRIAL 174-76 (1984).

Even Justice White, who wrote for the majority in *Swain*, concurred in Batson v. Kentucky, because the impermissible exclusion of black jurors from cases in which the defendant was black remained widespread. This was so in spite of *Swain's* warning that the Equal Protection Clause prohibits prosecutors from using the challenges in a racially discriminatory manner. Batson v. Kentucky, 476 U.S. at 101 (White, J., concurring).

[29] 476 U.S. at 96.

[30] *Id.* at 97.

[31] *Id.* at 98. The Supreme Court emphasized that while this ruling limited the peremptory challenge, the neutral explanation given "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97.

See Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, *supra* note 28, for an analysis and interpretation of this decision. The author of the Note concludes that the Batson v. Kentucky test does not completely protect a defendant from discriminatory peremptory challenges because the decision: (1) is limited to instances in which the challenged juror and the defendant are of the same race; (2) is limited to instances

In addition to reversing a portion of *Swain*, the United States Supreme Court in *Batson v. Kentucky* extended *Swain* in one respect. While reaffirming that the Equal Protection Clause prohibits the exclusion of blacks from the venire on the basis that blacks as a group are unqualified for jury duty, the Court further held that the Equal Protection Clause prohibits the exclusion on the assumption that blacks will be biased in a particular case because the defendant is black.[32]

Like the United States Supreme Court, the Hawaii Supreme Court also recently addressed the use of discriminatory peremptory challenges. In *State v. Batson*,[33] the Hawaii Supreme Court followed and extended the United States Supreme Court's decision in *Batson v. Kentucky*.[34] The prosecution in *State v. Batson* exercised a peremptory challenge to exclude the only black person on the venire.[35] The defendant, who was also black, contended that the State thus denied him his equal protection rights under the fourteenth amendment to the Constitution of the United States[36] and under article I, section 5 of the Hawaii Constitution.[37] Despite the defendant's request, the trial court refused to order the prosecution to state a reason for peremptorily challenging the black juror. Subsequently, the jury found the defendant guilty of second degree murder.[38]

On appeal, the Hawaii Supreme Court reversed the verdict and remanded the case for a new trial, ruling that

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in which the defendant is a racial minority; and (3) fails to provide a concise standard or procedure for implementing the rule. *Id.* at 1196, 1222.

See also Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187 (1989). The Note discusses various procedures a court could follow when examining a prosecutor's motive for the peremptory challenges. The author argues that a court should allow the defense to be present when the prosecution articulates its racially neutral explanation and that the defense should be given an opportunity to rebut these reasons before the court determines whether to allow the peremptory challenges.

[32] Batson v. Kentucky, 476 U.S. at 97.

[33] 71 Haw. 300, 788 P.2d 841 (1990).

[34] The two defendants in Batson v. Kentucky and State v. Batson are not related.

[35] 71 Haw. at 301, 788 P.2d at 841.

[36] *See supra* note 19 for the relevant text of the Equal Protection Clause.

[37] 71 Haw. at 301, 788 P.2d at 841.

HAW. CONST. art. 1, § 5 reads:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

[38] 71 Haw. at 301, 788 P.2d at 841.

> whenever the prosecution so exercises its peremptory challenges as to exclude entirely from the jury all persons who are of the same ethnical minority as the defendant, and that exclusion is challenged by the defense, there will be an inference that the exclusion was racially motivated, and the prosecutor must, to the satisfaction of the court, explain his or her challenges on a non-ethnical basis.[39]

In addition to reversing the verdict, the Hawaii Supreme Court also extended the *Batson v. Kentucky* test in a procedural aspect. The prosecution's exclusion of even one person from the jury who is of the same ethnic minority as the defendant is sufficient to raise an inference that the exclusion was racially motivated if that person constitutes the only member of the particular minority on the jury panel.[40]

Although the United States Supreme Court has imposed limits upon the prosecution's use of peremptory challenges, the Court has not addressed the question of whether the Equal Protection Clause also limits the defendant's exercise of such challenges.[41] Indeed, the United States Supreme Court in *Batson v. Kentucky* specifically declined to express its view on that issue,[42] although Chief Justice Burger noted in his dissent that such limitations upon the defendant are both "inevitable" and "rational," given the *Batson v. Kentucky* opinion.[43]

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[39] *Id.* at 302-03, 788 P.2d at 842.

[40] *Id.* at 302, 788 P.2d at 842.

[41] On October 9, 1990, the United States Supreme Court heard oral arguments in Powers v. Ohio, No. 89-5011 (U.S. Oct. 9, 1990). At issue was whether the Equal Protection Clause of the fourteenth amendment prohibits the prosecution from using peremptory challenges to remove prospective jurors whose race differs from that of the defendant. In this case, the jury convicted a white defendant of murdering two white people. During the jury selection process, the prosecution used seven of its ten peremptory challenges to excuse black jurors. Among the arguments presented to the Supreme Court, the defendant argued that racial discrimination in selecting a jury denies equal protection rights to the *juror* excluded on the basis of race. Additionally, the prosecution argued that the rule of Batson v Kentucky should apply equally to the defendant and the prosecution. *See* Raphael, *Can a white defendant in a criminal case object if the prosecutor keeps blacks off his jury?*, 1 PREVIEW 15 (1990) for a brief overview and description of the arguments. The Hawaii Supreme Court addressed and decided these very issues in State v. Levinson. By the time this article is in print, the United States Supreme Court may have decided these issues as well.

[42] 476 U.S. at 89 n.12.

[43] 476 U.S. at 125-26 (Burger, C.J., dissenting).

In a compelling and persuasive article, Professor Katherine Goldwasser refutes Chief Justice Burger's statement, arguing that the Court could rationally hold that the Equal Protection Clause limits only the prosecution in its exercise of peremptory challenges.

Furthermore, the United States Supreme Court has not addressed the issue of whether the Equal Protection Clause prohibits the exercise of peremptory challenges that discriminate on the basis of gender.[44]

In *State v. Levinson*, the Hawaii Supreme Court addressed both of these issues.

III. Facts and Decision

In *State v. Levinson*,[45] defendant Alexander S. "Boy" Carvalho, Jr. allegedly murdered his wife. The parties commenced jury selection for

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Goldwasser, *Limiting a Criminal Defendant's Use of the Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 838 (1989). Three conclusions lead Professor Goldwasser to her position. First, she argues that the defendant's use of peremptory challenges does not constitute state action — an essential element for a finding of constitutional violations. Second, she maintains that fairness in our system of criminal justice does not require complete symmetry between the defense and the prosecution. Third, despite the importance of eliminating racial discrimination in selecting juries, the criminal defendant's interest in the unlimited use of peremptory challenges is more important. While she believes that the United States Supreme Court correctly decided Batson v. Kentucky, Professor Goldwasser argues that the differences between the prosecution and the defense are "so significant" that such limitations should not be imposed on the criminal defendant. *Id.* at 811.

See Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 Colum. L. Rev. 355 (1988) for an opposing argument.

[44] While the United States Supreme Court has not addressed the issue of gender discrimination in the context of peremptory challenges, the Court has addressed this issue in other parts of the jury selection process. In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that the sixth amendment requires that a jury be selected from a representative cross section of the community, thus prohibiting a state from excluding women as a class from jury service or giving automatic exemptions from jury service based on sex. *Id.* at 530, 537. In this case, Taylor, a male defendant convicted of aggravated kidnapping and sentenced to death, had challenged the composition of the jury venire drawn for his trial, arguing that a Louisiana statute which systematically excluded women from the venire denied him his sixth amendment rights. Under the Louisiana jury-selection system, a woman could not serve on a jury unless she filed a written declaration expressing her desire to be selected for jury service. Although technically, then, women could serve on a jury, in reality very few ever did. Fifty-three percent of persons eligible in the district were female, but only ten percent of the people on the jury wheel were female. *Id.* No women were on the venire from which Taylor's jury was selected. *Id.* at 524-25.

Because the Court's decision in *Taylor* rested upon the sixth amendment's cross-section requirement and the defendant's right to a fair and impartial jury, the prosecution has no standing to object to the jury's composition based upon this case.

[45] 71 Haw. 492, 795 P.2d 845 (1990).

Carvalho's trial in the courtroom of Circuit Judge Steven H. Levinson. Neither the State nor Carvalho challenged the composition of the venire, which consisted of sixty-seven men and forty-five women.[46]

After questioning the prospective jurors concerning their ability to serve for a long trial, their exposure to pre-trial publicity, and their ability to be impartial, the parties randomly selected forty-one potential jurors whom they had passed for cause. Twelve of the forty-one were women. The State and Carvalho each received thirteen peremptory challenges. After they exercised the twenty-six challenges, the remaining fifteen members of the venire would comprise the twelve members of the jury proper and the three alternates.[47]

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[46] *Id.* at 493, 795 P.2d at 847.

[47] *Id.* This method of exercising peremptory challenges is known as the "struck-jury" system and is contrary to the method mandated by HAW. REV. STAT. § 635-26 (1988).

Under the "struck-jury" method, the parties delay exercising their peremptory challenges until after a specific number of potential jurors are passed for cause. When a number of jurors equaling the size of the jury plus the total number of peremptory challenges available to each party has been passed for cause, the parties then exercise their peremptory challenges. This method is more sophisticated, because the attorneys on each side have gathered all the available information on the potential jurors before exercising any of their challenges. However, this method also leaves a great deal of room for manipulation, and the goal of having a randomly selected jury is somewhat curtailed. (HAW. REV. STAT. § 612-1 (1988) provides that it is the "policy of this State that all persons selected for jury service be selected at random from a fair cross section of the population. . . .").

The more common method of exercising peremptory challenges, known as the sequential method, is mandated by HAW. REV. STAT. § 635-26 (1988). Under this method, prospective jurors equal to the number of jurors to eventually serve (usually twelve) are assembled in the jury box. Each party then questions the prospective jurors and exercises challenges for cause and peremptory challenges before he has the opportunity to question each potential juror. When a juror is challenged peremptorily, a new, randomly selected juror who may be less desirable, replaces the challenged juror in the juror box. Thus, an attorney must exercise his limited number of peremptory challenges cautiously. This process continues until twelve jurors have been passed for cause and each party has exercised or waived all his peremptory challenges. *See* JURY SELECTION PROCEDURES, *supra* note 10, at 146-47 for an explanation of these two methods.

See also Frederick, *Voir Dire and Peremptory Challenges*, 93 CASE & COM. 18 (1988). Frederick argues that the struck jury method is the "superior method," because it removes uncertainty from the section process and ensures that both parties have equal access to available information on the jurors. *Id.* at 24.

HAW. REV. STAT. § 635-26 (1988), *Impaneling*, in relevant part states:

> (a) At the trial of any cause requiring a jury, in any circuit court, the clerk of the court shall draw by lot such jury, to the number of twelve, from the box containing the names of such persons as have been duly summoned to attend

Carvalho excused women with his first six peremptory challenges. The State moved to strike these challenges, arguing that Carvalho was engaging in a pattern of systematic, discriminatory exclusion of women.[48] The trial court, however, refused to require Carvalho to provide a non-gender explanation for his challenges. Instead, the court took the motion under advisement, ruling that the issue could be resolved at a later time.[49] The State renewed its motion to strike the defendant's challenges when Carvalho excused yet another woman with his seventh peremptory challenge.[50] After each party had exercised its thirteen peremptory challenges, "a potential jury consisting of 11 men and 1 woman, with 3 male alternates remained. Respondent Carvalho had excused 9 women, 3 men and waived one challenge."[51]

Carvalho's attorney admitted to the trial court that he had excused some of the women solely on the basis of their gender, believing an all-male jury would be in Carvalho's best interest.[52] Furthermore, he stated that had it not been for the "chilling effect" of the State's "untimely motion," he would have exercised his last challenge to excuse the remaining female juror.[53]

Because of the lack of precedents, the trial judge denied the State's motion, but recessed the court to enable the State to petition the Hawaii Supreme Court for a writ of mandamus or prohibition to seek extraordinary relief.[54]

After considering the State's petition, the Hawaii Supreme Court ruled that the limitations imposed upon the exercise of peremptory

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> as trial jurors, and who are not excused from attendance; and if any of the twelve be challenged and set aside, the clerk shall continue to draw by lot from the box until twelve impartial jurors are obtained, when they shall be sworn as the jurors for the trial of the cause. If so directed by the court, additional jurors shall be drawn and impaneled to sit as alternate jurors.

[48] 71 Haw. at 493-94, 795 P.2d at 847.

[49] *Id.* at 494, 795 P.2d at 847.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* Carvalho's attorney thus had the ability to exclude all women from the jury under the struck-jury method of exercising peremptory challenges. Had the sequential method been used, as mandated by HAW. REV. STAT. § 635-26 (1988), he may have been more hesitant to exclude each woman, because he would not know who would replace her in the jury box. Less room would exist for manipulation. *See supra* note 47 and accompanying text.

[54] 71 Haw. at 494, 795 P.2d at 847.

challenges apply equally to the prosecution and the defense.[55] The court, quoting the United States Supreme Court, stated, "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' "[56] The Hawaii Supreme Court further noted that just as the defendant has civil rights, so too do the people of the State of Hawaii. Thus, logic mandated that the system should impose the same limitations upon both parties in a criminal trial.[57] Otherwise, protection afforded by the judicial system would be "one-sided."[58]

To support its decision, the Hawaii Supreme Court also relied upon Ethical Consideration 7-19 of the Hawaii Code of Professional Responsibility, which requires an attorney to represent his client zealously within the bounds of the law.[59] The court reasoned that by excluding

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[55] *Id.* at 499, 795 P.2d at 849.

[56] *Id.* at 495, 795 P.2d at 848 (quoting Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); Batson v. Kentucky 476 U.S. at 126 (Burger, C.J., dissenting); Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

Professor Goldwasser argues that courts have mistakenly read and applied this passage from Hayes v. Missouri. (*See supra* note 15 for a description of the *Hayes* decision.). In *Hayes*, she maintains, the Court neither addressed nor considered whether the Equal Protection Clause affords the prosecution constitutional rights. Rather, the Court only considered the issue of whether the Equal Protection Clause permitted the state to prescribe a different number of peremptory challenges for capital cases in cities as opposed to rural areas.

Professor Goldwasser also maintains that affording the defendant unlimited use of peremptory challenges would not be one-sided or unfair, as symmetry has never been the hallmark of fairness in our criminal judicial system. To the contrary, in recognition of " '[t]he awesome investigative and prosecutorial powers of the government,' " the criminal defendant enjoys a number of constitutional rights that are not afforded the prosecution. *See* Goldwasser, *supra* note 43, at 821-26 (quoting Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part)).

[57] 71 Haw. at 496-97, 795 P.2d at 848.

[58] *Id.*, 795 P.2d at 848.

[59] *Id.* at 497, 795 P.2d at 848.

HAWAII CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1990) states:

> Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

women from the jury, Carvalho's counsel was attempting to obtain a partial, rather than impartial, jury. In the court's opinion, these efforts of Carvalho's counsel did not constitute representation "within the bounds of the law."[60]

More importantly, however, the Hawaii Supreme Court relied heavily upon the analysis of the Court of Appeals of the State of New York in *People v. Kern*[61] to support its ruling that the Hawaii Constitution prohibited such discrimination.[62] The Hawaii Supreme Court extensively quoted from and cited to *Kern*, reasoning that because jury service is a civil right established by the Hawaii State Constitution and a state statute, "[r]acial discrimination in the selection of juries harms the excluded juror by denying this opportunity to participate in the administration of justice, and it harms society by impairing the integrity of the criminal trial process."[63] While a citizen does not have a right to sit on a particular trial jury, the Hawaii Supreme Court noted that the Hawaii legislature, like the New York legislature, had declared that a citizen has a right to an opportunity to do so.[64] The Hawaii legislature had mandated that citizens shall not be excluded from jury service on account of "race, color, religion, sex, national origin, economic status,

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[60] 71 Haw. at 497, 795 P.2d at 849.

[61] 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990).

[62] 71 Haw. at 497-98, 795 P.2d at 849 ("We agree with the reasoning of the Court of Appeals of the State of New York in People v. Kern. . . .").

The New York Court of Appeals, like the Hawaii Supreme Court, had addressed the issue of whether the state constitution prohibited the defendant as well as the prosecution from using racially discriminatory peremptory challenges. In other words, the issue was whether the rule of Batson v. Kentucky should apply equally to the defendant and the State. *Kern*, 555 N.Y.S.2d at 653, 554 N.E.2d at 1241. Both the Hawaii Supreme Court and the New York Court of Appeals found that their respective state constitutions prohibited such discrimination, which denied the prospective juror his equal protection rights. *Id.*; *Levinson*, 71 Haw. at 498-99, 795 P.2d at 850.

[63] *Levinson*, 71 Haw. at 498, 795 P.2d at 849 (quoting *Kern*, 555 N.Y.S.2d at 654, 554 N.E.2d at 1242 (citing Batson v. Kentucky, 476 U.S. at 87-88 and other cases cited therein)).

[64] 71 Haw. at 498, 795 P.2d at 849 (citing *Kern*, 555 N.Y.S.2d at 654-55, 554 N.E.2d at 1242-43.)

HAW. REV. STAT. § 612-1 (1988) provides:

> It is the policy of this State that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this State and an obligation to serve as jurors when summoned for that purpose.

or on account of a physical handicap."[65] Because the Hawaii Constitution guarantees the privileges of citizenship, it is unconstitutional for either the prosecution or the defense to deny a citizen the right to serve on a jury on the basis of race, religion, sex or ancestry.[66]

Additionally, both the Hawaii Supreme Court and the New York Court of Appeals found that the racially discriminatory use of peremptory challenges violated the Equal Protection Clause of their respective state constitutions.[67] To reach this conclusion, both courts addressed the issue of whether the defendant's exercise of peremptory challenges constitutes state action. Because the Hawaii Supreme Court adopted the New York Court of Appeals reasoning, an examination of the New York opinion sheds light on the Hawaii ruling.

In ruling that the Equal Protection Clause of the New York State Constitution prohibited the defendant from exercising his peremptory challenges in a racially discriminatory manner, the New York Court of Appeals noted that the Equal Protection Clause is directed at state action.[68] Because the State is "inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges,"[69] the court of appeals found that judicial enforcement of a racially discriminatory peremptory challenge by the defense constituted "state action" for purposes of the Equal Protection Clause.[70]

> Justice would indeed be blind if it failed to recognize that the [trial] court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a [trial] judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, 'Ms. X, you are excused.'[71]

In reaching this conclusion, the New York Court of Appeals noted that in *Batson v. Kentucky*[72] the United States Supreme Court recognized

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[65] HAW. REV. STAT. § 612-2 (1988). Section 612-2 states, "[a] citizen shall not be excluded from jury service in this State on account of race, color, religion, sex, national origin, economic status, or on account of a physical handicap except as provided in section 612-4(3)."

[66] 71 Haw. at 499, 795 P.2d at 849.

[67] *Id.*

[68] *Kern*, 555 N.Y.S.2d at 655, 554 N.E.2d at 1243.

[69] *Id.* at 657, 554 N.E.2d at 1245.

[70] *Id.* at 658, 554 N.E.2d at 1246.

[71] *Id.* at 657-58, 554 N.E.2d at 1245 (quoting Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1313 (5th Cir. 1988), *on reh.*, 895 F.2d 218 (5th Cir. 1990)).

[72] 476 U.S. 79 (1986). *See supra* notes 26-32 and accompanying text.

that a juror excluded on the basis of race was also denied equal protection rights.[73] The court of appeals further reasoned that discriminatory jury selection harms the entire community and "undermine[s] public confidence in the fairness of our system of justice."[74] The prosecution can thus assert the rights of the excluded juror as well as those of the community at large when the defense uses his peremptory challenges in a racially discriminatory manner.[75] The court therefore concluded that the *Batson v. Kentucky* test applied to the defense as well as the prosecution.

Similarly in *Levinson*, the Hawaii Supreme Court found that judicial enforcement of peremptory challenges constitutes state action in the State of Hawaii.[76] Because peremptory challenges are creatures of statute,[77] and it is the judge who excuses the juror, the court reasoned that a defendant's peremptory challenges are converted into state action.[78]

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[73] *Kern*, 555 N.Y.S.2d at 655, 554 N.E.2d at 1243 (citing Batson v. Kentucky, 476 U.S. at 87-88 (1986)).

[74] *Id.* (quoting *Batson*, 476 U.S. at 87-88).

[75] *Id.* at 656, 554 N.E.2d at 1243.

[76] *Levinson*, 71 Haw. at 499, 795 P.2d at 849 (1990).

[77] HAW. REV. STAT. § 635-30 (1988) states:

> In criminal cases, if the offense charged is punishable by life imprisonment, each side is entitled to twelve peremptory challenges. If there are two or more defendants jointly put on trial for such an offense, each of the defendants shall be allowed six challenge. In all other criminal trials by jury each side is entitled to three peremptory challenges. If there are two or more defendants jointly put on trial for such an offense, each of the defendants shall be allowed two challenges. In all cases the State shall be allowed as many challenges as are allowed to all defendants.

[78] *Levinson*, 71 Haw. at 499, 795 P.2d at 849.

Although the Hawaii Supreme Court did not cite to Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the United States Supreme Court in that case enunciated a two prong test to determine whether an individual's actions constitute "state action." To find that the deprivation of a right is "fairly attributable" to the State:

> [(1) T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.
>
> . . . .
>
> [(2) T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937. (In *Lugar* the Court found that a private creditor's prejudgment attachment of its debtor's property constituted state action, because he obtained significant official aid provided for by statute).

The Ninth Circuit Court of Appeals in a recent decision found, as did the Hawaii

The Equal Protection Clause of the Constitution of the State of Hawaii prohibits the state from discriminating against the excused juror on the basis of race.[79] The Hawaii Supreme Court extended this holding to

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Supreme Court and the New York Court of Appeals, that peremptory challenges exercised by a criminal defendant constitutes state action. United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990). The Ninth Circuit Court of Appeals first noted that the right to a peremptory challenge is a right created by the State, through statutory enactment. *Id.* at 1423. Secondly, the court compared the defendant's exercise of peremptory challenges with other state action cases and concluded that a defendant exercising peremptory challenges is a state actor because he makes " 'use of state procedures with the overt, significant assistance of state officials.' " *Id.* at 1424 (quoting Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 486 (1988)). In reaching this conclusion, the Ninth Circuit Court of Appeals analyzed and relied on: Shelley v. Kraemer, 334 U.S. 1 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988); and Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

The Supreme Court of New York reached the opposite conclusion in Holtzman v. Supreme Court, 526 N.Y.S.2d 892 (Sup. 1988), which was decided before the New York Court of Appeals resolved the issue in People v. Kern, 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990). The Supreme Court of New York in *Holtzman* found that while the legislature and the courts permitted the defense counsel to exercise peremptory challenges, neither the legislature nor the courts compelled the defense counsel to exercise the peremptory challenges. Thus the court held that the State could not be held responsible for the manner in which the defendant exercised his challenges, simply because the judges are required to grant the peremptory challenges. 526 N.Y.S.2d at 898. The defendant's exercise of peremptory challenges failed the two-prong test enunciated in *Lugar* and did not constitute state action. *Id.* at 898. In reaching its decision, the Supreme Court of New York relied upon Polk Co. v. Dodson, 454 U.S. 312 (1982), which held that "a public defender does not act 'under color of state law' when performing a lawyer's traditional functions as counsel to a defendant in a state criminal proceeding." *Id.* (quoting Polk Co. v. Dodson, 454 U.S. 312, 325 (1982)). People v. Kern has since overruled Holtzman v. Supreme Court.

Professor Goldwasser reaches the same conclusion as the Supreme Court of New York. She argues that the mere fact that a defendant exercises a state-created right does not render the conduct state action. Otherwise, "everything that occurred in the context of a lawsuit, even between two private parties, could give rise to a constitutional claim." Goldwasser, *supra* note 43, at 816. Additionally, she distinguishes a defendant's peremptory challenges from the facts of *Lugar*, by noting that when a judge excuses a juror, the judge is acting as a mere conduit for the defense. The judge is not giving offical aid to the defense in its selection of which juror to excuse. Professor Goldwasser also points out that it is "difficult to imagine anyone less a 'state actor' than a criminal defendant." *Id.* at 816-20.

[79] 71 Haw. at 499, 795 P.2d at 849.

The dissent in *Levinson*, citing to Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989), vigorously argued that the State of Hawaii, through the

gender discrimination,[80] noting that the Hawaii Constitution expressly prohibits discrimination on the basis of gender.[81] Excluding women jurors solely on this basis is therefore unconstitutional.[82]

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prosecution, lacked standing to raise the issue of discrimination. The dissent argued that because the State of Hawaii does not serve on the jury, is not the object of gender discrimination, and has not suffered injury, and because one cannot vicariously assert constitutional rights, the State has not obtained the requisite standing. 71 Haw. at 501-02, 795 P.2d at 850-51 (Wakatsuki, J., dissenting).

However, in Holland v. Illinois, 110 S.Ct. 803 (1990), the United States Supreme Court ruled that its opinion in the Batson v. Kentucky decision implied that the defendant had standing to object to racially discriminatory peremptory challenges exercised by the prosecution, which violated the excused jurors equal protection rights and harmed the interests of the community. *Id.* at 811-12 (Kennedy, J. concurring); 813-14 (Marshall, J. dissenting); 821-22 (Stevens, J. dissenting).

In a recent decision, the Ninth Circuit Court of Appeals noted that the recognition of third-party standing in Holland v. Illinois would logically extend to the United States when the defendant exercised discriminatory peremptory challenges. United States v. De Gross, 913 F.2d 1417, 1420 n.5 (9th Cir. 1990). The Ninth Circuit Court of Appeals ruled that the United States government, through the prosecution, does have standing to object to equal protection violations of the excluded juror. *Id.* at 1420. In reaching this conclusion, the court first noted that the government's interest in protecting a citizen's, including a juror's, rights and its interest in maintaining a justice system that is perceived as fair and impartial will ensure that the prosecution will defend a juror's rights. Secondly, the court noted that a juror would find it difficult to assert his equal protection rights, either because of lack of an incentive to initiate a costly and lengthy process, lack of an effective remedy, or an unawareness that he has been discriminated against. Thirdly, violation of a juror's equal protection rights "injures the United States by impugning the jury system." *Id.* at 1420-21.

Although the majority opinion in *Levinson* did not address this issue, the same arguments in *Holland* and *De Gross* may apply. While the Hawaii Supreme Court's opinion in State v. Batson is somewhat cryptic, the court seems to focus on the *defendant's* equal protection rights, rather than the excused *juror's* equal protection rights. State v. Batson, 71 Haw. 300, 788 P.2d 841 (1990). However, even if one cannot find implied third-party standing for Hawaii constitutional violations in State v. Batson, the third-party standing for violations to the fourteenth amendment to the United States Constitution implied in Batson v. Kentucky and recognized in Holland v. Illinois applies.

[80] *Levinson*, 71 Haw. at 499, 795 P.2d at 849-50. The Hawaii Supreme Court also extended this holding to discrimination on the basis of religion and ancestry. *Id.*

[81] Unlike the United States Constitution, the Constitution of the State of Hawaii expressly forbids discrimination on the basis of sex in the Due Process and Equal Protection Clause as well as in a separate Equal Rights Amendment, thus elevating gender to the same classification as race for equal protection analysis. *See supra* note 37 for the text of the Due Process and Equal Protection Clause.

HAW. CONST. art. 1, § 3 (the Equal Rights Amendment) provides, "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex.

The Hawaii Supreme Court in *Levinson* thus extended the ruling of *State v. Batson* to impose limitations upon the exercise of peremptory

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The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."

See Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978) and State v. Rivera 62 Haw. 120, 612 P.2d 526 (1980) for a discussion of the test employed in determining the consitutionality of gender classifications under the Hawaii State Constitution.

Although the United States Supreme Court in Batson v. Kentucky specifically limited its holding to racial discrimination, Chief Justice Burger, in his dissent, feared that under conventional equal protection principles, one could "object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry, or profession." Batson v. Kentucky, 476 U.S. 79 at 124 (1986) (Burger, C.J., dissenting) (citations omitted).

Additionally, the Ninth Circuit Court of Appeals in a recent decision has ruled that peremptory challenges based on gender, like those based on race, are unconstitutional. In ruling that gender-based challenges are not substantially related to the government's ends of achieving an impartial jury, the court noted that such challenges are based upon false assumptions that members of a particular sex are either unqualified or unable to consider a case impartially. The court also expressed concern that discrimination on the basis of gender may undermine public confidence in the judicial system. United States v. De Gross, 913 F.2d 1417, 1422 (9th Cir. 1990).

But see United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988). In this case, the Fourth Circuit Court of Appeals arrived at the opposite conclusion and ruled that Batson v. Kentucky applied only to peremptory challenges based on race and should not be extended to those based on gender.

[82] *Levinson*, 71 Haw. at 499, 795 P.2d at 849-50.

The dissent in *Levinson* points out two inconsistencies between the majority's opinion in this case and the opinion in State v. Batson. First, the dissent maintains that the court is placing a more difficult burden on the defense than on the prosecution. Under the State v. Batson test, the defendant can only demand an explanation when the prosecution excludes all members of a minority group to which the defendant himself belongs. The defendant may not demand an explanation if the prosecution excludes all members of a *different* minority group. However, if the defendant excludes those same members that the prosecution excluded, the prosecution may demand an explanation. *Levinson*, 71 Haw. at 504-05, 795 P.2d at 851-52 (Wakatsuki, J., dissenting). For example, if the defendant were black and the prosecution excluded from the jury all persons who were of Chinese ancestry, the defendant could not demand an explanation under State v. Batson, because he does not belong to that minority group. However, if that same black defendant were to exclude from the jury all persons who were of Chinese ancestry, the prosecution could demand an explanation under *Levinson*. The defendant thus has a more difficult burden. In *Levinson*, the prosecution could demand an explanation when the male defendant chose to exclude women from the jury. State v. Batson suggests that this same male defendant would not be able to demand an explanation if the prosecution had exercised its peremptory challenges to exclude all the

challenges by the defense. The same evidentiary standards outlined in *State v. Batson* to establish discrimination apply: when a prosecutor establishes a prima facie case of discrimination on the basis of race, religion, sex or ancestry in the exercise of peremptory challenges, the defendant is required to give a non-discriminatory explanation of the challenge, which satisfies the court that the challenge is not constitutionally prohibited.[83]

In *Levinson*, the Hawaii Supreme Court ordered the trial court to ascertain whether the potential jurors in the action were aware of the proceedings and the issues raised in the petition. If the jurors were aware, the trial court was to grant a mistrial and call a new venire. If the jurors were not aware, the trial court was to give the defendant an opportunity to provide a gender neutral basis with respect to each of his peremptory challenges of women. The trial court could then determine whether or not to excuse those challenged jurors. The defense was to receive an additional peremptory challenge for each challenge denied because of gender bias.[84]

IV. Commentary and Conclusion

While the Hawaii Supreme Court's conclusion in *Levinson* may ultimately be sound and grounded in legal precedent, the decision has some troubling aspects. The most difficult hurdle to overcome in determining

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women from the jury. This raises constitutional questions involving peremptory challenges that the United States Supreme Court will address this term. *See supra* note 41. Previous cases may indicate how the Court will ultimately rule. *See* Peters v. Kiff, 407 U.S. 493 (1972) (holding that a white man had standing to challenge the systematic exclusion of blacks from jury service and that he had been deprived his federal rights); Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (In ruling that a male defendant's sixth amendment rights were violated when women were excluded from jury service, Justice White, writing for the majority stated, "Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service.").

The dissent in *Levinson* also noted that under the State v. Batson test, the defendant could demand an explanation from the prosecution only when the defendant excluded all members of the cognizable racial group. In *Levinson*, although not all the women jurors were removed, the Hawaii Supreme Court still required the defendant to provide a neutral explanation. 71 Haw. at 504-05, 795 P.2d at 850-52 (Wakatsuki, J., dissenting). Unfortunately, the Hawaii Supreme Court did not address this inconsistency and the law is now unclear.

[83] 71 Haw. at 499, 795 P.2d at 850.

[84] *Id.* at 500, 795 P.2d at 850.

whether the decision is sound lies in finding that the defense's use of peremptory challenges constitutes state action.

Under the *Lugar*[85] test to determine whether a private individual's actions constitute state action, it is somewhat absurd to hold that the criminal defendant may be fairly said to be a state actor when the party *directly* opposing him is the State itself. To find that the defendant has obtained significant aid from a state official is almost as troubling. A judge plays *no* role at all, let alone a *significant* role in determining which potential jurors the defense should peremptorily challenge. Traditionally, the defense need not give a reason for the exercise of this challenge. The judge therefore plays no part in deciding whether or not to grant peremptory challenges, but instead merely acts as a conduit.[86] As noted earlier, however, various courts and many commentators have found that the court's role in enforcing the peremptory challenges *does* rise to a level of involvement constituting state action. Ultimately one's view and interpretation of the level of state involvement necessary to constitute state action will probably be influenced by the result one wishes to obtain, rather than by logic alone. An interpretation can go either way.

Once state action is established, the Hawaii Supreme Court's decision to impose the same limitations on both the defense and the prosecution is correct. Some authorities note, however, that peremptory challenges in criminal trials have "long been recognized primarily as a device to protect *defendants*."[87] Early statutes in the colonial state courts in North America granted peremptory challenges only to defendants.[88] Both New York and Virginia, for example, specifically denied the prosecution any peremptory challenges.[89] Even after states began allowing the prosecution peremptory challenges, they severely limited the number.[90] The argument goes, therefore, that against this background of preferential treatment for the defense in the exercise of peremptory challenges and given the principle that defendants should be afforded wide latitude in conducting a defense, the defendant should be allowed to exercise peremptory challenges without any of the limitations that are imposed upon the prosecution.[91]

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[85] Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The *Lugar* test is set forth in *supra* note 78.

[86] *See supra* note 78 for Professor Goldwasser's argument.

[87] *Swain*, 380 U.S. at 242 (Goldberg, J., dissenting) (emphasis in original).

[88] J. VAN DYKE, JURY SELECTION PROCEDURES, *supra* note 10, at 148.

[89] *Id.*

[90] *Id.* at 149.

[91] Goldwasser, *supra* note 43, at 826-33.

Despite this history of peremptory challenges and their recognized importance, the Constitution of the United States does not guarantee them.[92] Thus, when a defendant's peremptory challenges conflict with rights that *are* guaranteed — the equal protection rights of the prospective jurors — the latter must always prevail.[93] A defendant's use of peremptory challenges, like the prosecution's use of such challenges, is limited.

In reaching this conclusion, however, the Hawaii Supreme Court's decision in *Levinson* is inconsistent with its decision in *State v. Batson,*[94] as the dissent aptly points out.[95] In *State v. Batson*, the Hawaii Supreme Court held that the prosecution must explain its peremptory challenges only when it excludes all prospective jurors who are of the same ethnical minority as the defendant.[96] Now that the court in *Levinson* has recognized that prospective jurors have equal protection rights, the prosecution should also be required to give a non-discriminatory explanation when the defense establishes a prima facie case of discrimination on the basis of race, religion, sex or ancestry in the exercise of peremptory challenges. The prosecution should be required to do so without regard to whether the prospective jurors are of the same ethnical minority as the defendant or to the number of jurors challenged.[97]

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[92] "[T]he right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial." Batson v. Kentucky, 476 U.S. 79, 108 (Marshall, J., concurring) (citing Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); Stilson v. United States, 250 U.S. 583, 586 (1919)).

[93] On the other hand, if the defendant's exercise of peremptory challenges rose to a level of constitutional magnitude, the defendant's right to exercise peremptory challenges without any explanation should prevail over the prospective juror's equal protection rights. When two constitutional rights clash, it is necessary to balance the two. A criminal defendant, facing the possibility of imprisonment and confronting the awesome power of the state, should have the widest possible leeway in conducting his defense. His consitutional rights, in that situation, should outweigh a citizen's right to sit on a jury.

[94] 71 Haw. 300, 788 P.2d 841 (1990). *See supra* notes 33-40 and accompanying text.

[95] *See supra* note 82.

[96] *See supra* note 39 and accompanying text.

[97] A proper reading of the two cases may be that *Levinson* modified the court's holding in State v. Batson or that one should not take the Hawaii's Supreme Court's words literally in State v. Batson when it states:

> The rule of law, which we adopt for future cases, is that whenever the prosecution so exercises its peremptory challenges as to exclude *entirely* from the jury *all* persons who are of the *same ethnical minority as the defendant*, and that exclusion is challenged by the defense, there will be an inference that the exclusion was racially motivated, and the prosecutor must, to the satisfaction of the court, explain his or her challenges on a non-ethnical basis.

71 Haw. 300, 302, 788 P.2d 841, 842 (1990) (emphasis added).

The *Levinson* decision (as well as the *State v. Batson* decision) will impose administrative difficulties. As the dissent in *Levinson* notes, the protracted voir dire may extend the length and increase the cost of trial; the accusations of discrimination may escalate the animosity between the parties at trial; and peripheral issues may intrude into the trial.[98] Additionally, both the prosecution and the defense may find it difficult to prove that the other party exercised its peremptory challenge in a constitutionally impermissible manner. As noted earlier, the neutral explanation given "need not rise to the level justifying exercise of a challenge for cause."[99] Any astute attorney should find it fairly easy to come forward with a neutral explanation to justify the challenge, and a court may find it difficult to discern a party's true motives.

Because of the ease with which an attorney can provide a neutral explanation and because of the difficulty in discerning a party's motives, Justice Marshall favored banning peremptory challenges altogether.[100] Few would advocate such an extreme position, nor is the court likely to ban peremptory challenges in the near future, given the longstanding recognition of their importance in our criminal justice system. One authority on the subject, Professor Jon M. Van Dyke,[101] offers a unique procedural solution. Professor Van Dyke maintains that the struck-jury system and the large number of peremptory challenges are the "culprits."[102] In his view, the struck-jury system leaves room for manipulation so that the jury itself is no longer representative of a fair cross-section of the community. This in itself violates the equal protection rights of the defendant and the prospective jurors. Additionally, a large number of peremptory challenges "ensures that anyone with any sense of uniqueness will be removed from the final jury panel. . . ."[103]

To remedy these problems, Professor Van Dyke argues that the defendant should be allowed a limited number of peremptory challenges, three in the usual case, and that he should be allowed to exercise these in the traditional fashion, that is, with no explanation at all. The prosecution, on the other hand, should always be given fewer peremptory

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[98] *Levinson*, 71 Haw. at 505, 795 P.2d at 853 (Wakatsuki, J., dissenting).

[99] Batson v. Kentucky, 476 U.S. 79, 98 (1986). *See supra* note 31.

[100] Batson v. Kentucky, 476 U.S. 79, at 102-08 (1986) (Marshall, J., concurring). *See supra* note 13.

[101] Professor Jon M. Van Dyke is a Professor of Law, University of Hawaii at Manoa. B.A. 1964, Yale University; J.D. 1967, Harvard University.

[102] Van Dyke, *Peremptory Challenges Revisited, supra* note 10.

[103] *Id.*

challenges than the defense and should continue to be limited by the *Batson v. Kentucky* rule, not only because one expects the government "to bend over backward to be fair," but also because historically the peremptory challenge was a right of the accused.[104]

While Professor Van Dyke's solution is appealing because it limits some of the administrative difficulties imposed by the *State v. Batson* and *Levinson* decisions, it fails to address the violations of the excused juror's constitutional rights. As long as the Hawaii Supreme Court recognizes that jurors have the constitutional right to an opportunity for jury service and that the defendant's use of peremptory challenges constitutes state action, both the defendant and the prosecution should be limited in the exercise of such challenges. Additionally, imposing this limitation on both the defense and the prosecution boosts public confidence that our system of justice is indeed fair and evenhanded.[105] These cases change the traditional nature of peremptory challenges, and the Hawaii courts may face administrative difficulties in applying the decisions, but no better solution exists. Requiring a party to provide a neutral explanation once a prima facie case of discrimination is established is the best solution to balance the necessity of protecting prospective jurors' equal protection rights against the importance of maintaining peremptory challenges.[106]

Ann-Marie McKittrick Grundhauser

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[104] *Id.*

[105] *See Levinson*, 71 Haw. 492, 496-97, 795 P.2d 845, 848 (1990) ("The public often perceives the protection which our judicial system affords defendants as being one-sided, and complains that, seemingly, the defendant has rights, while the citizens, as a whole, have none.").

See also Kern, 555 N.Y.S.2d 647, 654, 554 N.E.2d 1235, 1243 (1990) (citations omitted) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

[106] After the *Levinson* decision, defendant Carvalho was ultimately tried by a jury consisting of six women and six men. To the prosecution's disappointment, the jury found Carvalho guilty of the lesser charge of manslaughter rather than second-degree murder. The Honolulu Advertiser, Feb. 9, 1991, at A1, col. 2; Honolulu Star-Bulletin, Feb. 9, 1991, at A3, col. 2. The defendant, in effect, "won." Ironically, the presence of six women on the jury demonstrates that an all-male jury was not necessarily in the best interest of Carvalho, contrary to the belief of his attorney. *See supra* note 52 and accompanying text. A representative cross-section of the community served the best interests of the defendant.

An Analysis of Hawai'i's Superfund Bill, 1990*

One of the most controversial pieces of legislation to become Hawai'i law in 1990 was, what has popularly been called, the State Superfund Bill. Although discussion of the bill took place in the wake of an oil spill off Barbers Point,[1] the bill barely made it out of the Legislature.[2] Despite the Governor's touting the original measure as a priority at the start of the 1990 Legislative Session[3]—and hailing its passage at the State Democratic Convention[4]—he nearly vetoed it.[5] Both the politics of personalities and the competition between ideologies and interests shaped this very important, yet flawed bill.

A careful examination of the bill reveals what was accomplished. A starting point for such an analysis must be the necessity of a superfund law, based on the void left by the national and state laws in effect

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* As this article went to press, imminent and substantial amendments to the Superfund law were being posed by the 1991 Legislature. As such, some of the issues raised in this article may well become moot. *See infra* note 136.

[1] Honolulu Advertiser, Feb. 14, 1990, at C6. 16,800 gallons of oil spilled on January 29, 1990. Also, in the course of legislative debate, 500 gallons of fuel oil were found to have leaked on Nimitz Highway from a Hawaiian Electric pipeline. Honolulu Star Bulletin, March 29, 1990, at A4.

[2] Tummons, *State Superfund Bill Passes, Warts And All*, 1 ENVIRONMENT HAWAI'I 1 (July 1990). For more information regarding the difficulties the bill had in the Legislature, *See* Tummons, *NARS Bill—Still, No Comment*, 1 ENVIRONMENT HAWAI'I 6 (July 1990); Manuel, *Nasty Negotiations Cut Off Cleanup Bill*, Honolulu Star Bulletin, March 27, 1990, at B1.

[3] In his state-of-the-state address Governor John Waihe'e declared: "I propose a tougher environmental emergency response law to protect every living thing from the harm of oil or chemical spills. Parties who cause spills must be held responsible for reporting them and the cost of cleanup." 1990 SENATE JOURNAL, at 50.

[4] Address to the State Democratic Convention, May 27, 1990.

[5] "Waihe'e said the toughest decision he had to make during veto deliberations this week was deciding to sign the so-called 'environmental superfund bill.'" Honolulu Advertiser, June 28, 1990, at A3.

prior to the 1990 Legislative Session. The State Superfund Bill wrought significant changes to the law in Hawai'i. Comparisons of the new law with the old and with federal law reveal the impact of these changes and important flaws in the law.

I. The Necessity of the State Superfund Bill

A. Federal Legislation

In response to the catastrophe at Love Canal and to enormous public pressure,[6] Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980.[7] In 1986 this act was amended by the Superfund Amendments and Reauthorization Act (SARA).[8] These acts authorize the Environmental Protection Agency (EPA) to ensure that hazardous waste sites are cleaned up and to seek reimbursement for cleanup costs and damages from responsible parties.[9] In addition, the creation of a "superfund" provides the government with resources to clean up sites, rather than having to wait for the responsible parties to act.[10]

While CERCLA addressed problems of national importance, it did not provide the states with sufficient federal resources to protect them from the release of hazardous substances. For example, the Alaska Oil Spill Commission concluded that the state's resources and expertise are more readily accessible in the crucial early hours of a spill than those of the federal government.[11] The national government may not be able to adequately respond to an emergency spill. Before passage of Hawai'i's State Superfund Bill, Senator Donna Ikeda noted that CERCLA does not

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[6] According to former EPA administrator Douglas M. Costle, "Love Canal became so powerful in the national consciousness we were able to pass the Superfund bill even after Carter was defeated, and that's an extraordinary action to do in a 'lame duck' administration." [16 Current Developments] Env't Rep. (BNA) 7 May 3, 1985. *See also* 126 Cong. Rec. 30,930 (1980). After declaring that "Our Nation cannot afford more Love Canals," Senator Randolf illustrated the scope of the problem, referring to various hazardous waste releases throughout the country.

[7] 42 U.S.C. §§ 9601-9657 (1982) (amended 1986).

[8] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[9] 42 U.S.C. §§ 9604, 9606, 9607 (1988).

[10] 42 U.S.C. § 9611 (1988).

[11] Alaska Oil Spill Commission, Spill: The Wreck of the Exxon Valdez; Implications for Safe Marine Transportation, 42 (Jan. 1990).

> delegate responsibility for local implementation of the law to individual states. . . . Furthermore, there is no local federal authority for implementation of CERCLA. Emergency response to an environmental release of a hazardous material must be mobilized from EPA's Region 9 Office in San Francisco.[12]

Not only would a state law provide local authority to respond to emergency spills, but it would also allow the state to clean up sites which the federal government has no plans to clean up. For example, CERCLA does not provide authority to clean up oil spills on land.[13] Furthermore, the federal government cleans up only high priority sites. The prioritizing gives the EPA the authority to clean up hundreds of sites—but leaves thousands untouched.[14] A state superfund bill authorizes cleanup of those sites which the federal government has not made a priority.[15]

B. Early State Legislation

Primarily in response to the need to address emergencies, the Hawai'i State Legislature created the Environmental Emergency Response chapter (EER) in 1988.[16] Although the 1990 bill was called the State Superfund Bill, it was the EER which actually created the superfund. The purpose of the EER was to:

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[12] Comments of Senator Ikeda, Chair of the Committee to which the State Superfund Bill had been referred, before the final Senate vote. 1990 SENATE JOURNAL, at 607.

[13] CERCLA's definitions of "hazardous substance" and "pollutant or contaminant" exclude petroleum, including crude oil, thereby precluding cleanup actions pursuant to CERCLA. U.S.C. § 9601 (14), (33) (1988).

[14] In February of 1991, the EPA announced that it had dropped six pesticide contaminated wells on O'ahu from consideration for cleanup. While the wells were not placed on the priority list for a number of reasons, Bruce Anderson, deputy state health director for environmental health, pointed out that other western states have thousands of wells tainted by pesticides at much higher levels. Honolulu Advertiser, February 9, 1991, at A3. The federal government's announcement that it will not fund a cleanup leaves the responsibility with the state.

[15] Another example of the problem the state faces was the discovery in July of 1990 of 1,000 waste-oil barrels at nine sites in the Maili area. 400 barrels were leaking badly. Three thousand gallons of oil were contaminated with chlorinated solvents or other flammable compounds. Health Officials cautioned that the oil could contaminate drinking water, and that it could contain benzene, a carcinogen, and lead, which can cause mental retardation. Honolulu Advertiser, Nov. 21, 1990 at A3.

[16] HAW. REV. STAT. § 128D (Supp. 1989).

> establish an environmental emergency response revolving fund within the department of health to provide the department with the resources and authority to: (1) perform emergency removal actions of hazardous substances; (2) require responsible parties to perform necessary removal or remedial actions; (3) recover costs incurred by the department in the course of performing any necessary actions; and (4) develop a contingency plan for the cleanup of hazardous sites in the State.[17]

The scope of this act is evidenced in the broad definition of "hazardous substance." The category of substances triggering cleanup orders and liability included anything that posed a present or potential hazard to human health, property or the environment when improperly managed; or that significantly contributed to irreversible or incapacitating illness.[18] Thus, the act potentially applied to such substances as oil, pesticides and PCBs.

The EER gave the director of the Department of Health ("the department") broad powers to act whenever the public or the environment faced an imminent or substantial endangerment from a release or a threatened release of a hazardous substance.[19] In order to expedite cleanups, the director was authorized to: 1) issue administrative orders to responsible parties to engage in cleanup activities; 2) investigate releases; and 3) use the fund to engage in preliminary cleanup activities.[20]

These broad powers to expedite cleanups were somewhat restricted by the significant distinction between "removal" actions and "remedial" ones. Removal actions were characterized by their stopgap nature in preventing and mitigating damage, while remedial actions were those of a more permanent nature.[21] Under the EER, the director was given

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[17] Act 148, 1988 Haw. Sess. Laws 248.

[18] HAW. REV. STAT. § 128D-1 (Supp. 1989). In this respect, Hawai'i's law is far broader than CERCLA. Hazardous substances under the federal scheme are actually designated on specific lists. 42 U.S.C. § 9601(14) (1988). Prior to the 1990 State Superfund bill, and arguably afterwards, Hawai'i's law encompassed a broader range of substances. *See infra* notes 95-114 and accompanying text.

[19] HAW. REV. STAT. § 128D-4 (Supp. 1989). The federal courts have interpreted similar language in CERCLA broadly. Immediate, irreparable harm need not be shown; instead, all that is required is a reasonable cause for concern that someone or something may be exposed to a risk of harm. *See* U.S. v. Conservation Chemical Co., 619 F. Supp. 162, 193-94 (Mo. 1985); B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (Conn. 1988).

[20] HAW. REV. STAT. § 128D-4 (Supp. 1989).

[21] HAW. REV. STAT. § 128D-1 (Supp. 1989).

the authority to order a responsible party to engage in both removal and remedial activities.[22] However, the department was not authorized to spend money on remedial actions unless the state was working with the federal government.[23] This restriction hampered the department's ability to expedite cleanups.

Liability for the costs of cleanup actions and damage to natural resources was imposed on generators and transporters of hazardous substances, as well as past and present owners and operators of hazardous waste sites.[24] The only defenses to liability were natural disasters, war, or unforseen third party intervention.[25]

The availability of the superfund was supposed to encourage responsible parties to follow administrative orders. All costs incurred by the fund were recoverable against those liable.[26] This was particularly frightening to industry where the specter of inefficient and costly government action looms large.[27] Thus, industry may have obeyed an order simply because it believed that it could do so at less expense than the government. Failure to obey an administrative order also subjected the responsible party to punitive damages of up to three times the amount incurred by the fund as a result of the failure to obey the administrative order "without sufficient cause."[28]

Parties with knowledge of releases of hazardous substances were required to report them within twenty-four hours.[29] Finally, the law authorized the adoption of a state contingency plan which would establish criteria for ranking of sites in order of priority of cleanup.

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[22] HAW. REV. STAT. § 128D-4(a)(1) (Supp. 1989).

[23] HAW. REV. STAT. §§ 128D-4(a)(3), -4(b), -2(b) (Supp. 1989) (amended 1990).

[24] HAW. REV. STAT. § 128D-6(a) (Supp. 1989). The cost of damages to natural resources includes the cost of assessing the damage.

[25] HAW. REV. STAT. § 128D-6(c) (Supp. 1989).

[26] HAW. REV. STAT. §§ 128D-5 to D-6 (Supp. 1989).

[27] *See* Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 301-02. EPA costs may average up to thirty to forty percent more than comparable private cleanups.

[28] HAW. REV. STAT. § 128D-6(e) (Supp. 1989) (current version at § 128D-8(a) (Supp. 1990)). Like Hawai'i's law, the federal statute calls for punitive damages of up to three times the costs incurred. But it also mandates punitive damages at least equal to the response costs when punitive damages are awarded. 42 U.S.C. § 9607(c)-(3) (1988). For further discussion of the "sufficient cause" defense *see infra* notes 55-57 and accompanying text.

[29] HAW. REV. STAT. § 128D-3(b) (Supp. 1989).

Pursuant to these criteria, the department is to annually publish a listing of hazardous substance release sites.[30]

Not only did the EER give the director broad powers to ensure the cleanup of threats to the environment, but so too did other statutes adopted the same year. The director was given authority to protect water[31] and air[32] quality, and to guard against the risks posed by various hazardous substances.[33] These almost identically worded statutes gave the director the authority to:

1. inspect premises—or any area—to ensure that the environment is not being polluted;
2. seek injunctive relief to prevent violation of applicable statutes, rules, permits and variances;
3. issue administrative orders and assess civil penalties to correct violations; and
4. expedite the issuance of such orders where the public's health and safety is in imminent peril, regardless of whether a violation has occurred.

Despite this power, the department's ability to act quickly was limited. An understanding of the efficacy of the law can only be made from the vantage point of the responsible party (RP).[34] The RP was likely to ask for a hearing on any order that was issued. Orders issued under the EER may have been subject to the provisions of the Hawai'i Administrative Procedure Act (HAPA).[35] As such, they would have been subject to a contested case hearing with fifteen days notice. Orders issued pursuant to the other environmental statutes, also subject to HAPA, spelled out various hearings procedures. Under these statutes the emergency powers (for imminent peril to health and safety—not to welfare or the environment) gave the potentially responsible party the right to a hearing within twenty-four hours. This seemingly innocuous

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[30] HAW. REV. STAT. § 128D-7 (Supp. 1989).

[31] HAW. REV. STAT. §§ 340E, 342D (Supp. 1989).

[32] HAW. REV. STAT. § 342B (Supp. 1989).

[33] HAW. REV. STAT. §§ 342J, 342L (Supp. 1989).

[34] As Justice Oliver Wendall Holmes said:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 171 (1920).

[35] HAW. REV. STAT. § 91 (Supp. 1990).

provision could place an incredible burden on the department. In the midst of coping with an emergency, an under-staffed and over-stressed department could not hope to adequately deal with a battery of corporate attorneys.

In addition, by challenging an order, an RP could delay the effect of the order. The administrative hearings and subsequent judicial review could delay cleanup operations. The availability of review also could discourage quick settlements between the department and responsible parties.

The Department of Health never exercised its authority to issue such orders because it never adopted appropriate rules. But the experience of other states demonstrates that administrative review has delayed cleanups. For example, in Maine, the Department of Environmental Protection has been reluctant to use its administrative order powers because of the review process. The review process for oil discharge cleanups has taken four years.[36] Similarly, in Washington, orders issued under the water pollution statute,[37] are usually appealed—almost always if any substantial amount of money is involved.[38] Settlement of such orders usually takes eight to twelve months, but may take much longer.[39]

Not only could the administrative procedure potentially delay cleanup, but RPs had little incentive to obey the orders even after they were issued. The law offered no assurance (and no mechanism to ensure) that money spent in compliance with an order was recoverable. Completely innocent parties could be ordered to perform a cleanup with no right to recover the money spent. Thus, where, for example, a party believed it could later show that it was not liable for a spill, it was not in its interest to obey the order; any money spent in compliance with such an order was wasted. An RP may also have found it cheaper to disobey an order and pay for the damages caused. Since the marketplace and the courts have trouble putting a price tag on the environment and environmental damage, the calculated costs may have been lower than obeying an order.

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[36] Letter from Dennis Harnish, Assistant Attorney General, Maine to the author (October 31, 1990).

[37] WASH REV. CODE § 90.48 (Supp. 1991).

[38] Letter from Jay Manning, Hazardous Waste Section Chief, Ecology Division, Attorney General's Office, Washington to the author (October 5, 1990).

[39] *Id.*

Rather than issuing a feckless administrative order, the director could seek injunctive relief under the other environmental statutes. The problems with this alternative are not hard to imagine. The time spent seeking such relief would only delay necessary action. The high burden of proof on the department, together with the scant information readily available, would make such relief nearly impossible to get.

II. Changes Under the State Superfund Bill

It was the inadequacies in the law, the haunting images from the Exxon Valdez spill and the near disaster of the Exxon Houston at Barbers Point in March 1989[40] that prompted changes. In proposing amendments to the then two year-old EER, Dr. John Lewin, the director of the Department of Health stated:

> As Alaska has experienced recently, relying solely on either the federal government or a private party to assume the full burden for these environmental disasters is not necessarily advisable nor possible. Strong state authority is a necessity, in order to be prepared to respond to the release of hazardous substances into the environment.[41]

A committee report for the State Superfund bill, which renamed the law the Environmental Response Law (ERL), reflects this concern.[42] Like CERCLA and SARA, the federal laws on which the ERL is modelled,[43] the bill was intended to fulfill twin goals: expediting clean-

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[40] 25,000 gallons of crude oil and 8,000 gallons of fuel oil spilled after the tanker hit a reef. According to the Advertiser, "If the tanker had broached—turned sideways to the surf, the economic and environmental damage might have been catastrophic." Honolulu Advertiser, March 7, 1989, at A3.

[41] Testimony before the House Committee on the Judiciary and the House Committee on Planning, Energy and Environmental Protection on Feb. 27, 1990.

[42] The Committee Report of the bill which was signed by the governor, H.R. Stand. Comm. Rep. No. 1084-90 for S.B. 3109 SD1, HD1, 1990 Haw. Leg. Sess., House Journal actually says next to nothing about the need for an emergency response law. Nor does any version of the bill contain legislative findings. Last minute politics resulted in the insertion of the dead superfund bill, H.B. 2897 HD1 into a bill containing housekeeping amendments to other environmental statutes. It is the Committee Report for H.B. 2897 HD1, H.R. Stand. Comm. Rep. No. 761-9, 1990 Haw. Leg. Sess., House Journal that refers to "recent environmental disasters [which] clearly demonstrate the need . . . to respond swiftly and with clear authority."

[43] Dr. John Lewin testified that:

> We have incorporated key provisions from the federal Superfund law, . . . CERCLA and . . . SARA, and some other provisions to account for Hawaii's

ups (either by the RP or by the department) and ensuring that costs and damages are paid by the responsible parties.

A. The Preclusion of Pre-enforcement Review

By far the most controversial aspect of the bill was the attempt to address the potential for delays in cleanup.[44] Such delays are deterred by the preclusion of pre-enforcement review of department orders, and the imposition of harsh penalties for the refusal to obey such orders.

Hawaii Revised Statutes section 128D-16 now allows the department to issue orders without a hearing, and therefore, more expeditiously. In addition, theoretically[45], judicial review of administrative orders is greatly restricted. No one can challenge the appropriateness of a cleanup action. Nor, in theory, can an RP challenge the issuance of an order directing cleanup activities—until after the cleanup is completed. The jurisdiction of the court is limited to actions by:

1) the state to recover money for its cleanup costs and damages from an RP;[46]

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own unique needs for protecting the public health and welfare, and the environment. . . . These amendments will . . . make the State's "Superfund law" more consistent with the federal statute. . . .

Testimony before the House Committee on the Judiciary and the House Committee on Planning, Energy and Environmental Protection on February 27, 1990. The attorney general testified that, "In its efforts to strengthen chapter 128D, the administration patterned H.B. 2897, in large measure, after the federal superfund law, . . . CERCLA." Testimony before the House Committee on the Judiciary and the House Committee on Planning, Energy and Environmental Protection on February 27, 1990.

[44] Senator Donna Ikeda declared before passage of the bill:

Since this legislation was first heard, the parties involved have had many opportunities to discuss their differences and have made several attempts to reach a consensus. Unfortunately, all attempts have failed.

The major disagreement centers on the pre-enforcement provisions in the bill which would permit the Department of Health to order cleanup without an appeal process. . . .

It was this provision, above all others, which troubled me . . . .

1990 SENATE JOURNAL, at 606.

[45] This discussion is based on early drafts of the bill, administration testimony, and the fact that this provision is supposed to be modelled after the federal law. Drafting flaws in the bill may mean that judicial review is not restricted as intended. *See infra* text at notes 83-94.

[46] HAW. REV. STAT. § 128D-17(a)(1) (Supp. 1990). This works in conjunction with the liability provision of § 128D-6, which is explained in the text accompanying notes 24-25 and 72-78.

2) the state to enforce an order;[47]
3) a party, after completion of an order, for reimbursement of monies expended in compliance with such order where either:
   a) it was not liable for the release; or
   b) the order was arbitrary or capricious or not in accordance with the law;[48] and
4) the state to compel remedial action through an injunction.[49]

The ability of the department to issue orders without a prior or subsequent administrative hearing and without judicial review precludes delaying tactics by RPs. As the director of the Department of Health noted:

> We also have analyzed the experience of the federal government in using its Superfund Act which precludes pre-enforcement review. We feel more strongly than ever that to provide pre-enforcement review of Department actions would cripple our ability to use the bill effectively.[50]

Washington state's experience with similar preclusions on pre-enforcement review[51] bears out Dr. Lewin's conclusions. According to the Washington attorney general's ecology division,

> After working under the statute for 1-4 years, it indeed appears that we are spending more time cleaning up sites and less time litigating about those sites than we have under other state environmental statutes. Consequently, I am convinced that the preclusion of pre-enforcement

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[47] HAW. REV. STAT. § 128D-17(a)(2) (Supp. 1990). The state may go to court to force an RP to cleanup a release if the state does not want to use its own resources. This provision will not often be used assuming that the penalties (described below) discourage the RP from refusing to obey an order, and that the state has enough money in the superfund to do the cleanup itself. Any attempt by the state to enforce an order in court will only result in the delay of a cleanup.

[48] HAW. REV. STAT. § 128D-17(a)(3) (Supp. 1990). RPs should be able to recover their expenses pursuant to an order inconsistent with the contingency plan. § 128D-4(a) requires that such orders be consistent, although § 128D-16 does not.

[49] HAW. REV. STAT. § 128D-17(a)(4) (Supp. 1990). The bill actually refers to the state completing a remedial action, but the meaning of this language is unclear as well as inconsistent with CERCLA.

[50] In a letter to Senator Ikeda dated April 20, 1990, 1990 SENATE JOURNAL, at 606.

[51] WASH REV. CODE § 70.105D.060 (Supp. 1991). Oregon, Pennsylvania, Illinois, Minnesota and New Jersey also preclude pre-enforcement review—either directly in their statutes, or through judicial interpretation. OR. REV. STAT. § 465.260 (1989); 35 PA. CONST. STAT. § 6020.508; ILL. REV. STAT. ch. 111 1/2, ¶ 1004(Q) (1988); MINN. STAT. § 115B.17 (1987); N.J. REV. STAT. § 58: 10-23.11f (1982).

review is absolutely essential to the expeditious cleanup of contaminated sites.[52]

Refusal to obey orders subjects an RP to harsh sanctions. As previously discussed, the RP may be liable for the costs of the state-administered cleanup and for punitive damages of up to three times the amount incurred by the fund.[53] In addition the Superfund bill allows for the assessment of civil penalties of up to $25,000 per day for the failure to obey an order without sufficient cause.[54]

Thus, the combination of the punitive damages, civil fines, and liability for superfund expenditures, together with the preclusion of pre-enforcement review, spur compliance with orders and expeditious cleanup of contaminated sites.

The federal courts have upheld the constitutionality of this type of scheme by giving broad latitude to the construction of the "sufficient cause" clause.[55] RPs can avoid punitive damages and civil fines if their failure to comply with an order was done in good faith.[56] By allowing good faith defenses the RP is not coerced into complying with the order.[57] The statutory scheme of CERCLA and the ERL nevertheless

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[52] Letter from Jay Manning, Ecology Division, Attorney General's Office to the author (Oct. 5, 1990).

[53] HAW. REV. STAT. § 128D-8(a) (Supp. 1990). This provision of the bill is not new to the Hawai'i law, but it was renumbered, and suddenly caught industry's attention. Like Hawai'i's law, the federal statute calls for punitive damages of up to three times the costs incurred. But it also mandates punitive damages at least equal to the response costs where such damages are assessed. 42 U.S.C. § 9607(c)(3) (1988).

[54] HAW. REV. STAT. § 128D-16(b) (Supp. 1990).

[55] U.S. v. Reilly Tar and Chem. Corp., 606 F. Supp. 412 (Minn. 1985) (good faith defense to validity of EPA order is sufficient to avoid punitive damages; thus the punitive damages provision does not deny due process because penalties are not so severe as to intimidate parties into not seeking judicial review); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) (due process not violated because penalties are subject to judicial review, and cannot be imposed where defense is made in good faith).

[56] In other words, "the party opposing such damages had an objectively reasonable basis for believing that the EPA's order was either invalid or inapplicable to it." Solid State Circuits Inc. v. U.S.E.P.A., 812 F.2d 383, 391 (8th Cir. 1987).

[57] Environmentalists objected to the inclusion of the "sufficient cause" defense as creating an avenue for "courtroom mischief." Memo from Lola Mench, Conservation Chair, Sierra Club Hawai'i Chapter and Patricia Tummons, Natural Resources Chair, League of Women Voters of Hawai'i to Senator Gerald Hagino (March 8, 1990). The federal courts have made it clear that this so-called "wiggle room to challenge an administrative order" is constitutionally mandated. *See supra* note 55.

deter non-compliance. An RP may have to wait years before a decision is reached regarding its good faith defense, while liability costs and potential penalties accumulate—a gamble that few may be willing to take.

When review is eventually granted, the department's actions are more than likely to be upheld. As in any review of an administrative action, the standard of review is high. Review of the selected cleanup action itself is limited to whether it was arbitrary and capricious or otherwise not in accordance with the law.[58] And procedural errors may disallow costs and damages only if they were very serious.[59]

The RP's other option is to comply with the order and attempt to recoup its expenses from the department later. Within sixty days after completion of the order, the RP may petition the director for its costs if a) it is not liable; or b) the order was arbitrary and capricious, or was otherwise not in accordance with the law.[60]

B. Other Changes

The preclusion of pre-enforcement review and the harsh penalties help to ensure that all but the most recalcitrant RPs comply with orders. In addition, the State Superfund Bill gives the department the authority to seek injunctive relief to prevent violation of the chapter, rules, or order issued.[61] Should an RP be unable to act,[62] however, the department can act. Under the EER, the department was authorized to engage in removal actions—preliminary cleanup activities. The State Superfund Bill expanded the department's authority so that it could use the superfund to engage in remedial actions as well—those of a more permanent nature.[63]

At the same time, however, the department's ability to act and recover costs and damages was limited by changes in the definition of the term "release". Although "release" is defined as any type of escape, it exempts:

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[58] HAW. REV. STAT. § 128D-17(c) (Supp. 1990).

[59] HAW. REV. STAT. § 128D-17(e) (Supp. 1990).

[60] HAW. REV. STAT. § 128D-16 (Supp. 1990).

[61] HAW. REV. STAT. § 128D-9 (Supp. 1990). This comports with the provisions of other environmental statutes discussed at notes 29-32.

[62] If, for example, an RP is financially unable to comply with an order, the department would have to do the cleanup.

[63] HAW. REV. STAT. §§ 128D-4(a)(4), 128D-7(d) (Supp. 1990).

1) releases where exposure only affects workers covered under worker's compensation;
2) engine exhaust;
3) releases of nuclear material from a nuclear incident;
4) releases resulting from the normal application of fertilizer;
5) releases resulting from the application of registered pesticides; and
6) releases from sewerage systems.[64]

The exemptions for fertilizers, pesticides and sewerage systems are new additions to the law, limiting its scope.

In order to engage in cleanups that remain within the scope of the law, the department needs adequate information. The State Superfund Bill gives the department the power to commence civil actions for anything less than full disclosure of relevant information. The failure to provide information regarding hazardous substances, pollutants or contaminants subjects one to penalties of up to $25,000 a day.[65] Similarly, the department can commence civil action in response to the destruction of records relevant to an investigation, or the firing of whistleblowing employees.[66]

The public is assured access to the information obtained from a potentially responsible party by the department—unless it constitutes legally protected confidential information.[67] This confidential information may include the ability of the party to pay for the cleanup, information which the department has the right to obtain from the potentially responsible party.[68]

Stringent reporting requirements are also supposed to assure that the department has adequate information to act. The failure to report the release of certain amounts of hazardous substances *immediately* upon knowledge (rather than within 24 hours) subjects one to a fine of up to $10,000 a day and/or imprisonment of up to three years (five years for subsequent conviction).[69] However, the bill exempted from the reporting requirement all unpermitted releases occurring before July 1, 1990 and all permitted releases.[70]

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[64] HAW. REV. STAT. § 128D-1 (Supp. 1990).
[65] HAW. REV. STAT. § 128D-4(b), 128D-8(b) (Supp. 1990).
[66] HAW. REV. STAT. § 128D-11, 128D-15, 128D-8(b) (Supp. 1990).
[67] HAW. REV. STAT. § 128D-12 (Supp. 1990).
[68] HAW. REV. STAT. § 128D-4(b)(3) (Supp. 1990).
[69] HAW. REV. STAT. § 128D-3 (Supp. 1990).
[70] HAW. REV. STAT. § 128D-3 (Supp. 1990). In any case such releases should have been reported under CERCLA to the federal government. The federal government was supposed to have passed these reports on to the state.

Stiff sanctions are also applied to RPs who knowingly release a hazardous substance into the environment. The offender is subject to fines of at least $5,000, but no more than $50,000 or imprisonment of up to three years. Repeat offenders are subject to increased punishment.[71]

Although the release of hazardous substances is subject to criminal sanctions if the person knowingly did so, liability for a release is assessed regardless of culpability. Arguably the bill did not change the fact that liability is strict, joint and several for the cost of removal and remedial actions and damage to natural resources. While making it more clear that it is so,[72] case law would probably have interpreted it as such anyway: CERCLA was interpreted as imposing strict, joint and several liability without Congress explicitly saying so.[73]

However, the bill did change the extent of liability. The cost of health studies was added to the liability of an RP.[74] On the other hand, liability is narrowed by several provisions of the bill. Recovery for any cleanup costs of releases occurring before July 1, 1990 is limited to the government; thereby excluding cost recovery by private parties for past releases.[75] Liability for damages to natural resources was also limited. An RP is not responsible for damages to natural resources so long as a permit or license has authorized the irreversible and irretrievable commitment of these resources, and the permit or license has not been violated.[76] Damages to natural resources which occurred wholly before July 1, 1990 are not recoverable.[77] Nor can anyone but the state recover for damages to natural resources.[78]

An action for the recovery of natural resource damage must be commenced within three years of the discovery of the damages and its connection with the release.[79] On the other hand, an action to recover

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[71] HAW. REV. STAT. § 128D-10 (Supp. 1990).

[72] HAW. REV. STAT. § 128D-6 (Supp. 1990).

[73] *See e.g.* U.S. v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); New York v. Shore Realty Corp., 759 F.2d 1032 (2nd Cir. 1985) Later Congress accepted these conclusions. *See* H.R. No. 253(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856.

[74] HAW. REV. STAT. § 128D-6(a) (Supp. 1990).

[75] HAW. REV. STAT. § 128D-6(i) (Supp. 1990).

[76] HAW. REV. STAT. § 128D-6(h) (Supp. 1990).

[77] *Id.*

[78] HAW. REV. STAT. § 128D-6(g) (Supp. 1990).

[79] HAW. REV. STAT. § 128D-5(d) (Supp. 1990).

cleanup costs can be commenced up to six years after the completion of the cleanup.[80]

Persons acting pursuant to the chapter in an emergency are immune from liability under this or *any other law* (including the common law) unless they were negligent or acted with intentional misconduct.[81] Similarly, the bill immunizes the counties from liability under the chapter for actions in an emergency excepting gross negligence and intentional misconduct.

Finally, the bill mandates the formulation of criteria for evaluating imminent or substantial hazards, and the feasibility and effectiveness of response action.[82]

III. SHORTCOMINGS OF THE ERL

While many of these changes were necessary, the law is now riddled with drafting errors and hastily drawn compromises. The shortcomings are particularly glaring in light of the twin goals of expediting cleanups and ensuring that responsible parties would bear the costs.

A. Pre-enforcement Review

Hawaii Revised Statutes section 128D-17 on judicial review was poorly drafted and contains typographical errors that could render the section meaningless. As discussed earlier,[83] this section is supposed to limit judicial review of removal and remedial orders issued by the department—just as CERCLA as amended does. However, instead of prohibiting *review* of any order as in title 42 of the United States Code section 9613(h), the Hawai'i statute reads: "No court shall have jurisdiction . . . to *renew* any order issued under this chapter except as follows. . . ."[84] Whether the Hawai'i Supreme Court will overlook this mistake and substitute the word "review" for "renew" is open to speculation.

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[80] HAW. REV. STAT. § 128D-5(c) (Supp. 1990).

[81] HAW. REV. STAT. § 128D-6(d) (Supp. 1990).

[82] HAW. REV. STAT. § 128D-7 (Supp. 1990).

[83] *See supra* text at notes 43-52.

[84] HAW. REV. STAT. § 128D-17 (Supp. 1990) (Emphasis added). This "typo" was either an inadvertent blunder, or a tactical (albeit unsuccessful) move to ensure that the bill would go to conference committee before passing. Knowing the legislature, either explanation is plausible.

The Hawai'i Supreme Court has declared that:

> A general rule of statutory construction is that if a statutory ambiguity is present the purpose of the act justifies departure from the strict letter of the statute when adherence to the letter of the statute will lead to absurdity or palpable injustice.[85]

The word "renew" certainly renders the provision absurd, and could hamper the state's ability to protect the public. And the court has consistently held that it is the duty of the court to give effect to the intent of the legislation.[86] Furthermore, in the past the court has looked to judicial interpretation of a federal statute to shed light on a state statute.[87] It could do so again here.

On the other hand, the question here is not the mere interpretation of a word, but rather, the substitution of a word and the reconstruction of a statute. This could require the court to do more than it may feel comfortable with. The court may well hold that "statutes which deprive a court of jurisdiction are strictly construed."[88] Furthermore, the U.S. Supreme Court has held that it is important to adhere to the language of a statute where the language is a result of carefully considered compromises.[89] In this case, although much discussion took place and compromise negotiations were held between the department, industry and environmentalists, it is not clear that this language was a result of compromise, or was even carefully considered.

The ambiguity may allow an RP to disobey an order in "good faith" to gain access to the court to challenge the order. As long as the ambiguity remains, the department's ability to ensure speedy cleanups will be hampered.

Assuming that the court reads "review" for "renew," or alternatively, the legislature fixes this mistake, problems remain with the judicial review section. Review is allowed where the "state has moved

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[85] Pacific Ins. Co. Ltd. v. Oregon Automobile Ins. Co., 53 Haw. 208, 210, 490 P.2d 899, 901 (1971).

[86] Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. 480, 483, 777 P.2d 244, 246 (1989). Note also Senator Ikeda's comments on the floor: "I have therefore concluded that if we are to err on this issue, let it be on the side of protecting the environment." 1990 SENATE JOURNAL, at 607.

[87] In Molokai Homesteaders Coop Assoc. v. Cobb, 63 Haw. 453, 629 P.2d 1134 (1981) the court looked to the federal courts' interpretation of NEPA to shed light on the broader state EIS law, which was modelled on NEPA.

[88] SUTHERLAND STATUTORY CONSTRUCTION § 67.03 (4th ed. 1986).

[89] *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

to complete a remedial action."[90] It is unclear exactly what this means. It could mean that review is available when the state is preparing to certify that a site is clean. What is clear is that the word "complete" is another typo; that CERCLA uses the word "compel." Under CERCLA, review is allowed where the government seeks review in attempting to get an injunction (*i.e.*, to compel remedial action).[91]

Unfortunately, this mistake was compounded by the fact that the Revisor of Statutes misnumbered the section that was to be cited. Instead of citing the section in which the state is given the authority to seek judicial relief,[92] section 128D-17(a)(4) now refers to the ability of the department to issue orders. And to make matters even more confusing, judicial review is supposed to be allowed for reimbursement actions, but section 128D-17(a)(3) refers instead to the civil penalty section (128D-8), rather than the reimbursement section (128D-16(d)).

The legislative language is terribly confusing. Although Senator Ikeda's summary of the preclusion of pre-enforcement review is an oversimplification, it sheds light on the legislative intent. She stated that "the order is reviewed only if the cleanup is completed or if someone is in violation of the order."[93] CERCLA allows for review when the government goes to court (before or after a cleanup), when citizens sue, or when a potentially responsible party seeks reimbursement after a cleanup.[94] Although the ERL was intended to follow this scheme (without the citizen suit provision), the judicial review section is riddled with errors that make it nearly incomprehensible.

B. Narrowing the Scope of the Law

While the preclusion of pre-enforcement review may remain ambiguous, it is clear that the scope of the law has been narrowed. In an attempt to clarify the law, the Department of Health suggested amending the definition of "hazardous substance" and adding a new term, "pollutant or contaminant."[95] Although the department's suggested amendments would not have changed the law, they made clear that the implications of the law were quite broad.

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[90] HAW. REV. STAT. § 128D-17(a)(4) (Supp. 1990).
[91] 42 U.S.C. § 9613(h)(5) (1988).
[92] HAW. REV. STAT. § 128D-8 (Supp. 1990).
[93] 1990 SENATE JOURNAL, at 606.
[94] 42 U.S.C. § 9613(h) (1988).
[95] S.B. 3108, 15th Leg., 2d Sess. (1990).

First, the department attempted to track the CERCLA definition of "hazardous substance," which provides references to lists of such substances. However, in a significant departure from CERCLA, the bill did not exempt petroleum and natural gas as "hazardous substances."[96] The State Superfund bill made it clear that the state could expedite the cleanup of an oil spill and assess liability. Second, the department added the open-ended term "pollutant or contaminant," which in essence meant any substance that may affect public health or welfare, the environment, or natural resources.[97]

The distinction between "hazardous substances" and "pollutant or contaminant" is important in two contexts. The requirement that a release be immediately reported applies only to "hazardous substances."[98] And the knowing release of a "hazardous substance" is punished under Hawaii Revised Statutes section 128D-10, but not the release of a "pollutant or contaminant."

An example an unlisted substance is 1,2,3-trichloropropane (TCP), which has contaminated wells in Central O'ahu.[99] While its structure would indicate that it is a possible carcinogen, it is not on any of the federal lists.[100] Because it has not been adequately studied, it fits into the "pollutant or contaminant" category.

Under CERCLA, no liability can be assessed for such a substance. But under the ERL, the state can recover its cleanup costs of pollutant or contaminants.

Industry objected to the open-ended definition of Hawai'i's law on the ground that it could subject businesses to untold liability.[101] Industry's attempt to require the listing of all substances triggering response

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[96] HAW. REV. STAT. § 128D-1 (Supp. 1990); 42 U.S.C. § 9601(14) (1988).

[97] S.B. 3108, 15th Leg., 2d Sess. (1990).

[98] HAW. REV. STAT. § 128D-3 (Supp. 1990).

[99] Memo from Bruce Anderson, Environmental Epidemiologist, to Mona Bomgaars, Acting Deputy Director of Health (Oct. 3, 1983).

[100] Honolulu Star Bulletin, February 17, 1986, at A1. Interview with Mark Ingoglia, Hazard Evaluation and Emergency Response Office (November 7, 1990).

[101] Testimony of Hawaiian Electric Co. Inc. and Pacific Resources Inc. before the House Committee on the Judiciary and the Committee on Planning, Energy and Environmental Protection on February 27, 1990. Industry contends that the open-ended definition violates due process. However, it is unlikely that the courts would agree. In interpreting CERCLA, the federal courts have allowed its retroactive application. If CERCLA can be applied retroactively, there would appear to be no reason that "pollutant or contaminant" could not be an open-ended definition. *See, e.g.*, U.S. v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986).

actions and liability, while not successful, resulted in confusing legislative drafting.

Instead of providing a clear definition of "hazardous substance", and including the CERCLA definition, the ERL offers two different definitions. The first definition is broad; the second specific. The consequences of this error are probably slight, but the dual definition is confusing.

Also confusing is the overly broad and ungrammatical definition of "pollutant or contaminant." "'Pollutant or contaminant' means any element, substance, compound, or mixture, including disease-causing agents, which, after release into the environment which is . . . listed by the . . . Chemical Abstracts Service Registry."[102] Other lists are referred to, but since the Chemical Abstracts list any compound referred to in chemical literature, just about anything can be a pollutant or contaminant.[103]

The absurdity of such an open-ended definition without any criteria could render references to pollutants and contaminants useless until the law is amended. A statute is void for vagueness if it fails a three part test articulated by the Hawai'i Supreme Court. The inquiry is based on:

> (a) Whether the statute provides fair warning of proscribed conduct, (b) whether it provides clear guidance so as to prevent arbitrary application and enforcement; and (c) whether the statute 'overreaches' by lack of clarity so as to prohibit lawful or constitutionally protected, as well as unlawful, activities.[104]

Since the definition of "pollutant or contaminant" includes innocuous substances such as sugar and water, the law is arguably overly broad. However, the legislative intent is to protect the environment and the public; and department action and liability are triggered only if damage has occurred (or is about to occur). Thus, the release of water or sugar would not trigger liability — unless, in fact, the public or the environment was actually threatened. Therefore, it can be argued that fair warning is provided, discriminatory application is prevented, and lawful conduct is not prohibited.

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[102] HAW. REV. STAT. § 128D-1 (Supp. 1990).

[103] Interview with John Harrison, Director, Environmental Center, University of Hawai'i (Dec. 11, 1990).

[104] Woodruff v. Keale, 64 Haw. 85, 95, 637 P.2d 760, 767 (1981) (citations omitted) (upholding the validity of a termination of parental rights statute).

Other problems with the bill arise not so much from drafting errors, but with the real accomplishments of special interests. The liability and response provisions are triggered by the release, or threat of release, of a hazardous substance. The new definition of the term "release" means that cleanups of damages caused by fertilizers, pesticides and sewage may not occur; nor can damages be recovered.[105]

These exemptions are troubling—particularly as they are not exempt in CERCLA and have sorry histories in Hawai'i. CERCLA does exempt pesticides from any liability for response costs or damages and from reporting requirements.[106] The ERL broadens these exemptions such that cleanup of any contamination caused by the application of pesticides is prohibited.[107] The most threatening releases of hazardous substances in Hawai'i—other than those by the military—have been the various applications of pesticides by agri-business.[108] Pesticides were not exempted prior to 1990, but testimony by the Hawaiian Sugar Planters' Association, the Hawai'i Farm Bureau Federation and Dole Packaged Foods Company ensured their exemption.[109]

The exemption of sewerage system is startling in light of the incredible mismanagement of sewage plants through out the state. The city is currently being sued by the Sierra Club Legal Defense Fund and Hawai'i's Thousand Friends for violations at two of its sewage treatment plants: Sand Island and Honouliuli.[110] Private plants have been subject to suit as well. Brigham Young University and Zions Securities agreed to a twelve million dollar settlement in a suit over the Laie sewage treatment plant's spilling of half a million gallons of sewage a

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[105] HAW. REV. STAT. § 128D-1 (Supp. 1990) (definition of "release.")

[106] 42 U.S.C. §§ 9607(i), 9603(e) (1988).

[107] HAW. REV. STAT. § 128D-1 (Supp. 1990) (definition of "release.")

[108] As far back as 1969 the Department of Agriculture warned in a report titled "Pesticide Problems in Hawaii": "With continued use of pesticides it is possible for pesticides to enter the water table and contaminate domestic water." Honolulu Star Bulletin, July 9, 1985, at A1. By 1985 fifteen O'ahu wells serving the public had been closed due to pesticide contamination; five private wells were contaminated as well. *Id.* The Sunday Honolulu Star Bulletin & Advertiser of August 13, 1989, at A4 displays on a map what sites have been contaminated, and the levels of contamination.

[109] Testimony before the House Committee on the Judiciary and the Committee on Planning, Energy and Environmental Protection on February 27, 1990.

[110] Honolulu Star Bulletin, March 29, 1990, at A6. According to environmental attorney Skip Spaulding, the Sand Island plant "has established one of the country's worst Clean Water Act compliance records for a municipal sewage facility." *Id.* Additionally, the city has spilled thousands of gallons of sewage into Enchanted Lake. The Sunday Honolulu Star Bulletin & Advertiser, Nov. 25, 1990, at A2.

day into a marsh.[111] And Bedford's Hawai'i Kai plant, is the subject of criminal investigations.[112] While the exemption for sewage treatment plants might be explained by coverage under other laws,[113] these other laws suffer from the same deficiencies pointed out earlier in this paper.[114] It would be more reasonable to exempt only the permitted releases from sewage treatment plants. The exemptions given for pesticides and sewage plants mean that certain cleanups cannot be expedited and liability cannot be easily assessed.

C. Failure to Encourage Action

Agri-business and sewage plant operators were not the only beneficiaries of changes in the law; so too was the banking industry. The power of the banking industry in Hawai'i is evidenced in the definition of "owner or operator."[115] Under the definition creditors are not liable for a release unless their actions or decisions contributed to a release or threatened release.[116] This is in stark contrast to CERCLA where liability is imposed on a creditor who has participated in the management of a vessel or facility.[117] This language has been interpreted to mean that liability is attached where participation is "to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[118] So long as it could exercise influence, it is subject to liability. This encourages creditors to investigate the policies and practices of debtors. Hawai'i's broader exemption protects creditors

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[111] Honolulu Advertiser, Sep. 14, 1990, at A12.

[112] MEPAC acknowledged unauthorized discharges off Sandy Beach between 1986 and 1989. The Sunday Honolulu Star Bulletin & Advertiser, March 11, 1990, at A4. Three men were indicted by a federal grand jury for secretly dumping partially treated sewage off Sandy Beach in 1988 and 1989. Honolulu Star Bulletin, Oct. 19, 1990, at A4.

[113] HAW. REV. STAT. § 342D (Supp. 1990).

[114] *See supra* text at notes 34-38.

[115] The Department of Health's suggested definition was amended pursuant to a request of the Hawai'i Bankers Association. Testimony before the House Committee on the Judiciary and the Committee on Planning, Energy and Environmental Protection on February 27, 1990.

[116] HAW. REV. STAT. § 128D-1 (Supp. 1990).

[117] 42 U.S.C. § 9601 20(A)(iii) (1988).

[118] U.S. v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990); *See also* U.S. v. Maryland Bank and Trust Co., 632 F. Supp. 573 (Md 1986). *But see* U.S. v. Dart Indus. Inc., 847 F.2d 144 (4th Cir. 1988); U.S. v. Mirabile, 15 ENVTL. L. REP. 20994 (E.D. Pa. 1985)

regardless of the imprudence of a loan; and it lessens the duty to investigate or ameliorate a hazardous condition.

Expeditious cleanup of sites may also be hampered by that which is not in the bill. Most strikingly absent from the bill are adequate resources. The Hazard Evaluation and Emergency Response Office remains woefully understaffed, with funding for only seven positions.[119] Most states have far larger staffs.[120] The Superfund itself, presently amounting to less than $150,000, is also one of the smallest in the country.[121] Yet sufficient staff sizes and adequate funds together with strong enforcement tools are key to getting sites cleaned up. EPA concluded that "the strong programs also appear to make significant use of the credible threat of Fund-lead actions if negotiating deadlines are not met by RPs."[122] This threat cannot be made without the availability of adequate funds. If the fund cannot be used, the threat of liability for cost cleanup and triple punitive damages vanishes.

Even if the fund were large enough to be used effectively, the state might find it difficult to recover its expenses. Unlike CERCLA[123] the ERL contains no lien provision. Such a lien would facilitate the recovery of government expenses, particularly if attached to all real property belonging to the liable party or if taking precedence over other liens.[124]

It was clamor from the public that made CERCLA a reality, and it is clamor from the public that can ensure that cleanups occur. Unfortunately, the public has essentially been locked out of the ERL. Hawaii Revised Statutes section 128D-4 gives the department the authority to include public participation, but nowhere is it required. While the public certainly cannot be involved in any emergency removal, it should play a role in the approval of any remedial plan or settlement agreement. CERCLA provides for notice and opportunity to comment on such items.[125] CERCLA also provides for citizen suits to ensure

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[119] Interview with Mark Ingoglia, Hazard Evaluation and Emergency Response Office (Nov. 7, 1990).

[120] EPA, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY (1989).

[121] *Id.*

[122] *Id. See also* GAO, HAZARDOUS WASTE SITES: STATE CLEANUP STATUS AND ITS IMPLICATIONS FOR FEDERAL POLICY (1989).

[123] 42 U.S.C. § 9607(l) (1988).

[124] While CERCLA allows for liens on other property belonging to the liable party, a few states have broader powers that give their liens priority over other liens. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1988), N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1988).

[125] 42 U.S.C. § 9617 (1988).

that standards, regulations, conditions, requirements and orders are obeyed by both the government and RPs.[126] These suits are also allowed where the government is not fulfilling its non-discretionary duties. Although the department may be doing a good job today (the department's leadership is hailed by most environmental groups), the department's past leaves much to be desired. One cannot assume that future administrations will be so open. Public participation and citizen suits can help ensure adequate performance by the department.

D. Insufficient Deterrence

The ERL may not go far enough to sufficiently encourage proper management of hazardous substances.[127] The experience of other states demonstrates that civil penalties may not deter mismanagement resulting in releases of hazardous substances, pollutants or contaminants.[128] The cost of taking safety measures may outweigh a business' potential liability — particularly if the releases are not traceable. And liability may fail to provide proper incentives to engage in safe practices if the penalty judgment would exceed the assets of the company. Thus, while the civil penalties may encourage some degree of corporate compliance, they may not elicit sufficient compliance by marginally-profitable or judgment-proof businesses, or by employees themselves. Ohio has found it necessary to rely on criminal penalties in its environmental statutes.[129]

The absence of strong criminal penalties in the ERL may result in the failure to improve business practices. Releases of hazardous subst-

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[126] 42 U.S.C. § 9659 (1988). For a criticism of the fecklessness of the citizen suit provision, *See* Gaba & Kelly *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?* 43 Sw. L.J. 929 (1990).

[127] *See generally,* Abrams, *Prospects for Safer Communities: Emergency Response, Community Right to Know and Prevention of Chemical Accidents* 14 HARV. ENVTL. L. REV. 135 (1990). Abrams suggests that crisis management is not enough; attention should be focused on ensuring that crises do not occur in the first place. He emphasizes that the superfund scheme is insufficient without accident prevention planning.

[128] *Id.*; Celebrezze, *Criminal Enforcement of State Environmental Laws: The Ohio Solution,* 14 HARV. ENVTL. L. REV. 7 (1990). Hawai'i has experienced the weakness of civil penalties in other arenas. For example, potential civil fines of up to $1,000 a day did not stop American Hawai'i Cruises from repeated dumping of sewage in state harbors. Honolulu Star Bulletin, March 20, 1986, at A2.

[129] "Ohio's experience suggests that the fear of incarceration and the stigma of criminal conviction are effective threats against a corporate officer or manager engaged in environmental decision making." Celebrezze, *supra* note 128, at 243.

ances are only punished if they were "knowing."[130] A reckless release, such as the Exxon Valdez's, goes unpunished by criminal sanctions.[131] The weakness of the criminal sanctions is further evidenced in the broad immunity granted under Hawaii Revised Statutes section 128D-3(c). Notification of a release and the information obtained by exploitation of this information cannot be used against *any* person in *any* criminal case (except for prosecution for perjury or giving a false statement). This provision will make it extremely difficult to find admissible evidence in a criminal trial. The consequence of this is that so long as a report has been made, no criminal prosecution can take place—even for an intentional or knowing release of a hazardous substance.

E. Problems for Industry

On the other hand, the ERL may not go far enough in easing the burdens placed on industry. Unlike CERCLA as amended[132] the ERL does not contain an explicit provision allowing for contribution from one responsible party to another. This absence could mean that one responsible party is liable for all the damages.[133] On the other hand, a federal district court interpreted CERCLA as including such a right even before the contribution provision was included in the law.[134] To avoid ambiguity, an explicit contribution provision should be included in the Hawai'i law. Clarification could expedite the settlement process with RPs.

In addition, clarification of the protection offered to confidential information should be provided. The only punishment currently available for the release of such information by a department employee is a civil fine by the department—an unlikely event.[135]

IV. CONCLUSION

The many shortcomings in the State Superfund Bill help to explain why it nearly failed to become law. Although the Department of Health

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[130] HAW. REV. STAT. § 128D-10 (Supp. 1990).

[131] Ohio has successfully relied on a "reckless" culpable state of mind in its environmental statutes, rather than the higher "willful" and "knowing" standards. Celebrezze, *supra* note 128.

[132] 42 U.S.C. § 9613(f) (1988).

[133] *See* U.S. v. Ward, 22 Env't Rep. Cas. (BNA) 1235 (E.D.N.C. 1984)

[134] U.S. v. Westinghouse Elec. Corp., 22 Env't Rep. Cas. (BNA) 1230 (S.D.IN. 1983)

[135] HAW. REV. STAT. § 128D-8, -12 (Supp. 1990).

needed greater authority to respond to threats to the public and the environment, the bill may not have given it all that it needed. The department can investigate, issue orders and engage in cleanups. Liability for releases is strict, joint and several; and some releases are punished with criminal sanctions. Hazardous releases must be reported immediately.

But the attempt to preclude pre-enforcement review may have been unsuccessful. The scope of the bill has been narrowed. Measures to ensure expeditious action are missing. Deterrence may be insufficient. And while in many ways industry succeeded in weakening the law, in some instances industry got the short end of the stick.

The 1990 Legislature may have hoped that they had seen the last of the State Superfund Bill. These shortcoming ensure that this controversial law will remain a controversial subject in future legislative sessions as well.[136]

David Kimo Frankel

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[136] The Department of Health submitted its administrative bills to overhaul the ERL to the 1991 Legislature. H.B. 957, S.B. 1411, 16th Leg., 1st Sess. (1991). The bills represented a significant change in departmental policy; they eliminated liability for the cleanup of pollutants or contaminants and they allowed judicial review of orders during cleanups, rather than afterwards. Although these bills died, their contents were resurrected in amended form.

The Legislature passed out S.B. 1756, which awaits the governor's decision as we go to press. It would, among other things:

1. allow judicial review during a cleanup;
2. raise the standard of review by the courts and in administrative hearings;
3. eliminate liability for pollutants and contaminants;
4. allow pesticide contamination to be cleaned up;
5. increase civil penalties, while reducing criminal penalties;
6. close the loophole to some criminal prosecutions, but also exempt from criminal prosecution certain workers;
7. allow contribution and apportionment proceedings;
8. grant innocent landowners exemptions from liability;
9. give citizens the right to sue; and
10. clarify some key definitions.

In addition, the passage of H.B. 922 will provide additional revenue for the Superfund through the dedication of all environmental fines and penalties.

Fasi v. Cayetano: Challenging Hawaii's "Resign-to-Run" Amendment

I. INTRODUCTION

In 1978, the State of Hawaii added to its Constitution article II, section 7, a provision requiring elected officials to resign from office before being eligible as a candidate for another public office.[1] Article II, section 7, applies only if the term of the office sought begins before the term of the office held ends.

In 1990, Frank F. Fasi, Mayor of the City and County of Honolulu, Hawaii, filed an action in the United States District Court for the District of Hawaii, challenging the constitutionality of the "resign-to-run" amendment.[2] The suit resulted when Mayor Fasi's nomination papers as a 1990 candidate for Governor of the State of Hawaii were rejected after he refused to comply with article II, section 7, of the Constitution of the State of Hawaii, by resigning from his elected office.[3] Mayor Fasi's judicial challenge of Hawaii's "resign-to-run" amendment is presently pending in the United States District Court for the District of Hawaii.

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[1] HAW. CONST. art. II, § 7. *See infra* Section II for complete text of article II, § 7.

[2] Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990). Joining Mayor Fasi as plaintiffs were Sharon Gibo, Mark Shiira, and Kiyoshi Kimura, registered voters of the State of Hawaii. Benjamin Cayetano, Lieutenant Governor and Chief Elections Officer of the State of Hawaii, and Morris Takushi, Director of Elections for the State of Hawaii, were named as defendants. *Id.*

[3] *See* Letter from Benjamin J. Cayetano to Frank F. Fasi (May 23, 1990)(discussing nonfiling of nomination paper). In Hawaii, the term of office for both the Mayor of the City and County of Honolulu and the Governor is four years. However, the terms for these two offices are staggered by two years, which places Mayor Fasi squarely within article II, § 7, of the Hawaii State Constitution.

Fasi v. Cayetano[4] is a case of first impression in Hawaii.[5] Constitutional challenges against "resign-to-run" amendments similar to that of Hawaii's have been raised in only two other jurisdictions in the United States.[6] This article will review the available case law and attempt to determine whether Hawaii's "resign-to-run" amendment will be able to withstand Mayor Fasi's challenge.

II. Background

Article II, section 7, of the Hawaii State Constitution provides that "[a]ny elected public officer shall resign from that office before being eligible as a candidate for another public office, if the term of the office sought begins before the end of the term of the office held."[7] The provision, promulgated by the Hawaii Constitutional Convention of 1978, was added to the Hawaii State Constitution in November 1978.[8] Since its passage, article II, section 7, of the Hawaii State Constitution has been popularly known as the "resign-to-run" amendment.

The "resign-to-run" amendment requires that an elected public official resign from office before becoming eligible to run for another public office with an overlapping term.[9] The following justification was given for the requirement:

> By running for another office, the person is in effect saying that he no longer wishes to fulfill the responsibilities of the office to which he was

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[4] Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[5] Article II, section 7, of the Hawaii State Constitution was the subject of a prior lawsuit in Hawaii. However, the issue involved in that action was whether State Senator Steve Cobb was required to resign his State Senate seat in order to become a candidate for the United States House of Representatives. The Hawaii Supreme Court concluded that the drafters of the amendment did not manifest a clear intent to include candidates for federal office within the scope of article II, section 7, and held that State Senator Cobb did not have to resign from office in order to run for Congress. Cobb v. State, 68 Haw. 564, 722 P.2d 1032 (1986).

[6] *See* Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983); Clements v. Fashing, 457 U.S. 957 (1982), discussed *infra* in Section IV.A.

[7] Haw. Const. art. II, § 7.

[8] The provision was added to the Hawaii State Constitution pursuant to a popular vote in favor of passage during the State General Election in November 1978. Results of Votes Cast, General Election, State of Hawaii (Nov. 7, 1978) (hereinafter "Results of Votes Cast").

[9] Stand. Comm. Rep. No. 72, I Proceedings Of The Const. Convention Of Haw. 1978, at 678 (1980) (hereinafter "Stand. Comm. Rep. No. 72).

> elected, and accordingly he should resign from that office. The voters should not be saddled with an elected public official who no longer wishes to fulfill the duties of the office to which he was elected and will do so only if he fails to win election to the other office. This is not fair to the voters, who elected him to serve a full term, and is a violation of the public trust.[10]

III. THE FASI CHALLENGE

Frank F. Fasi, Mayor of the City and County of Honolulu, Hawaii, along with Sharon Gibo, Mark Shiira, and Kiyoshi Kimura, registered voters in the State of Hawaii, filed an action challenging the constitutionality of the "resign-to-run" amendment.[11] The judicial challenge resulted when Lieutenant Governor Benjamin J. Cayetano, the State's Chief Elections Officer, rejected Mayor Fasi's nomination papers as a gubernatorial candidate for the 1990 Republican primary ballot for failing to comply with section 12-3(a)(8) of the Hawaii Revised Statutes.[12] Section 12-3(a)(8) of the Hawaii Revised Statutes required Mayor Fasi to include with his nomination papers a certification that he had resigned as Mayor of the City and County of Honolulu as required by article II, section 7, of the Hawaii State Constitution.[13] Mayor Fasi not only failed to certify that he had resigned as Mayor of the City and County of Honolulu, but firmly stated that he had no intention to resign until he was Governor.[14]

Mayor Fasi's complaint, filed June 6, 1990, in the United States District Court for the District of Hawaii, alleged that the "resign-to-run" amendment violates the first amendment, the Equal Protection Clause of the fourteenth amendment, and article I, section 10, clause 1, of the United States Constitution.[15]

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[10] *Id.*

[11] Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[12] Letter from Benjamin J. Cayetano to Frank F. Fasi, *supra* note 3.

[13] HAW. REV. STAT. § 12-3(a)(8) (1988) requires that nomination papers contain, among other things, "[a] certification, where applicable, by the candidate that the candidate has complied with the provisions of article II, § 7, of the Constitution of the State of Hawaii."

[14] Letter from Benjamin J. Cayetano to Frank F. Fasi, *supra* note 3.

[15] Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990). Plaintiffs' arguments regarding their allegations are explicated in their Memorandum in Support of Motion for Preliminary Injunction filed concurrently with their Complaint.

IV. The State of the Law

"Resign-to-run" provisions similar to that of Hawaii's have been challenged in only two other jurisdictions. In both cases, the "resign-to-run" provisions were challenged as unconstitutional on the grounds that they violated the first amendment and the Equal Protection Clause of the fourteenth amendment of the United States Constitution. A review of the case law generated by these two cases may be helpful in determining the constitutionality of Hawaii's "resign-to-run" amendment.

A. Clements v. Fashing[16]

Article III, section 19, of the Texas Constitution provides:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.[17]

The provision renders certain officeholders ineligible for the Texas Legislature if the officeholders' current term of office will not expire until after the legislative term to which they aspire begins. A resignation by the officeholder is ineffective to avoid the provision.[18]

Article XVI, section 65, of the Texas Constitution, commonly referred to as the "resign-to-run" or "automatic resignation" provision, provides in relevant part:

> [I]f any of the officers named herein shall announce their candidacy or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such an announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.[19]

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[16] 457 U.S. 957 (1982).

[17] Texas Const. art. III, § 19.

[18] Lee v. Daniels, 377 S.W.2d 618, 619 (Tex. 1964).

[19] Article XVI, § 65, of the Texas Constitution applies to District Clerks; County Clerks; County Judges; Judges of County Courts at Law, County Criminal Courts, County Probate Courts, and County Domestic Relations Courts; County Treasurer; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners for Precincts Two and Four; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; County Commissioners for Precincts One and Three; and Constables.

In *Clements v. Fashing*,[20] both article III, section 19 ("section 19") and article XVI, section 65 ("section 65") were challenged as violating the first amendment and the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[21] The District Court for the Western District of Texas held that section 19 and section 65 denied the plaintiffs equal protection. The Court of Appeals for the Fifth Circuit affirmed the district court's holding without opinion. The United States Supreme Court granted certiorari and reversed the lower court's decision.[22]

1. Equal Protection analysis

In determining whether section 19 and section 65 violated the Equal Protection Clause, the United States Supreme Court first discussed the level of scrutiny that should be applied.[23] The Court noted that it has applied a strict scrutiny analysis in only two lines of ballot access cases.[24]

The first line of ballot access cases in which the Court has applied the strict scrutiny analysis involved classifications based on wealth.[25] In these cases, the excessive filing fees and restrictions involved invidiously burdened those of lower economic status.[26]

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[20] 457 U.S. 957 (1982).

[21] Bringing the action were: Fashing, a County Judge; Baca and McGhee, Justices of the Peace; Ybarra, a Constable; and 20 voters who alleged they would vote for the aforementioned were they to become candidates. *Id.* at 961.

[22] *Id.*

[23] Under traditional equal protection analysis, also known as the rational basis test, a classification is upheld if the classification bears a rational relationship to a legitimate state end. *See, e.g.*, McDonald v. Board of Election Commr's, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961). Under a strict scrutiny analysis, the classification must be found necessary to the accomplishment of some compelling state objective in order to pass constitutional muster. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968). *See generally* Note, *Stop H-3 Association v. Dole: Congressional Exemption From National Laws Does Not Violate Equal Protection*, 12 HAW. L. REV. 405, 409-18 (1990) (overview of the appropriate level of review in equal protection law).

[24] Ballot access cases involve restrictions placed on a candidate's access to the ballot. Clements v. Fashing, 457 U.S. 957, 963-65 (1982).

[25] *Id.* at 964.

[26] *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974) (California statute requiring a filing fee of $701.60 in order to be placed on the primary ballot); Bullock v. Carter, 405 U.S. 134 (1972) (Texas law requiring a candidate to pay a filing fee as a condition to having his name placed on the ballot in a primary election).

The second line of ballot access cases in which the Court applied strict scrutiny analysis involved classification schemes that imposed special burdens on small or new political parties or independent candidates.[27] The Court in these cases upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections. The Court, however, did not tolerate requirements and classifications aimed at maintaining the status quo and making it virtually impossible for any candidate other than the candidates from the two major parties to achieve ballot access.[28]

Sections 19 and 65 of the Texas Constitution did not involve excessive filing fees or restrictions that invidiously burdened those of lower economic status. The two sections also did not contain any classifications or requirements that imposed special burdens on minority political parties or independent candidates. Thus, sections 19 and 65 did not fall within the two lines of ballot access cases where the United States Supreme Court has departed from the traditional equal protection analysis and applied a strict scrutiny analysis.[29]

The Court, however, was cautious about automatically applying a traditional equal protection analysis to sections 19 and 65 merely because the restrictions imposed on candidacy did not fall within the two categories of ballot access cases described above. Instead, the Court decided to examine the extent of the burdens sections 19 and 65 placed on the candidacy of current officeholders.[30]

The Court found that the burden placed by section 19 on current officeholders desiring to run for a seat in the Texas Legislature involved, at most, a two year wait — one election cycle.[31] The Court further found that section 19 burdened only those elected officials whose

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[27] Clements v. Fashing, 457 U.S. at 964.

[28] *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974) (states may impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election); Jenness v. Fortson, 403 U.S. 431 (1971) (requirement that independent candidates demonstrate support in the community by securing the signatures of 5% of the total registered voters in the last election upheld); Williams v. Rhodes, 393 U.S. 23 (1968) (state must provide feasible means for political parties and candidates other than the two major parties and their candidates to appear on the general election ballot).

[29] Clements v. Fashing, 457 U.S. at 964-65.

[30] *Id.* at 965-66.

[31] *Id.* at 967.

political ambitions led them to pursue a seat in the Legislature.[32] In the Court's view, "[a] 'waiting period' is hardly a significant barrier to candidacy."[33] Thus, the Court concluded that the presence of a rational predicate behind this insignificant interference to ballot access would overcome the equal protection challenge.[34]

The Court found that section 19 clearly rested on a rational predicate and did not violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[35] According to the Court, the State of Texas had a legitimate interest in ensuring that its officeholders would neither abuse their positions nor neglect their duties because of their aspirations for higher office. By prohibiting candidacy for the Texas Legislature until the completion of an officeholder's term of office, the State intended to discourage officeholders from vacating their current terms of office and to avoid the difficulties that might arise due to interim elections and appointments.[36]

As to section 65, the Court found that the burdens it imposed were less substantial than those imposed by section 19.[37] The Court also found that section 65 served essentially the same state interests as section 19.[38] Thus, the Court concluded that unless the classification scheme could be shown to lack a rational basis, section 65 would survive the equal protection challenge as well.[39]

The Court's analysis of the language and legislative history of section 65 failed to reveal any invidious purpose for denying political process access to identifiable classes of potential candidates.[40] That fact, coupled with legitimate state interests,[41] led the Court to conclude that section 65 also did not violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[42]

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[32] *Id.*

[33] *Id. See also* Storer v. Brown, 415 U.S. 724, 733-37 (1974) (statute disqualifying any candidate seeking to run in a party primary if he had been registered or affiliated with another political party within 12 months preceding his declaration of candidacy upheld); Chimento v. Stark, 414 U.S. 802 (1973) *aff'g* 353 F. Supp. 1211 (D.N.H. 1973) (seven year durational residency requirement for candidates upheld).

[34] Clements v. Fashing, 457 U.S. 957, 968 (1982).

[35] *Id.* at 968-70.

[36] *Id.* at 968.

[37] *Id.* at 970.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 970-71.

[41] *See supra* notes 35-36 and accompanying text.

[42] Clements v. Fashing, 457 U.S. 957, 970-71 (1982).

2. First Amendment analysis

The United States Supreme Court summarily disposed of the officeholders' contention that sections 19 and 65 violated the first amendment of the United States Constitution by referring to its Equal Protection Clause analysis.[43] According to the Court, the officeholders' first amendment interests in candidacy were not significantly impaired.[44] Rather, the burdens placed on the officeholders' interest in candidacy were so insignificant that the classifications of sections 19 and 65 could be upheld under the traditional equal protection analysis.[45] Thus, the Court held that sections 19 and 65 did not violate the officeholders' first amendment rights.

B. Joyner v. Mofford[46]

Article 22, section 18, of the Arizona Constitution provides that "[e]xcept during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, State or federal office."[47]

In 1982, Conrad Joyner, a member of the Board of Supervisors for Pima County, Arizona, challenged article 22, section 18, of the Arizona Constitution, claiming that the provision violated the first amendment, the Equal Protection Clause of the fourteenth amendment, and the Qualifications Clause of article I, section 2, of the United States Constitution.[48]

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[43] *Id.* at 971-73.

[44] *Id.*

[45] *Id.* at 971-72. *See supra* notes 23-28 on traditional equal protection analysis.

[46] 706 F.2d 1523 (9th Cir. 1983).

[47] ARIZ. CONST. art. 22, § 18. This provision was proposed by the Arizona Legislature and approved by the voters at the 1980 general election. Joyner v. Mofford, 706 F.2d 1523, 1526 (9th Cir. 1983).

[48] Joyner v. Mofford, 706 F.2d at 1527. The Qualifications Clause, article I, § 2, cl. 2, of the United States Constitution provides:

> No person shall be a representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that state in which he shall be chosen.

The three qualifications contained in the Clause — age, citizenship, and residency — are exclusive, and neither Congress nor the states may require more of a candidate. Powell v. McCormack, 395 U.S. 486, 522-48 (1969).

On a motion for summary judgment, the United States District Court for the District of Arizona held that article 22, section 18, was unconstitutional under the Qualifications Clause and ordered that Joyner be allowed to run for the House of Representatives without having to resign from his supervisory position on the Pima County Board of Supervisors.[49] The district court did not reach Joyner's first and fourteenth amendments claims.[50]

On appeal, the Court of Appeals for the Ninth Circuit found that article 22, section 18, did not violate the Qualifications Clause.[51] The appellate court then went on to address Joyner's first and fourteenth amendments claims.[52]

The Court of Appeals for the Ninth Circuit dismissed Joyner's first amendment claim in a footnote in its opinion.[53] The appellate court cited *Clements v. Fashing*,[54] in which the United States Supreme Court found that a Texas "resign-to-run" provision similar to that at issue in *Joyner* placed insignificant burdens on an elected officeholder's first amendment rights.[55] The court of appeals dismissed Joyner's first amendment claim without further discussion.

In its analysis of the equal protection challenge,[56] the court of appeals again took guidance from *Clements v. Fashing*.[57] In following the *Clements* analysis, the court of appeals concluded that the state interests advanced by article 22, section 18, of the Arizona Constitution were substantial and compelling, while the burdens placed on potential candidates were

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[49] Joyner v. Mofford, 706 F.2d at 1526.

[50] *Id.* at 1525-26.

[51] The Court of Appeals for the Ninth Circuit found that article 22, § 18, did not violate the Qualifications Clause because it neither prevented an elected state officeholder from running for federal office, nor prohibited an elected state officeholder from filing for nomination to Congress. The court admitted that the provision, by regulating the conduct of state officials by requiring those officeholders who run for other offices before the final year of their current term to resign or be removed from their state office, placed an indirect burden on potential candidates for Congress. The court, however, viewed such an indirect burden as insufficient "to constitute an impermissible qualification for federal office." *Id.* at 1531.

[52] *Id.* at 1527-28.

[53] *Id.* at 1527 n.2.

[54] 457 U.S. 957 (1982).

[55] Joyner v. Mofford, 706 F.2d at 1527 n.2 (9th Cir. 1983). *See supra* notes 43-45 and accompanying text.

[56] Joyner, 706 F.2d at 1532-33.

[57] 457 U.S. 957 (1982).

minimal.[58] The court stressed that article 22, section 18, did not prevent Arizona officials from becoming candidates for other offices. Rather, the provision merely required that officials not occupy a state office while seeking another state or federal office.[59] Accordingly, the court of appeals found that the burdens imposed by article 22, section 18, were easily outweighed by the benefits, and held that article 22, section 18, did not violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[60]

V. Fasi v. Cayetano[61]

Plaintiffs in *Fasi v. Cayetano*[62] allege that Hawaii's "resign-to-run" amendment violates the first amendment, the Equal Protection Clause of the fourteenth amendment, and the Bill of Attainder Clause in article I, section 10, clause 1, of the United States Constitution.[63] Plaintiffs' specific claims are discussed in the following subsections.

A. First Amendment Claim

Plaintiffs claim that the "resign-to-run" amendment, in conjunction with Hawaii's lack of write-in voting, violates their first amendment rights by preventing otherwise eligible citizens from being candidates for public office and by preventing voters from freely casting ballots for candidates of their choice.[64] Plaintiffs recognize that the "resign-to-run" provisions which burdened an officeholder's right to be a candidate were found to not violate the first amendment in both *Clements*

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[58] Joyner v. Mofford, 706 F.2d at 1532. The state interests advanced by article 22, § 18, included: (1) to encourage an elected public official to devote himself exclusively to the duties of his office; (2) to reduce the possibility of public subsidies for public officials who are merely using public office as a "stepping stone"; (3) to prevent abuse of office before and after election; and (4) to protect the expectations of the electorate in voting a candidate into state office. The burdens imposed on potential candidates by article 22, § 18, were at worst a loss of income and the possibility of being without public office. *Id.* at 1532-33.

[59] *Id.* at 1533.

[60] *Id.*

[61] Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[62] *Id.*

[63] *Id.*

[64] Brief for Plaintiffs at 17-18, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

v. Fashing[65] and *Joyner v. Mofford*.[66] Plaintiffs, however, attempt to distinguish their case from that of *Clements* and *Joyner* by claiming that write-in voting was available and affirmatively required in the states where *Clements* and *Joyner* arose.[67]

1. Write-in voting in Texas

Section 146.001, of the Texas Election Code provides "*[e]xcept as otherwise provided by law*, if the name of the person for whom a voter desires to vote does not appear on the ballot, the voter may write in the name of that person."[68] Under the Code, write-in voting is subject to a number of limitations. One such limitation is that "[a] write-in vote may not be counted unless the name written appears on the list of write-in candidates required by Section 146.031."[69]

To be placed on the list of write-in candidates, "a candidate must [first] make a declaration of write-in candidacy."[70] Once the declaration of write-in candidacy is filed, the declarant must be certified for placement on the list of write-in candidates.[71] However, certification for placement on the list will be denied if "the information on the candidate's declaration of write-in candidacy indicates that the candidate is ineligible for office"[72] or "facts indicating that the candidate is ineligible are conclusively established by another public record."[73]

Although these write-in voting provisions were not discussed by the United States Supreme Court in *Clements v. Fashing*,[74] the language of the provisions does not appear to abrogate the application of Texas' "resign-to-run" or "automatic resignation" provision[75] to write-in candidates. As noted above, Texas' "resign-to-run" provision expressly provides for the *automatic* resignation of any officeholder who becomes a candidate or announces candidacy in any general, special, or primary

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[65] 457 U.S. 957 (1982).

[66] 706 F.2d 1523 (9th Cir. 1983).

[67] Brief for Plaintiffs at 20, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[68] TEX. ELEC. CODE ANN. § 146.001 (Vernon 1986) (emphasis added).

[69] *Id.* § 146.022.

[70] *Id.* § 146.023(a).

[71] *Id.* § 146.029(a).

[72] *Id.* § 146.30(a).

[73] *Id.* § 146.030(b).

[74] 457 U.S. 957 (1982).

[75] TEXAS CONST. art XVI, § 65.

election when the unexpired term of the current office exceeds the beginning of the term of office sought by one year.[76] The Texas write-in voting laws appear to prevent any write-in votes from being counted unless the person voted for is on the list of write-in candidates. The only way to get on the list of write-in candidates is to make a declaration of write-in candidacy. However, any declaration of candidacy by a Texas officeholder would effect the Texas "resign-to-run" law, resulting in the officeholder's automatic resignation. Thus, it appears that even under the Texas write-in voting laws, an ambitious officeholder cannot evade the "automatic resignation" provision of article XVI, section 65, of the Texas Constitution.

2. Write-in voting in Arizona

Section 16-312 of the Arizona Revised Statutes provides in relevant part:

> Any person desiring to become a write-in candidate for an elective office in a primary or general election shall file a nomination paper, signed by the candidate, giving his place of residence and post office address, age, length of residence in the state and date of birth. . . . Any person not filing such a statement shall not be counted in the tally of ballots.[77]

Clearly, under the Arizona write-in voting law, write-in votes for persons who have not filed nomination papers for candidacy are invalid.

The court in *Joyner v. Mofford*[78] did not discuss the effect of the Arizona write-in voting law on the Arizona "resign-to-run" provision. However, the plain language of the Arizona "resign-to-run" provision suggests that an officeholder may not evade the consequences of the provision through the process of write-in voting. The Arizona "resign-to-run" provision provides that "[e]xcept during the final year of the term being served, no incumbent . . . whether holding election or appointment, may offer himself for nomination or election to any salaried local, state or federal office."[79] Thus, Arizona officeholders who have more than one year remaining in their current term of office are prohibited from offering themselves for nomination or election. In

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[76] Clements v. Fashing, 457 U.S. 957, 960 (1982) (quoting TEXAS CONST. art. XVI, §65).

[77] ARIZ. REV. STAT. ANN. § 16-312 (1989).

[78] 706 F.2d 1523 (9th Cir. 1983).

[79] ARIZ. CONST. art 22, § 18.

reading Arizona's "resign-to-run" provision in conjunction with Arizona's write-in voting law, one would need to stretch one's imagination to conclude that filing nomination papers for write-in candidacy is not the same as offering oneself for nomination as a candidate for office.

The foregoing analysis reveals that although write-in voting was available in the states where *Clements* and *Joyner* arose, the write-in voting laws did not provide a means for evading the states' "resign-to-run" law. Thus, Plaintiffs' first amendment claim in *Fasi v. Cayetano* should fail.

B. Equal Protection Claim

In light of *Clements v. Fashing*[80] and *Joyner v. Mofford*,[81] Plaintiffs concede that Hawaii's "resign-to-run" amendment, on its face, does not violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[82] Plaintiffs, however, do not claim that Hawaii's "resign-to-run" amendment, on its face, violates the Equal Protection Clause of the fourteenth amendment. Rather, Plaintiffs claim that the "resign-to-run" amendment, *as applied*, denies them equal protection.[83] Specifically, Plaintiffs claim that the "resign-to-run" amendment was invidiously designed to punish Frank Fasi and that it has been "applied in such a way as to discriminatorily narrow its operation so it applies as much as possible only to the original target, Frank Fasi, and so as to protect those who can only be classified as mainline Democrats."[84]

To succeed on their equal protection claim, Plaintiffs will need to prove intentional discrimination.[85] Plaintiffs support their claim that

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[80] 457 U.S. 957 (1982).

[81] 706 F.2d 1523 (9th Cir. 1983).

[82] Brief for Plaintiffs at 26, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[83] *Id.*

[84] *Id.* at 27-28.

[85] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608-09 (1984) (petitioner required to show that the passive enforcement system, which was not discriminatory on its face, had a discriminatory effect and was motivated by a discriminatory purpose); Snowden v. Hughes, 321 U.S. 1, 8 (1943) ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."); Benigi v. City of Hemet, 868 F.2d 307, 311 (9th Cir. 1988) ("An equal protection claim

Hawaii's "resign-to-run" amendment was invidiously designed to punish Frank Fasi by citing the testimony of four delegates to the Hawaii Constitutional Convention of 1978.[86] Plaintiffs support their claim that Hawaii's "resign-to-run" amendment has been discriminatorily applied by citing several Hawaii State Attorney General Opinions which addressed the application of the "resign-to-run" amendment to particular elected officeholders.[87] In each instance, the State Attorney General was of the opinion that the "resign-to-run" amendment either did not apply to the situation presented or did not require a resignation.[88]

Although Plaintiffs' equal protection claim, standing by itself, appears meritorious, facts which Plaintiffs failed to address throw a different light upon their claim. Plaintiffs cited to four delegates at the Hawaii Constitutional Convention of 1978 who spoke of the "resign-to-run"

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based on selective law enforcement activity is judged according to ordinary standards and the plaintiff must show both a discriminatory effect and a discriminatory motivation."); Cook v. City of Price, Carbon City, Utah, 566 F.2d 699, 701 (10th Cir. 1977) ("[W]hen the discrimination is not aimed at a 'suspect class', a plaintiff must show intentional or purposeful discrimination.").

[86] Brief for Plaintiffs at 7-8, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990). Plaintiffs cite the testimony of Delegates DiBianco ("[W]e all know which elected official [the "resign-to-run" provision was] aimed at."); Miller ("This particular proposal has appeared a number of times in the state legislature, but has always failed to get the support necessary for passage because it was directed against one person, an incumbent Mayor who had his sights on higher office."); Chong (The provision "was designed to take care of one problem."); Cabral ("[T]his is another ruse that has been cleverly put together to serve the ulterior motives of a certain group."). II Proceedings Of The Const. Convention Of Haw. 1978, at 707-17 (1980).

[87] Brief for Plaintiffs at 9-15, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990). Plaintiffs' examples include: (1) When Governor Ariyoshi nominated State Representative Wakatsuki to the Circuit Court bench, Haw. Op. Att'y Gen. 80-2 (March 3, 1980); (2) When State Legislator Mary George inquired whether the "resign-to-run" amendment applied to county or state elected public officers seeking federal elective public office, Haw. Op. Att'y Gen. 86-4 (Feb. 6, 1986); (3) When Honolulu City Council member Patsy Mink inquired whether the "resign-to-run" amendment required her to resign her Council seat to run for Governor since the term of office for Governor began on the first Monday of December 1986 and Council member Mink's term expired on January 2, 1987, Haw. Op. Att'y Gen. 86-17 (July 11, 1986); and (4) When State Senator Cobb inquired whether the "resign-to-run" amendment applied to those wishing to run for positions on neighborhood boards, Haw. Op. Att'y Gen. 88-7 (Oct. 24, 1988).

[88] Brief for Plaintiffs at 9-15, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

provision as directed at "one" person.[89] However, Plaintiffs failed to point out that: (1) there were a total of eighty-two delegates to the Convention who voted on the provision;[90] (2) there were twenty-two delegates who spoke on the "resign-to-run" provision;[91] and (3) the "resign-to-run" provision was added to the Hawaii State Constitution pursuant to a majority vote by the voters in the State of Hawaii.[92]

In addition, Defendants note that Mayor Fasi has in fact benefitted from the "resign-to-run" amendment.[93] Specifically, Defendants point out the many potential candidates for the 1980, 1984, and 1988 mayoral races and the 1982 gubernatorial race who were affected by the "resign-to-run" amendment.[94] Defendants also point out that three Honolulu City Council members were required to resign in order to run for the Democratic nomination for Mayor in 1988.[95]

Thus, it appears that Plaintiffs face a formidable task in attempting to prove intentional discrimination in the adoption and application of the "resign-to-run" amendment. Given the facts and circumstances presented, it is unlikely that the United States District Court for the District of Hawaii will uphold the Plaintiffs' equal protection claim.

C. Bill of Attainder Claim

Plaintiffs claim that although the "resign-to-run" amendment is neutral on its face, it is a bill of attainder and, therefore, unconstitutional.[96] Specifically, Plaintiffs claim that Hawaii's "resign-to-run"

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[89] *See supra* note 86.

[90] I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at vii (1980).

[91] II PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 698-718 (1980).

[92] Results of Votes Cast, *supra* note 8.

[93] Brief for Defendants at 12-14, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[94] Defendants list 25 State Senators, 16 Board of Education members, 2 Governors, and 2 Lieutenant Governors who were subject to the "resign-to-run" amendment had they decided to run for Mayor in 1984 and 1988. Defendants also list 13 State Senators, 2 Mayors, and 13 Board of Education members who would have faced a forced resignation had they decided to run for Governor in 1982. Frank Fasi was a candidate in this gubernatorial race, but was not subject to the "resign-to-run" amendment because he was then out of office. *Id.*

[95] *Id.* at 14.

[96] Brief for Plaintiffs at 31, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

amendment was intended to punish one person for his actions, and that the effect of the amendment has been to direct punishment toward that same person.[97] According to Plaintiffs, the "resign-to-run" amendment is a bill of attainder, violating article I, section 10, clause 1, of the Constitution of the United States.[98]

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial."[99] The Bill of Attainder Clause proscribes statutes that inflict punishment on specified individuals or groups in retribution for past acts, or involve deprivations to deter the future misconduct of specified individuals or groups.[100]

To prove that the "resign-to-run" amendment is a bill of attainder, Plaintiffs must show: (1) that the "resign-to-run" amendment falls within the historical meaning of legislative punishment; (2) that the "resign-to-run" amendment, viewed in terms of the type and severity of burdens imposed, cannot be said to further nonpunitive legislative purposes; and (3) that the legislative record reveals an intent to punish.[101]

In order to succeed on their bill of attainder claim, Plaintiffs must first get over the hurdle of the definition of a bill of attainder as a *legislative act* which inflicts punishment without judicial trial. Plaintiffs may find the definition of a bill of attainder problematic because the "resign-to-run" amendment was not promulgated and passed by the Hawaii State Legislature. Rather, the "resign-to-run" provision was promulgated by the Constitutional Convention of Hawaii of 1978 and

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[97] *Id.*

[98] *Id.* at 30-31. Article I, § 10, cl. 1, of the Constitution of the United States provides: "No State shall . . . pass any bill of attainder." U.S. CONST. art. I, § 10, cl. 1.

[99] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1976). *See generally*, United States v. Brown, 381 U.S. 437 (1965) (historical development of the prohibition of bills of attainder).

[100] Selective Serv. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851-52 (1983). Examples of the types of punishment proscribed by the Bill of Attainder Clause include imprisonment, banishment, punitive confiscation of property, and legislative bars to participation by individuals or groups in specific employments or professions. *Id.* at 852. *See also* United States v. Brown, 381 U.S. 437 (1965) (disqualification, disfranchisement, and banishment); United States v. Lovett, 328 U.S. 303 (1946) (perpetual exclusion from any government employment); Cummings v. Missouri, 71 U.S. 277 (1866) (deprivation of any rights, civil or political).

[101] Selective Serv. v. Minnesota Pub. Interest Research Group, 468 U.S. at 852.

added to the Hawaii State Constitution pursuant to a majority vote by the State electorate.[102]

Assuming that Plaintiffs are able to convince the district court that the "resign-to-run" amendment is a legislative act, Plaintiffs must then show that the amendment falls within the historical meaning of legislative punishment. Again, this may be difficult for Plaintiffs to do because the "resign-to-run" amendment does not strictly bar Mayor Fasi from running for the office of Governor. Mayor Fasi may become a candidate for Governor by simply resigning from his current office. Thus, the "resign-to-run" amendment does not fall within the historical meaning of forbidden legislative punishment because the amendment does not perpetually bar Mayor Fasi from becoming a candidate for Governor.[103]

If Plaintiffs are able to convince the United States District Court for the District of Hawaii that the "resign-to-run" amendment falls within the historical meaning of legislative punishment, they must then show that the amendment fails to further any nonpunitive purpose. Again, this task may prove difficult because the "resign-to-run" amendment was promulgated to protect the voters from "an elected public official who no longer wishes to fulfill the duties of the office to which he was elected and will do so only if he fails to win election to the other office."[104]

Even if Plaintiffs are able to convince the district court that the "resign-to-run" amendment fails to further any nonpunitive purpose, they must still show that the legislative record reveals an intent to punish. Plaintiffs may be able to show the requisite intent to punish by citing the testimony of the four delegates at the Hawaii Constitutional Convention of 1978. However, the cogency of the testimony is lessened when one realizes that there were eighty-two delegates at the convention who voted on the provision,[105] there were twenty-two delegates who spoke on the "resign-to-run" provision,[106] and the electorate

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[102] *See supra* note 8 and accompanying text.

[103] Selective Serv. v. Minnesota Pub. Interest Research Group, 468 U.S. at 853 ("A statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment.").

[104] STANDING COMM. REP. No. 72, *supra* note 9.

[105] I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at vii (1980).

[106] II PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 698-718 (1980).

of Hawaii voted to amend the Hawaii State Constitution by adding the "resign-to-run" provision.[107]

Thus, it appears that Plaintiffs face a very difficult task in proving Hawaii's "resign-to-run" amendment is a bill of attainder and in violation of article I, section 10, clause 1, of the Constitution of the United States.

VI. Conclusion

Plaintiffs claim that Hawaii's "resign-to-run" amendment is unconstitutional because it violates their first amendment and equal protection rights, and is a bill of attainder. Plaintiffs have conceded that Hawaii's "resign-to-run" amendment, as written, is constitutional in light of the *Clements*[108] and *Joyner*[109] decisions. Thus, in order to present a viable constitutional claim, Plaintiffs attempt to distinguish their case from that of *Clements* and *Joyner*.

Plaintiffs argue that their first amendment claim is distinguishable from the first amendment claims made in *Clements*[110] and *Joyner*[111] because write-in voting is not allowed in Hawaii, but was available and required in the states where *Clements* and *Joyner* arose.[112] However, an analysis of the write-in voting laws in those states reveals that write in voting did not provide a means for evading the states' "resign-to-run" laws.

Plaintiffs also attempt to distinguish their equal protection claim from the equal protection claims found in *Clements*[113] and *Joyner*[114] by arguing that Hawaii's "resign-to-run" amendment was invidiously designed and discriminately applied to punish Frank Fasi.[115] However, existing facts and circumstances fail to support Plaintiffs' allegation of discriminatory intent and application. Thus, the United States District Court for the District of Hawaii will probably find that Hawaii's "resign-to-

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[107] *See supra* note 8 and accompanying text.

[108] 457 U.S. 957 (1982). *See supra* notes 16-45 and accompanying text.

[109] 706 F.2d 1523 (9th Cir. 1983). *See supra* notes 46-60 and accompanying text.

[110] 457 U.S. 957 (1982). *See supra* notes 43-45 and accompanying text.

[111] 706 F.2d 1523 (9th Cir. 1983). *See supra* notes 53-55 and accompanying text.

[112] Brief for Plaintiffs at 20, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[113] 457 U.S. 957 (1982).

[114] 706 F.2d 1523 (9th Cir. 1983).

[115] Brief for Plaintiffs at 26, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

run'' amendment does not violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution.[116]

Lastly, Plaintiffs claim that Hawaii's ''resign-to-run'' amendment violates the Bill of Attainder Clause of article I, section 10, clause 1 of the United States Constitution.[117] However, the facts and circumstances surrounding the adoption of Hawaii's ''resign-to-run'' amendment do not support Plaintiffs' assertion that the ''resign-to-run'' amendment is a bill of attainder and, therefore, violates article I, section 10, clause 1 of the United States Constitution.[118] Thus, Plaintiffs have failed to present a convincing argument that would distinguish their ''resign-to-run'' claim from those presented in existing case law.

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[116] *See supra* notes 80-95 and accompanying text.

[117] Brief for Plaintiffs at 31, Fasi v. Cayetano, Civ. No. 90-00455 (D. Haw. filed June 6, 1990).

[118] *See supra* notes 96-107 and accompanying text.

Book Review: *Hawaii Family Law and Practice* by Peter J. Herman

Reviewed by M. Casey Jarman[1]

To those interested in the traditional approach to substantive family law in Hawaii, I commend Peter Herman's book *Hawaii Family Law and Practice*. This well-organized work leads the reader through the statutory and case law that governs the dissolution of a marriage. The chapter titles reflect the litany of issues familiar to lawyers and non-lawyers alike: "Filing for Divorce", "Child Custody", "Child Support", "Alimony", "Division of Property and Allocation of Debts", and "Premarital Agreement and Palimony". However, to those who seek counsel on pressing social domestic law issues, Mr. Herman's book will be a disappointment. Such problems are simply cursorily referred to within the text.

Despite these shortcomings, the book is a valuable reference tool for attorneys and a helpful guide for lay persons interested in Hawaii family law. Within each section, Mr. Herman presents the relevant statutory provisions and the most important cases interpreting them. In addition, he includes a commentary that points out ambiguities and offers advice for handling them. Samples of model forms at the end of each chapter are helpful, particularly for attorneys new to family law practice. However, he fails to mention that the rules of family court often differ from those in Hawaii's district and circuit courts, and the resulting necessity of keeping abreast of family court memoranda.

In my opinion, the book's main strength lies in the author's analysis of the case law which gives substance to the often broad "equity" commands of the statutes. An excellent example is the discussion of property division. Mr. Herman deftly takes the reader through the series of Hawaii Supreme Court and Intermediate Court of Appeals

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decisions in this complex area of family law practice. He points out the differing philosophical approaches taken by the two appellate courts and how the family courts have adjusted their decision-making to accommodate these disparate points of view. In the process, the reader learns valuable lessons in settling property division problems.

Another strength lies in Mr. Herman's integration of policy considerations into his practical approach to the issues. For example, in his chapter on child support, Mr. Herman not only takes the reader through each step in the child support guidelines calculations, but also explains the policies behind the structure of the guidelines. And in the area of interstate child custody disputes where attorneys must cope with interrelated federal and state jurisdictional statutes that may conflict and which seem to create unreasonable forum problems, Mr. Herman has succeeded in presenting the issues and pitfalls clearly and in the context of the legislative purpose.

Unfortunately, Mr. Herman neglects to address some of the more controversial aspects of family law. Pressing issues such as the special problems faced by attorneys representing abused women in a divorce/custody dispute, or the impoverishment of women and children resulting from Hawaii's divorce process are simply not dealt with. The availability of post-separation temporary restraining orders is mentioned, but only cursorily. So little is said about spouse and child abuse that one wonders if Mr. Herman views these issues as legitimate problems for a family law attorney in Hawaii. In addition, no attempt was made to make the reader aware of the variety of community social service agencies and support groups available to clients in need of non-legal as well as legal assistance.

Practitioners and lay people alike can thank Mr. Herman for this glimpse into Hawaii's law arising from the dissolution of a marriage. But for those of us who want guidance on issues such as how to deal with family law problems exacerbated by domestic violence and methods of structuring property settlements that envision the future rather than focus almost solely on today's financial picture, we must wait for another day and another book.