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The Hawaii Supreme Court Since 1982: A Symposium Issue

Introduction

Each year the William S. Richardson School of Law publishes two issues comprising a volume of the *University of Hawai'i Law Review*. This year the summer issue of volume 14 is a "symposium issue" devoted to studying aspects of the Hawaii Supreme Court since the retirement of Chief Justice William S. Richardson at the end of 1982.[1] The purpose is simple: to stimulate thought and discussion about Hawai'i law.

William S. Richardson guided the Hawaii Supreme Court from 1966 to 1982. "During those sixteen years, his court reflected the activist tenor of the times as well as the liberal bent of the United States Supreme Court. However, in some instances, the Richardson-led court moved beyond mere reflection and engaged in extraordinary judicial activism."[2] Since 1982, the Honorable Herman T. Lum has directed the Hawaii Judiciary. In this issue, authors explore from various angles several broad questions. Has the Hawaii Supreme Court's judicial "philosophy" changed? Is it possible to characterize a "Lum Court" philosophy? Do certain values surface as being important in this court's decisions? How has the court treated different areas of the law?

This project began in early 1991. As planning began for volume 14 we looked for a central theme for the journal. We looked to guidance from William S. Richardson himself. In the first issue of the *University of Hawai'i Law Review* he wrote:

> The law review, like the law school itself, must play a major role in helping us to understand our laws and their effect upon that vision. It should encourage the thoughtful scrutiny and examination of local statutes and judicial decisions in light of our history and our present conditions. It should serve as a vehicle for analyzing our laws from the broader perspective of national and comparative law. It should focus

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[1] In conjunction with this issue, authors presented their articles in a series of panel discussions at a forum held at the law school on January 25, 1992.

[2] Carol S. Dodd, *The Richardson Court: Ho'Oponopono*, 6 U. HAW. L. REV. 9, 9 (1984).

> study upon the environmental, social, and economic problems of our community and, based upon an understanding of the origins of our laws and their social context, propose needed reforms. . . . Finally, the law review should reflect the character and concerns of the law school, for whatever distinguishes this law school will also distinguish its law review.[3]

In educating lawyers for Hawai'i, our law school has a duty to study and evaluate Hawai'i case law. In 1970, when discussing the purpose of establishing a law school at the University of Hawaii, J. Russell Cades wrote:

> One compelling reason for a local law school is that hopefully a group of legal scholars and analyzers will critically examine the local law making process, judicial, legislative and administrative. The minute and timely review of this significant facet of our state's growing pains is a rewarding enterprise for law review editors.[4]

As the William S. Richardson School of Law begins its twentieth year, we hope this issue represents the initial idealism and expresses the acquired maturity of the school.

A study of the local court is natural. As this court begins to change composition, we believe this is an appropriate time to study its judicial values. By publication date of this issue, the Hawaii Supreme Court under the guidance of Chief Justice Herman T. Lum will be nearly ten years old. Between 1982 and 1989 the court's composition remained unchanged, with Justices James Wakatsuki, Yoshimi Hayashi, Edward Nakamura, and Frank Padgett serving on the court. Justice Nakamura retired in 1989, being succeeded in 1990 by Justice Ronald Moon. In April 1992, Justices Hayashi and Padgett retired, succeeded by Justices Robert Klein and Stephen Levinson. In 1993, the initial terms of Chief Justice Lum and Justice Wakatsuki will expire. Further, Judge Harry Tanaka of the Intermediate Court of Appeals retired in the summer of 1991. The court is changing. While it is true that the "Lum Court" has not finished its work, now is an opportune time to study the court.

This issue approaches an analysis of the court's philosophy from different angles. This, of course, begs fundamental questions. What is a "judicial philosophy"? How is it "measured"? What are the values,

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[3] William S. Richardson, *Ka 'ike nui, ka 'ike iki*, ["grant knowledge of the great things, and of the little things"], 1 U. HAW. L. REV. [at ix] (1979).

[4] J. Russell Cades, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. BAR J. 58 (1970).

factors, and tradeoffs inherent in the court's decisions? What is or should be the role of a local court in our unique state?

In approaching these questions we solicited views from many perspectives, but clearly there are gaps and overlaps. In his overview article, David Kimo Frankel presents one set of possible conclusions.[5] Some authors comment that in view of a limited amount of case law, "trend analysis is a risky business."[6] Others remark that the court does not have an overriding "philosophy," but rather is "practical" and decides on a case-by-case basis.[7] Other authors approach these questions from unique perspectives. For example, Williamson B.C. Chang uses the court's practice of issuing memorandum opinions as a starting point to present a controversial sociological essay which compares the "Richardson Era" with the "Lum Era" against a backdrop of Hawaiian history.[8] As you read the articles in this issue, draw your own conclusions.

We have striven to conduct this exercise with the utmost respect for the court and for the justices that serve on it. As students, professors, and attorneys, who study and analyze written decisions daily, we look to the courts and case law for guidance and values. We respect the court. And precisely because of this recognition and respect, we study it. Especially in a university setting, we should not be afraid to draw supportable conclusions and to state them boldly. Ultimately if we do no more than provide a framework for people to think about the court, then we believe we will have succeeded.

Douglas K. Ushijima*

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[5] David K. Frankel, *The Hawaii Supreme Court: An Overview*, 14 U. HAW. L. REV. 5 (1992).

[6] *See* David L. Callies et al., *The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991*, 14 U. HAW. L. REV. 119, 121 (1992).

[7] *See, e.g.*, Richard S. Miller & Geoffrey K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV. 55, 116 (1992) ("[T]he opinions of the Lum Court do not reveal a consistent and monolithic philosophy either with regard to jurisprudence or social policy"). Justice Padgett commented in 1989 that "there's no discernible philosophical position to this court." Dan Boyland, *The brethren*, HONOLULU, July 1989, at 34, 36.

[8] *See* Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-Statehood Hawai'i*, 14 U. HAW. L. REV. 17 (1992).

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The Hawai'i Supreme Court: An Overview

by David Kimo Frankel*

I. Introduction

According to Justice Frank Padgett, "There's no discernible philosophical position to this court."[1] Despite Justice Padgett's assertion, a synthesis of the research and conclusions of the articles in this volume reveals a number of possible themes:

(1) The court has avoided conflict;

(2) The court has extended protection to labor, and avoided protection of the environment;

(3) The court has become more conservative since the retirement of Chief Justice William S. Richardson (except on criminal defense issues);

(4) The court has not stepped in to protect the politically powerless in response to the United States Supreme Court's denial of judicial redress to such groups; and

(5) The court has been unable to articulate solutions to problems, evidencing its general ambivalence.

II. The Court Avoids Conflicts

The infrequency of dissent illustrates the court's avoidance of conflict. Well over eighty percent of the supreme court's formal decisions have

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* Symposium Issue Co-editor, *University of Hawai'i Law Review*; class of 1992, Wm. S. Richardson School of Law.

[1] Dan Boylan, *The brethren*, Honolulu, July 1989, at 34, 36.

been unanimous.[2] This contrasts dramatically with the United States Supreme Court which issued unanimous decisions less than twenty-five percent of the time in the 1980s.[3] If the infrequency of dissent contrasts with the United States Supreme Court, it parallels the actions of the Democratically controlled Hawai'i Legislature. Democratic control of the Legislature has resulted in decisions by consensus—or, at least decisions without bitter public dissent.[4] For example, in recent years, the Legislature approved over eighty percent of the bills unanimously; the remaining bills passed over mere token dissent.[5]

This hesitancy to "rock the boat" is also apparent in the court's extreme deference to the other branches of government. The court has generally defered to administrative agencies, giving them broad authority to act.[6] Similarly, the court has generally allowed the Legislature

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[2] Evaluation of the official reports publishing the court's decisions shows:

Year	*Opinions*	*Dissents*	*Concurrences*
1983	81	5	4
1984	72	7	1
1985	69	4	1
1986	59	6	1
1987	55	3	1
1988	45	2	2
1989	68	4	1

[3] Note, *Leading Cases*, 104 HARV. L. REV. 129, 372 Table IV (1990).

[4] Legislative committees decide the fate of bills:

> The Chair decides he wants a bill to pass or has agreed with other members in private conversations, or has agreed with the leadership to pass the bill out. The Chair requests that a committee report on the bill be prepared by staff.
>
> The Committee report is usually then circulated in the private offices for the signature of the members of the committee. If enough signatures are obtained . . . the report is then . . . place[d] on the calendar for a vote.

Why Have Committees, 2 PUB. REP. (The Public Reporter, Honolulu, Haw.), 1990.

[5] 1 *id.* (1989); 2 *id.* (1990).

[6] Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 738 P.2d 1205 (1987) (upholding the commission's authority to adopt protective antidiscrimination rules); Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 794 P.2d 1115 (1990) (upholding agency decision to give strikers unemployment benefits); Stop H-3 Association v. Department of Transportation, 68 Haw. 155, 706 P.2d 446 (1985) (upholding Board of Land and Natural Resources finding that highway would not be injurious to forest growth, water resources, and open space); Malama Maha'ulepu v. Land Use Commission, 71 Haw. 332, 709 P.2d 906 (1990) (upholding agency's procedures in a contested case hearing); Mahiai v. Suwa, 69 Haw. 349, 742 P.2d 359 (1987) (upholding Board of Agriculture decision to slaughter cattle but not wildlife); Holman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978) (upholding prison rule requiring

to act without judicial interference.[7] Thus, the court has avoided confronting the Legislature and the Executive for their failure to address the needs of Hawaiians[8] and their procedures which harm environ-

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women visitors to wear brassieres); Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987) (upholding Board's approval of geothermal drilling); McCloskey v. Honolulu Police Department, 71 Haw. 568, 799 P.2d 953 (1990) (upholding Department's rule mandating drug testing). *But see*, Sussel v. City and County, 71 Haw. 101, 784 P.2d 867 (1989) (overturning decision of Republican city administration which did not provide an employee with an impartial tribunal); Hui Aloha v. Planning Commission of the County of Maui, 68 Haw. 135, 705 P.2d 1042 (1985) (overturning commission decision made before mandated finding of facts); McPherson v. Zoning Board of Appeals, 67 Haw. 603, 699 P.2d 26 (1985) (overturning Board's decision made without proper finding of facts).

[7] State v. Tookes, 67 Haw. 608, 699 P.2d 893 (1985) (upholding statute outlawing prostitution challenged on equal protection grounds); State v. Muller, 66 Haw. 616, 671 P.2d 1351 (1983) (upholding statute outlawing prostitution challenged on the basis of a right to privacy); Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (refusing to determine O.H.A.'s share of proceeds because such determinations were for the legislature to determine); Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 773 P.2d 250 (1989) (finding that the city council provided adequate procedural due process in granting a shoreline management permit); Nagle v. Board of Education, 63 Haw. 389, 629 P.2d 109 (1981) (upholding statute requiring mandatory retirement of public school teachers at 65); Washington v. Fireman's Fund Insurance Companies, 68 Haw. 192, 708 P.2d 129 (1985) (upholding statute treating people covered by Hawaii Joint Underwriting Plan differently than other members of the general public); State v. Rivera, 62 Haw. 120, 612 P.2d 526 (1980) (upholding rape statute defining rape as an offense only committed by males); Koolau Baptist Church v. Department of Labor, 68 Haw. 410, 718 P.2d 267 (1986) (upholding statute imposing unemployment compensation tax on church); Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 814 (1985) (upholding county ethics code requiring county employees to disclose personal financial information); Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. 179, 767 P.2d 815 (1989) (upholding city council amendments to development plan). *But see*, State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (overturning convictions for promoting pornographic materials where state failed to demonstrate a compelling interest).

[8] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (refusing to determine O.H.A.'s share of proceeds because such determinations were nonjusticiable and for the legislature to determine); Ahia v. Department of Transportation, 69 Haw. 538, 751 P.2d 81 (1985) (upholding lease of Hawaiian Homelands to the Department); Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987) (holding that certain Native Hawaiians' religious practices are not hurt by geothermal development since ceremonies were not conducted on the particular site of development—despite the fact the entire area was considered sacred).

mental groups.[9] Because these other branches are controlled by those with similar ideology, the court has acted as a rubber stamp.[10] This contrasts to battles in the federal courts, where judges have more frequently scrutinized federal agencies and Congressional action, particularly when the judges see the world differently than do the agencies, the President, or Congress.[11]

III. The Court Protects Labor, But Not the Environment

The court's Democratic orientation is further illustrated by its contrasting positions in labor and land use cases. The court has frequently risen to the defense of labor,[12] often going far beyond strict statutory

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[9] Malama Maha'ulepu v. Land Use Commission, 71 Haw. 332, 709 P.2d 906 (1990) (upholding agency's procedures in a contested case hearing, including the denial of opportunity to present relevant evidence); Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 773 P.2d 250 (1989) (upholding City Council decision despite ex parte contacts); Kona Old Hawaiian Tails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987) (refusing to review agency issuance of a special management area permit since plaintiffs did not avail themselves of administrative process despite the fact that agency's rules did not provide for a hearing and statute expressly authorized judicial review).

[10] The connection between the court and the Democratic Party machine is clear. Justice Wakatsuki was Speaker of the State House of Representatives. Justice Padgett campaigned for Lt. Gov. Richardson, Gov. Burns, and Sen. Inouye. Justice Lum ran for the Territorial Legislature and served as clerk of the House of Representatives from 1956-61. He also went to the Democratic National Convention in 1960 and served as the Democraticly appointed U.S. attorney for the District of Hawaii. Justice Hayashi campaigned for Democrats and ran for the Legislature in the 1950s. Justice Nakamura worked as a labor lawyer, representing the interests of the backbone of the Democratic Pary. *See* Boylan, *supra* note 1.

[11] *See, e.g.*, Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1990) (overturning agency decision which exceeded its authority to reduce health risks); Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) (overturning agency decision which failed to explain reasons for departing from old rule); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965) (setting aside agency decision for failure to adequately study alternatives); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (prohibiting the Secretary of Commerce from seizing steel mills); INS v. Chadha, 462 U.S. 919 (1983) (holding that legislative vetoes are invalid); U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating a provision of the Food Stamp Act which harmed a politically unpopular group).

[12] Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983) (establishing a cause of action for an employee's detrimental reliance on an employer's promise of employment); Kinoshita v. Canadian Pacific Airlines, Ltd., 68 Haw. 594, 724 P.2d 110 (1986) (limiting an employer's right to fire at-will employees).

language to grant labor broad protection.[13] Protective labor legislation, Justice Wakatsuki explained,

> should be liberally construed to accomplish the humanitarian objective of the legislation. The construction . . . providing the employee with the avenue by which he may be afforded a remedy for the violation of his rights would be more consonant with the legislative enactment of remedial social legislation for workers than would a technical reading which would deny relief without an opportunity to be heard.[14]

Similarly, Justice Nakamura wrote that socioeconomic legislation of a remedial character is meant to be "liberally construed to suppress the perceived evil and advance the enacted remedy."[15]

On the other hand, the court has refused to include environmental considerations in construing land use cases.[16] In fact, the court has appeared to go out of its way to ignore such concerns while bolstering development decisions.[17] In *Kona Old Hawaiian Trails Group v. Lyman*,[18]

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[13] Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984) (granting employee right to file antidiscrimination claim beyond time windows authorized by statute); Flores v. United Air Lines, Inc., 70 Haw. 1, 757 P. 2d 641 (1988) (interpreting statute broadly to grant employees first preference to reemployment upon regaining ability to work); Ross v. Stouffer, 72 Haw. 350, 816 P.2d 302 (1991) (interpreting ban against marital status discrimination broadly to prohibit the firing of employee married to another employee). *Cf.* UHPA v. University of Hawaii, 66 Haw. 207, 659 P.2d 717 (1983) (narrowly construing statutory management rights clause). *But see*, Abilla v. Agsalud, 69 Haw. 319, 741 P.2d 1272 (1987) (refusing to go beyond the clear language of the unemployment compensation statute to grant benefits to locked out employees).

[14] Puchert v. Agsalud, 67 Haw. 25, 37, 677 P.2d 449, 457-58 (1984).

[15] Flores v. United Air Lines, Inc., 70 Haw. 1, 12, 757 P. 2d 641, 647 (1988) (citation omitted).

[16] Malama Maha'ulepu v. Land Use Commission, 71 Haw. 332, 790 P.2d 906 (1990) (upholding Commission's authority to permit golf courses on prime agricultural land).

[17] Kona Old Hawaiian Trails Group v. Lyman, 69 Haw.81, 734 P.2d 161 (1987) (denying judicial review for breach of coastal zone management act despite clear statutory language permitting review); Kaiser Hawaii Kai Dev. Co. v. City and County, 777 P.2d 244, 70 Haw. 480 (1989) (holding that the legislature made it abundantly clear that zoning was not to be effectuated through the initiative process). In dissent Justice Nakamura argued, "Having read what is proffered thereafter as proof of abundant clarity of intent I cannot, even after viewing [HAW. REV. STAT.] § 46-4 and its legislative history in a light most favorable to the cause of legislative wisdom, ascribe such prescience to the legislature." *Id.* at 491, 777 P.2d at 251.

[18] 69 Haw. 81, 734 P.2d 161 (1987).

a community association asked the court to void a special management area permit which would have resulted in the loss of public shoreline and an ancient Hawaiian trail. Refusing to address the merits of the complaint, the court declared:

> [W]e are reluctant to read the [statutory] language literally and say . . . allegations of the planning director's breach of the [Coastal Zone Management Act] were sufficient to vest the circuit court with authority to decide the controversy.[19]

Thus, the court has liberally construed statutes to protect labor, but refused to even literally abide by—let alone liberally construe—statutes protecting the environment.[20]

The most dramatic example of such disparate treatment is the contrast between *Sandy Beach Defense Fund v. City Council*[21] (a land use case) and *Sussel v. City & County*[22] (a labor case). The Sandy Beach Defense Fund claimed that the City Council's issuance of a special management area permit for a coastline development violated their right to due process.[23] Pointing out that due process is a flexible concept, the *Sandy Beach* court completely ignored the ex parte contacts between members of the Council and persons interested in the quasi-judicial decision. In dissent, Justice Nakamura noted that

> the court's decision consigns anyone seeking a special management area use permit, as well as anyone objecting to its issuance, to the vagaries of the political process where the decision will not "rest solely on the legal rules and evidence adduced at hearing."[24]

In contrast, the *Sussel* court held that a public employee who challenges his firing has the right to appear before an impartial tribunal.[25] The court held that even "an appearance of impropriety" violates the due

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[19] *Id.* at 92, 734 P.2d at 168.

[20] After the completion of this paper and after the presentation of it at the Symposium on the Philosophy of the Hawai'i Supreme Court, the court issued its decision in Aluli v. Lewin, No. 89-358 (Haw. Mar. 18, 1992). The decision, which brought geothermal development to a temporary halt, undermines this thesis.

[21] 70 Haw. 361, 773 P.2d 250 (1989).

[22] 71 Haw 101, 784 P.2d 867 (1989).

[23] 70 Haw. at 376, 773 P.2d at 260.

[24] *Id.* at 389, 773 P.2d at 267 (citation omitted).

[25] 71 Haw. 101, 784 P.2d 867 (1989). Coincidentally, this unusual inquiry into an administrative agency's process was directed at the Republican administration of Mayor Frank Fasi.

process rights of an employee.[26] Thus, while an appearance of impropriety will overturn an agency decision negatively impacting an employee, it will not affect a quasi-judicial decision negatively affecting the environment.

IV. The Court Has Become More Conservative Since 1982

Since the retirement of Chief Justice Richardson, the supreme court has rendered more conservative land use and tort decisions, while increasing the protection provided to criminal defendants.

The contrast in land use cases is the most striking. In 1982, the Richardson Court stretched judicial doctrine to hold that a referendum vote after the issuance of an special management area permit precluded construction of coastal resort.[27] The court noted that the departure of literal construction of the county charter was required because it conflicted with overriding public policy.[28] In contrast, in 1989, the court reviewed an initiative vote that similarly downzoned a coastal area slated for development. The court, disregarding the earlier case as inapposite, held that zoning through initiative (a process similar to referendum) was not authorized by state law.[29] Whereas the Richardson Court's decision was based on the policy of furthering the democratic process of referendum, the court in 1989 held that public policy dictated not "effectuating land use zoning through the initiative process."[30]

Similarly, whereas the Richardson Court analyzed the law in a functional manner in order to protect the environment,[31] this court has used talismanic labels to avoid upsetting development plans.[32] And, whereas the Richardson Court broadened the definition of a contested

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[26] *Id.*

[27] County of Kauai v. Pacific Standard Life Insurance, 65 Haw. 318, 653 P.2d 766 (1982).

[28] *Id.* at 326, 653 P.2d at 773.

[29] Kaiser Hawaii Kai Dev. Co. v. City & County, 70 Haw. 480, 777 P.2d 244 (1989).

[30] *Id.* at 483, 777 P.2d at 246.

[31] Mahuiki v. Planning Commission, 65 Haw. 506, 654 P.2d 874 (1982) (deeming a public hearing a contested case hearing for the purposes of securing judicial review).

[32] Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 773 P.2d 250 (1989) (disregarding the City Council's quasi-judicial function and focusing on its title to hold that the Council does not have to hold contested case hearings on special management area permits).

case hearing to allow for judicial review,[33] this court has used the term restrictively to preclude review of development decisions.[34]

Although perhaps less dramatic, the court has recently shifted its orientation in personal injury cases. As Richard Miller points out in his article in this volume, the pro-recovery doctrines adopted during the Richardson years have been kept within the narrowest bounds and opportunities to expand recovery have, with a few important exceptions, generally been rejected.[35] The emphasis of the court appears to have shifted from protecting accident victims to protecting the insurance buyer's pocketbook.[36] The notable exception, Miller points out, is in the products liability arena where victims recover from large mainland or foreign enterprises.[37]

One possible explanation for this orientation is the court's concern for the local economy.[38] Judicial decisions which stop development or impose broad liability on local businesses hurt the local economy. Since few products capable of causing many serious injuries are manufactured in the state, generous product liability rulings in favor of plaintiffs do not threaten the local economy.

In contrast to this conservative drift, the court has become somewhat more liberal in selected criminal cases. It has overruled prior precedent to preclude expert testimony which vouches for the veracity of allegedly sexually-abused children.[39] As Jon Van Dyke, Marilyn Chung, and

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[33] Mahuiki v. Planning Commission, 65 Haw. 506, 654 P.2d 874 (1982) (holding that submission of written testimony for a public hearing constitutes participation in a contested case hearing since the court is disinclined "to foreclose challenges to administrative determinations").

[34] Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987) (plaintiffs' failure to participate in contested case hearing where agency failed to provide a hearing precludes judicial review).

[35] Richard S. Miller & Geoffery K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV. 55, 65-66 (1992). Miller contrasts the legal rationales employed in Kang v. State Farm Mutual Automobile Ins. Co., 72 Haw. 251, 815 P.2d 1020 (1991), and National Union Fire Insurance Co. v. Ferreira, 71 Haw. 341, 790 P.2d 910 (1990), to highlight the new restrictive attitude toward full compensation of accident victims.

[36] Miller & Komeya, *supra* note 35, at 79.

[37] *Id.* at 66.

[38] This explanation was suggested by Professor Richard Miller at the "Symposium on the Philosophy of the Hawai'i Supreme Court," William S. Richardson School of Law, January 25, 1992.

[39] State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990), *overturning* State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982) (allowing experts to testify as to the veracity of child victim).

Teri Kondo explain, the court has also expanded—albeit, narrowly—the right of people to be free from unreasonable searches and seizures and invasions of privacy.[40]

V. The Court Has Failed to Protect Politically Powerless Groups

It is no secret that the United States Supreme Court has become steadily more conservative over the past few decades. The Court has expressed its hostility to civil rights claims of the politically powerless,[41] environmental groups,[42] the poor,[43] and homosexuals.[44] The Court has overlooked government support of mainstream religions[45] while tolerating government interference with the religion of native peoples.[46] It has allowed the government to stifle the speech of nonconformists[47] and to burden the ability of politically unpopular groups to communicate.[48]

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[40] *See*, Jon Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution by the Lum Court*, 14 U. Haw. L. Rev. 311 (1992).

[41] Allen v. Wright, 468 U.S. 737 (1984) (denying standing to parents of black school children suing the IRS for failing to deny tax-exempt status to private schools that racially discriminate); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding racial harassment after employment not actionable under 42 U.S.C § 1981).

[42] Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990) (restricting standing of environmental groups to bring suit).

[43] Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988) (upholding a user fee for education which according to the dissent placed "a special burden on poor families in their pursuit of education . . . entrap[ing] the poor and creat[ing] a permanent underclass . . . ."); Mahrer v. Roe, 432 U.S. 464 (1977) (refusing to consider the poor a suspect class for equal protection purposes).

[44] Bowers v. Hardwick, 478 U.S. 186 (1986) (no privacy right to homosexual conduct).

[45] Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding city display of a creche in a Christmas display); Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deduction for tuition at parochial schools).

[46] Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988) (upholding timber harvest and road construction in area traditionally used by Native American tribes for religious rituals); Employment Division, Department of Human Resources v. Smith, 110 S.Ct. 1595 (1990) (upholding ban on peyote use in Native American religious ceremonies).

[47] FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding the banning of obscenities of slight social value by humorist George Carlin).

[48] Lyng v. International Union, United Automobile Aerospace and Agricultural Implement Workers, 485 U.S. 360 (1988) (upholding government ban of foodstamps to households in which any member is on strike); Frisby v. Shultz, 487 U.S. 474 (1988) (upholding an ordinance banning residential picketing); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding the banning of posting political signs on public property).

It has blocked access to the courts through the use of summary judgment.[49]

Despite this conservative shift by the United States Supreme Court, the Hawai'i Supreme Court is free to give citizens broader protection under the Hawai'i Constitution than that given by the U.S. Constitution.[50] The Hawai'i court has not followed every twist and turn of federal jurisprudence. It has not reduced access as significantly or reduced our liberties and freedoms as seriously. In fact, it has, on occasion, extended broader protection to individuals[51]—particularly from intrusion by the police.[52] The court has emphasized its role in protecting individuals from arbitrary government action.[53] It also has fought vigilantly against discrimination.[54]

On the other hand, the court has failed to extend significant privacy protection to probationers,[55] prostitutes,[56] and police officers required

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

[50] State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (right to sell pornographic materials to person intending to use items in privacy of home protected by state constitution).

[51] *Id.*

[52] State v. Rothman, 70 Haw 546, 779 P.2d 1 (1989) (persons using telephones have a reasonable expectation of privacy and expectation that the government will not tap their private phones to obtain phone numbers of outgoing and incoming calls); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985) (reasonable expectation of privacy in garbage); *see* Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution by the Lum Court* 14 U.HAW. L. REV. 311 (1992).

[53] State v. Bernades, 71 Haw. 485, 487, 795 P.2d 842, 843 (1990) ("[T]he touchstone of due process is protection of the individual against arbitrary action of government.").

[54] State v. Batson, 71 Haw. 300, 788 P.2d 841 (1990) (invalidating the peremptory challenge of a black panelist from jury although no pattern of discrimination revealed); State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990) (using equal protection clause to invalidate peremptory challenges exluding women from jury); Hyatt Corp v. Honolulu Liquor Commission, 69 Haw. 238, 738 P.2d 1205 (1987) (upholding Honolulu Liquor Commission's authority to adopt protective antidiscrimination rules); Ross v. Stouffer Hotel, 72 Haw. 350, 816 P.2d 302 (1991) (prohibiting an employer from firing an employee who marries a co-employee since such action constitutes marital status discrimination).

[55] State v. Fields, 67 Haw. 268, 686 P.2d 1379 (1984).

[56] State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983).

to take drug tests.[57] The court also depublished an Intermediate Court of Appeals decision which granted prison inmates a right to sue prison officials for damages caused by a violation of the inmate's due process rights.[58] In addition, as Jeff Portnoy argues in his article, the court has interpreted the First Amendment conservatively, as do the federal courts which uphold government action.[59] Although given many opportunities to expand the protections afforded by the First Amendment and Hawai'i's privacy amendment,[60] the court has consistently refused to do so—with but one exception.[61]

The Hawai'i court has been even more reluctant to protect public rights and group rights, following the pattern of the United States Supreme Court. Politically powerless groups like Hawaiians and environmentalists have failed to garner judicial support for their causes.[62] Melody MacKenzie points out that of the five decisions dealing with Hawaiian issues, not one expanded or advanced the rights of Hawaiians.[63] The court used the political question doctrine to avoid settling the claims of the Office of Hawaiian Affairs' entitlements from the public land trust.[64] It ignored the state's trust obligations to Native Hawaiians in approving the lease of Hawaiian Homes lands to another state agency.[65] It also demonstrated its hostility to the belief articulated by some Hawaiians that the land itself is sacred, regardless of whether a religious ceremony has been performed at a particular site.[66]

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[57] McCloskey v. Honolulu Police Department, 71 Haw. 568, 799 P.2d 953 (1990).

[58] Wilder v. Shimoda, 7 Haw. App. ___, No. 12297 (Haw. May 5, 1988), *cert. granted*, (May 18, 1988), *cited in* Hall v. State, 7 Haw. App. 274, 284 n.20 (1988). This I.C.A. decision should not be confused with Wilder v. Shimoda, 7 Haw. App. 666 (No. 12163, mem.) (1988).

[59] Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395 (1992).

[60] HAW. CONST. art. I, § 6.

[61] State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (right to sell pronographic materials to person intending to use items in privacy of home).

[62] *See supra* notes 8 and 9.

[63] Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992).

[64] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987).

[65] Ahia v. Department of Transportation, 69 Haw. 538, 751 P.2d 81 (1985).

[66] Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987).

Finally, this lack of sympathy for the politically powerless is demonstrated by the court's refusal to sanction write-in voting.[67] The United States District Court for the District of Hawaii asked, through a certified question, whether the Hawai'i Constitution permits and requires write-in votes. Without any analysis of the constitutional issues involved, the Hawai'i Supreme Court simply answered, "No."[68]

VI. The Court's Ambivalence

Perhaps the greatest obstacle in defining the Hawai'i Supreme Court's philosophy has been the court's reluctance to articulate its positions. As Jon Yoshimura points out in his article, the court has increasingly relied on memorandum opinions which do not set precedents and which do not clarify the law.[69] In 1991 alone, the Hawai'i Supreme Court overturned two decisions by the Intermediate Court of Appeals in memorandum opinions and another decision by order without explanation.[70] Rather than explain what the law is, or explain the error of the lower court, the court simply depublished the decisions of the Intermediate Court of Appeals. This hesitancy has frustrated attorneys looking for amplification of the law, as Melody MacKenzie expresses in this issue.[71]

VII. Conclusion

The reader may disagree with these conclusions about the court. The authors of the articles in this issue may as well. Read the following articles. Read the decisions. Develop your own theories.

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[67] Burdick v. Takushi, 70 Haw. 498, 776 P.2d 824 (1989).

[68] *Id.* Although the Hawai'i Supreme Court deemed the issue unworthy of analysis or discussion, the United States Supreme Court has taken the issue up on writ of certiorari, No. 91-535 (U.S. 1991).

[69] Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals*, 14 U Haw. L. Rev. 271, 286 n.91 (1992).

[70] Telephone Interview with Robert Toyofuku, Publisher and Editor, *Hawaii Appellate Court Reporter* (Feb. 13, 1992).

[71] Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. Haw. L. Rev. 377 (1992); *see, also*, Thomas Kaser, *Lawyer rips real estate fraud decision*, Honolulu Advertiser, Mar. 19, 1992, at A3. According to attorney William McCorriston:

> We expect our appellate courts to redress mistakes that are made in lower courts; we don't pay appellate judges to duck difficult decisions. If they want to establish unusual principles of law, they should do so in published decisions they have to stand by and be criticized for—and not do it through the back door of a memorandum opinion.

Id.

Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i

by Williamson B.C. Chang*

Preface

The Richardson-led Hawaii Supreme Court (1966-82) has been characterized as "controversial," having "altered Hawaii law so that it became more reflective of the islands' uncommon cultural heritage."[1] *In contrast, the court under the direction of Herman T. Lum has been called "passive," "a care-taker rather than the player it was under William Richardson," emphasizing "efficiency."*[2]

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[1] Carol Santoki Dodd, *The Richardson Court: Ho'oponopono*, 6 U. Haw. L. Rev. 9, 31 (1984) [hereinafter *Ho'oponopono*].

[2] *See Waihee's Court, A More Liberal, Activist Image?*, Honolulu Advertiser, Mar. 9, 1992, at A8, col. 1.; *In Islands, Power is Spelled P-O-L-I-T-I-C-S*, Honolulu Advertiser, Mar. 23, 1992, at A7, col. 1 ("[S]ome Democrats are critical of Chief Justice Herman Lum for heading 'a caretaker court,' not concerned enough with social issues . . . ."); *see also* Danielle K. Hart & Karla A. Winter, *Striking a Balance: Procedural Reforms Under the Lum Court*, 14 U. Haw. L. Rev. 221, 223 (1992) ("One of the Lum Court's primary goals has been to reduce case congestion in Hawai'i courts and ultimately to eliminate undue delay and cost in litigation. The Lum Court, therefore, implemented a variety of reforms and utilized other tools to achieve this efficiency ideal.").

Assuming these characterizations are true (or at least defensible), the larger question is "why?" Is the contrast entirely a function of the personality and political or judicial agenda of the individual justices? Or is there a larger, perhaps more subtle, historical "explanation"? Does the court no longer have a role in the post-statehood revolution?

In this essay, the Hawaii Supreme Court's use of the memorandum opinion is used as a starting point to present what some may consider to be a controversial thesis from a sociological and historical perspective analyzing why the two courts appear to be so different in terms of "judicial philosophy." It then concludes with jurisprudential observations that, despite elements of "silencing" by the powerful, the struggle for social change so evident in Hawai'i at the time of statehood still exists today, although in a subtler form; that by understanding our history, the development of a visionary, uniquely Hawaiian jurisprudence is still possible; that the visionary energy of social transformation may still be developed.

I. Introduction: Silence as a Form of Dominant Discourse.

The Hawaii Supreme Court's use of the memorandum opinion[3] has multiplied over the last decade.[4] Some express frustration with the court's use of these unpublished opinions.[5] Memorandum decisions are

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[3] Haw. R. App. P. 35 covers opinions. It reads in part:

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Id.

[4] For example, in 1980, the court under Richardson issued 29 opinions. In 1989, the court under Lum issued 415. Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals*, 14 U. Haw. L. Rev. 271, 286 n.91 (1992).

[5] Melody MacKenzie writes in this volume: "Many of the decisions issued [on Native Hawaiian Rights] are in fact memorandum opinions and have no precedential effect. These opinions . . . mark a disturbing trend by the court to issue memorandum opinions even where a published opinion could clarify or develop the existing body of law." Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. Haw. L. Rev. 377, 377 (1992). "[I]s the court, by its silence, abdicating its role to create and guide the development of our common law?" *Id.* at 394; *See also* David Kimo Frankel, *The Hawaii Supreme Court: An Overview*, 14 U. Haw. L. Rev. 5 (1992) (hereinafter *Overview*); *New Laws, Society's Problems Pile Work on the Judicial System*, Honolulu Star-

traditionally viewed as hindering access to information of a particularly powerful nature: judicial decisions which may be outcome-determinative in one's own case.[6] On the other hand, a court's use of memorandum decisions is a kind of "silence," indicative of insecurity with its own power.[7] Indeed, memorandum opinions may be symptomatic of institutional silence in general.

There can be two interpretations of institutional silence: domination or being dominated—either the entity is deliberately withholding information as a means of domination, or the entity is being silenced by domination or threat from another source. The common critique of memorandum decisions is that they are an unnecessary abuse of judicial power.[8] Such a narrow analysis, however, in reviewing the Hawai'i judiciary, would neglect elements of the court's relationship within the power structure that are unique to Hawai'i. The use of the memorandum opinion by the Hawaii Supreme Court must be analyzed from a Hawaiian historical and sociological perspective.

BULL., Feb. 21, 1992, at A4, col. 4 ("[City Prosecutor] Kaneshiro and other attorneys also question the Supreme Court's practice of issuing memorandum opinions in many cases instead of published opinions. 'Memo opinions don't provide direction; they are not establishing case law,' Kaneshiro said.").

[6] *See, e.g.*, *Lawyer Rips Real Estate Fraud Decision*, HONOLULU ADVERTISER, Mar. 19, 1992, at A3, col. 2 ("[Honolulu attorney William] McCorriston says he is bothered by not only the outcome of the appeal [upholding punitive damages for fraud] but also by the fact that the high court's response was not a decision but a 'memorandum opinion,' which cannot be cited as a legal precedent or the basis for future cases. . . . 'We expect our appellate courts to redress mistakes that are made in lower courts; we don't pay appellate judges to duck difficult decisions. If they want to establish unusual principles of law, they should do so in published decisions they have to stand by and be criticized for—and not do it through the back door of a memorandum opinion.'"); *see also* David Kimo Frankel, *No Stealth Candidates for the Hawaii Supreme Court*, HONOLULU STAR BULL., Jan. 13, 1992, at A-11, col. 2 ("Unfortunately, the court has often failed to clearly explain its decisions and the state of the law. Attorneys' most frequent criticism of the court has been its reliance on 'memo opinions' which do not amplify the existing body of law. Even the court's formal opinions occasionally fail to provide detailed analysis or explanations.").

[7] If there were negative consequences to publishing all decisions as fully citable opinions the practice would not exist.

[8] *See, e.g.*, William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1204 (1978) [hereinafter *Non-Precedential Precedent*] ("The limited publication/no-citation rules . . . leave some of the most powerful persons in the country accountable (with regard to at least part of their work) to no one—not even to themselves or to each other.").

The political history of Hawai'i over the last fifty years, where a social upheaval placed Asian-American, Hawaiians, and other disempowered groups in the judiciary,[9] also reflects elements of "silencing." After statehood, the grip of the "Big Five"[10] on both political and economic institutions was divided.[11] Given the power to vote, the non-white plurality put into power leaders from their own class of formerly dis-empowered plantation laborers.[12]

The resulting social revolution in Hawai'i embraced significant challenges to the property rights of the powerful. As a result, it is the judiciary that has come under increasing attack in the post-statehood era.[13] Hence, it is essential to consider the use of memorandum decisions as a sign of vulnerability, not invincibility.

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[9] *See generally* ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS (1984) [hereinafter LAST AMONG EQUALS]. In a recent interview Chief Justice Richardson recalled that after the appointment of former state senator Kazuhisa Abe, the Hawaii Supreme Court was the only court without a majority of Caucasians or Christians. He told of a day when Justice Abe came in to ask that "Buddha Day" be a holiday for the Supreme Court. Apparently, Justice Bernard Levinson had insisted that he be excused from his duties on Yom Kippur. The Chief Justice recalled that Abe was quite serious, but the Chief Justice did not declare "Buddha Day," celebrated as a national holiday in many Asian and South Asian countries, to be a holiday for the judiciary. At that time, the court consisted of Bernard Levinson, a Jewish-American; Kazuhisa Abe, a Japanese-American; Chief Justice Richardson, a Hawaiian-Caucasian American; Bert Kobayashi, former state Attorney General and a Japanese-American; and Thomas Ogata, a Japanese-American. Interview with Chief Justice William S. Richardson by Williamson B.C. Chang, in Honolulu, Haw. (July 15, 1989).

[10] The "Big Five" is used throughout this article to refer to the major businesses of pre-statehood Hawai'i. Cooper and Daws explain:

> Republican politics in Hawaii was little else but the politics of business, big business. In fact it was true enough to say that government in Hawaii in the Republican years functioned avowedly as an arm of local big business, more particularly as an arm of the so-called "Big Five"—Castle & Cooke, Alexander & Baldwin, American Factors, Theo H. Davies, C. Brewer—plus a sixth, the Dillingham interests. . . .
>
> In those decades, big business in Hawaii meant plantation agriculture—sugar and pineapple grown on land owned by the Big Five or leased either from government or from the great private estates.

GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 3 (1985).

[11] *See generally* LAWRENCE H. FUCHS, HAWAII PONO (1961).

[12] For a history of the Revolution of 1954, see DANIEL K. INOUYE, JOURNEY TO WASHINGTON (1967); TOM COFFMAN, CATCH A WAVE: HAWAII'S NEW POLITICS (1973); SANFORD ZALBURG, A SPARK IS STRUCK: JACK HALL AND THE ILWU IN HAWAII (1979); DENNIS M. OGAWA, KODOMO NO TAME NI: FOR THE SAKE OF THE CHILDREN (1978).

[13] Criticism of the Judiciary has surfaced as to a number of different issues. The

Various disciplines within the social sciences have focused on silence as a powerful instrument for the promulgation of pow-

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activist nature of the post-statehood court in returning to the public rights of use to resources came under severe challenge and criticism in federal courts, *see infra* notes 24 and 31, as well as from the local bar, *see infra* note 54. The controversial public resource decisions include, McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) (adjudicating water rights of the Hanapepe river); In re Ashford, 50 Haw. 314, 440 P.2d 76 (1968); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); In re Sanborn, 57 Haw. 585, 562 P.2d 771 (1977); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (*Ashford, Sotomura, Sanborn* and *Zimring* extended public rights to the shoreline and accreted land). In 1983, Richardson responded to some of the criticism:

> I should point out this [protection of Hawai'i's natural resources] is not a radical concept thought up by five old men in black muumuus. Our state constitution specifically provides for the conservation and development of our natural resources. . . . The constitution also imposes upon the State the obligation to protect and regulate our natural resources for the benefit of the people.
>
> Some of my comments today will probably reinforce the view held by some people that I am somewhat of a judicial activist. Well, I have news for you: I *am* somewhat of a judicial activist. But if "activism" means progress and growth and a looking forward to the future with hope and high expectations, then I guess I don't mind being called an activist.

Chief Justice William S. Richardson, Remarks to the Legal Concerns Discussion Group (Mar. 10, 1983) (manuscript available from author).

During the 1980s the media gave a great deal of attention to the problems of the judiciary. A ticket-fixing scandal in the judiciary received sustained coverage, despite testimony that the sheriff was continuing a practice that had dated back to territorial days. Vocal critics of the judiciary, particularly prosecutor Charles Marsland and others were able to use the press to vilify and malign particular judges for particular decisions. Finally, the newly established law school at the University of Hawaii, associated with Governor Burns and Chief Justice Richardson, also received intense scrutiny on issues of accreditation and the bar passage rate of its graduates. A voter registration scandal involving law school students and alleged improprieties in the admissions process received continuing front page coverage. *See infra* notes 25 and 26.

The thesis of this article is that the former oligopoly, through the two daily newspapers, with close ties to the former "Big Five" (The Thurston Family has always had a substantial stake in the *Advertiser*. Lorrin Thurston was the ambassador for annexation on behalf of the rebels who overthrew the Hawaiian Queen.) has applied a much higher standard of scrutiny to the present judiciary than was ever the case prior to statehood.

While this form of expose journalism has the appearance of progressive "muckraking," its deeper motivations seem to be in publicly embarrassing the judiciary—a means of diminishing the political power of those who usurped the Big Five.

If one examines the attitude of the local press towards the courts, particularly the light treatment of disparate treatment of whites and non-whites prior to statehood, it seems apparent that the press has applied a double standard to the pre-statehood, white,

er.[14] There is growing recognition that the dominant discourse of law

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Republican judiciary, and the post-statehood, largely non-white, Democratic judiciary.

The lack of media attention to the judiciary at all prior to statehood makes comparisons somewhat difficult. A bit of Hawaiian history, however, is illustrative: two prominent pre-statehood cases, the execution of Myles Fukunaga and the Massie Case [the pardon of Lt. Massie] provide some evidence indicating that reporting on the judiciary was biased against non-whites. "Hate" crimes against non-whites, as in the Massie case, where one of the defendants, Horace Ida was abducted and beaten by sailors, received back-page attention, while the rape of Mrs. Massie generated front page coverage biased against the non-white defendants who clearly were framed.

In her article on the Massie case, reporter Lois Taylor notes the different press treatment of the acquittal of the non-white defendants which created an "uproar" and the backpage treatment of the abduction and beating of Horace Ida, one of the defendants:

> After 97 ballots over 100 hours, the jury was hopelessly deadlocked and was discharged. The defendants [non-whites accused of the rape] were dismissed. . . .
>
> The decision created an uproar. Admiral George Pettingill telegraphed Washington that Honolulu was not a safe place for the wives and families of the fleet to visit. The shore patrol was trebled "to protect the homes of naval personnel while they are away on maneuvers."
>
> On Dec. 14, a small item announced that Horace Ida, one of the five defendants in the rape trial had been abducted, beaten with leather belts and left at the foot of the Pali by a group of men Ida identified as sailors. The Navy denied this, but canceled all shore leaves. . . .
>
> By Jan. 7, 1932, the follow-up stories [of the Ida beating] had been relegated to the back of the newspapers, and were mainly reports of the bad publicity given to the Islands by the recent events.

LINDA MENTON & EILEEN TAMURA, A HISTORY OF HAWAI'I 234 (1989) [hereinafter A HISTORY OF HAWAI'I] (citing Lois Taylor, *Something Terrible Has Happened, The Massie Travesty Retold*, HONOLULU STAR BULL. (1981))

Indeed, the Hawai'i press parroted the biases and prejudices of the twenty-odd mainland papers that sent reporters to Hawai'i to cover the trial. Almost without exception, the trial of the non-white defendants was cast in stereotypical racist metaphors of the "pure" white woman and the "animal," "lust" of non-white defendants. A HISTORY OF HAWAI'I, *supra*, at 237.

Moreover, when Lt. Massie and others received clemency from the Governor despite their conviction for manslaughter, the two daily papers did not express outrage at the nullification of the jury's verdict by the Governor, an act based solely on considerations of race and power. *Id.*

The present fixation of the two daily papers in uncovering any impropriety in the judiciary must be contrasted with the pre-statehood laxity in coverage. Whereas now a public figure, such as Charles Marsland, receives immediate coverage when critiquing, in the most unprofessional fashion, a judicial decision, the press paid little attention to suspect judicial proceedings during territorial period.

Many in Hawai'i remember the rush to judgment in the conviction and execution of Myles Fukunaga. Clearly he should have been able to raise a claim of lack of the proper mental state. The execution of Fukunaga, despite the injustice, received little press

has disempowered and silenced women[15] and people of color.[16] Moreover, the legislative "silence" accompanying open-textured terms[17] or

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coverage. On the other hand, injustices committed against whites, such as the alleged rape of Thalia Massie, were fodder for whipping up an atmosphere of hate against the non-white local population.

In particular the local press did not call to task Governor Judd who had refused executive clemency to Myles Fukunaga, a 20-year old Japanese man who had killed the son of a prominent haole family. Judd's decision to grant clemency to Lt. Massie was clearly based on pressure from the Navy and stemmed Judd's ability, as a governor appointed by the United States President, to exercise his power in racially biased fashion.

As to the media, the press did not pay any attention to the obviously biased nature of the jury in the Fukunaga case. On the other hand, in the trial of the defendants accused of the Massie case, the press made much of the fact that the jury was primarily non-white—asserting that a trial of white men before such a jury could never be fair. *See* GAVAN DAWS, SHOAL OF TIME 328 (1968) ("For local people the lesson was not a new one, and it was all the more galling for that: there was still one law for the favored few and another for the rest, and white men would always have the best of the bargain. . . . [Governor Judd] could only follow his best judgment, and his judgment told him that if Massie and the others went to jail it might mean the end of Hawai'i as a territory of the United States."); *see also* DENNIS M. OGAWA, JAN KEN PO 145 (1973) ("The suspicions and double standard of justice, exposed in the Fukunaga case, represent the same type of darker, and more prejudicial undercurrents of the Hawaiian social system which the Japanese had to encounter . . . .").

[14] Feminist scholars have challenged the exclusion of a feminist voice in "virtually every discipline—from anthropology to literary criticism, from religion to hard science." Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 44 (1987) (citing A FEMINIST PERSPECTIVE OF THE ACADEMY (E. Langland & W. Gove, eds., 1981)).

[15] *See, e.g.*, Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L, REV. 727 (1988); Martha Fineman and Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987); MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991); BELLE HOOKS, TALKING BACK (1969).

[16] *See, e.g.*, Richard Delgado, *The Imperial Scholar: Reflection On a Review of the Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (exclusion of civil rights scholarship of minority scholar); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1990); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

[17] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133-40 (1977) (discussing judicial activism and judicial restraint as to deliberately "vague" constitutional terms).

provisions, are a means by which courts exercise their own institutional power. Professor Richard Delgado and others have demonstrated that alternative dispute resolution "silences" minority voices by creating greater discretion and less formality.[18] Professor Eric Yamamoto has written as to how sanctions in the discovery process are a form of "silencing" by excluding politically powerless minorities from the political process.[19]

Within this context, the growing use of memorandum decisions presents obvious threats to traditional values of the legal process.[20] By its very nature, the memorandum decision violates the assumption that the law is readily accessible. There is no defense in ignorance of the law.[21] Thus, hiding the impact of law undermines the validity of this essential assumption. Others have commented on the dangers of the

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[18] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111 (1988).

[19] Eric Yamamoto, *Efficiency's Threat to the Value of Minority Accessibility to the Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

[20] First, the refusal to allow such opinions to be cited publicly, when in fact the opinions are written much in the form of other opinions, seems incongruous. Second, if these uncitable decisions represent the final result of a state case, the refusal to allow them to be publicly used in the same manner as other cases—that is to be cited back to the court as evidence of its previous stance on an issue—is evidence of the court's desire to "hide" some undesirable facet of its institutional action.

There is merit to this assumption. Our assumptions of political norms are created by the backdrop of the rhetoric of the Bill of Rights, in this case, the public's "right to know" stemming largely from the First Amendment. Thus, the American populace has an immediate suspicion of any refusal of government to make public any kind of official record, such as military records, information obtained by law enforcement agencies, or information deemed privileged for reasons of national security. It is national political folklore that this nation was founded on "open-government" and that the purposes of the First Amendment were to promote the scrutiny of "sunshine" and its qualities of either acting as a "disinfectant" or of creating the give and take akin to a Darwinian "marketplace" of ideas where information and ideas are tested against one another.

Thus, large scale use of unpublished memorandum opinions leads to a natural impulse of suspicion. The purpose of this essay is, however, to suggest that there are layers of complexity to the use of memorandum decisions that go beyond an analysis of these opinions as akin to a form of government "withholding." *See generally Non-Precedential Precedent*, *supra* note 8; George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

[21] *Ignorantia legis neminem excusat* [Ignorance of law excuses no one]. BLACK'S LAW DICTIONARY 747 (6th ed. 1990).

memorandum decision or the illusory quality of the premise that such decisions have no "weight" since they are not precedent.[22]

These commentaries are somewhat universal in their assumptions. They are based on a view that power groups in a society are monolithic and that government, including the courts, can be assumed to be the powerful—the "insiders"—while those who come before the courts can assumed to be the "outsiders."

The premise of this article is that although there has been a significant change in the practices of the Hawai'i judiciary in the last ten to twelve years, the practice results from scrutiny of the judiciary, both through the media[23] and by the federal court.[24] The attacks on the judiciary,[25]

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[22] *See, e.g., Non-Precedential Precedent, supra* note 8.

[23] To many, the assertion that the media has any conscious or unconscious agenda in terms of the state judiciary seems unfair. After all, it is the responsibility of the media to keep the public informed as to a very significant institution in Hawai'i. I do not disagree at all with the monitoring responsibility that the media has assumed. Rather, I am positing that the scrutiny reflects a double standard.

For example, one of the latest revelations about the judiciary appeared in a March 1992 article focusing on Chief Justice Lum's use of frequent flier miles, possibly for personal travel, that were the fruits of business travel paid for from state funds. The article described how the question had been put to the Chief Justice and that the response, a rather long, non-responsive memo prepared by the assistant administrator of the courts, never admitted the practice nor defended the practice. *Lum mum on frequent-flier benefits: Won't say if business-trip credits used personally*, HONOLULU ADVERTISER, Mar. 6, 1992, at A3, col. 1.

On the surface, the personal use of frequent flier miles, accumulated from state funded business travel, clearly raises issues of genuine concern to the citizens who cannot enjoy such a benefit. However, every state employee, appointed or civil service, is the beneficiary of the lack of clear state policy on the issue. This was admitted by Russell Nagata, the state comptroller, who stated that his office was struggling to develop a policy.

Although others were questioned about their use, it is not clear why the newspaper's focus was on the Chief Justice. The "selective use of scrutiny" is often overlooked, for it is common wisdom that widespread abuse does not justify any particular individual defense against such a practice. Nevertheless, even if wrong, the heightened scrutiny of the Chief Justice in this case appears to have been carefully chosen. In short, of all the various state employees to put on the "spot," the scrutiny of the Chief Justice appears odd.

The newspapers seem to be developing a theme from a series of incidents, even dealing with the use of travel funds by the Chief Justice, that reinforce an evolving picture for the public of the judiciary. While many of the earlier incidents did not involve selective scrutiny of this nature, where discretion existed among the press, even to the extent of focusing on the problem of use of frequent flier miles in general, choosing to focus on the article on the Chief Justice, although other articles focused on other

on a number of issues, have become more and more virulent.[26] While

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branches of government, seems to indicate that this choice, among many others, was intentional. *See* Editorial, *Justice Lum: Private perks at public expense?*, HONOLULU ADVERTISER, Mar. 7, 1992, at A10, col. 1 ("Lum and the Judiciary administration over recent years have been involved in a series of issues that seem to involve insensitivity to ethical considerations—the doings of former administrator Thomas 'Fat Boy' Okuda, a carpet in Lum's home, other travel questions, a trip to Molokai at the expense of a Japanese computer bidder, etc. It is not a good example by an agency that is supposed to deal in justice.").

The thrust of this article—that the judiciary (and associated institutions in Hawai'i such as the University of Hawaii Law School) have been the conscious or unconscious focus of an attempt, primarily through the print media, to undermine the authority and standing of the local courts—can really only be understood by examining the alternatives that the media had in treating many of the controversial events in the post-statehood history of the judiciary. The only means of such a comparison is to examine what was covered, often in excruciating detail and with high front page visibility, with what the media historically examine in detail.

For example, one must contrast the high visibility given problems associated with the formation and administration of the University of Hawaii Law School, viewed as part of the judicial "agenda" and philosophy of Chief Justice Richardson and other visionary Democrats, with the lack of coverage of the racially exclusive hiring policy of the major Honolulu law firms well after statehood. Or, going back to territorial days, one must contrast the "favoritism" implied to the admissions and graduation, and bar passage policies of the law school and the bar with the institutional bias against attorneys who were not of the elite *kama'aina* families or tied to the Big Five. During the territorial period, the major papers paid little attention to the division of the Hawai'i bar on racial and ethnic grounds into an "uptown" bar and a "downtown" bar.

Moreover, one must examine the nature in which the parking ticket scandal involving a key official in the judiciary, Tom Okuda, was handled. Although it was clear that many in the press itself, as well as prominent non-Democrats received the benefits of discretionary disposal of these tickets, the general approach of the daily media was to describe the practice as a creation of the post-statehood newcomers to the courts. Practically no coverage was given to the testimony of Mr. Okuda during his trial that this practice was inherited from his predecessor and that previous persons in his position, during the territory, dispensed the same favors.

Criticism of the judicial system has been made easy by the ready access of present critics to a forum for public hearing of complaints, whether within the boundaries of the professional canons of such criticism as set by the bar. Thus, many judges during the past decade have had to bear the brunt of vicious attacks without the opportunity, constrained by the judicial code of ethics, to respond. However, non-whites did not have the privilege of access to the daily media to criticize the decisions during Territorial days, as in the extremely disparate treatment of Myles Fukunaga and Lt. Thomas Massie. Indeed, because of the lack of press coverage of the treatment of local, non-whites before the judiciary, there is a lack of an easily accessible public record of the failure of the media during those periods. Only when those who suffered through those period, such as Chief Justice Richardson, or Kazuhisa Abe, have spoken publicly today as to the difficulties of being equally received by the judges prior to statehood, is there

often couched in substantive critiques, the tone, nature, and frequency

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any record at all of such discrimination.

It is only within this context of comparison, examining what the media would have uncovered about prior judicial practices, that there can be any sense to the thesis that the behavior of the present judiciary reflects a "siege" mentality. Moreover, when placed in the more acceptable context that a "wrong is a wrong" no matter what occurred in the past, the judiciary cannot muster much of a response to such scrutiny.

[24] The most visible example is the 30 years of litigation over the status of surface water rights in Hawai'i. The state court action in McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) (Abe, J.) (Marumoto, J., dissenting), *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (per curiam) (Marumoto, Levinson, JJ., dissenting), *cert. denied*, 417 U.S. 976, *cert. denied and appeal dismissed sub nom.*, McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974), resulted in "appeal" to the Federal District Court of Hawaii in Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (Pence, J.). See *infra* notes 31 and 56 for a discussion of the *Robinson* federal court litigation; *see also* Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57 (1979) [hereinafter *Unraveling Robinson*]; Williamson B.C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U. L. REV. 123 (1986) [hereinafter *Missing the Boat*].

[25] The judiciary (or related institutions) was "attacked" because of various incidents. By "attacks," I refer to the high visibility (compared to pre-statehood days) given to problems or incidents portraying the judiciary and related institutions as now administrered by persons acting unfairly or without respect for the proper judicial decorum. For example, (1) Chief Justice Richardson's "activism" was criticized, *see supra* note 13, (2) A scandal involving court administrator Tom Okuda was covered extensively, (3) Chief Justice Lum was admonished over an incident involving carpeting of his home ostensibly at judiciary expense, (4) Arthur Fong, Court Administrator, was criticized for giving foreclosure work to "political favorites." Further, the University of Hawaii Law School, established as a vision of William S. Richardson and originally associated with the judiciary, was also attacked. For example, a scandal alleging favoritism by the Dean in admitting "politically connected" students brought front page headlines. *See, e.g., UH law school admissions stir questions of favoritism*, SUN. STAR BULL. & ADVERTISER, Jan. 30, 1983, at A3, col. 2 (publishing internal memorandum that was six-months old); *Ending UH favoritism*, HONOLULU ADVERTISER, Feb. 8, 1983, at A6, col. 1; *Admissions Decisions at UH Law School*, HONOLULU STAR BULL., Feb. 4, 1983, at A20, col. 1 ("[T]he admissions issue is another headache for a school that is already troubled by allegations that several students were involved in voter registration fraud in last year's elections."). The school was severely criticized for an incident involving a student accused (and later convicted) of voter fraud. *See also, Hood & the U.H.*, HONOLULU ADVERTISER, Nov. 14, 1975, at A20, col. 1 ("Despite continuing denials that politics and policy disputes with the regents are involved, the departure of David Hood, first dean of the University of Hawaii Law School, remains disturbing. . . . Whatever the reason for Hood's quitting, regents and top administrators of the University must face the fact many people on and off campus feel it relates to local-vs.-Mainlander factionalism and unwarranted meddling in academic affairs."); *see also infra* note 29.

[26] Honolulu City Prosecuter Charles Marsland used the media to attack numerous state judges. *See, e.g., Prosecuter Marsland urges transfer of Judge Conklin*, HONOLULU ADVER-

of these critiques, seems consistent with the goal of disempowering the state judiciary.[27]

If the Hawaii Supreme Court is more conservative in the 1980s than in the 1970s,[28] perhaps it is because the criticism of the judiciary which reached a zenith during the last years of Chief Justice Richardson, has indeed succeeded. When such scrutiny can neither be fully explained

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TISER, Feb. 4, 1983, at A9, col. 1; *Marsland: 50% raise too high for judges*, HONOLULU ADVERTISER, Feb. 15, 1985, at A8, col. 1; *Marsland attacks judge's handling of rape hearing*, HONOLULU ADVERTISER, July 19, 1986, at A3, col. 1 (accusing District Judge Herbert Shimabukuro of medieval and chauvinistic behavior); *Child-abuse term draws irate reaction*, HONOLULU ADVERTISER, Oct. 22, 1986, at A1, col. 1 (attacking Circuit Judge Leland Spencer); *Judge accused of 'bullying' by prosecutor*, HONOLULU ADVERTISER, May 1, 1987, at A1, col. 2. (attacking administrative judge Robert Chang); *Marsland blasts Yim over McKellar lawsuit*, HONOLULU ADVERTISER, Apr. 25, 1988, at A3, col. 3 (attacking Circuit Judge Patrick Yim).

[27] *See* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 54-55 (1985) [hereinafter THE RICHARDSON YEARS]:

> Through a series of decisions stretching from the late 1960s through the next decade, Hawaii's Supreme Court would show a willingness to defy the existing body of Anglo-American case law. In rendering its decisions in these cases, the Court recognized the validity of both native Hawaiian and Anglo-American tenets of jurisprudence. . . . Harsh critics of these decisions charged the Richardson Court with tyranny and heresy. The Court, they said, assumed lawmaking and public policy-making authority which was assigned to other government bodies. Other critics of these Court decisions raised their concerns in gentler fashion.
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> A Star Bulletin editorial, for example, acknowledged that many people understood and sympathized with the underlying reasons for these decisions. But, the editorial continued:
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> > 'The danger in such a course . . . is that the whole foundation of law in the state, as developed and interpreted through most of this century, can now be said to be undermined and uncertain. No man can be sure that contract means much in these circumstances.'

In a more sublime manner, the above editorial echoes the turn-of-the-century, more blatant view of the haole oligarchy as to the inability of Hawaiians to respect the system of law and order their own life by its demands: "Kanaka's are children . . . a kanaka's word on any transaction is good for nothing." PACIFIC COMMERCIAL ADVERTISER, Apr. 9, 1900, *quoted in* A HISTORY OF HAWAI'I, *supra* note 13, at 129.

[28] *See* Frankel, *Overview*, *supra* note 5; *see also* Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395, 421 (1992) ("This is not a court that has demonstrated any real interest in expanding First Amendment rights. Its decisions have shown that the Lum Court is generally conservative in its First Amendment rulings. . . ."); Richard S. Miller & Geoffrey K.S. Komeya, *Tort Reform in a Common Law Court*, 14 U. HAW. L. REV. 55, 66 (1992) ("[T]he pro-plaintiff tort revolution has all but come to an end.").

in a historical context to a population in Hawai'i that has dim memories of territorial days, or when incidents are portrayed as exceptional given the higher standards of propriety that the judiciary must be held to, the judiciary, and those responsible for appointments understandably will select more conservative judges and justices—those whose decisions and prior associations have never been and are unlikely to ever be controversial.

Thus, the judiciary has responded with less "openness." The use of the memorandum decision is thus, I contend, a reaction to the deliberate fanning of public criticism of the court. Indeed, at least in the early years of the new, post-statehood Hawaii Supreme Court, such criticism was racist[29] in nature. The apparent purpose for this heightened scrutiny of the court has been genuine displeasure with the post-statehood changes initiated by the political revolution that placed the Democratic party in power.[30] The effect of sustained attack on the decisions as well as administration of the court, has been to undermine its authority in an attempt to render the court less "final," particularly as to legislation or law that affects property rights, and thus subject to judicial "correction" by federal trial courts.[31]

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[29] Prominent lawyers from the predominantly haole firms objected to the appointment of Justice Kazuhisa Abe on the grounds that he did not speak English well enough to write an opinion.

> Three major haole law firms confronted the Burns-appointed, non-haole (with the exception of Levinson) State Supreme Court. Justice Abe, whose nomination to the Court in 1967 met stiff resistance from these same firms [Goodsill Anderson & Quinn, Cades Schutte Fleming & Wright, Anthony Hoddick Reinwald & O'Connor] on the grounds that he couldn't speak English well enough to write an opinion, vigorously defended the Court's January 10, 1973 decision which he had written.

Dennis Loo, *State Supreme Court Decision Would Restore Ownership of All Surface Waters to the State*, HAWAII OBSERVER, Oct. 16, 1973. Dodd characterizes Abe as "[o]utspoken, he sometimes bordered on an inarticulateness bred partly of impatience, partly of very strong feelings, and partly of an early background where pidgin English was the normal mode of communication." THE RICHARDSON YEARS, *supra* note 27, at 54.

Such opposition to Abe would now be considered a possible form of national-origin discrimination under state and federal civil rights laws. *See, e.g.*, Fragante v. City and County of Honolulu, 699 F. Supp. 1429 (D. Haw. 1987), *modified*, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

[30] "The Richardson Court consistently would favor State and public ownership of property over ownership by private interests. These decisions would be met with great consternation by legal conservatives and traditionalists, who viewed them as shocking, almost capricious, disjunctions of the law." THE RICHARDSON YEARS, *supra* note 27, at 57.

[31] The most visible example is the Hawaii Federal District Court's "reversal" and

Thus, I am arguing that the growing use of the memorandum opinion by the Hawai'i appellate courts must be seen within the

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criticism of the Hawaii Supreme Court's decision in McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). *See supra* note 24. In Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (*Robinson I*), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated on ripeness grounds*, 477 U.S. 902 (1986), Federal District Judge Martin Pence held that the Hawaii Supreme Court's decision in *McBryde* (declaring that surface water is held in trust for the people by the state of Hawai'i) was an unconstitutional taking of property rights without just compensation.

Pence criticized the court vehemently. In describing the background of the *McBryde* holding, Pence wrote: "[I]gnoring both H.R.S. § 602-5(1) and its own Rule 3(b)(3), the [Hawaii] Supreme Court decided, sua sponte, without warning to any of the parties nor argument from them (a) that the State owned all the waters of the River . . . ." 441 F. Supp. at 563 (footnotes omitted). In discussing the *McBryde II* decision, his opinion reads: "the majority (three justices) in *McBryde II* refused to consider the same and summarily and most tersely, in a completely unenlightening per curiam opinion, held . . . ." *Id.* at 564. The decision then describes the court's holding:

> Thusly did the court 'proceed to spit the victim for the barbecue', and held that neither McBryde nor G&R owned the water of the river; the State owned it! But the court was not through with its culinary creations. . . . The court, giving lip service to the doctrines of res judicata and stare decisis, held that 'the rule of *Terr. v. Gay* . . . .is binding . . . . The barbecue was done!
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> From the manner in which the court wrote the majority opinion in *McBryde I*, it was obvious that the court determined, without notice to any party of its intent, that it was going to completely restructure what was universally thought to be the well settled law of waters of Hawaii. . . . It was strictly a 'public-policy' decision with no prior underlying 'legal' justification therefor. . . . In this case stare decisis interfered with the court's policy!
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> . . . .
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> The entire rationale of the majority is one of the grossest examples of unfettered judicial construction used to achieve the result desired — regardless of its effect upon the parties, or the state of the prior law on the subject.

Id. at 565-68; *see also infra* note 56.

On remand from the United States Supreme Court, the Ninth Circuit Court of Appeals held that the original decision in *McBryde* was not final and thus reversed *Robinson I*. Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989). Previously, the Ninth Circuit had certified questions to the Hawaii Supreme Court which William S. Richardson answered for the Hawai'i court in Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), one of his last decisions.

After his retirement at the end of 1982, Richardson participated in the appeal of *Robinson I* to the Ninth Circuit Court of Appeals as amicus curiae.

> In his brief and in conversations about the matter, Richardson pointed out that the federal district court would in effect become the appellate court of the State of Hawaii if review by the federal court was permitted. Also, since there are no time limits on the bringing of challenges to the state court decisions in the federal

particular political context of Hawai'i. On the surface this practice may seem to raise issues of fairness and procedural due process. At a deeper level it represents resentment with the changing face of power. Thus, if memorandum decisions are indicative of a retreat into silence, it is an understandable act by an institution that still perceives itself as politically vulnerable.

Hence, an analysis limited to whether the efficiency gains of memorandum decisions and other practices by the "Lum Court" outweigh the costs in lost access to the "law" is too limited. It is clear that in a more perfect world, with unlimited resources in terms of more judges, more law clerks and unlimited time in which to properly craft the written decision, there would be no justification for a memorandum opinion. Since, however, the Hawai'i judiciary operates under the same constraints as all judicial administrations, throughout the various states and federal districts, the state judiciary is following a practice that exists throughout the nation.[32] Thus, the state judiciary cannot be condemned any more than other state or federal jurisdictions that engage in the practice, unless local practice is particularly inimical. Assuming that there is no peculiar local manner of using the memorandum decision to single out certain groups for disparate treatment, then singling out the Hawai'i judiciary would not be fair. While we

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district courts, the judicial system of the State would be deprived of its most important quality, the ability to resolve any controversy before it with conclusiveness.

Ho'oponopono, *supra* note 1, at 21 n.49. *See generally*, *Missing the Boat*, *supra* note 24.

In a later proceeding, Judge Pence taking another opportunity for judicial comment, *see infra* note 56, awarded the property owners in the *McBryde* attorney's fees of $1,179,467. Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989), *rev'd*, 933 F.2d 781 (9th Cir. 1991).

The federal court also reviewed a shoreline boundary decision of the Hawaii Supreme Court. In Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975), the federal district court agreed with the plaintiff/appellants that the Hawaii Supreme Court's determination of a new seaward boundary in County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), constituted a taking of property without just compensation and enjoined the state from enforcing the decision. "Misunderstanding and bureaucratic bungling prevented the State of Hawaii from filing a timely notice of appeal." *Ho'oponopono*, *supra* note 1, at 25.

[32] "'If we don't do it by memo, we don't get around to handling the rest, and this is not a unique practice,' [Chief Justice Lum] said, pointing out it is being done by other courts around the country." *New Laws, Society's Problems Pile Work on the Judicial System*, HONOLULU STAR-BULL., Feb. 21, 1992, at A-4, col. 4.

might encourage the Hawai'i judiciary to be among the first to adopt what might be viewed as a better practice, the state judiciary cannot be unduly condemned for a practice that exists nationwide.

Therefore, an examination of the Hawaii Supreme Court in terms of its own history and practice must focus on what is unique about that practice, as to what is uniquely "Hawaiian" in terms of the Hawai'i judiciary. We gain little by applying a generic criticism that would apply to all courts, including the United States Supreme Court,[33] if our goal is to examine our own state system. Thus, my intent is to avoid issues that apply to memorandum decisions that would be universally applicable. Rather, I examine what is unique to Hawai'i about the use of the memorandum decision.

II. The Role of the Courts in the Political Transformation of Hawai'i After Statehood

Since statehood, the Hawai'i judiciary has been largely non-white, reflecting the power of the Democratic party. This was an enormous change from the Territorial judiciary that was almost solely Caucasian, primarily Republican, and associated with the social and political elite in Hawai'i.[34] Many of the judges and justices appointed after statehood were descendants of the Japanese, Filipino, or Hawaiians who worked in various low to mid-management positions on the plantations.[35] Thus,

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[33] The United States Supreme Court itself summarily disposes of cases in ways that would appear to afford less than full procedural due process to the parties. Given that the high court has summarily affirmed and reversed cases arising from the lower courts without briefings on the merits by either side, even the losing party, the resort to memorandum decisions would not appear to trouble the court in terms of procedural due process. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (summary reversal on appeal); Eaton v. City of Tulsa, 415 U.S. 697 (1974) (certiorari); Menna v. New York, 423 U.S. 61 (1975) (certiorari).

[34] For example, in 1950 the territorial judges and justices were all male Caucasians (15 of 15). In 1959, aside from Masaji Marumoto (a supreme court justice) and Benjamin Tashiro (a fifth circuit judge), the judiciary was all male caucasian (14 of 16). In contrast, in 1971, 10 of 14 circuit court judges and 4 of 5 supreme court justices were of Asian or Hawaiian ancestry.

[35] For example, Justice Abe recalls growing up in a plantation town on the Big Island of Hawai'i. He stated that one was denied company housing if a member of the family joined the ILWU, the union attempting to organize the sugar workers. Justice Kazuhisa Abe, Lecture at the University of Hawaii School of Law (Mar. 25, 1988) (transcript available from author).

the perspective of the post-statehood courts was vastly different from their territorial counterparts. The dramatic social and political revolution that resulted in statehood was reflected in the former "outsiders" of Hawai'i becoming the judges and justices of the state courts.

Statehood effected a reversal of fortune for the Big Five. Prior to statehood, citizens in Hawai'i could not choose their own governor or their own judges.[36] Self-government for the non-white majority, allowing the majority of non-white citizens to elect a governor of their own choosing, had always been the greatest fear of the sugar industry. Clearly, once the franchise was granted with statehood, a tiny numerical minority, despite their economic power, could no longer dominate the executive, legislative, and judicial branches of the state.[37]

Thus, it is no surprise that even upon annexation, the sugar industry sought association with the United States in a manner that would deny the right to vote to the Asians and Hawaiians who were a majority of the island population.[38]

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[36] During the territorial years,

> the Governor, appointed by the U.S. President for a 4 year term, could be reappointed but not impeached. He held fiscal powers stronger than the [P]resident's. He could veto items in appropriations bills and extend the legislature if such bills did not pass. He controlled education, welfare, safety, sanitation, health, highways and public works. He could suspend the writ of *habeas corpus*—the right of people to know what crimes they are charged with—and could put any part of the Territory under martial law.

HISTORY OF HAWAI'I, *supra* note 13, at 131.

[37] As Fuchs comments:

> [T]o the majority of Hawaii's citizens, justice in the Islands had finally been done [with statehood].
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> Justice—what did it mean? For years, Hawaii's leaders had complained that it was unjust for Islanders to be excluded from first-class citizenship. Now, the peoples of Hawaii would be on an equal legal footing with their fellow citizens on the mainland. But justice within Hawaii was another issue. Statehood symbolized, but did not create, the vast changes that were taking place in the Islands' economic, political, and social systems, making it a "just" society.

HAWAII PONO, *supra* note 11, at 414.

[38] *See* THOMAS J. OSBORNE, EMPIRE CAN WAIT: AMERICAN OPPOSITION TO THE ANNEXATION OF HAWAII 1893-98, 131 (1981) [hereinafter EMPIRE CAN WAIT] ("The government headed by President Sanford B. Dole was alarmed about the growing number and influence of Orientals in Hawaii, a situation that resulted largely from the sugar economy and the reciprocity treaty upon which that economy depended.").

On the eve of the signing of the Organic Act, in 1900, the haole press in Hawai'i made clear their disdain of Hawaiians and their fear of being outvoted: "Kanaka's are children . . . they vote whichever way, not their best, but what their last friend says

The social and political revolution that came with statehood for Hawai'i eventually resulted in a non-white, non-Christian state supreme court.[39] The values of the attorneys who were appointed to the bench after statehood differed greatly from their predecessors who sat on the Territorial Supreme Court. Many of the new Justices were part of the Democratic party that fought for statehood.[40] It was always clear that statehood would result in dramatic shifts in power, politically emancipating the non-white, largely Asian-American plantation workers.

It was the sugar industry that had dominated the politics of the Hawai'i, both before and after annexation by the United States in 1898. Indeed, the primary force driving for annexation of Hawai'i

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. . . a kanaka's word on a commercial transaction is good for nothing." "If color is to rule any subdivision of American territory, that color will be white." HISTORY OF HAWAI'I, *supra* note 13, at 129 (citing *The Pacific Commercial Advertiser*, Apr. 9, 1990, and *The Hawaiian Gazette*, Apr. 29, 1900).

In a study of Hawaiian Statehood, Bell writes:

> Haoles 'always wanted to keep the vast and unruly mass of natives from the ballot' [former Governor] Burns recalled, and Hawaiians and part-Hawaiians often accepted this as they accepted other changes, because they knew resistance would be futile. Like many dispossessed aboriginal peoples in other parts of the Pacific, native Hawaiians tended to internalize the very assumption of inferiority used by white settlers to rationalize colonization. Powerlessness, paternalism, and inequality gradually inculcated what Burns and other locals referred to as 'a subtle inferiority of spirit'—feelings of incompetence and separateness bred of domination by other cultures. And the haole paternalism which had helped nurture these feelings dissipated very slowly. . . .
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> If many Hawaiians and part-Hawaiians experienced a loss of pride and self-confidence, some other groups shared this problem, although to a substantially lesser degree. Burns noted that, like Hawaiians, many local Japanese simply accepted their unequal position in society.

LAST AMONG EQUALS, *supra* note 9, at 115.

[39] *See supra* note 9.

[40] *See* THE RICHARDSON YEARS, *supra* note 27, at 52 ("Even in his younger days, Bill Richardson's feelings about the islands' power structure were clearly defined. His intent to change that structure to a more equitable one became a persistent theme in his life, as did his intent to somehow reverse the flow of history and to better the lot of the Hawaiians."); *see also id.*, at 71-72 ("In early 1974, Thomas S. Ogata and Benjamin Menor . . . filled vacancies created by the retirement of Justices Marumoto and Abe. While neither had been part of the inner, original core of the earliest Democratic fighters, their backgrounds were akin to many other Burns appointees: their outlook was shaped by their immigrant heritage and their primary identification with non-Western cultures. . . .").

over the wishes of its native Hawaiian inhabitants was economic—the desire of the sugar industry to avoid tariff treatment as a foreign nation.[41] With a favorable tax treaty set to expire,[42] the Hawai'i sugar industry in the 1890s faced the imposition of disastrous tariffs on Hawaiian sugar. There were two political paths to avoid the tariffs—a continuation of the tax holiday by treaty, or incorporation of Hawai'i as a territory of the United States with the guarantee that sugar grown in Hawai'i would be treated equally with Louisiana and California sugar.[43]

The boldness of the new Hawaiian monarch in 1892, Queen Lili'uokalani, forced the hand of the small minority of businessmen who controlled the sugar industry in Hawai'i. When she threatened the political power of the sugar industry by seeking to curb the legislative power of the privy council, sugar interests and American marines overthrew the lawful government of Hawai'i.[44] The clear goal of the rebels was to seek annexation, by treaty, with the United States.[45] It would take five years of public debate before the U.S. Congress would annex Hawai'i.

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[41] HISTORY OF HAWAI'I, *supra* note 13, at 63.

> Hard times hit Hawai'i's sugar industry after 1866. With the close of the Civil War (1861-1865), the high demand for Hawaiian sugar also ended and prices dropped. Furthermore a high tariff on sugar entering the United States made it more difficult for Hawai'i to sell its product. Planters and their agents could not pay their bills. From 1866 to 1867 an economic depression hit Hawai'i.

Id.

[42] In 1887 the United States and Hawai'i had renewed the Reciprocity Treaty which temporarily removed the high tariff on sugar. Hawai'i gave the United States use of Pearl Harbor in 1867. In 1887 this use was broadened to allow the U.S. Navy access to the harbor.

[43] "To Hawai'i's sugar growers, the solution was clear—end the high tariff on sugar. This could be accomplished in one of two ways: by a reciprocity treaty or by annexation to the United States." HISTORY OF HAWAI'I, *supra* note 13, at 63.

[44] To support annexation, McKinley commissioned his own report to negate the findings of Cleveland's Blount Commission. In the so-called Morgan report, a pro-annexation version of the overthrow, holding the Queen responsible was presented to the United States Senate. The report vindicated everyone involved in the Hawaiian affair, excepting the queen and her cabinet. It upheld Steven's view that Lili'uokalani triggered the Revolution by attempting to promulgate a new constitution on January 14, 1893. Because of the disorder ensuing from the Queen's act, the report condoned Steven's landing of United States troops and his recognition of the provisional government.

[45] The benefits of extending the Reciprocity Treaty were nullified by the subsequent

Much of the difficulty lay with the hypocritical position of the sugar interests. They sought incorporation into the United States but made clear that such association should never lead to statehood. This created a legal enigma. It was difficult to reconcile annexation without the eventuality of statehood. To annex Hawai'i, without a clear intent that the people of Hawai'i would someday have the right to seek statehood, was to admit that the taking of Hawai'i was purely imperial.

Many in Congress and in the United States saw the proposal of the sugar interest in Hawai'i as fundamentally un-American.[46] If any conquest or "annexation" were to occur, it would only be palatable if was similar to the annexation of Texas, an act according the people of a nation their desire to become American.[47]

McKinley Tariff Act which removed the tariff on all foreign sugar but replaced it with a "bounty" of 2 cents on every pound of sugar produced in the United States. By 1890 Hawai'i again suffered an economic depression. HISTORY OF HAWAI'I, *supra* note 13, at 66.

[46] Elements from both Congress and the American press opposed annexation. Senator White of California and Speaker of the House Thomas Reed opposed annexation as a departure from the Republican tradition of the United States. E.L. Godkin of *Nation* magazine saw annexation as a "perversion" the American mission to extend Republicanism. The anti-imperialist press was led by the *New York Times*, *The Evening Post*, and *Nation*. EMPIRE CAN WAIT, *supra* note 38, at 95-98.

[47] Godkin of *Nation* magazine expressed the dilemma in his article "How are we to Govern Hawaii?":

> In that article Godkin asseverated that before reaching a decision on annexation, the Senate should consider the problem of how the archipelago would be governed if brought into the Union. He then proceeded to raise such thorny questions about the manner of government as to prove, at least to his own satisfaction, the folly of granting statehood. Consequently, only territorial status remained. In every case involving the acquisition of territory since the Ordinance of 1787 local governments were established with universal suffrage. But if universal suffrage prevailed in Hawaii, annexation itself would be rejected. Furthermore, Godkin depicted restricted suffrage in the islands as inconsistent with Section 1859 of the *Revised Statutes of the United States Respecting Territories*, which declared that all male citizens above the age of twenty-one are entitled to vote and hold office in the Territories. Yet if this law were implemented in Hawaii, the *Americans* would be voted out of office, and Godkin did not wish that to happen. Until these difficulties were resolved in a manner compatible with the United States code of laws, the question of annexation should be held in abeyance, he declared.

EMPIRE CAN WAIT, *supra* note 38, at 99 (citation omitted) (emphasis added).

Hence one can see the dilemma. Given the view of native Hawaiians and Asians as inferior, any status which allowed the possibility of eventual self-government threatened the hegemonic control of America by whites.

Annexation without statehood, at least in the future, forced Americans to contemplate their nation acting deliberately to enforce the subjugation of a majority of the persons of a nation, without even the pretense that they were entitled to eventual equality. Americans, even liberal Americans, were simply not currently prepared to extend to more non-whites the privileges accorded white Americans.[48]

Any annexation with the possibility of statehood meant that the large population of non-white, plantation labor, would obtain political power through numbers. Thus, the tight control by the sugar industry eventually would be lost if statehood were an inevitable part of the decision to annex.

In the end, the sugar industry was forced to concede that statehood would be possible, and Hawai'i was annexed, albeit according to many unconstitutionally, as an "incorporated" and not an "unincorporated territory." In post-statehood Hawai'i, political power is now largely divided. Successors to the Democratic revolution of 1954 hold institutional political power; the Big Five retain economic power.

Thus, with statehood an issue to be raised again and again, the reins of government would eventually fall to the "leprous Asiatics" and "semi-savage" Polynesians—even to the extent that they would stand in judgment, as duly appointed judges and justices, over the rights and liberties of the oligarchy that took power in 1893.[49]

Many of the post-statehood judges and justices had personally witnessed the suffering of the plantation lifestyle: from the personal racism directed at non-whites, the discrimination against them in terms of

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[48] Americans opposed to annexation seemed to hold two reasons for their position: that it would lead America down an imperialist path inconsistent with the intent of the Constitution and that it would contribute to the mongrelization of America through the introduction of "leprous Asiatics" and "semi-savage" native Hawaiians. "Of course, there was within the anti-imperialists' camp a large degree of hostility toward Hawai'i's nonwhite residents. One publicist warned in the pages of a leading journal that if annexation occurred, the "detested and dangerous Asiatic" would be a baneful influence in American elections." EMPIRE CAN WAIT, *supra* note 38, at 100.

[49] The white American view that Asians and Hawaiians were not fit to judge a white person were made clear during the Massie Rape trial. The American press that flocked to cover the trial in Hawai'i doubted the fairness of any proceeding where a jury of non-whites sat in judgment of a white man, such as Lt. Massie: ". . . and much was made of the fact that of the 12 jurors, six were part-Hawaiian, two were Chinese, two were Japanese, one was Portuguese 'and one of American descent.' This was not journalism's finest hour." HISTORY OF HAWAI'I, *supra* note 13, at 232.

admission to clubs, use of public utilities, entrance to private schools, availability of credit, respect for native Hawaiian customary law, and treatment by the "ex-patriate" judiciary in terms of equality of sentencing in criminal cases and respect for land and other rights in civil cases.[50] Moreover, the non-white population that appeared before the largely white, politically protected, territorial courts, suffered both subtle and blatant racism in the courts. These experiences were part of the drive for statehood. They also formed the basis for a different institutional and theoretical understanding of "law."

III. The Conservative Response to a Liberal Post-Statehood Court

After statehood, the political forms of power, as opposed to economic, were in the hands of former "outsiders." Former insiders—roughly put, the "Big Five" including the two major newspapers—had become "outsiders" in terms of the formal institutions of political power—the legislature, the executive branch, and the judiciary.[51] As the balance of power dramatically shifted through the "new deal" legislation and the decisions overruling territorial jurisprudence, the press, and in several cases, the federal courts,[52] became the only institutions for former insiders to use to disempower the new "insiders."

The form of disempowerment use legal theory to discredit the work of the court by stripping the judiciary of its institutional credibility. By focusing on the court in terms of its personalities—by employing such terms as the "Richardson Court," and by focusing on the personal experiences of the judges and justices of the judiciary, both the media

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[50] *See generally* The Richardson Years, *supra* note 27, at 49-76.

[51] *See, Ho'oponopono*, *supra* note 1, at 29-30.

> In handing down its controversial decisions on land and water rights, the Richardson court seemed to use as its test the same test used by the Warren Court. In deciding these cases, Hawaii's jurists did not ask primarily, "What is the legal precedent? What is the law?" They asked instead, "What is fair?"
>
> "Fairness", like many other human qualities, depends upon several variables for its definition. One variable—voiced by attorney Wally Fujiyama, vocal champion of the "local" as opposed to the "outsiders"' point of view is this: "It depends whose ox is being gored."

Id.

[52] *See supra* note 31.

and particularly the federal district court in the *Robinson*[53] series of litigation, generated and reaffirmed a public hesitancy about the validity and finality of judicial decision.[54]

In other words, by portraying the court and its personnel as "real people," whose prior experiences—whether unfortunate, unjust, or merely ordinary—dictated the results from this new post-statehood judiciary, those now out of power could cast doubt on the legitimacy of these decisions as the "law." The psychoanalytic, "people-story" approach to coverage exploited a weakness that exists with every judicial system—namely realist skepticism that judges are applying "neutral" principles as opposed to interlacing their own values within the enterprise of interpretation.

This realist achilles heel is not unique to Hawai'i; it applies as blatantly to the Supreme Court of the United States. Indeed, in the contest over the Thomas nomination to the high court, there was not even the scantiest of lip-service given to the pretense that Clarence Thomas, the person, and not some robotic interpretation machine, was the nominee whose values either frightened or comforted one.[55]

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[53] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977); *see supra* note 31.

[54] *See* J. Russell Cades, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. BAR J. 58, 65 (1970) ("[T]he floodgates of uncertainty have been let open and established precedent is, in effect, overturned. . . . Even the most active of the judicial activists would hardly advocate the divesting of property rights long settled and relied upon as coming within the proper scope of the judicial process. . . . To create uncertainty in the law where none exists is indeed as great a social evil as to attempt to carry out the dictates of social justice as they appear to the judge who happens to be writing the opinion.").

[55] When questioned during confirmation hearings on how he would rule on issues such as abortion, Thomas deferred and said basically that he would apply the "law,"—the appropriate answer from a classical, Blackstonian point of view that judges have no hand in the decisions they issue, that they are just conduits in which the existing natural law is transferred to paper. However, the public knew of course that the personal values of Judge Thomas would influence his decision. There is thus a double standard: the person, we know, makes the law, but the pretense of law being a "brooding omnipresence" is a illusion that we all recognize, but an important illusion for the sake of maintaining the system.

To be able to understand how law works in our system is to be able to hold two contradictory ideas simultaneously—that law is both "outside" of one's values, and that one's "values" properly do play a role in judicial decision making. The Blackstonian view of interpretation where the judge simply records what is "out there" is given sarcastic lip service by many: the most famous being Holmes' "irony tipped phrase" "brooding omnipresence of the law." Beryl H. Levy, *Realist Jurisprudence and Prospective*

Nevertheless, the pre-statehood treatment of the Court in the Territorial period, as a rather faceless, neutral (and thus dull in a newsworthy sense) institution, sharply contrasts with the highly personalized portrayal of the judiciary after statehood.[56]

Overruling, 109 U. PA. L. REV. 1, 2 (1960) (quoting 1 W. BLACKSTONE, COMMENTARIES 69).

The myth that law is "outside" and not a product of the judges preferences provides a check and balance between the legislature (which engages in policy decisions) and the judiciary (which does not, but rather neutrally applies principles of restraint). While this distinction is invisible in many cases, the distinction is critical to maintain, otherwise the judicial system crumbles as there is no finality. *See Unraveling Robinson*, *supra* note 24. As Justice Jackson said in Brown v. Allen: "We are not final because we are infallible, but we are infallible only because we are final." 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[56] One indicia of "personalizing" the court, thus diminishing the credibility of the Hawaii Supreme Court as an institution that "interprets" and thus does not "make" laws based on personal preferences is the widespread use of the term "Richardson Court" during Richardson's tenure. The phrase came to be used in an extremely sarcastic manner during the *Robinson* proceeding, where the finality of the Hawaii Supreme Court as to questions on Hawai'i state property law was ridiculed by Judge Pence of the Federal District Court in Hawai'i. His opinions bristle with personal attacks on Chief Justice Richardson himself. Of the several decisions in this contest of power between the state supreme court and the federal district court in which Judge Pence appears to address Chief Justice Richardson as the primary source of the abuse of the power of finality, Judge Pence's decision of November 27, 1987, is the clearest indication of Judge Pence's low regard for the competency of the state supreme court. This opinion is remarkable because it was written after the state [and therefore Chief Justice Richardson] had prevailed before the United States Supreme Court, achieving a written opinion that the plaintiff's complaint [primarily the sugar industry] should be dismissed as inappropriate on the basis of ripeness. Subsequently, the Ninth Circuit directed the case back to Judge Pence, who, given the opinion written by the United States Supreme Court, clearly had been instructed to dismiss the complaint in light of the ripeness decision in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

Instead of dismissing the opinion as was his duty, Judge Pence refused and reaffirmed his earlier opinion. In the course of his written opinion, Judge Pence pointed out the lack of judicial honesty of Chief Justice Richardson, failing to admit that his decision reflected his own values, but more incredibly, pointed out how and why the United States Supreme Court was wrong (they knew nothing of Hawai'i) and had been led astray by an amicus curiae brief filed by the U.S. Solicitor General's office urging dismissal on the grounds of ripeness (the attorney from that office did not "understand" Hawai'i.). Robinson v. Ariyoshi, 676 F. Supp. 1002 (1987).

It is the rare property rights case where a federal district court judge refuses to abide by the clear implications of a Supreme Court decision intended for his benefit. More rare is the opportunity to read the thoughts of such a judge and the structure of his

Indeed, there were sufficient, highly prominent critics of the judges[57] and nominees[58] to the court. Moreover, the manner of the criticism,

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reasoning:

> [t]his judge has concluded that it was the brief of the Solicitor General and his uncritical assumption of the unripeness of this case which triggered the Court's granting certiorari and remand. . . .

676 F. Supp. at 1004.

> [I]t is impossible for this judge to understand how the Solicitor General could make such a gross accusation that the "court of appeals failed to appreciate: the significance of the "Answers" to the taking inquiry and "essentially ignored them". The Solicitor General maintains that the "court of appeals failed to even mention, much less rebut, the Hawaii Supreme Court's explanation . . . that the law of Hawaii with regard to the ownership of water was unclear prior to McBryde. The above statement was an insult to the intelligence and integrity of the Ninth Circuit Court of Appeals. . . .
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> . . . .
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> It is clear from the above statement that the Solicitor General completely ignored all of the case law on water rights in Hawaii prior to *McBryde*.

Id. at 1012-13.

In critiquing the opinion of the United States Supreme Court, Judge Pence found an interesting basis for undermining the credibility of their decision in favor of the state and Chief Justice Richardson: they were hurried into an incorrect decision in the crunch of seeking to recess on time:

> A review of the record and briefs filed with the Supreme Court shows that less than one month from the time the Court received the Solicitor General's brief, and only 14 days before the end of its 1985 term, it issued the above remand. This judge [Judge Pence] draws the conclusion that the Court, "caught in the end of the term crunch," [citing remarks by Justice O'Connor at a 1987 Ninth Circuit Conference] and having a high regard for all briefs filed by the Solicitor General of the United States, simply followed the Solicitor General's recommendation [citing the Soliciter General's Brief]".

Id. at 1004.

No leniency was reserved for the "Richardson Court" in Judge Pence's criticism; his opinion plainly accused the Hawaii Supreme Court of deliberately subverting the integrity of the judicial process in the answers that court gave to questions certified to it by the Ninth Circuit: "The Richardson Court's discussion of the takings issue sharply illustrates the obfuscation and evasiveness of the Answers of that Court." *Id.* at 1017-18.

Consistently, Judge Pence personalized the evils of the Judiciary in Richardson himself: "Of course, no one knows the full impact of the Water Code upon waters of Hawaii. The Commission's report itself shows that the Commission felt that the Legislature had not substantially renounced the conclusions of the *Richardson Court*." *Id.* at 1024 (emphasis added).

In a later proceeding, Judge Pence awarded attorney's fees of over a million dollars to the private landowners, Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989), but was overturned by the Ninth Circuit in Robinson v. Ariyoshi, 933 F.2d 781 (9th

in simply repeating the emphasis on personalizing the judiciary,[59] was a not so discrete means of undermining the slender institutional credibility of all courts to their unique power to render "judgment."[60]

Cir. 1991). In his decision, Judge Pence again attacked the Richardson court:

> The initial reaction of anyone, not thoroughly familiar with the political background behind [*McBryde*] as well as the history of the movements of this litigation up and down through the Hawaii Supreme Court, this United States District Court, the Circuit Court of Appeals, and the United States Supreme Court . . . might be that any such request [for attorneys fees of over $2 million] is outrageous. . . . [I]t must be remembered that Hawaii's Governor Waihee, who appointed the present Attorney General, became Governor through the support of the political machine built up by former Governor Burns and preserved and continued by Governor Ariyoshi.
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> The casual observer would not know that on January 10, 1973, the 'Richardson Court' (which on December 20, 1973 became a 3-2 majority), headed by Chief Justice Richardson and Justice Abe, and without any warning to any of the parties . . . had decided sua sponte, that it was going to change all of the laws regarding flowing waters in the State of Hawaii. . . . By also holding that there could be no diversion of waters out of the watershed, Justices Richardson and Abe, in implementing their own political philosophy—some have likened it to that of Robin Hood—of taking the property of big business entities and giving it to the people of the State. . . . Those Justices apparently were oblivious to the obvious fact that the implementation of their opinion would meant that all of the sugar plantations on Kauai, on Oahu, on Maui, and some on the Big Island, would be forced instantly to close down and go out of business—throwing thousands of workers out of jobs.
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> [T]he attitude of the Attorney General . . . on January 10, 1973 when by ukase and fiat of Justices Richardson and Abe, the water rights of Robinson, McBryde, Olokele, and the Small Owners were, without warning, expropriated, taken away from them and, forthwith, given to the State of Hawaii, was, in effect, one of instant glee and rejoicing. Greedily, the Attorney General of the Burns administration not only accepted this unconstitutionally expropriated (judicially 'stolen') property, but thereafter, he and his successors have fought, relentlessly, through all courts to keep it.

703 F. Supp. at 1417-18.

[57] *See supra* note 54.

[58] *See, e.g., supra* note 9.

[59] Further quotes from Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987) exemplify the "personalization": "Without directly answering the question, [certified from the Ninth Circuit] the Richardson Court ('R. Court') said that when *McBryde I* held . . . ." 676 F. Supp. at 1013. Subsequently, Pence continued to use "R. Court" rather than spelling out the Chief Justice's name. 676 F. Supp. at 1014.

[60] The major ire of Judge Pence seems to be that the Richardson Court engaged in "policy-making"—the province of the legislature, not the judiciary. *See supra* note 31. While courts are urged to avoid usurping the role of the legislature, it is not simple to

IV. The Dominant Discourse of "Judicial Competence": How to Turn Social Reform Against Itself

Hence, institutional silence, exemplified by the memorandum decision, can be seen as a defense mechanism. The increasing use of memorandum decisions might be interpreted as resulting from the success of attacks on the Richardson Court, both as to the substantive nature of judicial revisions of territorial precedents regarding water rights and shoreline boundaries dividing public and private land, and as a reaction to the high scrutiny given the administration of the system in the last years of the court under Chief Justice Richardson and the few years subsequent.

Such criticism may have had a "chilling effect" on the court's willingness to put its reasoning fully before the public. Indeed the repeated theme used to criticize the court during the tenure of Chief Justice Richardson was its "inconsistency" and failure to adhere to law developed during territorial days.[61] The memorandum decision is a technique by which "inconsistency" does not come to light, or, does not "really count" because the memorandum decision does not have the full weight of decisions which are deemed precedential. The memorandum decision is a means of generating an illusion of consistency in a line of cases which does not exist.

Without more, observers of the court may deem this an egregious example of the court's hidden agenda and desire for secrecy. On the other hand, I am suggesting that the increasing use of the memorandum decision is a predictable result of the intense scrutiny and personal attacks experienced by the court when it challenged the property rights decisions that were deemed settled during the territorial period. The use of the memorandum decision may not be motivated by a desire to avoid responsibility for reconciling possibly divergent results; it may be an exaggerated response to the unforgiving nature of public criticism, in an atmosphere created by constant scrutiny and wooden insistence on a mechanical form of consistency, when any divergence from prior law is detected.

In short, both Judge Pence and the establishment media have used

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determine when interpretation of open-textured terms such as "fair" or "due process" constitutes policy making. Pence's criticism plays on the laypersons lack of awareness of the fine distinction between "interpretation" of a open-textured term and "out and out" legislating by the court where there is a "plain meaning." The difficulty of interpretation is well-studied. *See, e.g.*, Ronald Dworkin, Taking Rights Seriously 133 (1977) (describing the practice of referring to "strict" and "liberal" interpretation).

[61] *See supra* notes 54 and 56.

the inherent contradictions that exist in the judicial process (true of all courts, including Judge Pence's) to fashion a public atmosphere where any decision that retroactively overrules prior state law is simplistically "trashed" as illegitimate. This is a simplistic approach because all lawyers know that consistency is a self-imposed obligation. All courts, even the British by now, have abandoned the wooden obligation to precedent. All courts, even the United States Supreme Court, engage in retroactive overruling. Thus, all courts are candidates for the kind of diatribe that Judge Pence applied to the Hawaii Supreme Court. If the Hawaii Supreme Court went further and faster than others, it is clearly because the social predicament of the underclass in Hawai'i required that both the courts and legislature act quickly to eliminate the vestiges of plantation society that existed in both formal rules and societal life.

Thus, the purported criticism that the Hawaii Supreme Court is illegitimate because it engages in public policy-decisions seems racist and elitist when compared with the same policy oriented decisions made by many courts. After all, if *Brown v. Board of Education*[62] constitutes retroactive overruling with societal effects as large as that of *McBryde v. Robinson*,[63] why is such a dramatic overturning of rules regarding property rights and social life less "barbaric" than the decisions regarding water rights and beach access in *McBryde* and *Sotomura*?[64]

If the retort is that the United States Supreme Court is "final" or "superior," then much of the character of that message is racist in a subtle way. The Hawaii Supreme Court, the real message apparently seems to be, was incompetent and thus, compared to the United States Supreme Court, it lacked the intellectual and political credibility to overturn the privileges that existed among the elite. It is one thing for the United States Supreme Court to decide a decision such as *Brown*; it is quite another for a basically non-white, non-Christian court, as the makeup of court was at the time of *McBryde*, to undermine the privileges enjoyed by a dominant, white minority.

The argument that one court is "Supreme" and the other is not, is a makeweight argument. The Hawaii Supreme Court is "supreme" on issues of state law, such as property rights, in the same manner that the United States Supreme Court is "supreme" on issues of

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[62] 347 U.S. 483 (1954).

[63] McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). See *supra* note 24 for the subsequent history of *McBryde*.

[64] 55 Haw. 176, 517 P.2d 57 (1973). *See supra* note 31.

constitutional law and federal statutory and common law. The unspoken resentment reflected in the refusal to tolerate the "activism" of the court between 1966 and 1982 was simply the protracted refusal of the former minority elite to accept the reality that political power would have to be shared with those who were formerly subordinate in Hawaiian society.

Finally, the larger point that is often missed is that these changes were part of a political mandate that reflected the desire of the majority of the people, voting for new directions in their legal as well legislative system. The vote on statehood, where a popularly elected governor replaced one appointed by a President (without input from the local populace), was not only a vote simply on the political status of "statehood," but also a referendum on a new social order. The approval of statehood thus was a mandate for change in the judicial as well as executive branches. Voting for statehood was a vote for a judiciary reflective of the values and experiences of the majority of the population, not a judiciary that shared the privileges of the small oligarchy that controlled pre-statehood Hawai'i.

It is no surprise that the post-statehood judiciary, once reflective of the Democratic majority, would develop a judicial practice and philosophy that eliminated the worst aspects of the elitism, racism, and insulated power wielded by many of the territorial judges. Those judges, beholden only to the President of the United States and the Governor for their tenure, felt and acted with little obligation to the concerns of the vast majority of persons in Hawai'i. As in the distinction between the treatment of Myles Fukunaga and Lt. Thomas Massie,[65] most local persons of non-white origin felt the judiciary was biased against them.

Since this undercurrent for change in the judiciary was common knowledge during the debates on statehood, it would be foolish for any observer to insist that the Hawaii Supreme Court, now democratically selected, would parrot and replicate the injustices of the past. Indeed, if anything, the fight for statehood was a fight for the elimination of a double standard in the administration of justice. This double standard not only applied to the race-oriented decisions emanating from the courts,[66] the inability of non-whites, or those of unpopular political views, to receive adequate legal representation,[67] the inability of non-

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[65] *See supra* note 13.

[66] *See supra* note 13.

[67] *See, e.g.*, ZALBURG, *supra* note 12, at 333-37 (describing the difficulty of the Smith Act defendants to obtain counsel).

whites to fully participate as equal members of the bar and inability of the average non-white person growing up in territorial Hawai'i to receive a law degree.

Thus, even the establishment of the University of Hawaii Law School, which suffered from intense negative scrutiny in its early years,[68] was a natural outcome of the social revolution culminating in statehood.

These arguments are all aimed at putting the "hype" over the court's consistency with precedent, which reached its zenith in the property rights decisions during the Hawaii Supreme Court from 1966 to 1982, in the proper context. Both the media and the former elite were able to reverse the normal presumption: after statehood it would have been shocking if the state supreme court had not used its power to uphold legislative changes creating a fairer society.

Indeed, the court would have been more validly criticized had it adhered to the territorial decisions on water and land that simply reaffirmed the privileges of the propertied class who achieved wealth through these common law and legislative rules. If the court had acted to nullify or change then, as had the United States Supreme Court early in the New Deal, history would write that such a Hawaii Supreme Court had manipulatively used the artificial and empty principle of stare decisis to deny changes reflective of a "living constitution."

Only the blind or those with vested interests in an oligopoly would refuse to acknowledge that Hawai'i had changed vastly by 1960. Given that change, as well as the continuing denial of the fundamental human and American right of self-governance by the powers then in charge, the use of the idea of "precedent" or "stare decisis" to nullify law that supported the changes in Hawaiian society would have been to use "law" to mask the underlying tyranny of a minority.

Thus one can conclude that the "campaign" to undermine the possibility of a progressive and visionary judiciary may indeed have succeeded. The criticism of the present Hawaii Supreme Court by most of the articles in this symposium issue is either that the court

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[68] *See, e.g.*, W. Buddy Soares, *Phase out law & Med at U.H.*, HONOLULU ADVERTISER, Mar. 25, 1979, at A15, col. 2 ("I believe it is our responsibility at this time to curtail further funding of the Medical and Law Schools and place a freeze on enrollment so that the schools can close its doors after graduation of the present freshman class."); W. Buddy Soares, *UH law school opposed*, HONOLULU ADVERTISER, Feb. 25, 1980, at A13, col. 1 ("It is . . . gratifying to know that the Legislature has decided that a re-evaluation of the need for the law school is in order[.]"). W. Buddy Soares was a Republican state senator.

exhibits a conservative or middle-of-the-road position on substantive issues, or that, as in the case of constitutional issues or issues involving native Hawaiian rights, the court simply avoids controversies. To me, these traits are an example of individual and institutional response to the judiciary's version of "when did you stop beating your wife?" The structure of criticism directed towards the court in its most active period, 1966 to 1982, succeeded in making both judges and those who select judges "gun shy."

Both the media and powerful institutional enemies of reform in the society of the islands structured their criticism of the court in rhetoric that seemed fashionable and indisputable: what right does the court have to overturn settled law? Such a question forces acceptance of an assumption that is unwarranted: that change is impermissible. More important, it masks the historical fact that the privileges of the "Big Five" and the institutions and individuals that derived their privileges from its existence, benefitted themselves from massive changes in the law pre-existing their rise to power. Perhaps the most appropriate example is the criticism by Judge Pence, and the powerful firms representing the sugar industry as well as the daily press, regarding the "barbaric" overturning of the so-called settled law of water rights by the Hawaii Supreme Court in 1974.[69]

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[69] The evenhandedness of the two major newspapers in Honolulu should also be measured by the events that failed to be given coverage during this period of journalistic scrutiny of seemingly every action and facet of judicial behavior. For example, in the newspaper coverage of the state's ultimate victory in nullifying the attempt to use the Federal District Court to undermine the Hawaii Supreme Court, the two major papers failed to point out the extraordinary actions of the attorneys for the sugar industry in seeking victory.

For example, in reporting on the decision which thus overturned Judge Pence's award of attorneys fees to the lawyers for the various sugar companies, the papers failed to mention that part of the attorneys fees awarded to the firm of Cades Schutte Fleming & Wright was, as is stated in an opinion of Judge Pence, for the purpose of "Stifling Publications of Professor Chang's Writings." Robinson v. Ariyoshi, 703 F. Supp. 1412, 1430 (D. Haw. 1989). Judge Pence, in awarding attorney's fees to Cades Schutte, stated:

> The court is well aware of the fact that in this case, Professor Chang was more than an erudite professor of law at the University of Hawaii School of Law. Chang was selected by and purportedly represented Chief Justice Richardson, and paid by the State in order to assist the State's Attorney General in the State's Defense. This court can take judicial notice that some of the circuit judges of the Ninth Circuit during the pertinent years appeared to hold law review articles and conclusions therein in high esteem, since law review articles are normally written from an impartial scholar's standpoint. Anything written by Professor Chang

The law that they deemed to be "self-evident" was itself the result of judicial tampering between 1840 and 1904 where the laws by which

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during the time relevant here, however, could and would be only construed as written on a solidly partisan basis from the standpoint of an advocate representing his client. This court agrees with McBryde that the publication was intended to be, and was in effect, an additional brief for the State, after oral argument. The court of appeals even allowed McBryde to reply after the publication.

From what actually occurred after its publication it appears that CSF&W [Cades Schutte Fleming & Wright] soundly devoted a considerable amount of time in making every effort available to stop the publication of Chang's article, and McBryde is reimbursed for the charges.

703 F. Supp at 1430.

The attempts "to stop the publication of Chang's article" never received any attention, either at the time of these efforts nor during the arguments and award for attorneys fees during the 1983 proceeding. To this author, obviously speaking as the one subject to these efforts, these appeared "newsworthy" in that the two primary incidents appear to go beyond on the normal bounds of zealous lawyering.

As to the first, attorneys from the firms of Cades, Goodsill, and Hoddick appeared at a meeting of the Board of Editors of the *Hawaii Bar Journal* to argue that an article that had been accepted for publication, written by myself as one of the editors of the journal, cite-checked by Mr. Richard Morry and then in final "galleys," be excluded from the next issue of the journal. The attorneys argued that the article constituted (1) a violation of ethical canons in that it created a biased atmosphere in the midst of a judicial proceeding [although the case was then in the Ninth Circuit] and (2) constituted a violation of the page limitation rules of the Ninth Circuit since when the article was cited in the brief that was submitted by myself as counsel, the additional pages accorded to the article exceeded the forty-page limit of the Ninth Circuit. In any event, the editors of the *Bar Journal* [except myself] voted to quash the publication of the article. It was republished in the same form in the second volume of the *University of Hawaii Law Review*. *See Unraveling Robinson*, *supra* note 24.

For the record, the article was not initiated as a part of "litigation." Moreover, I was never called to testify in the attorney's fees proceeding as to the origination of the article. The article was the product of a grant from the University of Hawaii, Water Resources Research Center. When I received the grant, I was not a special deputy attorney general. Only after my research revealed that certain jurisdictional arguments were not being fully explored did I approach the state with inquiries. At that point, since the state already had existing counsel, and since the state officials deemed my arguments to be quite worthy, I was retained as counsel to the Chief Justice who appeared as an amicus curiae in the proceeding. It should be noted that at all times the Ninth Circuit had the discretion to deny amicus curiae standing or to refuse to accept the submission of briefs from an amicus. However, as a testament to their interest in the arguments presented, they granted Chief Justice Richardson through his counsel the right to participate in oral argument on two occasions, an extraordinary privilege not usually given to those presenting amicus briefs.

As to the second "effort . . . to stop Professor Chang's article," I would assume that

water could not be owned and was held in trust for the use of all were

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Judge Pence is referring to the decision to initiate a disciplinary complaint against me before the office of the Disciplinary Counsel. Mr. Russell Cades presented arguments at the hearing alleging that the publication of the aforementioned article, as well as a subsequent article, Williamson B.C. Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1981) [hereinafter "*Rediscovering Rooker*"], again violated ethical canons and disciplinary rules by attempting to influence the judicial process through the [media] and therefore create an atmosphere in which no fair proceeding could take place. Secondly, Mr. Cades asserted that the deliberate citation to my own articles in briefs submitted in the Ninth Circuit intentionally violated their page limitations. Finally, he asserted that the use of two attorneys to represent state officials created confusion and conflict of interest. Professor Addison Bowman, a former criminal defense attorney in Washington D.C., represented myself at the proceeding. When asked if Mr. Cades was billing his clients for this action, Mr. Cades, at that time, refused to answer.

The disciplinary counsel issued a one-sentence decision dismissing the allegations.

Even from the very personalized perspective of an unwilling participant to both incidents, I would suggest that both the uses of "powers" of suggestion (appearing before the *Hawaii Bar Journal*) and formally filing disciplinary charges that clearly seemed to involve protected First Amendment conduct, *see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (law review articles written by attorneys are protected by the First Amendment), were newsworthy. Indeed, if the parties had been reversed, and Chief Justice Richardson or myself had sought to stop Mr. Cades from either speaking on the case, as he has done, writing on the philosophy of judicial activism (*see* Cades, *supra* note 54), both newspapers would have seen such displays as excessive abuse of the power of the judiciary.

In examining the conduct of Mr. Cades, one must consider that the proceeding was, when the "efforts to stop . . . Professor Chang" occurred, were before the Ninth Circuit, hardly the kind of citizenry that would be easily swayed by a post-trial press conference designed to drum up sympathy for one's client. Second, if the reader examines both articles, the reader must realize, that, as in the case of almost all law review articles, the journals that published these articles sought to ensure the accuracy of citations. Moreover, while both articles raised questions about the jurisdiction of the federal courts to collaterally review state supreme court decisions, neither article can be deemed "clearly one-sided." Indeed, the article that seems most controversial concludes by saying that the case (McBryde v. Robinson) was "much ado about nothing." *Unraveling Robinson*, *supra* note 24, at 91. I meant then that the state had the power to regulate water under its police powers and really did not even have to rely on the landmark decision for such powers. This same legal conclusion was already well known, as it had been discussed in the 1978 constitutional convention.

Of course, Mr. Cades objections to my purported violations of Ninth Circuit rules were really the province of that court. The Ninth Circuit never had the obligation to accept these briefs (they were amicus briefs) in the first place. Moreover, the Ninth Circuit knows how to police its own procedural rules, and if briefs which incorporate law review articles (even if written by the same person) amount to attempts to cheat the rules against page limitations, the federal courts certainly have the power and acumen to deal with such irregularities.

overturned in favor of decisions privatizing water, largely because of the commercial needs of the sugar industry.[70]

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such irregularities.

Indeed, one colleague, who clerked on the Ninth Circuit, even noted to me that my article "Rediscovering Rooker" in the *Hastings Law Journal* had been placed on a "recommended reading" list for law clerks, independently, I assume, of the relationship of that article to the *Robinson* case.

Finally, let me point out that I have remained silent on these two incidents since their occurrence. However, I was rather surprised when a student of mine brought me the published opinion which pointed out that Judge Pence had awarded attorney's fees for "stifling" my writings. Indeed, I am rather surprised that Mr. Cades and others thought it necessary to bill their clients for these activities since the outrage they displayed against these alleged violations were always deemed to have been morally wrong and not simply part of the game of litigation tactics played between competing attorneys.

I find it necessary to discuss this example because further silence, that is the silence of the only person [myself] who could discuss these events in their proper context, would amount to my own complicity in allowing a situation of domination to continue. Much like spousal abuse that goes unreported, the unpleasantness of this episode is a necessary part of this article.

Two facts are relevant to the basic premise of this article. First, the public revelation of the attempt to quash my scholarship is an episode that I would assume would be of great interest to any newspaper concerned with freedom of the press. When it did appear (at the time of the request for fees, at the time of the issuance of the decision awarding the fees, and at the time the paper's reported that the fees would not have to be paid by the state) the fact is that these extraordinary actions were clearly made public. Nevertheless, the newspaper coverage focused solely on the size of the monies involved.

Second, the pressure placed on the *Hawaii Bar Journal* to withhold a publication that it had already deemed (knowing that it related to ongoing litigation—a positive factor in its decision) worthy of printing, even to the extent that it was already in final proofs, is indicative of the pre-statehood exercise of power by the "Big Five" (a term that I use as referring to those who were accustomed to power prior to statehood) that I speak of here.

My episode pales in comparison to the more prominent: the failure of Hawai'i attorneys to represent the "Smith Act Seven," *see supra* note 67, fearing one supposes, the same kind of treatment I received—instigation of disciplinary charges on petty charges. Nevertheless I raise it first as a matter of honesty, namely that those who read this article should be aware that the thesis I present here, a thesis I firmly believe is based in objective facts outside of my own experience, is nevertheless, the product of my own experience as an attorney in Hawai'i.

Second, if one can be objective about this experience, it also exemplifies the essence of the conflicts that surround the high degree of journalistic scrutiny of the present court, the court's retreat into procedural forms of defense, and undoubtedly the ramifications of such an attack, a court increasingly conservative as a result of a designed campaign to undermine its institutional and personal credibility.

[70] *See generally* Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

Thus, while some of this issue's articles may be accurate in their contemporary snapshot of the court as "more conservative," I suggest that understanding how that has come to be is the more interesting enterprise. Such conservatism, hopefully a superficial label at best, is not the result of totally unmolested freedom to choose. Such so-called "conservatism" may be, much like the "will to blend in" of middle class non-whites in a still racist[71] American society.[72] As in the case of middle class blacks, economic success is often tenuously linked to toeing a certain acceptable moderate political line.

In Hawai'i, post-statehood scrutiny of the courts has destroyed the ability to pass on the visionary energy of the original social transformation. If we have a more conservative judiciary, I assert that a powerful force in that development is that the continuation of a visionary politics, either in the judiciary or the legislature, has been made a choice with high personal costs.

For those who look at the court itself and despair as to what it may lack, I suggest they are missing the forest for the trees. I suggest we are blind to the reality that the essential struggle symbolized around statehood is still in progress. Statehood itself may have been gained, but we have not fully achieved that original vision of fairness, of addressing the rights of Hawaiians to longstanding wrongs, of providing a society in which trust and personhood are superior to the self-serving assertion of one's legal rights.

There is a nostalgia for the past that could only exist if one believed the urgency of the fight was over. Many of the old time Democrats lament that social consciousness associated with the progressive spirit of the Revolution of 1954 has been forgotten or is non-existent in the present generation. They speak of the "old days" as if those battles are long gone and over—that the young people today can never experience these struggles. It saddens the elders to see that the next generation can never achieve the sense of passion that so energized the generation prior to statehood.

I believe that the struggle, along more complicated lines, still exists. The divisions that existed then continue today in much deeper "structures" of society. The more complicated manifestations of the former

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[71] *See, e.g., Kristi Yamaguchi Not Getting the Gold in Endorsements: Some Talent Brokers Say Her Japanese Ancestry is Why*, HONOLULU STAR-BULL., Mar. 16, 1992, at A1, col. 2.

[72] *See, e.g.*, SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA ch. 2 (1990).

struggles mask the underlying similarity between then and now. We lack persons who are able to identify the new forms in which old struggles are expressed.

Material success has created the illusion of fundamental transformation. It is common to hear of frustration with the apparently growing conservatism of the Democratic party, just as it is common among lawyers and law students to hear frustration about an increasingly conservative court. The demise of both is commonly attributed to the internal corruption of those ideals that originally spurred the Democratic party.

Rather, I suggest that any new conservatism is a continued manifestation of the political power of the former elite, the Republican oligarchy known as the Big Five. This political power has "chilled" social change in much the manner described here—by aborting fundamental rearrangements of power by disparaging the integrity and competence of the "social engineers" who took power after statehood. It is thus a more complicated exercise of power—for the rhetoric of "competence" and "integrity" has transformed former "democrats" of the old kind into elitists akin to those of the Big Five, though they may be non-white as well as "Democrat" by self-designation.

The rhetorical transformation of the more blatant political struggles prior to statehood into those formed symbolically around "competence" and "integrity" (meaning "values") has fooled many into believing that the fundamental political hierarchies in Hawai'i have been eliminated and replaced by a neutral, objective standard for allocating the privileges and benefits of society. Attacks on integrity and competence seem "neutral" and fair game on the surface.

Moreover, the children of those who fought for social change became educated in a society that trumpeted these norms as if they were not themselves "loaded" with hierarchical possibility. Below the surface, attacks on "competence,"[73] "integrity," or "understanding how to do

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[73] Much of the elite bar's resistance to the University of Hawaii Law School was that it would not be good. *See, e.g., School of Law*, HONOLULU ADVERTISER, May 1, 1976, at A8, col. 1 ("[C]oncerns about communication between the law school and the local bar seem to rise from a deeper concern—subtly tinged with racism—that asks whether a law school can be both of high quality and heavily local in its career orientation and student selection."); *see also Law School, Anyone?*, HONOLULU ADVERTISER, Nov. 17, 1966, at E2, col. 1 ("Chief Justice William Richardson's proposal for a law school here may be somewhat controversial in the legal profession, but the idea of conducting a feasibility study on the question is a good one. . . . Any law school must not be designed just to

law''[74] can achieve the same disempowering results formerly achieved by attacking the ability of a local person to speak English with the proper enunciation.

Unfortunately, many who have ridden the social revolution to middle class success have seen the payoff in material, rather than experiential terms. For example, having experienced language or ''competence'' discrimination, the natural reaction of the middle class Asian-American parent has been to insist on the kind of private school education which will insulate their child from experiencing what they themselves suffered. Thus, while the goal becomes placing their children in schools, often private, which will insulate their offspring from the difficulties of their upbringing, the societal ramifications are exactly the opposite.

The next generation is thus deprived of the very experience that really counts: namely learning through experience that accent, or language, or ''competence,'' is not the measure of a person's social value. The children of reform thus become the most susceptible and sympathetic to the kinds of competence-oriented critique now leveled at many of the persons who led the vanguard for change.

Thus, Hawai'i's social pioneers are in danger of leaving their legacy to a generation that fails to understand the lesson that was so clear to their parent's generation: namely that the fights over ''competence'' or ''integrity'' often mask strategies to disempower persons with fundamentally visionary potential.[75]

In closing, the dangers of examining, and critiquing the use of the ''openness'' of the Hawai'i judiciary, absent examination of the his-

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turn out lawyers able to pass the Hawaii bar exam and serve here. The history of such schools on the Mainland is that they lower the quality of legal practice in the state.''); Addison Bowman, *In Defense of the Law School*, HONOLULU STAR-BULL., Sept. 22, 1979, at A8, col. 1.

Thus the bar didn't mind a law school, but most did not believe that it would be any good. Thus, they did not value the access to the profession afforded by a law school—good, great, or mediocre. Rather, unless lawyers were good—by their standards—the benefits of opening the opportunities of the bar to a greater number of local people was not as important as maintaining the quality of the bar. This ignored the vast legal under-representation of certain communities.

[74] Judge Pence's criticism of the Hawaii Supreme Court was that the justices did not understand the limits of their own power, that is that such finality was too dangerous in the hands of the newly empowered judges. *See supra* note 31.

[75] A clear example of the controversy over objective standards is the debate on objective criteria in law school affirmative action. *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

torical context, risks the same dangers of abstraction. When we fail to use history as a constraint on supposedly neutral standards that are applied elsewhere we become the forces that inhibit social change.

If anything, the greatest danger to a progressive judiciary in Hawai'i is confidence in the primacy of legal theory above real world experience. We ought to listen to Holmes who had sporadic bursts of great vision: "Experience," he said, in so many words, "is the real law."[76] If today's generation of law students had started life in the 1940s, their view might be similar. Concepts such as "access" and the "marketplace of ideas" would seem truly abstract compared to the sounds and smells of life at a Hanapepe sugar plantation on the eve of a strike in 1924.[77]

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[76] "The life of the law has not been logic, it has been experience." THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE (Clarence Morris ed., 1959) (citing OLIVER WENDELL HOLMES, THE COMMON LAW (1881)).

[77] In a 1924 plantation strike at Hanapepe on the Island of Kauai 16 plantation workers and four policemen were killed. HISTORY OF HAWAI'I *supra* note 13, at 186; *see generally* EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY 216-32 (1985). The Hanapepe river, of course, was the site of the 30 years of litigation over ownership of surface water rights involved in the *McBryde* and *Robinson* cases.

Tort and Insurance "Reform" in a Common Law Court

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I. INTRODUCTION

The genius of the common law has been its ability to respond to and to reflect both the temper and the needs of the times. As Justice Cardozo pointed out,[1] the customs and mores of the times and the objective of serving society's needs are often as important as logic and history in deciding cases which "count for the future."[2] Indeed, Cardozo's own decision in the landmark case of *McPherson v. Buick Motor Co.*[3] and the line of cases which preceded it have long been held out as the paradigm of how the common law moves to keep in step with the changes in community perspectives and needs.[4] It is not particularly surprising, therefore, that the Hawaii Supreme Court also recognizes that "[t]he adaptability of the common law to the changing needs of passing time has been one of its most beneficent characteristics."[5]

The changes experienced in the United States following World War II—the rapid and vast growth of science, industry, technology, and merchandising and the relative weakening of the ability of the individual consumer to cope with the rapid increase of risks to health, body, and pocketbook—brought with them a corresponding sympathetic response from the common law courts. Led by the great chief justice of the California Supreme Court, Roger Traynor,[6] and buttressed by the

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[1] B. N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[2] Finally there remains a percentage [of cases] . . . where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. . . . In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here comes into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver.

Id. at 165-66.

[3] 111 N.E. 1050 (N.Y. 1916). *McPherson* eliminated the requirement of privity of contract in negligence actions between consumers and manufacturers. It has led to the elimination of the privity requirement in virtually all product liability actions.

[4] E. LEVI, INTRODUCTION TO LEGAL REASONING (1961).

[5] Johnston v. KFC Nat'l Mgt. Co., 71 Haw. 229, 233, 788 P.2d 159, 162 (1990) (quoting with approval Ely v. Murphy, 540 A.2d 54, 57 (Conn. 1988) (quoting Herald Publishing Co. v. Bill, 111 A.2d 4, 8 (Conn. 1955))).

[6] *See* Escola v. Coca Cola Bottling Co., 150 P.2d 456, 440 (Cal. 1944) (Traynor, J. concurring).

reasoning and support of leading tort scholars, such as Leon Green and William Prosser, as well as the general influence of distinguished proponents of a policy-oriented approach, such as Yale's Myers McDougal and Harold Lasswell, the common law courts with no help from the legislative branches created a virtual revolution in tort law. The special features of this revolution included these:

(1) A general belief that individuals were virtually powerless to protect themselves from risks created by the dangerous modern environment;

(2) A general belief that industrial firms and manufacturers were in the best position to reduce the risks they created—they were the "cheapest cost avoiders"[7]—and could be made to reduce these risks if they were held responsible for the costs of injuries their activities produced;

(3) A general belief that industry and other accident causers, rather than accident victims, could absorb and shift the costs of accidents more efficiently, without serious adverse effects, by purchasing liability insurance;

(4) A widespread agreement that, at least in the area of injuries caused by manufactured products, fault need not be a requirement of liability; and

(5) A sense, not always clearly articulated, that compensation of injury victims should be a central purpose, rather than a by-product, of the tort system.

Starting mainly in the 1960s, these views led to a series of common law decisions which, among other things, (1) imposed strict, non-fault liability on manufacturers for injuries produced by their defectively manufactured or designed products; (2) tended to reject no-duty or other limiting rules in negligence cases and thereby to expand general negligence theory to apply to many areas where courts had heretofore been unwilling to extend liability; (3) eased proof requirements for injured victims; (4) reduced the impact of the victim's own failure to use ordinary care or evident willingness to accept the risk which caused injury; and (5) tended to expand the availability of insurance proceeds to cover accident losses by penalizing insurers who wrongly refused to settle claims. The California cases which led these trends are familiar to all tort lawyers: *Greenman v. Yuba Power Products, Inc.*[8] (announcing

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[7] G. Calabresi, The Costs of Accidents (1970).

[8] 377 P.2d 897 (Cal. 1962). An equally influential and well-known forerunner to *Greenman* was Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

strict product liability) and *Barker v. Lull Engineering Co.*[9] (adopting strict liability for design defects); *Dillon v. Legg*[10] (extending liability for negligent infliction of emotional distress to persons not within the zone of physical danger) and *Rowland v. Christian*[11] (eliminating no-duty rules applicable to liability for negligence of possessors of land to licensees and trespassers); *Ybarra v. Spangard*[12] (allowing unconscious hospital patient to recover unless hospital personnel prove that they did not cause patient's injury) and *Sindell v. Abbott Laboratories*[13] (allowing "market share" liability where victim cannot prove which of several companies producing the same drug produced the particular drug which caused her injury); *Li v. Yellow Cab Co.*[14] (adopting pure comparative negligence); *Crisci v. Security Insurance Co.*[15] (holding liability insurer liable for tort damages to policyholder for negligent failure to settle within policy limits); and *Royal Globe Insurance Co. v. Superior Court*[16] (holding liability insurer liable for tort damages to accident victim for bad faith refusal to settle).

During a period which followed most of these developments in California by about four or five years, much of which coincided with the tenure of William S. Richardson as Chief Justice of the Hawaii Supreme Court,[17] a somewhat similar revolution took place in the Hawaii Supreme Court. While the Hawai'i cases may have been triggered by cases such as those just described, both from California and other states undergoing changes with similar effects, the Hawaii Supreme Court did not slavishly follow the California courts. Here are the principal decisions which epitomized the tort revolution in Hawai'i:

In *Stewart v. Budget Rent-A-Car Corp.*,[18] the Hawaii Supreme Court adopted the doctrine of strict products liability in tort. Further, in addition to a very liberal use of circumstantial evidence, the court in *Stewart* went a long way toward reducing the plaintiff's burden of proof

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[9] 573 P.2d 443 (Cal. 1978).

[10] 441 P.2d 912 (Cal. 1968).

[11] 443 P.2d 561 (Cal. 1968).

[12] 154 P.2d 687 (Cal. 1944).

[13] 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[14] 532 P.2d 1226 (Cal. 1975).

[15] 426 P.2d 173 (Cal. 1967).

[16] 592 P.2d 329 (Cal. 1979) *rev'd*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988).

[17] William S. Richardson was appointed and qualified as Chief Justice of the Hawaii Supreme Court March 25, 1966. He served as Chief Justice until his retirement on December 30, 1982.

[18] 52 Haw. 71, 470 P.2d 240 (1970) (Levinson, J.).

in cases where the product is destroyed by suggesting, in a footnote, that "[i]n the most extreme circumstances a court might hold that where no specific defect can be shown, recovery is to be allowed anyway as a carefully driven vehicle does not leave the road in the absence of a defect in the car."[19] This comes close to a doctrine of res ipsa loquitur for strict liability.

In *Rodrigues v. State*[20] the Richardson Court leaped out in front of the entire nation and adopted an independent tort of negligent infliction of emotional distress, applicable even to cases where plaintiff's distress was caused by negligent injury to property and untrammeled by limitations imposed on the cause of action by other state courts. The only significant limitations on the tort are that the foreseeable distress has to be serious and that the plaintiff has to be within a reasonable distance of the accident that caused the distress.[21]

In *Pickard v. City & County of Honolulu*[22] the court, like the California court in *Rowland v. Christian,*[23] extended the negligence principle by refusing to apply traditional liability-limiting rules to the liability of possessors of land and instead held that "an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the premises, regardless of the legal status of the individual."[24]

In *Kaneko v. Hilo Coast Processing*[25] the court approved "pure" comparative negligence for strict product liability cases even though Hawai'i's comparative negligence statute provides for a form of "modified" comparative negligence.[26]

Although the Richardson Court never had to decide whether to adopt actions, such as those permitted in California in *Crisci*[27] and in *Royal*

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[19] *Id.* at 76 n.5, 470 P.2d 244 n.5.

[20] 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

[21] Kelley v. Kokua Sales and Supply Inc., 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (Kobayashi, J.); *see generally* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "the Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979).

[22] 51 Haw. 134, 452 P.2d 445 (1969) (Richardson, C.J.).

[23] 443 P.2d 561 (Cal. 1968); *see supra* note 11 and accompanying text.

[24] 51 Haw. at 135, 452 P.2d at 446.

[25] 65 Haw. 447, 654 P.2d 343 (1982) (Ogata, J.). Although there was some question whether *Kaneko* had adopted "pure" comparative fault, that question was finally put to rest by Chief Justice Lum's opinion in Hao v. Owens-Illinois, Inc., 69 Haw. 236, 738 P.2d 416 (1987).

[26] HAW. REV. STAT. § 663-31 (1984).

[27] 426 P.2d 173 (Cal. 1967); *see supra* note 15 and accompanying text.

Globe,[28] which hold insurers liable for wrongful failure to settle within policy limits (perhaps because insurers saw to it that such cases never came before the court), the court, in *Allstate Ins. Co. v. Morgan*,[29] demonstrated a policy favoring expansion of availability of insurance proceeds for accident victims by requiring stacking of uninsured motorists coverage.[30]

One last example of the Richardson Court's joinder with the mainland's progressive trend of extending the negligence principle is the case of *Ono v. Applegate*,[31] in which the court broke with a long tradition and held that a bar could be held liable to an accident victim of a bar patron who was negligently served liquor, in violation of statute, while intoxicated.[32]

It would not have been a surprise to anyone following the recent political history of Hawai'i that the Richardson Court would adopt a most liberal and activist posture in its decisions.[33] Following years of domination by the "Big Five" and conservative business interests, Hawai'i's governmental structure shifted into the hands of the liberal Democrats and their supporters, mostly Hawai'i's working people and those who had come from a plantation background, with the election

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[28] 592 P.2d 329 (Cal. 1979), *rev'd*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988); *see supra* note 16 and accompanying text.

[29] 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.).

[30] *Id.* at 49, 575 P.2d at 479. In *Morgan*, Insured's father had three vehicles, each covered by uninsured motorist coverage. Insured was injured by an uninsured motorist while a passenger in another vehicle. *Id.* at 46, 575 P.2d at 478. The court held that she was entitled to "stack" the uninsured motorist coverages on each of the other three vehicles to cover her injuries. She also recovered under the uninsured motorist provision of the car in which she was a passenger. *Id.* at 49, 575 P.2d at 478.

[31] 62 Haw. 131, 612 P.2d 533 (1980) (Ogata, J.).

[32] *Id.* at 133, 612 P.2d at 534. The traditional rule was that the patron's driving, and not the service of alcoholic beverages by the tavern, was the proximate cause of the accident. This bit of foolishness was also rejected by the California Supreme Court before the Hawaii Supreme Court decided *Ono*; *see* Vesely v. Sager, 486 P.2d 151 (Cal. 1917); *but see* CAL. BUS. AND PROF. CODE § 25602 (1985).

[33] *See, e.g.*, Yoshizaki v. Hilo Hospital, 50 Haw. 150, 155 n.7, 433 P.2d 220, 223 n.7 (1967) (Levinson, J.):

> Where reform is necessary in the area of tort law, the court should act whereever possible and leave to the legislature the question whether the reform should be modified or rescinded in whole or in part. Judicial action is frequently necessary to overcome legislative inertia.

Id., (citing Robert Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 45 TEX. L. REV. 1254, 1263 (1966)).

of Governor John Burns in 1962.[34] In the early years of the new Democratic administration, Professor Stephan Riesenfeld, a distinguished law professor at Berkeley, was brought to Hawai'i to help draft the nation's most progressive legislation providing medical care and disability income to Hawai'i's workers.[35] William S. Richardson, who served as Lieutenant Governor under John Burns, was appointed Chief Justice of the Supreme Court. The Supreme Court was thus put in the hands of a Chief Justice who was committed to serve the common people. Tort decisions following the most liberal trends, as well as other decisions which provided important benefits to the ordinary citizen, such as *In re Ashford*,[36] which expanded public access to Hawai'i's beaches, ought not to have been unexpected.

The current Supreme Court, under the leadership of Chief Justice Lum, is a product of the very same political heritage as the Richardson Court. There has been no significant change in the political control of the State. If anything, the Democrats who have descended from the Burns regime are stronger now than they were when William Richardson was appointed to the court. At the legislative and executive level they have demonstrated their progressivism by adopting, for example, the nation's most encompassing health care legislation, providing almost universal health insurance for Hawai'i citizens. Unlike the early Richardson Court, all the members of the current court have been appointed by nomination of a Judicial Selection Commission, by appointment of a governor, and by the consent of a Senate, all of which strongly reflect the recent Democratic tradition.[37] On this basis alone one might have expected the court to continue on in its progressive direction.

But another phenomenon, which started in the mid-1970s, reached new heights during the early 1980s, and which has continued with considerable force through to the present, has been the conservative movement for tort and insurance "reform." Insurance companies, businesses, physicians, governmental entities, non-profit organizations, and now even unions, alone or in various combinations, along with

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[34] *See generally* LAWRENCE FUCHS, HAWAII PONO 263-353 (1961).

[35] Act 116, 1963 Haw. Sess. Laws (codified at HAW. REV. STAT. ch. 386 (1963)).

[36] 50 Haw. 452, 440 P.2d 76 (1968).

[37] *See generally* HAW. CONST. art. IV; STATE OF HAWAII, RULES OF THE JUDICIAL SELECTION COMMISSION; *see also* James E.T. Koshiba, *Judicial Selection and Retention in the State of Hawaii*, 20 HAW. B. J. 1 (1986).

elected and appointed governmental officials at the highest levels of the federal government,[38] have sought to reduce or limit litigation, to reduce or limit lawyers fees associated with litigation, to cap tort recoveries, to eliminate punitive damages, to constrain products liability, and generally to impose restrictions designed to reduce the number and the levels of success of tort actions. The volume of literature seeking such changes has grown exponentially over recent years, and not just a few respected legal academics have joined in on the attacks upon the tort system and in calls for both major and minor changes.[39]

This is not the place to evaluate the accuracy of the charges that have been placed against the tort and insurance system. Suffice it to say that such independent studies as there are suggest that much of the national outcry has been based upon exaggerated claims of a "litigation explosion" and exaggerated claims of the adverse effects of tort claims.[40] While costs of the tort system have increased and the size of a small percentage of damage awards have increased enormously, and while there may be individual pockets where there are serious problems,[41] and other areas where improvement is possible, the overall system is by no means in crisis.[42]

Nevertheless, unrelenting and often well-orchestrated and well-funded attacks by respected individuals and groups on various facets of the

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[38] *See, e.g.*, Vice President Dan Quayle, Keynote Speech at the 1991 Annual Meeting of the American Bar Association (August, 1991) (calling for, among other things, requiring proof by clear and convincing evidence for awards of punitive damages; letting trial judges, rather than juries, determine the amount of punitive damages; limiting the amount of punitive damages to the amount of compensatory damages awarded; and adopting the "English rule" whereby the losing party to a lawsuit pays the winning party's attorney's fees); *see also* Daniel Broder, *Quayle Charges Some Lawyers Are "Ripping Off the System,"* WASH. POST, Sept. 7, 1991, at A3. For an earlier example of federal efforts to put controls on the tort system see U.S. ATTORNEY GENERAL'S TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986).

[39] *See, e.g., Symposium: Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548 (1985); STEPHEN SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989); George Priest, *The Current Insurance Crisis*, 96 YALE L. J. 1521 (1987).

[40] *See, e.g.*, Marc Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 18 (1988).

[41] Such as the senior author of this article believes is true of the automobile no-fault situation in Hawai'i.

[42] *Cf.*, 1 PAUL WEILER, AMERICAN LAW INSTITUTE REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, THE INSTITUTIONAL FRAMEWORK, PERSPECTIVES ON THE TORT CRISIS, 3-52 (1991).

tort and insurance system coupled with vicious attacks on the tort plaintiff's bar must undoubtedly have begun to affect community attitudes and to change community perspectives. This has surely occurred notwithstanding attempts to counterattack by the well-organized plaintiffs' lawyers and by consumer advocates,[43] such as Ralph Nader. Thus, it could have been predicted that decisionmakers in our democratic society would begin eventually to respond positively to what they may have perceived, rightly or wrongly, to be a shift in community attitudes with regard to alleged excesses of the tort and insurance system.[44]

Indeed, the Hawaii Legislature has clearly felt the need to respond, but in keeping with its liberal Democratic roots and traditions, has so far managed very successfully either to adopt changes which may be effective in reducing costs and excluding non-meritorious actions but which do not significantly limit suits, recoveries or damages, or changes which create a mere appearance of reform and which impose only the narrowest of limits on tort recoveries. Thus, for example, the legislature required plaintiffs in medical malpractice actions to present their cases to a purely advisory and non-binding panel, the Medical Claims Conciliation Panel, before bringing suit against medical professionals.[45] More recently, following the Hawaii Supreme Court's lead, the legislature has required all plaintiffs in tort actions in which the claim is $150,000 or less to bring the claim to arbitration[46] before commencing a lawsuit. While it is very difficult to develop a research methodology which will determine, definitively, whether these "alternative modes of dispute resolution" have cut litigation costs or reduced the number of lawsuits, there are indications that both have indeed achieved some success.[47]

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[43] *See, e.g., The Manufactured Crisis*, CONSUMER REP., Aug. 1986, at 544.

[44] *See* H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD: CASES AND TEXT MATERIALS 742 (1980):

> If sociological jurisprudence has a message for today and tomorrow, it may be that those who have the power and responsibility for the resolution of competing social interests reach the soundest decisions when they listen—really listen, which is the hardest thing in the world for a law-trained person to do—to the inevitably extreme demands of all the contending social factions and then strive for the way of "tolerable" adjustment and ultimate social reconciliation.

Id.

[45] HAW. REV. STAT. § 671-12 (1984). This approach was later applied also to other claims against other professionals. *See* HAW. REV. STAT. § 672-4 (1985) (architects).

[46] HAW. REV. STAT. § 601-20 (1986).

[47] *See, e.g.*, John Barkai & Gene Kassebaum, *The Impact of Discovery Limitations on Cost, Satisfaction and Pace in Court-Annexed Arbitration*, 11 U. HAW. L. REV. 81 (1989).

Examples of the other kind of reform include prohibiting the inclusion of an ad damnum clause in medical malpractice complaints,[48] largely to avoid adverse media publicity when the suit is filed; prohibiting awards of damages for emotional distress arising out of injuries to property unless the emotional distress results in "physical injury to mental illness;"[49] and abolishing joint and several liability with regard only to noneconomic losses and then evidently only in malpractice actions and motor vehicle accidents as to tortfeasors who are less than twenty-five percent at fault in causing claimant's injury.[50] Perhaps the most interesting example of legislative tort reform is the provision which caps awards of pain and suffering at $375,000.[51] First, this provision probably only applies to professional malpractice cases, since it expressly does not apply to the fairly comprehensive list of tort actions mentioned in the section which purports to abolish joint and several liability.[52] The more interesting feature, however, is a separate section defining noneconomic damages, which lists several types of such damages "which are recoverable in tort actions," and which states that pain and suffering is only one such type.[53] Thus, not only do other forms of noneconomic loss remain recoverable without limitation in malpractice cases but the statute explicitly does what the Hawaii Supreme Court had yet to do: it made controversial hedonic damages—damages for loss of enjoyment of life—recoverable along with mental anguish, disfigurement, loss of consortium, and "all other nonpecuniary losses or claims."[54] To the extent that the right to any of these costly forms of noneconomic loss was questionable under Hawai'i law before the passage of this section, it is assuredly no longer questionable. So much for legislative tort reform.

The question raised in this article, then, is how has the Hawaii Supreme Court during Chief Justice Lum's leadership responded to the concerns about excesses in the tort and insurance system that have

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[48] HAW. REV. STAT. § 663-1.3 (1986); *see also* Tobosa v. Owens, 69 Haw. 305, 741 P.2d 1280 (1987); Keomaka v. Zakaib, 8 Haw. App. 518, 811 P.2d 478 (1991).

[49] HAW. REV. STAT. § 663-8.9 (1986).

[50] *See* HAW. REV. STAT. § 663-10.9 (1991). A wag might suggest that it is possible that ultimately the cost of litigating the meaning of this complex and confusing section, which purports to eliminate joint and several liability, may far exceed the damages at stake in such cases.

[51] HAW. REV. STAT. § 663-8.7 (1986).

[52] *See supra* note 50 and accompanying text.

[53] HAW. REV. STAT. § 663-8.5 (1986).

[54] *See id; see also* Stephen Fearon, *Hedonic Damages: A Separate Element in Tort Recoveries*, 56 DEF. COUNS. J. 436 (Oct. 1989).

been expressed in the wider community? Has the court continued on the boldly progressive course first set by the Richardson Court, or has it been more responsive to a perceived community policy calling for a reversal of the trend favoring plaintiffs?

The answer—the thesis of this article—is that with regard to those areas of tort law of primary concern to those seeking "tort and insurance reform" in Hawai'i—to the State of Hawaii, to cities and counties, to liability and no-fault insurance companies, and to hotels and liquor establishments—the pro-plaintiff tort revolution has all but come to an end. While pro-recovery doctrines adopted during the Richardson years have not been overturned,[55] rights of victims and insureds have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected. On the other hand, with regard to products liability, an area which ultimately has little impact on most Hawai'i enterprises since relatively few products capable of causing many serious injuries are manufactured in this State, the court has continued and indeed expanded upon the Richardson Court's liberal tendencies.

Of course, these are generalizations. The court is not a one-person court, but a court composed of five individuals who do not always share the same views and, indeed, whose composition may change significantly from case to case when individual justices recuse themselves or when judges retire and are replaced. Dissents occur, but they are rare. It may be assumed that unanimous opinions are at least occasionally the product of compromises and tradeoffs; there will therefore be decisions, as we shall indicate, that do not seem to fit the general pattern. The sections which follow, however, will demonstrate the extent to which the thesis of this article—that the court has been engaging in a mild but significant kind of tort and insurance reform—is proven. The broad areas to be examined are: insurance coverage; the scope of duty and liability in negligence cases; joint and several liability; damages; and products liability.[56]

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[55] This contrasts with California where newly elected conservative justices of the Supreme Court are overturning or sharply limiting earlier controversial pro-victims decisions. *See, e.g.*, Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (1988), overturning *Royal Globe*, 592 P.2d 329 (Cal. 1979) and Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), and limiting *Sindell*, 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[56] Specific topics to be examined will include insurers' liability with regard to liability insurance, no fault insurance and uninsured and underinsured motorist

II. ANALYSIS

A. *Insurance Coverage*

A strong indication of the extent of an appellate court's concern about claims of rising insurance costs and related problems is the extent to which the court expands or limits coverage in controversial areas of policy interpretation or leans in the direction of the insured or the insurer in cases of statutory interpretation. With some important exceptions, these are cases in which the applicable language of the policy or statute, or the legislative history, does not inexorably call for a particular result; the cases in which, as Cardozo noted, it is up to the court to fill the lacunae. With few exceptions, most occurring early in the period of Chief Justice Lum's tenure in that office, the court has decided these cases favorably to the insurer, and against the earlier trend of expanding the availability of coverage.

1. *Homeowner's Liability Insurance*

One technique some courts have used to expand the amount of liability insurance available to compensate victims of motor vehicle accidents is to find that defendant's homeowner's policy provides coverage. Unfortunately, the homeowner's policy typically and plainly excludes liability for bodily injury or property damage arising out of the ownership or use of an automobile. To get around this exclusion, these courts have had to hold, disingenuously, that if the insured's liability is based upon vicarious liability for the negligent driving of another, or upon negligent entrustment of an automobile by the insured to another, then the injuries caused by the accident do not arise out of the ownership or use of an automobile, but out of the relationship which creates vicarious liability or out of the insured's negligence in entrusting a vehicle to another. Although willing to apply rules of construction of insurance policies which tend generally to favor the insured, the Hawaii Supreme Court, in two unanimous opinions

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coverage; liability of liquor servers; governmental tort liability; damages; joint and several liability; instructions in negligence cases; and products liability. Medical malpractice has not been examined because the principal cases have been decided by the Intermediate Court of Appeals and have not been re-examined by the Hawaii Supreme Court.

Not all cases in each area will be treated.

authored by Justice Nakamura, held itself bound to the exclusion in the homeowner's policy.

Thus, in *Fortune v. Wong*,[57] the court held that parents vicariously liable for the negligent driving of a minor son under *Hawaii Revised Statutes* section 577-3[58] are not covered for that liability under the terms of their homeowner's policy.[59] And, similarly, the court held, in *Hawaiian Ins. & Guaranty Co., Ltd. v. Chief Clerk of the First Circuit Court*,[60] that negligent entrustment of an automobile does not provide separate homeowner's policy coverage for liability growing out of an accident involving that vehicle.[61]

In another decision which favored the insurer in a homeowner's policy, *Hawaiian Ins. & Guaranty Co., Ltd. v. Blanco*,[62] the court held that the insurer had no duty to defend in a case where insured intentionally fired a gun at, or at least in a way to scare, a neighbor and injured him and was alleged also to have caused mental distress to the neighbor's wife, who was present at the time.[63] The clause in question excluded coverage for bodily injury "which is expected or intended by the *insured*."[64] The court held that there was no duty to defend even though, arguably, the frightening of the wife might have been negligently or recklessly caused rather than intentionally. In his opinion, Justice Padgett, with regard to both claims, found that their injuries were "expected" by the insured because a reasonable man in the insured's position would "anticipate" the injuries claimed to have been suffered.[65] With regard to the husband, the exclusion is probably warranted because firing to scare constitutes an assault, and if the

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[57] 68 Haw. 1, 702 P.2d 299 (1985) (Nakamura, J.).

[58] HAW. REV. STAT. § 577-3 (1984) provides in pertinent part: "The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all action in which the children or their individual property may be concerned." *Id.*

[59] 68 Haw. at 12, 702 P.2d at 307.

[60] 68 Haw. 336, 713 P.2d 427 (1986) (Nakamura, J.).

[61] *Id.* at 342, 713 P.2d at 430-31.

[62] 72 Haw. 9, 804 P.2d 876 (1990) (Padgett, J.).

[63] *Id.* at 19, 804 P.2d at 881. The Supreme Court has also held that the insurer under an automobile liability policy has no duty to defend a person in the driver's seat of a pick-up truck while plaintiff was being raped by another passenger in the rear section of the truck. Hawaiian Ins. & Guar. Co., Ltd. v. Brooks, 67 Haw. 285, 686 P.2d 23 (1984) (Nakamura, J.).

[64] 72 Haw. at 11, 804 P.2d at 878.

[65] *Id.* at 15, 804 P.2d at 881.

plaintiff is hit as a result, a battery.[66] It is not unusual for a liability policy to exclude intentional torts. But as to the wife's claim, the tort alleged under the facts may have been negligence; the question whether a reasonable person in the insured's position might anticipate (foresee) the wife's emotional distress is very close to the question we ask to determine whether a person may be held liable for the *negligent* infliction of emotional distress.[67] The questions raised, therefore, but unfortunately not expressly discussed, are whether the "expected or intended by the insured" exclusion encompasses ordinary negligence and, if so, whether an insurer in a policy designed to protect a homeowner from liability for negligence should be permitted to exclude such liability. Because of the doubt surrounding these questions, the court's holding that there was no duty to defend the wife's claim seems to contradict the broad expression of the insurer's duty to defend adopted by the court in 1982 in *Standard Oil Co. of California v. Hawaiian Ins. & Guaranty Co., Ltd.*[68]

2. *General Liability Insurance*

It is understandable why general liability policies covering businesses might ordinarily be written to exclude liability coverage which would serve, in effect, as a guarantee of the quality of the insured's product or the effectiveness of an insured's services. We do not, for example, expect papaya growers' general liability policies to protect the growers from liability to purchasers if the papayas they sell turn out to be overripe and inedible. On the other hand, we do expect the provisions of such policies to cover injuries to persons and to things other than the product itself caused by defects in the products or negligence in performing the service.

Early in the period under examination the Lum Court decided two cases in which general liability policy coverage of the quality of the insured's product or the effectiveness of the insured's work was in question. In the first, *Sturla, Inc. v. Fireman's Fund Ins. Co.*,[69] the court, in an opinion by Justice Nakamura, held that the comprehensive general liability policy of a carpet manufacturer provided no coverage

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[66] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 13, 21 (1965).

[67] *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970); *also supra* note 20 and accompanying text.

[68] 65 Haw. 521, 527, 654 P.2d 1345, 1349 (1982) (per curiam).

[69] 67 Haw. 203, 684 P.2d 960 (1984) (Nakamura, J.).

and that the insurer had no duty to defend a suit in which the gravamen of the claim was that carpeting sold by insured rapidly faded "after its delivery and installation in a condominium-hotel project on Kauai."[70] Construing the policy's standard but arcane language, the court held, "[T]he terms of the policy could not have given rise to an objectively reasonable expectation of protection against claims that the product Sturla sold was 'not that for which the damaged person bargained.'"[71] Rather, the court said, "[W]e believe the risks insured by the standard form policy are 'injury to people and damage to property caused by [a] faulty [product or] workmanship.'"[72]

How far *Sturla*'s restrictive view of the coverage of business risks would go was raised in the same year in *Hurtig v. Terminix Wood Treating & Contracting Co., Ltd.*[73] There, the question was whether an exterminator's comprehensive general liability policy covered termite damage to premises which followed insured's failure adequately to perform its contract to exterminate termites.[74] In one of the few cases in which the Lum Court held in favor of expanded insurance coverage, Chief Justice Lum and Justices Hayashi and Padgett held that injury to the premises was not excluded since the business risk exclusion recognized in *Sturla* only applies "to the insured's own work or work product."[75] In this case the exterminator's work and work product were "inspection and treatment" but the loss went beyond that "to the home itself."[76]

Justice Nakamura, joined by Justice Wakatsuki, dissented strongly. Their view was that the termite damage to the house was a business risk under the policy and that the insurance policy "could not have given rise to an objectively reasonable expectation of protection against a claim that the service rendered by Terminix was not that for which

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[70] *Id.* at 204, 684 P.2d at 961.

[71] 67 Haw. at 210, 684 P.2d at 963 (citing James A. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971)). The court in *Sturla* did not explain why the claim for consequential damages which the court found to be "of an intangible nature," 67 Haw. at 206 n.3, 684 P.2d at 963 n.3, as distinguished from the claim for the economic loss of replacing the carpet, was not covered.

[72] *Id.* (quoting Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 791 (N.J. 1979)).

[73] 67 Haw. 480, 692 P.2d 1153 (1984) (Hayashi, J.).

[74] *Id.* at 480, 692 P.2d at 1154.

[75] *Id.* at 482, 692 P.2d at 1154.

[76] *Id.*

the Hurtigs' bargained."[77] Their concern was that the majority's interpretation "would make the insurer a guarantor of adequate performance of contractual obligations and transmute a liability policy into a performance bond."[78]

Justice Hayashi's majority opinion, however, is arguably the better one on two grounds. Technically, the homeowner was seeking consequential damages to property damaged by the exterminator's failure properly to conduct the extermination. The business risk that would not be covered would be the economic cost of doing the inspection or exterminating job over again. But damage to other property, even if the purpose was to protect that property, would not, as the majority pointed out, constitute damage to the insured's "own work or work product."[79] By way of analogy, it can hardly be doubted that a claim by a person who drowned as a result of a defective life preserver would be covered by the standard comprehensive general liability policy, even though the exclusive purpose of the preserver, like the exterminating service, was to protect against the very risk that occurred. Not every business risk is the kind of risk that is excluded by the language of the policy.

The *Hurtig* decision, one of the few during the period under review in which the court actually expanded the availability of liability insurance, seems sound on policy grounds, as well. Virtually every building in Hawai'i is at risk of termites. Those building owners who can afford termite treatment feel compelled to contract for it. If the job is badly performed, and not caught in time, the damage to the treated premises can be extensive. The only recourse of the owner in such cases is against the exterminator, and many exterminators are small businesses which may not be able to self-insure against such losses. The decision not to exclude coverage for such damage, therefore, constitutes an important protection to Hawai'i property owners, at least those who insist on using exterminators who are insured by a comprehensive general liability policy, and to the insured exterminators, as well.[80]

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[77] *Id.* at 485, 692 P.2d at 1156 (Nakamura, Wakatsuki, JJ., dissenting).

[78] *Id.*

[79] *Id.*

[80] *Cf.* K. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS (1990). As a possible explanation of the justification for not applying the business risk exclusion to damage to property other than the economic loss involved in redoing the work, Professor Abraham suggested:

[L]iability for bodily injury or damage to other property [caused by faulty work]

3. Uninsured and Underinsured Motorist Insurance

The Hawaii Legislature has kept the amount of uninsured motorist (U.M.) insurance that must be offered to automobile owners[81] and the amount of mandatory automobile liability insurance[82] at very low levels relative to the damages that may be expected in serious automobile accidents. In consequence, the availability of underinsured motorist (U.I.M.) insurance and the possibility of stacking U.M. and U.I.M. coverages have taken on great potential significance in cases of serious accidents where a defendant is uninsured or only insured for the minimum required coverage.[83]

While the language of the statute which required the offering of U.M. coverage[84] did not clearly call for stacking, the absence of clear language to the contrary coupled undoubtedly with a progressive, if unspoken, policy of providing more adequate compensation for victims, led the Richardson Court to interpret the U.M. statute liberally to allow U.M. coverages to be stacked.[85]

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is sufficiently infrequent and the average cost of such liability sufficiently high that self-insuring against this kind of liability would be too risky for most small and medium-sized businesses. The business risk exclusions therefore do not pertain to this kind of liability.

Id. at 504. Of course, this protection is contingent on insurers not altering the language of the policy for the specific purpose of excluding liability coverage in these cases.

[81] *Cf.* HAW. REV. STAT. § 431:10C-301(b)(3) (1990). Presumably the minimum amount of U.M. coverage that must be offered is $35,000, the minimum amount of liability coverage. However, § 431:10C-301(b)(3) refers to HAW. REV. STAT. § 287-7 for the amount which must be carried, and § 287-7, as currently written, does not mention any amount.

[82] HAW. REV. STAT. § 431:10C-301(b)(1) (1990) ($35,000).

[83] Although persons injured in an automobile accident are usually entitled to no-fault benefits, the total amount available to compensate each person injured or killed is only $15,000, unless optional additional no-fault coverage is available. HAW. REV. STAT. § 431:10C-103(10)(B) (1990). The mandatory $15,000 amount has not changed since no-fault was adopted in 1972, although the cost-of-living since then has increased by two or three times. The $15,000 is clearly woefully inadequate to compensate seriously injured victims of automobile accidents.

[84] HAW. REV. STAT. § 431-448 (1985).

[85] *See, e.g.*, Allstate Ins. Co. v Morgan, 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.). *Cf.*, Calibuso v. Pacific Ins. Co., Ltd., 62 Haw. 424, 616 P.2d 1357 (1980) (Nakamura, J.).

Unfortunately, stacking of only U.M. coverage benefits only those who are wealthy enough to own more than one insured automobile or who are lucky enough to benefit from the policy or policies of such an insured. The better answer to the problem of

The Lum Court has not undone the Richardson era stacking cases. With regard to the *availability* of U.M. and U.I.M. insurance, it has, albeit with important exceptions, fairly liberally expanded coverage both to victims and to accidents that do not clearly fall within the class to be protected under the statute. In addition, the court has taken important steps to insure that insureds are not deemed to have rejected such coverage unless they do so knowledgeably. On the other hand, the court has kept the total amount of U.M. and U.I.M. coverage available, ordinary stacking aside, within very parsimonious bounds indeed.

Thus, although the court has refused to allow a motorcyclist injured by an uninsured motorist while riding his uninsured motorcycle to recover under the U.I.M. provisions of his father's auto policy,[86] the court has extended U.M. coverage under the policy of the owner of an ambulance to an occupant, a paramedic, who left the vehicle at the scene of a motorcycle accident to place flares in the center of the road and was there struck by an uninsured motor vehicle,[87] and has held that U.M. coverage was available to a motorist shot by a gun fired from another unidentified vehicle even though there was no indication that the gunshot had any other connection with the motor vehicles in which the victim and the shooter were riding.[88]

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inadequate insurance resources might be for the legislature (1) to raise the amounts of required liability coverage (in Japan, for example, the required amount is about $125,000 but most owners carry higher or even unlimited coverage); (2) to raise the required, or at least the optional, amounts of U.M. and U.I.M. coverage to levels which reflect the cost of compensation in serious accidents; (3) to raise the extremely low minimum amounts of no-fault coverage to reflect changes in the cost of living since the law was passed and also to offer optional additional no-fault up to amounts which reflect the current realities of economic costs of serious accidents, or (4) to adopt some parts or all of these three recommendations. Indexing would also serve to prevent the amounts from becoming inadequate over time, as they have in the past.

[86] National Union Fire Ins. Co. v. Ragil, 72 Haw. 205, 811 P.2d 473 (1991) (Wakatsuki, J.). This decision was consistent with the Hawaii Legislature's decision to deal separately with motorcycles—and their corresponding degree of risk of injury—in order to keep the cost of injuries caused by motorcycles from causing excessive insurance costs, particularly to the motorcyclists themselves. *Id.* at 214-16, 811 P.2d at 476-77.

[87] National Union Fire Ins. Co. v. Olson, 69 Haw. 559, 751 P.2d 666 (1988) (Lum, C.J.).

[88] Ganiron v. Hawaii Ins. Guaranty Ass'n, 69 Haw. 432, 744 P.2d 1210 (1987) (Padgett, J.) (also allowing the victim to recover no-fault benefits).

As the dissenting opinion by Justice Wakatsuki, joined by Justice Hayashi, con-

Most significantly, in *Mollena v. Fireman's Fund Ins. Co. of Hawaii*,[89] the court, in an opinion by Justice Wakatsuki, did Hawai'i automobile owners bewildered by the arcane complexity of auto insurance a significant service. The court held, first, that separate offers of U.I.M. coverage must be made prior to each policy renewal, in "every policy renewal notice."[90] Second, the court "endorsed" a demanding four-part test[91] to be used to determine whether the offer of U.I.M. coverage is legally sufficient, and then held that the renewal notice sent by respondent Fireman's Fund was deficient on three of the four parts of the test.[92] In connection with the test, the court held that the burden of establishing that it has been satisfied is on the insurer, and cannot be met by telling the insured to contact an agent or broker of the insurer.[93] Third, the court held that the current requirement that an applicant for automobile insurance must reject U.M. coverage in

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vincingly argues, for U.M. and no-fault coverage to exist, the automobile ought to "serve as more than merely the situs of the events. . . ." *Id.* at 437, 744 P.2d at 1215.

To add insult to injury, the court also held that the trial judge's award of only 55% of attorney's fees to the claimant because the issue was a difficult one was not warranted under the no-fault statute; rather, claimant was entitled to 100%. *Id.* at 436, 744 P.2d at 1215. Whether correctly decided or not, this case is likely to deter insurers from questioning coverage even in cases where the insurer's doubts are entirely reasonable.

[89] 72 Haw. 314, 816 P.2d 968 (1991) (Wakatsuki, J.).

[90] *Id.* at 325, 816 P.2d at 973-74.

[91] *Id.* The test is set forth in Hastings v. United Pac. Ins. Co., 318 N.W.2d 849 (Minn. 1982):

> (1) if made other than face-to-face, the notification process must be commercially reasonable; (2) the limits of optional coverage must be specified and not merely offered in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insurer must apprise the insured that the optional coverage is available for a relatively modest increase in premium.

Id. at 859.

The court in its opinion did not indicate the source of these specific requirements in the Hawai'i statutes. The sections which describe and which require offering U.M. and U.I.M. do not, for example, require that the coverage be offered "for a relatively modest increase in premium." 72 Haw. at 325, 816 P.2d at 974 (citing *Hastings*, 318 N.W.2d at 859). In *Hastings*, the Minnesota Supreme Court found the source of these requirements in Jacobson v. Illinois Farmers Ins. Co., 264 N.W.2d 804 (Minn. 1978); Holman v. All Nation Ins. Co., 288 N.W.2d 244 (Minn. 1980); and Kuehenmeister v. Illinois Farmers Ins. Co., 310 N.W.2d 86 (Minn. 1981).

[92] 72 Haw. at 322-23, 816 P.2d at 972-73.

[93] *Id.* at 320, 816 P.2d at 971.

writing applies as well to U.I.M. coverage.[94] Finally and most importantly, the court held that the effect of the failure of the insurer to satisfy the four-part test is to provide the insureds with implied coverage "in the minimum amount [$35,000] required to be offered" for the kind of coverage being offered.[95]

The question arises, however, as to just how much U.M. and U.I.M. coverage is available in individual accidents, and it is here that the court's growing concern for the premium dollar becomes evident. Its decision that U.M. coverage provided by the City and County of Honolulu under a group policy for 1106 police-owned vehicles could not be stacked to provide $27 million of coverage to a policeman injured by an uninsured motorist while occupying his insured vehicle,[96] while unexceptional, nevertheless took specific note of the likely effect on premiums if such stacking were allowed.[97] Similarly, the court referred to "the legislative objective of optional [U.I.M.] protection at the least possible cost" in *Kang v. State Farm Mutual Automobile Ins. Co*,[98] a decision holding that a person injured by the negligence of the owner and driver of the vehicle in which he was a passenger who recovers from the liability coverage of the owner-driver's insurance may not also recover U.I.M. coverage under the same policy. In *Kang* the court held a specific clause excluding the insured vehicle as an underinsured vehicle was not against public policy or in violation of the U.I.M. statute, even though the plain meaning of the U.I.M. statute would seem to require coverage.[99] It is worth noting, however, that the court

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[94] *Id.* at 324, 816 P.2d at 971.

[95] *Id.* at 326, 816 P.2d at 974. In Moorcroft v. First Ins. Co. of Hawaii, Ltd., 68 Haw. 501, 720 P.2d 178 (1986) (Wakatsuki, J.), the court took an important step to protect the rights of those covered by U.M. insurance. It held that the insurer could not sit back and ignore the insured's demand for U.M. benefits, ignore and refuse to consent to the insured's bringing suit against the uninsured motorist, and then, after claimant gets a default judgment, seek to use the "consent to sue" clause to refuse to pay claimant the policy amount and also to insist on its right to arbitrate. *Id.* at 504, 720 P.2d at 180. However, the court also held that although the insurer thus waived its right to consent to sue and its right to arbitrate the claim, it was only liable for the face amount of the U.M. coverage, and not the very much larger amount of the default judgment. *Id.*

[96] Lee v. Insurance Company of North America, 70 Haw. 120, 763 P.2d 567 (1988) (Lum, C.J.).

[97] *Id.* at 124, 763 P.2d at 569.

[98] 72 Haw. 251, 815 P.2d 1020 (1991) (Moon, J.).

[99] The court, in an opinion by Justice Moon, while recognizing that "[u]nderinsured

evidently unanimously rejected, sub silentio, or perhaps did not even consider the opportunity to deal with the inadequacy of liability coverage in the same manner the Hawaii Supreme Court acted in the original stacking cases: by constructing a rationale, based less on statutory construction than on public policy, to allow multiple coverage.[100]

Another example of the court's restricting the amount of insurance available in an accident is *Hara v. Island Ins. Co., Ltd.*[101] There, plaintiffs, the widower and children of a person killed in an automobile accident, brought actions for wrongful death coupled with a survival action against defendants covered by an Allstate policy which provided "a maximum coverage of $25,000 per person for bodily injury or

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motorist coverage was designed to protect against loss resulting from bodily injury or death *suffered by any person legally entitled to recover damages from an owner or operator of an underinsured motor vehicle*" (emphasis added), thus clearly describing the claimant in this case, nevertheless determined, based on the slim evidence that the no-fault law was intended to provide "adequate protection to persons injured in motor vehicle accidents *at the least possible cost*," that the plain language need not be followed. Instead, the court followed advice by Professor Widiss to the effect that uninsured motorist insurance should not be transformed into liability insurance. *Id.* at 255-56, 815 P.2d at 1022 (citing 2 WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 35.5 at 56-57 (2d ed. 1985)). But an owner of a motor vehicle might very well wish to provide extra protection to her passengers in the event she might negligently cause their injury, and why should they not get the benefit if the existing liability insurance is inadequate? "[A]dequate protection . . . at least possible cost" is not the same as least possible cost regardless of adequacy. *See* Chun v. Liberty Mutual Ins. Co., 5 Haw. App. 290, 687 P.2d 564 (1984) (Tanaka, J.) ("In the enactment of and amendments to the No-Fault Law, the legislature was never guided solely by a policy of keeping no-fault insurance premiums low at all costs.").

It should also be noted that WIDISS, *supra*, mentions that in this situation "the fact that purchasers of underinsured motorist coverage have considerable latitude in regard to selecting the coverage limits is a matter of significant import." *Id.* § 35.5 at 56-57. Evidently, he is referring to the possibility that an owner could buy minimal amounts of expensive liability coverage but protect his passengers against his own negligence by buying enormous amounts of cheap U.I.M. coverage. However, there is no indication in *Kang* and it does not appear to be the fact in Hawai'i that large amounts of optional underinsured motorist insurance, in excess of $35,000 per person, are available to most insurance purchasers.

[100] *See, e.g.*, Allstate Ins. Co. v. Morgan, 59 Haw. 44, 575 P.2d 477 (1978) (Ogata, J.). *Cf.* Palisbo v. Hawaii Ins. and Guar. Co., 57 Haw. 10, 547 P.2d 1350 (1976) (Menor, J.); Walton v. State Farm Mut. Auto. Ins. Co., 55 Haw. 326, 518 P.2d 1399 (1974) ((Ogata, J.).

[101] 70 Haw. 42, 759 P.2d 1374 (1988) (Padgett, J.).

death."[102] Allstate tendered the $25,000 but plaintiffs proceeded to secure a default judgment in favor of the widower for $437,160, $180,712 to one child, $220,874 to another, and $86,278 to the widower as personal representative in the survival action.[103] Plaintiffs argued that, as in *Palisbo v. Hawaiian Ins. & Guaranty Co.*,[104] if the amount of liability insurance available was insufficient to cover each injured person for the minimum amount of per person coverage required under *Hawaii Revised Statutes* section 287-7, in this case $10,000, then the defendant was underinsured and the victim's own U.M. coverage should provide the minimum amounts.[105] However, the court ruled, quite correctly in this case, that the claims of the plaintiffs were derivative of the decedent and, since she was the only one who suffered bodily injury or death, and since the amount available from Allstate clearly exceeded the amount that must have been available under the statute to compensate her injuries, the defendant was neither uninsured nor underinsured.[106]

Perhaps the most restrictive decision in the interpretation of U.M. and U.I.M. coverage of the Lum Court is *National Union Fire Ins. Co. v. Ferreira*.[107] There the court held that U.M. and U.I.M. coverage were mutually exclusive: If defendant has no insurance then only U.M. coverage is available, but if defendant has insurance but it is inadequate

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[102] *Id.* at 43, 759 P.2d at 1374-75.

[103] *Id.*

[104] 57 Haw. 10, 547 P.2d 1350 (1976).

[105] *Id.* at 44, 759 P.2d at 1375.

[106] *Id.* at 17, 759 P.2d at 1379. Interestingly, Justice Padgett's opinion suggests a possibility for expanding the liability available in an accident. He expressly leaves open the question whether, under the liability requirements of the no-fault statute—then "$25,000 for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm . . . ."—the Allstate policy, which would evidently only pay $25,000 in this case, was in compliance with the statute. *Id.* It is possible that "accidental harm" under the statute might be interpreted to include emotional distress suffered by a relative of the victim and sought by way of an "independent tort" of negligent infliction of emotional distress or even by way of a wrongful death action. If so, there should be a separate fund of $35,000 which would become available under the current no-fault law to cover liability to each person suffering such harm. *But cf.* Doi v. Hawaiian Ins. & Guar. Co., 6 Haw. App. 456, 727 P.2d 884 (1986) (Heen, J.) (action for loss of consortium was derivative and hence defendant whose liability insurance did not provide a separate fund to cover such liability was not underinsured), and National Union Fire Ins. Co. v. Villanueva, 716 F. Supp. 450 (D. Haw. 1989) (holding that a pure emotional distress claim is not independently compensable accidental harm under no-fault law).

[107] 71 Haw. 341, 790 P.2d 910 (1990) (Moon, J.).

to cover plaintiff's damage, then only underinsured coverage is available.[108] The most unfortunate feature of this holding is that a person who has purchased both $35,000 each of U.M. and U.I.M. coverage to protect herself and who suffers damage of $100,000 from an uninsured motorist, can only recover $35,000 of U.M. coverage and nothing from her U.I.M. coverage, leaving $75,000 of her losses uncovered notwithstanding she paid premiums for both and her likely expectation that both would be available in a situation like this. Unlike *Kang*, in which the court disregarded the literal meaning of the underinsured motorist statute, in *Ferreira* the court seemed to fasten woodenly on the language of the same statute and to ignore its spirit and intention.[109] The definition of an "uninsured motor vehicle" in the statute read:

> [A] motor vehicle with respect to the ownership, maintenance, or use of which *the sum of the limits of liability of all bodily injury liability insurance coverage applicable at the time of the loss to which coverage afforded by such policy or policies applies is less than the liability for damages imposed by law.*[110]

The court then held that under this language a prerequisite "is the existence of 'bodily injury liability insurance coverage . . . .'"[111] Thus, "[w]here a tortfeasor has no bodily injury liability insurance coverage . . . he is not underinsured . . . ."[112] With all due respect, however, the court's reading of the literal meaning is not inexorable, for if the "sum of the limits of liability" is zero, then zero is certainly "less than the liability for damages imposed by law." And arguably, since U.M. coverage in such a situation stands in for defendant's liability insurance, it is not stretching things too far to suggest that the defendant is "insured" and therefore "underinsured" if the U.M. coverage does not cover the entire damages. A better solution surely would have been to hold that U.M. covers the first $35,000 (or other amount of U.M. coverage) of loss and the U.I.M. coverage covers the last $35,000 (or other amount of U.I.M. coverage) of loss so that in the situation described above plaintiff would recover a total of $70,000 of this $100,000 loss.[113]

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[108] *Id.* at 346, 790 P.2d at 912.

[109] 71 Haw. at 345, 790 P.2d at 912-13.

[110] *Id.* at 344-45, 790 P.2d at 913 (citing HAW. REV. STAT. § 431-448 (1985)).

[111] 71 Haw. at 345, 790 P.2d at 913.

[112] *Id.*

[113] If the insured had only U.I.M. coverage, arguably it would not be unfair to say that coverage does not substitute for U.M. coverage, i.e., it does not cover the first $35,000 of loss.

What seems to be revealed, however, by the *Ferreira* decision, and particularly by the arguably inconsistent way in which the court treated the same statute in *Kang* and *Ferreira*, is the court's newly restrictive attitude toward the ability of an accident victim to draw upon different forms of coverage to achieve full compensation for a single accident. The opinions in both cases were written by Justice Moon. Dare we suggest that with the addition of Justice Moon to the court the emphasis has shifted from more adequately compensating the accident victim to protecting the insurance buyer's pocketbook?

4. Automobile Liability Insurance[114]

The decisions deciding questions of motor vehicle liability insurance seem consistent with the emerging trend toward reducing the insurer's exposure and start with an important case early in the period which expanded coverage and an equally important case at the end which contracted it. Thus, in 1983, in *Government Employees Ins. Co. v. Franklin*,[115] the court interpreted the Franklins' policy to provide coverage to protect them against the liability of their minor daughter who had been held liable for an automobile accident while involved in a common enterprise with two friends. Evidently the three minors had operated a car owned by the parents of one of the other minors without the parent's express or implied permission.[116] Under *Hawaii Revised Statutes* section 577-3,[117] parents are strictly liable for the torts of their minor children. Under Hawai'i's no-fault law, however, liability coverage seems only to be extended to owners of automobiles involved in accidents and to drivers who are driving with the express or implied permission of the owner.[118] The difference between these two statutes potentially leaves open a serious exposure to personal liability without insurance protection for parents whose minor children negligently harm others, as in this case, while driving someone else's car without the express or implied permission of the owner of that car. Here, however, the parents argued

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[114] For an important case dealing with the abolition of tort liability in automobile accident cases and the proof necessary to meet the conditions necessary for bringing a suit, see discussion of Parker v. Nakaoka, *infra* note 182 and accompanying text.

[115] 66 Haw. 384, 662 P.2d 1117 (1983) (per curiam).

[116] *Id.* at 385, 662 P.2d at 1118.

[117] *See supra* note 58 (quoting pertinent part).

[118] *See* HAW. REV. STAT. § 431:10C-301(a)(2)(1987).

that the language of their own policy covered them in this instance.[119] The language in question provided:

> Persons insured: The following are insured under Part I:
>
> . . .
>
> (b) with respect to a non-owned automobile,
> (1) the named insured,
> (2) any relative, but only with respect to a
> private passenger automobile or trailer, *provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission*. . . .[120]

Courts had gone both ways on the question whether the proviso in part (2) also modified paragraph (1), so as to make the coverage of the parent's (the named insured's) vicarious liability conditional on their child's using the other parent's car with the permission of the other parent.[121] The Hawaii Supreme Court, however, in a per curiam opinion found the policy provisions ambiguous and, on that basis, held that they should be interpreted in favor of the insured. Thus, the parent's coverage was not conditioned on their daughter's having had permission to use the car involved in the accident.[122]

Other pro-claimant decisions relating to liability involved the limitations periods in the no-fault law.[123] They include *Crawford v. Crawford*,[124] in which the court held that the general tolling provisions relating to children apply to automobile accident cases for wrongful death brought by children to recover for the death of their mother notwithstanding the two-year limitations period in the no-fault law,[125] and *Zator v. State Farm Mutual Ins. Co.*,[126] which held that the no-fault statute of

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[119] 66 Haw. at 387, 662 P.2d at 1119.

[120] *Id.* at 386, 662 P.2d at 1119 (emphasis the court's).

[121] 66 Haw. at 386-87, 662 P.2d at 1119.

[122] *Id.* The benefits of this holding to parents in Hawai'i would be lost if insurers modified their policies to make the proviso applicable to named insureds, as well as to relatives. Because the legislature has saddled parents with vicarious liability without any fault, however, public policy would seem to require that they be protected from liability in cases like this. Insurers, therefore, should either be prevented from excluding such protection from homeowner's or automobile liability policies or should be required to offer such protection optionally, as in the case of U.M. and U.I.M. coverage.

[123] HAW. REV. STAT. § 431:10C-301 (1987).

[124] 69 Haw. 410, 745 P.2d 285 (1987) (Hayashi, J.).

[125] *Id.* at 417, 745 P.2d at 289.

[126] 69 Haw. 594, 752 P.2d 1073 (1988) (Lum, C.J.).

limitation may be tolled pending appointment of guardian for a claimant who is incompetent when the cause of action accrued.[127]

By way of contrast, the court in 1991, in *Hawaiian Ins. & Guaranty Co., Ltd. v. Financial Security Ins. Co.*[128] had to decide whether the relatively rich ($500,000) liability policy of the retail seller of an automobile or the minimum liability coverage ($25,000) of the buyer's policy covered the car when the buyers were sued for wrongful death as a result of an accident which occurred after the car was sold and possession transferred to them. The buyers took possession of the car on December 28, 1983, and the accident occurred on January 16, 1984.[129] The seller, however, had not yet processed and sent documents reflecting the transfer of ownership to the Department of Motor Vehicles and the Department did not issue new certificates of ownership and registration until February 3, 1984.[130]

By the plain language of two statutes, *Hawaii Revised Statutes* section 286-52(e)[131] of the motor vehicle registration law and section 294-2(13)[132] of the Hawai'i No-Fault Law, the seller under these facts would not only be deemed the owner of the motor vehicle but, under the registration law, the owner "for any purpose." Further, the no-fault law required every "owner" of a motor vehicle to maintain a no-fault policy on the vehicle.[133]

Nevertheless, the court, speaking through Justice Moon, disregarded the statutes' plain meaning and found that the seller's policy was not applicable.[134] With regard to its interpretation of the motor vehicle registration law, the court relied on *Pacific Ins. Co. v. Oregon Auto Ins. Co.*,[135] a case in which a private seller had sold the car to a buyer and forwarded the documents to the Treasurer prior to the accident but the title did not reach the private buyer until a day or two later. Under those circumstances, the court found that a literal application

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[127] *Id.* at 598, 752 P.2d at 1075.

[128] 72 Haw. 80, 807 P.2d 1256 (1991) (Moon, J.).

[129] *Id.* at 82-83, 807 P.2d at 1257-58.

[130] *Id.* at 83, 807 P.2d at 1258.

[131] HAW. REV. STAT. ch. 286 (1929).

[132] *Id.* ch. 294 (1973). The operative language provided: "Whenever transfer of title to a motor vehicle occurs, the seller shall be considered the owner until delivery of the executed title to the buyer, from which time the buyer holding the equitable title shall be considered the owner." *Id.* § 294-2(13).

[133] *Id.* § 294-8(a)(1) (1978).

[134] 72 Haw. at 89, 807 P.2d at 1262-63.

[135] 55 Haw. 208, 490 P.2d 899 (1971).

of the statute would work an absurd and unjust result by imposing liability on the seller. Arguably, the facts in this case were distinguishable, since the seller had not forwarded the documents at the time of the accident and the seller may actually have been withholding the title documents until the buyer fulfilled a commitment to pay a promised installment on the purchase price.[136] Most importantly, the mandatory provisions of the Hawai'i No-Fault Law were not involved in *Pacific*.

With regard to the provisions of the no-fault law, the court drew a distinction between the motor vehicle statute and the motor vehicle insurance policy which seems difficult to support. Noting that because the statutory definition of owner "was expressly limited to that term '[a]s used in this chapter [294],'" the court then proceeded to conclude that "it is clear that the legislature did not intend that the definition dictate the meaning of the term as used in automobile insurance policies," and that "the term 'owner' as defined in *Hawaii Revised Statutes* section 294-2(13) is not determinative of ownership in the context of insurance coverage disputes."[137]

The problem, of course, is that the entire purpose of chapter 294, dealing with motor vehicle insurance,[138] is to dictate the terms and conditions of required motor vehicle insurance. To apply different criteria of ownership to coverage disputes, on the one hand, and to questions as to who is required to purchase insurance and secure a no-fault card, on the other, is to invite confusion in enforcement of and to undermine the motivation of sellers to comply with mandatory statutory requirements to maintain a no-fault insurance policy on a vehicle until the executed title has been delivered to the buyer.

Further, as Justice Padgett noted in his dissenting opinion, the language of the policy of the seller, who is designated owner under the statute, clearly contemplated coverage when the automobile was being driven by someone with the permission of the "named insured."[139] As Justice Padgett correctly pointed out, the question was not one of "stacking," "but a question of whether or not the [seller's] policy covered the [buyers] at the time of the accident."[140] Further, as he

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[136] This is true even though the trial judge found that the evidence was insufficient to establish that the insurer was holding the documents until monies owed under the contract were paid. *See* Hawaiian Ins. & Guar. Co., 72 Haw. at 86 n.7, 807 P.2d at 1259 n.7.

[137] *Id.* at 90, 807 P.2d at 1261.

[138] Now Haw. Rev. Stat. § 431:10C (1987).

[139] 72 Haw. at 95, 807 P.2d at 1263 (Padgett, J., dissenting).

[140] *Id.*

also stated, there is "nothing in the law that prohibits two parties, each having interests in a vehicle from taking out separate liability policies thereon."[141]

Once again, therefore, the legislative objective of "reducing motor vehicle insurance costs," explicitly set forth in the majority opinion,[142] seems to take precedence not only over the explicit language of the statutes and the seller's insurance policy, but over the legislative objective of insuring adequate coverage[143] as well. Where, by virtue of good fortune perhaps, adequate coverage—a seller's $500,000 liability policy—was made available *by law*, the sympathies of the court[144] and only $25,000 per person to the injured third parties under the buyer's liability policy seem not to be sufficient substitutes.

5. No-Fault Insurance (Personal Injury Protection)

The provisions of Hawai'i's No-Fault Law, as originally conceived and as adopted in 1973, were well designed to keep many small injury claims out of the courts and to provide adequate non-fault compensation by way of a tradeoff for the former right to sue.[145] In the interim, two distressing things have occurred. First, the mandatory amount of no-fault personal injury protection coverage required, $15,000, has not been increased and has become woefully inadequate to provide compensation for victims of many minor accidents. Second, the threshold which has to be crossed before suits can be brought has been significantly eroded,[146] allowing too many of the small claims to proceed to

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[141] *Id.* Should the court have held the seller's insurer liable in this case, it is likely that insurers of retail automobile sellers would seek arrangements with their insureds to ensure that title documents are promptly transmitted to the director of finance for issuance and delivery of a new title to the buyer unless seller has a good reason for not doing so. Conceivably, the seller would be required by the insurer to retain possession of the vehicle until the new title was available. If this caused too much trouble for sellers, a change in the law should have been sought from the legislature.

[142] 72 Haw. at 92-93, 807 P.2d at 1261.

[143] *Id.*

[144] *Id.* at 93, 807 P.2d at 1262.

[145] *See* Wiegand v. Allstate Ins. Cos., 68 Haw. 117, 121, 706 P.2d 16, 19 (1985) (Wakatsuki, J.).

[146] *See* HAW. REV. STAT. §§ 431:10C-306(b)(2) (threshold), 431:10C-308 (annual revision of medical rehabilitative limit by commissioner). The Medical Rehabilitative limit, evidently the easiest threshold for most automobile accident victims to cross, is currently $8300.00.

suit.[147] The upshot is that insurers are having to pay the full amount for questionably necessary "soft" therapy, which enables a victim to exceed the $8300.00 medical-rehabilitative limit and thus bring suit, and then, in addition, to pay for the costs of the suit and any damages awarded. On the other hand, accident victims who suffer actual economic losses and medical expenses but who elect not to play the system by running up bills for unnecessary treatment, may not be compensated adequately for their actual economic losses.[148]

Appropriate reform, therefore, would undertake to deal with both of these problems: the inadequacy of the no-fault amount and the ineffectiveness of the threshold. The question for discussion here, therefore, is whether and to what extent the Supreme Court during the era of Chief Justice Lum has improved or exacerbated these problems.[149]

a. Inadequacy of benefits

The court's tendency during Chief Justice Lum's reign has been generally to respond favorably to requests to expand the amount or

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[147] Arguably, any reform undertaken by the legislature should treat both problems. It would be most unfortunate if, in the interests of reducing premiums, the legislature were to impose greater barriers to suit without correspondingly increasing to adequate levels the amount of compensation available to victims who could not sue. At least one proposal, however, would do just that. *See, e.g.*, LICENSE TO STEAL (Coalition for Auto. Ins. Reform, Honolulu, Haw.) (pamphlet circulated during the Hawai'i Legislative Session of 1991; copy on file with the authors).

[148] For example, they can only recover earnings losses up to $900 per month, when in fact their actual earnings losses may be far in excess of that amount. *See* HAW. REV. STAT. § 431:10C-103(19)(A)(iii) (1987).

[149] Late in the era of the Richardson Court, two decisions, Joshua v. MTL, Inc., 65 Haw. 623, 656 P.2d 736 (1982), and McAulton v. Goldstrin, 66 Haw. 14, 656 P.2d 96 (1982), with the majority opinions written by Justice Padgett over the strong dissents of Justices Nakamura and Richardson, almost put an end to the no-fault law by holding that the provisions in the law which abolished tort liability unless certain conditions were met denied persons not eligible for no-fault benefits equal protection of the law. 65 Haw. at 632, 656 P.2d at 742; 66 Haw. at 15, 656 P.2d at 100. Thus, those persons could sue directly without meeting the threshold conditions. The Hawaii Legislature, in response, quickly stepped in, chiding the court for "having eroded one of the most important elements of the no-fault system, the mandatory insurance coverage of all who choose to exercise the privilege of driving" and amending the law to correct the defects perceived by the court. *Cf.* Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 708 P.2d 129 (1985) (Hayashi, J.) (upholding the constitutionality of the no-fault law after passage of Act 245 (1983)). Although the two dissenters have left the court and the members of the original majority remain, no decisions during the era of the Lum Court have set aside such essential features of the no-fault law.

availability of no-fault personal injury protection (P.I.P.) benefits when asked by accident victims to do so. Often the expansion goes beyond the plain language of the statute.

Perhaps the most blatant example is *In re Maldonado*,[150] where the issue was how much by way of P.I.P. benefits, for lost earnings, should be paid to an injured bus driver who was receiving workers' compensation benefits. The worker's salary had been $1,534 per month. The accident caused him to be totally disabled. Workers' compensation paid him $931.66 per month. His actual monthly wage loss, therefore, was $602.34 per month.[151]

The no-fault statute provided, in pertinent part:

> Payment from which insurer . . . .
> (b) All no-fault benefits shall be paid secondarily and net of any benefits a person is entitled to receive because of the accidental harm from . . . workers' compensation laws. . . .[152]

When the no-fault insurer of the bus company denied Maldonado's claim for the difference between what he received from workers' compensation and his former salary, he appealed to the insurance division. The hearing officer ruled in his favor but the Insurance Commissioner reversed. On appeal both the circuit court and the Intermediate Court of Appeals affirmed the Insurance Commissioner.[153] On appeal to the Supreme Court the court reversed, holding that the quoted section "deals not with the claimant's right to benefits . . . but only with priority, as to payments, among insurers."[154] To borrow his own language,[155] Justice Padgett, the author of the opinion, seems to have "emasculate[d] the plain language of" *Hawaii Revised Statutes* section 294-5, not to mention having ignored the legislative history, which made it rather clear that workers' compensation benefits were to be subtracted from the amount of P.I.P. benefits that would otherwise be available. The dissenters, Justices Nakamura and then-Circuit Judge Moon, convincingly demonstrated the correctness of the opposite result.[156] They also noted that the decision created "an anomaly that

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[150] 67 Haw. 347, 687 P.2d 1 (1984) (Padgett, J.).

[151] *Id.*

[152] HAW. REV. STAT. § 294-5 (1973).

[153] 67 Haw. at 347, 687 P.2d at 4.

[154] *Id.* at 350, 687 P.2d at 4.

[155] Hawaiian Ins. & Guar. Co. v. Financial Security Ins. Co., 72 Haw. 80, 95, 807 P.2d 1256, 1263 (1991) (Padgett, J., dissenting).

[156] 67 Haw. at 351, 687 P.2d at 5.

could not have been within the legislature's contemplation—a loss of $1,534 in gross earnings will now be replaced by $1,534 in tax free benefits."[157]

Other cases which tended to expand the amount of P.I.P. benefits include these:

Early in his tenure, Chief Justice Lum wrote the opinion in *Mizoguchi v. State Farm Mutual Automobile Ins. Co.*,[158] in which the estate of the no-fault insured, who had died while driving his automobile, sought the full optional amount of P.I.P. coverage, $50,000.[159] The no-fault insurer, Allstate, argued that the survivor's recovery should be restricted to $15,000, the maximum amount set forth in the no-fault law in the event of death. The court, in a well-reasoned decision, held "that work loss benefits would be payable in cases of death in addition to any survivors' loss benefits and that eligible beneficiaries would be entitled to no-fault benefits up to the increased aggregate limit of any additional coverage."[160]

In *Ganiron v. Hawaii Ins. Guaranty Ass'n*,[161] the court held that a victim of a shooting from one automobile into another was entitled to no-fault benefits.[162] The court's expansive decision in *Ganiron* raises the interesting question whether the court's generous reasoning would have led to the payment of P.I.P. benefits to the victim in *Hawaiian Ins. & Guaranty Co., Ltd. v. Brooks*,[163] who was raped by another passenger in the back of a pickup truck.

In *Barcena v. The Hawaiian Ins. & Guaranty Co., Ltd.*,[164] Justice Nakamura, in his decision for the court, deliberately rejected a narrow interpretation of statutory language which seemed to allow the insurer to deny the insured's claim for the expenses of physical therapy.[165] The no-fault law, in describing no-fault benefits, barred payment of expenses

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[157] *Id.* at 354, 807 P.2d at 6. Subsequently, the legislature amended the section in question, partially adopting the majority's holding that workers' compensation benefits paid for lost earnings should not be deducted from the earnings losses to be paid by no fault, but limiting the total payment to no more than 80% of the person's monthly earnings. *See* HAW. REV. STAT. § 431:10C-305(2)(1988).

[158] 66 Haw. 373, 663 P.2d 107 (1983) (Lum, C.J.).

[159] *Id.* at 374, 663 P.2d at 110.

[160] *Id.* at 378, 663 P.2d at 113.

[161] 69 Haw. 432, 744 P.2d 1210 (1987) (Padgett, J.).

[162] 69 Haw. at 435, 744 P.2d at 1212.

[163] 67 Haw. 285, 686 P.2d 23 (1984) (Nakamura, J.).

[164] 67 Haw. 97, 678 P.2d 1082 (1984) (Nakamura, J.).

[165] *Id.* at 104, 678 P.2d at 1087.

of physical therapy, as well as other expenses, "for any person receiving public assistance benefits" if the assured was issued a no-fault policy at no cost to her as a recipient of public assistance.[166] In this case, insured had been receiving public assistance benefits when she received a free policy but had evidently become ineligible for public assistance at the time she incurred the physical therapy expenses.[167] In allowing recovery, the court read the language restrictively, holding that "'no-fault benefits' are withholdable only while a person is a recipient of public aid."[168]

In a particularly generous decision, a unanimous court, in *Lorenzo v. State Farm Fire & Casualty Co.*,[169] held that a no-fault insured who became permanently disabled in an automobile accident could continue to receive work-loss benefits under his no-fault policy even after suffering a serious heart attack not caused by the automobile accident, which independently would have rendered him unable to work.[170] Although it is extremely doubtful that the legislature intended to continue payment of no-fault work loss benefits in this situation and although the relevant language of the no-fault law provided little or no support for continuing the payments, the court nevertheless found for claimant, expressing its approval of the reasoning in the dissent to a Michigan case that had been decided in favor of the insurer.[171]

While the foregoing cases indicate a large degree of liberality on the part of the court in deciding whether no fault coverage is available and, if so, in coming down on the generous side, there are other cases which indicate that the court has not "given away the whole store."

In *First Ins. Co. of Hawaii, Ltd. v. Jackson*,[172] for example, the court refused to allow an automobile accident victim and the tortfeasor to bind the insurer, which had paid no-fault benefits to the victim, by a provision in the release specifying that the settlement was for general damages only and did not duplicate payments for any no-fault benefits paid to the claimant.[173] The objective of the settlement agreement had

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[166] HAW. REV. STAT. § 294-2(10) (1973).

[167] 67 Haw. at 104, 678 P.2d at 1087.

[168] *Id.* at 103, 678 P.2d at 1086-87.

[169] 69 Haw. 104, 736 P.2d 51 (1987).

[170] *Id.* at 110, 736 P.2d at 52.

[171] MacDonald v. State Farm Mutual Ins. Co., 350 N.W.2d 233, 238-39 (Mich. 1984) (Cavanagh, J., dissenting).

[172] 67 Haw. 165, 681 P.2d 569 (1984) (Padgett, J.).

[173] *Id.* at 167, 681 P.2d at 570.

been to bar the insurer from trying to recover fifty percent of the no-fault benefits it had already paid,[174] as it had the right to do under *Hawaii Revised Statutes* section 294-7.[175] In affirming a decision of the Intermediate Court of Appeals,[176] the court, in an opinion by Justice Padgett, disagreed with the Intermediate Court of Appeals' holding that the burden of proving that there was no duplication was on the insured.[177] Instead, the court held that "the insurer must prove factually that the settlement duplicated, in whole or in part, the no-fault benefits already paid."[178] In view of the difficulty the insurer is often likely to encounter in proving that there was a duplication, the holding that the release is not conclusive may turn out to be a Pyrrhic victory for the insurers.

A case which much more clearly kept no-fault coverage within limits was *Rana v. Bishop Ins. of Hawaii, Inc.*,[179] where the court adopted and affirmed a decision of the Intermediate Court of Appeals which had held that an insured who had a single insurance policy which covered several vehicles could not stack the basic no-fault (personal injury protection) coverage on each vehicle.[180] On this issue the no-fault statute seems to speak clearly,[181] and the court followed the clear statutory language.

b. Maintaining the threshold

With regard to the problem of maintaining the integrity of the threshold to bringing a lawsuit, the most important case of the period was arguably *Parker v. Nakaoka*.[182] Plaintiff, injured in an automobile accident, was found by a jury to have suffered $1174.10 of special damages and $66,500 as general damages.[183] The amount of special

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[174] *Id.* at 167, 681 P.2d at 570-71.

[175] HAW. REV. STAT. § 294-7 (1973) (now HAW. REV. STAT. § 431:10C-307 (1987)).

[176] 5 Haw. App. 98, 678 P.2d 1095 (1984).

[177] 67 Haw. at 167, 681 P.2d at 570-71.

[178] *Id.* at 167, 681 P.2d at 571.

[179] 68 Haw. 269, 709 P.2d 612 (1985) (Wakatsuki, J.).

[180] That is, he could not multiply the amount of personal injury protection coverage or basic no-fault—usually $15,000 unless additional optional coverage is purchased—by the number of cars insured under the policy in order to increase the amount available to each covered person.

[181] *See, e.g.*, HAW. REV. STAT. §§ 294-2(10), 294-3(c) (now § 431:10C-303 (1987)).

[182] 68 Haw. 557, 722 P.2d 1028 (1986) (Wakatsuki, J.).

[183] *Id.* at 558, 722 P.2d at 1029.

damages was too low to reach the medical-rehabilitative limit, then set at $1500, which was one of the ways plaintiff could have overcome the abolition of tort liability.

It is important to note that, without regard to the specific facts of plaintiff Nakaoka's case, this situation—small economic losses coupled with the potential for substantial non-economic losses for pain and suffering, emotional distress, and the like—is illustrative of the very class of costly cases the legislature wanted to remove from the courts unless evidence of more serious injury was present.[184] The way in which the court handled this case is, therefore, indicative of the court's seriousness in keeping a tight rein on the cases which slip through the "tort abolition" net.[185]

In *Parker*, the critical question was whether plaintiff suffered "a significant permanent loss of use of a part of her body."[186] If she had, then her tort action was proper; if not, then her tort action would be dismissed. Two errors were claimed by the defendant: (1) that the judge, rather than the jury, should have determined the critical question, or, (2) in the alternative, that defendant's requested special verdict, putting to the jury the question whether plaintiff's injury satisfied the threshold seriousness requirement,[187] should have been

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[184] *See id.* at 559, 722 P.2d at 1029. These were the class of cases in which the legislature believed that "relatively minor losses were overcompensated." *Id.* Also, see *id.* for the list of "notable deficiencies in the insurance system" the legislature was seeking to correct when it adopted the no-fault law. As to the trade-off between guaranteed no-fault benefits and the right to sue in order "to reap a monetary windfall," see *id.* at 560, 722 P.2d at 1030.

[185] The court seemed to misdescribe the operation of the no-fault law when it said, in discussing how the law operated, "The traditional tort remedy was left intact for economic losses exceeding those amounts assured of payment under the law, but for non-economic losses which the law assures no definite payment the tort remedy was not left wholly intact." *Id.* at 560, 722 P.2d at 1028 (citing HAW. REV. STAT. § 294-6 (now § 431:10C-306 (1987))). Under the no-fault law, if plaintiff cannot sue, she is limited to the no-fault benefits provided in the act, up to $15,000. This $15,000 includes no non-economic losses. If, on the other hand, the plaintiff crosses one of the thresholds for tort liability, she is entitled to sue for all of her economic and non-economic losses, but must return to the no-fault insurer 50% of the no-fault payments duplicated by the tort recovery. HAW. REV. STAT. § 294-6 (now § 431-10C-306 (1988)).

[186] *See* HAW. REV. STAT. § 294-6 (1973) (now § 431:10C-306 (1987)).

[187] 68 Haw. at 588, 722 P.2d at 1029. The instruction read: "In the accident of February 15, 1978, did Plaintiff SUSAN PARKER sustain injury which constituted a significant permanent loss of use of a part or function of the body? Answer: Yes-No." *Id.* at 558 n.3, 722 P.2d at 1029 n.3.

given.[188] Plaintiff, on the other hand, maintained (1) that the failure of the plaintiff to satisfy the threshold requirement should not only be a jury question but an affirmative defense, to be pleaded and proved by the defendant, and (2) that the bare-bones special verdict should not be given since the appellant failed to proffer an explanatory instruction to the jury on the threshold requirement.[189]

The court essentially "split the baby," holding first that whether the plaintiff has satisfied the threshold requirement is a question for the jury, not the judge,[190] yet then holding that the burden of pleading and proving that the threshold has been satisfied is on the plaintiff, and that the defendant in this case was entitled to have the special verdict submitted to the jury without proffering an explanatory instruction.[191]

Unfortunately, Justice Wakatsuki, in his opinion for the court, did not see fit to provide the specific facts of the *Parker* case, so the reader is left at sea as to why there was a significant issue as to whether the claimed injury satisfied the particular threshold requirement at issue. If, as a result of trial judges' interpretation of *Parker*, the practice of sending most contested cases of painful and possibly long-lasting injury to the jury should develop, then the purpose of the no-fault law could be thwarted. If the court is serious in its effort to enforce the policy behind the no-fault law, as *Parker* suggests it is, then it should not be unwilling to develop some clear interpretations which might allow most non-serious cases which ought, on fair reading of the legislative intent, to fall on the wrong side of the threshold to be dismissed on motion for summary judgment.

B. Negligence

The question is whether, and if so, to what extent the Lum Court has indulged the tendency to allow ordinary negligence principles to expand to their logical limits, as discussed at the beginning of this article. The conclusion, to be developed in the discussion below, is that, with the exception of product liability, the era of expansion of tort liability has come to an end.

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[188] 68 Haw. at 558, 722 P.2d at 1029.

[189] *Id.* at 562-62, 722 P.2d at 1032.

[190] *Id.* at 562, 722 P.2d at 1031. Unless, of course, the judge determines that reasonable persons could not agree. *Id.*

[191] *Id.*

1. The Firefighter's Rule[192]

In 1969, in *Pickard v. City and County of Honolulu*[193] the Hawaii Supreme Court, following the lead of the California Supreme Court,[194] dispensed with the familiar categories of licensee and invitee which had traditionally governed the duties of an occupier of land to those who came upon the land. In its place the court imposed a duty on the occupier "to exercise reasonable care for the safety of all persons anticipated to be on the premises."[195] In 1965, in *Bulatao v. Kauai Motors, Ltd.*[196] the Supreme Court, in an opinion by Rhoda Lewis, citing with approval New Jersey's path-breaking decision in *Meistrich v. Casino Arena Attractions, Inc.*,[197] rejected the applicability of the doctrine of secondary assumption of risk in cases in which the doctrine merely paralleled the doctrine of contributory negligence.[198] The court also held that assumption of risk has no place when a person knowingly encountering a known risk is found to have acted reasonably in doing so.[199]

In view of these cases one might have predicted that when the court came to decide whether to allow a firefighter to recover damages for injuries suffered in line of duty as a result of a land occupier's negligence in causing the fire and the injuries, it would have answered in the affirmative. After all, absent the doctrines of primary and secondary assumptions of risk, eliminated by *Pickard* and *Bulatao*, there is precious little reason left under the traditional law of torts for denying recovery to the firefighter in such cases. This is particularly true when Hawai'i statutes impose a duty on landowners to keep their buildings "reasonably safe from loss of life or injury to persons or property by fire."[200]

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[192] *See* Thomas v. Pang, 72 Haw. 191, 203, 811 P.2d 821 (1991) ("The name of the rule adopted in this case is not the Fireman's Rule. Its name is the Firefighter's Rule, formerly known as the Fireman's Rule." (Burns, J., concurring)).

[193] 51 Haw. 134, 452 P.2d 445 (1969) (Richardson, C.J.); *see also* Gibo v. City and County of Honolulu, 51 Haw. 299, 459 P.2d 198 (1969) (Abe, J.).

[194] Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

[195] 51 Haw. at 135, 452 P.2d at 446.

[196] 49 Haw. 1, 406 P.2d 887 (1965).

[197] 155 A.2d 90 (N.J. 1959).

[198] 49 Haw. at 15, 406 P.2d at 895.

[199] *Id.* at 14, 406 P.2d at 894.

[200] HAW. REV. STAT. § 132-8 (1917).

Nevertheless, in *Thomas v. Pang*,[201] the court adopted the firefighter's rule. Rather than relying on the discredited traditional defenses, however, the court asserted that it explicitly relied "on considerations of public policy."[202] What these considerations seem to boil down to is that firefighters are to be denied the recovery available to most other public employees when they suffer injury in the line of duty as a result of an occupier's negligence because: (1) they are needed for the protection of society;[203] (2) their presence at the locus of a fire arises out of a "duty owed to the public as a whole;"[204] (3) their very purpose is to confront danger;[205] (4) "the timing of their entry cannot be predicted;"[206] (5) while they are "performing their duties a landowner or occupier is without authority to control their action;"[207] and (6) "[d]anger is inherent in a firefighter's work and the firefighter is trained and paid to encounter hazardous situations unlike the majority of public employees."[208]

While each of these reasons is true, individually they do not seem to justify the denial of recovery and they do not fare any better collectively. In order to be found liable for negligence, after all, a land owner would have to unreasonably fail to foresee and guard against an unreasonable risk of harm to those who might come on the premises. "The risk to be perceived," said Cardozo, "defines the duty to be obeyed"[209] and "danger invites rescue."[210] A landowner who negligently creates a risk of fire also negligently creates a risk of harm to the firefighter who comes to put out the fire. It is hard to see why the nature of the firefighter's profession or the other factors mentioned by the court should result in a denial of recovery.

What might arguably justify denial of recovery from a policy point of view, however, is a genuine fear that every time a firefighter is hurt in the course of duty at a fire, a lawsuit will be brought against the occupier of the premises or others who might be charged with negli-

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[201] 72 Haw. 191, 811 P.2d 821 (1991) (Wakatsuki, J.).
[202] *Id.* at 196, 811 P.2d at 824.
[203] *Id.*
[204] *Id.*
[205] *Id.* at 197, 811 P.2d at 825.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] Palsgraf v. Long Island Railroad Company, 162 N.E. 99, 100 (N.Y. 1928).
[210] Wagner v. International Railway Co., 133 N.E. 437, 437 (N.Y. 1921).

gence.[211] The fear of a multitude of suits, however, was pretty well discredited by the Richardson Court as a reason for denying a just claim.[212] If this is the "real" basis for the decision, therefore, the decision represents an about-face for the court, demonstrating, like others already discussed, a heightened concern for the premium payer and the insurer[213] and significantly reduced concern for deterrence and for the adequacy of compensation.[214]

2. Negligent Serving of Liquor

In 1980, in *Ono v. Applegate*,[215] the Richardson Court held that a victim of an accident caused by another's intoxication could recover damages from the bar that negligently served liquor to the other while the other was intoxicated.[216] In his opinion for the court, Justice Ogata expressly repudiated the traditional common law rationales which disingenuously reasoned that it was the voluntary consumption of the alcohol—and not its sale or service—that was the proximate cause of the ensuing accident, and that it was not reasonably foreseeable to the liquor seller or server that the sale or service of the alcoholic beverage would cause the subsequent accident or injury.

The court found the seller's duty to arise from the Hawai'i liquor law which, although it does not expressly provide a civil remedy in damages, prohibits the sale of liquor by a licensee to a person "under the influence of liquor."[217]

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[211] 72 Haw. at 202, 811 P.2d at 827 (Padgett, J., dissenting). "Let us make no mistake about what this case really involves. It involves the liability insurance policies of those in control of the premises where the fire occurred." *Id.*

[212] *See, e.g.*, Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

[213] Although the firefighter's rule has recently come under criticism, it is evidently followed by the vast majority of states. *See* Annot., *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty*, 11 A.L.R.4th 597 (1979). *But see* Christensen v. Murphy, 678 P.2d 1210 (Or. 1984).

[214] 72 Haw. at 197, 811 P.2d at 827.

[215] 62 Haw. 131, 612 P.2d 533 (1980) (Ogata, J.). For a good analysis of *Ono*, see Note, Ono v. Applegate: *Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149 (1981).

[216] The court drew heavily on the analysis of the California Supreme Court in Vesely v. Sager, 486 P.2d 151 (Cal. 1917), even though *Vesely* had been specifically abrogated by the California legislature well before the Hawaii Supreme Court considered *Ono*.

[217] HAW. REV. STAT. § 281-78(a)(2)(B) (1976). The statute provides, in pertinent part: "(a) At no time under any circumstances shall any liquor: . . . . (2) Be sold or furnished by any licensee to: (A) Any Minor. (B) Any person at the time under the influence of liquor. . . ." *Id.*

The logic of the decision in *Ono* would have suggested that since an adjacent subsection of the same statute prohibited a licensee from selling liquor to a minor, minors who are served liquor while intoxicated might also recover for their injuries caused by the intoxication. The opinion in *Ono*, however, expressly left open the question "whether a non-commercial supplier of liquor may be held liable for injuries caused by the intoxicated."[218] As to that question and the question whether the intoxicated patron, not a minor, who gets into an accident and suffers injury after leaving the premises where the liquor was served can recover against the server, the court strongly suggested that a common law duty, not grounded in the liquor control statute, might exist: "The first prime requisite to deintoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. *This is a duty which everyone owes to society and to law entirely apart from any statute.*"[219]

If the court were to find such a duty to run to the drinker, as well as the third person, then presumably the appropriate way to deal with the drinker's own negligence would be to consider his behavior under Hawai'i's comparative negligence statute.[220]

In a series of decisions since *Ono*, however, the Lum Court has refused to extend liability for serving of liquor beyond the facts of *Ono* itself, notwithstanding the clear promise of Justice Ogata's opinion. Thus, In *Bertlemann v. Taas Associates*[221] the court held that "in the absence of harm to an innocent third party, merely serving liquor to an already intoxicated customer and allowing said customer to leave the premises, of itself, does not constitute actionable negligence."[222] The court did note, however, that "a bar or tavern owes a duty to avoid affirmative acts which increase the peril to an intoxicated cus-

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[218] 62 Haw. at 136 n.5, 612 P.2d at 538 n.5.

[219] *Id.* (emphasis added). The common law, non-statutory duty, might arise from reasoning similar to that contained in Brett, M.R.'s famous dictum in Heaven v. Pender:

> Whenever one person is by circumstances placed in a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

11 Q.B.D. 503, 509 (1883).

[220] HAW. REV. STAT. § 663-31 (1985).

[221] 69 Haw. 95, 735 P.2d 932 (1987) (Hayashi, J.).

[222] *Id.* at 101, 735 P.2d at 934.

tomer."[223] In *Feliciano v. Waikiki Deep Water*[224] the court held that the duty to avoid affirmative acts did not include "aggressive sales of drinks" to a nineteen-year-old adult who claimed lack of sophistication about drinking.[225] Plaintiff had claimed that although he did not recall ever asking for a drink, alcoholic drinks began arriving "automatically"[226] and, being intimidated by the aggressiveness of the waitresses, he paid for and drank them.[227] During the drive home Feliciano's truck left the road and crashed, rendering him a quadriplegic.[228] In *Johnston v. KFC National Management Co.*[229] the court explicitly held that "a non-commercial supplier of alcoholic beverages—the social host—does not have a duty to protect third persons from risks of injury caused by an inebriated person to whom the social host served alcoholic beverages."[230] Finally, in *Winters v. Silver Fox Bar*[231] the court extended the holding of *Bertlemann*—that the person unlawfully served liquor cannot recover for his own injuries—to an eighteen-year-old minor who became drunk and subsequently sustained a fatal injury as a result of his intoxication.[232] The decision is broad enough to deny recovery to minors under the age of eighteen.[233] However, the court's

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[223] *Id.* Such an act, for example, might be removing the customer to a place where, because of his intoxication, he will be subjected to increased peril of bodily harm. *Cf.* Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977) (holding that city had duty to plaintiff hit by a car who had been transported by police, while intoxicated, to spot outside the city limits near a busy thoroughfare).

[224] 69 Haw. 605, 752 P.2d 1076 (1988) (Lum, C.J.).

[225] *Id.* at 606, 752 P.2d at 1077. Feliciano grew up in Waianae and claimed that before the incident he had never driven to Honolulu and had never been to Waikiki; that he grew up in a sheltered environment due to an accident in which he was run over by a truck as a teenager, preventing him from attending school for a considerable period of time; and that he had tasted beer on prior occasions but was not an experienced drinker. *Id.*

[226] *Id.*

[227] *Id.* Feliciano claimed to have consumed at least four drinks in a two-and-a-half hour period and to have spent approximately $175.00. *Id.*

[228] *Id.* at 606, 752 P.2d at 1077-78.

[229] 71 Haw. 229, 788 P.2d 159 (1990) (Wakatsuki, J.).

[230] *Id.* at 230, 788 P.2d at 159-60.

[231] 71 Haw. 524, 797 P.2d 51 (1990) (Moon, J.).

[232] 71 Haw. 524, 536, 797 P.2d at 56-57. The court also held that the rights of the minor's survivors under the wrongful death act, HAW. REV. STAT. § 663-3 (1985), were derivative. Since the minor was barred, so were his survivors. *Id.*

[233] The court cited Miller v. City of Portland, 604 P.2d 1261, 1265 (Or. 1980), in which the Oregon Supreme Court denied recovery to a minor even though a statute, like Hawai'i's, prohibited the sale of liquor to persons under twenty-one. The Oregon

lengthy discussion of the legislative purpose in raising the drinking age from eighteen to twenty-one—simply to satisfy federal requirements for continued receipt of highway funds[234]—and its description of a minor as connoting "one who lacks maturity and requires supervision and protection for his/her well-being and safety,"[235] suggests that the court might eventually allow recovery in the case of such a "true" minor.[236]

The necessary effect of these post-*Ono* cases, however, is to put an end to the logical extension of the negligence principles set free in *Ono*. And the reasons for doing so are made unequivocally clear by Justice Wakatsuki in *Johnston* and by Justice Moon in *Winters*. In refusing to allow social host liability in *Johnston*, the court views the problem "[f]rom an economic perspective [where] there needs to be consideration of the effect social host liability would have on homeowners' and renters' insurance rates, and the economic impact on those not wealthy or foresighted enough to obtain such insurance."[237] In refusing to extend the right to recover to a minor unlawfully served liquor at a bar, the court in *Winters* rooted around the legislative history of the Hawai'i "tort reform" legislation, which as has been noted above does not amount to much,[238] and proceeded to adopt the legislative intent there expressed as the policy to be followed in these cases:

> [W]e note that the 1986 Regular and Special Session of the legislature focused its efforts on tort reform due to the then purported liability insurance crisis and sought to reduce and stabilize automobile and commercial liability insurance rates. Therefore, it would be totally

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court had noted that there was another statute, as there is in Hawai'i, which prohibits minors from purchasing liquor and that "[i]t would be inconsistent with apparent legislative policy to reward the violator with a cause of action based upon the conduct which the legislature has chosen to prohibit and penalize." 71 Haw. at 529-30, 797 P.2d at 53 (quoting *Miller*, 604 P.2d at 1263).

A contrary argument, however, is that notwithstanding the prohibition and penalty imposed on minors for purchasing alcoholic beverages, the statute prohibiting licensees from selling liquor to "true" minors should be interpreted as protecting them, as a class, from their own immaturity and lack of judgment. *Cf.* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 18 at 123 (5th ed. 1984) [hereinafter "PROSSER"].

[234] 71 Haw. at 532, 797 P.2d at 55.

[235] *Id.* at 531, 797 P.2d at 54.

[236] The court indicated that the question whether infants under 18 should be dealt with differently from infants over 18 should be decided by the legislature. *Id.* at 535, 797 P.2d at 56.

[237] 71 Haw. 229, 237, 788 P.2d. 159, 163-64 (1990).

[238] *See supra* notes 45-54 and accompanying text.

> inconsistent with the legislative policy of 1986 to conclude that it intended to expand the liability of commercial liquor suppliers which in turn would undoubtedly increase their liability insurance premiums.[239]

Such creative use of legislative policy may be appropriate as a makeweight where the court's decision may effect "changes in social relations in a society where consumption of alcohol is a pervasive and deeply rooted part of our social life,"[240] as is probably the case with holding social hosts responsible for serving liquor to their guests. But it is considerably less clear why such legislative expression of policy should be given effect with regard to a dram shop's liability to minors whom it is prohibited by statute from serving where the Hawaii Supreme Court's direction in effectuating the statutory purpose behind the liquor licensing law has already been demonstrated in a widely discussed case, *Ono v. Applegate*, and the legislature has not expressed its dissatisfaction either by overruling *Ono* or by adopting legislation limiting its expansion. Indeed, the legislature seems to be demonstrating far greater concern in recent years for the problems of drunk driving[241] than it has for the problems it has dealt with under the heading of tort reform.[242]

In any event, it is suggested that there were, and still are, options available to the court with regard to the serving of alcoholic beverages, whether by a licensee or a social host, that will enhance deterrence as well as compensation for deserving victims without necessarily bringing on a flood of litigation or producing a new crisis in the availability and cost of commercial and homeowners' insurance. For example, the court could require that the plaintiff prove that the defendant, or defendant's employee, had *actual knowledge* of facts regarding the drink-

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[239] 71 Haw. at 534-35, 797 P.2d at 56 (footnotes omitted). The court also noted that the legislature has been adopting stricter laws and heavier penalties in order to cut down on "the devastating cause of loss of human life and limb on our highways," *Id.* at 535, 797 P.2d at 56. However, it decided that whether the law should be expanded to further deal with these problems, in the face of the economic issues it identified in connection with tort reform, should better be left to the legislative branch: "It is within the legislature's province to weigh and balance the far reaching social, economic and legal consequences of modifying the common law as Appellant urges." *Id.*

[240] 71 Haw at 237, 788 P.2d at 159 (quoting Garren v. Cummings & McReady, Inc., 345 S.E.2d 508, 510 (S.C. App. 1986) (quoting Miller v. Moran, 421 N.E.2d 1046, 1049 (Ill. App. 1981))).

[241] *See Johnston*, 71 Haw. at 236, 788 P.2d at 163.

[242] *See supra* note 240 and accompanying text.

er's consumption of alcohol or the drinker's other conduct, or both, which would make it obvious, to a reasonably prudent person in the defendant's circumstances, that the drinker was intoxicated.[243] Perhaps such a test, which eliminates the much more liberal "should have known" criteria of ordinary negligence,[244] if coupled with a higher burden of proof, such as "clear and convincing evidence"[245] would strike an appropriate balance between the competing policies involved in these cases. If so, then there is no compelling reason to refuse to so extend the negligence principle in order to help to further reduce the incidence of alcohol-based accidents and to compensate its victims.[246]

3. Actions Against Governmental Entities

In the State Tort Liability Act, the State waived its immunity from tort liability and provided that the State "shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[247] Notwithstanding this clear mandate for Hawai'i's courts to treat the state the same as they would a private defendant, even the Richardson Court tended to interpret the common law in a manner favoring the State against a tort claimant seeking to recover from the State's deep pocket. Thus, by way of a fairly blatant example, the court in 1973, in *Ikene v. Maruo*,[248] held that the State had no duty to design or correct a dangerous curve in a highway in order to make it safe for persons in speeding cars,[249] even though speeding drivers are as foreseeable as rain in Hawai'i, the State knew or should have known that the curve in question was dangerous, and the plaintiff was the passenger and not the speeding driver.

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[243] In a similar vein, some states have limited the liability of social hosts or others to "obviously intoxicated" or "visibly intoxicated" minors. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602(b)-(c) (West 1985); *id.* § 25602.1 (West Supp. 1988) ("obviously intoxicated); OR. REV. STAT. §§ 30.950-30.960 (1988) ("visibly intoxicated").

[244] Under *Ono*, for example, the liberal "should have known" criteria may impose on a liquor seller a burdensome duty which it would be impracticable to enforce in a busy bar.

[245] *See, e.g.*, Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1979) (Lum, C.J.) (adopting "clear and convincing" standard as a requirement for proof of punitive damages); *see infra* note 318 and accompanying text.

[246] *Cf.*, Note, 102 HARV. L. REV. 549 (1988) (calling for judicial adoption of social host liability).

[247] HAW. REV. STAT. § 662-2 (1957).

[248] 54 Haw. 548, 511 P.2d 1087 (1973) (Levinson, J.).

[249] *Id.* at 551, 511 P.2d at 1089.

This same tendency seems to continue to be at work under the current court. Thus, by way of the most serious example, the court in *Wolsk v. State*[250] held that the State had no duty to warn or provide protection against the criminal conduct of third persons to visitors camping in a state park.[251] While camping in MacKenzie State Park two visitors were brutally beaten and one of them was killed by unidentified persons.[252] The court considered the *Restatement (Second) of Torts* which recognizes, in section 315(b), a duty to control the conduct of third persons "so as to prevent [them] from causing physical harm to another" where "a special relation exists between the actor and the other which gives to the other a right to protection."[253] Section 314(A)(3) states, as one of the situations creating such a relationship, that "a possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation."[254] Nevertheless, the court held: "[T]he Restatement principles are not applicable to the facts of this case since no special relationship exists."[255] In so holding the court inexplicably failed to explain adequately why section 314(A)(3), which was specially italicized in the opinion, was inapplicable.[256] The cases cited by the court dealt for the most part with the absence of a relationship between the criminal actor and the public entity where there was clearly no special relationship between the public entity and the plaintiff.[257] In the one cited case in which the relationship between the plaintiff and the occupier, a hotel, was in question, the Intermediate Court of Appeals had found that there was no duty to protect a non-guest of the hotel.[258] However, by way of contrast to *Wolsk*, the court in the following year, in *Knodle v. Waikiki Gateway Hotel, Inc.*,[259] found a duty based upon the special

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[250] 68 Haw. 299, 711 P.2d 1300, 59 A.L.R. 4th 1229 (1986) (Hayashi, J.).

[251] *Id.* at 303, 711 P.2d at 1303.

[252] *Id.* at 300, 711 P.2d at 1301.

[253] RESTATEMENT (SECOND) OF TORTS § 315(b) (1965), *cited in* 68 Haw. at 301-02, 711 P.2d at 1302.

[254] RESTATEMENT (SECOND) OF TORTS § 314(A)(3) (1965), *cited in* 68 Haw. at 301-02, 711 P.2d at 1302.

[255] 68 Haw. at 302, 711 P.2d at 1302.

[256] *Id.*

[257] *Id.*

[258] King v. Ilikai Properties, 2 Haw. App. 359, 632 P.2d 657 (1981) (Hayashi, C.J.) (noting that HAW. REV. STAT. § 314(a)(2) recognizes a special relationship between an innkeeper and his/her guests).

[259] 69 Haw. 376, 742 P.2d 377 (1987) (Nakamura, J.). The opinion in *Knodle* is an important and well-written exegesis on the law of negligence and its elements.

relationship of innkeeper and guest, as set forth in *Restatement* section 314(A), to protect guests from unreasonable risks of criminal conduct.[260] It is difficult to understand, except on the ground of preferential treatment for the State, why the court followed the *Restatement* and recognized a special relationship in *Knodle* but not in *Wolsk*.[261]

Other examples of the court's granting the State greater protection than is granted to private defendants are provided by two decisions holding, first, that the tolling statute for minors applies to automobile negligence actions brought pursuant to the no-fault law,[262] which expressly bars suits based on motor vehicle accidents brought more than two years after the accident or after the last no-fault payment,[263] and second, that it does not apply to such actions brought under Hawai'i's State Tort Liability Act,[264] which bars suits in which the action is not brought within two years after the claim accrues.[265] While the court found a colorable reason applicable to the suit against the State which would justify different treatment from that given to the action under

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[260] *Id.* at 392, 742 P.2d at 388.

[261] The most difficult issue in cases such as these may be the question of "cause in fact" or "substantial factor." It is by no means clear either in *Wolsk* or in *Knodle* that exercising reasonable care would have prevented the tragic consequences. Assuming the question is allowed to get to the jury, there is naught for the jury to do but speculate as to whether the taking of reasonable precautions by defendant would have made any difference.

Where the State is a defendant, as in *Wolsk*, the question whether the exercise of the duty falls within the "discretionary function" exception to State tort liability may provide another opportunity for the court to protect the State from liability. Because the court in *Wolsk* found no legal duty to plaintiffs, it determined that it did not have to respond to this question. In the future, however, this grounds of exception to state tort liability is likely to loom much larger in view of the extraordinarily expansive view of what constitutes a discretionary function adopted by the United States Supreme Court in United States v. Gaubert, ___ U.S. ___, 111 S.Ct. 1267 (1991). In *Gaubert* the Court rejected the planning level/operational level distinction, which had been the principal guideline for Hawai'i and other courts in the past, and held that even an operational level activity could be a discretionary function if "it involved the exercise of discretion in furtherance of public policy goals." *Id.* at ___, 111 S.Ct. at 1279. The Court noted: "If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable." *Id.*

[262] Crawford v. Crawford, 69 Haw. 410, 745 P.2d 285 (1987) (Hayashi, J.).

[263] HAW. REV. STAT. § 294-36(b) (1985).

[264] Whittington v. State, 72 Haw. 77, 806 P.2d 957 (1991) (Padgett, J.).

[265] HAW. REV. STAT. § 662-4 (1985).

the no-fault law—that the tolling statute only applies to actions there specified[266] and the action under the State Tort Liability Act is not specified[267]—such a conclusion does not seem inexorable: the court could have found that the nature of the action, one for personal injury arising out of a motor vehicle accident, was specified in *Hawaii Revised Statutes* section 657-7, which is the statute of limitations applicable to "actions for the recovery of compensation for damages or injury to persons or property."[268]

It is not difficult to understand why the court might wish to protect the State's fisc against a multitude of actions. On the other hand, the State Tort Liability Act does call rather specifically for treating the State the same as a "private individual."[269]

4. Jury Instructions—Emergency Rule, Unreasonably Dangerous, and Joint and Several Liability

In two cases, one as recent as 1989, the Lum Court has upheld claims of error in negligence cases when the trial court has given instructions to the jury which are technically correct, but which the court feels tend excessively to favor the defendant. In the first case, *Dicenzo v. Izawa*,[270] the court, in an opinion by Justice Nakamura, held that it was error to give a *correct* instruction on the emergency rule[271] separately and apart from the general negligence instruction. The court said "The doctrine of sudden emergency cannot be regarded as something apart from and unrelated to the fundamental rule that everyone

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[266] HAW. REV. STAT. § 657-13 (1984).

[267] *Whittington*, 72 Haw. at 78, 806 P.2d at 957-58.

[268] HAW. REV. STAT. § 657-7 (1907).

[269] HAW. REV. STAT. § 662-2 (1957).

[270] 68 Haw. 528, 723 P.2d 171 (1986) (Nakamura, J.).

[271] The instruction read, in pertinent part:

> An emergency situation is a sudden or unexpected combination of circumstances which calls for immediate action. Such a situation leaves the actor with no time for thought and requires a speedy decision based largely on impulse.
>
> Thus, if you find that if defendant . . . faced an emergency situation on April 12, 1982 which was not of her own making, you must find that she was not negligent in her conduct if you also find that her actions were those of a reasonably prudent person in a similar emergency. Whether or not such emergency situation existed on April 12, 1982 is a matter of fact for you to decide based upon all of the evidence of the case.

Id. at 540-41, 723 P.2d at 171.

is under a duty to exercise ordinary care under the circumstances to avoid injury to others."[272] The court was concerned that placing the instruction on the emergency rule apart from the negligence instruction might create the erroneous impression that the emergency rule provided a standard of care different from the ordinary standard of care in a negligence case and that this might also confuse the jury.[273] Because of problems of confusion associated with the emergency doctrine,[274] the court's opinion, though pro-plaintiff, was not exceptional.

The case of *Corbett v. Ass'n of Apartment Owners of Wailua Bayview Apartments.*,[275] however, is another story. In *Corbett*, plaintiff claimed to have fallen as a result of a five-inch difference between the height of the sidewalk and the adjacent lawn.[276] The trial court gave defendant's proposed instructions, which stated that in order to recover, plaintiff must prove that the condition was "unreasonably dangerous."[277] Evidently, the unreasonably dangerous requirement was repeated five times in the instructions.[278]

The court, speaking through Justice Padgett, held the instructions incorrect:

> The focus of the test for negligence should be, and, in the case of jury instructions, must be, on the unreasonableness of the risk of harm, not on the degree of dangerousness of the condition.
>
> A jury might, and probably would, regard the four- to five-inch difference in height between the sidewalk and the adjoining lawn as not "unreasonably dangerous" but it might find that, in the circumstances of the case, it posed an unreasonable risk of harm.[279]

With all due respect, the distinction between the charge given and the court's preferred language seems to be a distinction without a difference. "Danger" and "risk" are synonyms, as are "dangerous"

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[272] *Id.* at 541, 723 P.2d at 179.

[273] *Id.* at 543, 723 P.2d at 181. The court also stated: "[W]e think the wiser course of action would be to withhold sudden emergency instructions." *Id.* at 544, 723 P.2d at 181. However, the court did indicate that it would be permissible for counsel to make the sudden emergency argument in addressing the jury. *Id.*

[274] *See* PROSSER, *supra* note 233, § 33 at 196-97.

[275] 70 Haw. 415, 772 P.2d 693 (1989) (Padgett, J.).

[276] *Id.* at 415, 772 P.2d at 694.

[277] *Id.* at 416, 772 P.2d at 694.

[278] *Id.*

[279] *Id.* at 417-18, 772 P.2d at 695.

and "risky".[280] It seems clear that a condition which constitutes an "unreasonable risk of harm," the preferred language, is "unreasonably dangerous," the prohibited language.

While it is true that some courts, including the Hawaii Supreme Court, have eliminated the requirement that a defective product be "unreasonably dangerous" in order to recover under strict product liability, the reason that requirement has been eliminated is that it smacks of negligence.[281] The *Corbett* case, however, was a negligence case and the unreasonably dangerous language in the charge seems entirely appropriate.

From the point of view of tort reform, surely one of the most significant cases handed down by the Lum Court was *Kaeo v. Davis*.[282] In *Kaeo*, the court held that where a party so requests, the trial court should inform the jury of the possible effect of a verdict in which it (the jury) apportions negligence among two or more joint tortfeasors.

The action was a suit by a passenger of an automobile for serious injuries suffered when the vehicle collided with a utility pole.[283] Under the facts found by the jury in its special verdict, the driver of the car was found by the jury to be 99% negligent, while the City and County of Honolulu was found to be 1% negligent.[284] Under the rule of joint and several liability, of course, the effect of such a verdict would be to make the two defendants each liable for 100% of the verdict. Although the defendant paying a higher percentage of the damages than its percentage of fault would normally have a right to contribution against the other, the reality in a case such as this, where the jury found damages of $725,000,[285] would be that the much-less-negligent defendant, in this case the City and County, will end up paying the lion's share of the verdict; more often than not the driver or owner of the vehicle will only have the minimum mandatory amount of liability insurance coverage—$35,000 for each injured person—and minimal personal assets, as well.

Why is telling the jury the effect of their verdict so significant? Because the subject of joint and several liability is one with which most

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[280] WEBSTER'S NEW COLLEGIATE DICTIONARY 209, 732 (1961); *see also*, BLACK'S LAW DICTIONARY 393, 1328 (6th ed. 1990).

[281] *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972).

[282] 68 Haw. 447, 719 P.2d 387 (1986) (Nakamura, J.).

[283] *Id.* at 449, 719 P.2d at 389.

[284] *Id.* at 451, 719 P.2d at 390.

[285] *Id.*

jurors are not familiar. If the jury is asked to assign a percentage of fault to each defendant guilty of some causal fault, it is likely to infer, quite logically, that each defendant will *only* be liable for that percentage of the verdict. In fact, however, each such defendant will become jointly and severally liable to the plaintiff *for the entire verdict.* Should that be known to the jury, should the institutional defendant be guilty of the smaller amount of fault (in this case only 1%), and should the jurors, or some of them, be concerned about the high cost of taxes or utility rates, the likelihood is probably excellent that the jury will prefer to find the institutional defendant not guilty rather than subject it to what the jury might believe is an excessive and disproportionate amount of the damages. At the least, the jury will be severely tempted to distort its findings in order to remove the burden of liability from the institutional defendant.

Thus, the effect of informing the jury of the effect of joint and several liability will be to tempt the jury to distort the facts they find in order to achieve a result that they believe might benefit them as taxpayers or rate-payers. Possibly, but not necessarily, they may also believe that the result they are seeking by distorting the facts is more just. If they do so believe, then they will, in effect, be rewriting the law to suit their own view of what the law should be.

The rule of joint and several liability, however, is essentially a just rule: a party who negligently subjects another to an unreasonable risk of harm should be liable for the entire damages if the operation of that risk is the proximate cause of the damages, even though the negligence of other parties concurred to produce those damages.[286] Arguably, therefore, the jurors' substitution of their own judgment, possibly for self-serving reasons, should be discouraged. This is particularly true where, as here, the legislature has considered the matter and enacted detailed legislation which, in effect, retains the rule of joint and several liability in most cases.[287]

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[286] One of the reasons the deep pocket defendant may end up being saddled with an excessive amount of the liability costs, when its negligence is compared with that of other defendants as in this case, is that the "shallow pocket" defendant is inadequately insured. Insurance inadequacy is a serious problem not only because of unfairness to the wealthier defendant, but especially because it adversely effects seriously injured plaintiffs in cases where there is no deep pocket defendant. This problem should be resolved by a substantial increase in the amount of minimally required liability insurance, as is the case in other nations, such as Japan and Canada.

[287] *See* HAW. REV. STAT. § 663-10.9 (1986).

In any event, the likely effect of informing the jury of the effect of their findings is to achieve a modification of the rule of joint and several liability by exposing it to the possibility of jury nullification. This is especially true in cases such as *Kaeo*, where deep-pocket public or quasi-public entities are very often joined as parties in accident cases. This may have a much more significant impact on tort claims than recent "tort reform" legislation.[288] On the other hand, however, *Kaeo* can be viewed as simply offsetting similar outcomes, often favorable to plaintiffs, where the court, as it is required to do "where appropriate," informs the jury of the effect of comparative negligence.[289] What is sauce for plaintiffs should be sauce for the defendants.[290]

5. *Foreseeability and the Negligence Formula*

The case of *Henderson v. Professional Coatings Corp.*,[291] is not only consistent with the view that the expansion of negligence has come to an end but may demonstrate a contraction of the negligence principle. There, the court held that summary judgment was correctly granted to defendant on claims of both negligent entrustment and general negligence where plaintiff alleged that the defendant, who knew that one of his employees was an alcoholic, lent a company-rented automobile to that employee for likely use in going to a party with other employees, and that employee in turn allowed another intoxicated employee to use the automobile, resulting in a head-on collision with plaintiff.[292]

As the dissenters, Justices Padgett and Hayashi, correctly pointed out, the usual rule is that "[f]oreseeability is not to be measured by

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[288] *See, e.g., id.*

[289] HAW. REV. STAT. § 663-31(d) (1985). Telling the jury how our modified comparative negligence statute works may cause the jury to distort its percentage findings in order to prevent a sympathetic plaintiff's percentage of negligence from being greater than 50% when compared to the total of all the negligence of the persons against whom recovery is sought. If the plaintiff's negligence is greater than 50%, she will recover nothing. *Id.*, § 663-31.

[290] It is not clear that the court need give the clarifying instruction, even though requested, in all situations. Both the comparative negligence statute and the opinion in *Kaeo* provide that the instruction need only be given "where" (the statute) and "when" (*Kaeo*) appropriate. It is hoped that the courts will apply the requirement even-handedly.

[291] 72 Haw. 387, 819 P.2d 84 (1991) (Moon, J.).

[292] *Id.* at 388-90, 819 P.2d at 85-87.

what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct."[293] The court, however, confused the question of what risks were foreseeable with the question of breach of duty for purposes of engaging in the negligence calculus:

> [W]e accept [plaintiff's] position that the issue is . . . one of foreseeability, that is, whether [owner] knew or should have known at the time he loaned the vehicle to persons such as [the alleged alcoholic], that [the alcoholic] would act unreasonably by loaning the vehicle to persons such as [another intoxicated person], who in turn would negligently operate the vehicle and cause injury to others.[294]

With all due respect, the correct approach would have been for the court to consider *all* of the reasonably foreseeable risks, great and small. These would have included the considerable risk that the person to whom the car was entrusted, admitted by defendant to be an alcoholic, might himself cause an accident while drunk and the lesser one that, if he were to get drunk, he might entrust the car to another intoxicated person who might cause an accident. The question then to be considered by the court on motion for summary judgment should have been whether a jury could find that in light of this bundle of foreseeable risks, the defendant's entrusting of the car created an unreasonable risk of harm.[295] The answer to this clearly seems to be yes.[296]

If the court intends in the future to consider, in determining whether conduct is negligent, *only* the very particular risk that caused the injury

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[293] *Id.* at 413, 819 P.2d at 97 (Padgett, Hayashi, JJ., dissenting) (quoting 2 FOWLER HARPER & FLEMING JAMES, THE LAW OF TORTS § 18.2 at 1020 (1956)).

[294] *Id.* at 399-400, 819 P.2d at 91.

[295] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (the "Hand" formula). *Cf.* Petition of Kinsman Transit Co., 338 F.2d 706 (1964):

> We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability.

Id. at 725.

[296] *See* PROSSER, *supra* note 233, § 31 at 169-73.

rather than all the reasonably foreseeable risks created by the conduct, then the court is engaged in a substantial and unfortunate contraction of traditional negligence law.

C. Products Liability

With regard to the question whether the seller or manufacturer of a product should be held liable for injuries caused by manufacturing or design defects in its product, the Hawaii Supreme Court under Justice Lum has continued without significant hesitation to follow the pro-claimant trend of its predecessor[297] and of the California Supreme Court,[298] at least in cases where the ultimate liability is likely to carry up the distributional chain to a large manufacturer.

The most significant rulings of the court are these.

(1) The plaintiff may join claims of negligence, including negligent manufacture, design or failure to warn, breach of implied warranty of fitness and merchantability under the Uniform Commercial Code,[299] and claims of strict liability in tort, all arising out of the same facts, in a single product liability action.[300]

(2) The plaintiff need not prove that a defective product is "unreasonably dangerous" as § 402A of the *Restatement (Second) of Torts* seemed to require.[301] Instead, it is enough if "the plaintiff demonstrates that because of its manufacture or design, the product does not meet the reasonable expectations of the ordinary consumer or user as to its safety."[302]

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[297] *See, e.g.*, Stewart v. Budget Rent-A-Car, 52 Haw. 71, 470 P.2d 240 (1970) (Levinson, J.) (adopting strict products liability). "The public interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products." *Id.* at 74, 470 P.2d at 243; *see also* Brown v. Clark Equipment Co., 62 Haw. 530, 618 P.2d 267 (1980) (Kobayashi, J.), Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982) (Ogata, J.).

[298] The end of that trend in California may be marked by Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), which held that strict liability for defective design does not apply to prescription drugs and that a manufacturer held liable under market share liability is only liable for the proportion of the total damages equal to its percentage share of the the relevant market.

[299] HAW. REV. STAT. §§ 490:2-314 (merchantability), 490:2-315 (fitness for particular purpose). The court's willingness to recognize these warranties along with strict liability in tort suggest that in an appropriate case the court will recognize an express warranty under the U.C.C. or under the RESTATEMENT (SECOND) OF TORTS § 402B, as well.

[300] Ontai v. Straub Clinic and Hospital, Inc., 66 Haw. 237, 659 P.2d 734 (1983) (Menor, J.).

[301] Section 402A of the *Restatement* imposed strict liability on "[o]ne who sells any product

(3) Even though the allegedly defective product is available for inspection, the plaintiff in a strict product liability case may use circumstantial evidence to establish a defect.[303]

(4) With regard to design defects, there are two alternative ways that a plaintiff may establish strict liability in tort. The first is the "consumer expectation test," described above.[304] The second is the most plaintiff-oriented and most controversial of all tests[305] for liability for design defects:

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in a defective condition unreasonably dangerous to the user or consumer . . . ." The California Supreme Court eliminated the "unreasonably dangerous" requirement on the ground that it sounded too much like negligence. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972).

[302] 66 Haw. at 241, 659 P.2d at 739. In expressing its view that the "unreasonably dangerous" requirement need not be met, the court in *Ontai* said:

> [T]he plaintiff need not show that the article was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases or uses it. . . . It is enough that the plaintiff demonstrates that because of its manufacture or design, the product does not meet the reasonable expectations of the ordinary consumer or user as to its safety.

Id. With all due respect, however, there does not seem to be any significant difference between the two statements: a product which "does not meet the reasonable expectations of the ordinary consumer or user as to its safety" and which would subject the seller to liability is necessarily more dangerous than ("dangerous to an extent beyond that") reasonably expected ("contemplated") by the ordinary consumer or user as to its safety. The only difference is that the requirement that the expectations be "reasonable" is not spelled out in the disapproved phrase, although it may be inferred.

[303] Wakabayashi v. Hertz, 66 Haw. 265, 660 P.2d 1309 (1983) (Nakamura, J.).

[304] *See supra* note 300 and accompanying text. In adopting the consumer expectation test the court was following the Supreme Court of California in Barker v. Lull Engineering Co., Inc., 573 P.2d 443, 455-56 (Cal. 1978). In *Barker*, the test is: "a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." This test has reference to the actual expectations of ordinary consumers or users, not necessarily to "reasonable expectations." The problem with that test, as the court itself noted in *Barker*, is that consumers may be led to have very low safety expectations for some products. *Id.* So long as the product meets those low expectations, there would be not liability under this test. That is one of the reasons the court in *Barker* found it necessary to formulate a second test not dependent upon consumer expectations.

The Hawai'i test, which relates to "reasonable expectations of the ordinary consumer," rather than the "ordinary expectations," might conceivably be interpreted to mean the amount of safety that the reasonable consumer *has the right to expect*. If it were to be so interpreted then, apart from the difficulties it might create, it would probably turn out in most cases to constitute a more plaintiff-oriented test than the *Barker* formulation.

[305] *See* James A. Henderson, Jr., *Renewed Judicial Controversy Over Defense Product Design*, 63 MINN. L. REV. 773 (1979).

> [A] product may alternatively be found defective in design if the plaintiff demonstrates that the product's *design* proximately caused his injury and the defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.[306]

Note that the plaintiff's case does not include proving that the design is defective; she need only prove more probably than not that the design proximately caused her injury. Thus, for example, if plaintiff were injured when the car in which she was a passenger skidded into a wall, she need only prove by a preponderance of the evidence that she would have escaped such serious injury if the vehicle had been equipped with an airbag or an automatic braking system. In order to avoid liability, *the defendant must then prove* that the benefits of the design without the airbag, or without the automatic braking system, outweigh the risk of danger involved in not having either safety device. If defendant fails in his proof, the product is then deemed "defective" and the defendant held liable. This second test, calling for a risk-benefit analysis, is similar to the so-called "Hand formula"[307] in a negligence case except that the burden is on the defendant rather than the plaintiff.[308]

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[306] *Barker*, 573 P.2d at 456 (emphasis added).

[307] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

[308] Another difference between the tests is also the possibility that what the defendant knew or should have known about the risks of the design and the feasibility of an alternate design [state of the art] may not be relevant in the design defect case. *See infra* note 309 and accompanying text.

It is not clear that the court in *Ontai* fully understood the implications of adopting the *Barker* tests, since the court said:

> Under either test, it would still be incumbent upon the plaintiff to show that the offending product was dangerously defective and the defect was the proximate cause of his injuries. . . . Ontai, in the present case, was thus required to show: (1) a defect in the footrest which rendered it dangerous for its intended or reasonably foreseeable use, and (2) a causal connection between the defect and his injuries.

66 Haw. at 243, 659 P.2d at 740. Quite clearly, however, under the second test it is not "incumbent" on plaintiff to prove the product is dangerously defective. Rather, it is incumbent on the defendant to prove it is not defective.

Any misunderstanding, however, was cleared up by Chief Justice Lum in his opinion in *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989), where the court expressly approved a charge which shifted the burden to defendant based upon the second test in *Barker*. *Masaki*, 71 Haw. at 24-25, 780 P.2d at 579.

(5) In a products liability action based upon strict liability in tort, state of the art evidence is *not* admissible to establish, as a defense, that the the manufacturer did not know or should not have known of the danger inherent is its product.[309]

(6) In a negligence action brought against manufacturers of drugs, where the plaintiff is unable to identify which manufacturer provided the specific drug which caused plaintiff's harm, proportional liabilty based on the "market share" theory of *Sindell v. Abbott Laboratories*[310] is

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[309] Johnson v. Raybestos-Manhattan, 69 Haw. 287, 740 P.2d 548 (1987) (Wakatsuki, J.). It is difficult to know what the brief opinion in this case means. The action was based upon injuries suffered from asbestos exposure in the workplace and included a claim for strict liability for a defective product and failure to warn of the danger. The question, certified by the United States Court of Appeals for the Ninth Circuit, was worded in a way almost designed to elicit a negative response from a court committed to maintaining a separation between negligence and strict liability:

> In a strict products liability case for injuries caused by an inherently unsafe product, is the manufacturer conclusively presumed to know the dangers inherent in his product, or is state of the art evidence admissible to establish whether the manufacturer knew or through the exercise of reasonable human foresight should have known of the danger?

Id. at 287, 740 P.2d at 549.

In answering no, the court responded with the shibboleth that "in a strict liability action, [as opposed to a negligence action] the issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability." 69 Haw. at 288, 740 P.2d at 549. (relying on Boudreau v. General Electric Co., 2 Haw. App. 10, 15, 625 P.2d 384, 389 (1981)). However, reading the question very narrowly, the court refused to answer the question whether state of the art evidence might be relevant to the duty to warn claim, *Id.* at 288 n.2, 740 P.2d at 549 n.2, and also left open the question "Whether or not state-of-the-art evidence is probative of some other factor that is relevant in a strict product liability action (e.g., consumer expectations, which bears on whether a product is defective) and therefore admissible for that limited purpose . . . ." *Id.* at 289 n.3, 740 P.2d at 549 n.3. Further, the court noted that this case involved a product that was inherently dangerous "not involving a manufacturing defect nor a design defect . . . ." *Id.* at 288 n.1, 740 P.2d at 549 n.1.

Rather than being an extremely liberal ruling restricting use of state-of-the-art evidence, therefore, the decision may simply be read as reflecting an aversion to the use of negligence language in a strict liability case. On the other hand, the court in passing remarked that "our analysis makes defendant's knowledge of the dangers irrelevant in a strict liability action . . . ." and cited, using the ambiguous "*cf.*" signal, the controversial New Jersey case which disallowed state-of-the-art evidence in a product liability case, Beshada v. Johns-Manville Products Corp., 447 A.2d 539, 544 n.3 (N.J. 1982), *subsequently limited to its facts by* Feldman v. Lederle Laboratories, 479 A.2d 374 (N.J. 1984).

[310] 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

allowed.[311] In so holding the Supreme Court acknowledged the need to "fairly deal with the plight of plaintiffs who are unable to identify, for no fault of their own, the person or entity who should bear the liability for their injury."[312]

By way of contrast with these unmitigated pro-claimant cases and holdings, the court refused to extend strict liability in tort to conditions, such as a towel bar in a hotel bathroom that would not support the weight of a woman[313] and a cracked, non-shatter-proof plate glass shower door that caused injury to plaintiff's hand,[314] where the defendants were not the manufacturers or distributors of the product but were the owner or lessor of the premises in which the condition existed. The court's rationale for refusing to extend strict liability to these situations was that the usual reasons and policies which support strict liability, as in the cases described above, were not present in these

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[311] Smith v. Cutter Biological Inc., 72 Haw. 416, 823 P.2d 717 (1991) (Lum, C.J.). The court in *Smith* went further than the California Supreme Court in *Sindell*. Plaintiff was a hemophiliac who became HIV positive by ingesting "Factor VIII" or "AHF," a blood protein extracted from donated blood which enables the blood to coagulate when a hemophiliac suffers a bleeding episode. *Id.* at 421-22, 823 P.2d at 721. Unlike the DES in *Sindell*, the drug in this case was not fungible with the Factor VIII sold by each defendant, since each defendant's product was compounded from blood taken from different donors.

In overruling defendant's summary judgment, the court also held that Hawai'i's blood shield law, HAW. REV. STAT. § 327-51 (1985), while precluding a strict liability action, does not preclude a negligence action based on "market share" liability even though the statute provides that defendant shall only remain liable for "its *own* negligence." 72 Haw. at 423, 823 P.2d at 722 (construing HAW. REV. STAT. § 327-51 (1985) (emphasis added).

Justice Moon vigorously dissented, asserting that the blood shield statute precluded the market share action; that even if the market share action was available, this was an inappropriate case because defendants' products were not fungible; and that, in any event, there was insufficient evidence of duty and breach of duty to sustain plaintiff's claims of negligence, a question which the majority left open for subsequent determination. *Id.* at 453-54, 823 P.2d at 736-37.

It is interesting that neither the majority nor the dissent cited Brown v. Superior Court, 751 P.2d 470 (Cal. 1988), in which the California Supreme Court limited liability under the market share theory of *Sindell* to proportional liability—each defendant joined only being held liable for a percentage of plaintiff's damages equal to the defendant's market share—and also held that strict liability in tort does not apply to drug manufacturers. *Id.* at 486.

[312] 72 Haw. at 428, 823 P.2d at 724.

[313] Bidar v. Amfac, Inc., 66 Haw. 547, 669 P.2d 154 (1983) (Nakamura, J.).

[314] Armstrong v. Cione, 69 Haw. 176, 738 P.2d 79 (1987) (Lum, C.J.).

cases.[315] An additional reason given in *Armstrong*, of some interest in assessing the court's attitude to expansion of liability, was that the defendant "cannot adjust the costs of protecting the consumer up the chain of distribution"[316] but must instead charge the costs "down the chain of distribution"[317] to those who rent from the defendant. In cases such as these, application of strict liability might have caused increases in hotel rates or in rent, matters of particular concern in Hawai'i.

D. Damages

Two extremely important rulings on damages emerged from a single decision, *Masaki v. General Motors Corp.*,[318] in 1989, one favoring the defendants, the other favoring claimants. First, the court held that the burden of proving punitive damages is elevated to "clear and convincing evidence."[319] In view of the United States Supreme Court's refusal to hold that punitive damages violate the United States Constitution,[320] the elevation of the burden of proof may take on considerable importance, particularly in the settlement process. It should henceforth become at least somewhat more difficult for a claimant to extract an inflated settlement because of exaggerated fear of an award of punitive damages based on the fact that the right to such damages need only be proved by a preponderance of the evidence.

Of even greater importance, however, is the court's approval, also in *Masaki*, of the controversial element of damages known as filial

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[315] *Id.* at 184, 738 P.2d at 84. Of particular interest is the court's acceptance of the Intermediate Court of Appeals' reasoning in Messier v. Ass'n of Apartment Owners of Mt. Terrace, 6 Haw. App. 525, 535, 735 P.2d 939, 947-48 (1987) (Heen, J.): "Withholding the rule will not measurably depreciate [plaintiffs] chances of obtaining compensation for his injuries," and "[h]e does not face the kind of difficulty in proving [defendants'] negligence . . . as is faced by plaintiffs in other cases where the doctrine of strict products liability has been applied." 69 Haw. at 184, 738 P.2d at 84.

[316] 69 Haw. at 185, 738 P.2d at 84.

[317] *Id.*

[318] 71 Haw. 1, 780 P.2d 566 (1989) (Lum, C.J.).

[319] *Id.* at 16-17, 780 P.2d at 575.

[320] Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991).

consortium—parents' damages for loss of the comfort, care, and services of a child.[321] Even the California Supreme Court, in *Baxter v. Superior Court*,[322] declined to extend the archaic common law action by a parent for the loss of services of a minor child to allow recovery for loss of the love, comfort, companionship, and society of the child.[323] The Hawaii Supreme Court, however, noting that such damages were allowed by statute in cases of wrongful death,[324] held that parents could bring a common law action for similar damages based upon the negligence of a manufacturer in causing a non-fatal injury to their child, *in this case a 28-year-old adult*.[325]

In his opinion, Chief Justice Lum adopted the reasoning of the Arizona Supreme Court in *Frank v. Superior Court*,[326] which noted "no meaningful distinction can be drawn between death and severe injury where the effect on consortium is concerned."[327] Further, in rejecting the tie between the common law action for loss of a child's services—which limited recovery to loss of the child's earnings until majority—and this action for loss of society, companionship and love of an adult child, the *Masaki* court said:

> It is irrelevant that parents are not entitled to the services of their adult children; they continue to enjoy a legitimate and protectible expectation of consortium beyond majority arising from the very bonds of the family relationship. Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation . . . .[328]

This decision, in its boldness and in its effect, is similar to and reminiscent of the Richardson Court's landmark opinion in *Rodrigues v. State*,[329] allowing the tort of negligent infliction of emotional distress.

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[321] 71 Haw. at 19, 780 P.2d at 576.

[322] 563 P.2d 871 (Cal. 1977).

[323] *Id.* at 874.

[324] HAW. REV. STAT. § 633-3 (1972, as amended).

[325] 71 Haw. at 22, 780 P.2d at 578.

[326] 722 P.2d 955 (Ariz. 1986).

[327] *Id.* at 957-58. Of course one significant distinction is that both the action and damages in death cases are provided for by statute while the action and damages in a negligence action are not. The court's reason for extending the right to similar damages in a negligence action may therefore be based on an equal protection argument, an independent policy argument justifying such extension, or both. The court, however, did not specifically address this issue.

[328] *Id.*; *see also Masaki*, 71 Haw. at 21-22, 780 P.2d at 577-78.

[329] 52 Haw. 156, 472 P.2d 509 (1970) (Richardson, C.J.).

Indeed, because the court in *Masaki* held that the parents may recover for negligent infliction *as well* as for loss of consortium, one wishes the court had spoken to the issue of which damages allowable under the loss of consortium claim do, and which do not, overlap the damages allowable in the mental distress claim. Surely, the mental distress engendered by learning of the son's serious injuries includes elements of distress which will be difficult, if not impossible, to separate from the mental element which composes loss of love, comfort, companionship and society.

Masaki also implies that actions for loss of parental consortium will also be allowed. In a footnote the court stated:

> In *Halberg v. Young*, 41 Haw. 634 (1957), we followed the traditional common-law rule and held that no cause of action exists in favor of a child for injuries sustained by his parents. Appellants claim that our decision in *Halberg* is dispositive of the instant case because a parent's claim for the lost consortium of a child is merely the reciprocal of a child's claim for the lost consortium of his parents. While we recognize that the two actions are analogous in many respects, the issue of parental consortium is not before us today.[330]

Nevertheless, since is it is really not possible on principled grounds to distinguish the right to filial consortium for injury to an *adult* child from the right to parental consortium, the likely effect of *Masaki* is to overturn *Halberg*.

III. Conclusion

As the Richardson Court had done in its time, so too has the Lum Court, in its own time, responded to concerns expressed in the community. This the Lum Court has done by addressing problems of insurance availability and affordability, while tending to continue to afford generous protection of victims in areas, such as products liability, where local community concerns are muted. Products liability aside, the court seems increasingly, if not consistently, to follow a path which protects local economic interests—businesses in the visitor industry, the State, and purchasers of no-fault and liability insurance—from costs that might be generated by a consistently liberal expansion of tort liability and insurance coverage.

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[330] 71 Haw. at 19 n.8, 780 P.2d at 576 n.8.

First, with regard to the law of strict products liability, there has been no inclination to do anything but to continue the liberal trend of the Richardson Court, to consolidate its pro-victim approach, and to proceed even beyond the farthest reaches of the "mentor" court—the Supreme Court of California—which has recently backed off continued expansion of strict liability. While product liability actions often have local suppliers and distributors as parties, however, the ultimate responsibility for damages and the major costs of litigation will almost always land on manufacturers located outside of Hawai'i. Evidently, the court can therefore benefit local victims with relatively little direct or immediate impact on local enterprises or on local insurance rates.[331]

In other areas, the evidence of continued liberalism is more sparse. The expansion of liability for loss of filial consortium[332] is dramatic and important, but is not matched by other pro-victim decisions. Decisions in which the court overturned jury instructions which appeared to restrict the definition of negligence are pro-plaintiff, and at least one of them could lead to the award of damages in cases where proof of negligence is weak,[333] but they are not of overarching significance. More important, perhaps, is the decision to uphold a duty of an innkeeper to protect a guest from criminal behavior.[334] This case does not seem unduly to extend the negligence principle.

By way of contrast, cases that have imposed restrictions or limits on victim-favoring common law rules seem to predominate. These include cases requiring that proof of punitive damages be made by clear and convincing evidence,[335] restricting the expansion of liability of liquor sellers,[336] denying recovery for the negligent serving of alcoholic beverages by a social host,[337] approving the liability-limiting Firefighter's Rule,[338] holding that the State has no duty to warn or protect against criminal behavior in state parks,[339] narrowing the foreseeability concept

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[331] This may be another reason, in addition to the differences among product liability laws among the states, why product liability reform will have to take place, if at all, at the federal level. There, any negative effects of strict liability on American enterprise in the international arena are likely to be more clearly evident.

[332] *See supra* note 318 and accompanying text.

[333] *See supra* part II.B.4.

[334] *See supra* note 259 and accompanying text.

[335] *See supra* note 318 and accompanying text.

[336] *See supra* part B.2.

[337] *See supra* note 229 and accompanying text.

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

[339] *See supra* note 250 and accompanying text.

by focusing on only one of several risks created by defendant's behavior in determining whether defendant was negligent in entrusting a vehicle to an alcoholic,[340] and allowing the judge in "appropriate" cases to inform the jury of the effect of joint and several liability.[341]

The insurance cases on balance seem to reflect a picture in which important protections to consumers have been provided and availability of some coverage has usually been assured, but where, for the most part, bold interpretations which would expand coverage have been rejected and the amount of insurance available in particular cases has been restricted even though the applicable language might easily have carried a more expansive interpretation.

It will thus be noted that the tort and insurance opinions of the Lum Court do not reveal a consistent and monolithic philosophy either with regard to jurisprudence or social policy. This is not an introspective court, and the justices—perhaps because the caseload is too heavy and the justices too few, or perhaps because it is their inclination—do not dwell in lengthy opinions on the underpinnings of their decisions. Rather, they tend to be relatively terse and pragmatic. On this court, the views of individual justices with strong feelings also seem to have carried great weight. Frank Padgett, who has left the court, was such a justice. His views most often favored the victims of accidents. Ronald Moon is also such a justice. He has clearly favored a policy of reducing insurance costs and has often carried the court in a conservative direction. There are now two additions to Hawai'i's five-person court, Justices Robert Klein and Steven Levinson. It is pure speculation whether the now considerable influence of Justice Moon will continue to set the direction of the court in the area of torts and related insurance.

Addressing the question of tort reform in a common law court, it is clear from the decisions of the Lum Court as here described that so far, the Hawaii Supreme Court, not the Hawaii Legislature, has been the major player in tort reform in Hawai'i.[342] Whether the Supreme Court, supposedly the "least dangerous branch,"[343] has recognized and acted upon the popular will, readers will have to decide for themselves.[344]

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[340] *See supra* note 291 and accompanying text.

[341] *See supra* note 282 and accompanying text.

[342] *See infra* Epilogue.

[343] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[344] *Cf.* Warren A. Seavey, *Negligence—Subjective or Objective?* 41 HARV. L. REV. 1

Like Hawai'i's community, the Supreme Court is composed of diverse individuals with their own personal histories, political views, predispositions, and perspectives. Yet the justices all have strong ties to, and a common membership in the community. It is through this link to the community that the court responds to and reflects the temper and needs of its time.

EPILOGUE

At the end of April, 1992, as this article was about to go to press, the Hawaii Legislature passed bills revising the Hawai'i motor vehicle insurance laws which increased the amount of mandatory no-fault insurance, on the one hand, but raised the medical-rehabilitative limit, reduced the amount of required liability insurance, and eliminated automatic stacking of uninsured and underinsured motorist coverage, on the other hand.[345] These changes, produced in large measure by political pressure to reduce premiums brought to bear by the Coalition for Automobile Insurance Reform, may indeed demonstrate a new activism on the part of the Hawaii legislature in the area of tort and insurance reform reflecting, in turn, a new attitude on the part of the wider community.

(1927):

> The lawyer cannot determine that our rules of liability for negligence are either just or unjust, unless he has first discovered what the community desires (which determines justice for the time and place), and whether the rules are adapted to satisfying those desires (which I assume to be the end of law).

Id. at 19.

[345] *See* H.R. 3974 (H.D. 1 and S.B. 2361, S.D. 2 (as amended, 1992)), 16th Leg., 1992, Reg. Sess. (1992), *reprinted in* 1992 Haw. ___ J. ___.

The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991

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I. INTRODUCTION

Given the plethora of land use regulations at the state and local level in Hawai'i,[1] the relative dearth of land use cases reaching the appellate courts of Hawai'i is still something of an anomaly.[2] This was true in the Richardson years,[3] and it is true for the Lum Court as well. This makes trend analysis a risky business.

Nevertheless, there are a few discernible case lines,[4] short though they may be. These include (1) the relationship between county plans, and to some extent state plans, and zoning regulations;[5] (2) the role

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[1] For analysis and discussion of Hawaii's complex land use regulatory system at the state and county levels see FRED P. BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROLS ch. 1 (1971); DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII (1984); DANIEL L. MANDELKER, ENVIRONMENTAL AND LAND USE CONTROLS LEGISLATION ch. 7 (1976); PHYLLIS MYERS, ZONING HAWAII (1977).

[2] Such cases do not often reach the United States Supreme Court either, but the Court's 1991-92 term promises to be a watershed one. In three cases, the Court will address and in all likelihood substantially rewrite the law on taking of property by regulation, which will vitally affect the application of land use law in Hawai'i.

In Lucas v. So. Carolina Coastal Council, 404 S.E.2d 895 (1991), the Court will address whether a state coastal protection statute forbidding construction on two beach front residential lots is a taking of private property through regulation. In PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1990), the Court will address the application of constitutional due process to alleged defects in Puerto Rico's land use permitting process. Finally, in Yee v. Escondido, 274 Cal. Rptr. 551 (1990), the Court will deal with the application of the Fifth Amendment to rent control in the context of a mobile home park.

Coupled with the Court's 1987 trilogy (Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (deciding takings); First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (requiring compensation for regulatory takings); and Nollan v. California Coastal Comm'n, 483 U.S. 825 (requiring an "essential nexus" between land use permit conditions and the proposed land development)), the Court may very well be finally disposing of land use and the Constitution, at least for the balance of this century.

[3] William S. Richardson was Chief Justice of the Hawaii Supreme Court from 1966 to 1982.

[4] Some of the case lines continue the court's interests from the Richardson years. To that end, Richardson Court cases are included in this survey, primarily in the footnotes, for comparison.

[5] *See infra* part II.

of initiative and referendum in land use regulation;[6] (3) the role of coastal zone management protection law;[7] (4) standing;[8] (5) the presumption of validity afforded administrative agency decisions;[9] and (6) the role of and standard of review applicable to the zoning board of appeals.[10]

The court has also addressed the applicability of zoning regulations to religious buildings in the face of First Amendment challenges.[11] More tangentially, from a land use perspective, the court has suggested that the police power is not coterminous with eminent domain in the public purpose area, at least under Hawai'i's land reform act,[12] in welcome contrast to the United States Supreme Court.[13]

This survey also incorporates decisions from the Hawaii Intermediate Court of Appeals (I.C.A.). *Hawaii Revised Statutes* section 602-57 gives the I.C.A. concurrent jurisdiction with the Hawaii Supreme Court to hear all matters.[14] The Lum Court's policy of assigning cases focuses more on an even distribution of the caseload between the supreme court and I.C.A. than on a separation of cases by the issues they present. The rationale behind this division is that strict adherence to the assignment criteria as set forth in *Hawaii Revised Statutes* section 602-6 would place an unmanageable burden on the I.C.A., resulting in a backlog.[15] In order to avoid this overload, the supreme court does

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[6] *See infra* part III.

[7] *See infra* part IV.

[8] *See infra* part V.

[9] *See infra* part VI.

[10] *See infra* part VII.

[11] *See infra* part VIII.A.

[12] *See infra* part VIII.B.

[13] Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[14] HAW. REV. STAT. § 602-57 (1985).

[15] Interview with Chief Justice Lum by Jon C. Yoshimura, in Honolulu, Haw. (Sept. 24, 1991).

> [O]ur number of appeals has gone to about 800 a year. And that's just appeals. Now, if we were to follow the guidelines, I would say that maybe only about 100 to 150 cases would come to us, the rest would go to the I.C.A. and obviously the cases would bog down at the I.C.A. And so I think that as a practical matter, because there are eight of us really, we try to allocate about 100 cases per judge. Roughly, we keep about 500 cases, about 300 cases to the I.C.A. Now, we're trying to get more I.C.A. judges so that we can really handle what is truly the kind of cases the supreme court should be handling. But we have been turned down by the legislature. And for that reason we will

not assign all the cases which the I.C.A. might normally be expected to hear.[16]

II. Planning and Zoning: The Conformity Requirement

The most significant land use law and policy contribution of the Lum Court is its ringing defense of the land use plan as the basis for land use controls in *Lum Yip Kee, Ltd. v. City & County of Honolulu*[17] and *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*[18] (commonly referred to as "Sandy Beach"). There can be no question after these two decisions that land use plans are paramount in the land use regulatory scheme in Hawai'i—and particularly in the City and County of Honolulu. Furthermore, the cases make clear that in the event of conflict with zoning ordinances or land use initiatives, it is the plan which will control. Hawai'i thus retains its position among states in the forefront of the requirement that zoning must conform to and be based upon comprehensive planning.[19] Of the two cases, the most fulsome and important is *Lum Yip Kee*.

In *Lum Yip Kee*,[20] the court had before it a land use initiative of the type that it later condemned on land use planning grounds in *Sandy*

> continue with the same policy. . . . Generally that's the sort of policy I adopted when I was assignment justice, and I think Justice Padgett has likewise continued to do that.

Id.; *see* Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and The Intermediate Court of Appeals*, 14 U. Haw. L. Rev. 271 (1992).

[16] *See* interview with Chief Justice Lum, *supra* note 15.

Justice Moon was recently appointed assignment justice in place of Justice Padgett. This may impact the policy of distribution observed in the court thus far because Justice Moon favors stricter compliance with Haw. Rev. Stat. § 602-6. Interview with Justice Moon by Jon C. Yoshimura, in Honolulu, Haw. (Oct. 1, 1991).

[17] 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J.).

[18] 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.) [hereinafter *Sandy Beach*].

[19] Other jurisdictions in which "in accordance with a comprehensive plan" is more than lip service with respect to the relationship of planning to zoning are California, Washington and Florida. For examples of statutes and cases see David L. Callies & Robert H. Freilich, Cases and Materials on Land Use chs. 3, 9 (1986).

[20] 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J). In *Lum Yip Kee*, the landowner challenged two ordinances which changed the land use designation of his property from "high density apartment" to "low density apartment". The dispute spanned three annual development plan reviews by the Honolulu City Council in which the property was reclassified from high density apartment use to medium density and then back to high density. Frustrated with the City Council's indecisiveness, the voters of

Beach, but which it failed to resolve because the City Council passed an ordinance virtually identical to the initiative,[21] rendering the propriety of the initiative issue moot.[22]

However, in the course of a lengthy opinion, Chief Justice Lum made it crystal clear that land use controls in Hawai'i are founded absolutely on the planning process,[23] a sentiment echoed by Justice Wakatsuki writing for the majority in *Sandy Beach* the following year.[24]

The court commenced its discussion with the general principle that the "actual physical development of a site is controlled by the development plan of the area in which the site is located."[25] The court had previously noted that in Honolulu land use controls are implemented through a "three-tier regime" consisting of the island-wide general plan; the eight regional development plans; and zoning and subdivision

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the City and County of Honolulu turned to the initiative process and adopted an ordinance in November of 1984. Finally, in May of 1985, the City Council adopted a similar ordinance designating the property as low density apartment use. *Id.* at 184-85, 767 P.2d at 819.

[21] *Id.* at 185, 767 P.2d at 819. The redesignation from high density to low density was part of the overall Development Plan Amendment Ordinance, No. 85-46. *Id.*

[22] *Id.* at 181, 767 P.2d at 817. The property owner in *Lum Yip Kee* also claimed the City Council's reclassification of its fairly large parcel from high to low density apartment use on the applicable development plan map constituted spot zoning. *Id.* at 190, 767 P.2d at 822. Spot zoning is universally condemned as the zoning of a usually small parcel in a manner wildly inconsistent with surrounding zones and uses without a rational basis. CALLIES & FREILICH, *supra* note 19, at 95-97; DANIEL L. MANDELKER, LAND USE LAW § 6.24 (1988). The court noted that it had defined spot zoning as an arbitrary zoning action applied to a small area within a larger area, different from and inconsistent with the surrounding classifications and not in accordance with a comprehensive plan. 70 Haw. at 190, 767 P.2d at 822 (citing Life of the Land v. City Council, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980) (Marumoto, J.)). The court concluded that there had been no spot zoning here, finding that the council's action was not arbitrary, but based upon sound planning principles. Moreover, the area surrounding the Lum Yip Kee parcel was not inconsistent with low density apartment use. Finally, the court noted that since some of the plans applicable to the parcel had as objectives the provision of affordable housing, there was a reasonable basis for the reclassification. *Id.* at 191-92, 767 P.2d at 823.

[23] Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 773 P.2d 250 (1989) (Lum, C.J.).

[24] Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.).

[25] *Lum Yip Kee*, 70 Haw. at 182, 767 P.2d at 817 (citing Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 548, 735 P.2d 950, 955 (1987) (Heen, J.) (citing CALLIES, *supra* note 1, at ch. 3, and 1 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS §§ 1.72, 1.75 (1971))).

laws, rules, and regulations. It is the development plan land use map which is a part of each of the eight development plans that "indicates the location of various land uses such as residential, recreation and parks, agriculture, commercial, military, and preservation."[26] The Public Facilities Map shows existing and future location of roads and streets, sewer lines and other proposed facilities.[27]

The court first summarized the various requirements for annual review and amendment of development plans pursuant to the City Charter.[28] It observed that "[t]he Charter requires zoning ordinances to conform to and implement the development plan for that area. . . . In order to meet this conformance requirement, it is frequently necessary for a landowner first to seek a development plan amendment from the City before requesting a zoning change."[29]

Since the plaintiffs in *Lum Yip Kee* attacked not only the development plan amendment and conformance to zoning in the County's procedures but also its conformance to state planning requirements applicable to counties,[30] the court then proceeded to review those requirements as well. First, it noted that state statutes require that "county development plans shall be formulated with input from state and county agencies as well as the general public."[31] Furthermore, observed the court, "The formulation, amendment, and implementation of county general plans or development plans shall take into consideration statewide objectives, policies and programs stipulated in state functional plans approved in consonance with this chapter."[32] However, the court further observed that "[t]he state functional plans are broad policy

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[26] *Id.* at 182, 767 P.2d at 817.

[27] *Id.* at 182, 767 P.2d at 818.

[28] *Id.* at 183, 767 P.2d at 818.

[29] *Id.* (citing CALLIES, *supra* note 1, at 27). Unfortunately, the court also blithely accepted a previous—and pre-development—plan "recognition" that not only enactments but also amendments to development plans constitute legislative acts of the Council (*see* Kailua Community Council v. City & County of Honolulu, 60 Haw. 428, 432, 591 P.2d 602, 605 (1979) (Menor, J.)), thus raising a presumption that map amendments to the development plans may also be legislative acts. *Id.* at 187, 767 P.2d at 820. This has a variety of ramifications, not the least of which is to make them subject to initiative and referendum should Hawai'i, through appropriate legislation, choose to reinstate these popular techniques held illegal in *Sandy Beach*, discussed *infra* part III.

[30] *Id.* at 186, 767 P.2d at 820.

[31] *Id.* at 188, 767 P.2d at 821 (citing HAW. REV. STAT. § 226-61(a) (1985)).

[32] *Id.*

guidelines providing a framework for state and county planning and do not constitute legal mandates, nor legal standards of performance."[33] This is significantly different from the way the state functional plans were to interact with county plans originally,[34] but at the very least the counties must make some attempt to "consider" state policies in formulating their plans,[35] which in turn control their zoning and subdivision laws.[36]

Noting that the action of the City Council in amending the applicable development plan furthered at least two articulated policies of the State Housing Functional Plan,[37] the court also observed that "studies were made, public hearings held, field investigations were conducted, public testimony was considered, and findings were made."[38] Therefore, the court concluded that the City and County had acted in accordance with state functional plan requirements as well as its own general and development plan requirements in amending its development plan.[39] In a critical footnote, it also observed that although the challenge was only to the development plan amendment and that is all the City had so far done, "[t]he zoning issue is necessarily moot, however, because zoning is required to conform to the development plan. . . . Thus, it would not be possible to rezone [the subject property for high density use] after the development plan had been amended to 'Low Density Apartment.' Such a rezoning would be void."[40]

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[33] *Id.*

[34] *Id.* The difference is due to a change in the language of the statute. As the court noted: "The Hawaii Legislature made this [difference in interaction with the county plans] clear in 1984, when it amended the State Planning Act to eliminate the requirements of conformance by the counties with the Act. [HAW. REV. STAT.] § 226-61(a) was amended so that the counties would only have to 'consider' the functional plans." *See* H.R. CONF. COMM. REP. No. 35-84, 12th Leg. Sess., Reg. Sess. (1984), *reprinted in* 1984 HAW. H.R. J. 732-33.

[35] *Lum Yip Kee*, 70 Haw. at 188, 767 P.2d at 821.

[36] *Id.* at 183, 767 P.2d at 818.

[37] *Id.* at 189, 767 P.2d at 821. Act 100, the State Plan (codified at HAW. REV. STAT. § 226), calls for 12 so-called functional plans to be formulated by state agencies and approved by the legislature, for agriculture, housing, tourism, transportation, conservation lands, education, higher education, energy, health, recreation, historic preservation, and water resource development. *Id.*

[38] *Id.* at 189, 767 P.2d at 821.

[39] *Id.*

[40] *Id.* at 192 n.15, 767 P.2d at 823 n.15. In this assertion, the court is not quite correct, strictly speaking. The County Charter specifically requires that no zoning or subdivision ordinance may be "initiated or adopted unless it conforms to and imple-

These views of the Lum Court on the importance of the plan foreshadowed its decision in *Sandy Beach*,[41] in which it reiterated the tight fit between land use controls and planning. Suffice it here to observe that, in that case, the court said, "Zoning by initiative is inconsistent with the goal of long range comprehensive planning"[42] and cited with approval those cases which have so held from other states. The court then reiterated its view of the legislature's "concern for comprehensive long range planning"[43] by its enactment of the State Plan[44] setting out county planning requirements and their relationship to state plans, all, as the court here observed, as set out in the *Lum Yip Kee* case.[45]

In sum, the place of planning in the land development and regulation process in Hawai'i is clearly recognized in all its sophistication and detail by Hawaii's Supreme Court. While hardly a departure from previous decisions, the court had not previously dealt, approvingly or otherwise, with planning and land use in such comprehensive detail. The full ramifications of this clearly plan-based land regulatory system will in all probability take years of judicial decision-making to clarify. The court's treatment of initiative and referendum is consequently no surprise.

III. Initiative, Referendum, and Land Use Planning in Hawai'i

How to deal with the use of initiative and referendum as applied to land use decision making is a subject which has bedeviled land use

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ments the development plan for that area." Honolulu, Haw., Rev. Ordinances § 5-412(3) (1984). It is therefore possible for a landowner to proceed under a zoning classification which existed prior to the passage of a development plan or amendment thereto without violating that charter requirement. Hawai'i courts have not yet decided, as have the courts in at least one state with similar conformance requirements, *see, e.g.*, Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23 (Wash. 1973), that the county is under a duty to conform its zoning map with its development plan map and that until that is done, the development plan map controls. It is however, still possible to read earlier statements of the court in this case, as favoring such an interpretation. *See infra* notes 25-36 and accompanying text. However, because the City Council almost inevitably does so conform its zoning map to the relevant development plan map, this legal "gap" may have little real significance.

[41] *See infra* part III.

[42] Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 484, 777 P.2d 244, 247 (1989) (Wakatsuki, J.).

[43] *Id.* at 486 n.2, 777 P.2d at 248 n.2.

[44] Haw. Rev. Stat. § 226 (1985).

[45] *Sandy Beach*, 70 Haw. at 486-87, 777 P.2d at 248.

commentators for many years.[46] There are several theories upon which cases dealing with the subject turn,[47] among which is the effect of ballot box zoning on comprehensive planning.

The issue of ballot box zoning has come before the Hawaii Supreme Court three times. In the first case, *County of Kauai v. Pacific Standard Life Insurance Co.*[48] (commonly referred to as "*Nukoli'i*"), the Richardson Court rejected a developer's claim of estoppel while appearing to approve of referendum as a means of downzoning parcels of land. Pursuant to the county charter,[49] Kauai voters passed a referendum measure which repealed a Kauai County Council map amendment to the Comprehensive Zoning Code permitting resort development at Nukoli'i Beach.[50] After the referendum petition had been certified by the county clerk,[51] the Planning Commission approved a Special Management Area (SMA) use permit for the project. The developer proceeded with expenditures on the project even though the referendum vote was pending.[52] Then at the general election the voters voted to repeal the zoning code amendment.[53]

In its analysis, the court rejected the developer's argument that the County should be estopped from prohibiting the project from contin-

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[46] *See, e.g.*, David L. Callies, Nancy C. Neuffer & Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum, and the Law*, 39 J. URB. AND CONTEMP. L. 53 (1991); Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiative and Referendum*, 21 URB. LAW. 511 (1989); Jon E. Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 PAC. L. J. 793 (1987); Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381 (1984).

[47] E.g., whether the rezoning act is legislative (referendable) or quasijudicial (non-referendable), whether federal or state due process requirements are met, whether the power is reserved to the people in the state constitution, and whether direct democracy is discriminatory. Callies, Neuffer & Caliboso, *supra* note 46.

[48] 65 Haw. 318, 653 P.2d 766 (1982) (Richardson, C.J.) [hereinafter *Nukoli'i*], *appeal dismissed*, Pacific Standard Life Ins. Co. v. Committee to Save Nukolii, 460 U.S. 1077 (1983). For full discussion of this case and its aftermath, see Benjamin A. Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279 (1984); CALLIES, *supra* note 1, at 168-69.

[49] KAUAI, HAW., CHARTER art. XXII (1986). In the *Nukoli'i* opinion, the court cited to art. V of the Kauai County Charter. However, art. XXII addresses initiative and referendum.

[50] *Nukoli'i*, 65 Haw. at 322, 653 P.2d at 771.

[51] *Id.* at 321, 653 P.2d at 770.

[52] *Id.* at 333-34, 653 P.2d at 777.

[53] *Id.* at 322, 653 P.2d at 771.

uing.[54] The court first stated that there could be no claim of estoppel until there was reliance on a final discretionary action.[55] In this case the final discretionary action on which the developer could rely was the referendum because it had been certified prior to the final discretionary action under the permit process—the issuing of the SMA use permit.[56] The court therefore rejected the developer's estoppel claim; the developer had proceeded with development prior to the referendum vote at the risk of the zoning ordinance being repealed and at the risk of loss of its investment up to that point.[57]

Despite the lengthy discussion on estoppel, the court did not address the validity of referendum in the planning and zoning process. *Nukoli'i* appears to assume that referenda are appropriate means of effecting zoning code amendments under the law.

In the second case, *Lum Yip Kee v. City & County of Honolulu*,[58] the issue of zoning by initiative was raised briefly. However, the court did not rule on its validity because the Honolulu City Council passed an ordinance essentially the same as that approved by the voters, rendering the issue of ballot box zoning validity moot.[59]

Shortly after *Lum Yip Kee*, the court got its chance to rule on zoning by initiative when it decided *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*[60] (*Sandy Beach*). In *Sandy Beach* the Lum Court seized upon the opportunity to reinforce the importance of the planning process in land use policy which it had stressed in *Lum Yip Kee*.[61] The controversy in Sandy Beach centered around the proposed development of a parcel of land located in Hawai'i Kai. Sandy Beach, a popular surfing and picnic area, is located across the street from the proposed development. The property had been zoned for residential use since 1954. During the permit application process,[62] the public expressed its concern about the impact of the development on Sandy Beach. When

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[54] *Id.* at 326, 653 P.2d at 773.

[55] *Id.* at 328, 653 P.2d at 774 (citing Life of the Land v. City Council, 61 Haw. 390, 606 P.2d 866 (1980) (Marumoto, J.)).

[56] *Id.* at 329-30, 653 P.2d at 775.

[57] *Id.*

[58] 70 Haw. 179, 767 P.2d 815 (1989) (Lum, C.J.).

[59] *Id.* at 181, 767 P.2d at 817.

[60] 70 Haw. 480, 777 P.2d 244 (1989) (Wakatsuki, J.).

[61] *See supra* part II.

[62] The parcel in question required an SMA use permit under the Coastal Zone Management Act (CZMA), HAW. REV. STAT. § 205A (1985). *Sandy Beach*, 70 Haw. at 481-82, 777 P.2d at 245.

the City Council granted the SMA use permit, the public opposition turned into an initiative petition drive which had as its goal the downzoning of the property from residential to preservation.[63]

During the petition drive, the developer sought an injunction to keep the Coalition, a group of citizens formed to prevent the development, from putting the petition on the ballot and a declaration that zoning by initiative constituted an illegal procedure to downzone the property.[64] The circuit court ruled in favor of the developer and issued an injunction.[65] The supreme court stayed the injunction but reserved the right to decide the issue of zoning by initiative at a later date.[66] The Coalition succeeded in putting the proposed initiative ordinance on the ballot, and the voters approved the proposal in the general election in November of 1988.[67] Subsequent to the election, the supreme court held that zoning by initiative was illegal.[68]

The court's reasoning in *Sandy Beach* focused primarily on the policy expressed in the Zoning Enabling Act[69] which "clearly indicates the legislature's emphasis on comprehensive planning for reasoned and orderly development."[70] It held that "zoning by initiative is inconsistent with the goal of long range comprehensive planning."[71] The court distinguished *Sandy Beach* from *Nukoli'i* by declaring that "the court in the Nukolii case was not faced with the issue of whether zoning by referendum is permissible in light of [*Hawaii Revised Statutes* section] 46-4(a)."[72] Therefore, *Nukoli'i* was inapposite.[73]

The Lum Court has decided that the use of initiative to rezone land is not available to voters of Hawai'i under current law because such zoning is inconsistent with long-range planning. It is interesting to note the effect that initiative has had on public officials, however. In both *Lum Yip Kee* and *Sandy Beach*, the City Council amended the zoning ordinances to do what the initiatives were intended to do. If

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[63] *Id.* at 492, 777 P.2d at 246.

[64] *Id.* at 482, 777 P.2d at 246.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* Nevertheless, the City Council did in fact downzone the subject property in accordance with the purpose of the now-illegal initiative vote.

[69] HAW. REV. STAT. § 46-4 (1985).

[70] 70 Haw. at 484, 777 P.2d at 246-47.

[71] *Id.* at 484, 777 P.2d at 247.

[72] *Id.* at 485, 777 P.2d at 248.

[73] *Id.*

the Council was acting in accordance with long-range comprehensive planning when it amended the ordinances, as it must under the Charter, then it is also arguable that the initiative votes were both in accordance with comprehensive plans. Of course, it is the process, and not the results, which is the key. That ballot box zoning may occasionally result in the same decision that the comprehensive planning process might produce is a far different "guarantee" than that the land use decision-making process will always be required to accord with comprehensive planning.

Although initiative is no longer available as a means of rezoning, there is a remote possibility that the applicability of referenda to land use decision making remains unsettled. The court in *Nukoli'i* impliedly approved of referendum as a means to amend the zoning code. However, the Lum Court in *Sandy Beach* cited with approval several mainland referendum cases which struck down referenda on various grounds, including effect on planning, in the course of its decision. Therefore the likelihood of the court's distinguishing between initiative and referendum for land use decision making is remote.[74] What will continue is the court's emphasis on long-range comprehensive planning and the requirement that zoning be based thereon.

In sum, while the Lum Court has clearly removed ballot box zoning from the Hawai'i legal scene, it has done so on narrow, if predictable grounds: illegal damage to Hawai'i's sophisticated land use plans and planning process. However, there are many other bases for striking down ballot box measures which attempt to reclassify property.[75] It

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[74] The court's treatment of the referendum issue in *Nukoli'i* as "inapposite" to the initiative issue in *Sandy Beach* is less convincing given that the issue of the validity of referendum and planning were raised in *Nukoli'i* in the Motion for Reconsideration. Memorandum in Support of Motion for Reconsideration, County of Kauai v. Pacific Standard Life Insurance, 65 Haw. 318, 653 P.2d 766 (No. 8267) (1982). The court denied the motion, though on what grounds is not clear. 65 Haw. 682 (1982). The implication, though, is that the referendum was not subject to attack on grounds of incompatibility with long range planning. If this is so, the court in *Sandy Beach* was actually overruling that part of *Nukoli'i* which implied the validity of the referendum. However, the court did cite with approval both Township of Sparta v. Spillane, 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973), and Leonard v. City of Bothell, 557 P.2d 1306 (Wash. 1976), both referendum cases, from which one would logically conclude that, if confronted with any inconsistency between *Nukoli'i* and *Sandy Beach*, it would in all likelihood reconsider and overrule *Nukoli'i*, even though there are sufficient differences between initiative and referendum in terms of due process for the court to make a distinction.

[75] *See, e.g.*, Callies, Nueffer & Caliboso, *supra* note 46.

would thus be a grave error to assume that simplistic legislative solutions merely creating an exception from the land use planning process for initiative and referendum would result in legal ballot box zoning for Hawai'i.

IV. The Role of Coastal Zone Management Protection Law

A. SMA Permits: Legislative, Quasijudicial, or Something Else?

One of the most troublesome cases to come from the Lum Court is *Sandy Beach Defense Fund v. City Council*.[76] Ostensibly about the granting of an SMA permit under local implementation of the state's Coastal Zone Management Act[77] (CZMA), the case tells a lot about the court's views concerning legislative bodies acting in nonlegislative capacities.

After setting out the process by which the Honolulu City Council grants SMA permits,[78] the court correctly observed that the Hawaii Administrative Procedure Act[79] (HAPA) provides no basis for requiring a contested case hearing since HAPA specifically and categorically exempts legislative bodies from its requirements.[80] It is an unfortunate and myopic exemption for an instance such as the granting of an SMA

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[76] 70 Haw. 361, 773 P.2d 250 (1989) (Lum, C.J.).

[77] Haw. Rev. Stat. § 205A (1985). The Legislature enacted the CZMA in 1977 to provide for the effective planning, management, beneficial use, protection, and development of the coastal zones of the State. For a detailed discussion of the adoption of the CZMA by Hawai'i, see Callies, *supra* note 1.

[78] Space is too short to fully describe the process and the court's reasoning on this issue, but see Lea Oksoon Hong, Recent Development, Sandy Beach Defense Fund v. City & County of Honolulu: *The Sufficiency of Legislative Hearings in an Administrative Setting*, 12 U. Haw. L. Rev. 499 (1990).

[79] Haw. Rev. Stat. § 91 (1985).

[80] Haw. Rev. Stat. § 91-1(1) (1985); *Sandy Beach Defense Fund*, 70 Haw. at 369, 773 P.2d at 256.

The Richardson Court decided a case with facts similar to those in *Sandy Beach Defense Fund*. In Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974) (Kobayashi, J.), the court had to characterize a district designation amendment proceeding. The court held that because the plaintiff, who was an adjacent owner to the parcel in question, had a property interest at stake, the proceeding was properly to be characterized as a contested case proceeding under HAPA. *Id.* at 548, 524 P.2d at 91. Despite the *Town* holding, the court in *Sandy Beach Defense Fund* did not look at the interests claimed to be at stake by appellants. Rather it chose to look only at the exemption which HAPA provides to the City Council as a legislative body. 70 Haw. at 369, 773 P.2d at 256.

permit in which the Honolulu City Council is clearly acting in its quasijudicial, and not its legislative, capacity.[81] However, the court then proceeded, unaccountably, to hold that the CZMA does not require such a contested case hearing either, but merely an informational one.[82] Because the CZMA contemplates that each county will choose its own method of considering SMA permit applications, by designating the City Council—a HAPA-exempt body—as the appropriate body, Honolulu has opted for informational hearings rather than contested case hearings.[83]

It is difficult to follow the court's distinction in *Sandy Beach Defense Fund* of its previous decisions in which neighbor island counties were required to hold contested case hearings for SMA permits.[84] The

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[81] The absurdity of this exemption is evident when one considers—as appellants and Justice Nakamura in dissent did—that SMA permits are considered on the neighbor islands by county planning commissions, not county councils, thereby presumably making HAPA applicable to the SMA process there, but not in Honolulu, purely on the basis of which body doles out the permit!

The exemption becomes even more troublesome when considered in light of Kailua Community Council v. City & County of Honolulu, 60 Haw. 428, 591 P.2d 602 (1979) (Menor, J.). In *Kailua*, the court held that to the extent that the chief planning officer and the planning commission were engaged in purely advisory functions akin to legislative committee work when reviewing applications for amendments to the general plan, their role is part of the legislative process and they are therefore not subject to HAPA requirements, along with the city council. *Id.* at 433-34, 591 P.2d at 606. "To hold otherwise would, by indirection, extend the application of the HAPA to the actions of the city council which by its terms the Act has excluded from operation. [HAW. REV. STAT.] § 91-1(1)." *Id.*

Arguably the court applied a functional approach in *Kailua* to reach its conclusion, which extended the HAPA exemption to government bodies which are executive administrative agencies rather than legislative. In contrast, the *Sandy Beach Defense Fund* court did not look beyond the title of the government body in its analysis. The effect of these two cases is to allow greater freedom to government bodies to act without the procedural safeguards of HAPA.

[82] *Sandy Beach Defense Fund*, 70 Haw. at 373, 773 P.2d at 258.

[83] *Id.* at 372-73, 773 P.2d at 258.

[84] Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982) (Nakamura, J.); Chang v. Planning Comm'n, 64 Haw. 431, 643 P.2d 55 (1982) (Lum, C.J.). In *Chang* the court observed that an "SMA use permit application proceeding was a 'contested case' within the meaning of [HAW. REV. STAT.] chapter 91." *Id.* at 436, 643 P.2d at 60. Also, "[t]he State Coastal Zone Management Act and corresponding planning commission rules specifically make [HAW. REV. STAT.] § 91-9 and planning commission contested case procedures applicable to proceedings on SMA use applications in Maui County." *Id. Mahuiki* involved the Kauai planning commission, and reiterated the observation in *Chang* that an SMA use permit application proceeding

difference is based merely on the fact that in the neighbor island counties it is the planning commissions—which are not HAPA-exempt—which issue the SMA permits rather than the county council.[85]

Protect Ala Wai Skyline v. Land Use and Controls Committee[86] provides another example of the judiciary's approach to the City Council acting in a non-legislative manner. The case involved a challenge to the granting of an SMA use permit by the Honolulu City Council.[87] The I.C.A. concluded that the incorporation of the specific findings in a committee report, rather than in the resolution issuing the permit, did not violate the CZMA.[88] Although this decision may be seen as procedurally based, it does reflect the policy that when the Honolulu City Council acts in a non-legislative function, such as the issuing of permits, different standards will apply to these functions.

Hopefully, the court will find an early opportunity to revisit the legislative/quasijudicial issue. The distinction which it has so far espoused leads to differences in results among the four counties for the self-same permitting process, based almost solely on the nature of the body considering the permit, rather than the nature of the process and the permit. Whatever the result, the Lum Court's construction of HAPA and the CZMA requirements has been strict. And, as the discussion below indicates, strict construction is something the court does consistently.

B. SMA Permits and Process: Strict Construction of Procedural Requirements

Both the Hawaii Supreme Court and the I.C.A. have had opportunity to construe the procedural requirements of the CZMA, and specifically, the granting of SMA permits. Both have chosen to construe the CZMA strictly, thereby giving effect to legislative intent.

In *Hui Alaloa v. Planning Commission of the County of Maui*,[89] the Maui Planning Commission issued two SMA use permits under the CZMA for the construction of a 150-unit condominium project and development of a nearby beach park facility and access road on the island of

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was a contested case hearing under HAPA. *Mahuiki*, 65 Haw. at 513, 654 P.2d at 879.

[85] *Sandy Beach Defense Fund*, 70 Haw. at 373, 773 P.2d at 258-59.

[86] 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).

[87] *Id.* at 542, 735 P.2d at 952.

[88] *Id.* at 546, 735 P.2d at 955.

[89] 68 Haw. 135, 705 P.2d 1042 (1985) (Wakatsuki, J.).

Moloka'i.[90] The Planning Commission issued both permits, after holding contested case and public hearings, on the condition that the developer undertake further archaeological survey and excavation.[91]

The court vacated the permits[92] because the Planning Commission had failed to meet the procedural requirements of the CZMA:[93] the county agency authorized to issue permits must *first* find the proposed development consistent with the objectives and policies of the act;[94] it could not issue them when further study was needed to determine if the objectives of the CZMA would be met.[95]

In *Hui Malama Aina O Ko'olau v. Pacarro*,[96] the I.C.A. held that the developer fell outside the requirements of the CZMA due to a grandfather clause included in a 1975 legislative act.[97] There, a community organization attempted to prevent the development of a 164-unit town house project on the windward coast of O'ahu.[98] The Honolulu City Council approved the planned development in an ordinance adopted on July 21, 1975.[99] The ordinance contained a time-limit clause which provided that failure to secure building permits within one year of adoption of the ordinance "may" constitute grounds for the City Council to repeal the ordinance.[100] However, upon timely request by the applicant, the City Council had the option of granting an extension of time.[101] The appellant argued that the CZMA had been violated because an SMA use permit was required before the Council could approve the extension of time.[102] The I.C.A. held that the developer

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[90] *Id.* at 135-36, 705 P.2d at 1043.

[91] *Id.* at 136-37, 705 P.2d at 1044.

[92] *Id.* at 138, 705 P.2d at 1045.

[93] HAW. REV. STAT. § 205A (1985).

[94] *Hui Alaloa*, 68 Haw. at 137, 705 P.2d at 1044. Policies include identifying and analyzing significant archaeological resources; maximizing information retention through preservation of remains and artifacts or salvage operations; and supporting state goals for protection, restoration, interpretation, and display of historic resources. *Id.* at 136, 705 P.2d at 1044.

[95] *Id.*

[96] 4 Haw. App. 304, 666 P.2d 177 (1983) (Burns, C.J.).

[97] *Id.* at 319-20, 666 P.2d at 187 (construing Act 176, § 3, 1975 Haw. Sess. Laws 389).

[98] *Id.* at 305, 666 P.2d at 179.

[99] *Id.*

[100] *Id.* at 306, 666 P.2d at 179.

[101] *Id.*

[102] *Id.* at 318-19, 666 P.2d at 186. CZMA provides that "no agency authorized to

was exempt from this requirement under the "grandfather clause" contained in section 3 of Act 176:[103] "[t]his part shall not apply to developments or structures for which a building permit, planned development permit, planned unit development permit or ordinance, or special permit for cluster development was issued prior to December 1, 1975."[104] The court did not accept appellant's argument that "developments" refers to "actual developments" and not to some conceptual proposal or plan.[105] It concluded that the "natural and most obvious import of the grandfather clause is that the requirements of the Hawaii CZM Act are not applicable to any development, existing or planned."[106]

C. Summary

The court's treatment of the CZMA has been one of strict construction. It has lead to certain inconsistencies, some of which are arguably of the court's making, while others appear to be inherent in the CZMA itself. For example, the court has strictly construed HAPA and the CZMA so as to insulate legislative bodies from their requirements. This results in further ramifications from inconsistency in treatment of government bodies built into the statutes themselves. The counties have the choice to be exempt from the procedural safeguards usually afforded when administrative/quasijudicial bodies make decisions. In this area, the court has taken a non-activist, strict constructionist role, leaving the decision to deal with the inconsistency for the legislature. Arguably, that is where it belongs.

V. Standing

A hallmark of the Richardson years was the clear and unmistakable broadening of the standing rights of citizens and citizens' groups before administrative agencies, especially where environmental interests were concerned.[107] As the Richardson Court in *Mahuiki* declared: "[W]here

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issue permits pertaining to any development within the special management area shall authorize any development unless approval is first received in accordance with the procedures adopted pursuant to this part." Haw. Rev. Stat. § 205A-29(b) (1985).

[103] Act 176, § 3, 1975 Haw. Sess. Laws 389.

[104] 4 Haw. App. at 319, 666 P.2d at 186.

[105] *Id.* at 319-20, 666 P.2d at 186-87.

[106] *Id.* at 320, 666 P.2d at 187.

[107] *See, e.g.*, Mahuiki v. Planning Comm'n of Kauai, 65 Haw. 506, 654 P.2d 874

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(1982) (Nakamura, J.). In *Mahuiki*, a developer sought permission from Kauai Planning Commission to develop property subject to CZMA regulations. *Id.* at 508, 654 P.2d at 876. In response to requests for testimony on developer's request for necessary permits for the project, objections were voiced orally and in writing regarding the project's adverse environmental consequences. *Id.* at 509, 654 P.2d at 876-77. Two of the appellants submitted a written response to the request. *Id.* at 509, 654 P.2d at 877. After "qualified endorsement" of the project by the Planning Director, the Commission granted the permits with conditions, despite reservations by several of the commissioners. *Id.* at 511, 654 P.2d at 877-78. Appellants appealed to Fifth Circuit Court under *Hawaii Revised Statutes* section 91-14, which allows any person "aggrieved by a final decision and order in a contested case" to invoke judicial review. *Id.* at 513, 654 P.2d at 879. Circuit Court dismissed the appeal on the ground that appellants had not participated in the administrative proceedings. *Id.* Upon review, the court set forth the following "guiding tenet": "where the interests at stake are in the realm of environmental concerns 'we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'" *Id.* (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

The court, having no difficulty determining that there was a final decision and order in a contested case, then had to decide whether appellants had shown that "their interests were injured and they were involved in the administrative proceedings that culminated in the unfavorable decision." *Id.* at 514-15, 654 P.2d at 879-80. The interests involved here were "essentially aesthetic and environmental in character," which the court had previously recognized as sufficient to confer standing when such interests are "personal" and "special", or when there is a property interest involved. *Id.* at 515, 654 P.2d at 880 (citing Life of the Land, Inc. v. Land Use Comm'n, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979) (Richardson, C.J.)). The court found personal and special interests at stake, since the development would negatively impact the environment in the area in which the appellants lived. *Id.* As for involvement in a contested case hearing, the court stated that it had not "conditioned standing to appeal from an administrative decision 'upon formal intervention in the agency proceeding.'" *Id.* (quoting Jordan v. Hamada, 62 Haw. 444, 449, 616 P.2d 1368, 1371 (1980) (Nakamura, J.)). "Participation in a hearing as an adversary . . . has been held sufficient to give rise to appeal rights . . . ." *Id.* (quoting *Jordan*, 62 Haw. at 449, 616 P.2d at 1372). Since two of the appellants had written a letter that was a part of the record, the adversary participation requirement was satisfied, and standing to challenge the Commission decision was conferred on appellants (at least the two that wrote the letter). *Id.* The court then went on to find that the Commission had not complied with the requirements of the CZMA and, therefore, the case was remanded. *Id.* at 516-20, 654 P.2d at 880-83.

Mahuiki continued a line of cases by the Richardson Court which extended standing rights. In Dalton v. City & County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969) (Kobayashi, J.), the court conferred standing on individuals who lived across the street from a proposed high rise development and who wished to challenge a general plan amendment. *Id.* at 403, 462 P.2d at 202. Because the development would result in

have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'"[108] The Lum Court retreats not an iota from this position in the two land use cases which raised the issue most prominently: *City & County of Honolulu v. F.E. Trotter, Inc.*[109] and *Kona Old Hawaiian Trails Group v. Lyman.*[110]

In *Kona Old Hawaiian Trails*, the court held that parties may have standing to pursue a land use case, even if the particular controversy is moot, provided there is a public interest question to be resolved.[111] The case arose over the challenge to the granting of an SMA permit by the County of Hawaii's Planning Commission under the authority of the State CZMA[112] for the construction of a roadway and installation of utility lines pursuant to a four-lot residential planned unit development.[113] Kona Old Hawaiian Trails, a group of Kona residents formed to protect ancient trails and access routes, objected and sought judicial review of the permit issuance.[114] It claimed that the public trust had been violated and that procedures required by the CZMA and by HAPA had not been followed.[115] The owners, having finished the work under a valid permit and having sold the property, sought dismissal of the suit on the ground that the controversy was now moot.[116]

"restricting the scenic view, limiting the sense of space and increasing the density of population," the court held that this was a "concrete interest" in a "legal relation" so as to give standing. *Id.*

In East Diamond Head Ass'n v. Zoning Board of Appeals, 52 Haw. 518, 479 P.2d 796 (1971) (Kobayashi, J.), the court granted standing to a private unincorporated organization consisting of individuals who owned or resided upon land neighboring the parcel which was the subject of a zoning variance proceeding. The court stated that the appellants in this case asserted the same rights as those in *Dalton*; that is, "an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change." *Id.* at 521-22, 497 P.2d at 798.

[108] Mahuiki v. Planning Comm'n of Kauai, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982) (Nakamura, J.) (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

[109] 70 Haw. 18, 757 P.2d 647 (1988) (Lum, C.J.).

[110] 69 Haw. 81, 734 P.2d 161 (1987) (Nakamura, J.).

[111] *Id.* at 87, 734 P.2d at 165.

[112] HAW. REV. STAT. § 205A (1985), which implements the federal CZMA and for which the State of Hawaii has been exceedingly well-paid.

[113] *Kona Old Hawaiian Trails*, 69 Haw. at 84, 734 P.2d at 164.

[114] *Id.*

[115] *Id.* at 86, 734 P.2d at 164-65.

[116] *Id.* at 86, 734 P.2d at 165.

The court, in a unanimous opinion by Justice Nakamura, found nevertheless that the suit "retains vitality."[117] While the court noted that there was still some construction left to be done, it nevertheless observed that

> even if all of the work sanctioned by the two permits is finished, a basis for the exercise of our appellate jurisdiction remains. For we recognize that in exceptional situations mootness is not an obstacle to the consideration of an appeal. . . . We think the situation would call for the exercise of our appellate jurisdiction even if there is no more work to be done under the minor permit. The questions posed here are of public concern and, even if they recur in the future, are of a nature that would be as likely as not to become moot before they could be determined on appeal.[118]

Although standing was conferred upon Kona Old Hawaiian Trails, it eventually lost the appeal. The court determined that first of all, Kona Old Hawaiian Trails had failed to avail itself of the opportunity for an agency hearing on SMA permits provided by Hawaii County Charter.[119] Thus it had deprived itself, and the court, of a final decision or order in a contested case hearing[120] which would otherwise have been reviewable under HAPA.[121] Second, it could not avail itself of the CZMA provision allowing "any person . . . [to] commence a civil action alleging that any agency" has breached the CZMA[122] because, until that matter had been appealed to the county zoning board of appeals, it was not a judicial action of which the court could be cognizant for lack of exhaustion of administrative remedies.[123] In sum, as the court itself observed, Kona Old Hawaiian Trails failed because of the timing of its appeal in the administrative process, not because of any standing or aggrieved party problems.[124]

This broad approach to the open court room door was affirmed by Chief Justice Lum in the unanimously decided opinion of *City & County of Honolulu v. F.E. Trotter, Inc.*[125] There the court held that a private

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[117] *Id.* at 87, 734 P.2d at 165.
[118] *Id.* at 87-88, 734 P.2d at 165-66.
[119] HAWAII, HAW., CHARTER art. V, § 5-4.3 (1980).
[120] *Kona Old Hawaiian Trails*, 69 Haw. at 92, 734 P.2d at 168.
[121] HAW. REV. STAT. § 91-14(a) (1985).
[122] HAW. REV. STAT. § 205A-6 (1985).
[123] 69 Haw. at 93-94, 734 P.2d at 169.
[124] *Id.*
[125] 70 Haw. 18, 757 P.2d 647 (1988) (Lum, C.J.).

landfill operator was able to challenge a taking by the City and County of Honolulu of property for a landfill, even though the operator had only an unrecorded lease in the premises which terminated upon condemnation. The court stated:

> A party has standing if he alleges such a personal stake in the outcome of the controversy that the court should exercise its remedial powers on his behalf. [The landfill operator] has a personal interest in the outcome because it is an unrecorded lessee of the property being condemned. Thus, [it] has standing to challenge the validity of the taking.[126]

The court, however, refused to grant the operator relief because it had not yet commenced any operations on the subject property, and had no city permits to do so.[127]

I.C.A. decisions have not uniformly applied the standing rule developed in the Richardson Court and upheld under Chief Justice Lum. In *Waikiki Discount Bazaar v. City & County*,[128] the I.C.A. found Waikiki Discount did not have standing because it failed to make the requisite showing to support its allegations.[129] Waikiki Discount alleged, inter alia, that (1) Hemmeter Center Company had persuaded Waikiki Discount to terminate their lease and had subsequently defaulted on an agreement to provide retail space and (2) the City and County illegally and knowingly allowed Hemmeter to violate certain Comprehensive Zoning Code requirements and fire regulations.[130] A member of the public may sue to enforce the rights of the public if he can show that he has suffered an injury in fact.[131] The plaintiff must show that (1) he has suffered actual or threatened injury as a result of the defendant's alleged illegal conduct; (2) the injury can be traced to the challenged action; and (3) the injury is likely to be remedied by a favorable decision.[132] This dispute did not concern an environmental issue and so the court was not required to apply the standing rule

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[126] *Id.* at 20-21, 757 P.2d at 649 (citing Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (Nakamura, J.)).

[127] *Id.* at 22, 757 P.2d at 650.

[128] 5 Haw. App. 635, 706 P.2d 1315 (1985) (Burns, C.J.).

[129] *Id.* at 641, 706 P.2d at 1320.

[130] *Id.* at 640-41, 706 P.2d at 1319.

[131] *Id.* at 641, 706 P.2d at 1319 (citing Akau v. Olomana Corp., 65 Haw. 383, 652 P.2d 1130 (1982) (Richardson, C.J.)).

[132] *Id.* at 641, 706 P.2d at 1319-20 (citing Akau v. Olomana, 65 Haw. 383, 389, 652 P.2d 1134, 1135 (1982)).

liberally. The situation in *Protect Ala Wai Skyline v. Land Use and Controls Committee*[133] presented an environmentally related dispute in which the standing of the appellants was an issue.

In *Protect Ala Wai Skyline*, the I.C.A. applied the liberal standing rule for environmental concerns. The I.C.A. held that appellee's argument that appellant lacked standing was without merit.[134] Appellee asserted that because appellant had not incorporated until after the Honolulu City Council granted the SMA use permit, appellant could not raise the permit issue.[135] The I.C.A. decided that if appellant was not granted standing, the two individuals who had extensively involved themselves from the beginning would be denied the opportunity to show that the permit was illegal.[136]

However, in *Pele Defense Fund v. Puna Geothermal*,[137] the I.C.A. held that appellants had no standing to raise a due process issue because appellants had not shown any injury.[138] In this case the appellants appealed the Hawaii County Planning Commission's award of a geothermal resource permit claiming it was invalid due to violation of their due process rights.[139] Appellants argued that the rule providing that a reasonable attempt to notify residents within one thousand feet of the geothermal project's boundaries did not meet minimum due process requirements because it was not large enough to cover everyone who might suffer injury to property or health from the project.[140]

> Persons seeking to challenge an agency's rule that an applicant for a geothermal development permit must make a reasonable attempt to give notice of a public hearing on its application to residents beyond 300 feet but within 1000 feet of the perimeter of the project's boundaries on the ground that the rule is facially inadequate because the geothermal development activity has the potential to affect property and human health over large areas of the region, but who have not shown they have been injured by the rule, have no standing to raise the issue.[141]

The court did not use lack of standing to justify dismissal of appellants' other arguments;[142] however, this decision does seem to

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[133] 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).
[134] *Id.* at 543, 735 P.2d at 953.
[135] *Id.*
[136] *Id.* at 544, 735 P.2d at 953.
[137] 8 Haw. App. 203, 797 P.2d 69 (1990) (Heen, J.).
[138] *Id.* at 211, 797 P.2d at 73.
[139] *Id.* at 210, 797 P.2d at 73.
[140] *Id.* at 211, 797 P.2d at 73.
[141] *Id.* at 204, 797 P.2d at 70.
[142] *Id.* at 209-10, 797 P.2d at 72. Appellants claimed that HAW. REV. STAT. § 205-

move away from the broad rule of standing.

The Lum Court has chosen to continue to allow broad standing to seek judicial review of agency decisions in cases of environmental concern. Although this appears to be a victory for environmental groups, as the following discussion of administrative decisions and agencies shows, having the opportunity to challenge agency decisions in court is not likely to result in their being overturned since the Lum Court holds fast to a policy of deference to agency decisions.

VI. Administrative Decisions and Agencies

The Lum Court has continuously expressed the view that the decisions of administrative agencies and officials are presumptively correct, and cannot be set aside unless the entire record shows them to be clearly erroneous in view of reliable, probative and substantial evidence.[143] Although the court liberally interprets standing requirements in environmental actions,[144] it does not extend this policy to administrative decisions affecting environmental issues.

Stop H-3 Association challenged the Board of Land and Natural Resources' granting of a conservation district use permit to the State Department of Transportation.[145] The permit allowed for construction of an interstate highway through a conservation district.[146] The court noted that it would not allow an administrative decision to stand if application of the regulation would achieve a statutorily impermissible end.[147] However, the court held that *Hawaii Revised Statutes* section 183-41(c)(3) authorized the Department of Land and Natural Resources to permit land utilizations that are not detrimental to the conservation of necessary forest growth, the conservation and development of adequate

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5.1, which authorizes the issuance of geothermal permits, violated their due process rights. *Id.* The court held that the statute had already been found to comply with all constitutional requirements. *Id.* (citing Medeiros v. Hawaii County Planning Comm'n, 8 Haw. App. 183, 797 P.2d 59 (1990) (Heen, J.)).

[143] Stop H-3 Ass'n v. Dep't of Transportation, 68 Haw. 154, 706 P.2d 446 (1985) (Lum, C.J).

[144] *See supra* part V.

[145] *Stop H-3 Ass'n*, 68 Haw. at 155, 706 P.2d at 448.

[146] *Id.* at 156, 706 P.2d at 448.

[147] *Id.* at 161, 706 P.2d at 451 (citing Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981)).

water resources for present and future needs, and the conservation and preservation of open spaces for the public use and enjoyment.[148] The court accepted the Board of Land and Natural Resources' findings that the highway would have significant effects on the conservation district but would not be injurious to forest growth, water resources, and open spaces.[149] The court concluded that the contesting party had failed to meet its burden of showing the Board's findings of fact to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.[150]

The statutory interpretation practiced by the court strengthens the deference shown to an administrative agency's decision. The court has stated that its primary duty in interpreting statutes is to give effect to the legislature's intent which, in the absence of a clearly contrary expression, is conclusively obtained from the language of the statute itself.[151] The court applied this rule very precisely in *Maha'ulepu v. Land Use Commission*.[152]

In *Maha'ulepu*, the dispute involved the issuance of a special use permit by the Kauai county planning commission for the construction of a golf course on prime agricultural land.[153] The appellants raised two issues on appeal: (1) whether *Hawaii Revised Statutes* section 205, as amended by Act 298,[154] authorized the Land Use Commission and the county planning commission to issue special use permits for golf courses on agricultural B lands;[155] and (2) whether the planning commission committed procedural irregularities which deprived appellant of a full and fair hearing.[156] The supreme court gave the decision of

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[148] *Id.*

[149] *Id.* The Board of Land and Natural Resources, also known as the Land Board, acts in executive fashion as a "director" does in other state agencies, but in addition has quasijudicial functions as well, particularly with respect to permitting uses on both public and private lands classified under the state land use law by the Land Use Commission in the Conservation District. For further discussion of both the Land Board and Land Use Commission statutory duties and activities see BOSSELMAN & CALLIES; CALLIES; MANDELKER AND MYERS, all *supra* note 1.

[150] *Stop H-3 Ass'n*, 68 Haw. at 161-62, 706 P.2d at 451-52.

[151] *Id.* at 161, 706 P.2d at 451.

[152] 71 Haw. 332, 709 P.2d 906 (1990) (Lum, C.J.); *see also* Douglas K. Ushijima, Note, 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*, 13 U. HAW. L. REV. 205 (1991).

[153] *Maha'ulepu*, 71 Haw. at 334-35, 709 P.2d at 907-08.

[154] 1985 Haw. Sess. Laws 298.

[155] *Id.* at 333-34, 709 P.2d at 907.

[156] *Id.* at 339, 709 P.2d at 910.

the agencies wide latitude in its holding. The court held that statutes should be read as being in accord, and not in conflict, with each other.[157] Further, the court noted that it does not support repeals by implication so that wherever possible an earlier statute should be presumed to remain in force, and not repeal a later statute.[158] Related to the second issue, the court held that deference should be accorded to an administrative agency's interpretation of its own procedural rules unless the decision is clearly erroneous or inconsistent with underlying legislative purposes.[159]

The I.C.A. appears to follow the lead of the Hawaii Supreme Court in its reluctance to overturn administrative agency decisions related to land use and zoning. Actions brought contesting administrative decisions usually result in judgment for the agency, even where the agency's actions constituted illegal procedure. *Outdoor Circle v. Harold K.L. Castle Trust Estate*[160] exemplifies this point.[161]

In *Outdoor Circle*, the I.C.A.'s opinion stressed the presumption of validity accorded to decisions of administrative bodies acting within their sphere of expertise. A party challenging a decision carries a heavy burden because the challenging party must show that the order is

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[157] *Id.* at 337-38, 709 P.2d at 909.

[158] *Id.*

[159] *Id.* at 339, 709 P.2d at 910.

[160] 4 Haw. App. 633, 675 P.2d 748 (1983) (Tanaka, J.), *cert. denied*, 67 Haw. 1, 677 P.2d 965 (1984) (per curiam).

[161] Chang v. Planning Comm'n of County of Maui, 64 Haw. 431, 643 P.2d 55 (1982) (Lum, J.), also illustrates this point. In *Chang* a resident appealed the decision by the Maui Planning Commission to grant an SMA use permit for the development of a condominium project. *Id.* at 432-33, 643 P.2d at 58. The challenge focused on the Planning Commission's failure to adhere to the notice and open deliberations requirements of HAPA, *Hawaii Revised Statutes* chapter 92, Planning Commission Rules, and the County Charter. While agreeing that the Commission had not followed the exact notice requirements of HAPA § 91-9, the court nevertheless stated that "while the planning commission may have committed a technical statutory violation in its published notices, appellant cannot be heard to complain of harm or injustice caused thereby as he subsequently received ample notice . . . ." *Id.* at 440, 643 P.2d at 62. The court further determined that the Commission had carried on closed deliberations in contravention of planning commission rules and the Maui County Charter. *Id.* at 443-44, P.2d 643 at 64. Still, this did not entitle appellant to voidance of the SMA use permit because "appellant has failed to allege or otherwise establish that his substantial rights may have been prejudiced by the commission's closure of deliberations." *Id.* at 444, 643 P.2d at 65. The court placed the burden on the person challenging the closed deliberation to allege impropriety during the its course, a difficult task. *Id.*

unjust and unreasonable in its consequences. Even a procedural violation on the part of the agency may not lighten this burden.

In *Outdoor Circle* the State Department of Planning and Economic Development (D.P.E.D.) filed a petition with the Land Use Commission (L.U.C.) requesting reclassification of approximately 244 acres from urban to conservation land.[162] After conducting the required prehearing conference and public hearings pursuant to *Hawaii Revised Statutes* section 205-4(e)(1), the L.U.C. denied the petition.[163] D.P.E.D. appealed the L.U.C.'s decision and appellants were allowed to intervene in the action.[164] The L.U.C. claimed that after accepting the final version of the findings of fact and voting to deny D.P.E.D.'s petition at open meetings, its adjudicatory functions were concluded.[165] The work remaining was simple "housekeeping chores" which were not adjudicatory functions requiring any further open meetings; therefore, the L.U.C. declared that it had not violated the Sunshine Law.[166] The I.C.A. did not agree with the L.U.C.'s interpretation of its functions as non-adjudicatory.[167] However, because an agency decision is voidable only "upon proof of wilful violation" of the Sunshine Law,[168] the I.C.A. upheld the L.U.C. decision despite the statutory non-compliance of the decision process.[169] The I.C.A. also discussed the standard of review for an appellate court reviewing a circuit court's review of an administrative agency's decision[170] and concluded that the "right/wrong" standard should replace the previous standard of clearly erroneous.[171] The supreme court agreed with the result and reasoning of the court

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[162] *Outdoor Circle*, 4 Haw. App. at 635-36, 675 P.2d at 787 (1983); see generally CALLIES, *supra* note 1, for a description of the land classification process of the Land Use Commission.

[163] 4 Haw. App. at 637, 675 P.2d at 788.

[164] *Id.*

[165] *Id.* at 641, 675 P.2d at 791.

[166] *Id.* HAW. REV. STAT. ch. 92, codifies the Hawaii Sunshine Law. The policy and intent behind the Sunshine Law is to open up the governmental processes to public scrutiny and participation as the only viable and reasonable method of protecting the public's interest. HAW. REV. STAT. § 92-1. Under § 92-3 "[e]very meeting of all boards shall be open to the public and persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5." *Id.* § 92-3 (1985).

[167] 4 Haw. App. at 642, 675 P.2d at 791.

[168] *Id.* (quoting HAW. REV. STAT. § 92-11 (1976)).

[169] *Id.*

[170] *Id.* at 638, 675 P.2d at 789.

[171] *Id.* at 640, 675 P.2d at 790.

below and denied appellants' writ of certiorari.[172] The supreme court did not address the question of the proper standard of review because under either standard the evidence supported the circuit court's decision.[173]

In *Kilauea Neighborhood Ass'n v. Land Use Commission*,[174] the I.C.A. again stressed the presumption of validity attached to an administrative agency's decision and the heavy burden carried by a party seeking to void the decision.[175] In this case, the appellee filed a petition with the L.U.C. requesting reclassification of approximately twenty-eight acres in Kaua'i from agricultural to urban to allow for development of the land for light industrial use.[176] The L.U.C. approved reclassification of fifteen acres.[177] The appellants claimed that the L.U.C.'s findings of fact and conclusions of law did not meet the statutory requirements of *Hawaii Revised Statutes* section 205-4 which outlines the procedures to be followed in amending district boundaries.[178] The I.C.A. found that although the L.U.C.'s findings were poorly drawn, the record sufficiently supported its decisions.[179] The I.C.A. noted that an agency's findings of fact are reviewable for clear error while its conclusions of law are freely reviewable.[180] The I.C.A. emphasized that where an appellant claims the trial court failed to make adequate findings of fact, the appellate court will examine the entire record to determine whether the findings are (1) supported by the evidence, and (2) sufficiently comprehensive and pertinent to the issues in the case to form a basis for the conclusions of law.[181]

In *Protect Ala Wai Skyline v. Land Use & Controls Committee*[182] the appellant conceded that although the project in question generally complied with the General Plan's policy of maintaining the viability of O'ahu's visitor industry, the project conflicted with the General Plan

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[172] *Outdoor Circle*, 67 Haw. 1, 3, 677 P.2d 965, 965 (1984).

[173] *Id.*

[174] 7 Haw. App. 227, 751 P.2d 1031 (1988) (Heen, J.).

[175] *Id.* at 230, 751 P.2d at 1034.

[176] *Id.* at 229, 751 P.2d at 1033.

[177] *Id.*

[178] *Id.* at 230, 751 P.2d at 1034.

[179] *Id.* at 233, 751 P.2d at 1035.

[180] *Id.* at 229, 751 P.2d at 1034 (citing Protect Ala Wai Skyline v. Land Use & Control Comm., 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.)).

[181] *Id.* at 233, 751 P.2d at 1035 (citing Nani Koolau Co. v. K & M Construction, Inc., 5 Haw. App. 137, 140, 681 P.2d 580, 584 (1984) (Heen, J.)).

[182] 6 Haw. App. 540, 735 P.2d 950 (1987) (Heen, J.).

in its policies of prohibiting major increases in densities and further growth in Waikiki, and preserving O'ahu's beauty, natural environment, and scenic views.[183] The court found this argument to be without merit.[184] The court held that "[t]he Council's interpretation of the General Plan is to be given deference unless plainly erroneous or inconsistent with the underlying legislative purpose."[185] The court deferred to the City Council's interpretation because of the Council's frequent use and familiarity with the General Plan.[186]

The Lum Court tends to defer to the administrative agencies (and legislative bodies acting in nonlegislative capacities) making land use decisions and to interpret statutory language as broadly as necessary in order to uphold an agency's decision. A party appealing an agency's decision has a considerable burden to overcome. This is consistent with the court's deference to other branches of government and not inconsistent with common judicial practice of placing the burden on those who would challenge governmental action, particularly absent claims involving civil rights and others calculated to protect minority rights. Since government in theory represents the people who elect it, it is not surprising that the burden falls on a litigant which challenges that presumption, other things being equal.

VII. Zoning Boards and Variance

It is standard practice for those local governments which exercise the power to zone to also provide for the varying of the requirements of a zoning ordinance upon a showing of a land-use related hardship by a petitioner. Usually this is accomplished by an administrative body called a zoning board of appeals or board of adjustment.[187] While such variances and boards are usually provided for in zoning enabling statutes, in Hawai'i such authority is usually set out in county charters. So it is with Honolulu, whose charter grants the authority specifically to a zoning board of appeals.[188]

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[183] *Id.* at 547, 735 P.2d at 955.

[184] *Id.*

[185] *Id.* at 547-48, 735 P.2d at 955 (citing Int'l Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 713 P.2d 943 (1986) (Padgett, J.)).

[186] *Id.* at 548, 735 P.2d at 955.

[187] Callies, *supra* note 1, at 41; Mandelker, *supra* note 22, at § 6.36.

[188] Honolulu, Haw., Charter § 6-909 (1984). The mayor of the City and County of Honolulu has, with the approval of the City Council, "reallocated" such power to

The Lum Court has been sharply critical of the zoning variance process as exercised by the zoning board of appeals (Z.B.A.). In *McPherson v. Zoning Board of Appeals*,[189] the Z.B.A. granted a variance to the owner of agriculturally-zoned land to enlarge a nonconforming use of the premises for a piggery in a zone which prohibited such use altogether.[190] The court reversed and remanded the decision of the Z.B.A.[191] principally because the Z.B.A. failed to make required findings of fact to support the granting of the variance,[192] as required by the Charter, a common complaint about Z.B.A.s generally.[193]

The court noted that the Charter requires the showing of unnecessary hardship upon a showing that the applicant would be otherwise deprived of the reasonable use of land or building, that the request for the variance is due to unique circumstances not common to the rest of the neighborhood, and that the grant of the variance will not alter the essential character of the locality nor be contrary to the intent and purpose of the zoning ordinance.[194] Applying the requirements, the court observed, first, that "the record however is devoid of any evidence that the appellant could not make reasonable use of the land or buildings in conformity with the AG-1 (Restricted Agricultural district) zoning or her preexisting nonconforming use."[195]

As to the uniqueness of appellant's circumstances, the court called it questionable that the violation of the ordinance could, as the Z.B.A. suggested, be a unique circumstance as a matter of law, and that "in our view, the conclusion of law is not supported by the facts in the record."[196] Finally, the court questioned whether, from the record, the essential character of the neighborhood was altered by the vastly increased numbers in the piggery and whether the zoning ordinance intent was adversely affected by permitting by variance what was

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grant variances to the Director of the Department of Land Utilization, under a general charter provision granting him the power to reallocate functions among departments. It is the position of the authors, however, that such reallocation power does not apply to specific grants of power under the Charter. The matter is now under consideration by the City Charter Revision Commission during its decennial deliberations.

[189] 67 Haw. 603, 699 P.2d 26 (1985) (Padgett, J.).

[190] *Id.* at 603, 699 P.2d at 26.

[191] *Id.* at 607, 699 P.2d at 29.

[192] *Id.*

[193] *See, e.g.*, CALLIES & FREILICH, *supra* note 19, at ch. 2.

[194] 67 Haw. at 605, 699 P.2d 28 (citing HONOLULU, HAW., CHARTER § 6-909 (1984)).

[195] *Id.* at 606, 699 P.2d at 28.

[196] *Id.*

purposely excluded as a use in AG-1 and relegated to AG-2 (General Agricultural district).[197] The Board was directed upon remand to hold new hearings to permit the parties to introduce relevant evidence in connection with the aforementioned charter criteria for granting variances.[198]

The case indirectly raises the issue of whether use variances are in any set of circumstances appropriate, leaving the Z.B.A. only with the power to vary the terms of a zoning ordinance to permit area or bulk variances. What kind of evidence would justify a use contrary to that permitted under a zone classification? Is there any land-use related hardship that is comparable to or less damaging to the neighborhood than, say, the varying of a front or side yard by a few inches or a minimum lot area requirement by a few feet in order to permit construction of an otherwise permitted use? The state of California amended its statute in 1970 to virtually eliminate use variances largely because of these problems.[199]

The court also has decided that the Z.B.A. has no authority to hear building permit appeals, even if they deal tangentially with zoning matters. In *Swire Properties (Hawaii), Ltd. v. Zoning Board of Appeals*,[200] the court ruled that the decision of the Honolulu Director of the Department of Land Utilization that certain ridgeline property owners were not protected by a view protection ordinance "must stand" since the Z.B.A. lacked jurisdiction under the Charter for the City and County of Honolulu to hear the appeal.[201] The Charter restricts the Z.B.A.'s appeals to decisions of the Department of Land Utilization (D.L.U.) Director in the administration of the zoning and subdivision ordinances only.[202] The court's characterization of the facts also makes it clear that the court was disenchanted with the Z.B.A. reversal of the D.L.U. Director[203] given that the Charter requires that the Z.B.A. must first find that the Director acted in an arbitrary or capricious

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[197] *Id.*

[198] *Id.* at 607, 699 P.2d at 29.

[199] *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 n.5 (1974).

[200] No. 90-1212, slip op. (Haw. Feb. 27, 1992).

[201] *Id.* at 7.

[202] *Id.* at 4.

[203] The Director of the Department of Land Utilization is responsible for the administration of the Honolulu Land Use Ordinance (LUO) and the Subdivision Code. HONOLULU, HAW., CHARTER § 6-909 (1984).

manner, or had manifestly abused his discretion or had acted on an erroneous finding of material fact.[204]

In *Foster Village Community Ass'n v. Hess*,[205] the I.C.A. faced a novel question of whether a pig is a pet and thus permitted as an accessory use[206] and the question of whether a decision on that issue by the Z.B.A. is a rule-making function.[207] Chun, the owner of the pig, was informed by the Honolulu Building Department that she was in violation of the Comprehensive Zoning Code (CZC) and must get rid of her pet.[208] The D.L.U. decided that Chun was not in violation of the CZC and did not seek a variance.[209] The neighborhood board appealed the decision and demanded a hearing in front of the Z.B.A.[210] The Z.B.A. affirmed the decision of the D.L.U. holding that the D.L.U. had not acted arbitrarily or capriciously in determining that the pig was a pet.[211] The appellants appealed the decision arguing that the D.L.U. and the Z.B.A. engaged in "rule-making."[212] However, the court held that D.L.U. and the Z.B.A. were engaged in an adjudicative function and not rule-making function.[213] Therefore the decision was not invalid for failure of the agency to meet the procedural requirements for performing its rule-making function within the meaning of HAPA.[214] The court noted the difficulty in distinguishing between the rule-making and the adjudication functions, particularly where statutory language is unclear.[215]

In sum, the court has been critical of the activities of the zoning board of appeals from a variety of perspectives. This is not unusual for such citizen administrative bodies which are often confused concerning their role and the strict legal standards under which they carry out their functions. However, the alternative is giving the "relief valve"

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[204] HONOLULU, HAW., CHARTER § 6-909 (1973).

[205] 4 Haw. App. 463, 667 P.2d 850 (1983) (Heen J.), *cert. denied*, 66 Haw. 681 (1983)).

[206] *Id.* at 464, 667 P.2d at 851.

[207] *Id.*

[208] *Id.* at 465, 667 P.2d at 851-52.

[209] *Id.* at 466, 667 P.2d at 852.

[210] *Id.*

[211] *Id.* at 467, 667 P.2d at 853.

[212] *Id.* at 473, 667 P.2d at 856.

[213] *Id.* at 474-75, 667 P.2d at 857.

[214] *Id.*

[215] *Id.* at 475-76, 667 P.2d at 857.

function contemplated by the drafters of the Standard Zoning Enabling Act to a single administrator. This raises the problem of reconcentrating zoning authority in the hands of executive agency administrators which is not what the aforesaid drafters had in mind.[216]

VIII. . . . AND ALL THE REST BRIEFLY NOTED

In other unrelated (except for their land use impacts) cases, the Lum Court has cut back from the United States Supreme Court definition of public use for purposes of eminent domain, and addressed the conflict between religious practices and land use controls. To these we now briefly turn.

A. Land Use Controls Take Precedence Over Religious Practices

The federal courts have always observed limits on the free exercise of religion guaranteed by the First Amendment.[217] The Lum Court adheres to this limitation at the state court level when a religious practice, as opposed to a religious belief, conflicts with a land use law.[218] Acting per curiam in *Marsland v. International Society for Krishna Consciousness*,[219] the court refused to permit the use of a church as a dwelling where that use conflicted with applicable zoning regulations, even though the owners could show that such group living was a part of its religious practice.[220] In this case, the Krishnas used a residential

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[216] *See Model Act* and commentary *in* CALLIES & FREILICH, *supra* note 19, at ch. 1; MANDELKER, *supra* note 22, § 4.20.

[217] *See, e.g.*, Braunfield v. Braun, 366 U.S. 599 (1961) (holding that a general state law regulating conduct which indirectly burdens religious observance is constitutional as long as the law is within the power of the state and advances the state's secular goals). Based in part upon the philosophy in *Braunfield*, a federal circuit court has upheld a local zoning ordinance which forbids the construction of churches in most residential zones. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983).

[218] Dedman v. Bd. of Land & Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987) (Lum, C.J.); Marsland v. Int'l Society for Krishna Consciousness, 66 Haw. 119, 657 P.2d 1035 (1983) (per curiam).

[219] 66 Haw. 119, 657 P.2d 1035 (1983) (per curiam).

[220] *Id.* at 121-22, 657 P.2d at 1037-38.

The Richardson Court apparently did not have an opportunity to rule on the issue of conflict between zoning and religious practices. However, in State v. Maxwell, 62 Haw. 556, 617 P.2d 816 (1980) (per curiam), which involved the criminal conviction of appellant for operating a hula studio in a residential district, the court did note in

structure as a church and as a dwelling for unrelated persons coming to the temple to learn the Krishna lifestyle.[221] The building, a two-story structure originally designed for use as a single-family home, was located in a single-family dwelling zoning district which, under the then-applicable CZC regulations,[222] prohibited more than five unrelated people from occupying a dwelling.[223] Apparently, there were thirty members living on the premises.[224] The court held that when the premises are used as a residence rather than as a church, then the provisions of the CZC apply, in which case the Krishnas were in violation.[225]

The court, in a unanimous opinion by Chief Justice Lum, similarly upheld a geothermal project approval by the state Board of Land and Natural Resources against a claim by Pele practitioners that the use thus permitted would infringe on their religious practices. In *Dedman v. Board of Land & Natural Resources*,[226] Pele practitioners alleged that both the granting of a permit to commence geothermal exploration and the designation of a geothermal subzone by the Land Board infringed upon their religious practices.[227] The court found that the Pele practitioners failed to meet the heavy burden of showing that the actions of the Board demonstrated a coercive effect upon them, as required in such free exercise cases: "[A]pproval of the geothermal plant does not regulate or directly burden Appellants' religious beliefs, nor inhibit religious speech. Further, the Board's action does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds."[228] The court further found that their religious practices were not burdened

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dicta that "[t]he total exclusion of places of worship is regarded not only as a regulation not within the scope of the police power, but also as one which infringes upon freedom of religion guaranteed by the constitution." *Id.* at 561-62, 617 P.2d at 820. The court did not rule on appellant's argument that hula lessons were an exercise of her religion, nor on the constitutional question because, under the applicable zoning laws, "church use" was a special use, and appellant had failed to apply for a special use permit, rendering the issues not ripe for judicial review. *Id.*

[221] *Krishna Consciousness*, 66 Haw. at 120, 657 P.2d at 1037.

[222] Comprehensive Zoning Code § 21-110.

[223] 66 Haw. at 121, 657 P.2d at 1037-38.

[224] *Id.*

[225] *Id.* at 122, 617 P.2d at 1038.

[226] 69 Haw. 255, 740 P.2d 28 (1987) (Lum, C.J.).

[227] *Id.* at 259, 740 P.2d at 31.

[228] *Id.* at 261, 740 P.2d at 32 (footnotes omitted).

by either the grant of the development permit or the reclassification of land by the state.[229]

B. Land Reform and Eminent Domain

In perhaps the most important eminent domain case of the decade, the United States Supreme Court decimated the public purpose clause of the Fifth Amendment to the United States Constitution in *Hawaii Housing Authority v. Midkiff*,[230] which upheld Hawai'i's land reform act.[231] The holding that the public purpose was whatever a legislature could conceive it to be[232] was all the more chilling because the United States Supreme Court had nearly done away with the requirement of absolute compensation for physical takings just two years earlier in the case of *Loretto v. Manhattan Teleprompter*.[233] Take away public purpose and compensation and there is precious little left of the protections the Fifth Amendment was designed to give for those whose property is compulsorily acquired by government. Equally troublesome was the Court's blind allegiance to Justice Douglas's equation of the public use requirement in eminent domain with the state's police power,[234] a mischief-prone joining of two unrelated concepts if there ever was one.

Fortunately, the Lum Court, in a unanimous opinion by Chief Justice Lum, refused to follow that lead. In an otherwise identical opinion to the *Midkiff* decision, *Hawaii Housing Authority v. Lyman*,[235] the Hawaii Supreme Court specifically declined

> to embrace the Court's broader ruling in Hawaii Housing Authority v. Midkiff . . . equating the public use requirement of eminent domain with the state's police power. Rather, our review is limited to an examination of the [land reform act's] constitutionality under the mini-

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[229] *Id.* at 262, 740 P.2d at 33. For detailed discussions of this case, see Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992); Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395 (1992); Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992) (all in this issue).

[230] 467 U.S. 229 (1984).

[231] David L. Callies, *A Requiem for Public Purpose:* Hawaii Housing Authority v. Midkiff, 1985 INSTITUTE FOR PLANNING ZONING AND EMINENT DOMAIN, ch. 8.

[232] 467 U.S. at 241.

[233] 458 U.S. 419 (1982). A substantial minority of the Court was willing to undertake a balancing test to see if a physical invasion was sufficiently significant to warrant compensation. 458 U.S. at 442 (Blackmun, J., dissenting).

[234] Berman v. Parker, 348 U.S. 26 (1954).

[235] 68 Haw. 55, 704 P.2d 888 (1985) (Lum, C.J.).

mum rationality standard, which we adopt as appropriate for judicial evaluation of the legislature's public use determinations.[236]

IX. Conclusion

The Lum Court has consistently ruled in the area of land use to give effect to legislative intent. It has strictly construed the State Zoning Enabling Act so as to carry out legislative intent that land use planning and zoning be long range and comprehensive.[237] In doing so, it has stressed the importance of conformity of zoning ordinances to development plans,[238] and has held that the use of initiative to rezone is illegal because it does not further that particular legislative intent which stresses the importance of land use planning in Hawai'i's regulatory system.[239] The court has also strictly interpreted HAPA and the CZMA to carry out legislative intent that legislative bodies be exempt from their procedural requirements even though this has led to inconsistency in application across the four counties.[240]

The Lum Court has also consistently deferred to agency decisions, which, according to the court, have a presumption of validity that is difficult to overcome, even when the agency engages in procedural irregularities.[241] Given this presumption, environmental groups attempting to reverse agency decisions have been largely unsuccessful in overturning agency decisions on procedural grounds, despite the court's broad approach to giving such groups standing.[242] In contrast, environmental groups have been more successful in persuading legislative bodies to change their planning and zoning decisions.

This is arguably as it should be. Courts are increasingly withdrawing from a role in which they become second legislatures or executive agencies and are increasingly suggesting that policy remedies belong at another, usually legislative, level of government, where members are elected by, and therefore directly accountable to, the people.[243]

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[236] *Id.* at 69, 704 P.2d at 896-97.

[237] *See supra* part II.

[238] *See supra* part II.

[239] *See supra* part III.

[240] *See supra* part IV.

[241] *See supra* part VI.

[242] *See supra* part V.

[243] *See, e.g.*, Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) (dealing with this subject in a slightly different but philosophically similar context).

What this means for those with environmental concerns, or for any person dealing with land use agencies, is that the bulk of work, e.g., lobbying, commenting, and adjudicating, should be concentrated at the legislative and administrative levels. The Lum Court's decisions indicate that the court will no longer be a legislature of last resort.

Rape and Child Sexual Assault: Dispelling the Myths

Sue Ann Gregory*

I. INTRODUCTION

When men discovered they could rape, they proceeded to do it. Later . . . they even came to consider rape a crime.

Susan Brownmiller[1]

In an upstate New York community in November, 1987, a Black fifteen-year-old girl named Tawana Brawley was discovered with racial slurs written in excrement on her body. She told police she had been raped by six white males. Tawana Brawley then remained publicly silent about the details surrounding the rape. Her silence raised suspicion and doubt in her community about the rape incident. Many people wanted an explanation.

-What did she do to invite it?
-Did she lie?
-Could she have constructed her own rape; in other words, could she have raped herself?
-Could she feign rape and pain? . . .
-Was she deranged?[2]

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* Class of 1992, Wm. S. Richardson School of Law. The author wishes to thank Amy Kastely and Janice Weir for their hard work in adding Feminist Legal Theory to the curriculum and for constructing the Feminist Jurisprudence reading groups. Their feminist insights have encouraged me to think beyond the four corners of law school.

[1] SUSAN BROWNMILLER, AGAINST OUR WILL 14 (1975) [hereinafter BROWNMILLER].

[2] Barbara Omolade, *Black Women, Black Men, and Tawana Brawley-The Shared Condition*, 12 HARV. WOMEN'S L.J. 11, 16 (1989) [hereinafter Omolade].

These questions invoke the mythology of rape. The myths surrounding Tawana Brawley's rape are common to all rape cases, even when women openly repeat the circumstances. There are many other myths: women falsely accuse men of rape, women who say no really mean yes, women fantasize about being raped, women secretly want violently aggressive sex, women who wear mini-skirts without panties deserve to be raped, women must enjoy penetration (because men do)[3], women who have engaged in consensual sexual relations invite sex from all men, and women can never legally say no to ex-lovers or husbands.

These myths extend to raped and sexually-abused girls. That ten-year-old females often invite and encourage their step-fathers, fathers, brothers, uncles, and grandfathers into their bedroom, and that girls often claim sexual abuse just to get family attention are just two of many myths. These myths deny women's reality.[4]

For centuries women were objects, legal chattels of men. Men purchased women from their fathers for marriage and women became "obedient" wives, laying down for their husbands. Male landowners purchased Black women and Black women became "obedient" concubines, laying down for their owners. Victorious male warriors took women from the losers and women became part of the spoils of war, to be raped at will, an act well within the rules of warfare.[5] This women-as-property rule remained good law until only recently. Women fought for and were finally granted from the state a new legal independent status.

The myths continue, however, perpetuated through socialization and through legal institutions. Women are taught the myths at an early age. I remember as I entered my teens and wanted to wear mini-skirts how Grandma told me to be careful. I asked Grandma what she meant by "careful." Well, she said, you know how teenage boys are; they'll be after you if you advertise your goods. But I asked her, don't you trust me? She said, of course I trust you, but nobody else will; if you wear those short skirts, the boys and everybody else will think you're willing and loose. My Grandma was not unique. Many mothers and grandmothers protect their daughters the best way they know how—

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[3] CAROL SMART, FEMINISM AND THE POWER OF LAW (1989) [hereinafter SMART].

[4] *Id.* at 37.

[5] WILLIAM BOPP & JAMES VARDALIS, CRIMES AGAINST WOMEN 9-10 (1987) [hereinafter BOPP & VARDALIS].

by perpetuating the myths that tell women they are responsible for male behavior.[6]

Men, on the other hand, are taught the flipside of the myths. They are supposed to "sow their seeds" (upon whom?) and gain sexual prowess while women remain virtuous until marriage. Men learn from pornographic movies and trash literature that women are sexual objects and fantasizers, ready to jump in bed with any man who rings the doorbell. Men learn from mass media and advertising that Pretty Women can be bought and rescued by the uptown man. Men learn from fairy tales, such as Little Red Riding Hood, that women running in fear of their lives will eventually "voluntarily" succumb to their stalkers. Men are taught that women are theirs for the taking. "Being a sexual predator is regarded as normal, even desirable for men . . . . Pressing a women until she submits is a natural, pleasurable phallocentric pastime."[7]

Law continues to retell these myths. Modern legislatures define rape from the male point of view and speak of penetration, forcible compulsion, and consent. Who penetrates? Whose measure of force? Rape laws in effect assume consent and then place the burden of proving non-consent on the complainant. For decades, only "chaste" or virginal women could be legally raped. Historically, rape was a violation of another man's property, and unchaste women were damaged goods. A woman's prior unchaste history would absolve a defendant's responsibility for heinous deeds. So women had to prove their "chaste" character in order to prove the rape. Only in the last ten to fifteen years have new rules of evidence been enacted to prevent the defense from peering into a complainant's past sexual behavior. However, "male ownership" receives continued recognition in rape statutes where women cannot legally be raped by their social companions or by their husbands.

Case decisions also perpetuate the myths. Appellate courts continue to describe women's clothing as indicative of "consent," to describe a lack of physical bruising as indicative of "consent," and to demand corroboration of female complainants. Rather than taking a woman's "no" to mean "no", appellate courts look at the "signals" women

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[6] *See* Kristen Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, 18 INT'L J. OF THE SOCIOLOGY OF LAW 125 (1990) [hereinafter Bumiller]. Kristen Bumiller calls this responsibility the woman's duty to protect herself. *Id.* at 136.

[7] SMART, *supra* note 3, at 42.

send to men to determine whether the woman meant "yes". Appellate courts perpetuate the myth that women are not credible in simple rape cases by overturning convictions where there is little physical corroboration of the complainant's allegations. Appellate courts continue to uphold rape and sexual abuse convictions only where the crime is committed by a stranger and a substantial amount of physical evidence supports the complainant's allegations. Women and girls as objects remain unbelievable.

It is important to examine the appellate courts. Their position is powerful—they interpret the law and set the legal boundaries. How has the Hawaii Supreme Court dealt with rape and child sex-abuse? What standards are used in evaluating rape statutes and evidence? Has the subjectivity of the Hawaii Court perpetuated the myths surrounding rape?

This article examines the last twenty-five years of Hawaii Supreme Court decisions overturning and affirming convictions of rape and sexual assault. Specifically, it explores how Hawai'i's appellate courts fail to take into account the experiences and values of women in rape and child sexual assault cases and how existing legal standards and structurally embedded male perceptions damage the credibility of women.

Part I reviews the violent history of rape as evolving from a crime of property to a crime against women and examines two rape categories: aggravated rape and simple rape. Aggravated rape concerns stranger rape where there is corroborative evidence of physical violence, such as bruising, and no relationship between the defendant and complainant. Credibility is typically not an issue because of the strong corroborating evidence. Simple rape, on the other hand, exists when there is a relationship between the defendant and complainant, either as past lovers or friends, and there is little corroborating physical evidence to support the complainant's claim. Aggravated rape cases are usually treated as severe criminal infractions whereas simple rape cases are treated as incredulous.

Part II focuses on the myths apparent in Hawai'i appellate decisions. Both the Richardson Court and the Lum Court have consistently upheld convictions where the complainant is raped and murdered or raped and physically beaten and where the rapist is a stranger. Strong corroborating evidence of forcible compulsion confirms the complainant's story; consent is not an issue. In simple rape cases, however, where "nonviolent" rape occurs or little physical evidence of force is used and where the defendant is usually familiar with the complainant, the Hawai'i courts have overturned convictions.

Consent and credibility are the key issues in simple rape, with the focus and the burden on the complainant to disprove consent. Most states have enacted specific statutes and evidentiary devices to aid the complainant. Two examples include the use of expert testimony in child sex abuse cases to bolster the complainant's credibility and Hawaii Rules of Evidence 412 which precludes the introduction of the past sexual behavior of the complainant in certain circumstances.

What role has the Hawaii Supreme Court played in disbelieving women? During the Richardson era the court interpreted the use of expert testimony in child sexual assault cases liberally, but the Lum Court reversed this precedent. In addition, the Lum Court has narrowly interpreted Rule 412 on a victim's past sexual behavior. Has the Lum court's narrow view hurt complainants? To what extent are the myths continued?

Part III proposes two methods to aid appellate courts in their treatment of simple rape. First, the credibility of women must be advanced. One positive step is to view rape from the female perspective by dissolving the "reasonable man" standard in rape cases and enacting a reasonable woman standard. Second, the issue of consent must be re-examined. The legislature wrote consent out of the rape statute; however, Hawai'i courts continue to analyze consent as the flipside to forcible compulsion and continue to adopt traditional male notions of how women should resist a rapist's demands.

Part IV concludes that Hawai'i courts need new direction in order to dispel myths which harm the credibility of women in rape trials and for women to have a fair day in court.

II. WOMEN AS PROPERTY: THE MALE'S RIGHT TO SEX

A man's home is his castle, the boundaries of which ought be respected by other men.

Kevin C. Paul[8]

Rape has existed ever since men discovered their greater physical strength and figured out how the anatomical parts fit together. Women were open game. They were ravished, beaten, and abused by men. As Susan Brownmiller describes, women's only chance of survival was to seek out male protectorates.

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[8] Kevin C. Paul, *Private/Property: A Discourse on Gender Inequality in American Law*, 7 LAW & INEQ. J. 399, 424 (1989) [hereinafter Paul].

> Among those creatures who were her predators, some might serve as her chosen protectors. Perhaps it was thus that the risky bargain was struck. Female fear of an open season of rape . . . was probably the single causative factor in the original subjugation of woman by man, the most important key to her historic dependence, her domestication by protective mating.[9]

The "protective mating" did not lead to women-male partnerships. To the contrary, the protectorates became owners; women became possessions, chattels of men. The protectorates gained power and women learned obedience. In such an environment, rape was not defined as a matter of female consent nor could it be defined in terms of a female's right to her physical and mental integrity. "Rape entered the law through the back door, as it were, as a property crime of man against man."[10] Four types of rape as a property crime included the rape of virgin daughters, the rape of married women, the rape of slave women, and the rape of women as war spoils. Women were not the victims of these rapes; the victims were the fathers, the husbands, the white slave masters, or the losing country.[11]

A father's property included his daughters whom he sold in marriage to the highest male bidder. Such "bride selling" was a perfectly acceptable marriage arrangement. Virgin daughters were the best property and brought in the largest dowries. The rape of a virgin, therefore, made her practically useless for marriage and deprived her father of a substantial dowry.[12] "Criminal rape, as a patriarchal father saw it, was a violation of the new way of doing business. It was, in a phrase, the theft of virginity, an embezzlement of his daughter's fair price on the market."[13]

Women passed from the hands of their fathers and became the property of their husbands. Women could not be legally raped by their husbands. They were forced to lie down at the whim of their husband-owners and become "obedient" wives. However, the rape of another

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[9] BROWNMILLER, *supra* note 1, at 16.

[10] *Id.* at 18.

[11] Paul, *supra* note 8. "Although women are no longer bought and sold as personal property, rape law in general, and its treatment of marital rape specifically, suggest that women remain objects in legal culture, their sexuality available for appropriation by the man, or men, who can demonstrate a legally cognizable claim to it." *Id.* at 417.

[12] BOPP & VARDALIS, *supra* note 5, at 18.

[13] BROWNMILLER, *supra* note 1, at 18.

man's wife was a crime, bringing shame and dishonor to the husband's house as well as severe punishment for both the woman and her rapist. Under the Code of Hammurabi, a married woman who got raped was thrown into the water with the rapist, and the husband was permitted to pull his wife from the water if he so desired.[14]

The most literal form of women-as-property was experienced by Black women in America. Enslaved Black women were truly the property of their white masters. As a consequence of being property, one of the many evils Black women encountered was their sexual exploitation at the hands of white masters. "The power of the [master] and [his] sexual privileges extended to those directly below him . . . . [He] could force the black woman against her will, and she was held morally responsible for the injury done to her."[15]

Black women could not charge the white master with rape. "Rape was an integral part of the master's right to use the slave woman's body."[16] The white master's right to rape went unchallenged. A crime occurred only if the slave woman was raped by a man other than the white master, but the crime would not be rape. The white master would charge the intruding male with property damage.

Women also became part of the spoils of war, to be raped at will, an acceptable act within the rules of warfare.[17] Brownmiller describes rape during war as the privilege of the conquerors, almost a license of entitlement over the women of the losing side. "Access to a woman's body [was] considered an actual reward of war."[18]

Rape laws continue to reflect a more powerful male story and impart to women the moral responsibility of defending their injury. For example, in Hawai'i as well as many other states, rape is currently defined as intercourse by forcible compulsion and without consent.[19] The burden is on women to show a lack of consent, much like the raped virgin in ancient times who had to "cry to the neighboring

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[14] *Id.*

[15] *Id.* at 167.

[16] Omolade, *supra* note 2, at 13.

[17] BOPP & VARDALIS, *supra* note 5, at 9-10.

[18] BROWNMILLER, *supra* note 1, at 35.

[19] HAW. REV. STAT. §707-730 (1981) (Sexual assault in the first degree) reads in pertinent part: "(1) A person commits the offense of sexual assault in the first degree if: (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion . . . ."

townships . . . and show the blood and her clothing stained with blood, and her torn garments'' in order to prove her rape.[20]

Women's responsibility for proving consent varies with the type of rape. No one would place responsibility for rape on an eighteen-month-old girl who had a one-inch tear in her perineum and facial bruises.[21] However, a fifteen-year-old girl who is sexually assaulted by a family friend during a ride home must prove her lack of consent.[22] Susan Estrich names these two categories of rape as aggravated and simple and explains their disparate criminal recognition. Aggravated rape, rape which includes extrinsic violence and evidence in the form of guns, knives, or beatings committed by multiple assailants or by a stranger, is treated as criminal in our current judicial system.[23] Prosecutors and jurors are more willing to believe a woman as long as she is willing to testify against her assailants, unlike Tawana Brawley's silence, and there is sufficient physical evidence of the rape. In addition, young girls who are abducted at curbside or from playgrounds and sexually assaulted by strangers are treated seriously by the judicial system and "the behavior of the perpetrator is more likely to be [viewed as] deviant or abnormal . . . ."[24]

Simple rape, on the other hand, where a single defendant knows his victim and neither beats her nor threatens her with a weapon, is not given equal criminal recognition as rape.[25] Prosecutors and jurors view simple rape as a form of acquiescence on the part of the complainant.

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[20] BROWNMILLER, *supra* note 1, at 26; *see also* Bumiller, *supra* note 6. Kristen Bumiller describes the complainant as one who is placed into the role of an "angel" who must defend her heavenly qualities after her fall from grace. *Id.* at 127.

[21] In State v. Laurie, 56 Haw. 664, 548 P.2d 271 (1976) (Kobayashi, J.), the complainant was 18-months old. The defendant was convicted by a jury of attempted rape in the first degree and attempted assault in the first degree. The defendant had had a brief relationship with the complainant's mother, and on the day in question, had gone to the mother's home after the mother had indicated she wanted to end the relationship. The defendant, after putting the complainant to sleep, had left a crumpled blood-stained blanket in the corner of the complainant's bedroom, the defendant had blood on his shorts, and the complainant had a one-inch tear in her perineum and a facial bruise on her left cheek. *Id.* at 667-68, 548 P.2d at 275. The court found sufficient evidence to affirm the defendant's convictions. *Id.* at 674, 548 P.2d at 277.

[22] State v. Calbero, 71 Haw. 115, 785 P.2d 157 (1989) (Padgett, J.).

[23] SUSAN ESTRICH, REAL RAPE 4 (1987) [hereinafter ESTRICH]. She notes that surveys have found that juries are four times more willing to convict aggravated rapists. *Id.*

[24] Kee MacFarlene, *Sexual Abuse of Children*, THE VICTIMIZATION OF WOMEN 81, 87 (Jane Roberts Chapman & Margaret Gates, eds., 1978) [hereinafter MacFarlene].

[25] ESTRICH, *supra* note 23, at 4-5.

Simple rape encompasses many of the institutional myths: she asked for it, she dressed provocatively, she owed him for dinner, and on and on. In effect, the complainant is responsible for the rape due to her "contributory behavior." "[W]here there [is] 'contributory behavior' on the part of the woman—where she [is] hitchhiking, or dating the man, or met him at a party—juries [are] willing to go to extremes in their leniency toward the defendant."[26]

The leniency in simple rape cases embodies the ongoing women-as-property posture. Marital rape laws, for example, are not recognized in a majority of the states and husbands continue to have a "right of sex" to their wives. Sir Matthew Hale, writing in the early eighteenth century, is credited for enunciating the "marital rape exception" which has become the accepted legal doctrine in the United States. "'[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.'"[27]

Furthermore, female "social companions" only recently were given a legal redress. A social companion defense existed in Hawai'i until 1986[28] whereby female social companions who were forced to perform sexually were not injured under the law; male companions were given a blanket license to claim such sexual conduct was consensual. Date rape, which the media has recently reported in staggering numbers across the nation on high school and college campuses, remained invisible as a crime and is only now treated as criminal behavior.[29]

Simple rape also encompasses child sexual assault. Such assaults typically take place in the home by family members and family friends and usually occur over a long period of time.[30] As is the case with adult rape accusations, sexual assault accusations by young girls are often viewed with a great deal of suspicion. One four-year-old girl who was hospitalized with massive internal injuries was asked by an emergency room nurse, "Were you 'playing with yourself'?"[31]

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[26] *Id.* at 5.

[27] Paul, *supra* note 8, at 411-12 (quoting from 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (1736)).

[28] HAW. REV. STAT. § 707-730 (1981).

[29] Nancy Gibbs, *When is it Rape?*, TIME, June 3, 1991, at 48.

[30] MacFarlene, *supra* note 24, at 87.

[31] *Id.* at 95.

A young girl's credibility is attacked in much the same way as an adult woman who is raped. If there are no witnesses, no physical injury or presence of semen or evidence of penetration, few prosecutors or juries believe a young girl's accusations. Young girls in effect become responsible for their mistreatment.

> The notion that sexual pleasure may be taken, either by physical force or coercion, or that women and children 'ask for' sexual exploitation by their behavior or vulnerable status, is one which is all too often subtly reinforced by our society. As long as prevailing societal attitudes reflect a view of women as sexual objects, and as long as the rights of children receive such casual regard, female children will remain an especially vulnerable target for sexual abuse.[32]

III. The Myths Reinforced in Appellate Decisions

> *The more intimate you are with your accused rapist, the less likely a court is to find that what happened to you was rape.*
>
> Catharine MacKinnon[33]

Appellate courts have the duty to interpret legislation. These interpretations are critical to the treatment of rape complainants in the judicial system; appellate courts have the power to set the boundaries for the law. Appellate courts determine when expert testimony will be allowed to explain the phenomena surrounding child sexual abuse, when a woman will be forced to parade her past sexual relations before the public eye, and when women's clothing will be scrutinized for consensual meaning.

Not surprisingly, both the Richardson and Lum Courts have repeatedly affirmed convictions in aggravated rape cases where there is strong corroborating physical evidence. On the other hand, in simple rape and child sex assault cases, few of the cases have been affirmed. This article examines those cases where issues of consent, credibility,

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[32] *Id.* at 106.

[33] Catharine MacKinnon, Feminism Unmodified 95 (1987) [hereinafter MacKinnon].

and forcible compulsion have been raised. It is within these areas that the myths surrounding rape and child sexual assaults appear.[34]

A. Aggravated Rape and the Richardson Court

The Richardson Court affirmed all[35] of the aggravated rape and sex abuse cases that it reviewed.[36] Even though the convictions were affirmed, many of the myths continue to surface in the decisions.

1. Consent

In a rape trial, a woman must show non-consent in order to prove that a rape occurred. "The state of mind of the victim is the window to the mens rea that establishes the culpability of the defendant."[37] Therefore, courts and juries scrutinize a woman's responsive behavior

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[34] The Richardson Court reviewed other sexual assault cases dealing with lesser included offenses, juvenile waivers, reasonable mistake of fact, and other issues: State v. Silva, 53 Haw. 232, 491 P.2d 1216 (1971) (per curiam) (affirming conviction of statutory rape of 16-year-old where defense of reasonable mistake raised); State v. Gomes, 57 Haw. 271, 554 P.2d 235 (1976) (per curiam) (vacating judgment of conviction of rape in the first degree where defendant died before appeal adjudicated); State v. Doe, 61 Haw. 48, 594 P.2d 1084 (1979) (Ogata, J.) (affirming the juvenile waiver for the offenses of rape and sodomy in the first degree); State v. Doe, 61 Haw. 167, 598 P.2d 176 (1979) (per curiam) (vacating the juvenile waiver for murder and attempted rape in the first degree); State v. Yoshimoto, 64 Haw. 1, 635 P.2d 560 (1981) (per curiam) (affirming conviction of sexual abuse in the first degree as a lesser-included offense of rape in the first degree).

[35] This article refers only to published opinions.

[36] The Richardson Court also reviewed aggravated rape and sex assault cases which did not involve issues of consent, credibility, and forcible compulsion: State v. Altergott 57 Haw. 492, 559 P.2d 728 (1977) (Kidwell, J.) (affirming jury conviction of kidnapping and sodomy in the first degree on issue of trial court's limitation of voir dire); State v. Pahio, 58 Haw. 323, 568 P.2d 1200 (1977) (Richardson, C.J.) (affirming jury conviction of rape in the first degree on issues of admissibility of defendant's slippers and the trial court's denial of a requested identification instruction); State v. Hernandez, 61 Haw. 475, 605 P.2d 75 (1980) (per curiam) (affirming in part jury convictions for sexual abuse in the first degree and kidnapping dealing with co-conspirator's culpability); State v. Perez, 64 Haw. 232, 638 P.2d 335 (1981) (per curiam) (affirming jury convictions for rape, sodomy, and robbery dealing with trial court's admissibility of a telephone call received by police); State v. Reiger, 64 Haw. 510, 644 P.2d 959 (1982) (per curiam) (affirming convictions for attempted murder, rape in the first degree, and burglary in the first degree dealing with issues of admissibility of photographic lineup and prior convictions).

[37] Bumiller, *supra* note 6, at 132.

to rape: Did she engage in active resistance, active participation, or encouragement?

> Consent is a devilishly malleable term . . . . For that reason, a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behavior of the parties or as a shorthand method for classifying certain forms of sexual behavior as normal.[38]

A woman's behavior was reviewed in *State v. Iaukea*.[39] A female social worker, while driving the defendant home, was raped and sodomized at knifepoint on a deserted stretch of road.[40] Justice Ogata, writing for the court, found that the defendant's prior convictions were admissible because it went to the complainant's state of mind of why she remained calm.[41] Otherwise, the court noted, the jury might have mistakenly believed that the complainant's silence and lack of screaming was indicative of consent or that she was his voluntary social companion.[42] Essentially, the court affirmed that "normal" behavior for a woman being raped is to resist the aggressor in a forceful way or have a good explanation for why they remain "calm" (calm during a rape?) while being raped and sodomized at knifepoint. The message sent is that "no" is still not enough.

The standard of "earnest resistance" was in effect in Hawai'i when the court reviewed *State v. Alfonso*.[43] In *Alfonso*, two men confronted the complainant and her companion on a secluded portion of Diamond Head beach. After defendants assaulted and chased away the compan-

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[38] Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 793 (1988).

[39] 56 Haw. 343, 537 P.2d 724 (1975) (Ogata, J.).

[40] *Id.* at 347, 537 P.2d at 728.

[41] *Id.* at 352, 537 P.2d at 731.

[42] *Id.* at 353, 537 P.2d at 731. HAW. REV. STAT. §707-730 (1972) in effect at the time of the incident read in pertinent part:

> Rape in the first degree. (1) A male commits the offense of rape in the first degree if: (a) He intentionally engages in sexual intercourse, by forcible compulsion, with a female and: (i) The female is not, upon the occasion, his voluntary social companion who had within the previous twelve months permitted him sexual contact.

Id.

[43] 65 Haw. 95, 648 P.2d 696 (1982) (Lum, J.). This case is considered under the "Consent" section of this article rather than the "Forcible Compulsion" section because it was the complainant's behavior that was under scrutiny, not the amount of force used by the defendant.

ion, both defendants proceeded to take turns "switching places on top of [the complainant] several times before the police arrived."[44] Defendant alleged that the complainant's sole response of "please don't" was insufficient to prove forcible compulsion.[45] However, the complainant testified that she offered no physical resistance because she knew that her companion had left a knife in the sand nearby and she feared that the defendants would find the knife and use it on her.[46]

Justice Lum in writing for the court noted that "'[f]orcible compulsion' . . . is defined . . . as 'physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.'"[47] The court explained that the reasonableness of the victim's fear of death or serious physical injury "would be subjective and based upon the totality of circumstances surrounding the assault."[48]

> Although the record is not replete with attestations of fear of specific injury, we believe that appellant's explicit threat of harm, together with [the co-defendant's] show of brute force against the victim's companion and boast of strength manifesting a power to carry out the threat, when viewed in the context of the circumstances, enabled a jury to find that the victim's fear of serious injury was a reasonable one.[49]

Another common issue reviewed by appellate courts relates to the link between consent and a woman's prior sexual history. This issue arose in *State v. Iaukea*[50] where the defendant struck the complainant with sufficient force to break her jaw in two places and held a pair of scissors to the complainant's throat after the complainant refused his sexual advances.[51] The defendant wanted to inform the jury about the complainant's prior sexual history and reputation for sexual promiscuity,[52] but the court held that the complainant's past sexual history

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[44] *Id.* at 102, 648 P.2d at 701.
[45] *Id.* at 100, 648 P.2d at 701 (citation omitted).
[46] *Id.* at 101, 648 P.2d at 701.
[47] *Id.* at 100, 648 P.2d at 700.
[48] *Id.* at 101, 648 P.2d at 701.
[49] *Id.* at 103, 648 P.2d at 702.
[50] 62 Haw. 420, 616 P.2d 219 (1980).
[51] *Id.* at 423, 616 P.2d 221.
[52] *Id.* HAW. R. EVID. 412 was not applicable, having been adopted after the case.

was not relevant in this instance because the defendant had not raised the defense of consent. Susan Estrich has found this response typical, i.e., that appellate courts seldom reverse a trial court's decision to exclude a complainant's prior sexual history in a case of aggravated rape.

> When the defendant is a stranger, particularly an armed stranger, courts seldom reverse. The stated reason is that consent is not an issue . . . . What explains [these] cases best is not whether consent is raised as a technical defense, but whether the court sees reason to doubt or suspect the woman. If there is no reason to distrust, there is also no reason to humiliate.[53]

The *Iaukea* court apparently viewed the corroborating evidence as a substantial justification for the complainant's charges and did not see the need to delve into the complainant's history.

2. *Credibility*

A cornerstone in modern legal thought was laid three centuries ago by Sir Matthew Hale's warning that rape is a charge easy to make and hard to defend against.[54] Hale feared that spurned women would cry rape.[55] That underlying theme of distrust of women remains evident today. Defendants portray women as deceitful and vindictive, as revealed in the much-publicized William Kennedy Smith rape trial in Florida. Smith's attorneys publicly commented that "the 30-year-old alleged victim is emotionally unstable and that such traumatic sexual experiences as childhood abuse and unwanted pregnancies may have caused the 'state of mind' behind her charges.[56]

The myth persists that women are hysterical creatures who do not know when they have been violated, who cannot distinguish sex from violence.[57] Such was the defense raised in *State v. Kahinu*[58] where the defendant broke into the complainant's home after midnight, pushed

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[53] ESTRICH, *supra* note 23, at 50-51.

[54] ESTRICH, *supra* note 23, at 50-51.

[55] ESTRICH, *supra* note 23, at 50-51.

[56] *Smith Judge Bars Use of Accuser's Sexual History*, WASH. POST, Nov. 6, 1991, at A8.

[57] Catharine MacKinnon, *Method and Politics*, TOWARD A FEMINIST THEORY OF THE STATE 106 (1989). MacKinnon asks the question: Rape—is it sex or is it violence? *Id.* at 112.

[58] 53 Haw. 536, 498 P.2d 635 (1972) (Levinson, J.).

her to the floor, and raped her at knifepoint. There was no medical examination and no eyewitnesses, and the trial court refused to order the complainant to submit to a psychiatric examination.[59]

The defendant argued that in cases where there is no evidence corroborating the complainant's testimony "the accused may fall victim to the groundless fantasies or vindictiveness of a pathological female."[60] The defendant cited to *Wigmore*: "'No judge should ever let a sex offense go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.'"[61]

Thank goodness the court rejected *Wigmore* and held that such a requirement would deter victims of sex crimes from disclosing such crimes.[62] But the court did not completely debunk the myth that women are pathological liars because the court went on to note that such an exam may be ordered if the defendant presents a compelling reason.[63]

In addition, courts legitimize Hale's distrust of women victims by requiring strong corroboration of women's rape accusations. Corroboration is a critical factor in determining the disposition of rape charges.[64] "'Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough to convict a man of a crime.'"[65]

The Richardson Court found the complainant's rape charges corroborated in *State v. Rivera*.[66] The defendant drove the complainant and her sister to the edge of a cliff and threatened to rape them and throw them off the cliff unless one of them slept with him that night.[67] As one issue on appeal, defendant claimed a lack of sufficient evidence to support the jury's convictions of kidnapping and rape.[68] In response the court found that the corroborative finding by the police of the weapons used and the testimonies of the sisters were sufficient evidence

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[59] *Id.* at 547, 498 P.2d at 642.

[60] *Id.* at 545, 498 P.2d at 641.

[61] *Id.* at 545, 498 P.2d at 641 (citing 3A WIGMORE, EVIDENCE § 924a, at 737 (Chadbourn rev. 1970)).

[62] *Id.* at 546, 498 P.2d at 641.

[63] *Id.* at 547, 498 P.2d at 642.

[64] ESTRICH, *supra* note 23, at 21.

[65] *Id.* at 43 (quoting from Note, *Corroborating Charges of Rape*, COLUM. L. REV. 67, 137-38 (1967)).

[66] 62 Haw. 120, 612 P.2d 526 (1980).

[67] *Id.* at 129, 612 P.2d at 532.

[68] *Id.* at 128, 612 P.2d at 532.

from which a reasonable man might fairly conclude guilt beyond a reasonable doubt.[69] But would the court have affirmed the convictions in the absence of the sister's testimony or without the weapons?

3. Forcible compulsion

A classic aggravated rape occurred in *State v. Kekaualua*[70] where a stranger, wearing a mask, broke into the complainant's home, climbed on her bed and straddled and stroked the complainant's neck as she slept.[71] He pinned the complainant's arms to the bed, and after discovering that she was menstruating at the time, visible by a blood-soaked pad, punched her three or four times in the face and fled from the home.[72] The court found that the jury had sufficient evidence to find "the [defendant had] specific intent to have intercourse . . . and the specific intent to use sufficient force to overcome the woman's will."[73]

An interesting dialogue occurs in Justice Levinson's concurring opinion which faulted the majority for not discussing the issue of intent to use force. The Justice noted that "the force which the defendant must intend to use is that necessary to overcome the prosecutrix's[74] resistance. The use of force merely to quiet a screaming woman is not sufficient."[75] In other words, the defendant's three punches may not have been intended to overcome the complainant's will, but merely intended to quiet her indiscrete cries.

> The evidence is not as clear as the majority opinion intimates. If the defendant had intended to use force, the most natural thing for him to

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[69] *Id.* at 129, 612 P.2d at 532.

[70] 50 Haw. 130, 433 P.2d 131 (1967) (Mizuha, J.).

[71] *Id.* at 130-32, 433 P.2d at 132.

[72] *Id.*

[73] *Id.* at 132, 433 P.2d at 135.

[74] *See* BROWNMILLER, *supra* note 1. Brownmiller explains that "[t]he term 'prosecutrix' stems from [a] time in English history when a female had the burden of instituting a civil suit in order for a rape trial to take place. Today, of course, it is the state, not the woman, that prosecutes for rape; yet 'prosecutrix' continues to appear with regularity in appellate briefs that are written by rapists' defense attorneys, where it is used interchangeably with 'complainant' and 'alleged victim.' Much of the legal language is archaic, but in this instance it is hard not to conclude that the word is favored for the harsh, vindictive quality of personal prosecution that it plainly connotes." *Id.* at 27.

[75] 50 Haw. at 137, 433 P.2d at 135 (Levinson, J., concurring).

> have done while the prosecutrix was still asleep would have been to prepare himself by removing or unzipping his trousers. He would have removed the sheet. He would not have awakened the prosecutrix by massaging her neck lightly. *When he punched her, he may have been trying to quiet her and not to overcome her will.* If these facts stood alone, I would find them sufficient to justify a reasonable doubt as to the defendant's intention to use force to overcome her will . . . .[76]

A punch is a punch to the complainant; pain is inflicted whether the defendant intended to overcome her will or quiet her. Is there a suggestion that screaming women be subdued by more than three punches? Or that screaming women who are quieted may eventually voluntarily submit? Do women welcome strangers into their beds in the middle of the night who lightly massage their necks? Or is this the sort of romantic foreplay that women must endure?[77]

B. Aggravated Rape and The Lum Court

The Lum Court has reviewed numerous cases dealing with rape and sexual assault convictions. However, only one aggravated rape case appears to raise issues of the complainant's consent and credibility.[78]

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[76] *Id.* at 137, 433 P.2d at 135 (emphasis added).

[77] ESTRICH, *supra* note 23, at 31.

[78] The Lum Court has reviewed other sexual assault cases dealing with bail, repeat offender sentencing, and ineffective assistance of counsel that are beyond the scope of this article. State v. Guzman, 68 Haw. 14, 701 P.2d 1287 (1985) (Padgett, J.) (reversing convictions of first degree rape, sodomy in the first degree, two counts of kidnapping, and robbery in the second degree based on ineffective assistance of counsel); State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990) (Lum, C.J.) (affirming the trial court's denial of defendant's motion to dismiss the complaint due to the inadvertent destruction of physical evidence concerning the charges of sexual assault in the first degree and kidnapping); State v. Sugiyama, 71 Haw. 389, 791 P.2d 1266 (1990) (Padgett, J.) (reversing convictions of kidnapping and sexual assault offenses and holding that the defendant was denied a fair trial where a juror during deliberations made comments to other jurors about the defendant's failure to take the stand); State v. Roman, 70 Haw. 351, 772 P.2d 113 (1989) (Hayashi, J.) (affirming the trial court's suppression of a rape victim's confessions as to the falseness of the accusations); State v. Blanding, 69 Haw. 583, 752 P.2d 99 (1988) (Lum, C.J.) (affirming convictions for murder, rape in the first degree, sodomy in the first degree, and kidnapping; no issues of consent were raised on appeal. The physical evidence was overwhelming; the complainant was found in her home, raped, fatally stabbed, naked, her wrists tied to the bedposts, with a tee-shirt loosely tied around her neck; the defendant's fingerprints were also found in the home); State v. Moniz, 69 Haw. 370, 742 P.2d 373 (1987) (Lum, C.J.) (reversing the trial court's decision that court approval is not necessary for defendants who are acquitted of sexual abuse on the founds of mental disease or disorder for release from the state hospital).

State v. Brezee[79] is a classic example of an aggravated rape where the defendant's convictions included both murder and attempted rape.[80] Initially, the defendant alleged that there was insufficient evidence to support an inference that the defendant's attack on the victim was a sexual assault. Justice Padgett in writing for the court found the deceased complainant's physical condition to speak for itself.

> [H]er shirt [was] removed and stuffed in her mouth; her brassiere was pulled up over her breasts; her jeans were pulled down to her knees; she had large abrasions on her back; and there was a bruise of the fossa navicularis, a part of the vagina, which could have been caused by a blunt force applied to the area.[81]

The defendant also invoked the myth of "past-sexual-consent-equals-current-sexual-consent," alleging as a defense to the sexual assault that he had previous sexual relations with the victim.[82] The court noted that

> [t]here was ample testimony from other witnesses as to the character of the victim, her relationship with the [defendant] and her statements about the prospective, and, as it proved, fatal meeting with him, from which the jury could have disbelieved [defendant's] statements as to the previous sexual relations with the victim.[83]

Even though the court upheld the convictions, it is important to note that—in addition to the fact of death, vaginal bruising, partial nudity, and the shirt stuffed in the mouth of the victim—the court persisted in commenting on the complainant's character and past relationship with the defendant and thereby legitimized this mythical defense.

C. Simple Rape in Hawai'i: Overturned Convictions

Both the Richardson and Lum Courts have reviewed simple rape cases. In these types of cases, the physical corroborating evidence is minimal and the defendant is a family member or acquaintance. The

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[79] 66 Haw. 162, 657 P.2d 1044 (1983) (Padgett, J.). Even though the defendant may have been acquainted with the complainant, the "aggravated" categorization is justified in light of the physical beating and ultimate death of the complainant.

[80] *Id.* Brezee also raised an issue concerning the defendant's right to counsel at interrogating interviews with the police. *Id.* at 163-65, 657 P.2d at 1045-46.

[81] *Id.* at 166, 657 P.2d at 1047.

[82] *Id.*

[83] *Id.*

focus is on the complainant's credibility and consent. A large number of these simple rape cases deal with child sex-abuse complainants, where the defendants are fathers or step-fathers. Although not "classic simple rape cases" child sex-abuse cases share many of the same myths surrounding women and rape: women and young girls are vindictive and deceitful, women and young girls fantasize sexual encounters, women and young girls are responsible for male behavior, and women and young girls are "wholly owned male subsidiaries."

Whereas both courts similarly affirmed aggravated rape convictions, a definite split exists in simple rape cases. The Richardson Court notably affirmed convictions involving simple rape while the Lum Court has overturned simple rape convictions.[84] In one particular instance, *State v. Kim*, the Lum Court overruled the Richardson Court precedent dealing with expert testimony in child sex abuse cases. How has the court dealt with the myths surrounding simple rape? Does the court believe women and young girls?

1. Credibility

One of the most prevalent myths about child sexual abuse is the common belief that perpetrators are shadowy strangers who haunt the parks and playgrounds in search of young victims.[85] To the contrary, major studies reveal that in eighty percent of child sexual abuse cases, children are sexually abused by men whom they trust.[86]

Another Victorian myth that surrounds child sexual abuse portrays such abuse occurring in poor, cramped, working-class living conditions, coupled with a view of women shirking their marital, sexual obligations to their husbands, embellished by the idea that abuse occurs during

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[84] *See generally* State v. Lima, 64 Haw. 470, 643 P.2d 536 (1982) (Ogata, J.), where the Richardson Court overturned the Intermediate Court of Appeals and affirmed the defendant's conviction for rape. The defendant was acquainted with the complainant and took her to a secluded hiking trail where the rape occurred. The Intermediate Court concluded that the complainant had not earnestly resisted and therefore the jury verdict was not supported by substantial evidence. *Id.* at 475, 643 P.2d at 539. The Hawaii Supreme Court reversed and held that the complainant's actions (telling the defendant to stop, crying, and pleading with defendant to stop, and physically trying to restrain him by attempting to push him off) constituted a genuine physical effort to resist in light of the facts of that case. *Id.*

[85] MacFarlene, *supra* note 24, at 86.

[86] *Id.*

isolated times of stress or frustration.[87] In this scenario, men are absolved from responsibility, and blame is directed elsewhere: "proximity causes abuse, women's [wives'] frigidity causes abuse, abnormal stress causes abuse, and that this form of abuse is rare."[88]

Such attitudes persist, resulting either in accusing young girls of fabricating sexual encounters or in leaving young girls to feel guilty and responsible for their abuse, as well as for the disruption and possible destruction of their family. One nine-year-old incest victim who saw her father brought into the courtroom with chains and handcuffs around his hands and waist withdrew into a spasmodic, twitching episode: "'I did *that* to my Daddy?'"[89] It is not surprising, therefore, that in many instances, children of sex abuse crimes recant their original allegations when examined under oath. However, many courts and lay jurors do not understand such behavior and will find that children are falsely accusing innocent individuals. Thus, credibility is a key issue in child sexual abuse cases.

Certain legal aids have been developed to assist child witnesses who have this credibility handicap. One such device includes the use of expert testimony to explain the "abnormal" behavior of child sex-abuse victims. *State v. Kim*[90] was a landmark decision by the Richardson Court on this issue. *Kim* allowed an expert to opine directly on the believability of a child victim, the court appearing to have keen insight into the problems surrounding child sex abuse.

In *Kim*, the victim was a thirteen-year-old stepdaughter. Not surprisingly, there were no witnesses to the acts of sexual intercourse. Within one week, the child informed her mother of the sexual encounter with her stepfather. At trial the defense attempted to impeach the complainant's story with insinuations that it was fabricated. The prosecution then called a psychiatrist who had previously examined her, offering the expert testimony to support the child witness' account of the abuse.[91]

The court found that expert testimony on the characteristics of child sex abuse victims was probative and "would not otherwise have been available to the jury but for [the expert's] testimony."[92] Furthermore,

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[87] SMART, *supra* note 3, at 56.

[88] *Id.* at 56.

[89] MacFarlene, *supra* note 24, at 99.

[90] 64 Haw. 598, 645 P.2d 1330 (1982) (Richardson, C.J.).

[91] *Id.* at 600, 645 P.2d at 1332.

[92] *Id.* at 608, 645 P.2d at 1338.

in viewing the evidence as a whole, the court did not find defendant prejudiced by such testimony. "The nature of the criteria applied and testimony presented were such that the jury could adequately assess and, if it chose to, disregard, the opinion of the expert. Proper instruction as to the jury's prerogative to evaluate all testimony was given."[93]

That landmark decision was overturned by the Lum Court when the same issue of the admissibility of expert testimony vouching for the truthfulness of the complainant was raised eight years later in *State v. Batangan*.[94] A seven-year-old girl was sexually abused by her father. She was examined several weeks prior to the trial by a psychologist who testified generally as to the behavior of child sex abuse victims. The doctor further *implied* that the victim was believable and that she had been abused by her father.[95]

Justice Wakatsuki wrote for the court, noting that child sex-abuse victims exhibit abnormal behavior such as a delay in reporting the offenses and recanting the allegations of abuse.[96] Furthermore, the court recognized that "it is helpful for the jury to know that many victims of sexual abuse behave in the same manner"[97] and experts play a useful role in exposing jurors to some widely held misconceptions and myths.[98] Basically, the court agreed with *Kim*, up to this point, that child sex abuse was outside the common experience of the jury and an expert's assessment of credibility provided useful information to the jury.[99]

However, the court emphasized that even though "child sexual abuse [cases] are difficult to prove . . . they are equally difficult to defend against" and held that an expert's opinion on the credibility of a victim is always suspect of bias and carries the danger of unduly influencing the triers of fact.[100]

On its face, *Batangan* supports the type of suspicion which commonly surrounds the child victim. In an almost Hale-like manner, the court

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[93] *Id.* at 610, 645 P.2d at 1339.

[94] 71 Haw. 552, 799 P.2d 48 (1990) (Wakatsuki, J.).

[95] *Id.* at 555, 799 P.2d at 50.

[96] *Id.* at 557, 799 P.2d at 51.

[97] *Id.* at 557, 799 P.2d at 52.

[98] *Id.* at 557-58, 799 P.2d at 52.

[99] *Id.* at 558, 799 P.2d at 52.

[100] *Id.* at 562, 799 P.2d at 53-54. In addition, the court never discussed the possibility of a jury instruction, such as the one given in *Kim*, which informed jurors that they could always disregard an expert's testimony whom they disbelieved.

announced that the seriousness of the crime leads to doubting a child's veracity. Much like a false accusation of rape will ruin a good man's reputation, a false accusation by a child may lead to the disruption and perhaps the destruction of the man's family. *Batangan* reflects the notion that claims of child sexual exploitation are an affront to the patriarchal vision of the family. What *Batangan* neglects, however, is the fact that "[d]espite the facade of contentment that might be maintained outside the home, incestuous families are often characterized by a high degree of family disruption and poor personal relationships."[101] Adult women, survivors of incest and child sexual abuses, who are no longer held responsible for their abuse, reveal the great extent of abuse that young girls experience in the home at the hands of their fathers, brothers, uncles, and grandfathers.[102] To say that these child victims are not credible denies the reality that thousands of children live with each day.

A second credibility device was legislated in *Hawaii Revised Statutes* section 621-28, which grants children under fourteen years of age the right to be accompanied by a parent or victim/witness counselor or other court-designated adult when testifying in court.[103] The Lum Court, however, has reversed convictions in both cases where such assistance was used at trial.[104] In one case the victim was fifteen years

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[101] MacFarlene, *supra* note 24, at 94-95.

[102] SMART, *supra* note 3, at 57.

[103] HAW. REV. STAT. § 621-28 (1985).

[104] Three other child sex-abuse convictions were overturned on different grounds. State v. Larue, 68 Haw. 575, 722 P.2d 1039 (1986) (Padgett, J.) (reversing convictions for rape in the second degree and sexual abuse in the first degree when a juror during deliberation revealed her personal experience with child abuse in order to buttress the reliability of the child victim's testimony); State v. Rodgers, 68 Haw. 438, 718 P.2d 275 (1986) (Nakamura, J.) (reversing conviction, holding sexual abuse in the first degree is not committed by touching the clothed breasts of a 13-year-old female); State v. Sherman, 70 Haw. 334, 770 P.2d 789 (1989) (Padgett, J.) (reversing convictions for two counts of first degree sexual abuse and one count of second degree sodomy when prosecutors breached their duty to supply date of offense to defense within reasonable time and defendant could not ascertain whether he had an alibi defense).

The court ruled against the defendant in the following cases: State v. Rodrigues, 67 Haw. 70, 679 P.2d 615 (1984) (Hayashi, J.) (overturning the trial court's acquittal on the question of defendant's sanity); State v. Torres, 66 Haw. 281, 660 P.2d 522 (1983) (Nakamura, J.) (overturning the trial court's dismissal of an incest count of a criminal information for failure to allege an offense); State v. Hoopii, 68 Haw. 246, 710 P.2d 1193 (1985) (Lum, C.J.) (affirming the trial court's refusal to provide

old and could not receive counselor support because she was one year over the age limit which the statute allowed,[105] and in another case, the eight-year-old victim sat in the lap of the counselor while testifying, which the court found to be an inappropriate form of nonverbal communication.[106]

In *State v. Suka*,[107] the court held that a counselor's presence and shoulder-touching during the complainant's testimony unfairly bolstered the complainant's credibility.[108] The trial court allowed a counselor to sit with the fifteen-year-old complainant after she broke down and cried during direct examination upon being asked to describe how she met the defendant. The court rejected such support because the counselor's presence and shoulder-touching could have conveyed to the jury the *counselor's belief* that complainant was telling the truth.[109] Furthermore, the court held the accompaniment statute inapplicable to the current case because the victim was fifteen-years old at the time she testified at trial.[110] The court relied on the fact that "the prejudicial impact of accompaniment would generally diminish as the witness' age declines because the jury would be less likely to perceive the accompaniment as vouching for the witness' credibility. Instead the jury would view it as needed assistance to a tender and fragile witness."[111]

One year later, in *State v. Rulona*,[112] when presented with a younger, more "tender and fragile witness," the court found that the trial court abused its discretion in allowing the eight-year-old victim to sit on the lap of a sexual abuse counselor.[113] The court found that no foundation had been laid as to the need for being seated in the counselor's lap.[114]

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defendant with funds for a fourth mental health expert).

The court ruled for the defendant in two other similar cases: State v. Moreno, 68 Haw. 233, 709 P.2d 103 (1985) (Padgett, J.) (reversing a conviction of rape in the first degree, holding that the victim's hypnotically induced recollection was inadmissible testimony); *Ex rel* Doe, 70 Haw. 32, 761 P.2d 299 (1988) (Nakamura, J.) (rejecting the admissibility of a teacher's testimony that the four-year-old sexual abuse victim was not lying).

[105] State v. Suka, 70 Haw. 472, 777 P.2d 240 (1989) (Wakatsuki, J.).

[106] State v. Rulona, 70 Haw. 127, 785 P.2d 615 (1990) (Lum, C.J.).

[107] 70 Haw. 472, 777 P.2d 240 (1989).

[108] *Id.* at 476, 777 P.2d at 243.

[109] *Id.* at 476, 777 P.2d at 242.

[110] *Id.* at 477, 777 P.2d at 243.

[111] *Id.*

[112] 71 Haw. 127, 785 P.2d 615 (1990).

[113] *Id.* at 129, 785 P.2d at 617.

[114] *Id.* at 130, 785 P.2d at 617.

The victim testified that "she was frightened to be there as a witness and would feel better if she sat on the counselor's lap."[115] However, the court found that answer insufficient. The court wanted an "indication that she could not testify without being seated in the counselor's lap."[116]

Furthermore, the accompaniment statute, which allows an adult to accompany a child sex abuse victim, does not allow communication in any manner with the child.[117] Sitting on the lap of a counselor, the court found, could be a form of nonverbal communication.[118]

Even though the Lum Court at times appears to understand the phenomena surrounding child sexual abuse, the court at other times seems resistant to listening to the voice of children.

> There has therefore been an uneven response to child sexual abuse. On the one hand there are examples of almost hysterical concern for children, on the other the danger to them is utterly ignored or glossed over. This is a history of both consternation and complacency, with the consternation over child/stranger abuse oddly nourishing the complacency over abuse by fathers.[119]

2. *Consent*

In ancient times, only a chaste woman could assert a charge of rape or sexual exploitation. A woman with a "soiled" history could not seek legal redress. Her consent on prior occasions left her vulnerable to every man who demanded access to her, for a man was absolved from responsibility for raping a permiscuous woman. Even in modern times, the law connects prior sexual behavior to a willingness to consent. "[A woman's] past sexual history is scrutinized under the theory that it relates to her 'tendency to consent,' or that it reflects on her credibility, her veracity, her predisposition to tell the truth or to lie. Or so the law says."[120]

Rape shield laws, as a new legal creation, protect a woman from the wholesale exposure of her sexual past. However, these shield laws

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[115] *Id.*

[116] *Id.*

[117] *Id.* at 129-30, 785 P.2d at 616.

[118] *Id.* at 130, 785 P.2d at 617.

[119] SMART, *supra* note 3, at 52.

[120] BROWNMILLER, *supra* note 1, at 385.

do not offer complete protection. If the defense can show that a woman's sexual history is "constitutionally required," it must be disclosed. The Lum Court upheld that defense in *State v. Calbero*.[121]

In *Calbero* the fifteen-year-old complainant was a former friend of the defendant's wife. She accepted a ride home from the Pearlridge Shopping Mall from the defendant who proceeded to stop and park the car at a local beach before taking her home. It was in the parked car that the sexual assault occurred.[122]

The victim testified on direct examination that she had never been in "that" situation before.[123] This statement, the defense claimed, opened the door to cross-examination of her past sexual behavior because, as the defense offered, the complaining witness "boasted" to the defendant about her relationship with a former boyfriend.[124] The trial court ruled under Hawaii Rule of Evidence 412 that her answer did not open the door to her past sexual behavior; that the victim was merely answering that she had never been in a car with a man twice her age who was attempting to sexually assault her.[125]

The court accepted the defense position and found that the prosecution had deliberately inserted the victim's statement into the record to bolster compulsion and to negate the defense of consent.[126] Therefore, the court held that the defendant should have been allowed reasonable cross-examination on that subject.[127]

The court also emphasized that the complaining witness never expressly consented to the advances, nor did she expressly object or physically attempt to prevent them, thus creating a jury question on the issues of compulsion and the victim's credibility.[128]

> [Her] alleged boasting of her past sexual experiences to appellant (if the jurors believe it occurred), while parked in his car at the beach could be construed by reasonable jurors to be an invitation to sexual advances, and, coupled with her failure to object, by either words, or actions, to those advances, to constitute consent.[129]

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[121] 71 Haw. 115, 785 P.2d 157 (1989) (Padgett, J.).

[122] These facts do not appear in the court's decision; they arise from the underlying trial briefs.

[123] 71 Haw. at 118, 785 P.2d at 158.

[124] *Id.* at 120, 785 P.2d at 158.

[125] *Id.* at 119, 785 P.2d at 159.

[126] *Id.* at 124, 785 P.2d at 161.

[127] *Id.* at 125, 785 P.2d at 161-62.

[128] *Id.* at 126, 785 P.2d at 158.

[129] *Id.* at 126, 785 P.2d at 162.

Calbero reflects the most traditional male notion of objection in its definition of consent. If you object, you speak out, you act. In these terms there was no objection. Therefore, there was consent. On its face, the decision tells women to fear their silence and to speak out and object. But if "no" means "yes," what can women say to be heard by men?

The decision also supports the myth that a woman's prior sexual history relates to her tendency to consent. A woman talking about a prior boyfriend relationship could be construed (by reasonable people or men?) as an invitation to sex. In whose world?

Calbero suggests a third myth: women's clothing invites a rapist's attention. The court was interested in the conflict of "who took off the complaining witness' turquoise-colored, midcalf-length spandex pants."[130] Why does the color and style of pants matter? It must be related to consent.

The Lum Court also overturned convictions in a classic simple rape case in *State v. Lira*.[131] There, the complainant and the defendant knew each other several months. They met by chance at the beach on the day of the incident.[132] They drank tequila for several hours at the beach and then drank wine in a nearby park with a friend of the defendant's.[133] It was in the park that the defendant threw the complainant to the ground and raped her on a secluded pathway in the park.[134] She attempted to scream. The defendant placed his hand over her mouth and threatened her.[135] There was corroborative evidence of sperm in the victim and injuries consistent with her testimony.[136]

In the defendant's story, it was the victim who initiated sexual advances and persistently attempted to arouse him but failed.[137] The defendant had a broken jaw from an incident the night before and the pain rendered it impossible for him to have an erection.[138] When her efforts failed, the defendant suggested that she turn to his friend. Then she began calling the defendant vile names.[139] The defendant admitted

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[130] *Id.* at 117-18, 785 P.2d at 158.
[131] 70 Haw. 23, 759 P.2d 869 (1988) (Nakamura, J.).
[132] *Id.* at 24-25, 759 P.2d at 870.
[133] *Id.*
[134] *Id.* at 25, 759 P.2d at 871.
[135] *Id.*
[136] *Id.* at 29, 759 P.2d at 872.
[137] *Id.* at 26, 759 P.2d at 871.
[138] *Id.*
[139] *Id.*

to slapping her in response to the name-calling, but he denied raping her.[140]

Justice Nakamura in writing for the court initially reviewed the recent change in the sexual assault statute: "forcible compulsion" replaced "without the consent and against the will of the victim."[141] The court found, however, that even though consent was written out of the statute, consent was still a defense to the crime of rape.[142] "We agree with the framers of the code that testimony of the victim's consensual attitude, if worthy of belief, could only have a tendency to refute evidence that she was forcibly compelled to engage in sexual intercourse."[143] The court therefore concluded that there was evidentiary support for the proposition that the victim consented to the sexual intercourse and that the trial court erred in refusing to give a jury instruction on consent.[144]

In effect, the *Lira* court rewrote the statute to place the burden of disproving consent back on the complainant, thereby focussing on the complainant's actions rather than on defendant's behavior.

III. Dispelling the Myths in Appellate Decisions

They ask, does this event look more like fucking or like rape? But what is their standard for sex, and is this question asked from the woman's point of view?
Catharine MacKinnon[145]

Law is male, defined and interpreted from a male perspective.[146] As demonstrated throughout this article, the history of rape law evidences a male-dominated and male-orientated perspective. Rape began as a property crime with women as the damaged goods and men as the victims.

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[140] *Id.*

[141] *Id.* at 28, 759 P.2d at 872 (citing Haw. Rev. Stat. § 707-730 (1981)).

[142] *Id.*

[143] *Id.*

[144] *Id.* at 31, 759 P.2d at 874.

[145] MacKinnon, *supra* note 33, at 88.

[146] *See also* Mary Ellen Griffith, *Sexism, Language, and the Law*, 91 W. Va. L. Rev. 125 (1988) [hereinafter Griffith]; Paul, *supra* note 8 at ____; Smart, *supra* note 3, at 160; Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame L. Rev. 886 (1989) [hereinafter Finley]. "I want to be specific that the legal "male perspective" is reflective of the privileged white male who has had the "societal power" not to have to worry too much about the competing terms and understandings of 'others'." *Id.* at 892.

This male perspective continues in both modern rape legislation and appellate court decisions. Legislatures define rape with forcible compulsion and penetration. Appellate courts interpret the facts using a reasonable man standard. Appellate courts repeatedly focus on facts that assess the actions of the victim rather than the actions of the defendant: "Did she know the defendant prior to the incident? Was her own behavior morally blameless at the time? Did she fight the defendant off with all her strength?"[147] Women's experiences in rape and sexual abuse cases are thereby refracted through a male eye.

> In a very real sense, the 'reasonable' woman . . . is not a woman at all. [She] is one who does not care easily, one who does not feel vulnerable, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man.[148]

The myths surrounding rape and child sexual assault descend from such a male history and remain perpetuated in law. The myths apparent in the Hawai'i appellate court decisions reveal a firmly embedded structure of male perception. In order to dispel the myths, the male norms must be challenged and a woman's perspective must be introduced.

A. Adopting a Reasonable Woman Standard

This article adopts a methodology, as Katherine Bartlett describes, of "asking the woman question."[149] This means examining how the law fails to consider the experiences and values of women, both in terms of existing legal standards and perceptions that harm women. Bartlett delineates that the purpose of the woman question is two-fold: (1) to expose the male features in law and how they operate, and (2) to suggest how they might be corrected.[150]

Law projects a neutral approach in its formulation of rules and methods of analyses. In case analysis in particular, the reasonable man standard applies to every complainant and every defendant, whether

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[147] Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1101 (1987) [hereinafter Scheppele].

[148] SMART, *supra* note 3, at 65.

[149] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) [hereinafter Bartlett].

[150] *Id.*

male or female.[151] Despite the fact that women and men are socialized differently, law maintains a facade of neutrality. However, the "objective" reasonable man standard is a reasonable *man* standard. Law's so-called "objective" application is in fact gendered.[152] This male-gendered perspective is evident in rape and child sexual assault cases.

> It is the male's view of whether the woman consented that is determinative of consent; it is men's view of what constitutes force against men and forms of resistance by men in situations other than rape that defines whether force has been used against a woman and a woman has resisted; it is men's definition of sex—penetration of the vagina by the penis—rather than women's experience of sexualized violation and violation that defines the crime.[153]

The earlier review of appellate court decisions highlights the extent to which rape myths, which exonerate the more powerful male position and invalidate women's experiences, persist in appellate court decisions.

Exposing the nonneutral, male standards in law only partially satisfies the woman question. The second step is to suggest corrective measures in order to bring women's voices and experiences to the center of law and to allow the myths to die. One positive measure is to adopt a reasonable woman standard, which would require judges "to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women."[154] By incorporating a reasonable woman standard, perhaps some of the deeply flawed factual assumptions that have surrounded rape and child sexual assault may be changed.

Applying a reasonable woman standard to the cases reviewed herein does not necessarily alter the final outcome, but it does alter the story told about the women in those cases. Many of these cases focus on the amount of force used by the defendant and the level of resistance used by the complainant in order to determine whether the complainant consented. But this force, as courts have interpreted it, becomes "physical force, the sort of punching, kicking, brawling violence that

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[151] Griffith, *supra* note 142, at 127. As Griffith points out, women remain invisible in law. *Id. Black's Law Dictionary* does not contain an entry for woman or female. Instead, "man" encompasses woman. BLACK'S LAW DICTIONARY 127 (6th ed. 1990).

[152] SMART, *supra* note 3, at 21; *see also* Finley, *supra* note 142, and Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). Scales writes that "we (women) must challenge the 'objective' standards which objectify us, which make us invisible and our history unimportant." *Id.* at 1376.

[153] Finley, *supra* note 142, at 895.

[154] Bartlett, *supra* note 145, at 863.

is required to get a conventionally socialized man to do something against his will."[155] For example, in *State v. Iaukea* the complainant remained "calm" while being raped and sodomized at knifepoint, and the court feared that her behavior would be misconstrued by the jury as indicative of consent. In *State v. Kekaualua*, the complainant was punched three times, and those three punches, the concurring opinion explained, might merely have been an attempt to quiet a screaming woman and were not intended to overcome her will. In *State v. Calbero*, the court emphasized that the complainant's silence and failure to object might itself constitute consent.

A reasonable woman standard would encompass a female perspective, acknowledging that women are socialized differently and that women often perceive force in more subtle cues.

> Women may see force in a man's intimidating posture or veiled threat, and they may sensibly compare risks of getting hurt with the chances of escaping someone bigger and stronger. In other words, a woman may feel the threat of force before any knives are drawn or punches thrown. And she may give in to that force, engaging in sex against her will . . .[156]

Viewed under a reasonable woman standard, women who remain calm and remain silent will not be found guilty of consent. Their actions will not be the highlight and the focus of the defendant's conduct. In other words, women will not be held responsible for male behavior.

Furthermore, a reasonable woman standard would address the other myths present in these appellate court decisions. For example, a reasonable woman standard would not blame a complainant for wearing turquoise-colored, midcalf-length spandex pants.[157] Nor would a reasonable woman standard support the myth that a woman's prior sexual history relates to her "tendency to consent" to being raped.

The reasonable woman standard would also shed new light on recent Hawai'i appellate court decisions focussing on child sexual assault cases. For example, in *State v. Rulona*, the court refused to allow a child complainant to testify while sitting in the lap of a counselor, and in *State v. Suka*, the court refused to allow a counselor to maintain physical contact with a child complainant while testifying. The court interpreted such touching to be sending signals of credibility vouching to the jury, which thereby prejudiced the defendant. Under a reasonable

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[155] Scheppele, *supra* note 143, at 1101.

[156] *Id.* at 1103.

[157] 71 Haw. 115, 117-18, 785 P.2d 157, 158 (1989); *see supra* note 130 (discussing description of the *Calbero* complainant's clothing).

woman standard, a female perspective is advanced, a perspective that credits nurturing and comforting a frightened child.

The law, because it is self-defining, can create a reasonable woman standard. "'Reasonable women' [c]ould thus make their appearance in court decisions."[158]

B. Re-examining Consent

The role of consent in rape statutes descended historically from a distrust of the testimony of rape victims.[159] Hale precipitated and encouraged the assumption that women lie about being raped. Non-consent therefore was required to be proven through "objective" factors, such as physical resistance. On the other hand, the defense of consent could be shown from the complainant's past sexual behavior or implied from her behavior or appearance.[160]

In Hawai'i, the legislature deleted consent from the rape statutes in 1986. However, appellate courts cling to "culturally infused perceptions" even when the statutes have been reformed.[161] This was demonstrated in *State v. Lira*, where the Supreme Court persisted in reviewing consent as a backdrop for the complainant's actions even though consent had been written out of the statute. Statutes may be reformed, but courts continue to demonstrate a distrust of women who claim rape. "Whatever the legal test seems to require, the real test is whether the woman put herself in what looks in retrospect like a compromising situation. Once that happens, the law seems to indicate, she's on her own."[162]

IV. CONCLUSION

All law is in some way in the shadow of the judges. . . .

Carol Smart[163]

The appellate court decisions discussed herein demonstrate the maleness present in law. The decisions endorse the myths invalidating women's experience in rape and child sexual abuse cases.

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[158] Griffith, *supra* note 142, at 142.

[159] Cynthia Ann Wickton, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988).

[160] *Id.*

[161] Scheppele, *supra* note 143, at 1101.

[162] *Id.* at 1103.

[163] SMART, *supra* note 3, at 25.

> [The law continues] to enforce traditional views of male aggressiveness and female passivity, continue[s] to uphold the "no means yes" philosophy as reasonable, continue[s] to exclude the simple rape from its understanding of force and coercion and nonconsent—until change overwhelms us. That is not a neutral course. In taking it, the law not only reflects the views of a [part of] society, but legitimates and reinforces those views.[164]

Action is needed to include women in the current standards and language used in rape and child sexual assault cases. Women are necessary to transform the language and standards of the law. However, adding women to the subject matter of law cannot be accomplished without "radically altering the perspective and method of [this] discipline."[165]

One approach to altering the current legal maleness is, as Mary Ellen Griffith advocates, to change the identity of the speakers of the language.[166] "When women become the speakers, describing women's reality with their own expressions, a female way of apprehending the law will become intrinsic to the idea of how the law works and what justice means."[167]

If more women are allowed to bring their experiences to the legal benches, perhaps the Tawana Brawleys of the world would be heard and not silenced by dismay and disbelief.

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[164] ESTRICH, *supra* note 23, at 101.

[165] SMART, *supra* note 3, at 21; *see also* Finley, *supra* note 142, at 907. As Finley reminds us, "incorporating 'women's experience' into legal definitions is not as simple as 'one, figure out who or what is 'women'; two, consult women's experience; and three, add [women] to law and stir.' Women's experiences are diverse and often contradictory; and there is no true women's experience unaffected by social construction, which includes legal construction, which includes male defined understandings." *Id.*

[166] Griffith, *supra* note 142, at 142. In addition to changing the identity of the speakers of the language, Griffith also proposes changing the content of what is related and the descriptive terminology used. *Id.* at 143. This article focuses on her first proposal.

[167] Griffith, *supra* note 142, at 144. Not all women will bring a new perspective to law. Many women who practice law have assimilated to a male point of view and have become adept at wielding the tools of the powerful male tradition. The indoctrination into the language and reasoning constructs of the men who defined law begins (or continues) at law school. Christine Boyle has written a thoughtful article on how legal schools convey the message that women really do not matter and in fact teach the value of sexual inequality. Christine Boyle, *Teaching Law as if Women Really Mattered, or, What about the Washrooms?* 2 CANADIAN J. WOMEN & LAW 96 (1991).

Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and The Hawai'i Supreme Court

by Deborah S. Jackson* and Elizabeth Jubin Fujiwara**

We therefore hold that an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy.[1]

Justice Hayashi
October 28, 1982

HPD's need to conduct its suspicionless drug testing program outweighs the privacy interest of the police officers.[2]

Chief Justice Lum
October 25, 1990

Prologue[3]

Eugenie Parnar was a secretary for the Ala Moana Hotel's controller for three years. Under her employer's supervision, Parnar exchanged information with various hotels concerning room rates and occupancy

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[1] Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982) (Hayashi, J.)

[2] McCloskey v. Honolulu Police Dept., 71 Haw. 568, 579, 799 P.2d 953, 959 (1990) (Lum, C.J.)

[3] Eugenie Parnar's and Shanda McCloskey's fact situations as presented in this prologue narrative are derived from the respective appellant briefs. The authors believe that to footnote in this part of the article would detract from the significance of these courageous women's struggles to establish their rights. They have footnoted the prologue only to factually supplement the text.

percentages. Unknown to Parnar, a grand jury investigation was initiated by the United States Department of Justice to determine if various hotels, including the Ala Moana Hotel, were engaged in anti-competitive practices. While the grand jury proceedings were pending, Parnar met with the hotel's attorney ostensibly to discuss her activities.[4] Two days following the meeting, Parnar's immediate supervisor filed personnel forms to fire her within thirty days.[5] Parnar filed suit against the hotel for retaliatory discharge.

Shanda McCloskey became a police officer in 1984. As part of the conditions of her hiring, McCloskey underwent extensive investigations into her personal background, employment records, psychological profile, qualifications, and physical condition.[6] In July of 1988, the Honolulu Police Department (H.P.D.) ordered McCloskey to submit to a random drug test, a test requiring that McCloskey provide a urine sample under the observation of an employee of Accupath Laboratories.[7] When McCloskey refused, H.P.D. ordered her to surrender her service badge, service-issued revolver, and police identification card. She was also removed from the patrol division and assigned a desk job. Following an Internal Affairs' investigation, H.P.D. placed McCloskey in a mandatory testing group subject to frequent urinalysis testing without prior notice for a year, ending July 24, 1989, and reassigned her to a patrol division. On June 15, 1989, H.P.D. again ordered McCloskey to submit to urinalysis. Her refusal to comply resulted once more in the loss of her police badge, revolver, and identification card. H.P.D. again assigned McCloskey to a desk job. On July 19, 1989, McCloskey filed a Complaint for Injunctive and Declaratory relief and a Motion for Temporary Restraining Order.

I. Introduction

The intent of this article is to explore, discuss, and analyze judicial decisions impacting upon nonunion employment rights.[8] The *Parnar v.*

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[4] Parnar had not been called to testify in the grand jury investigation. Following her termination, she was interviewed by a Department of Justice attorney but was not called as a witness in any subsequent criminal or civil proceeding.

[5] The termination was to be effective October 24, 1975, but Parnar was not notified of the termination until October 24, 1975.

[6] Her pre-employment physical included urine testing.

[7] Although much was later made about the privacy surrounding the procedure, in 1988 direct observation by the Accupath Laboratories employee was part of the specimen collection process.

[8] Discussion of issues regarding the rights of employees covered under collective

Americana Hotels, Inc.,[9] and *McCloskey v. Honolulu Police Department*[10] cases are important maps to facilitate understanding of the various approaches taken by the Richardson and Lum Courts in addressing employment issues. *Parnar* and *McCloskey* are two stories, but the Hawaii Supreme Court has heard other employment-related cases, and we propose to draw attention to its use of public policy[11] in determining the outcomes of those cases.

Part II of this article begins with a brief historical overview of the employer-employee relationship and legal claims which commonly stem from the relationship. Part III examines Lum Court decisions confronting the issues presented by the employer-employee relationship. The focus includes decisions involving public policy claims, treatment of employment-at-will, tort claims, and constitutional issues. Part IV explores the impacts that these decisions have had or will have on employee rights in Hawai'i and concludes that while substantial inroads into the employment-at-will doctrine have resulted, privacy issues associated with the workplace remain unsettled.

II. Wrongful Termination and Legal Claims[12]

The most dramatic change in the employer-employee relationship in the United States over the past six decades has been the erosion of the employment-at-will doctrine due to the statutory and common law rights protecting individual employees against wrongful termination.

Until the 1970s, the American workplace was subject to the employment-at-will doctrine which provides that an employer may discharge

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bargaining is beyond the scope of this article. The authors are mindful however that there are several cases which overlap and, where appropriate, those holdings will be discussed. *See* Ronald C. Brown, *The Hawaii Supreme Court Under The Lum Court: Commentary on Selected Employment and Labor Law Decisions*, 14 U. Haw. L. Rev. 423 (1992).

[9] 65 Haw. 370, 652 P.2d 625 (1982) (Hayashi, J.).

[10] 71 Haw. 568, 799 P.2d 953 (1990) (Lum, C.J.).

[11] See *infra* part II.A, for a discussion of the judiciary's use of public policy in employment rights cases.

[12] Part II is a revised version of an article by Elizabeth Jubin Fujiwara, *Wrongful Termination, reprinted in* Our Rights, Our Lives: A Guide To Women's Legal Rights In Hawai'i, at 37-40 (Fujiwara et. al., eds., 2d ed. 1991) [hereinafter Our Rights, Our Lives].

an employee for good reason, bad reason, or no reason at all.[13] The end result of the doctrine was that the employee had no remedy at common law for wrongful termination. In recognition of the harsh consequences of the doctrine, courts began establishing exceptions to the rule.[14]

The first significant inroad into the employment-at-will doctrine was only made in this century in the 1930s when the United States Supreme Court viserated laissez-faire economic theory and upheld the validity of the National Labor Relations Act of 1935 (NLRA).[15] The NLRA clearly cut into the employment at-will doctrine[16] by providing that employees could not be fired for union activities[17] and by protecting the right of employees to bargain collectively for contracts which limited the employer's right to fire.[18] Consequently, many union members

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[13] Employment-at-will implies that the employee is hired for an unspecified period of time. *See* RESTATEMENT (SECOND) OF AGENCY § 442 (1957): "*Period of Employment.* Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." *Accord* Crawford v. Stewart, 25 Haw. 226 (1919), *reh'g denied*, 25 Haw. 300 (1920). In adopting the employment-at-will doctrine, the Hawaii Supreme Court stated:

> [A] hiring at a certain sum per month, no time being specified, unaccompanied by any facts or circumstances or any proof from which a different intention may be inferred and when the testimony as to the contract is not conflicting, is an employment for an indefinite term and not for a month, and terminable at the will of either party.

Id. at 237.

[14] *See generally* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *see also* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.5-1.13 (2d ed. 1987 & Supp. 1991) [hereinafter PERRITT].

[15] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46-47 (1937) (the National Labor Relations Act of 1935 is codified at 29 U.S.C. §§ 151 to 169 (1988)); *see* LEX K. LARSON & PHILIP BOROWSKY, 1 UNJUST DISMISSAL § 2.05 (1991) [hereinafter LARSON & BOROWSKY]; PERRITT, *supra* note 14, § 1.7.

[16] LARSON & BOROWSKY, *supra* note 15, 19, § 2-11.

[17] 29 U.S.C. § 158(a)(3) (1976) of the National Labor Relations Act states that it is unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

[18] *Id.* § 157. Union employees generally have collective bargaining contracts that specify work conditions and termination procedures that are binding on the employers.

have been able to secure the protection of a just cause limitation on termination of their employment[19] as have civil servants in the public sector.[20]

The civil rights movement in the mid-1960s produced the next major statutory incursion into the employment-at-will rule for private sector employees. Most notable is Title VII of the Civil Rights Act of 1964[21] which prohibits employers from making their employment decisions, including discharge, on the basis of race, color, religion, national origin, or sex. Other federal statutory provisions enacted during the 1960s imposing limitations on the employment-at-will doctrine are the Equal Pay Act of 1963,[22] The Age Discrimination in Employment Act of 1967,[23] and Executive Order 11,246 as amended by Executive Order 11,375.[24] Later federal statutes providing protection are the Rehabilitation Act of 1983[25] and the Americans with Disabilities Act of 1990[26] as well as the Pregnancy Discrimination Act of 1978,[27] the Civil Rights

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NLRA § 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Id.

[19] LARSON & BOROWSKY, *supra* note 15, § 2-11; *see also* PERRITT, *supra* note 14, § 3.5.

[20] Lloyd-LaFollette Act, § 6, 27 Stat. 539, 555 (1912); *see generally* Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611 (1984).

[21] 42 U.S.C. §§ 2000e to 2000e-17 (1988).

[22] 29 U.S.C. § 206(d) (1988).

[23] 29 U.S.C. §§ 621 to 634 (1985).

[24] 41 C.F.R. §§ 60-1.1 to 60-1.47 (1990). Executive Order 11,246 is the most recent of a series of orders dealing with discrimination by federal contractors. Numerous federal statutes specifically prohibit discrimination by recepients of federal funds; *see, e.g.*, Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1988); the Justice Assistance Act of 1984, 42 U.S.C. § 3789d (1988); the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5672 (1988); the Job Training Partnership Act, 29 U.S.C. § 1577 (1988); and the Community Development Block Grant Entitlement Program, 42 U.S.C. § 5301 (1988).

[25] 29 U.S.C. § 794 (1982).

[26] Pub. L. No. 101-336, 104 Stat. 327 (1990).

[27] 42 U.S.C. § 2000e(k) (1988). The Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions in the provision of medical fringe benefits. *Id.* Related medical conditions include abortions. *See* Kansas Ass'n of Commerce & Indus. v. EEOC, 22 FAIR EMPL. PRAC. CAS. (BNA) 1343 (D. Kan. 1980); Catholic Bishops v. Beel, 490 F. Supp. 734 (D.D.C.

Act of 1991,[28] and the Government Employee Rights Act of 1991.[29]

Besides these federal civil rights, Congress has further expanded other individual employee rights: whistleblower protection,[30] the Employee Polygraph Protection Act of 1988,[31] and the Worker Adjustment and Retraining Notification Act.[32]

By 1964, the majority of state legislatures had already passed laws which placed specific limitations on the employer's right to "fire at will" in the form of fair employment practices legislation.[33] Locally, under the terms of Hawaii's Fair Employment Practices law,[34] an employer[35] may not take discriminatory actions, including discharge, against an employee because of the employee's race, sex (which includes

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1980), *aff'd sub nom.* Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981); *see generally* PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE AND HEALTH & SAFETY (BNA 1987).

[28] Pub. L. No. 102-166, 105 Stat. 1017 (1991). The Civil Rights Act of 1991 provides additional remedies to protect against and deter unlawful discrimination and harassment in employment and to restore strength to federal antidiscrimination laws that have been weakened by several recent United States Supreme Court decisions. *See* WARREN, GORHAM & LAMONT, SPECIAL STUDY—ANALYSIS OF THE CIVIL RIGHTS ACT OF 1991 § 3 (1991). "Because of these decisions, victims of discrimination have had a widening perception that the federal courts are no longer hospitable to legitimate civil rights claims." *Id.*

[29] Pub. L. No. 102-166, § 302, 105 Stat. 1088 (1991).

[30] The Whistleblower Protection Act of 1989, 103 Stat. 29 (1989) (codified at 5 U.S.C. §§ 1201-1222 (West Supp. 1990)) (wherein the speech interests of federal employees who disclose waste and fraud at the government level are protected from employer retaliation).

[31] 29 U.S.C. §§ 2001-2009 (1988).

[32] 29 U.S.C. §§ 2101-2109 (1988).

[33] PERRITT, *supra* note 14, § 1.8.

[34] HAW. REV. STAT. § 378-1 (1985 & Supp. 1991). A bill entitled "Associational Discrimination" has been introduced in the 1992 Legislative session. This bill seeks to expand the protections of the Fair Employment Practices Law in order to protect those "having a marital, family, or household relationship with an individual who is protected by this part, or being a member of an organization identified with or seeking to promote the interests of individuals who are protected by this part." H.R. 2810, S. 2923, 16th Leg., Reg. Sess. (1992).

[35] HAW. REV. STAT. § 378-1 (1985 & Supp. 1991). The statutory definition of "employer" includes both the public and private employment sectors. An employer is "any person, including the State or any of its political subdivisions and any agent of such person, having *one* or more employees, but shall not include the United States." *Id.* (emphasis added)

Thus, Hawai'i provides broader protection than the federal civil rights statutes such as Title VII which requires fifteen or more employees. 42 U.S.C. § 2000e (1988).

pregnancy discrimination[36] as well as sexual harassment[37]), sexual orientation,[38] age,[39] religion,[40] color, ancestry,[41] handicapped status,[42] marital status,[43] or arrest and court record.[44]

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[36] There are some definite differences between a pregnancy discrimination claim under Hawai'i law and one under Title VII. For example, the Hawai'i administrative regulations regarding pregnancy, childbirth, and related medical conditions are broader. HAW. ADMIN. RULES §§ 12-46-106 to 12-46-108 (1990). Specifically, Title VII only requires that pregnant, disabled employees be treated the same as non-pregnant, disabled employees. In contrast, under Hawai'i law, regardless of what is done for non-pregnant, disabled employees, female employees who are disabled due to pregnancy, childbirth, or related medical conditions must be permitted to take leaves of absence, paid or unpaid, for a "reasonable period of time." HAW. ADMIN. RULES § 12-46-108(a)(1990); *see* Virginia Lea Crandall, *Pregnancy Discrimination*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 30. Furthermore, Hawai'i appears to be the only state that also specifically requires "reasonable accommodation" for disability caused by pregnancy, childbirth, and related medical condition. HAW. ADMIN. RULES § 12-46-107(c)(1990).

[37] There are also definite differences between a sexual harassment claim under Hawai'i law and one under Title VII in the area of strict liability for agents and supervisory employees. Under Title VII as construed by the United States Supreme Court in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), the majority rejected the views of both the EEOC's guidelines and that of the court of appeals, stating instead that it was "wrong to entirely disregard agency principles and impose strict liability on employers for the acts of their supervisors, regardless of the circumstances of the particular case." ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 59 (1990). The Court further held that the record was not sufficiently complete to justify a definitive ruling. Four justices "wrote separately to stress that they would extend the usual employer liability rule to sexual harassment cases." CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (1988).

In contrast, the HAW. ADMIN. RULES provide as follows:

> An employer shall be responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence.

HAW. ADMIN. RULES § 12-46-109(c); *see generally* Elizabeth Jubin Fujiwara, *Sexual Harassment*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 12-15.

[38] HAW. REV. STAT. § 378-1 (Supp. 1991). Sexual orientation protection was enacted into law in Hawai'i in 1991. Employees in both the public and private sector are protected. *Id.* Apparently, most sexual orientation protection that does exist on the continental United States is only for the public sector. PERRITT, *supra* note 14, § 5.28, at 311 n.95; *see generally* Daphne E. Barbee-Wooten, *Lesbian-Gay Rights*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 149-151.

[39] HAW. REV. STAT. § 378-2 (1985 & Supp. 1991); HAW. ADMIN. RULES § 12-46-131 (1990). Under Hawaii's Fair Employment Practices Law, all employees are

The remedies under the Hawaii Fair Employment Practices Act were further expanded by the 1991 enactment of the Hawaii Civil Rights

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protected against age discrimination. *See* Elizabeth Jubin Fujiwara, *Age Discrimination in Employment Act of 1967*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 21-22. Moreover, it is prohibited to reduce a work force which causes a wholesale discharge of older workers for no apparent rational reason other than age. HAW. ADMIN. RULES § 12-46-139 (1990). Such a reduction also may not be made on the basis that older employees are paid more than younger employees. *Id.*

[40] HAW. ADMIN. RULES § 12-46-1 (1990). "Religion" includes all aspects of religious observances, practices, and beliefs. Religious "practice" includes moral or ethical beliefs that are sincerely held with the strength of traditional religious views.

[41] *Id.* § 12-46-1. "Ancestry" means national origin, an individual's or ancestor's place of origin, or the physical, cultural, or linguistic characteristics of an ethnic group. Furthermore, the commission defines ancestry discrimination broadly and will examine with particular concern charges alleging that individuals have been denied equal employment opportunity for reasons related to ancestry such as:

> (1) marriage to or association with persons of an ancestral group;
>
> (2) membership in or association with an organization identified with or seeking to promote the interest of an ancestral group;
>
> (3) attendance or participation in schools, churches, temples or mosques, generally used by persons of an ancestral group; and
>
> (4) because an individual's name or spouse's name is associated with an ancestral group.

Id. § 012-46-171(a).

Moreover, discrimination on the basis of language including speech peculiar to a certain ancestry, a foreign accent, vernacular language, and dialects within the same national group is a violation unless language is a bona fide occupation qualification for the particular position involved. *Id.* § 12-46-174(d). Also, any rule requiring employees to speak only English or another specific language at all times, including work breaks, in the work place violates the law. *Id.* § 12-46-174(a).

[42] HAW. REV. STAT. § 378-2 (Supp. 1991). "Handicapped status" now includes a mental as well as physical impairment which substantially limits one or more major life activity. Regulations are currently being drafted by the Hawaii Civil Rights Commission which parallel those in the recently enacted Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). Adoption of the federal statute would bring individuals with contagious diseases into the definition of handicapped.

[43] HAW. REV. STAT. § 12-46-121. "Marital status" is defined as the state of being married or being single. *Id.* This protection applies to females and males alike. HAW. ADMIN. RULES § 12-46-121. For an analysis of the first Hawaii Supreme Court case that has construed a martial status violation, see *infra* part III.D.

[44] HAW. REV. STAT. § 378-1 (Supp. 1991). "Arrest and court record" is defined to include information about an individual who has been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served

Commission.[45] Beside the usual remedies of equitable relief, backpay, reinstatement and attorney fees,[46] these remedies include general and punitive damages for which there are no caps.[47] Furthermore, it is clear that a workers compensation claim or remedy does not bar relief on complaints filed with the Hawaii Civil Rights Commission.[48]

There are other state statutes which prohibit discriminatory conduct in the employment sector. Equal pay with respect to sex, religion and race is provided for under the Hawaii Wage and Hour Law, protecting private sector employees who receive a guaranteed compensation of less than $1250 or more a month and who are not included in the other exceptions.[49] Under the State Civil Service Law, discrimination is forbidden with respect to race, color, sex, age, religion, ancestry, politics,[50] and, under the General Provisions on Public Service Law, handicapped status.[51]

Additionally, the Hawaii State Legislature passed the Whistleblowers' Protection Act.[52] The purpose of the statute "is to provide protection to employees in the private and public sectors who report suspected violations of law from any form of retaliation by their employers."[53] It was the Hawaii Legislature's expressed hope that "providing protection to government employees and citizens who are willing to 'blow the whistle' when they are aware of ethical or other violations of law will help the State maintain high standards of ethical conduct."[54]

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a summons, arrested with or without warrant, or tried or convicted under any law enforcement or military authority. An exception exists specifically applicable to conviction-based personnel actions by certain financial institutions. *Id.* § 378-3(8).

[45] HAW. REV. STAT. § 368 (Supp. 1991); *see generally* HAW. ADMIN. RULES § 12-46 (Supp. 1991); *see also* Elizabeth Jubin Fujiwara and Lenor Tamoria, *Hawaii Civil Rights Commission*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 41-43.

[46] HAW. REV. STAT. §§ 368-17(a)(1) and (a)(8), 378-5(a) and (b) (Supp. 1991).

[47] *Id.* §§ 368-17(a), 378-5(a).

[48] *Id.* § 368-17(b).

[49] *Id.* §§ 387-1, 4 (1985 and Supp. 1991).

[50] *Id.* § 76-1.

[51] *Id.* § 78-2.

[52] *Id.*. §§ 378-61 to 378-69 (Supp. 1988). The statute was a legislative response to the Hawaii Supreme Court's decision in *Parnar*, 65 Haw. 370, 652 P.2d 625 (1982), and extends protection from work discharge to employees who report their employers' illegal activities to the appropriate regulatory entity.

[53] STAND. COMM. REP. No. 1127, 14th Leg., Reg. Sess. (1987), *reprinted in* 1987 HAW. SEN. J. 1391-92.

[54] *Id.*

The same year the Legislature enacted the Plant Closing Act for the purpose of protecting employees from the effects of unexpected and sudden layoffs or terminations resulting from plant closures, partial plant closures, and relocations.[55]

Hawaii's Constitution provides further protection for workers. Article I, section 5 provides that "[n]o 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."[56]

The language of article I, section 3 of the Hawaii State Constitution is idential to the ill-fated proposed Equal Rights Amendment to the United States' Constitution: "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislature, the provisions of this section."[57]

Hawai'i's constitutional right to privacy also plays a crucial part in today's work environment. It provides in pertinent part that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."[58]

In addition to these federal and state statutory rights, the judiciary has created exceptions to the at-will rule, recognizing interests previously unprotected by either statutory or state common law.[59] One commentator explains as follows:

> Some of these expansions afforded government employees protection against wrongful dismissal . . . . Particularly influential was *Perry v.*

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[55] HAW. REV. STAT. § 394B (Supp. 1991).

[56] HAW. CONST. art. I, § 5. Hawai'i's due process protection is similar to that provided by the United States' Constitution and the federal cases providing public employees with protections against wrongful dismissal. Nonetheless, because the terms "race, religion, sex and ancestry" are specifically provided for in § 5 as compared to the 14th Amendment of the United States Constitution, it is clear that full equal protection would be accorded to employees discriminated on the basis of religion, sex, or ancestry as compared to only race discrimination.

[57] HAW. CONST. art. I, § 3; *see generally* Fujiwara, *Wrongful Termination*, *in* OUR RIGHTS, OUR LIVES, *supra* note 12, at 171-73.

[58] HAW. CONST. art. I, § 6. For a thorough discussion of how this amendment was found by the Hawaii Supreme Court not to be violated by drug testing by the Honolulu Police Department, see *infra* part III. D. Other work-related constitutional rights are addressed by art. I, § 4 which protects freedom of association and expression.

[59] PERRITT, *supra* note 14, § 5.12, at 17.

Sindermann which permitted a public employee to establish a constitutionally protected property right based on expectations of employment tenure derived from employer conduct.

These statutory and constitutional legal developments had their impact on judges confronted with the Employment-at-Will rule. Dealing with new constitutional principles probably made state judges more sensative to their power to change the common law. In addition, as they became more familiar with applying statutory principles protecting individual employees, it is likely that they became increasingly uneasy with common law rules that barred recovery by circumstances that seemed to the judges unfair or outrageous.

The changes in common law rules necessary to permit such employees to recover were not extreme . . . . [T]he Employment-at-Will Rule depended for its efficacy on special interpretations of presumptions of contract terms and the requirement for consideration. To permit an employee to recover in breach of contract, it really only was necessary to apply to the employment relationship the same basic contract rules respecting implied-in-fact promises and considerations that are applied to other forms of legal relationships. Similarly . . . developments of the public policy tort required little more than application of generally recognized prima facie tort principles to the specific facts of an individual employment termination.

At the same time, maturation of legal principles in the statutory employment discrimination and labor relations areas helped to reduce concern that imposing liability on employers in certain circumstances would fundamentally undermine the economic system. The body of case law under the antidiscrimination statutes and the National Labor Relations Act provided models for common law principles that adequately protected both the employees' right to recover for wrongful dismissal and the employers' right to dismiss for cause . . . . [P]ublic employee constitutional developments, collective bargaining practices, and employment discrimination law set the stage for the private sector common law developments of the late 1970s and early 1980s.[60]

Generally, the judicially-created exceptions fall into three broad categories: public policy, common law tort, and implied-in-fact contract claims.

A. Public Policy Claims

Public policy claims are grounded in the theory that the law should not countenance employee dismissals for reasons that violate public

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[60] *Id.* at 17-18 (citations omitted).

policy.[61] Examples of violations of public policy include dismissals stemming from an employee's opposition to her employer's illegal or unethical activities, performing legal duties, or exercising legal rights.[62] Moreover, courts have found termination in retaliation for the filing of worker's compensation claims to be violative of public policy.[63]

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[61] *See, e.g.*, Petermann v. International Bd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (holding it unlawful to discharge an employee who refused to commit perjury before a legislative committee contrary to employer's instructions).

"Public policy" was not succinctly defined by the *Parnar* Court. Instead, the court looked with approval at the definition advanced by the *Petermann* Court: "'[P]ublic policy' may comprehend 'that which has a tendency to be injurious to the public or against the public good' and 'whatever contravenes good morals or any established interests of society. . . .'" 65 Haw. at 378, 652 P.2d at 630 (quoting *Petermann*, 344 P.2d at 27). In *Parnar*, the court noted that

> [s]everal courts which have embraced the public policy exception have similarly discerned the relevant public policy from a statute which particularly addressed the employment relationship in some manner or defined (or from which could readily be inferred) the societal interest at stake. In view of the somewhat vague meaning of the term 'public policy,' few courts have been inclined to apply the public policy exception absent a violation of a statute or clearly defined policy. These decisions manifest a reluctance of courts to unjustifiably intrude on the employment arrangement or to arrogate to themselves the perceived legislative function of declaring public policy.
>
> Because the courts are a proper forum for modification of the judicially created at-will-doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases. The public policy exception discussed herein represents wise and progressive social policy which both addresses the need for greater job security and preserves to the employer sufficient latitude to maintain profitable and efficient business operations.

Id. at 379-380, 652 P.2d at 630-631 (footnotes omitted).

However, the *Parnar* Court expressed a reluctance to intrude on the employment relationship by signaling its intention to exercise judicial caution:

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, the courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.

Id. at 380, 652 P.2d at 631.

[62] The definitive case in Hawai'i is Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982). *See also* Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (holding that employer's discharge of employee for refusal to participate in illegal price-fixing scheme violates fundamental principles of public policy).

[63] *See, e.g.*, Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973)

Of the three judicially-created exceptions, public policy challenges in state courts have had the most success nationwide. The Lum Court's use of the public policy argument/exception is reviewed infra in part III.

B. Common Law Tort Claims

In some cases, employees have posed negligence and intentional tort challenges to at-will dismissals,[64] often in conjunction with public policy tort claims. In determining whether the employer has committed a tort in firing an employee, the courts consider a myriad of substantive issues: defamation,[65] assault and battery,[66] retaliatory discharge,[67] in-

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(noting that worker's compensation is for the benefit of the employee and must be liberally construed in order underlying public policy to be properly effectuated).

By statute, it is unlawful in Hawai'i for an employer to suspend, discharge or discriminate against her employees

> [s]olely because the employee has suffered a work injury which arose out of and in the course of the employee's employment with the employer . . . unless the employee is no longer capable of performing the employee's work as a result of the work injury and the employer has no other available work which the employee is capable of performing.

HAW. REV. STAT. § 378-32(2) (1985).

[64] *See generally, e. g.*, PERRITT, *supra* note 14; PAUL H. TOBIAS & SHARON J. SOBERS, LITIGATING WRONGFUL DISCHARGE CLAIMS (1987).

[65] *See e.g.*, Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985) (holding employer liable to plaintiff for defamatory statements made by its employees). *Cf.* Vlasaty v. Pacific Club, 4 Haw. App. 556, 670 P.2d 827 (1983), in which the Intermediate Court of Appeals dismissed a defamation claim made by a former manager of the Pacific Club. The plaintiff charged that the club president defamed him by telling other employees about alleged thefts made by the plaintiff. The Intermediate Court of Appeals held that the statements were qualifiedly privileged inasmuch as they were made in the scope of employment and only to individuals with a common interest in the subject matter. *Id.* at 563, 670 P.2d at 833.

[66] In Kroger Co. v. Warren, 420 S.W.2d 218 (Tex. Civ. App. 1967), plaintiff, a grocery clerk, brought suit against his employer Kroger, a security officer employed by Kroger, a third party security firm, and one of its employees, for false imprisonment and assault and battery arising out of events following a theft accusation. In determining venue, the court considered that both the employers and employees could be held jointly and severally liable for the employees' acts. *But see* Lui v. International Hotels Corps, 634 F. Supp. 684 (D. Haw. 1986), in which a claim for assault and battery arising from sexual harassment on the job was dismissed against the employer because Hawai'i's state worker's compensation law was held to be the exclusive remedy for

tentional infliction of emotional distress,[68] interference with employment relationships,[69] invasion of privacy,[70] fraud and misrepresentation,[71] and negligent discharge.[72]

A recurrent theme is whether a cause of action for bad faith arises out of wrongful termination. If a wrongful discharge is not predicated on a violation of public policy, the question becomes whether the same claim can be predicated solely on a lack of good faith on the part of the employer. This issue has proven to be troublesome for many courts, and only a minority of jurisdictions prohibit bad faith discharges.[73]

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injuries that reasonably appeared to have flowed from the conditions under which the employee was required to work. *Id.* at 687.

[67] *See, e.g.*, Jett v. Dallas Independent School District, 798 F.2d 748 (5th Cir. 1986), *aff'd in part*, 491 U.S. 701 (1989). The Fifth Circuit held a school principal personally liable for his retaliatory transfer of an athletic coach. The plaintiff alleged that the transfer was grounded in racial reasons, not inability to perform his duties.

[68] *See, e.g.*, Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) (recognizing a cause of action for emotional distress stemming from failure to offer permanent employment). This tort has also been used to vindicate victims of racist attacks. *See* Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977).

[69] Zippertubing Co. v. Teleflex, Inc., 757 F.2d 1401 (3d Cir. 1985).

[70] PERRITT, *supra* note 14, § 211 (public disclosure of the contents of a personnel file might give rise to a privacy action).

[71] *See, e.g.*, Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (1968), in which the plaintiff was induced to close his business and go to work for a competitor. He was found to have a cause of action in fraud against his new employer when he was discharged from his at-will job after just two weeks.

[72] A negligently performed evaluation of an employee has been found to support a tort claim. Schipani v. Ford Motor Co., 302 N.W.2d 307 (Mich. Ct. App. 1981). *But see* Haas v. Montgomery Ward and Company, 812 F.2d 1015 (6th Cir. 1987) (holding under Michigan law that an at-will employee has no independent tort claim for negligent evaluation of job performance).

[73] Monge v. Beebe Rubber Co., 316 A.2d 54 (N.H. 1974), represents the benchmark case of finding wrongful discharge predicated on lack of good faith. The plaintiff alleged wrongful discharge because she refused to date her foreman. The New Hampshire Supreme Court concluded that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Id.* at 551 (citing Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973)). The court found the employer to be motivated by bad faith or malice and affirmed the jury verdict for the plaintiff. For a comprehensive discussion of *Monge*, see Susan M. Ichinose, *Hawaii's Supreme Court Recognizes Tort of Retaliatory Discharge of an At-Will Employee*, 17 HAW. B. J. 123, 125 (1982); *see also* Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass.

The Hawaii Supreme Court rejected the concept of bad faith termination in *Parnar*, explaining in part:

> to imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.[74]

Further discussion of the Hawaii Supreme Court's more recent treatment of common law tort claims follows in part III.

C. Implied-In-Fact Contract Claims

The implied-in-fact contract exception broadens the scope of judicial inquiry to encompass the manner of discharge. Some courts have inferred a contractual obligation not to fire an at-will employee arising from the *employer's conduct*. For example, the Hawaii Supreme Court has found that an employer's deviation from representations made in written personnel policies and procedures, supervisory manuals, employee handbooks, hire letters, written memoranda, or performance evaluations constitutes a contractual exception to the at-will rule.[75]

In states where a personnel manual and/or other employment memorandum are not considered to be a part of the employment contract, the mechanistic application of outmoded doctrines, such as mutuality of obligation and adequacy of consideration, are applied.[76] However, these very doctrines are considered outmoded in the context of non-employment types of contracts.[77] In Hawai'i, which follows the more

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1977) (imposing a duty to terminate in good faith); *see generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

[74] *Parnar*, 65 Haw. at 377, 652 P.2d at 629; *cf.* Hawaii Leasing v. Klein, 5 Haw. App. 450, 698 P.2d 309 (1985) (recognizing implied covenant of good faith and fair dealing on the part of the parties in contractual matters).

[75] Kinoshita v. Canadian Pacific Airlines, Ltd., 68 Haw. 594, 724 P.2d 110 (1986) (Nakamura, J.).

[76] LARSON & BOROWSKY, *supra* note 15, 19, §§ 8.02-8-2, 8.02-8-4 to 8.02-8-5c.

[77] *Id.* § 8-4; *see, e.g.*, A. CORBIN, CONTRACTS § 152 (1973). Corbin has criticized this rule as follows: "These employments [requiring mutuality of obligation in employment contracts] can be found in considerable number; but the decisions to the contrary are far better considered, both in justice and in theory." *Id.* at 16-17.

modern view—one in keeping with modern analysis of other types of contracts—the question whether employee policies are part of a contract or form an implied contract is a question of fact.[78]

In jurisdictions, such as Hawai'i, in which employee policies form an implied-in-fact employment contract, claims that the contract has been breached by the employer's discharge of an employee may be based upon a breach of the handbook's promises either as to substance or as to procedure.[79]

Conversely, some courts have inferred a contractual obligation from the *employee's conduct*. In *Ravelo v. County of Hawaii*,[80] the Hawaii Supreme Court found that an employer's promise to a job applicant of definite employment which induced the applicant and his wife to quit their jobs and make plans to move was considered binding and recovery was allowed.[81]

Within the past decade, the development of judicial exceptions to the employment at-will doctrine has lead to an explosion of employee dismissal litigation filed in state courts. Prior to this shift to the state forum, a litigant who sought affirmative relief for claims against state or local governments and their officials preferred the federal forum.[82] However, as the United States Supreme Court has apparently become less interested in construing federal law to protect individual rights[83] and more willing to restrict access to the federal courts,[84] employees have turned to state law and state courts as alternative sources of judicial protection.[85] Consequently, the ensuing explosion of interest in

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[78] LARSON & BOROWSKY, *supra* note 15, 19, § 8-5. Thus the analysis is the same as that generally used to determine whether a contract has been formed: would a reasonable person looking at the objective manifestations of the parties' intent find that they had intended this obligation to be an implied-in-fact contract? *Id.*

[79] *Id.* § 8.04, at 8-23.

[80] 66 Haw. 194, 658 P.2d 883 (1983) (Nakamura, J.).

[81] *Id.* at 199, 658 P.2d at 887.

[82] *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106-15 (1977).

[83] *See* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Court Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Mark Tushnet, *. . . And Only Wealth Will Buy You Justice—Some Notes on the Supreme Court, 1972 Term*, 1974 WIS. L. REV. 177 (1974).

[84] Jon O. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 22 (1982).

[85] Justice William Brennan has urged state courts to use state law to fill the void created by the Supreme Court's narrowly construed individual rights. *See* William Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 989 (1977).

state law, especially state constitutional law,[86] has led one state supreme court justice to characterize the 1980s as "the decade of the state courts."[87] And so it is in this past decade that Hawai'i's plaintiff employment attorneys have looked to Hawai'i state courts to protect and enforce the rights of Hawai'i's workers under the state constitution as well as under the state law.

Having discussed the nature of legal claims which typically arise out of an employment context, this article now examines the specific manner in which such claims have been addressed by the Hawaii Supreme Court.

III. Analysis of the Hawai'i Judicial Exceptions to the Employment-At-Will Doctrine: From *Parnar* to *Ross*

A. Parnar: *A Clear Mandate Of Public Policy*

In *Parnar v. Americana Hotels, Inc.*,[88] Eugenie Parnar charged her former employer with retaliatory discharge in contravention of public policy.[89] On cross motions for summary judgment, the lower court dismissed on the grounds that an at-will employee had no right of action for retaliatory discharge under the law and, alternatively, that even if Parnar had such a cause of action, public policy was not present in Parnar's case.[90] On appeal, the Hawaii Supreme Court reversed, recognizing a public policy exception to the at-will rule. The court stated:

> The public policy exception [to the employment-at-will rule] . . . represents wise and progressive social policy which addresses the need for greater job security and preserves to the employer sufficient latitude to maintain profitable and efficient business operations. We therefore hold that an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy.[91]

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[86] *See generally Developments in State Constitutional Law 1988*, 20 Rutgers L. J. 903 (1989); *see also* Burt Neuborne, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L. J. 881 (1989).

[87] Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L. J. 951 (1982) (Justice, Wisconsin Supreme Court).

[88] 65 Haw. 370, 652 P.2d 625 (1982).

[89] Susan M. Ichinose, *Hawaii's Supreme Court Recognizes Tort of Retaliatory Discharge of an At-Will Employee*, 17 Haw. B. J. 123, 126 (1982) [hereinafter Ichinose].

[90] *Id.* at 126.

[91] 65 Haw. at 379-380, 652 P.2d at 631.

Since the court found a clear mandate of public policy expressed in federal antitrust laws,[92] it held that Parnar had stated a cause of action for retaliatory discharge.[93] Accordingly, the lower court's summary judgment for the defendant was reversed, and the case was remanded for further proceedings.[94]

The *Parnar* decision, decided just two months before Chief Justice Richardson's retirement, excited the public interest law community. Justice Hayashi, writing for an unanimous court, dispensed with the at-will rule "in . . . recognition of the plight of the largely unprotected private sector employee."[95] The court made it clear that the termination-at-will doctrine was at odds with modern public policy and that, as one commentator has noted, "there is now a public interest in employment and job security which overrides the private interest of employers in terminating at their will and whim."[96] In the words of Parnar's attorney, "[The decision] has at least established a new direction for Hawai'i's courts in this area—toward promoting the public interest in employment and job security."[97] *Parnar* thus left the judicial door wide open to subsequent cases that might question a variety of potential exceptions to the at-will employment relationship.

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[92] The court relied on section 4 of the Clayton Act which provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15 (1914).

[93] *Parnar*, 65 Haw. at 377, 652 P.2d at 629. The court rejected the bad-faith exception to the termination-at-will. *See supra* note 74 and accompanying text.

[94] On April 24, 1987, a jury awarded over $2 million to Parnar. The award included $300,000 in compensatory damages, $275,000 for emotional distress, and $1.5 million in punitive damages. [Authors' note.]

[95] *Parnar*, 65 Haw. at 375, 652 P.2d at 628. Justice Hayashi further stated: "[W]e cannot ignore the new climate prevailing generally in the relationship of employer and employee (citations omitted). Nor can we discount the trend to submit the employer's power of discharge to closer judicial scrutiny in appropriate circumstances." *Id.* at 377, 652 P.2d at 629.

[96] Ichinose, *supra* note 89, at 124.

[97] *Id.* at 127. Susan Ichinose further explains:

> It may well be that *Parnar* will also serve as a turnstile to measure the effect on the courts of the advent of the retaliatory discharge action in Hawaii. If 'intrusions' on the employment relationship and 'impositions' on the courts fail to materialize, hopefully the courts may move further in the direction of the public interest, toward acceptance of the bad-faith exception or a 'just cause' standard for all employees.

Id.

B. Post-Parnar And At-Will Terminations Exceptions By The Lum Court

Two months into its term, the Lum Court was presented with another at-will termination issue. In *Ravelo v. County of Hawaii*,[98] the issues raised centered around a rescission by the County Police Department of Benjamin Ravelo's application for employment.[99] Crucial to Ravelo's action was whether the court would extend *Parnar*'s "judicial incursions" into the employment arena by utilizing the doctrine of promissory estoppel.[100] The court adroitly avoided any discussion of the public interest in job security as expounded by the *Parnar* holding. Instead, the *Ravelo* court based its holding on recognition that Ravelo had detrimentally relied upon the County's promise of employment and that the County should have reasonably anticipated that the Ravelos would have taken the steps that they did. Finding detrimental reliance on a promise equated to promissory estoppel, the court reversed the circuit court's dismissal of the complaint.[101]

The *Ravelo* decision is significant for what it did not address. First, the court avoided any public policy discussion regarding the "carrot" approach to inducement in the employment sector.[102] Instead, the court

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[98] 66 Haw. 194, 658 P.2d 883 (1983).

[99] *Id.* at 196, 658 P.2d at 885. The County Police Department informed Ravelo that his application had been accepted. Therefore, Ravelo resigned from his position, his wife gave notice of termination to her employer, and they arranged to remove their children from their schools. A week later, the County rescinded its offer. The Ravelos attempted unsuccessfully to rescind their respective job resignations. *Id.*

[100] *Id.* at 198, 658 P.2d at 886. The court found that the Ravelos' complaint did not state a cause of action for breach of contract or for tortious conduct. *Id.*

However, the court sua sponte found that the allegations gave rise to a cause of action under promissory estoppel inasmuch as "our position has been that a 'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 414, 368 P.2d 887, 890 (1962)) (citations omitted).

[101] *Ravelo*, 66 Haw. at 199-200, 658 P.2d at 887-888.

[102] *Cf.* McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970) (Levinson, J.) (decision of the Richardson Court). Plaintiff was induced by the manager of an automobile dealership to permanently relocate to Hawai'i. Within two and one-half months he was discharged and suit was brought for breach of an alleged one-year oral employment contract. *Id.* at 29-30, 469 P.2d at 178. On appeal, defendants argued that the oral contract was unenforceable under the Statute of Frauds. *Id.* at 31, 469 P.2d at 179. In strong language, the *McIntosh* court dissected defendants' reliance

relied heavily on the *Restatement (Second) of Contracts* to support its conclusion that promissory estoppel was the controlling factor.[103] Second, the court did not expressly adopt the detrimental reliance exception to employment-at-will.[104] One commentator has noted that although "the substance of its holding is virtually identical to the application of [detrimental reliance], the court did not expressly set forth its reasoning in applying promissory estoppel."[105]

Another exception to the employment-at-will doctrine was adopted by the Lum Court in *Kinoshita v. Canadian Pacific Airlines, Ltd.*[106] The plaintiffs, part-time passenger agents for Canadian Pacific Airlines (CP Air), were arrested for an alleged cocaine promotion conspiracy. CP Air, following hearings and independent investigation, terminated the plaintiffs' employment.[107] The lawsuit, alleging breach of contract,

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upon the Statute. Writing for the majority, Justice Levinson stated:

> [i]t is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available.

Id. at 35, 469 P.2d at 180.

[103] 66 Haw. at 200, 658 P.2d at 887. RESTATEMENT (SECOND) OF CONTRACTS § 90, Promise Reasonably Inducing Action or Forbearance, provides: "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.* § 90(1).

[104] A year following *Ravelo*, the federal district court of Hawai'i indicated that Hawai'i had not adopted the detrimental reliance exception and therefore did not grant relief to the plaintiff who had argued detrimental reliance. Stancil v. Mergenthaler Linotype Co., 589 F. Supp. 78 (D. Haw. 1984).

[105] Cheryl Volta Brady, Note, *Ravelo v. County of Hawaii: Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163, 178 (1986). Brady concludes that the court focused exclusively upon the fact that the defendant could have anticipated that its promise of employment would induce reliance. *Id.*

[106] 68 Haw. 594, 724 P.2d 110 (1986).

[107] *Id.* at 599, 724 P.2d at 114. The basis for the terminations was that the employees had violated employee rules which subjected employees to disciplinary action should the employees "commit[] any act of an illegal nature when off duty which harms or has the potential to harm the Company's reputation . . . ." *Id.* The facts indicate that this "rule" was essentially promulgated by CP Air in the form of a memorandum to its employees. The hearings were carried out in accordance with set employee rules as contained in CP Air's employee manual. Following the hearings, CP Air determined that the plaintiffs had violated the memorandum. The decision was made by the company's Vancouver headquarters. Moreover, CP Air determined that its decision

wrongful discharge, and violations of Title VII of the Civil Rights Act of 1964 and of *Hawaii Revised Statutes* section 378-2, making it unlawful for employer to discharge employee because of arrest and court record, was removed to the United States District Court for the District of Hawaii.[108] The federal court found essentially that CP Air's Employee Rules were not binding and that CP Air had the right to make unilateral changes in the rules.[109] The plaintiffs subsequently appealed to the United States Court of Appeals for the Ninth Circuit which found that the plaintiffs' contract claim raised a question of Hawai'i law.[110]

A question was promulgated to the Hawaii Supreme Court by the Ninth Circuit: "Do CP Air's Employee Rules under Hawaii state law constitute a contract enforceable by the employees?"[111] The Hawaii Supreme Court answered affirmatively. The federal court held that the Employee Rules were not binding inasmuch as "there was no meeting of the minds and [the employer] retained the right to unilaterally change the rules."[112] The Hawaii Supreme Court, however, was of a different mind and, through Justice Nakamura, found that an employer could not be free to selectively abide by its policy statements be they contained in an employee's manual or otherwise.[113]

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was not appealable due to the gravity of the alleged illegal activity despite language to the contrary in Rule 26.05 (grievance procedure) of the Employee Manual: "Should no decision be given within the time limit specified, or the decision be unsatisfactory, the employee may appeal progressively to the Department Head, applicable Vice-President and, in turn, to the President or his designated representative." *Id.* at 598, 724 P.2d at 114.

[108] *Id.* at 597, 724 P.2d at 113. Plaintiffs' counts of infliction of emotional distress and violations of Title VII of the Civil Rights Act of 1964 were dismissed at the close of plaintiffs' case in chief. Ronald K. Nakashima v. Canadian Pacific Air Lines, Limited, et al., Civil No. 83-0011 (D. Haw. 1984), Finding of Fact No. 26.

[109] 68 Haw. at 601, 724 P.2d at 116. For a comprehensive discussion regarding the federal court proceeding and an analysis of the trial judge's rulings, see Leslie A. Hayashi, *Canadian Pacific Cases:* Kinoshita & Nakashima*: What Really Happened to the Employer?*, 22 HAW. B. J. 75 (1989).

[110] 68 Haw. at 597, 724 P.2d at 113.

[111] *Id.*

[112] *Id.* at 601, 724 P.2d. 116. Judge Harold Fong concluded that the plaintiffs had failed to show that they agreed to specific terms, i.e., the memorandum as appended to the Employee Rules, and that CP Air had made its changes without the employees' consent. *Kinoshita*, No. 83-0011 (D. Haw. 1984), Conclusions of Law No. 12. According to Judge Fong, plaintiffs failed to prove either promissory estoppel or detrimental reliance, *id.*, Conclusion of Law No. 13, and could not prevail on their breach of contract claim. *Id.*, Conclusion of Law No. 14.

[113] 68 Haw. at 603, 724 P.2d at 117 (citing Leikvold v. Valley View Community

In reviewing the case, the Hawaii Supreme Court noted that the plaintiffs had been denied one step of the company's internal grievance procedures, notably Rule 26.05.[114] The court found that in certain situations an employer's written policies and handbooks can be "binding contracts" of employment which require the employer to adhere to *all* policies and procedures set forth.[115]

Hospital, 688 P.2d 170, 174 (Ariz. 1984)). The *Kinoshita* Court derived much of its analysis and applied the same principals as those adopted by the Michigan Supreme Court in Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980). In *Toussaint*, the employee was a traditional at-will employee. He had no written contract nor any specified term of employment. However, he alleged that the employer had promised or at least implied that he could only be fired for just cause. He further alleged that he had been shown an internal policy manual which essentially said that an employee would only be fired for cause. The employer argued in response that the manual was not intended to be shown to employees and that, regardless, the manual (and therefore the policy) could be changed any time. The Michigan Supreme Court held that an employee need not be told of the employer's policy at the time of hire. But if the policy is in effect at the time of the hire or comes into effect during the employee's tenure and the employee could reasonably be aware of the policy, the policy is binding.

Thus, in *Kinoshita*, it is not necessary for the employee to be personally aware of the company's policy. As the court explains:

> It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation 'instinct with an obligation.'

68 Haw. at 601-02, 724 P.2d at 116 (citing Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d at 892).

Kinoshita does not stand for the proposition that it is a prima facie requirement that an employer strive to create an atmosphere of job security and fair treatment. The court merely stated that in certain situations an employer's written policies and handbooks can be "binding contracts" of employment. One such situation exists when the employer is striving to create an atmosphere "instinct with obligation."

[114] 68 Haw. at 603, 724 P.2d at 117; *see supra* note 107 and accompanying text.

[115] *Id.* The court reasoned in pertinent part:

> We think the employer here can hardly be free to selectively abide by the policies and procedures set forth in the Employee Rules which were 'promulgated in an effort to defeat a unionization attempt.' Surely, [CP Air] was striving to create an atmosphere of job security and fair treatment, one where employees could expect the desired security and even-handed treatment without the intervention of a union, when it distributed copies of the rules to the employees who were to vote in a representation election . . . [and] thus created a situation 'instinct with an obligation.'

Id. at 603, 724 P.2d at 117 (citations omitted).

Ravelo and *Kinoshita* seem to signal the Lum Court's intention to recognize that the employer-employee relationship requires close scrutiny. Although not specifically addressed, the respective opinions were replete with underlying concerns regarding the public policy of job security. Why the reluctance to explicitly address public policy? One commentator has suggested that to do so would have required the Court to revisit *Parnar* and its rejection of the good faith concept on the part of the employer in discharging an employee.[116] Such a reexamination might lead to the result feared by the *Parnar* Court: opening the floodgates of litigation and "subject[ing] each discharge to judicial incursions into the amorphous concept of bad faith."[117]

C. *Incursions Into Tort Claims*

When confronting tort issues in the employment sector, the Lum Court has not eagerly sought to reformulate the master-servant black letter law. One case decided in 1987 serves to illustrate this observation.

In *Janssen v. American Hawaii Cruises, Inc.*,[118] a co-worker sexually attacked a ship's waiter.[119] At the time of the attack, both employees had been discharged from their duties.[120] Janssen brought an action against his former employer and former union alleging, inter alia, negligent hiring, negligent supervision, and negligent retention.[121] Although the recitation of facts by the court revealed that the attacker had been hired following his release from San Quentin prison,[122] the opinion delivered by Chief Justice Lum chose to discount this particular fact in its analysis of the duty owed by the defendants to the plaintiff. Instead, the court found strength in the doctrine of foreseeability: "The existence of a duty under a negligent hiring theory depends upon foreseeability, that is, 'whether the risk of harm from the dangerous

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[116] Hayashi, *supra* note 109, at 81.

[117] *Parnar*, 65 Haw. at 377, 652 P.2d at 629; *see supra* note 74 and accompanying text.

[118] 69 Haw. 31, 731 P.2d 163 (1987) (Lum, C.J.).

[119] *Id.* at 33, 731 P.2d at 165.

[120] *Id.*

[121] *Id.* On appeal, the court found that Janssen's negligent supervision and retention claims were without merit as the actors involved had been discharged from their employment. The decision discussed only the negligent hiring claim. *Id.* at 35 n.3, 731 P.2d at 166 n.3.

[122] *Id.* at 32, 731 P.2d at 165. The individual had been convicted on charges involving a homosexual attack. *Id.*

employee to a person such as the plaintiff was reasonably foreseeable as a result of the employment.'"[123] The court found that the union which had recommended the hiring of Janssen's attacker did not owe a duty of care to Janssen. To so hold would require the screening or investigation of employment applicants, leaving the employer to confront "an unmanageable, unbearable and totally unpredictable liability."[124] More pointedly, the court believed "To hold [the union] liable under these facts would make it an insurer of the safety of anyone who may have become acquainted with [the dangerous employee] while he worked on the ship."[125] The court did admit that in hindsight the attacking employee may have posed a threat but added that "that potential risk of harm was in no way magnified by the fact of his employment . . . ."[126] Some consideration was given to Janssen's personal interest in risk-free employment. However, that consideration was dismissed, largely due to the fact that the attack occurred after Janssen's employment had been terminated.

Nevertheless, the importance of *Janssen* is the fact that the Hawaii Supreme Court has now recognized a cause of action for negligent hiring, although on the facts of this particular case no liability was found.

D. The Right To Privacy Debate

Within the past five years, many private sector and government sector employers have adopted programs to test the urine of employees and job applicants for drug use. Under these programs, individuals who test positive are either disciplined, induced to undergo treatment, or fired. The programs are fueling a new area of law intent upon protecting the individual worker from an invasion of privacy. Most reported cases on the legality of drug and alcohol testing involve government employees.[127] The United States Constitution protects these

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[123] *Id.* at 34, 731 P.2d at 166 (quoting Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982)).

[124] *Id.* at 35-36, 731 P.2d at 166.

[125] *Id.* at 36, 731 P.2d at 166.

[126] *Id.*

[127] *See, e.g.*, American Federation of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, ___U.S.___, 110 S.Ct. 1960 (1990) (testing approximately 30,000 Department of Transportation employees); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (testing of army civilian police); Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 493 U.S. 963 (1989) (random testing of police officers carrying firearms).

employees in varying degrees, but not those in the private sector, unless the tests are attributable to the government or its agents.[128]

Under Hawaii's State Constitution, article I, sections 6 and 7 could help prevent drug testing. Section 6 clearly states that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."[129] Section 7 reads that the people shall have the right "to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy."[130] Because of public safety concerns, the Hawaii Supreme Court has held that these two constitutional provisions are not violated by the Honolulu Police Department's drug testing program.[131]

Prior to *McCloskey*, the court discussed the expectation of privacy articulated in article I, section 6. In *Nakano v. Matayoshi*,[132] the court stated that the right to privacy protected an individual's interest in avoiding disclosure of personal matters.[133] *Nakano*, a class action suit, challenged the constitutionality of a Hawaii County Code requiring county employees to submit biennial disclosures of their income and financial interests to the County Board of Ethics.[134] The plaintiffs argued inter alia that the code infringed upon their right to privacy.[135] The court agreed that article I, section 6 was meant to underscore the framers' premise that "the people of Hawaii have a legitimate expectation of privacy where their personal financial affairs are concerned."[136] However, the court noted that article XIV of the Hawaii Constitution empowers political subdivisions to adopt specific codes of ethics which in turn shall require public financial disclosures.[137] The court read

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[128] *See, e.g.*, Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989) (drug testing of railroad engineers); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (testing of border patrol officers who carry firearms).

[129] HAW. CONST. art. I, § 6. In its adoption of article I, § 6, the assembly of the 1978 Constitutional Convention of Hawai'i defined privacy as "[a] concept encompass[ing] the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest." COMM. OF THE WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1978, at 1024 (1980).

[130] HAW. CONST. art. I, § 7.

[131] McCloskey v. Honolulu Police Dept., 71 Haw. 568, 799 P.2d 953 (1990).

[132] 68 Haw. 140, 706 P.2d 814 (1985) (Nakamura, J.).

[133] *Id.* at 143-44, 706 P.2d at 818.

[134] *Id.* at 143, 706 P.2d at 817.

[135] *Id.* at 144, 706 P.2d at 818.

[136] *Id.* at 148, 706 P.2d at 819.

[137] *Id.* Article XIV states in pertinent part:

article I, section 6 and article XIV together with the language of the code and perceived no constitutional infirmity:

> [W]e cannot say an employee of the State or any of its political subdivisions may reasonably expect that his interest in avoiding disclosure of his financial affairs is protected to the same extent as that of other citizens, for the convention that proposed an affirmation of 'the right to confidentiality' also authored constitutional language subjecting him to a code of ethical conduct.[138]

In short, plaintiffs suffered diminished privacy interests because they were public employees. Article XIV directs a political subdivision to adopt a code of ethics which applies "to appointed and elected employees of the State or the political subdivision, . . . including members of the boards, commissions, and other bodies . . . [nonelected] public officials have significant discretionary or fiscal powers."[139] In terms of the potential number of impacted employees, *Nakano* is far-reaching.[140]

Additionally, the *Nakano* Court reached deep into public policy considerations to determine that an individual does not have a fun-

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> Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction. The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees as provided by law to make public financial disclosures. Other public officials having significant discretionary or fiscal powers as provided by law shall make confidential financial disclosures.

HAW. CONST. art. XIV.

[138] 68 Haw. at 148, 706 P.2d at 819.

[139] HAW. CONST. art. XIV.

[140] *E.g.*, section 2-91.1(a)(7) of the County Code, as amended by Ordinance No. 83-7, defines a "regulatory employee" as:

> (A) Supervisors of inspectors employed by the department of public works;
> (B) Inspectors employed by the department of public works;
> (C) Supervisors of liquor control investigators;
> (D) Liquor control investigators;
> (E) Buyers and purchasing agents;
> (F) Supervisors of real property tax appraisers;
> (G) Real property tax appraisers;
> (H) Planners employed by the planning department;
> (I) Supervisors of inspectors employed by the department of water supply;
> (J) Inspectors employed by the department of water supply;
> (K) The legislative auditor.

68 Haw. at 143, 144 n.2, 706 P.2d at 816 n.2.

damental right to government employment. The court found that the code's purpose was to deter "corrupt conduct and conflicting interests" among public employees.[141] That there may be wide variance in responsibilities and authority did not render the disclosure provisions invalid.

In *State v. Mueller*,[142] the court found a second protected interest in personal autonomy and freedom to make important personal decisions. The privacy at issue was the personal autonomy of an individual to engage in sexual intercourse for a fee in her own home.[143] In deciding *Mueller*, the court reviewed the legislative history of article I, section 6 to determine its breadth. The court concluded that the legislature intended to treat privacy as a fundamental right.[144]

Mueller found broad protection in personal autonomy. *Nakano*, however, set the theme that an individual does not have a basic constitutionally protected right to governmental employment and thus forfeits some privacy interests and personal autonomy should she elect public employment. *McCloskey* enlarges the theme. The issue before the court was the extent of an employer's power to inquire into the details of its employees' personal lives.[145] Following *Nakano*, the court first found that a police officer, by the nature of her employment as a government employee, has a diminished expectation of privacy.[146] Moreover, on the facts, this diminution transcends the employment sector. The H.P.D. regulations impacted McCloskey and her fellow officers both on-duty and off-duty. Unlike the deterrence sought in *Nakano* to assure an ethical environment in the workplace, the H.P.D. rules "failed to distinguish between the Department's attempts to deter drug use in the workplace and efforts to deter drug use in general."[147] Chief Justice

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[141] *Id.* at 153, 706 P.2d at 822.

[142] 66 Haw. 616, 671 P.2d 1351 (1983) (Nakamura, J.).

[143] *Id.* at 618, 671 P.2d at 1353.

[144] *Id.* at 630, 671 P.2d at 1360. However, the *Mueller* Court ultimately held that Mueller did not have a fundamental right to engage in sex for a fee in her home. *Id.* at 629, 671 P.2d at 136 .

[145] Appellant's Opening Brief at 9, McCloskey v. Honolulu Police Department, 71 Haw. 568, 799 P.2d 953 (1990) (No. 14221).

[146] *McCloskey*, 71 Haw. at 579, 799 P.2d at 959.

[147] Amicus Curiae Brief of the American Civil Liberties Union of Hawaii at 6, McCloskey v. Honolulu Police Department, 71 Haw. 568, 799 P.2d 953 (1990) (No. 14221):

> The government may certainly take an interest in deterring drug use throughout society, but that interest cannot justify random testing. Otherwise, mass testing

Lum, writing for the court, dismissed this assertion, reasoning that "all police officers know they are subject to regulations which affect their private non-professional lives."[148] Second, the court found that the H.P.D. testing program was "a necessary means to a compelling state interest."[149] In classic balancing fashion, the court weighed the competing interests of McCloskey's expectation of privacy, the needs of H.P.D. to promote and preserve the integrity of the department, and the public's "trust and confidence in the police."[150] The scales

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> of the entire population of the nation would be justified . . . . The government . . . may not hide behind that role in attempting to justify intrusive searches of innocent citizens who happen to be in its employ, absent some compelling articulable interest of the government *qua* employer.

Id. (quoting National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 943 n.12 (D.C. Cir. 1987)).

[148] 71 Haw. at 579 n.2, 799 P.2d at 959 n.2. By way of explanation, the court stated that the rules

> require a police officer at all times to enforce the law, on or off duty. Police officers are subject to being called in for duty at any time, and are required by regulation to have their police equipment, including their badge and gun, available for use at all times. Therefore, police officers are on duty or subject to an immediate call to duty at all times. Thus a police officer's drug impairment at any time threatens the compelling state interests enumerated.

Id. at 577, 799 P.2d at 958.

Cf. Capua v. City of Plainfield, 643 F. Supp 1507 (D.N.J. 1986):

> We would be appalled at the specter of the police spying on employees during their free time and when reporting their activities to employers. Drug testing is a form of surveillance, albeit it is a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life.

Id. at 1511.

[149] 71 Haw. at 576, 799 P.2d at 957. The court found three compelling interests served by the testing program: "(1) insuring that individual police officers are able to perform their duties safely; (2) protecting the safety of the public; and (3) preserving H.P.D.'s integrity and ability to perform its job effectively." *Id.* at 576, 799 P.2d at 958.

[150] *Id.* at 577, 799 P.2d at 958. The court was presented with no evidence that a large number of police officers were taking drugs. *Id.* At trial, David Heaukalani, former Assistant Chief of Police and Administrative Chief at H.P.D., testified that he had earlier publicly commented that "drugs don't pose a major problem on the force and didn't prompt the program's creation. Rather, 'it is a *policy decision* by the chief of police . . . .'" *Drug Testing Approved: Police Can Be Dismissed for Using Narcotics*, HONOLULU STAR-BULL., Oct. 15, 1986 (emphasis added).

Three years later, on redirect by defendant's counsel, Heaukalani still maintained

tipped in favor of the government's need over the privacy interest of McCloskey. Although the court acknowledged that the testing program was a search for purposes of article I, section 7 of the Hawaii State Constitution,[151] the court did not address section 7's requirement that a showing of reasonable cause to conduct a search be made. Instead, the court found strength in its conclusion that it is "extremely difficult, if not impossible, to detect drug use among police officers by mere observation."[152] The court summarily dismissed the amicus and appellant's arguments that drug screening detects both *legal* and illegal drug use, arguments meant to show that an employer "has no legitimate right to know what an employee ingests while off-duty as long as it does not impact on job performance."[153]

Lastly, the court did not decide whether a generic compelled drug testing program would implicate a right to privacy under the state constitution because the H.P.D. program was found to have met a compelling state interest.[154]

The *McCloskey* decision has been poignantly described as follows:

> [A]t this point our system of justice appears to be upside down: *today in Hawaii a police officer has less rights than the criminal defendant she or he is arresting*! A police officer can be subjected to the most intimate type of 'search and seizure' without probable cause, much less any reasonable suspicion; while a criminal defendant has his 'search and seizure' rights protected.
>
> . . . .
>
> As serious as the problem of drug abuse may be, the 'war on drugs'

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that the credibility of the police department was the raison d'etre for the program because, in his opinion, there was not a major drug problem within H.P.D. Appellant's Brief at 20, *McCloskey* (No. 14221).

[151] 71 Haw. at 578, 799 P.2d at 958. The court consistently characterized the search as "suspicionless."

[152] *Id.* at 579, 799 P.2d at 959.

[153] Amicus Curiae Brief at 3-4, *McCloskey* (No. 14221). Both appellant and amicus presented objective evidence of existing technological means of detecting workplace impairment which are substantially less intrusive into a person's private life than urinalysis. *See* ZEESE, *Examination to Detect Employee Impairment, in* DRUG TESTING LEGAL MANUAL § 9.05 (1989); *see also* McDonell v. Hunter, 612 F. Supp.1122, 1130 (S.D. Iowa), *affirmed as modified*, 809 F.2d 1302 (8th Cir. 1987) (noting that although searches can yield a wealth of information useful to the searcher, that potential does not make a search a constitutionally reasonable one).

[154] *McCloskey*, 71 Haw. at 577, 799 P.2d at 957.

> cannot be allowed to number among its casualties the Sixth, Seventh and Tenth Sections of the Hawaii State Constitution as well as common law privacy rights.[155]

Shandra McCloskey's job security and personal autonomy concerns were dismissed by the Lum Court with a scrutiny which seems to fall short of *Parnar*'s call for a clear mandate of public policy: "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme."[156]

The *McCloskey* Court cited to the Committee of the Whole's report regarding the adoption of article I, section 6 and its subsequent decisions in *Nakano* and *Mueller* which purported to have interpreted the framers' intent. However, the court articulated no cognizant basis for distinguishing its prior decisions, stating instead that it disagreed with "Appellant's broad view of the framer's [sic] intent."[157] A careful reading of the Committee's report seems to confer a broader right to privacy than had previously existed in the State of Hawaii.[158] The

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[155] Appellant's Opening Brief at 10, *McCloskey* (No. 14221).

[156] 65 Haw. at 380, 652 P.2d at 631.

[157] *McCloskey*, 71 Haw. at 575, 799 P.2d at 957. *Cf.* State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (noting that the delegates to the 1978 Hawaii Constitutional Convention intended to establish a broader privacy right than had previously existed under *both* the federal and state constitutions).

[158] The report states in pertinent part:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. Privacy as used in this sense concerns the possible abuses in the use of highly personal and intimate information in the hands of the government or private parties. . . .

COMM. OF THE WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. of 1978, at 1024 (1980).

It should be noted that McCloskey's attorneys specifically drafted the complaint by pleading only state constitutional provisions. No federal constitutional provision was plead in order that the Hawaii Supreme Court could base its decision on Hawai'i case law. Instead, the court chose to ignore its own liberal rulings in the privacy area as well as in the search and seizure areas and followed federal precedent, analogizing the United States Supreme Court's Fourth Amendment decisions in Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). This was done despite the fact that the federal constitution, unlike the Hawaii Constitution, has no privacy amendment.

Committee on the Bill of Rights, Suffrage and Elections proposed section 6.[159] The Committee explained that section 6 gives "*each and every individual* the right to control certain highly personal and intimate affairs of his own life."[160] Lest there be any unresolved doubt, the Committee further stated that the concept of privacy included the right to "personal autonomy, to dictate one's lifestyle, to be oneself."[161] This powerful language was either overlooked or dismissed by the *McCloskey* Court.[162] Instead, it appears that the court inserted its own public policy mandate and accordingly determined that the "war on drugs" far outweighed McCloskey's right to privacy.[163]

Quite recently, the court decided *Ross v. Stouffer Hotel Company (Hawaii) Ltd., Inc.*[164] Although the dispute and analysis turned on perceived tension between a state statute and an internal company policy, the issue tacitly involved another privacy concern, the right to marry. The appellant and his spouse were both employed by the Waiohai Hotel. At the time of his hiring, the Rosses had been cohabiting for two years and subsequently married approximately eleven days following appellant's hire. In a year's time, the appellees acquired the hotel and promulgated a company rule which prohibited "direct relatives" from working in the same department.[165] The rule further stated that if marriage between co-workers occurred, one of the two employees would be asked to transfer or resign.[166] Ross and his spouse declined to transfer, and Ross was subsequently fired.[167]

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[159] *See* STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 674-75 (1980).

[160] *Id.* at 674 (emphasis added).

[161] *Id.*

[162] *But see* State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (Hayashi, J.), wherein the court meticulously explored the legislative history and scope of art. I, § 6 in deciding a privacy issue involving the sale of pornographic materials.

[163] In deference to the court, there is every indication to believe that drug testing will be used increasingly to control the workplace without offending public policy. *See* Elinor P. Schroeder, *On Beyond Drug Testing: Employer Monitoring and the Quest for the Perfect Worker*, 36 KAN. L. REV. 869 (1988): "In the case of drug testing, the federal government's enthusiastic propaganda campaign undoubtedly has encouraged the adoption of drug screening programs by some employers who otherwise might not have done so. Certainly, the government's efforts have muted public objections to these programs." *Id.* at 870.

[164] 72 Haw. 350, 816 P.2d 302 (1991) (Padgett, J.) (Wakatsuki, J., dissenting).

[165] *Id.* at 351, 816 P.2d at 303.

[166] *Id.*

[167] *Id.*

Ross brought suit against his former employer claiming that his termination violated *Hawaii Revised Statutes* section 378-2.[168] Defendants argued that Ross was not terminated because of his marital status but because he married a co-worker. Pointing to the fact that the employer would have apparently tolerated Ross' continued employment had he simply chosen not to marry his co-worker, the court concluded that defendants' company policy violated section 378-2. The majority concluded that public policy clearly encourages marital relationships and any other reading of section 378-2 would discourage marriage, and encourage divorce or cohabitation.[169] The dissenters, on the other hand, argued that while the public interest is served by a policy of not discouraging marital relationships, this interest "is not a motivating factor behind civil rights laws such as Section 378-2."[170]

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[168] HAW. REV. STAT. § 378-2 (1985) provides:

> It shall be an unlawful discriminatory practice:
> (1) For an employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record.

Id.

[169] 72 Haw. at 354, 816 P.2d at 304. The court explained:

> The public policy argument behind encouraging marital relationships . . . seems to us persuasive as applied to the facts of this case . . . . The employer's invocation of the policy a year after they had entered into a marital relationship left them with a Hobson's choice of one of them either giving up his or her employment, or their seeking a divorce, and continuing to live together and being employed in their chosen occupation.

Id.

[170] *Id.* at 358, 816 P.2d at 306 (Wakatsuki, J., dissenting). Justice Wakatsuki stated (Justice Moon joining):

> [T]he fear that antinepotism rules will discourage marriage and encourage divorce, and thus undermine the freedom of persons to marry, seems, to say the least, farfetched. Indeed, some with a practical bent might think that the pressures of employment supervision by one spouse or other close relative over another, if anything, would add rather than detract from the normal tensions of an already close and somewhat consuming relationship. In any event, given the societal, religious, romantic and practical support arrayed behind the marriage institution, it is inconceivable that it would not withstand the fact that some employers believe close relatives are not the preferred choice for supervisors of one another.

Id. at 358-59, 816 P.2d at 306 (quoting Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board, 415 N.E.2d 950, 954 (N.Y. 1980)).

Ross, like *McCloskey*, may indicate that the court will not hesitate long to insert its own interpretation of public policy.

IV. Conclusion

Can any judicial trends be discerned in decisions impacting employment issues? The court has dealt with very difficult issues, issues impacting upon both a worker's right to employment and her right to personal autonomy. While trend-spotting is perhaps premature, some observations may be offered.

The Hawaii Supreme Court appears to be a wary sentinel overseeing judicial incursions on the employment relationship. Although *Parnar* was initially hailed as a substantial step in the direction of the public interest,[171] recent decisions which impact fundamental rights seem to have given scant attention to that public interest. Admittedly, *Ravelo* and *Kinoshita* bode well for employees-at-will provided there are cognizable contractual issues in question.[172] It is neater, cleaner, and safer to rely on definitive principals of contract law.

When faced with issues of impacted expectations—be they expectations of personal safety, personal integrity, or job security—it is difficult for the court to avoid directly confronting the underlying public interest or policy. The Lum Court has been confronted with very difficult issues and while it has been suggested that the court has avoided the "whole picture," some argument might be made that the court has sought not to deliberately avoid public policy but to make policy as the cases appear before it. This is not to suggest that the court is totally impervious to prevalent public policy. On the contrary, *McCloskey* and *Ross* appear to be clear indications that the climate of the times subtly influences the court's decision making process.[173] *McCloskey* was

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[171] Ichinose, *supra* note 89, at 127.

[172] The *Kinoshita* decision may have served employees-at-will well in the contractual sense but CP Air, the employer, prevailed on the plaintiffs' wrongful discharge claims, the violations of § 378-2 and Title VII, and the emotional distress claims both in district court and upon appeal to the Ninth Circuit. Kinoshita v. Canadian Pacific Airlines, Ltd., 803 F.2d 471, 475 (9th Cir. 1986).

[173] *See also* Hyatt Corporation v. Honolulu Liquor Commission, 69 Haw. 238, 738 P.2d 1205 (1987) (Lum, C.J.). Although *Hyatt* is not an employment case, the observer may look to it as one example of the Lum Court's deference to prevailing public policy. In the case, Chief Justice Lum indicated the court's strong commitment to disavow racial discrimination: "The public policy of the State of Hawai'i disfavoring racial discrimination is embodied in our statutes and our Constitution. The strength of this expressed public policy against racial discrimination is beyond question." *Id.* at 244, 738 P.2d at 1208 (footnotes omitted).

decided in a time of societal focus on a growing national problem with illegal drug use. *Ross*, had it been decided otherwise, might have been perceived as an irreverent discount of marriage and tacit judicial approval of cohabitation without benefit of marriage.

It is difficult to predict the future course of the employment relationship as it comes before the court, especially in light of the current inroads being made into rights at the federal level. We feel comfortable in predicting, however, that job security for at-will employees is judicially assured. *Parnar* and its progeny have so provided. In addressing other employment issues such as privacy interests, we can only observe that this area of law is not fully developed in Hawai'i despite the *McCloskey* decision. The court should be encouraged at every opportunity to liberally apply the concepts behind the drafting of article I, section 6.[174] Other considerations such as avoidance of extensive litigation and overburdening the already saturated dockets, while viable, should not deter the court from thoroughly exploring issues which impact rights in all areas of public and private employment.

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[174] *See supra* notes 158-61 and accompanying text.

Striking a Balance: Procedural Reform Under the Lum Court

by Danielle K. Hart* and Karla A. Winter**

I. Introduction

Access to the courts should be among the primary goals of any court system. At the same time, however, the sheer number of cases filed can and does overburden the courts. Thus, there will always be tension between the desire to provide litigants with their day in court and the practical realities of managing a court system.

Whether articulated or not, courts do address the conflicting concerns of court access and court efficiency. The Hawaii Supreme Court, under the direction of Chief Justice Herman T. Lum, is no different.

This article, therefore, examines the ramifications of the Lum Court's attempt to strike a balance between these competing values.

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Part II looks at the various reforms, procedures, and mechanisms comprising the Lum Court's "court reform package."[1] Part II then examines how the court reform package is actually applied in practice.

Part III explores the parameters of the conflict between efficiency and access to the courts. Part IV examines the role of the courts in society in relation to the resolution of this conflict. Part V then concludes by arguing that the two goals, access and efficiency, are not necessarily incompatible, but that in cases of conflict, the value of access to the courts should be accommodated.[2]

II. The Court Reform Package: Redesigning the System

The civil litigation system in the United States as a whole has come under attack over the last fifteen years.[3] Critics have focused on "overcrowded dockets, excessive cost, delay, waste and insensitivity to human needs. Scholarly criticism also pointed to failures of the adversary system, including flawed procedures that encouraged frivolous filings, runaway discovery, and begrudgingly authorized pretrial judicial management of cases."[4]

As a result of this national trend and the Hawaii Judiciary's continuing effort to improve judicial administration,[5] the Hawai'i

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[1] The term "court reform package" is used throughout this article to describe some of the various reforms, procedures, and mechanisms implemented or otherwise adopted by the Lum Court during Chief Justice Lum's tenure as chief justice. This article does not address *all* of the procedural changes that have occurred under the Lum Court. Nor is the term used to imply that all of the reforms and/or mechanisms discussed in this article occurred at the same time. The term "court reform package" is simply used for ease of reference purposes.

[2] This article specifically embraces certain values and minimizes others. Other interpretations of the data are, of course, possible. However, this article only provides one possible analytical framework to examine the issues raised by the competing values of court efficiency and court access.

[3] Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 Harv. C.R.-C.L. L. Rev. 341, 349-50 (1990) [hereinafter Yamamoto, *Efficiency's Threat*].

[4] *Id.* at 350; *see also* Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 Buff. L. Rev. 487, 503 (1980).

[5] The Lum Court's court reform package must be seen as a continuation of an on-going process to improve Hawai'i's court system. Chief Justice William Richardson, Chief Justice Lum's predecessor, was also concerned about court administration and trial court delay. Thus, within a decade after Richardson became chief justice, the

state court system has been restructured and refined under the Lum Court.[6] One of the Lum Court's primary goals has been to reduce case congestion in Hawai'i courts and ultimately to eliminate undue delay and cost in litigation.[7] The Lum Court, therefore, implemented a variety of reforms and utilized other tools to achieve this efficiency ideal.[8]

A. The Administrative Reform Program

Administrative reform, at least in the Hawai'i court system, "has focused on systematic efficiency: paring down the cost and time of litigation through technological innovation and firm scheduling deadlines."[9] Central to the Lum Court's administrative reform program was a self-imposed eighteen-month deadline for case resolution. More specifically, Chief Justice Lum determined when he took office that cases entering the circuit courts should be resolved through settlement or trial within eighteen months after the complaint was filed.[10]

To achieve this goal, the Lum Court needed to reduce a backlog of over 14,000 cases[11] that was burdening the circuit court system in

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Hawaii Judiciary was well on its way to becoming more centralized and computerized. CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 116 (1985).

A thorough examination of Chief Justice Richardson's tenure on the Hawaii Supreme Court is beyond the scope of this article. Instead, this article examines some of the reforms implemented by the Hawaii Judiciary since Chief Justice Lum took office for purposes of discovering the current Hawaii Supreme Court's judicial philosophy. For more information on Chief Justice Richardson, *see generally* DODD, *supra*.

[6] Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 397 (1987) [hereinafter Yamamoto, *Case Management*].

[7] *Id.* at 399.

[8] *See infra* parts II.A.-II.D.

[9] Eric Yamamoto, *Pending Procedural Reform in Hawaii's Courts—New Civil Rules 11, 16 and 26: Benefits and Problems of Active Case Management*, 18 HAW. B.J. 1 (1988) [hereinafter Yamamoto, *Procedural Reform*].

[10] Interview with Judge Philip T. Chun, Judge of the Fourteenth Division of the Circuit Court of Hawaii, in Honolulu, Haw. (Jan. 14, 1992). Judge Chun was the administrative judge in the Hawai'i circuit courts from September 1983 to March 1991. *Id.*

[11] *Id.*; Interview with Justice Ronald Moon, Associate Justice of the Hawaii Supreme Court, in Honolulu, Haw. (Oct. 25, 1991).

1983. Ideally, the Lum Court wanted to reduce the case backlog to the point that only five to six cases were tried each week.[12]

Even assuming that most cases settled,[13] however, four percent of the remaining cases went to trial in any given month.[14] Given the fact that a trial court could try one case per week,[15] and given the backlog of cases in 1983, this meant that approximately forty-five cases were scheduled for trial each week.[16]

The Lum Court's response was two-fold. First, Chief Justice Lum gave Judge Yasutaka Fukushima[17] the responsibility of not only reviewing all the cases in the circuit court system, but also of reducing their number.[18] From 1984 to 1985, Judge Fukushima successfully brought the backlog down to approximately eight-thousand cases.[19] Even with the elimination of six-thousand cases, however, twenty to twenty-five trials were still scheduled per week.[20]

The Lum Court's second response attacked the case backlog problem by identifying contributing causes. The primary problem was that the court system, as it existed prior to 1984, was not conducive to the expeditious completion of discovery:[21] there was no court imposed deadline for trial,[22] and there was no settlement conference requirement.[23] Consequently, attorneys were not forced to work their cases until just before trial.[24] As a result, cases that should have

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[12] Interview with Judge Chun, *supra* note 10. This was apparently the number that would enable Hawai'i trial courts to remain on top of their dockets and also prevent additions to the case backlog. *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* This was the operative assumption in 1983. *Id.*

[16] *Id.*

[17] *Id.* Judge Fukushima was retired at the time but came out of retirement at the Chief Justice's request. *Id.*

[18] *Id.*

[19] *Id.* According to Judge Chun, the mechanism Judge Fukushima used to reduce the backlog was dismissal for lack of prosecution. *Id.*

[20] *Id.*

[21] Interview with James Kawashima, Partner with Watanabe, Ing & Kawashima, in Honolulu, Haw. (Oct. 17, 1991).

[22] Telephone interview with Keith Hiraoka, Partner with Roeca, Louie & Hiraoka (Sept. 17, 1991). The mechanism triggering a trial date was a defendant's or a plaintiff's filing of a statement of readiness. *Id.*

[23] Interview with Justice Moon, *supra* note 11. Such conferences were up to the individual judge's discretion. *Id.*

[24] Interview with James Kawashima, *supra* note 21; Interview with Keith Hiraoka, *supra* note 22.

settled or been dismissed remained in the system longer than was otherwise necessary had discovery been conducted sooner.[25]

Each of these factors were addressed in turn. Thus, the Lum Court approved drastic revisions to the Rules of the Circuit Courts of the State of Hawaii (Rules of the Circuit Courts) in 1984,[26] and, acting through Judge Philip T. Chun,[27] succeeded in computerizing the Hawai'i court system[28] and in introducing settlement judges into the circuit courts.[29]

Whatever the method or mechanism, however, each of the Lum Court's administrative reforms must be seen as part of an overall program designed specifically to meet the Chief Justice's eighteen-month goal for case resolution.[30]

1. The revised Rules of the Circuit Courts

The primary purpose of the 1984 revisions to the Rules of the Circuit Courts was to help eliminate the backlog of cases by imposing mandatory deadlines on various aspects of the civil litigation process.[31] Rule 12 in particular was revamped to accomplish that end.[32]

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[25] Interview with Judge Chun, *supra* note 10. The argument is that discovery should inform the attorney whether her case is viable and thus whether it should remain in the court system. *Id.*

[26] Interview with James Kawashima, *supra* note 21. The 1984 revisions are considered the most drastic because they constituted a complete revamping of the rules as they pertained to civil cases. *Id.*

[27] Interview with Judge Chun, *supra* note 10. Judge Chun was the administrative judge in the First Circuit Court of Hawaii from September 1983 to March 1991. *Id.*

[28] *Id.* According to Judge Chun, Justice (then Judge) Moon and his court clerk Susan DeGuzman were largely responsible for computerizing the court system. *Id.*

[29] Yamamoto, *Procedural Reform*, *supra* note 9, at 2.

[30] *See supra* text accompanying note 10.

[31] Interview with James Duffy, Partner with Fujiyama, Duffy & Fujiyama, in Honolulu, Haw. (Oct. 18, 1991); Interview with Justice Moon, *supra* note 11; Interview with James Kawashima, *supra* note 21; Interview with Keith Hiraoka, *supra* note 22.

Though relieving the case backlog may have been the primary goal of the revisions, other purposes were also incorporated, such as preventing trials by surprise (more disclosure was mandated) and minimizing the expense for litigants. Interview with Justice Moon, *supra* note 11.

[32] Interview with James Kawashima, *supra* note 21; Interview with James Duffy, *supra* note 31.

Rule 12 sets forth a strict pretrial timetable/deadline which essentially forces attorneys to work their cases.[33] For example, Rule 12 now requires plaintiffs to file pretrial statements within one year,[34] unless extended.[35] If no pretrial statement is filed within that time period, the case will be dismissed for want of prosecution.[36]

Upon the filing of a pretrial statement, a defendant then has sixty days to file a responsive pretrial statement.[37] Rule 12 also sets a deadline for the final naming of witnesses[38] and imposes a mandatory end to discovery.[39]

Failure of a party or his or her attorney to comply with any section of Rule 12 will be deemed an undue interference with orderly procedures and, unless good cause is shown, the court has discretion to impose sanctions authorized under Rule 12.1(a)(6).[40] Such sanctions include dismissing the action and paying attorney's fees.[41]

In practice, however, the mandatory deadlines and requirements of the Rules of the Circuit Courts have not always been strictly followed. The seminal opinion interpreting the 1984 revisions to the Rules of the Circuit Courts is not a Hawaii Supreme Court opinion—it is an Intermediate Court of Appeals (I.C.A.) decision. However, the I.C.A. opinion has not been questioned or reversed by the Hawaii Supreme Court thereby providing the inference that it comports with the supreme court's views on the subject.

Messier v. Association of Apartment Owners of Mt. Terrace,[42] involved a personal injury action based upon strict liability and negligence.[43] Trial was scheduled for June 16, 1985. On May 16, 1985, on the eve of discovery cutoff and one month before trial, Messier filed a first amended pretrial statement which named three expert witnesses—an economist and two engineers—for the first time.[44] The two engineers were Messier's only experts on the issue of liability.[45]

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[33] Interview with Keith Hiraoka, *supra* note 22.
[34] HAW. CIR. CT. R. 12(b).
[35] *Id.* 12(d).
[36] *Id.* 12(q).
[37] *Id.* 12(h).
[38] *Id.* 12(l).
[39] *Id.* 12(r).
[40] *Id.* 12(t).
[41] *Id.* 12.1(a)(6)(i), (ii).
[42] 6 Haw. App. 525, 735 P.2d 939 (1987).
[43] *Id.* at 526, 735 P.2d at 942.
[44] *Id.* at 529, 735 P.2d at 943. Messier's counsel explained that his original economist

Then, on May 23, 1985, after the discovery cutoff, Messier filed a motion to add critical witnesses under Rule 12(a)(15)[46] of the Rules of the Circuit Courts.[47] The trial court granted one of the defendant's motion to strike Messier's pretrial statement and denied Messier's motion to add critical witnesses.[48]

Finally, on June 17, 1985, the date originally set for trial, the trial court orally authorized all defendants to file substantive motions on Messier's claims.[49] This authorization violated Rule 7(f) of the Rules of the Circuit Courts which specifically prohibited the filing of such motions more than sixty days after the responsive pretrial statement was filed.[50] The trial court granted the defendants' motions, one of which was a summary judgment.[51]

The I.C.A. addressed four issues, only two of which are relevant for our purposes. First, it considered whether the trial court abused its discretion in disallowing Messier's amended pretrial statement and in denying Messier's motion to add critical witnesses.[52] Second, whether a motion for summary judgment filed subsequent to the cutoff date for substantive motions under the Rules of the Circuit Courts was nevertheless permissible because it was filed within the time allowed for such motions by the Hawaii Rules of Civil Procedure.[53]

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witness would not be available for trial so he was compelled to find another economist. As for the engineers, Messier's counsel stated that he had been planning to use an architect as an expert witness on the liability issue. However, after an architect was added as a third-party defendant, he felt compelled to switch to engineers. *Id.* at 531, 735 P.2d at 945.

[45] *Id.* at 529, 735 P.2d at 943.

[46] The Rules of the Circuit Courts have been renumbered since the *Messier* opinion. To avoid confusion, however, the numbering in the opinion has been retained for the discussion of the case.

[47] *Messier*, 6 Haw. App. at 529, 735 P.2d at 944.

[48] *Id.* at 529-30, 735 P.2d at 944.

[49] *Id.* at 530, 735 P.2d at 944.

[50] Note that Rule 7(f) has subsequently been revised since the *Messier* opinion. The Rule now requires substantive motions to be filed no later than 30 days prior to the assigned trial date. HAW. CIR. CT. R. 7(f).

[51] *Messier*, 6 Haw. App. at 530, 735 P.2d at 944.

[52] *Id.* at 527, 735 P.2d at 942. The I.C.A. noted that both motions were based on Rule 12 of the Rules of the Circuit Courts, specifically Rule 12(a)(2): Pretrial Statement, and Rule 12(a)(15): Addition of Critical Witnesses. In addition, both motions involved the question of whether Messier should have been allowed to present his experts' testimony at trial. *Id.* at 530, 735 P.2d at 944.

[53] *Id.* at 527, 735 P.2d at 942, 945-46.

Rule 12(a)(15) of the Rules of the Circuit Courts specifically requires a party moving for the addition of critical witnesses to make a showing of good cause and substantial need.[54] Despite the questionable showing of good cause made by Messier[55] and despite the fact that the identification of witnesses could have been made earlier,[56] the I.C.A. held with respect to the first issue that the trial court should have granted Messier's motion to add critical witnesses.[57]

Two facts appeared to be crucial to this particular holding. First, the I.C.A. found that the sanction resulting from both motions, i.e., that Messier would not be allowed to present his experts' testimony at trial, led to Draconian results.[58] Second, the I.C.A. also found that the defendants did not suffer undue prejudice from Messier's late naming of witnesses.[59]

The I.C.A. essentially ignored Rule 12's "good cause" requirement in favor of a prejudice analysis not authorized by the Rule. According to the I.C.A., the trial court should have allowed Messier to add his witnesses and continued the trial to allow all the parties to fully prepare.[60]

As to the second issue, the I.C.A. held that, because Hawaii Rules of Civil Procedure 56 allows a motion for summary judgment to be filed at any time, the conflict between Rule 56 and Rule 7(f) of the Rules of the Circuit Courts must be resolved in favor of Rule 56.[61]

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[54] *Id.* at 529, 735 P.2d at 944 n.8 (The rule stated: "At any time after the Final Naming of Witnesses, upon a *showing of good cause* and substantial need a party may move for the addition of a witness." (emphasis added)).

[55] *Id.* at 531, 735 P.2d at 945. Messier's counsel's only explanation was that his original economist witness would not be available for trial so he was compelled to find another economist. As for the engineers, Messier's counsel stated that he had been planning to use an architect as an expert witness on the liability issue; however, after an architect was added as a third-party defendant, he felt compelled to switch to engineers. *Id.*

[56] *Id.* (The I.C.A. explicitly acknowledged in its opinion that "those decisions might have been made at an earlier date.").

[57] *Id.* at 532, 735 P.2d at 945.

[58] *Id.* at 532, 735 P.2d at 945. More specifically, many of the judgments rendered by the trial court against Messier were based in part on the argument that Messier would not be able to prove his case at trial without the use of experts. Of course, Messier did not have experts for trial because the trial court would not allow them. *Id.*

[59] *Id.* at 531, 735 P.2d at 945.

[60] *Id.* at 532, 735 P.2d at 945.

[61] *Id.* at 532-33, 735 P.2d at 946.

Messier is significant because it undermined, to a certain extent, portions of Rule 12 of the Rules of the Circuit Courts.[62] The I.C.A.'s opinion basically said that the plaintiff should have been given a break, i.e., he should have been allowed to add witnesses at the last minute, even without a showing of "good cause" as required by the rule. This position is inconsistent with Rule 12 to the extent that Rule 12 was specifically designed to reduce the case backlog in the circuit courts by imposing mandatory deadlines and requirements on the civil litigation process.[63]

Messier demonstrates that, despite the clear language of the Rules of the Circuit Courts and their emphasis on efficiency,[64] in practice other considerations, such as giving litigants their day in court, do get factored into the decision-making calculus.

2. *Involuntary dismissals*

Another factor that contributed to the case backlog in the circuit courts was the fact that stale cases continually clogged the system. More specifically, cases remained in the system even when no papers or motions were filed after the initial complaint. As a result of the computerization of the Hawai'i court system, however, involuntary dismissals became the mechanism by which the Lum Court addressed this aspect of the backlog problem.[65]

The circuit court computer system now processes a notice of dismissal automatically when plaintiffs fail to file their pretrial statements within one year after the complaint is filed.[66] Unless objections showing good cause are filed within ten days after receipt of such notice, the plaintiff's case is dismissed.[67]

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[62] Interview with Keith Hiraoka, *supra* note 22. The counterargument is that *Messier* should be limited to its facts. *Id.*

[63] *See supra* text accompanying notes 31-41.

[64] *See supra* text accompanying note 31. Efficiency as the term is used here refers to the Rules of the Circuit Courts' emphasis on streamlining litigation by imposing mandatory deadlines on the civil litigation process. *Id.*

[65] HAW. R. CIV. P. 41(b) also authorizes involuntary dismissals and, therefore, is included in the general statement regarding the disposition of stale cases in the court system. However a Rule 41(b) dismissal requires a motion by one of the parties and, therefore, is not the rule directly involved in this aspect of the Lum Court's administrative reform program.

[66] Interview with Judge Chun, *supra* note 10.

[67] HAW. CIR. CT. R. 12(q). According to Judge Chun, such dismissals are supposed to be with prejudice. Interview with Judge Chun, *supra* note 10.

In practice, cases do get dismissed.[68] However, if objections are filed, a large number of cases are reinstated.[69]

The most plausible explanation for what is occurring in practice is that actual practice comports with a longstanding policy of the Hawai'i appellate courts. Specifically, involuntary dismissals are too harsh a sanction in most cases;[70] they are simply not favored.[71] Decisions of both of Hawai'i's appellate courts have stated that "'[a] dismissal of a complaint is such a severe sanction[] that it is to be used only in extreme circumstances when there is a 'clear record of delay or contumacious conduct . . . and where lesser sanctions would not serve the best interests of justice.'"[72]

Thus, even though the I.C.A. affirmed a dismissal with prejudice in *GLA Inc. v. Spengler*,[73] the court still recognized that the Hawaii Judiciary favored full trials on the merits and disfavored dismissals if

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[68] Interview with Judge Chun, *supra* note 10. Involuntary dismissal was the mechanism Judge Fukushima used to reduce the backlog of cases in the circuit courts from over 14,000 in 1983 to approximately 8000 in 1984. *See supra* note 19. However, when cases have been dismissed, no objections have generally been filed. Interview with Judge Chun, *supra* note 10.

[69] Interview with Judge Chun, *supra* note 10. Generally, objections are filed if the case is still viable. *Id.*

[70] *Id.* For the most part, case law development and interpretation of involuntary dismissals has been delegated to the I.C.A.. The Lum Court has addressed 10 cases involving some kind of involuntary dismissal whereas the I.C.A. has addressed the issue in 22 cases. Search of LEXIS, Haw Library, Cases File (Jan. 6, 1992).

[71] *See generally* Lim v. Harvis Constr., Inc., 65 Haw. 71, 647 P.2d 290, (1982) (*per curiam*); *see also* Richardson v. Lane, 6 Haw. App. 614, 619, 736 P.2d 63, 67 (1987).

[72] Bagalay v. Lahaina Restoration Foundation, 60 Haw. 125, 132, 588 P.2d 416, 422 (1978) (Kobayashi, J.) (internal quotation marks and citation omitted); *accord* Lim, 65 Haw. at 73, 647 P.2d at 292; Ellis v. Harland Bartholomew & Associates, 1 Haw. App. 420, 426-27, 620 P.2d 744, 749 (1980); Richardson, 6 Haw. App. at 619, 736 P.2d at 67.

Though the Hawaii Supreme Court opinions cited date back to Chief Justice Richardson's tenure on the court, they still represent the philosophy of the Lum Court today as evidenced by the long-standing and unmodified statements of policy in various I.C.A. decisions.

[73] 1 Haw. App. 647, 623 P.2d 1283 (1981). The I.C.A. affirmed a dismissal with prejudice made pursuant to Rule 12 of the Hawaii Rules of the Circuit Courts. This holding was reached only after the I.C.A. found that the trial court committed no abuse of discretion in deciding that plaintiff's attorney's inattention to the case, which was the cause ultimately cited for the fact that no statement of readiness was filed, did not constitute excusable neglect. *Id.* at 649-50, 623 P.2d at 1285.

lesser sanctions were available to "vindicate the purpose of the rules and the desire to avoid court congestion."[74]

The reality of actual practice, i.e., that cases are generally reinstated if objections are filed,[75] runs contrary to the purpose arguably served by involuntary dismissals. In fact, actual practice creates an anomalous situation: a mechanism is in place that efficiently disposes of cases being neglected or ignored in the circuit courts but that mechanism is easily bypassed. Like the Rules of the Circuit Courts,[76] therefore, case law and actual practice indicate that the Lum Court has been guided by concerns other than mere efficiency when dealing with involuntary dismissals and the case backlog problem.

3. Settlement judges

The Hawaii Judiciary was aware that most cases settled approximately one month prior to trial.[77] Thus, the Hawaii Judiciary also knew that another factor contributing to the case backlog in 1983 was the lack of a settlement conference requirement.[78] Settlement judges were the Lum Court's solution.[79]

Settlement judges were implemented in the circuit court system in 1984.[80] Their primary function was to assist the settlement process by making settlement conferences mandatory prior to trial.[81] Like the revised Rules of the Circuit Courts,[82] settlement judges operated and

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[74] *Id.* at 650, 623 P.2d at 1285.

[75] Interview with Judge Chun, *supra* note 10.

[76] *See supra* part II.A.1.

[77] Interview with Judge Chun, *supra* note 10.

[78] *See supra* text accompanying note 23. More specifically, cases simply remained in the circuit court system longer than was necessary partly because the circuit courts lacked a mechanism to facilitate settlements. *See supra* text accompanying notes 23-25.

[79] Interview with Judge Chun, *supra* note 10. The position of settlement judge was created by the authority vested in the administrative judge. They are currently selected on a one-month rotational basis from among the trial judges in the circuit court. These judges are provided with the master calendar a month in advance. Using the master calendar, the settlement judges then set up their settlement conferences for the following month. *Id.*

[80] *Id.*

[81] *Id.*

[82] *See supra* part II.A.1.

continue to operate on the theory that if attorneys know that settlement conferences with a judge are mandatory, they will work their cases earlier and more thoroughly.[83]

The success rate of settlement judges has varied[84] as has attorney reaction to them.[85] Thus, though settlement judges have contributed to alleviating the circuit court case backlog, they have not eliminated it.[86] Despite this fact, settlement judges remain an effective and efficient feature of the Lum Court's administrative reform program.

4. Summary

The revised Rules of the Circuit Courts, involuntary dismissals, and settlement judges form the heart of the Lum Court's administrative reform program. Each was implemented to address a contributing cause of the backlog of cases in the circuit courts.[87] Each was also designed to help achieve Chief Justice Lum's eighteen-month deadline for case resolution.[88]

The administrative reform program has not eliminated the case backlog problem.[89] The program, however, has been successful in

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[83] Interview with Judge Chun, *supra* note 10. In other words, if attorneys are forced to work their cases as soon as practicable after they commence, i.e., begin the discovery process, then attorneys will be better informed as to whether they are working on viable cases. If a given case is not viable, settlement or dismissal is more likely to occur. The result is that the case should be removed from the court system sooner than if the case was allowed to languish. *See also supra* text accompanying note 23.

[84] Interview with Judge Chun, *supra* note 10. From 1985 to 1987, settlement judges settled approximately eighty percent of their cases. That number has since decreased, though Judge Chun could not provide an exact figure. *Id.*

[85] Informal conversation with an attorney licensed to practice law in Hawai'i.

[86] Interview with Judge Chun, *supra* note 10. According to Judge Chun, the circuit courts are no longer falling behind at such an alarming rate. Judge Chun maintains that from 1988 to 1990 the circuit courts actually disposed of more cases than were filed. The average number of cases added to the backlog per year during Judge Chun's tenure as administrative judge was approximately 200-300 cases a year. *Id.*

[87] *See supra* text accompanying notes 21-29.

[88] *See supra* text accompanying note 30.

[89] Interview with Judge Chun, *supra* note 10. Judge Chun estimates that the backlog in the circuit courts is approximately eight thousand cases. He states, however, that the court system has stayed current with that number for the most part, i.e., cases are not being added to that figure at a noticeable rate. *Id.*

meeting the chief justice's self-imposed case resolution deadline.[90] Placed within a larger context, the success of the administrative reform program has also gone a long way in achieving the Lum Court's efficiency ideal, i.e., reducing case congestion and eliminating undue delay and cost in litigation.[91]

B. Case Management Reforms: The New Procedural Rules

"Case management" reform describes another, more recent aspect of the Lum Court's overall court reform package; it specifically addresses the "problems of careless filings and unnecessary pretrial activity"[92] by making trial judges more involved in managing qualitative aspects of the pretrial process.[93] New Rules 11 and 26 of the Hawaii Rules of Civil Procedure form the backbone of this program.[94]

But for the addition of nine words in Hawai'i's version of Rule 26,[95] new Hawaii Rule of Civil Procedure 11 and 26 are identical to their federal counterparts.[96] Thus, federal court experience and much of the commentary regarding the operation of these rules in the federal court system are applicable to a discussion of the new Hawai'i rules.

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[90] *Id.* The actual figure for case resolution is approximately 20 months. *Id.*; Interview with Keith Hiraoka, *supra* note 22. Judge Chun believed from the beginning that 20 months was more realistic than the 18 months suggested by Chief Justice Lum. A plaintiff has 12 months to file a pretrial statement; a defendant then has 60 days, or two months, to respond. Using the 18-month schedule selected by Chief Justice Lum, only four months remained to complete discovery and otherwise wrap up the case. Four months was not considered a reasonable amount of time to accomplish this. Interview with Judge Chun, *supra* note 10.

[91] *See supra* text accompanying notes 7-8.

[92] Yamamoto, *Procedural Reform*, *supra* note 9, at 2.

[93] *See generally* Yamamoto, *Case Management*, *supra* note 6.

[94] The Lum Court recently amended several of the Hawaii Rules of Civil Procedure. Among the rules amended were HAW. R. CIV. P. 11 and 26. Order Amending the Hawaii Rules of Civil Procedure (July 26, 1990).

[95] HAW. R. CIV. P. 26(f) Discovery Conference:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon *its own initiative or upon* motion by the attorney for any party . . . .
>
> Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed *by the court or* by the attorney for any party.

Id. (added words italicized).

[96] FED. R. CIV. P. 11, 26.

Federal Rules 11 and 26 were themselves amended in 1983. According to the Advisory Committee, "[t]he purposes of these amendments were to discourage thoughtless or otherwise unjustified uses of the Civil Rules imposing cost, delay, and injustice on adversaries and to encourage the exercise of professional responsibility by lawyers signing papers."[97] Significantly, the amendments also provided trial judges with potentially effective and efficient tools to manage the cases before them.[98]

1. The mechanics of the new Hawai'i rules[99]

Both the federal and new Hawai'i Rule 11 authorize a trial judge to sanction attorneys and/or parties (a) who file "pleadings, motions, or other papers" without first making a reasonable inquiry into the factual and legal bases of their claims/defenses or (b) who interpose such filings for an improper purpose.[100] Indeed, once a violation is found, the trial judge is *required* by the Rule to impose an "appropriate" sanction.[101]

Hawaii Rule of Civil Procedure 26 is the discovery counterpart to Rule 11.[102] It is designed not only to allow discovery of relevant

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[97] The Advisory Committee's Call For Comments on Rule 11 and Related Rules 1 (July 24, 1990); *see also* Stephen B. Burbank, *The Underlying Assumptions of the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 1925, 1955 (1989) ("The concern that too much federal litigation was protracted and expensive, with consequences for litigants, prospective litigants, and the courts, was a major animating force behind the . . . 1983 amendments to the Federal Rules of Civil Procedure.").

[98] *See generally* Yamamoto, *Case Management*, *supra* note 6.

[99] An extended analysis of Rule 11 and Rule 26 mechanics is beyond the scope of this article. The Rules, for the purposes of this article, are important because they make up a part of the Lum Court's court reform package. Analysis of the Rules in this article focuses on the Rules' purposes. For a complete discussion of Rule 11, see Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. HAW. L. REV. 57 (1991) [hereinafter Yamamoto, *Rule 11*]. For a thorough discussion of Rule 26, see Yamamoto, *Case Management*, *supra* note 6, at 445-54.

[100] HAW. R. CIV. P. 11.

[101] *Id.* The relevant portion of HAW. R. CIV. P. 11 reads: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . ." *Id.*

[102] *See supra* text accompanying notes 92-96. The 1983 version of federal Rule 26 is the version recently adopted in the HAW. R. CIV. P. *Id.*

Note, therefore, that the 1983 amendments to Federal Rule 26 seem to represent a compromise between the competing values of being able to conduct liberal discovery

information, but also to control the costs discovery generally entails.[103] Rule 26 is to accomplish these goals, at least in theory, by "(1) limit[ing] the scope of discovery on the basis of practical concerns . . . ; (2) establish[ing] the discovery conference as a tool of the managerial judge; (3) requir[ing] attorney certification of the 'reasonableness' of discovery requests, responses and objections; and (4) specify[ing] sanctions for noncompliance."[104]

The requirements of Rule 26 are almost identical to those found in Rule 11.[105] Unlike Rule 11, however, Rule 26(g) imposes an additional certification requirement. Specifically, the attorney or party signing must also certify that her discovery request, response, or objection is not unreasonable, unduly burdensome or expensive.[106] Once a violation of Rule 26(g)'s certification requirements is found, sanctions are mandatory.[107]

The central purpose of Rule 11 is deterrence,[108] and arguably, therefore, the same goal is intended for Rule 26.[109] Data is not

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and the increasingly unreasonable cost of discovery. *See* Yamamoto, *Case Management*, *supra* note 6, at 445 (commenting that "[i]ncreasing attention has focused on the collision between the liberal truth seeking spirit of the discovery rules and the unreasonable cost of 'doing discovery' over the last ten years" (citation omitted)); *see also* Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 365 (1987) (noting that new Rule 26 deleted the phrase which allowed for unlimited discovery and that the new rule provides instead for limited discovery under certain circumstances).

[103] *See* Yamamoto, *Case Management*, *supra* note 6, at 445.

[104] *Id.*

[105] HAW. R. CIV. P. 26 states in relevant part:

> The signature of the attorney or party constitutes a certification that he has read the request, response or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

HAW. R. CIV. P. 26(g).

[106] *Id.* Four factors are relevant in making this determination: "the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." HAW. R. CIV. P. 26(g)(3).

[107] HAW. R. CIV. P. 26(g) ("If a certification is made in violation of the rule, the court . . . shall impose . . . an appropriate sanction . . . .").

[108] Yamamoto, *Rule 11*, *supra* note 99, at 66-67. In fact, there appears to be a consensus amongst commentators, most of the federal circuit courts, the Advisory

available on sanctions under federal Rule 26; however, Rule 11, at least at the federal level, has produced salutary results. It has deterred careless and meritless filings to a measurable extent[110] and it has "made attorneys 'stop, look and inquire' before filing."[111] This in turn translates into fewer meritless positions being litigated.[112]

Together, Hawaii Rules of Civil Procedure 11 and 26 form part of a "package of managerial rules designed to assure that cost is proportionate to case value and that litigation means are appropriate to case needs."[113] More than that, however, Rule 11 and Rule 26 are designed to streamline the civil litigation process by giving trial judges sanctioning powers.

2. The potentially chilling effects of Rules 11 and 26

There are no Hawai'i cases on new Rules 11 and 26. However, the Lum Court has evinced its philosophy toward sanctions in several related cases. These cases seem to illustrate not only that trial courts possess discretion in imposing sanctions but also that trial courts should not hesitate to do so.

In *Wong v. City and County of Honolulu*,[114] for example, one of the issues was whether the trial court abused its discretion in imposing Rule 37(b)(2) sanctions against the City and County for the City's destruction of a malfunctioning traffic signal control box.[115] In holding

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Committee, and the United States Supreme Court that deterrence is the primary purpose of federal Rule 11. *Id.*

[109] This argument is based on the fact that Rule 26(g) is so similar to Rule 11. Moreover, both rules were amended at the same time at the federal level thereby providing the inference that similar purposes were intended for both rules.

[110] Yamamoto, *Rule 11*, *supra* note 99, at 60.

[111] *Id.* at 60-61.

[112] *Id.* at 61.

[113] Yamamoto, *Procedural Reform*, *supra* note 9, at 5.

[114] 66 Haw. 389, 665 P.2d 157 (1983) (Lum, C.J.).

[115] *Id.* at 392, 665 P.2d at 160. In *Wong*, a personal injury action was brought by a pedestrian and her parents against the City and County for injuries sustained at a street corner as a result of a malfunctioning traffic signal control box. *Id.* at 390-91, 665 P.2d at 159. Plaintiffs' attorney served the City with a formal, written request for production of the traffic signal control box. *Id.* at 391, 665 P.2d at 159. However, sometime subsequent to the request, a private contractor, working under the supervision of City employees, removed and destroyed the box without informing plaintiffs. *Id.* The City was therefore unable to comply with plaintiffs production request.

Judge Fong sanctioned the City under HAW. R. CIV. P. 37(b)(2) and ordered that the City be deemed negligent for purposes of the litigation for having a malfunctioning control box at the time of the accident. *Id.* at 391, 665 P.2d at 160.

that no abuse of discretion was committed,[116] the Lum Court stated that "[t]he circuit court is given broad discretion in determining the sanctions to be imposed pursuant to Rule 37(b)(2)."[117]

Then in *Ramil v. Keller*,[118] the Lum Court addressed the question of whether the trial court abused its discretionary powers when it imposed litigation-ending sanctions for noncompliance with a court order.[119] The court, answered the question in the negative. It stated that "a court has inherent power to dismiss lawsuits and default defendants, power 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[120]

Finally, in *Coll v. McCarthy*,[121] the Lum Court reversed a trial court's decision not to award attorney's fees to a defendant, even though the decision was made pursuant to a discretionary sanctioning statute[122] and despite the fact that the trial court found that plaintiff's

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[116] *Id.* at 396, 665 P.2d at 163.

[117] *Id.* at 394, 665 P.2d at 161.

[118] 68 Haw. 608, 726 P.2d 254 (1986) (Nakamura, J.).

[119] *Id.* at 610. 726 P.2d at 256. *Ramil* involved a suit brought by a receiver of an insurance company against individuals who controlled insurance agencies who allegedly misappropriated and misapplied insurance funds. *Id.* at 612, 726 P.2d at 257. The receiver was granted a preliminary injunction against the defendants which prohibited them or anyone associated with them from conveying, transferring, or encumbering the defendants' assets that were traceable to the misappropriated funds and assets. *Id.* at 613, 726 P.2d at 257.

After learning that some of the defendants were continually breaching the preliminary injunction, the receiver was granted an order by the circuit court directing the defendants to render an accounting of all their assets and to deposit the same with the court clerk. *Id.* at 613, 726 P.2d at 258. When defendants failed to comply with the court's order, the receiver moved for an entry of judgment in his favor, which the court ultimately granted. *Id.* at 614-15, 726 P.2d at 258-59.

[120] *Id.* at 619-20, 726 P.2d at 262 (quoting Link v. Wabash R.R., 370 U.S. 626 (1962)).

[121] 72 Haw. 20, 804 P.2d 881 (1991) (Moon, J.).

[122] *Id.* at 21, 804 P.2d at 884. The applicable statute, HAW. REV. STAT. § 607-14.5, stated in relevant part:

> In any civil action in this State where a party seeks money damages . . . against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party . . . a reasonable sum for attorneys' fees, in an amount to be determined by the court upon a specific finding that the party's claim or defense was *frivolous* . . . .

Id. at 28 n.6, 804 P.2d at 886 n.6.

The Lum Court defined "frivolous" as "a claim so 'manifestly and palpably without merit, so as to indicate bad faith on [the pleader's] part such that argument to the court was not required.'" *Id.* at 30, 804 P.2d at 887 (citation omitted).

claims were not so frivolous as to warrant the imposition of sanctions.[123] The Lum Court, in an opinion by Justice Moon, stated:

> We are mindful of the argument that statutes which allow the assessment of attorneys' fees may have a chilling effect in deterring the filing of law suits based on innovative theories or to modify, extend, or reverse existing law. However, we must also heed the obvious legislative intent in enacting such statutes which is to "compensate parties in civil litigation who have been victimized by the frivolous claims of the opposing party in the course of the litigation and thereby incurring unnecessary attorneys' fees."[124]

The Lum Court concluded that not awarding defendant's attorney's fees in this case constituted an abuse of discretion.[125]

In addition to the available Hawai'i case law, federal court experience with Rules 11 and 26 indicates that sanctions are being imposed more and more frequently by federal judges.[126] Federal court experience, therefore, suggests several things. First, the sanctioning provisions have been used to achieve efficiency where efficiency means managing court dockets,[127] reducing case build-ups, streamlining the

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[123] *Id.* at 21, 804 P.2d at 884. Plaintiff in *Coll* filed a complaint against his attorney and insurance company alleging that the insurance company was negligent in paying plaintiff's no fault benefits to plaintiff's attorney. *Id.* at 23, 804 P.2d at 884. In actuality, the insurance company paid the no fault benefits by way of a draft payable to plaintiff. Plaintiff subsequently endorsed the draft to his attorney. *Id.* at 22, 804 P.2d at 884.

Still, the trial court concluded that plaintiff's claim was not "so clearly and palpably bad that no argument is able to convince the Court that the claim was without merit . . . ." *Id.* at 24, 804 P.2d at 884.

[124] *Id.* at 33, 804 P.2d at 889 (citation omitted).

[125] *Id.*

[126] Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988); Gregory P. Joseph, *Supreme Court Shapes Rule 11*, 26 TRIAL at 65 (Sept. 1990). For example, in 1988, Professor Vairo stated that a total of 688 Rule 11 sanctions were reported between August 1, 1983 and December 15, 1987. Vairo, *supra*, at 199. By 1990, however, more than 3000 Rule 11 decisions were reported. Joseph, *supra*, at 65. *See also* William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988) (Judge Schwarzer asserts that there is a significant number of unreported Rule 11 sanctions and, therefore, the actual number of Rule 11 sanctions is greater than the reported figure).

[127] *See* Robert L. Carter, *The Federal Rules of Civil Procedure As A Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2191-92 (1989) (Judge Carter notes that "[t]he availability of sanctions provides district judges with a useful tool by which to control our dockets.").

litigation process, and avoiding unnecessary pretrial activity.[128] Second, these procedural rules have not been wielded neutrally in the federal courts.[129] Finally, efficiency, according to some, has taken on a life of its own in the federal court system.[130]

3. The Rules of Civil Procedure: Historical commitment and original intent

The federal courts' use of Rules 11 and 26 to achieve efficiency comports with one aspect of the Lum Court's philosophy.[131] However, the rules of civil procedure also come with a long history of commitment to other values, such as access to the courts.

According to some commentators, the drafters of the original Federal Rules of Civil Procedure believed that all cases should be tried on their merits rather than on procedural points and maneuvering.[132] The drafters also believed that a basic goal in litigation should be economy of time and resources.[133] The two goals—trials on the merits

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[128] The Advisory Committee's Call For Comments on Rule 11 and Other Related Rules at 1 (July 24, 1990) ("[t]he purposes of [the 1983 amendments to Rules 11 and 26] were to discourage thoughtless or otherwise unjustified uses of the Civil Rules imposing cost, delay, and injustice on adversaries and to encourage the exercise of professional responsibility by lawyers signing papers.").

[129] Carter, *supra* note 127, at 2191-92. Judge Carter laments that "[t]he availability of sanctions provides district judges with a useful tool by which to control our dockets. My objection is that, in application, amended Rule 11 has not been wielded neutrally, but rather has exhibited a substantive bias against civil rights claimants." *Id.*

Other commentators note that "[j]udges, attorneys, litigants and scholars complain about excessive Rule 11 litigation, 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." Yamamoto, *Rule 11*, *supra* note 99, at 61 (citations omitted).

[130] *See* Carter, *supra* note 127, at 2182 ("Much of the contemporary discussion on procedural efficiency implies that a successful . . . court system is one which most effectively *excludes* certain kinds of substantive claims. Efficiency has taken on a value of its own.").

[131] *See supra* text accompanying notes 3-8.

[132] Goodman, *supra* note 102, at 357, 363; Carter, *supra* note 127, at 2195; Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

[133] Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5 (1938); *see also* Goodman, *supra* note 102, at 357; Weinstein, *supra* note 132, at 1910. According to Edson R. Sunderland, a member of the Advisory Committee who drafted the original Federal Rules of Civil Procedure in 1938:

The purpose which [the rules of procedure] seek to accomplish is to eliminate

and economy of time and resources—were not considered incompatible.[134]

Many people are now questioning whether recent reforms in the federal rules evidence a marked departure from the drafters' original intent.[135] But, regardless of how one interprets the recent amendments to the federal rules, it remains undisputed that the rules of civil procedure have a powerful history and tradition that value access to the courts. The Lum Court has already demonstrated that it can accommodate that history.

More specifically, in *International Savings v. Woods*,[136] the Lum Court allowed litigants to proceed with an appeal in a multiple claim, multiple party dispute despite the fact that the appeal was not certified pursuant to Hawaii Rules of Civil Procedure 54(b).[137] The court essentially determined that the irreparable injury that these particular litigants might suffer by dismissing their appeal[138] outweighed a strict adherence to the efficiency values embodied in the final judgment rule.[139]

> technical matters by removing the basis for technical objections, to make it as difficult as impossible, for cases to go off on procedural points, and to make litigation as inexpensive, as practicable and as convenient, as can be done.

Sunderland, *supra*, at 30.

[134] Carter, *supra* note 127, at 2181. According to Judge Carter:

> [T]he desire that disposition be expeditious and economical is by no means new. Roscoe Pound in 1906 complained about judicial inefficiency. . . . The drafters of the Rules were primarily concerned with preserving substantive justice from the onslaught of an outcome-determinative procedural quagmire, and valued procedural efficiency chiefly as a means to that end.

Id.

[135] *See generally* Carter, *supra* note 127; Goodman, *supra* note 102; Weinstein, *supra* note 132.

[136] 69 Haw 11, 731 P.2d 151 (1987) (Nakamura, J.).

[137] *Id.* at 20, 731 P.2d at 156-57. For a more complete discussion of Rule 54(b) certifications, see *infra* part II.D.2.

[138] *Id.* at 17, 731 P.2d. at 155. (The Court stated that "if the Woodses' appeal is not heard now they may be subjected to irreparable injury; the mortgage on their property has been foreclosed and the condominium apartment may well be sold before the summary judgment, decree of foreclosure, and the order of sale can be reviewed.").

[139] *Id.* at 19-20, 731 P.2d at 155. According to the court, the purpose of HAW. REV. STAT. 641-1(a) (Hawai'i's final judgment rule) is to "combine all stages of the proceeding in one review to promote the judicious use of scarce resources." *Id.* at 17, 731 P.2d at 155.

Whether the Lum Court will choose to emphasize the efficiency aspect of Rules 11 and 26 or the more general historical commitment of the rules of civil procedure to court access, however, remains to be seen.

C. The Court Annexed Arbitration Program

In another response to the increasing congestion of the court docket and the increasing delays and costs of litigation, the Lum Court encouraged arbitration as a form of dispute resolution, stating that "[p]ublic policy . . . is to encourage arbitration as a means of settling differences and thereby avoiding litigation."[140]

1. The voluntary arbitration program

In 1985, Chief Justice Lum appointed a committee[141] to explore and investigate a court-annexed arbitration program.[142] Among the reasons for initiating the arbitration program were to increase the pace of case resolution and to prevent case backlog by diverting some litigants away from the regular litigation process.[143]

The committee drafted rules for a voluntary arbitration program, which the Lum Court adopted in February, 1986.[144] This was a two-year experimental program under the judiciary's rulemaking authority involving voluntary arbitration of personal injury cases with a probable jury verdict of less than $50,000.[145]

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[140] Kukui Plaza v. Swinerton and Walberg, 68 Haw. 98, 107, 705 P.2d 28, 35 (1985) (Nakamura, J.); *accord* Gadd v. Kelly, 66 Haw. 431, 667 P.2d 251 (1983) (Lum, C.J.); Hawaii Professional Assembly *ex rel.* Daeufer v. University of Hawaii, 66 Haw. 214, 659 P.2d 720 (1983) (per curiam).

[141] JANICE WOLF, ADMINISTRATIVE DIRECTOR OF THE COURTS, & PETER S. ADLER, DIRECTOR, PROGRAM ON A.D.R., JUDICIAL ARBITRATION COMMISSION STATUS REPORT TO THE STATE LEGISLATURE 1 (Dec. 30, 1986) [hereinafter WOLF, REPORT TO THE STATE LEGISLATURE]. The committee members included Judges Philip Chun and Ronald Moon, (now Associate Justice of the Hawaii Supreme Court), members of the First Circuit Court Rules Committee, and Dr. Peter S. Adler of the Program for Alternative Dispute Resolution. *Id.*

[142] Edward C. Kemper, *Interview of Judge Ronald Moon and Edwin Aoki Concerning Hawaii's Arbitration Program*, 21 HAW. BAR J. 187 (1988) [hereinafter Kemper, *Interview of Judge Moon*].

[143] Interview with Peter S. Adler, Director, Center for Alternative Dispute Resolution, in Honolulu, Haw. (Nov. 14, 1991).

[144] Kemper, *Interview of Judge Moon*, *supra* note 142, at 187.

[145] *Id.*

2. Legislative mandate: a mandatory arbitration program

In July of 1986, when the voluntary arbitration program was less than six-months old and only 200 cases had been submitted to arbitration, the Hawaii State Legislature, in its 1986 Special Session on tort and insurance reform, passed Act 2, a wide-sweeping tort reform act that included a mandatory court-annexed arbitration program (C.A.A.P.).[146] Act 2 amended *Hawaii Revised Statute* section 601, raised the arbitration threshold for tort cases from $50,000 to $150,000,[147] and required the court to adopt rules implementing the new limit by January 1, 1987.[148] Arbitration Committee member Judge Ronald Moon anticipated that the greater threshold would keep eighty-five percent of tort cases off the court dockets.[149]

In developing the new C.A.A.P. pursuant to Act 2, the Arbitration Commission looked at model arbitration programs and existing programs nationally.[150] The development of the new C.A.A.P. was based on the following assumptions:

(a) The program would be an experimental three-year program that would be institutionalized if it succeeded. If not, and if other unanticipated benefits could not be demonstrated, the program would be abandoned.[151]

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[146] Act of Aug. 4, 1986 § 21, 13th Leg., Special Sess., 1986 Haw. Sess. Laws 11 (amending HAW. REV. STAT. § 601).

[147] This figure represented the highest threshold in the country. Peter S. Adler, *Rethinking Hawaii's Court-Annexed Arbitration Program: Issues, Choices, Recommendations* 6 (Nov. 14, 1986) (part of a Judicial Arbitration Commission status report to the State Legislature (Dec. 30, 1986)) [hereinafter Adler, *Rethinking C.A.A.P.*].

[148] Act of Aug. 4, 1986, *supra* note 146, at 11 (codified in HAW. REV. STAT. § 601(20)).

[149] Kemper, *Interview of Judge Moon*, *supra* note 142, at 187. Approximately 1500 Hawai'i tort cases are eligible for the C.A.A.P. each year. Memorandum from John Barkai, C.A.A.P. evaluator and Professor of Law, Wm. S. Richardson School of Law, University of Hawai'i at Manoa 1 (Apr. 1, 1992) (on file with author).

[150] Adler, *Rethinking C.A.A.P.*, *supra* note 147, at 2, 6. The Commission considered various factors including: (1) decentralization and the amount of control the courts would have over arbitration cases; (2) Hawai'i's uniqueness; (3) maintaining support of the "players" involved; e.g., plaintiffs' attorneys, arbitrators, and insurance companies; (4) national trends (toward centralized management, greater pay for arbitrators, expanding types of cases in arbitrations and increasing award thresholds); and (5) accomplishing a mix of goals (and being aware that achieving one goal may be at the expense of another goal). *Id.* at 2, 6.

[151] WOLF, REPORT TO THE STATE LEGISLATURE, *supra* note 141, at 3.

(b) The program goals, in order of priority, would be:
(1) To reduce costs for private litigants by managing and reducing pretrial discovery;
(2) To move cases through the courts at a faster pace;
(3) To provide litigants with a fair, just, and satisfactory "day-in-court;"
(4) To encourage early settlements;
(5) To prevent backlogs and delays.

(c) The program would be implemented in the First Circuit Court but if successful would extend to the other circuits.

(d) The C.A.A.P. would be part of a larger alternative dispute resolution trend.[152]

3. Hawai'i's C.A.A.P.

The mandatory arbitration program commenced on May 1, 1987.[153] Hawai'i's C.A.A.P. mandates non-binding arbitration for tort cases with a probable jury award of $150,000 or less.[154] There is a presumption that this includes all torts and tort "hybrid" cases, i.e., those that also have contract issues.[155] A plaintiff's attorney may petition for exemption from the C.A.A.P. if it can be factually demonstrated that a jury verdict might exceed $150,000.[156]

The C.A.A.P. proposes two deadlines: the arbitrator must schedule a prehearing conference within thirty days of being assigned of the case,[157] and the case must be concluded nine months from the day the complaint was served.[158]

The arbitrator controls the discovery process,[159] and the rules of evidence may be relaxed.[160] No transcript or record of the hearing is

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[152] Adler, *Rethinking C.A.A.P.*, *supra* note 147, at 7, 8.
[153] Kemper, *Interview of Judge Moon*, *supra* note 142, at 188.
[154] HAW. ARB. R. 6.
[155] *Id.*
[156] *Id.* 8(A).
[157] *Id.* 15(D).
[158] *Id.* 15(A).
[159] *Id.* 14.
[160] *Id.* 11(A)(2).

allowed,[161] and findings of fact and conclusions of law are not required.[162] Awards must be filed within seven days of the conclusion of the hearing.[163]

The award becomes a final judgment if neither party files an appeal request within twenty days of the time the award is served.[164] An appeal consists of a trial de novo, and the case is treated as if it had never been in arbitration.[165] If the award granted as a result of the trial de novo does not exceed the arbitration award by fifteen percent, the "appellant" is subject to sanctions and disincentives.[166]

The committee which developed the C.A.A.P. incorporated an evaluation program into the C.A.A.P. The evaluation program is performed by persons outside the process itself[167] and provides interim and conclusionary reports on the success of the arbitration program in achieving its goals over the initial three-year period.[168]

4. The C.A.A.P. evaluation[169]

The final data and conclusions from the evaluation program indicate that the C.A.A.P. has achieved success in reaching each of its major

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[161] *Id.* 17(B).

[162] *Id.* 19(C).

[163] *Id.* 20(A).

[164] *Id.* 21.

[165] *Id.* 22(B), 23(A).

[166] *Id.* 25(A), 26. Sanctions available are reasonable costs and fees, costs of jurors, and attorneys' fees up to $5000. "In determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawaii." *Id.*

[167] WOLF, REPORT TO THE STATE LEGISLATURE, *supra* note 141, at 2. The evaluators included John Barkai, Gene Kassebaum, and David Chandler, Professors at the University of Hawai'i. *Id.*

[168] Adler, Rethinking C.A.A.P., *supra* note 147, at 13. Most courts, including Hawai'i's, have never kept specific data correlating the manner in which cases terminate with how much it costs the litigants. The arbitration program, therefore, targeted specific problems that were perceived without any statistical analysis of exactly what those problems were. Due to the lack of records on the cost, pace, and satisfaction of regular litigation, the C.A.A.P. evaluation program established a randomized control group. One half of the cases eligible for arbitration were placed in the C.A.A.P. and the other half were designated as the control group and reassigned back to regular litigation. The evaluation figures are based upon a comparison of the control group with the C.A.A.P. group and upon attorneys' impressions of the program. Interview with John Barkai, C.A.A.P. evaluator and Professor of Law, Wm. S. Richardson School of Law, University of Hawai'i at Manoa, in Honolulu, Haw. (Aug. 27, 1991).

[169] The final evaluation report on the C.A.A.P. was not available at the time of this

goals.[170] A summary of the final evaluation report that will be submitted to the Arbitration Commission shows that the C.A.A.P. has:

- reduced pretrial discovery;
- reduced litigation costs for private litigants;
- increased the pace of litigation;
- provided litigants with a fair, just, and satisfactory "day-in-court;"
- encouraged early and less expensive settlements;
- increased the percentage of cases that terminate each year; and
- may have reduced the number of trials.[171]

Although the evaluation covered many aspects of the C.A.A.P., the primary focus was on the ability of the program to increase the pace of litigation and decrease the costs for the litigants.[172] The final data and conclusions of the evaluation program as they relate to each of the C.A.A.P.'s goals are as follows.

a. Goal 1: reduce costs for private litigants by managing and reducing pretrial discovery

The average amount saved over regular litigation by limiting discovery through the C.A.A.P. was $921 out of a total average cost per case of $7133.[173] Eighty-three percent of the savings came in the form of reduced discovery costs for both parties, representing a thirty-three percent reduction in discovery costs.[174]

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writing. A summary of the Evaluation Committee's final data and conclusions was provided to the authors. The Evaluators feel that they conducted the most comprehensive evaluation of a court-annexed arbitration program in the United States. Memorandum from John Barkai, *supra* note 149, at 3.

[170] *Id.*

[171] *Id.* The final report will be based on data collected from 1986 to late 1991. *Id.* The final report will have been submitted to the Arbitration Commission by the time of publication of this article.

[172] *Id.* at 1.

[173] *Id.* at 2. The total litigation costs include the discovery costs of both plaintiff and defendant and the fees of the defendant. *Id.* The fees of the plaintiff are not included in the total figure due to the fact that they are contingent upon the amount received by the plaintiff as a result of settlement or award. It is estimated that plaintiff fees average around $10,000 per case. Interview with John Barkai, *supra* note 168.

[174] Memorandum from John Barkai, *supra* note 149, at 2. Discovery costs savings amounted to $762 of the $921 in total savings. *Id.*

When the parties settled before completing the arbitration process, the total litigation costs averaged $3138 less than the control group.[175] However, when arbitration was completed and the arbitration award was accepted by both parties, the total average cost was $1813 more than the average costs of the control group.[176] When the arbitration award was appealed, the total average cost was $3417 more than the average costs of the control group.[177]

b. Goal 2: move cases through the courts at a faster pace

For C.A.A.P. cases, the average length of litigation has been reduced by an average of 133 days over the control group.[178] When a C.A.A.P. case results in an arbitration award, the average length of the litigation is ten days longer than regular litigation because almost half of the awards are now appealed for a trial de novo.[179]

c. Goal 3: provide litigants with a fair, just, and satisfactory "day-in-court"

The evaluation of satisfaction has focused on lawyer, not litigant, satisfaction with the C.A.A.P.[180] Generally, lawyers are less satisfied with arbitration awards than with the awards received through the regular litigation process.[181] Plaintiffs' lawyers find settlements achieved through the arbitration process equally as satisfying as those reached through regular litigation,[182] while defense lawyers are more satisfied with regular litigation settlements.[183] Whether lawyer satisfaction translates into litigant satisfaction is as yet unanswered.

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[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 2. The pace of litigation is determined by measuring the time between filing and termination of the litigation. Interview with John Barkai, *supra* note 168.

[179] Memorandum from John Barkai, *supra* note 149, at 2. Most of the arbitration awards which are appealed are settled before they go to trial, resulting in what is called an "award-ment." Interview with John Barkai, *supra* note 168.

[180] John Barkai & Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience* 14 (1990-92) (a working paper for the Program on Conflict Resolution, University of Hawai'i at Manoa).

[181] *Id.* at 15.

[182] *Id.*

[183] *Id.*

d. Goal 4: encourage earlier settlements

While those C.A.A.P. cases that settle before completing arbitration save an average of 178 days over the time needed for resolution through regular litigation,[184] the final data does not indicate whether cases settle earlier in the C.A.A.P. than they settle through regular litigation. The data also does not reflect the pace for cases that settle after the arbitration award is appealed.

e. Goal 5: prevent backlogs and delays

While not specifically addressed by the evaluation program, the final data certainly indicates that the C.A.A.P. may prevent backlogs and delays. With the average pace of litigation being 178 days faster for C.A.A.P. cases than for the control group, it can be inferred that backlogs and delays will be better prevented with the C.A.A.P. than without.

5. C.A.A.P. and Access to the Courts

The C.A.A.P.'s success in achieving its goals of increasing the pace and reducing the cost of litigation through arbitration is commendable. The final data indicates that the C.A.A.P. is an important tool for the Lum Court in its endeavor to promote greater judicial efficiency. Notwithstanding this success, the ability of the C.A.A.P. to provide litigants with access to the courts remains somewhat troubling.

The most important question left unanswered by the evaluation program is whether the C.A.A.P. provides litigants with a fair, just, and satisfactory "day-in-court." The C.A.A.P. evaluation has been unable to specifically address litigant satisfaction with arbitration.[185] However, the determination of litigant satisfaction is crucial since the C.A.A.P. is mandatory for its participants.[186]

Although litigants dissatisfied with the C.A.A.P. are afforded the opportunity to appeal the arbitration award and gain access to the regular litigation process, the appeal is not without its costs. Not only does the litigant risk sanctions,[187] but the entire process can become

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[184] Memorandum from John Barkai, *supra* note 149, at 2.

[185] *See supra* text accompanying note 180.

[186] *See supra* text accompanying notes 154-56.

[187] *See supra* note 166 and accompanying text.

significantly more expensive and more time consuming than the average case in regular litigation.[188] The risks, costs, and time involved in appealing a C.A.A.P. award may make the regular litigation process effectively unavailable to some C.A.A.P. participants.

The evaluation shows that the C.A.A.P. is a successful program. However, the net effect of the C.A.A.P. remains uncertain until litigant satisfaction can be effectively measured.

D. Other Procedures

The Lum Court's court reform package also includes procedures that were in existence prior to Chief Justice Lum's tenure on the Hawaii Supreme Court. These procedures, however, still further the Lum Court's goal of reducing case congestion and eliminating undue delay and cost in litigation.[189] These procedures include summary judgment,[190] Rule 54(b) certifications,[191] and interlocutory appeals.[192]

1. Summary judgment

Summary judgment is an important tool that enables courts to keep nonmeritorious claims out of the courts. Summary judgment law involves (1) the mechanical framework of determining which party bears the burden of producing evidence and (2) the substantive standard that must be met by the parties in order to carry or overcome a motion for summary judgment.[193]

a. The mechanical framework

Hawai'i courts have failed to adequately articulate and follow a mechanical framework for determining the relative burdens of pro-

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[188] *See supra* text accompanying notes 176-77, 179.

[189] *See supra* text accompanying note 7.

[190] HAW. R. CIV. P. 56.

[191] *Id.* 54(b).

[192] HAW. REV. STAT. § 641-1.

[193] Eric K. Yamamoto et al, *Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy*, 12 U. HAW. L. REV. 1, 4 (1990) [hereinafter Yamamoto, *Summary Judgment at the Crossroads*]. In the following discussion, it should be noted that the development of summary judgment law under the Lum Court has primarily been accomplished by the I.C.A.. Because the Lum Court has neither modified nor reversed the I.C.A. decisions, we can only assume that they represent the summary judgment law of the Lum Court.

duction for the parties with regard to a motion for summary judgment. In *Armizu v. Financial Security Insurance Co.*,[194] the I.C.A. clearly defined the burdens of production where the plaintiff is the movant: "Under Rule 56(c) . . . once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, "then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial.""[195]

Despite the clarity, however, the I.C.A. appeared to ignore its own precedent only two months later in deciding *Carrington v. Sears, Roebuck & Co.*[196] when it did not mention the burdens of the parties but merely stated that if "there is no discernible theory under which plaintiff could recover," summary judgment should be granted to the defendant as a matter of law.[197]

The I.C.A. once again failed to take advantage of an opportunity to follow precedent or further define the production burdens of the parties in *Waimea Falls Park, Inc. v. Brown*.[198] The court somewhat ambiguously stated that if the movant can show that there is "no competent evidence" to support a judgment for the respondent, the movant's burden is discharged.[199]

In an effort to promote appellate efficiency, the Lum Court in *Munoz v. Yuen*[200] stated that appellate courts "will not examine evidentiary documents . . . not specifically called to the attention of the trial court, even though they may be on file in the case."[201] Consequently, the party responding to a summary judgment motion, having no specific direction from the courts as to what will be sufficient to defeat a summary judgment motion, will present all the evidence in support of its case so that, if the motion is granted and appellate review is sought, all the pertinent evidence will be reviewable by the appellate court. "Overkill by respondents seems inevitable."[202]

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[194] 5 Haw. App. 106, 679 P.2d 627 (1984).

[195] *Id.* at 110, 679 P.2d at 632 (citation omitted).

[196] 5 Haw. App. 194, 683 P.2d 1220 (1984).

[197] *Id.* at 187, 683 P.2d at 1224; *see also* Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 7.

[198] 6 Haw. App. 83, 712 P.2d 1136 (1985).

[199] *Id.* at 92, 712 P.2d at 1142.

[200] 66 Haw. 603, 670 P.2d 825 (1983) (per curiam).

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

[202] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 9.

b. The substantive standard

As opposed to the clear goal of appellate efficiency expressed in the *Munoz* case, the development of the substantive standard of summary judgment law in the Hawai'i courts has emphasized court access.[203] The substantive standard traditionally used in Hawai'i courts is that of a "scintilla of evidence" or "slightest doubt."[204] Under this standard, all the respondent must do to defeat a motion for summary judgment is present one piece of evidence in support of his or her claim.

The I.C.A. expressed the purpose for this lenient substantive standard most clearly in the case of *McKeague v. Talbert*,[205] where the court stated that summary judgment "must be used with due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues."[206]

c. Summary judgment in the Hawai'i courts

Summary judgment law in Hawai'i has been characterized in three ways.[207]

> First, it may be characterized by a lack of precise mechanical framework. With few exceptions, reported cases do not analyze summary judgment mechanics and merely cite provisions of Hawaii Rule of Civil Procedure 56. Second, Hawaii law on substantive summary judgment standards [has been] characterized by clearly articulated appreciation for the values of jury access and full public trials. Finally, Hawaii

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[203] *Id.*

[204] *Id.* This standard had been clearly articulated by the Richardson Court in the cases of Abraham v. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968) (holding that the standard for granting defendant's summary judgment motion is if "it is clear that the plaintiff would not be entitled to recover under any discernible theory" and that "[t]he inferences drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion"); and Packaging Products Co. v. Teruya Bros. Ltd, 58 Haw. 580, 574 P.2d 524 (1978) (holding that summary judgment is not to be granted if the court finds even arguably conflicting inferences.). *See also* Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 10.

[205] 3 Haw. App. 646, 658 P.2d 898 (1983).

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

[207] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 5.

> summary judgment law [has been] characterized by a relative silence about efficiency concerns.[208]

With the Lum Court's apparent emphasis on judicial efficiency in its procedural reforms and application of other procedural tools,[209] it is curious that the Lum Court has not utilized summary judgment as a tool in its pursuit of efficiency, as it has in the past to pursue other issues of importance,[210] especially in light of recent developments in summary judgment law at the federal level.

Three United States Supreme Court summary judgment cases decided in 1986, commonly called the "*Celotex* Trilogy,"[211] changed federal summary judgment doctrine to encourage expanded use of summary judgment.[212] In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[213] the United States Supreme Court enabled judges to grant summary judgment to a defendant if the plaintiff's theory of the case was deemed implausible.[214] The Court's ruling in *Anderson v. Liberty Lobby, Inc.*[215] established that the party that would bear the burden of proof at trial must bear the burden of proof in a summary judgment motion under the same standard it would have to meet at trial.[216] The *Celotex Corp. v. Catrett*[217] decision enabled defendant-

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[208] *Id.* (citations omitted).

[209] *See supra* parts II.A. (administrative reforms), II.B. (case management reforms), II.C. (court-annexed arbitration), II.C.2 (Rule 54(b) certifications and interlocutory appeals).

[210] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 12. Hawai'i courts have departed from the basic standard in the past to pursue other issues of importance. For instance, in considering motions for summary judgment, Hawai'i courts have been extremely reluctant to grant them (1) in cases that would foreclose public interest in matters of vast public importance, (2) in favor of defendants in ordinary negligence cases where those defendants are indemnified by insurance, and (3) in cases where "state of mind" or credibility is at issue. Hawai'i courts have been more generous in granting motions for summary judgment when it was feared that tort law liability might be expanded if the case was left to a jury to decide. *Id.*

[211] The trilogy of cases consists of Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[212] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 18-19.

[213] 475 U.S. 574 (1986).

[214] *Id.* at 595; *see also* Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 20.

[215] 477 U.S. 242 (1986).

[216] *Id.* at 252; *see also* Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 22-23.

[217] 477 U.S. 317 (1986).

movant to meet its initial burden of production by pointing to the empty record of the plaintiff. The burden would then shift to the plaintiff to "designate 'specific facts showing that there is a genuine issue for trial.'"[218]

These cases have revitalized summary judgment law, providing federal courts with a strong tool that can be used "to cope with the perceived increase in, and difficulty of federal cases."[219] Although the *Celotex* Trilogy cases have been quoted in at least one I.C.A. case,[220] and the new federal summary judgment doctrine has been compared to Hawai'i summary judgment law in a Lum Court case,[221] the federal summary judgment law has not been expressly adopted by the Lum Court. In fact, Associate Justice Frank D. Padgett of the Hawaii Supreme Court has indicated that summary judgment is not an appropriate method for the purpose of achieving calendar control.[222]

2. *Rule 54(b) certifications and interlocutory appeals*

Because Hawaii Rule of Civil Procedure 54(b) and *Hawaii Revised Statutes* section 641-1 deal with access to the appellate courts, the application of these procedures reflect the tensions inherent between the trial courts and the appellate courts, tensions that may increase when both levels are faced with increased caseloads and real or potential backlogs.

In *TBS Pacific, Inc. v. Tamura*,[223] the I.C.A., in granting a motion to dismiss an appeal of a decree of foreclosure and order of sale, articulated the requirements that must be met to obtain appellate jurisdiction under Rule 54(b) and *Hawaii Revised Statutes* section 641-1. Under *Hawaii Revised Statutes* section 641-1(a), "appeals shall be

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[218] *Id.* at 324 (quoting FED. R. CIV. P. 56(e)).

[219] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 26.

[220] *See* Hall v. State, 7 Haw. App. 274, 756 P.2d 1048 (1988).

[221] First Hawaiian Bank v. Weeks, 70 Haw. 392, 772 P.2d 1187 (1989) (Nakamura, J.).

[222] Yamamoto, *Summary Judgment at the Crossroads*, *supra* note 193, at 29 n.165 (describing Justice Padgett's remarks at a Hawaii Institute for Continuing Legal Education meeting. Frank D. Padgett & James S. Burns, Remarks at HICLE meeting, Motions and Appeals: The Art of Oral and Written Advocacy (Feb. 3, 1990)).

[223] 5 Haw. App. 222, 686 P.2d 37 (1984), *rev. denied*, 5 Haw. App. 683, 753 P.2d 253 (1984), *cert. granted*, 67 Haw. 686, 744 P.2d 782 (1984), *aff'd* 67 Haw. 682 (No. 9333, memo. op. (Haw. Dec. 18, 1984)).

allowed [as a matter of right] in civil matters from all final judgments, orders or decrees." The I.C.A. defined a final judgment, order, or decree as a "final decision" and "one which ends the litigation . . . and leaves nothing for the court to do but execute the judgment."[224] The stated policy reason for this requirement is the "prevention of piecemeal litigation."[225]

Hawaii Revised Statutes section 641-1(b) allows for appellate jurisdiction of interlocutory appeals "only (1) upon application and (2) the circuit court's determination that the appeal would result in the speedy termination of the litigation."[226] The I.C.A. defined an interlocutory judgment, decree or order "as one that is not 'final' under Hawaii Revised Statutes section 641-1(a) and under the decisions of our supreme court."[227]

Rule 54(b) is closely related to *Hawaii Revised Statutes* section 641-1 but deals with appellate jurisdiction over one claim in a multi-claim or multi-party action. Rule 54(b) states that "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[228]

The I.C.A. interpreted the interaction between *Hawaii Revised Statutes* section 641-1(a) and Rule 54(b) as follows:

> Upon the court's (1) determination that there is no just reason for delay and (2) direction for the entry of a final judgment pursuant to Rule 54(b), a fully decided but not final judgment, decree, or order becomes final and appealable within the meaning of [*Hawaii Revised Statutes*] § 641-1(a).[229]

It follows, then, that a Rule 54(b) certification entitles the party to an appeal as a matter of right.[230]

Although Rule 54(b) and *Hawaii Revised Statutes* section 641-1 could

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[224] *Id.* at 226, 686 P.2d at 42 (citing Catlin v. United States, 324 U.S. 229 (1945)).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] HAW. R. CIV. P. 54(b).

[229] TBS Pacific, Inc. v. Tamura, 5 Haw. App. 222, 228, 686 P.2d 37, 43 (1984), *rev. denied*, 5 Haw. App. 683, 753 P.2d 253 (1984), *cert. granted*, 67 Haw. 686, 744 P.2d 782 (1984), *aff'd* 67 Haw. 682 (No. 9333, memo op. (Haw. Dec. 18, 1984)).

[230] *Id.* at 231, 686 P.2d at 45.

be interpreted liberally to allow easy access to the appellate courts, they have been interpreted strictly so as to constrict access. The Lum Court has used Rule 54(b) and *Hawaii Revised Statutes* section 641-1 as tools for promoting efficiency at the appellate court level.

The I.C.A. stated in *TBS Pacific* that the purpose of Rule 54(b) is "'to avoid the *possible injustice* of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.'"[231] While the I.C.A. interpreted the procedural aspects of Rule 54(b) and *Hawaii Revised Statutes* section 641-1 narrowly, it left some discretion available to both the trial and appellate courts with the "possible injustice" standard, thereby allowing the court to interpret the substantive standard of Rule 54(b) in a broad manner.

One year later, in *Mason v. Water Resources International*,[232] the Lum Court, in a brief one-page opinion written by Justice Padgett, adopted a stricter interpretation. When faced with an interlocutory appeal with neither an express determination that there is no just reason for delay nor an express direction for the entry of judgment, the court rearticulated the procedures to be followed by the trial court and litigants under Rule 54(b) and *Hawaii Revised Statutes* section 641-1.[233] However, unlike the I.C.A., Justice Padgett made no reference to substantive standards other than those articulated in the rule and statute. The court stated that the reason for Rule 54(b) and *Hawaii Revised Statutes* section 641-1 is efficiency.

> The *appellate case load in this state is steadily increasing*. It is apparent that that increasing trend will continue at least for some time into the future. The appellate courts in this State are, perhaps, unique in the United states in that they have been able to become current with their case load. If that desirable situation is to continue, it is necessary that appeals from other than final judgments, which form a significant portion of the appellate case load, be *strictly limited* to those situations where they are allowable under Rule 54(b), [Hawaii Rules of Civil Procedure] . . . or [*Hawaii Revised Statutes*] Section 641-1(b).[234]

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[231] *Id.* at 228-229, 686 P.2d at 43 (quoting 10 CHARLES A. WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE: *Civil* 2d § 2654, at 35 (1983) (emphasis added).

[232] 67 Haw. 510, 694 P.2d 388 (1985).

[233] *Id.* at 511, 694 P.2d at 389.

[234] *Id.* at 511, 694 P.2d at 389 (emphasis added).

Retreating somewhat from the strict language of *Mason*, the Lum Court turned again to the substantive standard of Rule 54(b) in *Association of Owners of Kukui Plaza v. Swinerton & Walberg.*[235] In an appeal from the denial of a motion to compel arbitration, the court stated that "a final judgment, order, or decree is not necessarily the last decision of a case. What determines the finality of an order or decree for purposes of appeal is the nature and effect of the order or decree."[236] In defining the "nature and effect" of the order or decree, the court said

> [t]here are, for example, orders falling in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[237]

Rights which would be "irretrievably lost" if review were delayed could also be deemed to have the nature and effect of a final judgment.[238]

In the case of *International Savings and Loan Association v. Woods*,[239] the Lum Court was once again faced with an appeal from an order in a multiple party case that had not been certified by the trial court under Rule 54(b). This time the court recognized the need for a balancing of the interests of the parties with the need for efficiency.

> [W]e would be ignoring the need for making review available to the Woodses at a time that best serves their needs if we granted International's motion to dismiss the appeal. Yet, we would be derelict also if we ignored another purpose of Rule 54(b)—to foster the most efficient use of judicial resources—and allowed any appeal taken after the determination of all claims to traverse the same ground this appeal might.[240]

In response to this need to balance the interests, however, the court refrained from establishing a test that would effectively balance the competing interests. It instead allowed the appeal to be heard without having met the procedural requirements but said that, thereafter, a

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[235] 68 Haw. 98, 705 P.2d 28 (1985) (Nakamura, J.).

[236] *Id.* at 105, 705 P.2d at 34.

[237] *Id.* (citations omitted) (articulating the collateral order doctrine).

[238] *Id.*

[239] 69 Haw. 11, 731 P.2d 151 (1987) (Nakamura, J.).

[240] *Id.* at 19-20, 731 P.2d at 156.

litigant would waive his right to appeal if he does not seek certification under Rule 54(b) and does not seek review before his injury becomes irreparable.[241] The Lum Court made a choice that in the future, the efficiency interest would predominate.

III. The Efficiency and Access Debate

The Lum Court has implemented or has advocated the use of a wide array of reforms, procedures and other mechanisms in an effort to manage court dockets and to streamline the litigation process by reducing costs and delays. These mechanisms have one thing in common—they all promote the value of efficiency. Cases no longer languish in the circuit courts to the extent that they once did;[242] disputes can potentially be settled more quickly;[243] or litigants may not even make their way into court at all.[244]

Thus far the Lum Court's message seems clear—make things quicker and cheaper and be sure that if cases do get into court that they belong there. However, when the Lum Court's court reform package is put into practice, efficiency is often put aside in favor of competing values, such as access to the courts.[245] The result in some situations is confusion: trial judges are given powerful tools to manage their dockets and the cases before them, and yet when they utilize these tools they are reversed on appeal.[246]

The tension embodied in the Lum Court's attempt to reconcile competing concerns is indicative of the tension inherent in the efficiency and access debate. The court seems to be struggling with the question of how to achieve efficiency without impeding access to the courts. It is a very fine line.

Essentially no one disputes that court congestion and delays are problems that need addressing in the American civil litigation system.[247]

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[241] *Id.* at 20, 731 P.2d at 157.

[242] See *supra* part II.A. for a discussion of the Lum Court's administrative reform program.

[243] See *supra* part II.A.3. for a discussion of settlement judges.

[244] See *supra* part II.C. for the discussion of the court-annexed arbitration program.

[245] *See, e.g.*, *supra* parts II.A.1., II.A.2., II.B.2.

[246] See *supra* part II.A.1. for a discussion of the Rules of the Circuit Courts.

[247] *But cf.* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 61 (1983) (suggesting that the litigation explosion may be a myth created by an elite of judges, professors, deans and practitioners).

The number of civil actions[248] filed in the Hawai'i circuit courts reached a peak in 1983 but have declined since then.[249] However, the number of civil actions being filed has increased in the 1990s.[250] Compounding that problem is the fact that the backlog of cases in the circuit courts has not been eliminated.[251]

Thus, efficiency in and of itself is not a negative value choice.[252] It is, however, a value choice that must be weighed against other competing values of litigation which access to the court fosters. Professor Michelman has identified four such values which he refers to as dignity[253] participation,[254] deterrence,[255] and effectuation values.[256]

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[248] "Civil actions" include: contracts, vehicular and non-vehicular personal injury and property damage, district court transfers, and other civil actions. Hawaii Supreme Court Office of Statistics.

[249] Hawaii Supreme Court Office of Statistics. A total of 8921 civil actions were filed in the circuit courts in 1983. *Id.*

[250] *Id.* The statistics for civil actions filed since, and including 1983, are as follows: 1983: 8921; 1984: 6960; 1985: 6709; 1986: 6718; 1987: 5987; 1988: 5732; 1989: 5524; 1990: 5876; 1991: 6070. *Id.*

[251] Judge Chun estimates that the current backlog of cases in the circuit court system is approximately 8000 cases. Interview with Judge Chun, *supra* note 10.

[252] Yamamoto, *Case Management*, *supra* note 6, at 407-08. Professor Yamamoto sums up the benefits that can be derived from efficiency in the context of the role of managerial judges as follows:

> Early intervention and tighter control mean less delay. Reducing delay benefits the litigants by resolving disputes and defining rights and obligations more quickly. Less delay generally means less cost. Early judicial control also means pared down pretrial activity. Fewer pleadings and motions, and discovery tailored to the needs of the case translate into reduced pretrial expenses. Less cost obviously benefits the court and the litigants already before the court. It also expands opportunities for access for persons with meritorious claims who have been excluded from the judicial process due to the cost of participation.

Id. (footnotes omitted).

[253] Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L. J. 1153, 1172 ("Dignity values reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate.").

[254] *Id.* (citation omitted) ("Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills 'counted,' in societal decisions they care about.").

[255] *Id.* at 1173 (citation omitted) ("Deterrence values recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable.").

[256] *Id.* ("Effectuation values see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.").

Building upon the same theme, other commentators note that access to the court provides litigants with the basic and arguably fundamental right to have their grievances heard in a democratic society.[257]

An emphasis on efficiency that overshadows values like access is, therefore, a value judgment.[258] More specifically, "in a system based on efficiency, plaintiffs outside society's political and cultural mainstream asserting marginal claims are expendable."[259] Such a value judgment can only generate negative consequences, not only for individual litigants, but also for society as a whole.[260] According to Judge Weinstein:

> [r]estricting access to the courts is seriously misguided and shortsighted. It will not alleviate any real "litigation crisis." . . . . It will not enhance the legitimacy of the legal system. What it will do is deprive

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[257] Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 322 (1985) (Professor Sarat notes that "[i]n the American context the concern that justice may be insufficiently accessible is especially troubling since access to justice is regarded as a minimum prerequisite to justice itself.").

Another commentator argues:

> [I]n our society, notice and hearing also serve to demonstrate a respect for the rights and will of each individual citizen, thereby recognizing the importance of dignity inherent in the democratic ideal. This is accomplished because a hearing both increases the likelihood that the outcome on the merits will be in some sense better and, in any case, will help to generate the feeling that the outcome (whatever it may be) is *legitimate*.

Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 454 (1974) (emphasis in original); *see also* Weinstein, *supra* note 132, at 1920 ("When we deprive a person of access to the ordinary courts, we are depriving him of something of value. We are also eroding a principle which is important to democratic life.").

[258] Yamamoto, *Efficiency's Threat*, *supra* note 3, at 379; *see also* Carter, *supra* note 127, at 2195. Reforms emphasizing efficiency have not had a neutral impact in practice. In fact, certain types of litigants asserting particular types of claims have been disproportionately affected. Judge Carter argues, "I have tried to suggest that the doomsday cries of the efficiency mongers mask a hidden agenda, an agenda that seeks to limit the access of justice of some rights-holders but not others." *Id.*

[259] Yamamoto, *Efficiency's Threat*, *supra* note 3, at 379.

[260] Weinstein, *supra* note 132, at 1922; *see also* Yamamoto, *Efficiency's Threat*, *supra* note 3, at 349, 413 (arguing generally that granting court access for "marginal" litigants not only provides an avenue of meaningful participation for people otherwise excluded from political life and processes, it also contributes to the potential transformation of the "larger social dialogue over time").

> individuals and society of important rights and heighten the disaffection and frustration that results from exclusion.[261]

The choice any court ultimately makes regarding the relative importance of access and efficiency will turn on that court's conception of what the role of the court in society should be.

IV. The Role of the Court

Stated very simply, courts were designed to adjudicate cases.[262] However, courts do not exist in a vacuum. They must be placed in a context; so, this functional answer, though true, is lacking in many respects. Another, more vital question must also be answered: specifically what *kinds* of cases are and should be adjudicated by the courts? The answer to this question will determine not only the role of the courts, but also who will be let into the system.

The access to the court question presupposes, however, that adjudication matters—that it makes some kind of difference; that it serves an important function. The starting point in this analysis of the role of the courts, therefore, is to determine whether adjudication does in fact play an important part in American society.

A. Settlement, Alternative Dispute Resolution, and Adjudication

There is a current emphasis in our court systems—both federal and state—on settlement[263] and alternative dispute resolution (A.D.R.).[264] Examples of this trend in the Hawai'i court system are the Lum

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[261] Weinstein, *supra* note 132, at 1922.

[262] *See, e.g.*, U.S. Const. art. 3, § 2, cl. 1.

[263] This term would include "managerial judges" who, by being given greater authority under different rules of civil procedure, are better equipped to foster settlement in the cases before them. *See generally* Yamamoto, *Case Management*, *supra* note 6.

[264] A.D.R. includes court annexed arbitration programs. *See* William N. Eskridge, Jr., *Metaprocedure*, 98 Yale L.J. 945, 959 (1989) (reviewing Robert M. Cover et al, Procedure (1988)) [hereinafter Eskridge, *Metaprocedure*] (noting that settlement of civil lawsuits is a policy strongly supported by the United States Supreme Court and the A.D.R. movement); Landsman, *supra* note 4, at 504 ("[C]ritics have urged that settlement rather than adjudication be used to resolve most disputes.").

Court's active use of settlement judges in its administrative reform program[265] and the introduction of C.A.A.P. in 1987.[266] One of the main thrusts of settlement and the A.D.R. movement is consent, i.e., the consent of the parties involved to the resolution produced.[267]

An underlying premise of settlement and the A.D.R. movement is that "formal dispute resolution is too expensive and too divisive a way to resolve disputes."[268] Related to this is the by now familiar criticism that formal adjudication simply takes too long.[269] There are two problems with these premises.

First, just because the parties "consent" to a given resolution does not mean that that resolution is in any way "fairer," "better" or more "right" than an adjudicated result. Professor Resnik states the quandary in the form of a question:

> If we all agree that imbalance is a problem in many cases, that attorneys or parties are exploitative or inept, that lots of cases are demanding attention and that legitimate outcomes are difficult to generate, then how do quick dispositions help . . . ? . . . . Can the label "consent" solve any more problems than does the label "judgment"?[270]

Second, the arguments supporting settlement and A.D.R. are persuasive if one agrees that the only purpose of adjudication is the resolution of strictly private disputes.[271] The premise implicit in this argument, i.e., that adjudication only resolves private disputes, is no longer viable.[272]

The traditional model of adjudication conceives of two private individuals of roughly equal bargaining power who are both repre-

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[265] *See supra* part II.A.3.

[266] *See supra* part II.C.

[267] Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 538 (1986) ("The perceived desirability of settlement is based not only upon the general 'goodness' of consent, but also upon the devaluation of adjudication.").

[268] Eskridge, *Metaprocedure*, *supra* note 264, at 959; Resnik, *supra* note 267, at 537.

[269] Landsman, *supra* note 4, at 503-04, 522; Sarat, *supra* note 257, at 325 ("By proliferating dispute processing mechanisms and discouraging the use of the courts, reformers hope to reduce the caseload burden on courts, and at the same time provide third party dispute processing mechanisms that are available, accessible, speedy, and inexpensive.").

[270] Resnik, *supra* note 267, at 545 (footnote omitted).

[271] Eskridge, *Metaprocedure*, *supra* note 264, at 959.

[272] *See infra* text accompanying notes 273-77.

sented by zealous advocates.[273] The advocates provide an impartial decision maker with all the relevant information. Based on this information, the impartial decision maker hands down a "fair" decision which attempts to return the individuals to the status quo.[274]

Most scholars now reject the traditional model of adjudication.[275] There is a sense that more is going on than merely the resolution of private disputes. Rather, adjudication can be seen as a process by which public values are articulated and developed.[276] Thus, settlement is seemingly inappropriate where "there are significant distributional inequalities, where it is hard to get true consent because the parties are social groups, where the court needs to supervise the parties after judgment, or where there is a social need for an authoritative interpretation of the law."[277]

Despite the criticisms leveled against formal dispute resolution,[278] settlement and the A.D.R. movement are not always appropriate substitutes for adjudication. Adjudication, therefore, still plays a necessary part in American society.

B. Adjudication as a Method of Articulating Public Values

The conclusion that adjudication still has an important role to play in American society does not end the analysis of the role of the courts. In fact, the conclusion begs the very question: what is or should the role of the courts be? Two constitutional law principles provide an answer.[279]

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[273] *See generally* Resnik, *supra* note 267, at 513.

[274] *See, e.g.*, Resnik, *supra* note 267, at 513; Eskridge, *Metaprocedure*, *supra* note 264, at 955-56.

[275] *See, e.g.*, Eskridge, *Metaprocedure*, *supra* note 264, at 955, 959-60; Yamamoto, *Efficiency's Threat*, *supra* note 3, at 399.

[276] Eskridge, *Metaprocedure*, *supra* note 264, at 955, 959-60; Yamamoto, *Efficiency's Threat*, *supra* note 3, at 402. Professor Eskridge defines public values as those "legal norms and principles that form fundamental underlying precepts of our polity—background norms that contribute to and result from the moral development of our political community. Public values appeal to conceptions of justice and the common good." William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989) [hereinafter Eskridge, *Public Values*].

[277] Eskridge, *Metaprocedure*, *supra* note 264, at 959 (footnote omitted).

[278] *See supra* text accompanying notes 268-69.

[279] Again, the relative importance given to access and efficiency will depend to a large extent on the particular court's notion of what its role in society should be. Thus,

First, and contrary to popular belief,[280] state courts play an important role in our federalism based system of government.[281] Indeed, retired United States Supreme Court Associate Justice William Brennan has stated that federalism "must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[282] This statement presupposes, however, that litigants have access to our state courts *and* that their claims are being adjudicated.

Adjudication, viewed as a function to protect individual and public rights, is deeply rooted in the separation of powers concept.[283] Separation of powers, in turn, embodies the fundamental principle of checks and balances.[284] In this scheme, a function of the courts is to hold the other branches of government accountable to the public and to the constitution and to protect minorities from "intemperate majorities."[285]

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all the arguments, constitutional or otherwise, that can be mustered delineating what the "proper" role of the court is will not matter much if the court simply disagrees. Generally speaking, this section of the article simply attempts to stimulate discussion of this issue.

[280] M.P. Duncan III, *Terminating the Guardianship: A New Role For State Courts*, 19 ST. MARY'S L.J. 809, 812 (1988) (the public's perception is that rights are protected in Washington D.C., if they are protected at all); Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) ("[I]t is a curious fact that when we speak of individual rights, not only the newspaper reading public but no doubt most members of the legal profession take it for granted that we speak of federal law, pronounced by the federal courts.").

[281] The concept of federalism recognizes that the national government and the government of each of the states coexist.

[282] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

[283] Yamamoto, *Efficiency's Threat*, *supra* note 3, at 401.

[284] Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988).

[285] Yamamoto, *Efficiency's Threat*, *supra* note 3, at 399-400. According to Professor Krent:

> The constitutional scheme . . . also reflects interest in making the branches [of government] responsible to some higher public interest. The framers [of the federal Constitution] included checks and balances not only to prevent each branch from accumulating power at the expense of the others, but also to protect against the rule of "faction," primarily in the legislative branch.

Krent, *supra* note 284, at 1260.

Separation of powers, however, is a federal doctrine and as such, it arguably only applies to the federal government. Moreover, the argument continues, separation of powers is designed to work in a three-branch government. The states, however, are sovereigns within a federal system and can choose to structure their governments in just about any manner they desire.

Generally speaking, most states have adopted the federal model of government, i.e., they have executive, legislative, and judicial branches. Thus, states patterned after the federal government can choose to have the separation of powers doctrine apply at the state level. Hawai'i is such a state,[286] and the Lum Court has determined that this federal doctrine does apply in Hawai'i.

In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,[287] the Lum Court noted that, unlike the federal judiciary, Hawai'i courts were not subject to the Article III case or controversy limitation of the federal constitution.[288] At the same time, the court acknowledged that Hawai'i, like the federal government, had divided its sovereign power amongst three branches of government.[289] Consequently, the Lum Court stated that "we have taken the teachings of the [United States] Supreme Court to heart and adhered to the doctrine that the use of 'judicial power to resolve public disputes *in a system of government where there is a separation of powers* should be limited to those questions capable of judicial resolution . . . .'"[290]

The Lum Court's *Yamasaki* opinion also provides important insight into the court's conception of its own role in a political society. In essence, that insight suggests that, to the Lum Court, the role of courts in American society is limited.[291] This conception led the Lum

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[286] *See* HAW. CONST. arts. III, V, VI.

[287] 69 Haw. 154, 737 P.2d 446 (1987) (Nakamura, J.). In *Yamasaki*, the Lum Court held that the specific issues involved in the case were nonjusticiable policy questions. *Id.* at 175-76, 737 P.2d at 458. The issues were whether the Office of Hawaiian Affairs (O.H.A.) was entitled to a portion of the damages received by the state for illegal mining of sand from public land and whether O.H.A. was also entitled to a pro rata share of income from the disposition of certain types of land in Hawai'i. *Id.* at 157-58; 737 P.2d at 446.

[288] *Id.* at 170, 737 P.2d at 455-56.

[289] *Id.* at 170-71, 737 P.2d at 456.

[290] *Id.* at 171, 737 P.2d at 456 (quoting Life of the Land v. Land Use Commission, 63 Haw. 166, 171-72, 623 P.2d 431, 438 (1981)) (emphasis added).

[291] *Id.* (citation omitted). The Lum Court stated: "[W]e have admonished our judges that "even in the absence of constitutional restrictions, [they must] still carefully weigh

Court to observe that "'too often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions.'"[292]

Nevertheless, regardless of how limited a court conceives its role to be, "limited" should not translate into abdication on the part of the judiciary of any state. Protecting minorities, as a function of the court,[293] takes on significance when one considers the fact that minorities, especially politically powerless minorities, are often excluded from the political process.[294] The only forum left open in these situations is the courts.[295] The role of the courts in a system of government committed to a separation of powers ideal, therefore, should be to keep the courthouse doors open, especially for those people who have nowhere else to go.

V. Conclusion

The reforms currently in place as a result of the Lum Court's concerted effort to make the Hawai'i court system more efficient have produced many positive results. For example, non-viable and/or friv-

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the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.'" *Id.* (alterations in quote in original).

The opinion goes on to state that "we have recognized 'the inappropriateness of judicial intrusion into matters which concern the political branch of government.'" *Id.* at 172, 737 P.2d at 456-57.

[292] *Id.* at 172, 737 P.2d at 457.

[293] *See supra* text accompanying notes 283-85.

[294] Professor Yamamoto explains how this phenomenon is likely to occur in today's society:

> The hypothetical marketplace of ideas results in truly representative outcomes only if decisionmakers are looking singularly for ideas. In the crowded, tumultuous political world, however, decisionmakers often are looking also to elicit and maintain political support from powerful constituencies. Those proponents of ideas backed by little constituent power have only their ideas to offer in a market that values much more. As a result, those without substantial access to power are ineffectual in the legislative and bureaucratic realms. Instead they seek court access.

Yamamoto, *Efficiency's Threat*, *supra* note 3, at 400-01.

[295] Carter, *supra* note 127, at 2195. Judge Carter argues that "it is the role of the courts to protect the rights of politically-excluded minorities; yet precisely in these times, when the protection of the courts is most needful, it is the disempowered who are sacrificed on the altar of a substantively biased notion of efficiency." *Id.*

olous cases can now be disposed of early in the civil litigation process;[296] many cases that do not necessarily require the formality of a full blown trial are now routed out of the circuit court system;[297] and the revised Rules of the Circuit Courts' strict deadlines ensure that cases are on a prearranged time schedule for discovery, settlement conferences, and trials.[298]

All of this is for the better. The court, litigants, and society in general all stand to benefit from: (1) an uncongested court system; (2) a court system that is not unduly expensive and time consuming; and (3) preventing unwarranted and clearly meritless claims/defenses from either getting into or staying in the system.

Nor has the Lum Court's court reform package adversely affected the quality of justice in the Hawai'i court system.[299] It is important to note in addition that the reforms, as used currently, should not noticeably impede access to Hawai'i courts.[300]

The reason for the lack of adverse impact on Hawai'i litigants to date is simple: the Lum Court has made clear that, in practice, considerations other than efficiency must be factored into the decisionmaking process.[301] Thus, the Lum Court has continued to establish that considerations like trials on the merits and giving litigants their day in court have enduring value in the Hawai'i court system.[302]

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[296] See *supra* parts II.A.2., II.A.3., and II.D.1. on involuntary dismissals, settlement judges, and summary judgments, respectively.

[297] See *supra* part II.C. on the court-annexed arbitration program.

[298] *See supra* part II.A.1.

[299] Interview with Judge Chun, *supra* note 10.

[300] *Id.* According to Judge Chun, the reforms implemented by Chief Justice Lum were premised on the fact that most civil cases settle. The reforms, therefore, were not implemented to keep cases out of court. They were designed to facilitate the settlement process and to make the court system more accessible to litigants by ensuring that cases in the system not only belonged there, but also that these cases progressed through the system once there. *Id.*

Justice Moon also commented during his interview that the adage "justice delayed is justice denied" is true to a large extent. Thus, by speeding up the process, the reforms were in fact attempting to make the system more accessible to everyone, i.e., getting cases resolved enables other cases to enter the system. Interview with Justice Moon, *supra* note 11.

[301] See, e.g., *supra* parts II.A.1., II.A.2., and II.D.1. for a discussion of the revised Rules of the Circuit Courts, involuntary dismissals and summary judgment respectively.

[302] See, e.g., *supra* parts II.A.2. and II.D.1. for the Lum Court's treatment of involuntary dismissals and summary judgments.

But just because the Lum Court's court reform package has not been used solely to achieve efficiency does not mean that it cannot be so used in the future, for the Hawai'i judiciary now has the tools, mechanisms, and procedures at its disposal to create a very efficient court system. For example, Hawai'i courts could decide to use Rules 11 and 26 as tools to discourage certain kinds of cases and certain kinds of litigants from getting into court.[303] Or, the Judiciary could decide that cases dismissed from the circuit court system should be dismissed with prejudice.[304] Yet another example is that the Hawai'i courts could choose to follow the restrictive standards set forth in federal summary judgment case law.[305]

This article has suggested that individual litigants and society as a whole lose out when a court tacitly or explicitly decides to pursue efficiency at the expense of access to the courts.[306] At the same time, this article has also acknowledged that efficiency in and of itself is not a negative value choice.[307] Not *every* claim put forth by *every* litigant must be adjudicated or even allowed into court; court congestion and the resulting delays in litigation are recognized problems in the American civil litigation system that should be addressed.[308]

The point that must be emphasized, however, is that the courts do have an important role to play in society, namely adjudicating individual and public values.[309] This role, even if seen as a limited one,[310] is threatened when a court chooses to pursue efficiency at the expense of other values, such as access to the courts.[311]

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[303] See *supra* part II.B.2. for a discussion of the potentially chilling effects of new Rules 11 and 26 of the Hawaii Rules of Civil Procedure.

[304] See *supra* text accompanying notes 66-69. Current practice is to allow dismissed cases to be reinstated if objections are filed. *Id.*

[305] See *supra* text accompanying notes 211-18 for a brief discussion of the federal summary judgment standards.

[306] *See supra* text accompanying notes 258-61.

[307] *See supra* text accompanying notes 247-52.

[308] *See supra* text accompanying notes 3-6 and 247.

[309] *See supra* part IV.

[310] See *supra* text accompanying notes 287-92 for discussion of Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (advancing the premise that the Lum Court takes the position that courts should play limited roles in society.).

[311] *See* Yamamoto, *Rule 11*, *supra* note 99, at 101-08. Federal court experience with Rule 11 is a prime example. Available information supports the conclusion that Rule 11 has been wielded with a substantive bias which has effectively barred the federal courthouse door to certain kinds of litigants. *Id. See also supra* part III.

Thus, because this article concludes that the role of the courts in society is to adjudicate individual and public values,[312] this article also concludes that access to the courts, as opposed to the pursuit of efficiency, is the more important and valuable goal for any court system. The Lum Court's court reform package as used to date illustrates that the two goals—access to the courts and court efficiency—do not necessarily have to be incompatible.

[312] People may differ with the analysis and the conclusions reached in this article. But again, this article has only employed one of many possible frameworks in which to interpret the Lum Court's attempt to strike a balance between the competing values of court access and court efficiency.

Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals

by Jon C. Yoshimura*

I was reminded, when I was the Chief Judge of the I.C.A., by Chief Justice Richardson, "[D]on't forget," he said, "I'm the overall boss of both courts. You can be the boss of the I.C.A., but I'm the boss of both courts."[1]

I think it's clear that we are an assistant supreme court. That's our role and function. We get no cases unless [the supreme court] give[s] us cases. And any case that we decide, the loser can ask them for certiorari, and they can review us. That gives them total control.[2]

I. Introduction

This article explores the structure of Hawai'i's appellate court system and the relationship between the Hawaii Supreme Court and the Intermediate Court of Appeals (I.C.A.).[3] Although the I.C.A. was created to assist the supreme court in reducing appellate caseload, it has served several other important functions. Critics argue, however, that historically, the role of the I.C.A. as defined by the supreme court does not comport with the role envisioned by those who established

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[1] Interview with Associate Justice Yoshimi Hayashi, Hawaii Supreme Court, in Honolulu, Haw. (Oct. 17, 1991) [hereinafter Hayashi].

[2] Interview with Chief Judge James Burns, Intermediate Court of Appeals, in Honolulu, Haw. (Aug. 19, 1991) [hereinafter Burns].

[3] Thirty-eight states have intermediate appellate courts. National Center for State Courts, State Court Caseload Statistics: Ann. Rep. 18 (1988).

the court. Events occurring during the writing of this article[4] suggest that the role of the I.C.A. will change significantly with more cases assigned to that three-judge panel.[5] This change will necessitate increasing the number of judges on the I.C.A. if a repeat of the appellate caseload backlog of the late 1970s is to be avoided.[6]

Part II chronicles the formation of the I.C.A.: the circumstances which made its establishment a necessity, the process by which it was created, and the framework provided by delegates to the 1978 Hawaii State Constitutional Convention and lawmakers of the Tenth Legislature of the State of Hawaii. Part III examines the eleven-year history of the I.C.A.: the emergence of its role as an "assistant" to the Richardson supreme court and the refinement of that role under Chief Justice Herman Lum. The future of Hawai'i's appellate courts is the subject of Part IV. Part V presents concluding remarks.

II. Creating the I.C.A.

> Appellate courts often determine irrevocably whether a person will be compensated for injury or loss, or released from confinement or continued in incarceration. . . . When the resolution of appeals is delayed, lives may be disrupted while individuals and society, unable because of the

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[4] Associate Justice Frank Padgett announced his intention to retire when his ten-year term expires on March 29, 1992. Justice Padgett, who served as assignment justice for eight years, had sought another term on the Hawaii Supreme Court but decided in September 1991 to withdraw his request for retention.

Associate Justice Ronald Moon was immediately appointed to replace Justice Padgett as assignment justice. Justice Moon's ten-year term will expire on March 8, 2000.

[5] Interview with Chief Judge James Burns, Intermediate Court of Appeals, in Honolulu, Haw. (Jan. 16, 1992).

Indeed, according to Chief Judge James Burns, the number of cases assigned to the I.C.A. has increased since Associate Justice Ronald Moon was appointed assignment justice. The Chief Judge says the I.C.A. was assigned an average of twelve cases per month during fiscal years 1988-89 and 1989-90. That figure dropped to an average of ten cases per month in fiscal year 1990-91. The average for the first five months of fiscal year 1991-92 was sixteen cases per month.

"It's clear that the type of case disposed of by memorandum opinion at the supreme court by Justice Padgett will now be assigned to the I.C.A. by Justice Moon." *Id.*

[6] *Id.* At the end of fiscal year 1989-90, the Hawaii Supreme Court had a 282-case backlog; the I.C.A. had a 55-case backlog. Total backlog: 337 cases. By the end of fiscal year 1990-91, the total backlog was 405 cases. As of November 1991, the total backlog was at 461 cases. *Id. See infra* notes 8-16.

> delay to plan confidently for the future, await the final disposition of cases.[7]

In 1976, 265 primary cases[8] were appealed to the Hawaii Supreme Court, up from 171 in 1971.[9] During the same six-year period, the number of opinions produced by the supreme court remained relatively constant with the justices drafting an average of ninety-six opinions annually.[10] The five-man supreme court terminated 520 of its 868 cases in 1976.[11]

> There is a limit to the number of appealed cases that any seven-judge court . . . can competently handle. It is generally agreed that no appellate judge, however competent, can write more than 35, or conceivably 40, full-scale publishable opinions in a year. . . . When the total runs above 50 per judge in a supreme court . . . justice inevitably suffers.[12]

Data compiled by the Statistical Analysis Center of the Hawaii Judiciary indicates that the time needed to terminate an appellate proceeding increased from 12.6 months in 1972 to 19.5 months in 1976.[13] A study conducted for the National Center for State Courts in 1977 came to the conclusion that "the Hawaii Supreme Court has not been able to stay current with its rapidly expanding caseload."[14] In a November 1976 speech to the Hawaii Bar Association, William S. Richardson, then Chief Justice of the Hawaii Supreme Court, observed that the state's "appellate system as presently structured is inadequate to meet the needs of the decade ahead."[15]

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[7] JOHN A. MARTIN & ELIZABETH A. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY 1 (1981) [hereinafter MARTIN & PRESCOTT].

[8] JUDICIARY, STATE OF HAWAII, ANN. REP. 1990 22 (1990). A primary case is an appeal from a trial court or from a government agency or an original proceeding including writs of mandamus and writs of habeas corpus. *Id.*

[9] JUDICIARY, STATE OF HAWAII, ANN. REP. 1971 (1971); THE JUDICIARY, STATE OF HAWAII, ANN. REP. 1976 (1976).

[10] *Id.*

[11] JUDICIARY, STATE OF HAWAII, ANN. REP. 1976 (1976).

[12] MARTIN & PRESCOTT, *supra* note 7, at 151.

[13] LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978, ARTICLE V: THE JUDICIARY 11 (1978).

[14] NATIONAL CENTER FOR STATE COURTS, HAW. APP. REP. 7 (Draft) (San Francisco: 1977).

[15] Gerald Kato, *Richardson Calls for New Court of Appeals*, HONOLULU ADVERTISER, Nov. 5, 1976, at A-10.

> Appellate backlog with its corresponding delay means increased costs and prejudice to litigants and results in loss of respect for the legal process as a whole. The supreme court has a duty to promptly review the decisions of lower courts . . . Appellate congestion hampers the court in performing its error-correcting function. More importantly, it threatens the court's principal duty to selectively review and formulate the law.[16]

Chief Justice Richardson favored the establishment of an intermediate court of appeals as a solution to the potentially debilitating appellate caseload problem. Expansion of the supreme court was also suggested as a solution to the caseload problem,[17] but the Chief Justice was opposed to the idea.[18]

The Chief Justice's proposal required an amendment to the Hawaii State Constitution. That opportunity arose in 1978 when delegates to the Hawaii Constitutional Convention convened to consider changes to the state's constitution.

The Constitutional Convention's Committee on the Judiciary agreed with Chief Justice Richardson's approach to solving the appellate caseload problem. A majority of the committee's members recommended "the establishment of an intermediate appellate court as the best, most effective and permanent solution to the problem."[19] The recommendation was embodied in Committee Proposal No. 10.[20]

However, a minority faction insisted that "instead of creating an intermediate appellate court, the size of the supreme court should be increased from five to seven members, and that the court should be

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[16] JUDICIARY, RECOMMENDATION OF THE CHIEF JUSTICE RELATING TO AN INTERMEDIATE APPELLATE COURT, SPECIAL REP. TO THE 1978 CONSTITUTIONAL CONVENTION, July 1978.

[17] LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978, ARTICLE V: THE JUDICIARY 11 (1978).

[18] Interview with former Chief Justice William S. Richardson, Kawaiahao Plaza, in Honolulu, Haw. (Sept. 25, 1991) [hereinafter Richardson]. "I never cared to go to seven, because I knew the next thing was to sit in panels and I'm opposed to that." *Id.*

[19] STAND. COMM. REP. No. 52, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 618 (1978).

[20] STAND. COMM. REP. No. 52, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 617 (1978). "These proposals addressed the basic concern over the evergrowing congestion of cases at the appellate level of our judicial system and the concurrent increase in the length of time for both civil and criminal cases to reach a conclusion." *Id.*

allowed to sit in panels, or en banc.''[21] The minority proposed an amendment to Committee Proposal No. 10 that would have deleted provisions calling for the creation of an intermediate appellate court.

> By creating an intermediate appellate court, there will be increased expense to taxpayers for the additional court, a potential for double appeals which may well cause additional delays and higher costs to litigants, and a potential increase in workload caused by the need to determine whether the intermediate appellate court or the supreme court should exercise original appellate jurisdiction in a particular case and whether a case decided by the intermediate appellate court should be reviewed by the supreme court.[22]

The minority position was criticized by supporters of Committee Proposal No. 10 during debates in the Committee of the Whole on the Judiciary. ''I think there is a basic misunderstanding as to what this intermediate appellate court is intended to accomplish. It will not be an additional level of appeal. It will be a substitute level of appeal.''[23]

The minority amendment was defeated by vote.[24] A second proposed amendment calling for an increase from five to seven justices on the supreme court[25] was then advanced by the minority faction.[26]

> The proposal to allow the supreme court to sit in panels would allow three justices at one time to decide on a particular case, rather than five, so there would be at least double the amount of cases heard and decided at any one particular time. . . . Now this particular system has worked well in the federal appellate court system.[27]

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[21] MIN. REP. NO. 10, *reprinted in* I Proceedings of the Constitutional Convention of Hawaii of 1978, at 989 (1978).

[22] *Id.*

[23] COMM. OF THE WHOLE DEBATES, *reprinted in* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 349 (1978) (statement of Del. DiBianco).

[24] COMM. OF THE WHOLE DEBATES, *reprinted in* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 351 (1978).

[25] Interview with Associate Justice Frank Padgett, Hawaii Supreme Court, in Honolulu, Haw. (Aug. 31, 1991) [hereinafter Padgett]. According to Justice Padgett, then Chief Justice William Richardson was unsure which remedy delegates to the Constitutional Convention would endorse. The supreme court building (Ali'iolani Hale) was being renovated at the time, so to be safe, the Chief Justice ordered the interior remodeled to accommodate seven justices. The two extra offices are today used by supreme court staffers. *Id.*

[26] COMM. OF THE WHOLE DEBATES, *reprinted in* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 352 (1978).

[27] *Id.* at 353 (statement of Del. Chu).

Majority delegates viewed the proposal as "a Band-Aid approach to a serious wound."[28]

> If we created—or if we expanded the supreme court now and authorized the sitting in panels to cope with the backlog, and then found that it was insufficient to meet the backlog of cases, we would still be faced down the road with the necessity of creating an intermediate appellate court in any event. In that eventuality, we would also, at that point in time, have the problem of an expanded supreme court, which we really don't need.[29]

The proposal to increase the size of the supreme court was also defeated.[30]

Hawai'i voters ratified the proposed constitutional amendment relating to creation of an intermediate appellate court in November 1978.[31] A bill delineating the jurisdiction and power of the new court was introduced in the regular session of the Tenth Hawaii State Legislature.[32] Lawmakers referred to the Constitutional Convention's Standing Committee Report No. 52 for guidance.[33]

> It is intended that the major duty of the intermediate appellate court will be to handle the more routine appellate cases of reviewing trial court determinations for errors and correcting such errors. This function is presently performed by the Supreme Court. By relieving the Supreme Court from this necessary but time consuming function, the Supreme Court can devote more time to its principal duty of selective review and formulation of decisional law. It is intended, however, that both the supreme court and intermediate appellate court have jurisdiction to hear all types of cases.[34]

A structure for appellate review involving both the supreme court and the intermediate appellate court was finalized by Senate and House conferees.[35] The proposal consisted of seven essential features:

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[28] *Id.* at 354 (statement of Del. Ikeda).

[29] *Id.*

[30] *Id.* at 358.

[31] OFFICE OF THE LIEUTENANT GOVERNOR, RESULTS OF THE GENERAL ELECTION OF 1978, Nov. 1978. Of the 397,471 casting votes in the 1978 general election, 221,745 (56%) voted in favor of the proposed amendment. Thirty-four percent voted against the proposal. Ten percent of the voters cast blank or defective ballots. *Id.*

[32] H.R. 92, 10th Leg., Reg. Sess. (1979).

[33] H.R. CONF. COMM. REP. No. 70, 10th Leg., 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 1122.

[34] STAND. COMM. REP. No. 52, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 618 (1978).

[35] H.R. CONF. COMM. REP. No. 70, 10th Leg., 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 1121 (recommending passage of amended House Bill 92).

(1) *Concurrent jurisdiction*. The intermediate appellate court was given jurisdiction concurrent to that of the supreme court because "[t]he essence of its establishment [was] not the construction of an additional layer of appeal."[36] Rather, the intermediate appellate court was created to "alleviate appellate congestion by relieving the Supreme Court of its appellate load in the more routine and minor decisions in all types of cases."[37]

(2) *Unitary filing*. "All appeals addressed to either court—Supreme Court and Intermediate Appellate Court—will be filed with the Supreme Court and there will be one filing fee."[38]

(3) *Assignment of cases*. "The Chief Justice or his designee from among the Supreme Court justices or Intermediate Appellate judges, is given the task, statutorily, to assign the cases filed under the unitary filing system, and to route them according to the magnitude of their importance."[39]

(4) *Criteria for assignment*. Conferees felt it "very important to observe that the criteria to be used in assignment of cases are set out in the Hawaii Revised Statutes."[40] Lawmakers stated that parties to an appeal should have access to such criteria thereby affording a measure of certainty as to which court would likely hear their appeal.

Conferees, with assistance from former Associate Justice of the Hawaii Supreme Court Bert T. Kobayashi, identified five separate issues determinant of assignment:

(a) Whether the case involves a question of first impression or presents a novel legal question; or

(b) Whether the case involves a question of state or federal constitutional interpretation; or

(c) Whether the case raises a substantial question of law regarding the validity of a state statute, county ordinance, or agency regulation; or

(d) Whether the case involves issues upon which there is an inconsistency in the decision of the Intermediate Appellate Court or of the Supreme Court; or

(e) Whether, in a criminal case, the sentence involved is life imprisonment without the possibility of parole.[41]

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[36] *Id.* at 1123.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1124.
[41] *Id.*

(5) *Motion for reassignment.* Conferees, cognizant of the possibility that an "assignment justice may err or that intervening changes of circumstances occurring after the original assignment may warrant a reassignment of the case from the Intermediate Appellate Court to the Supreme Court," provided a mechanism for reassignment.[42]

(6) *Reassignment by Supreme Court order.* The Supreme Court could obtain immediate reassignment of a case by order. "[I]t was considered that emergency situations might arise in which the procedure by way of motion for reassignment might prove too cumbersome, with justice being prevented by the very comprehensiveness of the procedure."[43]

(7) *Appeal from the Intermediate Appellate Court.* "Every final decision of the Intermediate Appellate Court is subject to further appeal to the Supreme Court, but only by certiorari, which the Supreme Court may, in its discretion, refuse."[44] It was the intent of lawmakers to minimize "double appeals" by allowing the Supreme Court to deny certiorari to cases already appealed to the Intermediate Appellate Court.

H.R. 92, (HD 2, SD 2, CD 1), entitled, "A Bill for an Act Relating to the Judiciary," (Act 111) passed both the House and the Senate on April 19, 1979.[45] Act 111 was signed by Governor George Ariyoshi on May 25, 1979.[46] The changes embodied in Act 111 were codified in chapter 602 of Hawaii Revised Statutes.[47]

Governor Ariyoshi appointed former District and Circuit Court Judge Yoshimi Hayashi Chief Judge of the newly created Intermediate Court of Appeals. Honolulu attorney Frank Padgett and Circuit Court Judge James Burns were named associate judges. The I.C.A. held its first session on April 28, 1980.[48] Two days later, the court issued its first decision, "a three-paragraph opinion which upheld a district court petty misdemeanor harassment conviction."[49] Two hundred eighty-one

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 1125.

[45] 60TH DAY, 10th Leg.,. 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 975.

[46] GOVERNOR'S MESSAGES, 10th Leg., 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 1021.

[47] HAW. REV. STAT. § 602-57 (1985) (concurrent jurisdiction); *id.* § 602-5(8) (1985) (unitary filing); *id.* § 602-6 (1985) (criteria for assignment); *id.* § 602-58 (1985) (motion for reassignment); *id.* § 602-5(9) (1985) (reassignment by supreme court order); *id.* § 602-59 (1985) (appeal from the intermediate appellate court).

[48] JUDICIARY, STATE OF HAWAII, ANN. REP. 1980, at 14 (1980).

[49] *Id.*

cases were assigned to the I.C.A. during its first year.[50] The court terminated forty-two of those cases in its first two months.[51] Two years later, the appellate caseload backlog had virtually been cleared.[52]

In twelve years, six judges have sat on the I.C.A. In 1982, Governor George Ariyoshi elevated Judges Padgett and Hayashi to the Supreme Court to fill vacancies created by the retirements of Associate Justices Tom Ogata and Benjamin Menor. Burns was appointed Chief Judge of the I.C.A., and former Honolulu City Councilman and attorney Walter Heen and attorney Harry Tanaka were named associate judges. Judge Tanaka retired in June 1991.[53] Governor John Waihee appointed Deputy Attorney General Corinne Watanabe to the I.C.A. in March 1992.[54]

III. FUNCTIONS OF THE I.C.A.

As is evident from Constitutional Convention debates and committee reports, delegates intended that the primary function of the I.C.A. would be to assist the supreme court in managing the state's appellate caseload.[55] All appeals are filed with the supreme court.[56] The chief

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[50] *Id.*

[51] *Id.*

[52] Padgett, *supra* note 25.

[53] Interview with Associate Judge Harry Tanaka, Intermediate Court of Appeals, in Honolulu, Haw. (June 20, 1991).

The Constitution of the State of Hawaii requires all judges to retire upon attaining the age of 70. HAW. CONST. art. VI, § 3. I.C.A. Associate Judge Harry Tanaka turned 70 on May 15, 1991. A day before Judge Tanaka's 70th birthday, U.S. District Judge David Ezra ruled that the state could not force the I.C.A. judge to retire. Judge Ezra noted that a case involving a similar mandatory retirement law for state judges enacted by Missouri lawmakers was pending before the United States Supreme Court. Judge Ezra stated that if Judge Tanaka were forced to retire and the Supreme Court subsequently struck down the mandatory retirement provisions as unconstitutional, it was questionable whether Judge Tanaka would be able to return to the bench.

On June 20, the United States Supreme Court in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), held that Missouri's law did not violate the federal Age Discrimination in Employment Act of 1967 or the Equal Protection Clause of the Fourteenth Amendment. Judge Tanaka acknowledged his retirement later that day.

[54] Interview with Deputy Attorney General Corinne Watanabe, Office of the Attorney General, in Honolulu, Haw. (Mar. 12, 1992).

[55] At its inception, the I.C.A. was required to hear oral argument on all cases before it unless otherwise stipulated by the parties. INTERMEDIATE COURT OF APPEALS

justice or his designee from any of the associate justices or the I.C.A. judges then assigns the case to either the I.C.A. or to the Supreme Court.[57]

The assignment judge determines the role of the I.C.A.[58] Four associate justices have served as assignment justice since the inception of the I.C.A.[59] Of the four, Associate Justice Frank Padgett held the position for the longest period of time. During the writing of this article, Justice Padgett relinquished the role, and Associate Justice Ronald Moon was appointed assignment justice by Chief Justice Herman Lum.[60] The transition is significant because while previous assignment justices have construed the statutory criteria for assignment[61]

R. 4(a)(1980).

The requirement seriously threatened the court's ability to dispose of cases in a timely manner. I.C.A. rules were amended in 1984 and the court is no longer required to hear oral argument on all cases. *See infra* text accompanying notes 194-98.

[56] HAW. REV. STAT. § 602-5(8) (1985); HAW. R. APP. P. 25(a).

[57] HAW. REV. STAT. § 602-58(8) (1985); HAW. R. APP. P. 31.

[58] The cases reviewed by intermediate appellate courts in Oklahoma, Idaho, and Iowa are similarly limited to those assigned by their respective supreme courts. M. OSTHUS, STATE INTERMEDIATE APPELLATE COURTS 6-7 (2d. ed. 1980).

[59] Associate Justice Benjamin Menor, 1980-81; Associate Justice Herman Lum, 1981-82; Associate Justice Frank Padgett, 1983-91; Associate Justice Ronald Moon, 1991-present.

[60] Interview with Associate Justice Ronald Moon, Hawaii Supreme Court, in Honolulu, Haw. (Oct. 1, 1991) [hereinafter Moon].

[61] HAW. REV. STAT. § 602-6 (1985) provides:

> In assigning a case to the appropriate court of appeal under section 602-58, the chief justice or the chief justice's designee may consider the following among other relevant matters and their substantiality in determining whether the case involves a question of such importance that it should be assigned to the supreme court:
>
> (1) Whether the case involves a question of first impression or presents a novel legal question; or
> (2) Whether the case involves a question of state or federal constitutional interpretation; or
> (3) Whether the case raises a question of law regarding the validity of a state statute, county ordinance, or agency regulation; or
> (4) Whether the case involves issues upon which there is an inconsistency in the decisions of the intermediate appellate court or of the supreme court; or
> (5) Whether the sentence in the case is life imprisonment without possibility of parole.

Id.

loosely,[62] allowing for practical considerations related to caseload management and the use of "expert" judges, Justice Moon's belief that the statute should be construed strictly[63] suggests a fundamental change in supreme court policy.

A. The Assignment Justice

The assignment of a case to the I.C.A. or to the Hawaii Supreme Court begins with the assignment justice. A popular term used to describe the role of the assignment justice is "traffic cop."[64] After an appeal is filed, the assignment justice reviews it and, by memorandum, makes a recommendation for assignment. The memorandum is circulated among the chief justice and the other three associate justices who indicate agreement with or rejection of the recommendation. All decisions are made by majority vote.[65]

According to Chief Justice Lum, the role of the assignment justice has changed little since the post was created. "Except that now . . . you have more cases to deal with. The procedure and the method by which things are done has stayed pretty much the same."[66] While state law specifies five criteria for assignment of cases,[67] Chief Justice Lum believes the level of importance given to the criteria is discretionary to the assignment justice. "I think the statute says 'may consider the following' factors, so, it's discretionary in my view in the sense that the question is how much weight do you put on each of these factors, and there is no set, definitive quantitative analysis you can follow."[68] According to the Chief Justice, a strict construction of the assignment statute would lead to caseload backlog at the I.C.A.[69]

> There are practical considerations as well. . . . If you use only the criteria, then obviously, the I.C.A. is going to get the bulk [of the cases] which then leaves us only to do what is sort of suggested by the statute. That way I think it would be unfair to the system in the sense that the

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[62] Interview with Chief Justice Herman Lum, Hawaii Supreme Court, in Honolulu, Haw. (Sept. 24, 1991) [hereinafter Lum].

[63] Moon, *supra* note 60.

[64] Burns, *supra* note 2.

[65] Lum, *supra* note 62.

[66] *Id.*

[67] HAW. REV. STAT. § 602-6 (1985) (quoted *supra* note 60).

[68] Lum, *supra* note 62.

[69] *Id.*

> public would be deprived of having their cases heard within a reasonable time. . . . If we follow the guidelines, I would say that maybe only about 100 to 150 cases would come to us, the rest would go to the I.C.A. and obviously the cases would bog down at the I.C.A. I think as a practical matter, because there are eight of us really [five justices, three judges], we try to allocate about 100 cases per judge.[70]

The Chief Justice is quick to point out, however, that the statutory criteria are not ignored.

> If it's a constitutional question, if it's of public importance we keep those cases. If it's a major felony conviction, we keep those. If there's a conflict in the law, we generally keep those. But it's easy to find cases we can refer to the I.C.A. because the bulk of the cases are really what we call correctional decisions. They truly belong to the I.C.A. But what is wrong if we were to keep some of them? We can do the same thing as the I.C.A.[71]

The Chief Justice says a larger I.C.A. would make possible an increase in the number of cases assigned to that panel. However, requests for more I.C.A. judges have been rejected by lawmakers.

> For that reason we will continue with the same policy. So the net effect is that we're able to keep pretty current, because I think if you look at the record you'll find that we're able to get out most of our decisions in a year. I think nine months is the median time, which is a dramatic change from what it was. In many cases appeals took about three, maybe four years. It's important people get the decision as soon as possible. Then they can get on with their lives, on with their business. I think that's important. Generally, that's the sort of policy I adopted when I was assignment justice, and I think Justice Padgett has likewise continued that.[72]

Associate Justice Frank Padgett was appointed assignment justice in 1983 by Chief Justice Lum. Justice Padgett served as assignment justice for eight years, longer than all his predecessors combined. In addition to the statutory criteria, Justice Padgett says he considered other factors in determining whether a case would be assigned to the supreme court or to the I.C.A. Could the case be dealt with summarily? Does the case involve an area of law which is well settled in Hawai'i and requires application of the law rather than creation of new law? Is there a judge

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[70] *Id.*

[71] *Id.*

[72] *Id.*

or justice with acknowledged expertise in the area of law involved?[73]

> The great majority of cases are garden variety cases. But obviously if I sent all of them to the I.C.A., the system wouldn't work. In normal situations, I'd send about a third there and keep two-thirds here and of the two-thirds I'd keep here, it always would work out about half of those, for several years, would be cases which could be disposed of without oral argument. And that way we could keep the calendar moving.[74]

Associate Justice James Wakatsuki was Speaker of the House in 1979 when Act 111 became law.[75] "I don't think that the intent of the legislature, the reasons why the I.C.A. was created, is being followed."[76] Justice Wakatsuki says statutory provisions for assignment of cases are largely being ignored.

> The statute says "may consider," but I interpret that to mean it should be a significant factor in assigning a case to the I.C.A. or leaving it here at the supreme court. Otherwise the guidelines would be meaningless. . . . I think the I.C.A. is getting some of the first impression cases. I see no reason why the supreme court handles memo opinion cases.[77]

Justice Wakatsuki says the supreme court should assign those cases it now disposes of by memorandum opinion to the I.C.A. He thinks the three-judge panel can handle the added work.

> And if it can't, then the legislature should be told and we should get another intermediate court of appeals judge.
>
> The assignment judge evidently has the discretion right now as to what cases should go or not go to the I.C.A. But I don't think that was the intent of the legislature.[78]

Justice Wakatsuki's comments came a week before Associate Justice Ronald Moon was appointed assignment justice. "I will look very closely at the guidelines and at the record of the legislative session and will try to meet their intent."[79] Justice Moon says the supreme court's

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[73] Padgett, *supra* note 25.

[74] *Id.*

[75] *See supra* text accompanying notes 45-47.

[76] Interview with Associate Justice James Wakatsuki, Hawaii Supreme Court, in Honolulu, Haw. (Sept. 24, 1991) [hereinafter Wakatsuki].

[77] *Id.*

[78] *Id.*

[79] Moon, *supra* note 60.

caseload should be limited to the types of cases listed in *Hawaii Revised Statutes* section 602-6.

> The supreme court should have an ability to delve in depth on the kinds of cases that the statute speaks of. To develop the law for the community, for the state. By handling the kind of cases that we have been doesn't really give us the ability to do that.[80]

Justice Moon says caseload concerns will not prevent him from assigning the I.C.A. more cases than it has received in the past. "I think we have to give some deference to the legislative intent. And if it so happens that the caseload backs up on them then I think there is good reason why the legislature should then consider expanding that court."[81]

One week before Justice Moon was appointed assignment justice, Chief Justice Lum said, "[i]f we were to strictly construe the statute, we would have bogged down in our work and people would be very unhappy."[82] Legislative history tends to support the Chief Justice's position.

> It should also be noted that the existence or absence of any among the listed criteria is not to be determinative of the question of assignment exclusive of other considerations. Rather, it is specifically provided that the assigning justice or judge is allowed to consider the substantiality of the applicable criteria in each case.
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> It is also expected that adequate consideration will be given to the workloads of both courts in determining case assignment.[83]

Rules of appellate procedure promulgated by the Hawaii Supreme Court in 1984 provide that "[t]he assignment judge may consider the relevant workloads of the [s]upreme [c]ourt and of the Intermediate Court . . . in determining whether the case . . . should be assigned to the [s]upreme [c]ourt."[84] The Chief Justice believes the assignment justice's primary responsibility is to manage the state's appellate caseload.

> I feel that it's important that both the I.C.A. as well as the supreme court be current in its work. And one way that you make it current is

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[80] *Id.*

[81] *Id.*

[82] Lum, *supra* note 62.

[83] H.R. CONF. COMM. REP. No. 70, 10th Leg., 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 1124.

[84] HAW. R. APP. P. 31(a).

> that you divide the work. . . . Roughly, we keep about 500 cases, about 300 cases to the I.C.A. Now, we're trying to get more I.C.A. judges so that we can really handle what is truly the kind of cases the supreme court should be handling. But we have been turned down by the legislature.[85]

The Chief Justice says lawmakers have refused to appropriate money for another I.C.A. judge because the "numbers" do not indicate a need.

> The people who do the budget always look at the numbers. They look at the numbers and they see the supreme court handling more work than the I.C.A. They say, "Well why do you need another I.C.A. judge?" But they don't know that we're working exceedingly hard to be able to become current. If we were to turn around and dump all the cases on the I.C.A. and show that there's a backlog and people consequently will wait two to three to four years to get their opinion and we sit around and have a holiday, we'll get our request. But that's not being honest. I don't believe in padding my numbers just to get what I want. My important goal as the administrator, the chief justice, is to see to it these cases are current, so that there's no backlog and people are not disillusioned with the system. But by doing that, I hurt myself because I'm not able to come up before the budget makers and say to them, "I have this problem, so now solve it."[86]

The Chief Justice's view seems in conflict with that of his new assignment justice, but Justice Moon downplays the difference. It is unclear whether Justice Moon's appointment signals a basic change in assignment policy or merely the fact that Justice Moon was "in line" for the appointment. According to Chief Justice Lum: "Tradition has been that as you move up to senior positions then you have either the assignment position or you have the motions position. The two senior justices occupy those positions. That's been the tradition of this court.[87]

Justice Moon is the newest member of the supreme court having been appointed March 9, 1990.[88] He will be the third most senior

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[85] Lum, *supra* note 62.

[86] *Id.*

[87] *Id.*

[88] In October 1991, Justice Moon was nominated and interviewed for a position as U.S. District Judge for the District of Hawaii. Justice Moon withdrew his name from consideration a month later citing a commitment to the Hawaii Supreme Court. Interview with Associate Justice Ronald Moon, Hawaii Supreme Court, in Honolulu, Haw. (Nov. 15, 1992).

justice on March 29, 1992, when Justices Padgett and Hayashi retire.

1. Caseload management

The desire to remain current, with as little appellate backlog as possible, has been the primary force behind many assignment decisions. An important tool used by the supreme court in achieving this goal is the memorandum opinion.[89] According to Justice Padgett, approximately forty-five percent of the principal cases filed with the Hawaii Supreme Court are disposed of summarily or by memorandum opinion.[90] Compared to the term of Chief Justice Richardson, there has been a marked increase in the number of memorandum opinions issued by the Hawaii Supreme Court under Chief Justice Lum.[91]

A strict reading of the assignment statute[92] would suggest that the I.C.A. handle memorandum opinions and summary dispositions, but Chief Justice Lum says it is more efficient to deal with such cases at the supreme court.

> What has happened here is that when Justice Padgett reviews the cases to determine whether it should go down to the I.C.A. and it's obvious

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[89] A memorandum decision is a holding of the whole court in which the opinion is very concise. BLACK'S LAW DICTIONARY 984 (6th ed. 1990).

A memorandum opinion shall not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent. INTERMEDIATE COURT OF APPEALS R. 2.

[90] Padgett, *supra* note 25.

[91] *See* 60-65 HAW. (1978-1982), 69-71 HAW. (1986-1990). Compare the number of memorandum opinions issued during the final four years of Chief Justice Richardson's term with the number issued by the Hawaii Supreme Court since 1986.

In 1979, the court issued 67 memorandum opinions. In 1980, that number dropped to 29. In 1981, 57 memorandum opinions were issued. In the final year of Chief Justice Richardson's term, with Associate Justice Lum serving as assignment justice, 105 memorandum opinions were issued.

In 1987, the Lum court issued 279 memorandum opinions. While that number dropped to 162 in 1988, it increased to a record high of 415 in 1989. As of December 20, 1990, 216 memorandum opinions had been issued for that calendar year. *Id.*

While the increase in appellate caseload from the Richardson years to present accounts for some of the increase in memorandum opinions, proportionally, the increase in memorandum opinions is far greater.

[92] HAW. REV. STAT. § 602-6 (1985).

> to him that these cases should be disposed of summarily because they contain no merit, it's just as easy for him to go ahead and write and issue this one or two paragraph opinion saying no merit or whatever it is, to dispose of the case rather than sending it down to the I.C.A. which would likewise, in all probability do the same. We have greater manpower than the I.C.A. so we chose to do that rather than send all the cases down to the I.C.A. and burden the I.C.A. with this additional responsibility of reading the cases.[93]

In making assignments, Justice Padgett first isolated the cases he believed would be best handled by memorandum opinions. These cases were listed on a memorandum circulated among the other justices. Unless a majority of the justices disagree, the cases listed are disposed of by memorandum opinion.

> Sometimes lawyers speculate as to why cases were decided by memorandum opinion. The normal is that it's a garden variety case and the legal issues have been decided over and over again and there just isn't any reason to have one more opinion on, for example, what are the standards for summary judgment. All you're doing is making West Publishing Company richer.
>
> The other primary reason for memorandum opinions is that while we can reach a result, we're really not comfortable with the briefing and the way the case was presented and so we don't want to create a precedent. If the case comes up and its been inexpertly tried and inexpertly argued in the supreme court so that it's mushy all the way around, you may get stung pretty bad if you rush in and write an opinion. Later, the same sort of case may come up but this time it's more expertly presented so there's some level that you didn't see in the previous case. That makes a difference. So, if we're uncomfortable with the thing, if it's a sloppy case, the chances are we're not going to write an opinion.[94]

Justice Wakatsuki says cases that can be disposed of by memorandum opinion should be assigned to the I.C.A. He says the fear of creating an appellate caseload backlog at the I.C.A. does not justify extensive use of the memorandum opinion by the supreme court.

> Is there a caseload problem now at the I.C.A.? That's my question. I don't think there is. To begin with, if they're saying the I.C.A. is already "bogged down," I disagree. Assuming that it's not bogged down, I don't see why those cases are not assigned to determine at what

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[93] Lum, *supra* note 62.

[94] Padgett, *supra* note 25.

> level, at what point they are going to be bogged down. And at that point, then maybe the supreme court can assist. But to say that, "[w]ell, if we send all the meritless cases to the I.C.A. they're going to be bogged down, so therefore, we're holding back all those case," it doesn't make sense.[95]

It is also argued that memorandum decisions promote judicial economy. A memorandum decision by the supreme court, rather than by the I.C.A., ends the opportunity for appeal in state courts. Supreme court disposition terminates a case. A case decided by the I.C.A., however, may be reviewed by the supreme court upon a writ of certiorari. By deciding the case at the Supreme Court rather than at the I.C.A., the court eliminates the case and the possibility of additional work presented by a petition for writ of certiorari. But Justice Hayashi calls the foregoing analysis flawed.

> If lawmakers wanted to provide litigants with no more than one opportunity for appellate review, they would have increased the supreme court rather than create the I.C.A. Looking at the reason why the I.C.A. was created and at the criteria that was set by the lawmakers, it's obvious that the memorandum opinion type cases should be decided by the I.C.A. Otherwise, I don't think there's any purpose of having an intermediate court of appeals.[96]

As the court's new assignment justice, Justice Moon says "he'll see to it"[97] that the I.C.A. handles all cases presently decided by memorandum opinion at the supreme court.

> If the case presents issues that have established precedent that applies to this specific case, and it's one that we can anticipate that it will go out as a memo opinion, then it's not something for the supreme court to handle. It is the kind of case that I think the legislature felt should be handled by the I.C.A.[98]

The justice says memorandum opinion cases are an unnecessary burden on the supreme court. He says it takes time away from his administrative duties.

> By handling the kind of cases that we have been doesn't really give us the ability to do that. The time involved to look through every one of

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[95] Wakatsuki, *supra* note 76.

[96] Hayashi, *supra* note 1.

[97] Moon, *supra* note 60.

[98] *Id.*

> these cases that should actually be assigned to the I.C.A. has been so time consuming.[99]

Delegates to the 1978 Constitutional Convention intended that the intermediate appellate court would assist the supreme court manage its caseload.[100] The delegates suggested and, subsequently, lawmakers enacted criteria for assignment of cases that would relieve the supreme court of the burden of reviewing "routine appellate cases."[101] Ironically, the supreme court has found it necessary to view the use of *Hawaii Revised Statutes* section 602-6 as discretionary for fear that a strict construction of the statute would lead to a caseload backlog at the I.C.A. Justice Moon promises to follow the statutory assignment criteria more faithfully than his predecessor even if it results in a backlog at the intermediate court.

2. Issues of first impression

Although legislative history indicates that cases involving issues of first impression should be retained by the supreme court, in practice, novel questions of law are occasionally decided by the I.C.A. Cases involving novel legal questions are assigned to the I.C.A. intentionally in some instances and by accident in others. According to Justice Padgett:

> You can't always tell from the brief whether a serious constitutional issue is raised, whether there is a case of first impression. So you've got to make a determination in passing, and sometimes I make a mistake in doing that and a serious constitutional issue does get over to the I.C.A. They could reassign it to this court when they discover it but that's only happened once. Normally, they just go ahead and decide it, and then the people can come up here by cert if they want to.[102]

The Chief Justice says having the I.C.A. review cases involving issues of first impression is, occasionally, beneficial to the supreme court.

> Sometimes it's good to have the I.C.A. look at the question initially because then it gives us a chance to then re-review what they have

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[99] *Id.*

[100] COMM. OF THE WHOLE DEBATES, *reprinted in* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 346 (1978).

[101] STAND. COMM. REP. NO. 52, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 618 (1978).

[102] Padgett, *supra* note 25.

> reviewed. So we allow them sometimes to go ahead and look at an issue of first impression. And then, on cert—obviously we can anticipate a cert will come—we will then review it to see whether or not the I.C.A. decision conforms to what we believe the law should be and if it does we reject cert. If it doesn't, we grant cert and decide the question anew.[103]

I.C.A. Chief Judge James Burns acknowledges that his court is sometimes called upon to serve as a "stalking horse" for the supreme court.

> In some cases we can be the stalking horse. In cases where the supreme court may want to try something out but is a little hesitant, because if they try something out and they don't like it then they're going to have to reverse themselves, we can try things out. The supreme court can let us do it and see how it works. If ultimately they think it works, they can approve it. If ultimately they think it doesn't work, they can disapprove it.
>
> One case recently had to do with when a jury may consider the lesser included offense. Does it have to find the person not guilty of the greater offense before it moves on?[104]

In *State v. Ferreira*,[105] the I.C.A. held that a jury should be instructed to consider the lesser offense after it reasonably tries but is unable to unanimously agree on the accused's guilt or innocence of the charged offense.

Justice Wakatsuki is strongly opposed to sending cases like *Ferreira* to the I.C.A. He says he has talked to the Chief Justice about the assignment process.

> I believe [the Chief Justice] has taken the view that it would be better if some of the first impression cases go to the I.C.A. to get a better record. But I don't view that as a better record. The record remains the same. All we're going to do is have the benefit of the opinion of the I.C.A. My concern is judicial economy. They take the position that if the litigants are not satisfied with the outcome at the I.C.A., they can always cert. I take the position that not everybody is wealthy enough to take a cert. Even though they may disagree with the final conclusion of the case at the I.C.A., if that person cannot afford to take a cert, that's not justice.[106]

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[103] Lum, *supra* note 62.

[104] Burns, *supra* note 2.

[105] 8 Haw. App. 1, 791 P.2d 407 (1990) (opinion by Burns, C.J.).

[106] Wakatsuki, *supra* note 76.

Justice Moon says the idea of sending a case to the I.C.A. to obtain a "preview" goes against his "overall concept of what the courts are all about."[107]

> We're supposed to resolve and dispose of cases in expeditious, economical fashion. If we were to take a position that would put the litigants through two ringers just for the benefit of the top court, the supreme court to have the sense of what another court thinks, or has analyzed, I think that's unfortunate. It's a waste of time, money, energy, subjects the judiciary to criticism. To me the guidelines would indicate that this is the kind of case we should have.[108]

Justices Wakatsuki and Moon criticized the supreme court's assignment to the I.C.A. of a 1991 case involving the tort doctrine of informed consent. In *Keomaka v. Zakaib*,[109] the I.C.A. ruled that a physician does not fulfill his obligation of timely and adequate disclosure by merely having his patient sign a printed consent form. The medical tort doctrine of informed consent imposes on physicians or surgeons the duty to fully disclose to a patient the type of risks and alternatives to a proposed treatment or surgery. "A signed consent form is not a substitute for the required disclosure by a physician."[110] Although *Keomaka* presented an issue of first impression in this jurisdiction, according to Justice Padgett, the case was assigned to the I.C.A. for practical, rather than statutory, reasons.

> My son-in-law was the appellant's counsel. When I get those I usually just send them to the I.C.A. in cases which I am not able to sit because my son or my son-in-law, either one, are the attorneys in the case . . . [I]f I stepped aside and the case is retained by the supreme court, they'll have to pull somebody out of another court to come up here and sit. That disrupts the work in the other court.[111]

Justice Padgett said he would recuse himself if certiorari is granted in *Keomaka*,[112] as he did in *State v. O'Brien*,[113] where the defendant was

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[107] Moon, *supra* note 60.

[108] *Id.*

[109] 8 Haw. App. 518, 811 P.2d 478 (1991) (Tanaka, J.), *cert. denied*, ___ Haw. ___ (1991).

[110] *Id.* at 532, 811 P.2d at 486.

[111] Padgett, *supra* note 25.

[112] The defendant in *Keomaka* was denied certiorari by the Hawaii Supreme Court. *Keomaka*, ___ Haw. at ___ (1991).

[113] 5 Haw. App. 491, 704 P.2d 905 (1985) (Tanaka, J.), *aff'd* 68 Haw. 39, 704 P.2d 883 (1985) (Lum, C.J.).

represented by the justice's son, daughter, and son-in-law. In *O'Brien*, the I.C.A. held that a person charged with driving under the influence of alcohol is entitled to a jury trial. The supreme court, with a circuit court judge sitting in place of Justice Padgett, affirmed the I.C.A. decision.

Justice Wakatsuki says Justice Padgett should have kept cases involving issues of first impression at the supreme court regardless of the parties or attorneys involved. He says the assignment function should not be used to evade potential conflicts of interest. If a conflict arises, Justice Wakatsuki says the justice involved should recuse himself.[114]

Since its inception, the I.C.A. has ruled on a number of novel questions of law including whether a pig is a pet,[115] whether a county water board has a duty to provide water suitable for a person's pond fish,[116] whether a person has the right to cut another's tree branches which happen to overhang his property,[117] and whether Hawai'i's automobile no-fault insurance law precludes stacking of basic coverage where the injured named insured has a single insurance policy covering several vehicles.[118] A small number of these cases were reviewed by the supreme court upon writ of certiorari. The policy and procedure behind grants of certiorari will be examined below. The reasons why cases involving issues of first impression were assigned to the I.C.A. vary. Cases involving family law and DUI issues, however, were routinely sent to the I.C.A. by Justice Padgett.

3. Utilizing "expert judges"

Justice Padgett says he intentionally assigned appeals based on Hawai'i's DUI and family law to the I.C.A.

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[114] Wakatsuki, *supra* note 76.

[115] Foster Village Community Assoc. v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983) (Heen, J.) (holding that Zoning Board of Appeals' finding that applicant's pig was a pet was not clearly erroneous), *cert. denied*, 66 Haw. 681 (1983).

[116] Kajiya v. Dept. of Water Supply, 2 Haw. App. 221, 629 P.2d 635 (1981) (Burns, J.) (holding that county water board has a secondary duty to a person's property).

[117] Whitesell v. Houlton, 2 Haw. App. 365, 632 P.2d 1077 (1981) (Burns, J.) (holding that a property owner has the right to "self-help" as to any intrusion of branches or roots above or below the property line).

[118] Rana v. Bishop Ins. of Hawaii, Inc., 6 Haw. App. 1, 713 P.2d 1363 (1985) (Tanaka, J.) (holding that Hawai'i no-fault law precludes the stacking of basic no-fault insurance coverage where the injured named insured has a single insurance policy covering several vehicles), *aff'd*, 68 Haw. 269, 713 P.2d 1363 (1985) (Wakatsuki, J.).

> I've sent questions involving breaking new ground to the I.C.A. in two areas. One was in the interpretation of Title 11 of the health regulations which governs intoxilizer tests for DUI. And that was a result of a historical accident. Some of the early cases got over to the I.C.A., and Judge Tanaka did such a careful analysis and built up such a familiarity with the ins and outs of the regulation, and I found it a matter of convenience to send those cases to him.[119]

I.C.A. Judge Harry Tanaka wrote the landmark *O'Brien* opinion where the right to a jury trial was established for persons accused of violating Hawai'i's DUI law. Statutory interpretation was the issue in *State v. Wetzel*,[120] a case characteristic of those regularly sent to Judge Tanaka. In *Wetzel*, the I.C.A. held that a person's blood-alcohol content test result of 0.10 percent or more within three hours of his arrest is competent evidence that he was under the influence of intoxicating liquor at the time of the arrest.[121] The supreme court, however, has not always deferred to the judgment of Judge Tanaka in the area of DUI law. In *State v. Dow*,[122] the supreme court reversed the I.C.A.'s reversal of a trial court conviction. The state's DUI statute,[123] provides two alternative means of proving a single offense.[124] In *Dow*, prosecutors charged the defendant with two counts of DUI, each count an alternative to the other. At trial, defendant's motion for judgment of acquittal was granted as to count one only. The trial jury was unable to reach a verdict on count two and the court declared a mistrial. When a second trial was scheduled on count two, the defendant filed a motion to dismiss on "double jeopardy" grounds. The trial court denied the motion and defendant was found guilty. On appeal, the I.C.A. reversed the conviction holding that the first trial court had

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[119] Padgett, *supra* note 25.

[120] 7 Haw. App. 532, 782 P.2d 891 (1989) (Tanaka, J.).

[121] *Id.*

[122] No. 13610, memo. op. (Haw. App. Oct. 3, 1990), *rev'd*, 72 Haw. 56, 806 P.2d 402 (1991) (Moon, J.).

[123] HAW. REV. STAT. § 291-4(a) (1985) provides:

> A person commits the offense of driving under the influence of intoxicating liquor if:
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> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor; or
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight, of alcohol in the person's blood.

[124] State v. Grindles, 70 Haw. 528, 777 P.2d 1187 (1989).

acquitted the defendant under *Hawaii Revised Statues* section 291-4(a)(1)[125] and that the second trial placed him in jeopardy twice for the same offense violating the double jeopardy clauses[126] of both the U.S.[127] and Hawaii Constitutions.[128] Reversing the I.C.A., the supreme court held that the first trial court's "acquittal" was "in form only and not in substance," therefore, although the charge based on *Hawaii Revised Statutes* section 291-4(a)(1) had been resolved, the State retained a completely separate method of proving DUI under *Hawaii Revised Statutes* section 291-4(a)(2).

Just as the presence of Judge Tanaka led to the assignment of the bulk of DUI cases to the I.C.A., Chief Judge Burns' stint on the family court bench[129] prompted Justice Padgett to send family law issues to the I.C.A.

> Judge Burns had been in the family court as a trial court judge and built up a good deal of familiarity with the procedures and had a lot to do with trying to get that court on track. And I felt that we, again, ought to take advantage of his expertise on the first run through.[130]

The written opinions of Judge Burns have had particular influence in the development of Hawai'i law in the area of property settlements in divorce actions.[131] In a series of cases dating back to the inception of the I.C.A., Judge Burns' opinions have established that an oral antenuptial agreement fails to meet the requirements of the statute of frauds and is thus unenforceable,[132] that the appreciation of property separately owned at the time of marriage or acquired during the marriage by gift or investment and still separately owned at the time of divorce is a marital asset subject to division after consideration of all the relevant circumstances of the case,[133] and that a spouse's nonvested military retirement benefit constitutes part of the estate of the parties subject to division and distribution upon divorce.[134]

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[125] HAW. REV. STAT. § 291-4(a) (1985).

[126] *Id.*

[127] U.S. CONST. amend. V.

[128] HAW. CONST. art. I, § 10.

[129] Burns, *supra* note 2.

[130] Padgett, *supra* note 25.

[131] *See* Amy Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381 (1984).

[132] Rossiter v. Rossiter, 4 Haw. App. 333, 666 P.2d 617 (1983) (Burns, C.J.).

[133] Takara v. Takara, 4 Haw. App. 68, 660 P.2d 529 (1983) (Burns, C.J.).

[134] Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1980) (Burns, J.).

I.C.A. decisions written by Chief Judge Burns in the area of marital property distribution, however, have not gone without supreme court review. In *Cassiday v. Cassiday*,[135] the supreme court refused to follow the general rule articulated by the I.C.A. that it is equitable to award each party half of the during-marriage appreciation of property separately owned at the time of the marriage or subsequently received through gifts or inheritance and still separately owned at divorce. The supreme court instead held that a trial court may award up to half of the during marriage appreciation of property "to the non-owning spouse if, under the totality of the circumstances, it is just and equitable to do so. The trial court also may determine that a lesser award, or no award, is in order."[136]

In *Lewis v. Lewis*,[137] the supreme court, affirming in part and vacating in part, rejected the I.C.A.'s decision that *Hawaii Revised Statutes* section 580-47 empowers a trial court to refuse, under just and equitable principles, to fully enforce an otherwise valid premarital agreement. The supreme court held that unless the premarital agreement rises to the level of unconscionability, a merely "inequitable" contract is not unenforceable under contract law.

Chief Judge Burns' attempt to introduce consistency to the division of separately owned property by the introduction of a "category" scheme in *Hashimoto v. Hashimoto*,[138] and expanded upon in *Woodworth v. Woodworth*,[139] prompted supreme court review in *Myers v. Myers*.[140] In *Hashimoto*, the I.C.A. held that divorce cases involve up to five separate categories of property net market values. In *Woodworth*, the I.C.A. added a sixth category.[141] In *Myers*, the supreme court held that the trial court's division of the post-separation appreciation of property, based on the sixth "category" introduced by Burns in *Woodworth* was

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[135] 6 Haw. App. 207, 716 P.2d 1145 (1985) (Burns, C.J.), *rev'd*, 68 Haw. 383, 716 P.2d 1133 (1986) (Lum. C.J.).

[136] *Cassiday*, 86 Haw. at 389, 716 P.2d at 1138.

[137] 7 Haw. App. 155, 747 P.2d 698 (1986) (Burns, C.J.), *vacated*, 69 Haw. 497, 748 P.2d 1362 (1988) (Wakatsuki, J.).

[138] 6 Haw. App. 424, 725 P.2d 1237 (1988) (Burns, C.J.).

[139] 7 Haw. App. 11, 740 P.2d 36 (1987) (Burns, C.J.).

[140] No. 12380, memo. op. (Haw. App. 1988), *rev'd*, 70 Haw. 143, 764 P.2d 1237 (1988) (Nakamura, J.).

[141] Neither *Hashimoto* nor *Woodworth* was reviewed by the supreme court. No application for further review in either case was filed.

not "just and equitable" as mandated by *Hawaii Revised Statutes* section 580-47.[142] The supreme court in *Myers*, vacated portions of the trial court's divorce decree and overruled *Woodworth*. However, the supreme court refused to pass judgment on the validity of categories one through five as established in *Hashimoto*, stating that the issue was not before the court.

If Chief Judge Burns is the "family law expert" and former Judge Tanaka the "DUI law expert," Judge Walter Heen might rightly be called the "agency law expert." According to the Chief Judge, the I.C.A. is assigned most if not all cases involving agency decisions. "[A]gency cases . . . tend to be fact intensive, thick, really got to get your nose into it and read a lot. A lot of detail work. That is easier done here than there."[143] Judge Heen has authored a majority of the opinions involving cases on appeal from agency decisions.[144] According to Judge Heen, the practice of assigning appeals from agency decisions to the I.C.A. "kind of slows us down."[145]

> I think it's common knowledge that the intermediate court has been getting the more complex cases and the supreme court, as a general rule, not that they don't have any complex cases at all, has tended to reserve for themselves those cases which can be handled by very brief memorandum opinions.[146]

Judge Heen says its probably more efficient to keep fact intensive agency decisions on appeal at the supreme court.

> At the supreme court, because they're the last resort, they can do almost anything they want unless it involves a federal question. So they can disregard arguments made in the briefs very cursorily, deal with them cursorily and completely disregard them in some cases and pinpoint

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[142] *Myers*, 70 Haw. at 145, 764 P.2d at 1239.

[143] Lum, *supra* note 62.

[144] *See, e.g.*, Protect Ala Wai Skyline v. Land Use and Controls Comm., 6 Haw. App. 540, 735 P.2d 950 (1987); Ariyoshi v. Hawaii Public Employment Relations Bd., 5 Haw. App. 533, 704 P.2d 917 (1985); Costa v. Sunn, 5 Haw. App. 419, 697 P.2d 43 (1985); Williams v. Hawaii Housing Auth., 5 Haw. App. 325, 690 P.2d 285 (1984); Application of Kaanapali Water Corp., 5 Haw. App. 71, 678 P.2d 584 (1984); Chock v. Bitterman, 5 Haw. App. 59, 678 P.2d 576 (1984); Foster Village Community Assoc. v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983); Feliciano v. Bd. of Trustees, 4 Haw. App. 26, 659 P.2d 77 (1983); Foodland Super Market, Ltd. v. Agsalud, 3 Haw. App. 569, 659 P.2d 100 (1982).

[145] Interview with Associate Judge Walter Heen, Intermediate Court of Appeals, in Honolulu, Haw. (Oct. 1, 1991) [hereinafter Heen].

[146] *Id.*

> what they think or decide is the dispositive issue and decide the case on that one issue.
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> But when these complex cases are sent down to us, we don't have that luxury. We have them, the supreme court, looking over our shoulder with the power of certiorari. And so we are necessarily going to have to discuss every issue and every argument raised in the briefs for two reasons. First of all, to avoid a motion for reconsideration, but also to show the supreme court how we arrived at the final decision so that they understand that we have dealt with all of the issues. So really, it's a question of requiring us to put in more work than they might with the same kind of case.[147]

Former Chief Justice Richardson says he sees nothing wrong with Justice Padgett's policy of assigning cases to I.C.A. judges based on their experience in specific areas of law. "That's a good practical consideration on his part."[148] But Justice Wakatsuki says the policy is fundamentally flawed.

> I don't think that's justice. No man is right all the time. That's why you have a group of individuals. We've had Nakamura up here [former Associate Justice Edward Nakamura], supposedly the labor expert. But he didn't end up deciding all labor cases.[149]

The court's new assignment justice says while there may be merit to Justice Padgett's policy of using "expert judges," he won't continue the practice. According to Justice Moon:

> Many of the family court cases end up in the I.C.A. almost automatically. In my view, certain of those cases should have been retained here.
>
> I don't think there should be a policy in the appellate courts to groom a person for expertise in a certain area. If you do that you're going to have a very narrow concept of what the law should be, coming from one person.[150]

Should the justices of the supreme court disagree with a holding of the I.C.A., certiorari, if sought, may be granted and the case reviewed.[151] This approach, however, decreases appellate efficiency. Chief Judge Burns says both the supreme court and the I.C.A. must be

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[147] *Id.*

[148] Richardson, *supra* note 18.

[149] Wakatsuki, *supra* note 76.

[150] Moon, *supra* note 60.

[151] *See infra* part III.C.

"compatible" if the I.C.A. is to fulfill its role as an "assistant supreme court."[152]

> If we're not compatible, could we be an assistant supreme court? And when I say compatible, I mean you kind of have to share judicial philosophy. Because if we kept making decisions that they had to reverse, what good would we be, right?[153]

The Chief Judge says the issue of division of separately owned martial property by category[154] is one area where the courts are in danger of becoming incompatible.

> We've got ourselves a situation now where we have two judges on this court and one of them doesn't like categories. We've got five justices on the supreme court and two of them don't like categories. Now, where are we going to go?
>
> At the moment, we're still compatible because there are three judges there and, so far, I have the power to bring in the third judge and I'm certainly not going to bring in someone who's against the categories. But you can see it, down the road, where the incompatibility factor could come in. Now obviously, if they say we disapprove of categories, I have to say, "yes, there are no categories." But if I'm going to continue doing family law cases I will still do what I think is right until they tell me don't.[155]

B. Reassignment to the Hawaii Supreme Court

A case assigned to the I.C.A. may be reassigned to the supreme court. This may be accomplished by order of the supreme court,[156] or the I.C.A., in its discretion, may entertain a motion requesting reassignment of a case to the supreme court. In the later situation, the request for reassignment must be made prior to the issuance of a decision by the I.C.A. The granting of the motion is discretionary. Acceptance or rejection by the supreme court of a case reassigned to

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[152] Burns, *supra* note 2.

[153] *Id.*

[154] *See supra* text accompanying notes 129-140.

[155] *Id.*

[156] HAW. REV. STAT. § 602-5(9) (1985) provides: "The supreme court may order the immediate reassignment of a case to itself after its assignment to the intermediate appellate court whenever the supreme court in its discretion deems that the case concerns an issue of imperative or of fundamental public importance."

the supreme court in this manner is discretionary.[157] According to the Chief Justice, reassignment rarely occurs.

> It may be because we already have a case before us and there's a subsequent case that deals with the same issue that improvidently was sent down to the I.C.A. and we decided we ought to bring it back to us. Or it may be something that the I.C.A. is unable to handle, and for that reason they notify us that they are unable to handle it and consequently we bring it back to us.[158]

Justice Hayashi says he can remember of only one or two instances when, as Chief Judge of the I.C.A., he suggested a case be reassigned to the supreme court.

> I think it was a case involving a constitutional question. Other than that one, we rarely questioned whatever cases came down. Cases have to go through a human being. There's no automatic, computerized system where you can decide which cases are supposed to go to the I.C.A. and which cases should be retained by the supreme court. Occasionally, we did have cases that we thought were supposed to be retained by the supreme court, but we decided to keep it at the I.C.A. At that time, we had Justice Menor as the assignment justice. We never questioned his assignments.[159]

Lawmakers statutorily provided for reassignment acknowledging the possibility that "the assignment justice may err or that intervening changes of circumstances occurring after the original assignment may warrant reassignment."[160] However, because Chief Judge Burns is not opposed to hearing cases of the type outlined in the assignment statute,[161] on the rare occasion reassignment is sought, it is usually done for practical reasons rather than because of error by the assignment judge. An example identified by I.C.A. Judge Walter Heen is illustrative.

> There was one case recently. The reason it was reassigned was Judge Burns and I had recused ourselves earlier from sitting on the case. Judge Tanaka had begun to handle it. And that could have been handled with two circuit judges sitting in our place. When Tanaka left the bench

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[157] HAW. REV. STAT. § 602-58 (1985).

[158] Lum, *supra* note 62.

[159] Hayashi, *supra* note 1.

[160] H.R. CONF. COMM. REP. No. 70, 10th Leg., 1979 Reg. Sess., *reprinted in* 1979 HAW. H.R. J. 1124.

[161] HAW. REV. STAT. § 602-6 (1985).

there was nobody on the I.C.A. who could sit with the circuit judges. So it went back to the supreme court.[162]

Justice Moon says if assignment error is made during his term as assignment justice, he hopes it is remedied by use of the statutory provisions for reassignment.

There's no question the assignment justice cannot know all of the cases that are included in our *Hawaii Reports*. Indeed, if there is something that we miss, an issue of first impression, of a constitutional nature, whatever the guidelines provide for, we would expect the I.C.A. to call it to our attention.[163]

C. Certiorari to the Hawaii Supreme Court

Certiorari to the Hawaii Supreme Court from an I.C.A. decision is discretionary on the supreme court.[164] Chief Justice Lum says the decision to grant certiorari to a case decided by the intermediate court of appeals is made through an informal process.

Generally, we have a review by Justice Padgett, one justice who makes a recommendation, say, not to grant cert. It's reviewed by all the justices and if they concur, then nothing is done. But if one justice requests that a review be granted, then it's circulated among the other justices. If there's any disagreement, then we have a conference. Generally, there has to be a substantial basis, an issue which probably has not been decided except for the I.C.A. decision. If it's a new issue, some justice might want to take a look at it, review it and decide what way we might go. Always by majority vote.[165]

Historically, the supreme court has granted about twenty percent of all requests for certiorari. From the inception of the I.C.A. in April 1980 to December 1990, 410 petitions for certiorari were filed with the supreme court. Eighty-seven of those petitions were granted.[166] In fiscal year 1989-90, the I.C.A. disposed of 120 cases. Forty-three applications for certiorari were filed with the supreme court. Ten were accepted for review.[167]

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[162] Heen, *supra* note 145.
[163] Moon, *supra* note 60.
[164] HAW. REV. STAT. § 602-59 (1985).
[165] Lum, *supra* note 62.
[166] 62-71 HAW. (1980-1990).
[167] JUDICIARY, STATE OF HAWAII, ANN. REP. 1990, at 22 (1990).

The supreme court has used certiorari to reverse the I.C.A.,[168] overrule I.C.A. made family law precedent,[169] affirm, but clarify decisions of the I.C.A.,[170] affirm, but refuse to adopt the reasoning of the I.C.A.[171] and affirm and endorse decisions of the I.C.A.[172] If a perceptible, quantifiable difference in the judicial philosophies of the Richardson and Lum Courts exists, the cases granted certiorari by each panel and the reasons given for review should provide important,

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[168] State v. Marino, No. 14924, memo. op. (Haw. App. 1991), *rev'd*, No. 14924, memo. op. (Haw. 1991); Meyer v. City & County of Honolulu, 6 Haw. App. 505, 729 P.2d 388 (1986) (Tanaka, J.); *rev'd*, 69 Haw. 8, 731 P.2d 149 (1986) (Padgett, J.); Treloar v. Swinerton and Walberg Co., 3 Haw. App. 41, 641 P.2d 327 (1982) (Padgett, J.), *rev'd*, 65 Haw. 415, 653 P.2d 420 (1982) (Nakamura, J.).

[169] Cassiday v. Cassiday, 6 Haw. App. 207, 716 P.2d 1145 (1985) (Burns, C.J.), *rev'd*, 68 Haw. 383, 716 P.2d 1133 (1986) (Lum, C.J.); Myers v. Myers, No. 12380, memo. op. (Haw. App. 1988), *rev'd*, 70 Haw. 143, 764 P.2d 1237 (1988) (Nakamura, J.).

[170] Contra Costa County, *ex rel.* Tuazon v. Caro, 8 Haw. App. 341, 806 P.2d 1212 (1990) (Burns, C.J.) (establishing that the custodial parent's act of concealing her children can be considered in determining whether by waiver, estoppel, or laches, the noncustodial parent is relieved of his duty to pay child support), *aff'd*, 72 Haw. 1, 802 P.2d 1202 (1990) (Wakatsuki, J.); Murakami v. County of Maui, 6 Haw. App. 516, 730 P.2d 342 (1986) (Burns, C.J.), *aff'd on other grounds*, 69 Haw. 43, 731 P.2d 787 (1987) (per curiam) (overruling I.C.A.'s statement that appellee's reliance on "Sherry v. Asing dicta and of the cases it cites as authority are wrong"); Welton v. Gallagher, 2 Haw. App. 242, 630 P.2d 1077 (1981) (Burns, C.J.), *aff'd on other grounds*, 65 Haw. 528, 654 P.2d 1349 (1982) (per curiam) (holding that I.C.A. erred in declining to consider question whether plaintiff-appellant had the mental capacity to make a valid gift).

[171] Lee v. Ins. Co. of North America, 7 Haw. App. 338, 762 P.2d 809 (1988) (Heen, J.), *aff'd on other grounds*, 70 Haw. 120, 763 P.2d 567 (1988) (Lum, C.J.) (affirming I.C.A.'s conclusion that stacking of uninsured motorist coverage should be denied under a single "Business Auto Policy" covering a group of 1106 separately owned vehicles but declining to follow the I.C.A.'s reasoning in applying a rule of "reasonable expectation" to stacking of uninsured motorist coverage); State v. Ortiz, 4 Haw. App. 143, 662 P.2d 517 (1983) (Burns, C.J.), *aff'd on other grounds*, 67 Haw. 181, 683 P.2d 822 (1984) (Hayashi, J.) (vacating I.C.A.'s adoption of the "plain feel" exception to warrantless searches but affirming the I.C.A. decision because the same result could have been reached under the already recognized "protective weapons search" exception).

[172] Littleton v. State, 6 Haw. App. 70, 708 P.2d 829 (1985) (Heen, J.) (holding that four percent interest applies and accrues from the date of the entry of final appellate judgment against the state), *aff'd*, 68 Haw. 220, 708 P.2d 824 (1985) (Wakatsuki, J.); State v. O'Brien, 5 Haw. App. 491, 704 P.2d 905 (1985) (Tanaka, J.) (establishing that a person charged with DUI offense has a right to trial by jury), *aff'd*, 68 Haw. 39, 704 P.2d 883 (1985) (Lum, C.J.).

tangible material to support the claim. However, identifying the paradigm case granted certiorari under both the Richardson and the Lum Courts is impossible. There is a general notion that the supreme court under Chief Justice Richardson regularly took a liberal approach toward statutory interpretation as a means of furthering legislative intent. While several cases granted certiorari during the Richardson years support this thesis, others do not. Likewise, although the present court has invoked a "plain meaning" approach to statutory interpretation in several cases on review from the I.C.A., it has also, on occasion, chided the lower court for a narrowly construing statutory language.

In *Cassiday*[173] and *Myers*[174], the supreme court under Chief Justice Lum rejected divorce property division "rules" developed by the I.C.A. as inconsistent with the statute governing division and distribution.[175] In *Cassiday*, the I.C.A. established a "general rule" that each party gets half of the during-marriage real appreciation of property separately owned at the time of the marriage or subsequently received through gift or inheritance and still separately owned at divorce. The supreme court regarded the rule as creating "a rebuttable presumption that [any appreciation in] separate property should be evenly divided."[176] In rejecting the rule, Chief Justice Lum stated that it denied a trial court the discretion, provided by statute,[177] "to divide all property of the parties, whether community, joint or separate according to what is 'just and equitable.'"[178] In *Myers*, the supreme court rejected "category six" of the six-part scheme developed to facilitate division of property upon divorce holding, as it did in *Cassiday*, that the rule was inconsistent with the statute governing property division.

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[173] 6 Haw. App. 207, 716 P.2d 1145 (1985) (Burns, C.J.), *rev'd*, 68 Haw. 383, 716 P.2d 1133 (1986) (Lum, C.J.).

[174] No. 12380, memo. op. (Haw. App. 1988), *rev'd*, 70 Haw. 143, 764 P.2d 1237 (1988) (Nakamura, J.).

[175] HAW. REV. STAT. § 580-47(a) (1985) provides:

> Upon granting a divorce, or thereafter if, in addition to the powers granted in (c) and (d) of this section, jurisdiction of such matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make such further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate . . . .

[176] *Cassiday*, 68 Haw. at 388, 716 P.2d at 1137.

[177] HAW. REV. STAT. § 580-47(a) (1985).

[178] *Cassiday*, 68 Haw. at 386, 716 P.2d at 1136.

Similarly, in *State v. Marino*,[179] the supreme court reversed a decision of the I.C.A. which had upheld a trial court criminal contempt conviction. The defendant had been convicted of knowingly disobeying a temporary restraining order issued by a family court. The I.C.A., in a memorandum opinion affirming the conviction, found that the defendant was present when the protective order was issued and understood its terms. The defendant argued that the protective order was defective because the state failed to serve him with written notice of the order as required by statute. The I.C.A. rejected defendant's argument stating that knowledge, which may be proved by service of the order, may be proved in other ways. The I.C.A. observed that the statute in question "merely establishes the methods for serving the order issued under [c]hapter 586. It does not preclude other evidence of knowledge of the terms of [c]hapter 586 orders or affect their validity." The supreme court, by memorandum opinion, held that "the plain wording of the statute" requires personal service "except in those instances where the respondent is present when the oral order is issued and, in such cases, the statute allows service by mail rather than personal service."

However, in *Meyer v. City & County of Honolulu*,[180] the supreme court held that Hawaii Rules of Evidence section 404(a)(1)[181] applied to both criminal and civil trials reversing a decision by the I.C.A. The I.C.A. had ruled that section 404(a)(1), by its plain language describing parties as "an accused" and "the prosecution", precluded application in a civil trial. In an opinion authored by Justice Padgett, the court stated that, "we think the I.C.A. construed the terms "accused" and "prosecution" too narrowly and that *Feliciano*[182] . . . is still good law."

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[179] No. 14924, memo. op. (Haw. App. 1991), *rev'd*, No. 14924, memo. op. (Haw. 1991).

[180] 6 Haw. App. 505, 729 P.2d 388 (1986) (Tanaka, J.), *rev'd*, 69 Haw. 8, 731 P.2d 149 (1986) (Padgett, J.).

[181] HAW. R. EVID. 404 provides in part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . . .

[182] Feliciano v. City & County of Honolulu, 62 Haw. 88, 611 P.2d 989 (1980) (per curiam) (holding that in a civil action for assault where there is an issue as to who committed the first act of aggression, evidence of the good or bad reputation of both plaintiff and defendant for peacefulness is admissible).

The supreme court under Chief Justice Richardson also reversed several I.C.A. decisions based on a "plain meaning" approach to statutory interpretation. In *Treloar v. Swinerton and Walberg Co.*,[183] the I.C.A. reversed a decision of the Labor and Industrial Relations Appeals Board which had allowed a workers' compensation claim to be reopened pursuant to *Hawaii Revised Statutes* section 386-89(c). The I.C.A. ruled that a plain reading of the statute precluded reopening of the claim. The claimant, Treloar, had received a lump sum payment of benefits pursuant to *Hawaii Revised Statutes* section 386-54. The I.C.A. held that "the employer's liability for compensation had been discharged by payment of a lump sum in accordance with [section] 386-54"[184] thereby barring reconsideration under [section] 386-89(c) which states in part: "This subsection shall not apply when the employer's liability for compensation has been discharged in whole by the payment of a lump sum in accordance with section 386-54."

The supreme court reversed the I.C.A. Writing for the court, Justice Edward Nakamura observed, "[W]e have rejected an approach to statutory construction which limits us to the words of a statute."[185]

> [*Hawaii Revised Statutes* section] 386-89(c) must be read in tandem with [*Hawaii Revised Statutes* section] 386-54 because the last sentence of the former stipulates that its provisions "shall not apply when the employer's liability for compensation has been discharged in whole by the payment of a lump sum in accordance with" the latter. At first glance, the sentence may give an appearance of disallowing a reopening whenever an employer's obligation under a commuted award has been met. But an examination of the relevant provisions discloses that reopening are proscribed only when an employer's liability for compensation has been discharged in whole in accord with [section] 386-54, which does not tell us exactly when this occurs. Hence, the pertinent statutory language is open to more than one interpretation.[186]

In *Silver v. George*,[187] the Richardson Court affirmed the I.C.A.'s reversal of the trial court's award of summary judgment in favor of

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[183] 3 Haw. App. 41, 641 P.2d 327 (1982) (Padgett, J.), *rev'd*, 65 Haw. 415, 653 P.2d 420 (1982) (Nakamura, J.).

[184] *Treloar*, 3 Haw. App. at 42, 641 P.2d at 327.

[185] *Treloar*, 65 Haw. at 421, 653 P.2d at 424 (quoting Dependents of Crawford v. Financial Plaza Contractors, 64 Haw. 415, 420, 643 P.2d 48, 52 (1982) (Richardson, C.J.)).

[186] *Id.*

[187] 1 Haw. App. 331, 618 P.2d 1157 (1980) (Padgett, J.), *aff'd on other grounds*, 64 Haw. 503, 644 P.2d 955 (1982) (Nakamura, J.).

the defendants, but rejected the I.C.A.'s application of usury statutes[188] in the case. Defendants had borrowed $100,000 from plaintiff agreeing, by promissory note, to pay interest at the rate of twenty per cent per annum. The promissory note was drafted by an attorney. Plaintiff brought suit in circuit court to enforce the terms of the promissory note upon default by defendants. Defendants asserted the defense of usury under *Hawaii Revised Statutes* section 478-4.[189] The trial court, agreeing with defendants, limited plaintiff's recovery to the principal sum. Plaintiff then filed a separate action praying for a reformation of the promissory note to reflect the actual agreement of the parties and damages against the attorney who drafted the instrument. The trial court granted summary judgments to all defendants.

The I.C.A. reversed the trial court and remanded the case. The I.C.A. also concluded that the agreement embodied in the promissory note was a "flat out violation of [section] 478-6, [*Hawaii Revised Statutes*],"[190] and that it was a "per se violation of an attorney's duty for him to draw a note which is on its face usurious."[191] The supreme court affirmed the I.C.A.'s reversal and remand but stated that "a review of the underlying transaction indicates the loan was not necessarily usurious, even though the promissory note evidencing the loan called for the payment of interest at an ostensibly usurious rate."[192]

> The agreement in question was not a typical commercial transaction. It involved a stepfather on one hand, his stepson and his close personal friend and business associate on the other . . . . The parties were fully

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[188] HAW. REV. STAT. §§ 478-4, 478-6 (1985).

[189] *Id.* § 478-4 (1985) provides: "Usury not recoverable. . . . if in any action on the contract proof is made that a greater rate of interest than one per cent a month has been directly or indirectly contracted for, the plaintiff shall only recover the principal and the defendant shall recover costs . . . ."

[190] HAW. REV. STAT. § 478-6 (1985) provides:

> Except as otherwise permitted by law, any person who directly or indirectly receives any interest, discount, or consideration for or upon the loan or forbearance to enforce the payment of money, goods, or things in action, on a rate greater than one per cent a month or who, by any method or device whatsoever, receives or arranges for the receipt of interest, increase, or profit at a greater rate than one per cent a month on any loan made by him shall be guilty of usury and shall be fined not more than $250, or imprisoned not more than one year, or both. . . .

[191] *Silver*, 1 Haw. App. at 332-33, 618 P.2d at 1159.

[192] *Silver*, 64 Haw. at 504, 644 P.2d at 956.

> aware the lender would obtain the money form lending institutions through short-term loans at prevailing interest rates specifically for this purpose. . . . And since Silver had obligated himself to pay the commercial lender's interest at ten to fourteen percent, his claim that the "20% interest" was actually meant to cover "the costs of borrowing the $100,000" and to produce interest at a legal rate was not unreasonable. Viewing the transaction as a whole and drawing the inferences most favorable to him, we agree the requisite intent to engage in usury was probably absent.[193]

The two foregoing cases support the common contention that the Richardson Court was never constrained by the plain language of a statute when it believed a more equitable outcome could be realized by liberal interpretation. However, the court's decision in *Escritor v. Maui County Council, Ltd., Boy Scouts of America*[194] is compelling evidence against that general theory. In *Escritor*, the supreme court, while agreeing with the I.C.A.'s dismissal of the appeal for lack of timely filing, nevertheless remanded the case finding that Hawai'i law[195] and I.C.A. Rule 4[196] required the I.C.A. to hold oral argument if any party so requested. The supreme court held that the I.C.A.'s decision violated appellant's "right to be heard."[197] Writing for the court, Justice Benjamin Menor stated, "[t]here is neither statutory provision nor rule of court which authorizes the intermediate appellate court to decide an appeal without having oral argument."[198] I.C.A. rules were amended in 1984 eliminating the oral argument requirement.

In sum, the supreme court will review a decision by the I.C.A. on certiorari only if there is a substantial basis for review. While about twenty percent of the petitions for certiorari are granted, a much smaller percentage actually result in a published opinion by the supreme court due to disposition by memorandum opinion or settlement.

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[193] *Id.* at 508, 644 P.2d at 958-59.

[194] No. 7948, memo. op. (Haw. App. 1981), *rev'd*, 65 Haw. 162, 649 P.2d 374 (1982) (Menor, J.).

[195] HAW. REV. STAT. § 602-55 (1985) provides in part: "Panels; substitute judge. Parties shall be entitled to a hearing before a panel of not less than three intermediate appellate judges. . . ."

[196] INTERMEDIATE COURT OF APPEALS R. 4(a) provided: "Submission on the Brief. Unless the court directs otherwise, parties to any case may stipulate to submit the case or matter on the briefs without oral argument." *Id.* (1980).

[197] *Escritor*, 65 Haw. at 164, 649 P.2d at 375.

[198] *Id.*

IV. The Future of Hawai'i's Appellate Structure

The number of cases appealed rose steadily throughout the 1980s reaching a peak in fiscal year 1987-88 when 835 appeals were filed with the supreme court.[199] State growth and increased litigation are cited as reasons for the rise, but Justice Hayashi says parties are more likely to appeal court and administrative decisions today because of the significant decrease in time needed to complete such a proceeding.

> Before the creation of the I.C.A., decisions took a long time. Sometimes, parties would have to wait two years or more. Now it's fast, taking several months at the most. This encourages people to appeal. The creation of the I.C.A. and the subsequent elimination of backlog made this possible.[200]

Filings dropped in fiscal years 1988-89 and 1989-90.[201] Justice Padgett says the drop might be attributable to the judiciary's institution of its alternative dispute resolution program.[202] Regardless of its cause, Justice Padgett says the decrease in filings is temporary.

> We're going to have a necessary slowdown in the I.C.A. with the absence of Judge Tanaka. The cases we're getting are somewhat more complicated, the caseload is rising. We're starting to build up a backlog, and I think over the coming months that backlog is going to increase. Because of the nature of cases coming through, it isn't really possible to do more cases on summary disposition.[203]

The supreme court has no authority to limit the number of cases filed, but it can control its caseload through the assignment process. That process is likely to change significantly with Justice Moon in charge.

> We haven't been doing that which the statute requires or the legislature intended. I'm looking forward to implementing that aspect of our work. And it goes hand in hand with this idea as to what happens in the

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[199] Judiciary, State of Hawaii, Ann. Rep. 1989, Statistical Supp. (1989).

[200] Hayashi, *supra* note 1.

[201] Judiciary, State of Hawaii, Ann. Rep. 1990, Statistical Supp. (1990). During fiscal year 1988-89, 790 primary cases were filed with the supreme court. In fiscal year 1989-90, 624 primary cases were filed with the supreme court. *Id.*

[202] Padgett, *supra* note 25.

[203] *Id.*

future. What we do in our assignments from now on will expedite what is to come.[204]

A. Expansion Alternatives

When the judiciary finds it necessary to expand its appellate structure, it will be faced with a number of alternatives. The most commonly advocated change involves increasing the number of judges on the I.C.A. with decisions rendered by rotating panels of three. This alternative is favored by all current supreme court justices as well as all judges presently on the I.C.A. Many feel the number of judges should be increased immediately to allow a more faithful application of the assignment criteria. "I think if you increase the I.C.A., then you can follow the statute more closely. Send the bulk of the cases to the I.C.A. and let the supreme court sit on the big ones."[205]

However, judiciary officials have attempted to get more I.C.A. judges for several years only to be regularly turned down by lawmakers.

> We have tried for several years to get an increase in the number of judges on the I.C.A. But the legislature always comes back and says, "Well, the I.C.A. judges turn out less cases per judge than the supreme court so why should we increase the I.C.A.?" Well, the reason they turn out less cases per judge is that I'm doing a lot of "no oral argument" cases myself, and that increases our productivity rather markedly. They have no understanding of the problem and they will never understand the problem. The only way the legislature ever understands a problem is when they've got a crisis.[206]

Because the supreme court disposes of more cases per justice than the I.C.A. does per judge, lawmakers might consider increasing the number of supreme court justices, an idea which was considered in 1978 by delegates to the Hawaii Constitutional Convention as an alternative to creating an intermediate court appeals. The idea has few supporters in the judiciary. "I don't think right now, or in the future, we'll need more justices because I don't think that there will be a significant increase in first impression cases."[207]

Another option which might be more palatable to lawmakers involves increasing appellate court staff attorneys. However, like the idea of

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[204] Moon, *supra* note 60.
[205] Heen, *supra* note 145.
[206] Padgett, *supra* note 25.
[207] Wakatsuki, *supra* note 76.

increasing the number of justices on the supreme court, this alternative is not favored by those in the judiciary.

> The other possible solution to it, used in some states, is to lay on more staff attorneys in appellate courts and turn over drafting of opinions to them. I don't like that. That really is having your case in effect decided by somebody who isn't a judge. I'm very uneasy with that approach. It's a practical solution. I don't think it's the best one.[208]

Chief Justice Lum predicts the eventual need for and creation of a second division of the I.C.A. The Chief Justice says the state should move toward a pure certiorari system in the future.

> I think it may come to pass someday when the number increases that we will follow the pure cert route. That is all cases will be filed with the I.C.A. and from there it comes to us upon a writ of cert just like the Supreme Court of the United States. If it's necessary we may have to change our constitution to conform with what is generally the practice with other states that have I.C.A. courts and a supreme court and use a pure cert route.[209]

Some observers of our nation's state appellate court systems agree with the Chief Justice's assessment arguing that where an intermediate court exists, the supreme court's function should be limited to overseeing the development of common law.[210] The addition of a fourth judge to the I.C.A. will make the appellate caseload more manageable, but if the role of the supreme court is to be limited to cases of the type suggested in the assignment statute,[211] an inherent change in the structure of Hawai'i's appellate system will be necessary. Essential changes include providing for an appeal of right to the I.C.A., increasing the number of I.C.A. judges to five or six and providing for two separate divisions of the I.C.A.[212] or maintaining one court while allowing for review by a rotating panel of three judges. Review of cases decided by the I.C.A. should be discretionary. In order to promote judicial economy, parties before the I.C.A. should be allowed

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[208] Padgett, *supra* note 25.

[209] Lum, *supra* note 62.

[210] S. WASBY, T. MARVELL & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 51-52 (1979).

[211] HAW. REV. STAT. § 602-6 (1985).

[212] Alabama, Oklahoma, Pennsylvania, Tennessee, and Texas have two intermediate appellate courts with jurisdiction divided between criminal and civil matters. M. OSTHUS, STATE INTERMEDIATE APPELLATE COURTS 5 (2d. ed. 1980).

to petition the supreme court for immediate review when their dispute presents an issue of first impression, constitutional interpretation or involves a matter of extreme public importance.

V. Conclusion

Lawmakers did a strange thing when they created the intermediate court of appeals in 1979. They ensured, by statute, that the I.C.A. would take on the bulk of the appellate caseload, but failed to provide the court with an adequate number of judges to meet the challenge. This dichotomy required the supreme court's assignment justice to treat as discretionary the assignment criteria codified in *Hawaii Revised Statutes* section 602-6 in order that the I.C.A. fulfill its purpose, that of eliminating appellate backlog. The ascension of Justice Moon to the role of assignment justice portends a time, perhaps sooner than later, when the legislature will find it necessary to cure an inherent structural defect in the appellate system.[213]

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[213] The state judiciary, since 1990, has annually requested state lawmakers to add a fourth judge to the I.C.A. amending Haw. Rev. Stat. § 602-51 (1985) which currently provides, "The intermediate appellate court shall consist of a chief judge and two associate judges. . . ."

The latest attempts are embodied in S. 606 and H.R. 2417, 16th Leg., Reg. Sess. (1992) (proposing that Haw. Rev. Stat. § 602-51 be amended to read, "[t]he intermediate appellate court shall consist of a chief judge and three associate judges").

The Protection of Individual Rights Under Hawai'i's Constitution

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I. Introductory Overview

Because the United States Supreme Court has become more cautious and conservative in applying the United States Constitution, state courts have had many opportunities in recent years to interpret their own constitutions and apply them to claims that are raised. In Hawai'i, these opportunities have been increased because our Constitution has a number of unique provisions that go beyond those in the federal document, including an explicit right to privacy, an Equal Rights Amendment, a more detailed restriction on searches and seizures, a right to a clean and healthful environment, and protections for persons of Hawaiian ancestry.

During the ten years of the Lum Court, the court has clarified some of these provisions with explicit interpretations, but others remain ambiguous. The court has been active in the area of criminal procedure and the right to a fair trial, and has taken innovative initiatives designed to protect the rights of the accused in the context of missing evidence, the use of experts in child-sex-abuse cases, trial delays, and the right to a jury trial. The court has declined to depart from federal precedents in other cases, including ones having to do with the use of confidential reports in sentencing hearings, mandatory sentencing laws, and double jeopardy.

The court has also examined claims of procedural fairness in non-criminal contexts. The two most interesting cases involve the land use classification at Sandy Beach on O'ahu[1] and a challenge to procedural fairness by Malcolm Sussell who was demoted by the City and County of Honolulu.[2] Although the facts of the cases have differences, the results are arguably inconsistent in that a rigorous commitment to procedural fairness was required in *Sussell* but not in the *Sandy Beach* case. In *Sandy Beach*, the court found that plaintiffs did not have legally protectable interests and ruled that the City Council was acting in a legislative capacity even when it was performing the quasi-judicial act of reclassifying land.

The right to privacy is protected twice in Hawai'i's Constitution, once in article I, section 7,[3] based on the Fourth Amendment (and

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[1] Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989); *see infra* notes 221-355 and accompanying text.

[2] Sussell v. Honolulu Civil Service Comm'n, 71 Haw. 101, 784 P.2d 867 (1989); *see infra* notes 236-44 and accompanying text.

[3] *See infra* notes 185 and 252.

expanded in 1968 to cover electronic surveillance) and again in article I, section 6,[4] which was explicitly designed to protect privacy outside the criminal context. The criminal decisions have followed federal precedents in cases involving the use of "participant" or "consensual" monitoring[5] and searches of probationers by probation officers,[6] but have protected privacy interests that are not protected under federal law in cases involving the use of pen registers to monitor telephone calls[7] and searches of household garbage.[8]

The right-to-privacy provision in article I, section 6 was designed to protect both "informational" privacy and "personal autonomy" privacy. Three cases have presented claims for "informational" privacy, but the court has rejected each of these claims, and thus has not yet clarified what rights are protected under this provision.[9] In the "personal autonomy" arena, the court has protected the right to acquire, buy, and sell obscene materials for use in the privacy of one's home,[10] but has rejected claims that the right to privacy protects the right to engage in unsolicited commercial prostitution in one's home[11] or the right of police officers to be free from random drug testing.[12]

In the major case involving racial discrimination—in the context of jury selection—the court reaffirmed decisively the state's commitment to equality and went beyond the federal precedent in restricting prosecutorial use of peremptory challenges.[13] The court has looked at several sex-based discrimination claims, but has not yet articulated a clear governing interpretation for Hawai'i's equal rights amendment (ERA).[14] The court went beyond federal precedents in the *Levinson* case, where

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[4] *See infra* note 251.

[5] *See infra* notes 310-27 and accompanying text.

[6] *See infra* notes 349-62 and accompanying text.

[7] State v. Rothman, 70 Haw. 546, 779 P.2d 1 (1989); *see infra* notes 328-40 and accompanying text.

[8] State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985); *see infra* notes 341-46 and accompanying text.

[9] *See infra* notes 261-74 and accompanying text.

[10] State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988); *see infra* notes 297-304 and accompanying text.

[11] State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983); *see infra* notes 279-87 and accompanying text.

[12] McCloskey v. Honolulu Police Dep't, 71 Haw. 568, 799 P.2d 953 (1990); *see infra* notes 289-96 and accompanying text.

[13] State v. Batson, 71 Haw. 300, 788 P.2d 841 (1990); *see infra* notes 36-44 and accompanying text.

[14] *See infra* notes 45-83 and accompanying text.

it ruled that a defense counsel could not exercise peremptories to challenge jurors solely because of their sex.[15]

The court has examined relatively few cases concerning the right to speak freely, and it has avoided addressing the constitutional claims raised in several of these cases based on procedural problems.[16] Two cases have raised claims based on the free exercise of religion, and the court has rejected both claims.[17] In the *Dedman* case involving the claim of Native Hawaiian Pele Practitioners that the development of geothermal resources interfered with their sacred deity, the court dismissed the claim by finding that the development did not significantly burden the claimants' religious beliefs.[18]

From this body of decisions, it is hard to identify a consistent perspective that has guided the court. Among the clearest decisions are *Batson* and *Levinson* protecting defendants against racial or sex-based discrimination in jury selection. Perhaps the boldest decision is *Kam*, which interprets the right to privacy as protecting access to obscene materials. In the criminal procedure area, the court has been willing to go beyond federal precedents to protect the rights of the accused, but the adjustments are incremental rather than moving in an entirely new direction. The *Sussell* and *Sandy Beach* cases leave unresolved a number of important issues in the administrative procedure area. In the areas of speech and religious freedom, the court has moved cautiously and has taken a narrow view of what burdens religious belief.

II. Protection Against Discrimination

The Hawaii State Constitution specifically guarantees the right to equal protection and includes two provisions on this topic: article I, section 3 (Hawai'i's version of the Equal Rights Amendment)[19] and article I, section 5 (based on the Fourteenth Amendment of the United States Constitution).[20] In a 1981 decision, the Hawaii Supreme Court

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[15] State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990); *see infra* notes 75-83 and accompanying text.

[16] *See infra* notes 363-411 and accompanying text.

[17] *See infra* notes 422-49 and accompanying text.

[18] Dedman v. Bd. of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987); *see infra* notes 438-45 and accompanying text.

[19] Haw. Const art. I, § 3 (Hawai'i's Equal Rights Amendment) states: "Equality of rights under the law shall not be denied or abridged by the State on account of sex . . . ."

[20] Haw. Const art. I, § 5 states: "No person shall be deprived of life, liberty or

discussed the United States Supreme Court's interpretation of the Fourteenth Amendment and stated that it would generally follow the same approach.[21] For a challenge based on the Equal Protection Clause, the Hawaii Supreme Court has applied either the strict scrutiny or the rational basis test, depending on the classification and interests involved. If the equal protection challenges involve suspect classifications or fundamental rights, the court uses the strict scrutiny test and requires the government to show that it has a compelling state interest.[22] The court has adopted the United States Supreme Court's definition of suspect classifications.[23] Where suspect classifications or fundamental rights are not at issue, the court has traditionally employed the rational basis (or minimum rationality) test, which asks whether the means used by the statute are rationally related to the statute's goal.[24]

A. Nonsuspect Classifications - Rational Basis Test

During the past ten years, the Hawaii Supreme Court has not significantly deviated from federal precedents in equal protection cases. In areas where no fundamental rights are implicated, the court has

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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." *Id.*

This section is similar to the language in Section 1 of the Fourteenth Amendment of the U.S. Constitution which reads: "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Although Hawai'i's Equal Protection Clause specifies with particularity the categories that government cannot use in its laws, the Hawaii Supreme Court has chosen not to impose a higher level of scrutiny on the Hawai'i provision than the federal courts use based on the Fourteenth Amendment. *See* the discussion of *Holdman* and *Rivera infra* at notes 48-65 and accompanying text.

[21] *See* Nagle v. Board of Education, 63 Haw. 389, 629 P.2d 109 (1981), where an employee of the State Board of Education challenged a mandatory retirement statute. The court, in reviewing the statute, traced the federal courts' analyses of the Equal Protection and Due Process Clauses and specifically chose not to deviate from those tests. *Id.* at 394, 629 P.2d at 113.

[22] *Id.* at 393, 629 P.2d at 112.

[23] *Id.* at 392 n.2, 629 P.2d at 112 n.2 (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). A suspect classification exists where the class of individuals formed has been: "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

[24] 63 Haw. at 394, 629 P.2d at 113.

deferred to the legislative judgment if the legislation meets the minimum rationality test. A case that exemplifies this analysis is *Washington v. Fireman's Fund Insurance Companies*,[25] where the court examined a provision in Hawai'i's insurance system that provides that persons with Hawaii Joint Underwriting Plan (H.J.U.P.) policies injured in an automobile accident by other H.J.U.P. recipients are denied no-fault benefits available to the general public.[26] Justice Hayashi, writing for the court, rejected the equal protection challenge stating that "equal protection . . . is not an obligation to provide the best governance possible" and ruling that there is no constitutional demand "that a statute necessarily apply equally to all persons."[27]

A similar analysis was used in *Mahiai v. Suwa*,[28] where Moloka'i ranchers argued that the Board of Agriculture's decision to slaughter cattle violated equal protection because captive wildlife was exempted.[29] Chief Justice Lum wrote an opinion that articulated a two-part test that the ranchers must satisfy in order to substantiate a claim of discriminatory enforcement. First, the ranchers had to demonstrate that the government's action was not enforced in an even-handed fashion against others "similarly situated."[30] Second, they had to establish that the categories used by the government agency were "deliberately based upon an unjustified standard such as race, religion, or other arbitrary classification."[31] Justice Lum in *Mahiai* did not focus on the rational basis for the statute, but instead held that even though the ranchers and the owners of captive wildlife were treated differently, the ranchers failed to demonstrate that the cattle owners and wildlife owners were "similarly circumstanced."[32] The court thus deferred to the government's decision regarding the appropriate classification.[33]

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[25] 68 Haw. 192, 708 P.2d 129 (1985).

[26] *Id.* at 200, 708 P.2d at 135.

[27] *Id.* at 201, 708 P.2d at 136 (quoting Shibuya v. Architects Hawaii, Ltd., 65 Haw. 26, 35, 647 P.2d 276, 283 (1982)).

[28] 69 Haw. 349, 742 P.2d 359 (1987).

[29] *Id.* at 359-60, 742 P.2d at 367-68.

[30] *Id.* at 361, 742 P.2d at 368.

[31] *Id.* at 361, 742 P.2d at 368 (quoting State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 227, 615 P.2d 730, 734-35 (1980) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))).

[32] 69 Haw. at 361, 742 P.2d at 369.

[33] Another example of the use of a rational basis test can be found in a case involving whether differential tax assessments violate equal protection. In Matter of Swann, 7 Haw. App. 390, 776 P.2d 395 (1989), the Intermediate Court of Appeals

B. Fundamental Rights/Suspect Categories - Strict Scrutiny Test

Under the federal standards that have evolved over the last half century, when a case involves "suspect classifications" or "fundamental rights" the court uses a higher standard of review and strikes down the statute unless the government can demonstrate that the classification chosen is necessary to achieve a compelling state interest. "Race" or "ethnic origin" was the first category to be identified as "suspect."[34] Article I, section 5 of Hawai'i's Constitution also specifically identifies race as an impermissible classification.[35]

The Lum Court has reaffirmed the illegitimacy of the use of race as a classification in the case of *State v. Batson*,[36] which involved the prosecution's use of peremptory challenges. Batson, an African-American convicted of murder, claimed he was deprived of equal protection under the law when the prosecution used one of its peremptory challenges to excuse the only African-American person on the panel of potential jurors.[37] The Hawaii Supreme Court, in an opinion written by Justice Padgett, ruled in Batson's favor, relying upon *Batson v. Kentucky*,[38] but also went beyond this case to apply the decision to a case involving only a single peremptory. In *Batson v. Kentucky*, the prosecutor exercised peremptory challenges to exclude all four African-Americans from the panel where the defendant was also African-American.[39] The United States Supreme Court reversed its earlier decision in *Swain v. Alabama*[40] and ruled that if a member of a racially cognizable group could show that the prosecutor exercised peremptory

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held that the Equal Protection Clause of the Fourteenth Amendment and HAW. CONST. art. I, § 5 applied only to taxation that in fact bears unequally on persons or property of the same class. The court held that the appellants' building and the appellants' neighbor's building were not comparable or similarly situated and that the classifications assigned were calculated appropriately under the cost factor manual used to determine their respective replacement costs for real property tax assessment purposes. *Id.* at 400-01, 776 P.2d at 402. Because the buildings were not of the same class, the Equal Protection Clause was inapplicable. *Id.*

[34] Korematsu v. United States, 323 U.S. 214 (1944); Brown v. Board of Education, 347 U.S. 483 (1954).

[35] *See supra* note 20 (quoting HAW. CONST. art I, § 5).

[36] 71 Haw. 300, 788 P.2d 841 (1990); *see generally*, Jon M. Van Dyke, *Peremptory Challenges Revisited*, ___ NAT'L BLACK L.J. ___ (publication forthcoming); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-75 (1977) [hereinafter VAN DYKE, JURY SELECTION PROCEDURES]; Ann-Marie McKittrick Grundhauser, Recent Development, State v. Levinson: *Limitations on a Criminal Defendant's Use of Peremptory Challenges*, 13 U. HAW. L. REV. 279 (1991).

[37] 71 Haw. at 301, 788 P.2d at 841.

[38] 476 U.S. 79 (1986).

[39] *Id.* at 83.

[40] 380 U.S. 202 (1968).

challenges to remove members of the defendant's race, the burden would shift to the state to come forward with a neutral explanation of the challenges.[41]

The Hawaii Supreme Court cited *Batson v. Kentucky* and adopted the United States Supreme Court's standard,[42] but it also extended the federal holding. In *Batson v. Kentucky*, the prosecution's use of peremptory challenges had arguably demonstrated a pattern of discrimination.[43] In comparison, in *State v. Batson*, the prosecution exercised a single peremptory challenge excusing the only African-American from the panel.[44] Although this action resulted in the defendant not having anyone of his race on the panel, excusing the only African-American does not demonstrate a pattern of discrimination as clearly as the use of multiple peremptories in *Batson v. Kentucky*. The Hawaii Supreme Court therefore showed a strong sensitivity to racial discrimination and rendered a significant decision protecting the rights of all racial groups in Hawai'i.

C. Gender-Based Categories

As mentioned above, the Hawaii Constitution contains the language of the national Equal Rights Amendment in article I, section 3.[45] Hawai'i adopted this amendment in 1972 when it was first proposed for addition to the national constitution.[46] The goal of this amendment was to end all sex-based distinctions except those required by actual physical differences between the sexes or by considerations of privacy.[47]

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[40] 380 U.S. 202 (1968).

[41] 476 U.S. at 97.

[42] 71 Haw. at 302-03, 788 P.2d at 842.

> [W]henever the prosecution so exercises its peremptory challenges as to exclude entirely from the jury all persons who are of the same ethnic 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 an non-ethnic basis.

Id.

[43] 476 U.S. at 83.

[44] 71 Haw. at 301, 788 P.2d at 841.

[45] *See supra* note 19 (quoting HAW. CONST. art I, § 3).

[46] Hawai'i adopted the ERA in 1972 and numbered it then as art. I, § 21. In 1978, it was renumbered as art. I, § 3.

[47] *See generally*, Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893-902 (1971).

Although the ERA had considerable national support, it never obtained the thirty-eight state approvals necessary for ratification. Hawaii's Supreme Court has examined the ERA on several occasions, but has been reluctant to articulate a definitive interpretation of this provision.

The court first dealt with sex-based classifications in 1978 in *Holdman v. Olim*,[48] which involved a prison regulation requiring women to wear brassieres in order to enter the prison.[49] Judge Kidwell, writing for the court, held that this requirement did not violate the equal protection of laws guaranteed by the Fourteenth Amendment nor did it deny equality of rights guaranteed under Hawai'i's equal rights amendment.

The court tested this regulation under both the intermediate test used by the United States Supreme Court for gender-based classifications[50] and under the compelling state interest test, and ruled that the classification was constitutional under both tests because of the strong state interest in prison order.[51]

In analyzing whether Hawai'i's ERA would lead to a different result, the court looked to other states that also have the ERA in their state constitutions. The closest analogy was the decision of the Washington Supreme Court in *Darrin v. Gould*[52] which considered the extent to which a physical characteristic unique to a person's sex should be taken into account in the context of a challenge to the exclusion of two women from the opportunity to play on a boys' football team.[53] Both women had passed the physical exam, met the medical insurance requirements and had played in the necessary required practice sessions; however, the Washington Interscholastic Activities Association (W.I.A.A.) regulations prevented the women from participating in interscholastic contact football on the boys' teams.[54] The Washington Supreme Court adopted a broad approach utilizing both the rational

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[48] 59 Haw. 346, 581 P.2d 1164 (1978).

[49] *Id.* at 348, 581 P.2d at 1166. The relevant regulation stated in part: "Visitors will be properly dressed. Women Visitors are asked to be fully clothed, including undergarments. Provocative attire is discouraged." *Id.*

[50] *Id.* at 350, 581 P.2d at 1167 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). "Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*; *see also* Califano v. Goldfarb, 430 U.S. 199, 209 (1977), Califano v. Webster, 430 U.S. 313, 316-17 (1977).

[51] 59 Haw. at 350, 581 P.2d at 1169.

[52] 540 P.2d 882 (Wash. 1975).

[53] *Id.* at 883.

[54] *Id.* at 884.

basis test and the strict scrutiny test in determining whether sex-based discrimination had occurred.[55] The court held that the discriminatory regulation did not meet the standard of a unique physical characteristic attributable to one sex and therefore that the W.I.A.A. regulation was unconstitutional.[56]

The Hawai'i court, by contrast, upheld the discriminatory prison regulation at issue in *Holdman*. In effect, the Hawaii Supreme Court concluded that Hawai'i's ERA did not require a test stricter than the compelling state interest test, because the court did not apply the more absolute test recommended by the ERA advocates.[57] *Holdman* did not, therefore, provide a definitive standard of review, but it can be read to support the proposition that physical characteristics unique to one sex may be taken into account in a regulation.

The "unique physical characteristics" issue was also relevant in *State v. Rivera*,[58] where the defendant claimed that Hawai'i's rape statute (which has since been changed)[59] established a gender-based classifi-

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[55] *Id.* at 890 n.8.

[56] *Id.* at 890.

[57] Brown et. al, *supra* note 47. The authors of the key *Yale Law Journal* article on the ERA set out six factors that a court should weigh in order to justify a regulation based on physical characteristics unique to one sex. These factors include:

> First, the proportion of [the specified gender] who actually have the characteristic in question. Secondly, the relationship between the characteristic and the problem. Thirdly, the proportion of the problem attributable to the unique physical characteristics of [the specified gender]. Fourth, the proportion of the problem eliminated by the solution. Fifth, the availability of less drastic alternatives. Sixth, the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution.

Brown et al., *supra* note 47, at 895-96.

These factors are limited to *physical* characteristics and cannot include the "psychological, social or other characteristics of the sexes." *Id.* at 893.

The Hawaii Supreme Court did not apply these six factors in determining whether the prison regulation was discriminatory. It is arguable that the provocative behavior displayed by lack of undergarments is not limited to the unique physical characteristics of women. Provocative behavior can be interpreted as a psychological or social characteristic that both sexes possess.

[58] 62 Haw. 120, 612 P.2d 526 (1980).

[59] HAW. REV. STAT. § 707-730 (1976) provided in pertinent part:

Rape in the first degree.

(1) A male commits the offense of rape in the first degree if:

(a) He intentionally engages in sexual intercourse, by forcible compulsion, with a female and:

(i) The female is not, upon the occasion, his voluntary social companion

cation by defining rape as an offense that only a male could commit. Justice Ogata, writing for the court, discussed both the Equal Protection Clause and Hawai'i's ERA. For the Equal Protection Clause analysis, Justice Ogata applied the United States Supreme Court's intermediate scrutiny test.[60] The court found that the statute's sex-based classification served both an important governmental interest and was substantially related to achievement of that objective.

With regard to the ERA, the court once again refused to articulate exactly what standard is applicable to sex-based classifications. Here, at least, the court cited the seminal *Yale Law Review* article[61] for the proposition that "[t]he fundamental legal principle underlying the ERA . . . is that the law must deal with particular individuals . . . ."[62] The court also went on to say:

> A classification based on a physical characteristic unique to one sex is not an impermissive under- or over-inclusive classification because the differentiation is based on the unique presence of a physical characteristic in one sex and not based on an averaging of a trait or characteristic which exists in both sexes.[63]

This statement emphasizes the court's tendency not to interpret the ERA as establishing an absolute test, and the court did not apply the "six factors" listed in the Yale article.[64] Because exceptions for unique physical characteristics can be taken into account, the court affirmed Rivera's conviction.[65]

The court next addressed discriminatory enforcement on the basis of sex in *State v. Tookes*,[66] where the defendant claimed that Hawai'i's

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> who had within the previous twelve months permitted him sexual intercourse;
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> (2) Rape in the first degree is a class A felony.

HAW. REV. STAT. § 707-730 (1976).

The defendant claimed that the subsequent change in the statute to gender neutral language in 1979 confirmed his claim that the statute prior to the amendment was unconstitutional. 62 Haw. at 122, 612 P.2d at 529. The legislature substituted the word "person" wherever words had previously indicated a gender distinction. *Id.*

[60] *Id.* at 123, 612 P.2d at 529 (citing Caban v. Mohammed, 441 U.S. 380 (1979)).

[61] Brown et al., *supra* note 47.

[62] 62 Haw. at 125, 612 P.2d at 530 (quoting 80 YALE L.J., *supra* note 47, at 893).

[63] 62 Haw. at 125, 612 P.2d at 531.

[64] *See supra* note 57.

[65] 62 Haw. at 125-26, 612 P.2d at 530-31.

[66] 67 Haw. 608, 699 P.2d 983 (1985).

law against prostitution[67] was unconstitutional. The defendant claimed (1) that the statute was facially unconstitutional because it discriminated against women as compared to men and (2) that the statute was applied unequally.[68] In response to the defendant's facial challenge, the court held that the statute was gender-neutral and did not set up a gender-based classification.[69] The statute is "triggered by a sale of sexual services by a man or a woman."[70] To establish an equal protection violation, a party must provide evidence of "a pattern of discriminatory enforcement against women."[71] "[D]isparate impact of legislation alone is not enough to make out an equal protection violation."[72] Evidence that would establish "the existence of intentional or purposeful discrimination . . . that is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification" is required before an equal protection violation is found.[73] Because the defendant Tookes failed to sustain the burden of proof required, Chief Justice Lum found that although there may be "a sexual imbalance in the State's efforts to combat prostitution, no showing of sexual discrimination was made."[74]

The Hawaii Supreme Court's most recent case involving sex-based discrimination is *State v. Levinson*,[75] where the court, in an opinion written by Justice Padgett, issued an important decision to protect the rights of women. Defense counsel was exercising peremptory challenges in an apparent attempt to exclude women jurors from serving on a jury for the prosecution of the defendant for murdering his wife.[76] Of the twelve potential women jurors, the state excused two and defense counsel excused nine, producing a jury of eleven men, one woman,

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[67] HAW. REV. STAT. § 712-1200(1) (Supp. 1984) provides in pertinent part: "A person commits the offense of prostitution if he engages in, or agrees or offers to engage in, sexual conduct with another person in return for a fee."

[68] 67 Haw. at 614, 699 P.2d at 987.

[69] *Id.* The court based its reasoning on the gender-neutral basis of the statute and made no mention of Hawai'i's ERA.

[70] *Id.*

[71] *Id.* at 614, 699 P.2d at 988.

[72] *Id.* at 615, 699 P.2d at 988 (citing Washington v. Davis, 426 U.S. 229, 239 (1976), Arlington Heights v. Metropolitan Housing Corp. 429 U.S. 252, 265 (1971)).

[73] 67 Haw. at 615, 699 P.2d at 988 (quoting State v. Kailua Auto Wreckers, Inc., 62 Haw. 222, 226-27, 615 P.2d 730, 734-35 (1980)).

[74] 67 Haw. at 615, 699 P.2d at 988.

[75] 71 Haw. 492, 795 P.2d 845 (1990).

[76] *Id.* at 494, 795 P.2d at 847.

and three male alternatives.[77] When the state protested, defense counsel's alleged discriminatory exclusion of women from the jury, defense counsel admitted that some women were excused solely on the basis of their gender.[78]

The Hawaii Supreme Court built on the criteria set forth in *Batson v. Kentucky*[79] and *State v. Batson*,[80] which specified that the government could not use peremptory challenges to exclude potential jurors on the basis of race. Looking at the Equal Protection Clause and the policy behind jury service, the court concluded "that the right to serve on a jury is a privilege of citizenship, guaranteed by the constitution, and provided for by statute, and that, under our Constitution, that right cannot be taken away for any of the prohibited bases of race, religion, sex or ancestry."[81]

Although the court specifically mentions that "[i]n our state we have an express prohibition, not only of racial discrimination, but of gender discrimination,"[82] the court does not cite to the ERA, but instead, alludes to the Equal Protection Clause. This hesitancy again demonstrates the court's consistent avoidance of interpreting the ERA as well as its failure to articulate clearly the standard of review that should be applied for gender-based discrimination.[83]

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[77] *Id.*

[78] *Id.*

[79] 476 U.S. 79 (1986); *see supra* note 38 and accompanying text.

[80] 71 Haw. 300, 788 P.2d 841 (1990); *see supra* note 36 and accompanying text.

[81] 71 Haw. at 499, 795 P.2d at 849.

[82] *Id.*

[83] The court also failed to address in any detail the difficult issue of whether the defendant's exercise of peremptories is subject to constitutional restraints, relying on the opinion of People v. Kern, 554 N.E.2d 1235 (N.Y. 1990), for the conclusion that "defendant's use of peremptories was sufficiently part of the overall jury selection process to constitute 'state action' and, therefore, was to be subject to constitutional restrictions." 71 Haw. at 499, 795 P.2d at 849; *see generally* Van Dyke, *Peremptory Challenges Revisited*, *supra* note 36.

In a related decision interpreting HAW. REV. STAT. § 378-2, the court gave a broad interpretation to the statutory prohibition on discrimination based on "marital status." In Ross v. Stouffer Hotel Co., 72 Haw. 350, 816 P.2d 302 (1991), an employee for the Waiohai Hotel was terminated for violating the hotel's anti-nepotism rule when he refused to transfer out of the department his wife worked in. *Id.* at 351, 816 P.2d at 303. Justice Padgett, writing for the court, focused on the public policy of encouraging marital relationships and concluded that Stouffer Hotel's policy that spouses could not work in the same department violated HAW. REV. STAT. § 378-2, which prohibits employers from discriminating on the basis of marital status. *Id.* at

D. Summary

In its interpretation of Hawai'i's Equal Protection Clause, the Hawaii Supreme Court has not significantly deviated from federal precedents. In *Batson*, however, its one major case involving race, the court has extended the protection of the Equal Protection Clause to the discriminatory exercise of a single peremptory challenge. This liberal interpretation of the Equal Protection Clause is also evident in *Levinson*, which prevented defense counsel from exercising peremptory challenges based on gender. The court's view of the ERA remains unclear.

III. The Right to Due Process and Fair Treatment in Criminal Proceedings

Article I, section 5 of the Hawaii State Constitution provides that an individual has a right to due process of law.[84] This clause serves to "protect the right of the accused in a criminal case to a fundamentally fair trial."[85] According to the Hawaii Supreme Court, "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[86] Article I, section 5 of the Hawaii Constitution is modeled after the Fifth and Fourteenth Amendments[87] of the United States Constitution, but Hawai'i's guarantee of due process is not

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354, 816 P.2d at 304. Justice Wakatsuki, joined by Justice Moon, dissented, arguing that civil rights laws such as Haw. Rev. Stat. § 378-2 were not designed for the protection of marital relationships. *Id.* at 356-57, 816 P.2d at 305-06. Legislative committee reports on Haw. Rev. Stat. § 378-2 mentioned no specific policy reason for marital status discrimination. *Id.* at 356, 816 P.2d at 305. Because employers should be free to adopt personnel policies not specifically prohibited by statute or the constitution, the dissent argued, the court should defer to the legislature which has remained silent as to prohibiting no-spouse rules. *Id.* at 359, 816 P.2d at 305.

[84] Haw. Const. art. I, § 5 states: "No person shall be deprived of life, liberty, or property without due process of law . . . ."

[85] State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990) (citing State v. Keliiholokai, 58 Haw. 356, 569 P.2d 891 (1977)).

[86] State v. Bernades, 71 Haw. 485, 487, 795 P.2d 842, 843 (1990) (quoting State v. Huelsman, 60 Haw. 71, 88, 588 P.2d 394, 405 (1978)).

[87] U.S. Const. amend. XIV, § 1 states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* U.S. Const. amend. V states in relevant part: "No person . . . shall be deprived of life, liberty or property, without due process of law . . . ." *Id.*

necessarily limited to that granted under the Constitution,[88] and the Lum Court has in selected instances broadened rights of the accused in criminal proceedings.

A. Due Process in General

In *State v. Matafeo*,[89] for instance, the court indicated that Hawai'i's Constitution provides additional protection to defendants in instances where critical evidence was destroyed. Matafeo was charged with sexual assault. When he asked to inspect the evidence gathered by the police—which included the alleged victim's clothing—he learned that the police had destroyed all physical evidence related to the case because of a mistake in the Records Department.[90]

Matafeo argued that the Police Department violated his due process rights when they inadvertently destroyed physical evidence favorable to him.[91] The court discussed the United States Supreme Court's ruling in *Arizona v. Youngblood*,[92] where the police had negligently failed to preserve semen stains on a sexual-assault victim's clothing.[93] The *Youngblood* court found no due process violation and refused to impose an absolute duty on police to retain all material that might be significant.[94] According to the *Youngblood* opinion, due process is violated when the state destroys evidence that is of potential exculpatory value only if the defendant can also show that the state acted in bad faith.[95]

Chief Justice Lum, writing for the Hawai'i court, rejected this limited *Youngblood* view, which would "preclude [the court] in cases where no bad faith is shown, from inquiring into the favorableness of the evidence or the prejudice suffered by the defendants as a result of its loss."[96] He went beyond the *Youngblood* analysis and wrote that under Hawai'i's Constitution, if the state loses or destroys evidence "so critical to the defense as to make a criminal trial fundamentally unfair without it,"[97] good or bad faith is irrelevant.

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[88] State v. Bernades, 71 Haw. 485, 487, 795 P.2d 842, 843 (1990) (citing State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971)).

[89] 71 Haw. 183, 787 P.2d 671 (1990).

[90] *Id.* at 184, 787 P.2d at 672.

[91] *Id.* at 185, 787 P.2d at 672.

[92] 488 U.S. 51 (1988).

[93] 71 Haw. at 186, 787 P.2d at 673.

[94] 488 U.S. at 58.

[95] *Id.*

[96] 71 Haw. at 187; 787 P.2d at 673.

[97] *Id.* (quoting *Youngblood*, 488 U.S. at 61, (Stevens, J., concurring)).

In applying this principle, the court held for the police department because the condition of the victim's clothing did not appear to support the defense.[98] The court's dicta should provide additional protection for the accused, but, as Justice Wakatsuki emphasized in his concurring opinion, it is unclear if this provision sufficiently protects the defendant because it will be difficult to determine how critical an item of evidence is to the defense when the item no longer exists.[99]

The court's liberal approach is also reflected in the court's recent treatment of expert testimony in child sexual abuse cases. In *State v. Batangan*, the defendant was charged with sexually abusing his daughter when she was six or seven years old.[100] The child could not provide specific dates or describe specific acts and did not report the incidents until several months after they allegedly occurred.[101]

The state presented an expert in clinical psychology to testify regarding his evaluation of the child, his methods in determining whether the child has been sexually abused, and the general behavior of sex abuse victims.[102] The expert implicitly testified that he thought the child was believable and that her father had abused her.[103]

In the 1982 case of *State v. Kim*,[104] the court had created an exception to the general rule that a expert cannot testify as to the credibility of a witness, reasoning that expert testimony in child sexual abuse cases might provide "potentially useful information" because child sexual abuse was out of a jury's "common experience."[105] This decision was overruled in 1990 by the *Batangan* court. In an opinion written by Justice Wakatsuki, the court recognized that "sexual abuse of children is detestable and society demands prosecution of these abusers" and also recognized the difficulty in prosecuting these cases because of the victims' young ages and the absence of eyewitnesses.[106] But the defendant's right to a fair trial must also be considered, and therefore the

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[98] 71 Haw. at 187-88, 787 P.2d at 673.

[99] *Id.* at 189, 787 P.2d at 674.

[100] 71 Haw. 552, 554, 799 P.2d 48, 50 (1990).

[101] *Id.* at 554, 799 P.2d at 50.

[102] *Id.* at 555, 799 P.2d at 50.

[103] *Id.*

[104] 64 Haw. 598, 645 P.2d 1330 (1982).

[105] 71 Haw. at 560, 799 P.2d at 53 (citing State v. Kim, 64 Haw. 598, 607, 645 P.2d 1330, 1337 (1982)).

[106] 71 Haw. at 555, 799 P.2d at 50-51.

court held that the expert's testimony was prejudicial to the defendant and inadmissible under Hawaii Rules of Evidence 702.[107]

The *Batangan* court acknowledged that child sexual abuse charges are difficult to prove but reasoned that they are equally difficult to defend against. In characterizing such testimony, the court noted that:

> [E]xperts may not give opinions which in effect usurp the basic function of the jury. . . . [A]n expert's opinion on the credibility of a victim is always suspect of bias and carries the danger of unduly influencing the triers of fact. Furthermore, even objective opinions of experts regarding a victim's credibility is [sic] no more reliable than the determination of the victim's credibility by the triers of fact.[108]

The court stated that expert testimony that explains "seemingly bizarre behavior" of child sex abuse victims is potentially admissible but not opinions about whether the child abuse occurred or whether the child is believable.[109] Further, the court was convinced that "[the doctor's] testimony could not have assisted the jury in understanding an otherwise bizarre behavior."[110]

Batangan represented the final blow to the *Kim* rule. Previously, in *State v. Castro*,[111] the court limited the *Kim* holding to allow expert testimony on credibility of witnesses to child sexual abuse cases.[112] In *Castro*, the defendant was charged with the attempted murder of his girlfriend. After the defendant's counsel cross-examined her at trial, the state called a psychologist who evaluated her after the alleged attack to give his opinion about her credibility.[113] The court held that he should not have been allowed to testify about her credibility.

Then in *In the Interest of Doe*,[114] the court held that lay opinion testimony regarding the credibility of an alleged child sex abuse victim was inadmissible and the state could not rely on *Kim* to allow such testimony. It was erroneous to admit a pre-school teacher's direct testimony regarding her student's credibility in a child sex abuse case.[115] Finally, the *Batangan* decision clarified the issue by allowing expert

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[107] *Id.* at 563, 799 P.2d at 54.
[108] *Id.* at 562, 799 P.2d at 54.
[109] *Id.* at 558, 799 P.2d at 52.
[110] *Id.* at 562, 799 P.2d at 54.
[111] 69 Haw. 633, 756 P.2d 1033 (1988) (Nakamura, J.).
[112] 71 Haw. at 561, 799 P.2d at 53.
[113] 69 Haw. at 641, 756 P.2d at 1040.
[114] 70 Haw. 32, 761 P.2d 299 (1988) (Nakamura, J.).
[115] *Id.* at 40, 761 P.2d at 304.

testimony to explain behavior of child sex abuse victims, but not to comment on the credibility of the victim.

State v. Fajardo[116] is another example of the Lum Court departing from federal precedent. Defendant was charged with murder. The jury deliberated for four days and then told the judge it was deadlocked and could not reach a verdict. The judge gave a supplemental instruction, known as the "Allen instruction"[117] to the jury. In part, the judge said that "[i]f you cannot reach a verdict, this case must be tried again" and that "[e]ach juror who finds himself to be in the minority should reconsider his views in light of the opinion of the jurors of the majority."[118] One hour after the judge gave the instruction, the jury found the defendant guilty of the lesser-included offense of manslaughter.[119]

The court followed other states[120] in rejecting the Allen instruction. The court reasoned that the jury should not consider whether the case would be retried and concluded that the Allen instruction "blasted the verdict from the jury."[121] As the court explained: "A conscientious minority is the backbone of our American way of life. No individual, group or institution, however altruistic its intentions, can set aside the sincere convictions of a minority to conform to that of the majority for the expedience of rendering a unanimous decision."[122] The court characterized its decision as "a judicially declared rule of criminal procedure."[123]

In *State v. Suka*,[124] the court held that the close presence of a representative from the Victim Witness Kokua program near an alleged rape victim during her testimony violated the defendant's right to a fair trial. During her initial testimony, the fifteen-year old alleged

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[116] 67 Haw. 593, 699 P.2d 20 (1985).

[117] In Allen v. United States, 164 U.S. 492 (1896), the Court upheld the trial judge's use of supplemental instructions to deadlocked jurors to encourage them to reevaluate their positions. *Id.* at 501-02.

[118] 67 Haw. at 594-95, 699 P.2d at 21.

[119] *Id.* at 595, 699 P.2d at 22.

[120] *See, e.g.*, State v. Thomas, 342 P.2d 197 (Ariz. 1959); People v. Gainer, 566 P.2d 997 (Cal. 1977); State v. Randall, 353 P.2d 1054 (Mont. 1960).

[121] 67 Haw. at 601, 699 P.2d at 25.

[122] *Id.*

[123] *Id.* at 602, 699 P.2d at 25 (quoting People v. Gainer, 566 P.2d 997, 1006 (1977)).

[124] 70 Haw. 472, 777 P.2d 240 (1989).

victim broke down and cried.[125] After the court reconvened, the representative from the Victim Witness Kokua program at first sat next to the alleged victim and later stood behind her, with her hands on her shoulders during her testimony.[126] The defendant argued that the victim advocate's presence was prejudicial and outweighed the need for it.

The court agreed in an opinion written by Justice Wakatsuki, reasoning that the advocate's presence could have conveyed her belief that the victim was telling the truth, thereby depriving defendant of the right to a fair trial.[127] Further, the advocate, as a neutral third party, was more likely to be seen as bolstering the witness' credibility than would a family member in the same position.[128] According to the court, the record did not reflect that the advocate's presence was necessary for the victim to testify; the witness was not asked if she could testify alone or with the advocate sitting in the audience, visible to her.[129] The court also felt that the fifteen-year-old witness "could generally be expected to testify more easily than a younger child."[130]

Another Sixth Amendment case addressed a defendant's right to cross-examine the alleged victim about prior sexual conduct. In *State v. Calbero*,[131] during defendant's trial on sexual assault charges, the prosecutor questioned the alleged victim about why she did not know what to do in response to defendant's alleged advances. She said, "I had never been in that situation before."[132] The trial judge ruled that the defense could not probe into her past sexual conduct because the defendant did not open any door and Hawai'i's rape shield law seemed to bar such testimony.[133]

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[125] *Id.* at 473, 777 P.2d at 241.

[126] *Id.* at 476, 777 P.2d at 242.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 476-77, 777 P.2d at 243.

[130] *Id.* at 477, 777 P.2d at 243.

[131] 71 Haw. 115, 785 P.2d 157 (1989).

[132] *Id.* at 118, 785 P.2d at 158.

[133] *Id.* at 119, 785 P.2d at 159. HAW. R. EVID. 412 states in part:

> Rape cases; relevance of victim's past behavior.
>
> a) Notwithstanding any other provision of law, in a criminal case in which a person as accused of rape or sexual assault under any of the provisions of chapter 707, part V of the Hawaii Penal Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or sexual assault is not admissible.

HAW. R. EVID. 412.

Justice Padgett, writing for the court, disagreed, holding that failure to allow the defendant to cross-examine the witness violated his right to confrontation under article I, sections 5 and 14 of the Hawaii Constitution.[134] The defendant had a right to question the alleged victim about her direct testimony because her testimony attempted to negate defendant's consent defense. Defendant could also testify about statements the witness made to him about her past sexual conduct.[135]

In *State v. Dunphy*,[136] the court found a violation of defendant's due process rights when defendant was indicted for promoting a dangerous drug more than twenty-five months after the alleged incidents occurred. An undercover officer had taped his telephone conversations with defendant, but these tapes had disappeared during the twenty-five month interval.[137]

In an opinion by Justice Padgett, the court balanced the prejudice to defendant arising out of the delay against the reasonableness of the delay.[138] If the tapes had supported defendant's version of events, then they would have helped him prove his defense of entrapment.[139] The destruction of the tapes was, in that situation, prejudicial.[140] The last thirteen or fourteen months of the delay were found to be unreasonable because they resulted from staffing problems in the Prosecutor's office.[141]

The court has also recognized the importance of the right to a jury trial under article I, section 14 of the Hawaii Constitution. In *State v. O'Brien*,[142] the court, in an opinion written by Chief Justice Lum, held that driving under the influence of intoxicating liquor is a serious offense giving the defendant a constitutional right to trial by jury. The court explained:

> In recognizing that punishments other than imprisonment exceeding six months can require the constitutional guarantees of a jury trial, we act on our belief that our interpretation of the mandate of the constitution

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[134] 71 Haw. at 125, 785 P.2d at 161-62.

[135] *Id.*

[136] 71 Haw. 537, 797 P.2d 1312 (1990).

[137] *Id.* at 539, 797 P.2d at 1313.

[138] *Id.* at 543, 797 P.2d at 1315; the balancing test used is derived from State v. English, 61 Haw. 12, 594 P.2d 1069 (1979).

[139] 71 Haw. at 541, 797 P.2d at 1314.

[140] *Id.*

[141] *Id.* at 544, 797 P.2d at 1315.

[142] 68 Haw. 39, 704 P.2d 883 (1985).

> must accord with the changing circumstances of modern times and the exigencies of life in a society dependent on technology such as the automobile.[143]

In *State v. Jordan*,[144] the court recently reaffirmed *O'Brien* and held that persons accused of driving under the influence[145] continue to have a constitutional right to trial by jury even though the legislature reduced the maximum jail term for first and second offenses to thirty and sixty days. The *Jordan* opinion, written by Justice Padgett, rejected the state's argument that driving under the influence was not "constitutionally serious,"[146] pointing to the legislative history indicating that the legislature continued to "regard driving under the influence as a very serious crime and social problem."[147]

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[143] *Id.* at 44, 704 P.2d at 887. Previously in State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982), the court declined to follow Codispoti v. Pennsylvania, 418 U.S. 506 (1974), which established that "serious offenses" that entitled defendant a jury trial were offenses that imposed at least a six-month sentence. 68 Haw. at 42, 704 P.2d at 886.

[144] No. 15790 (Haw. Feb. 13, 1992).

[145] HAW. REV. STAT. § 291-4 (1991).

[146] *Jordan*, No. 15790, slip op. at 4.

[147] *Id.* On March 25, 1992, the court issued another decision reaffirming the importance of an impartially-selected jury. In State v. Echineque, No. 15310, the court ruled that the use of the "struck jury" system of impanelling jurors violated HAW. REV. STAT. § 635-26(a). In the struck jury system,

> the attorneys and the judge question the prospective jurors and make their challenges for cause until a number of 'qualified' jurors are assembled equal to the size of the jury (usually 12) plus the number of peremptory challenges available to the two sides. Each side then uses its "peremptory strikes" to whittle the venire down to its final size.

VAN DYKE, JURY SELECTION PROCEDURES, *supra* note 36, at 146-47.

This system is thought by some judges to be more efficient than the "strike and replace" system, in which twelve qualified jurors are seated in the jury box and then the two sides exercise their peremptories, with a new randomly-selected potential juror summoned into the jury box after each peremptory. The "strike and replace" system is more true, however, to our commitment to random selection of juries; because the attorneys do not know who will replace a challenged juror (the replacement might be someone less desirable), they must exercise their peremptories with caution. In the "struck jury" system, by contrast, because the two sides know all the potential jurors, they are able to exercise their peremptories with care and sophistication, and the attorneys have "great power to change the jury profile." *Id.* at 147.

Justice Padgett's opinion for the court in *Eschineque* summarizes the policy arguments presented by the trial judge in favor of the "struck jury" system, but concludes that

A number of examples can also be provided where the court rejects a due process claim or simply adheres to federal precedents. For example, in *State v. Paaina*,[148] the court held that a defendant's due process rights were not violated when the trial judge refused to allow him to examine his probation officer's sentencing recommendation. The defendant was found guilty of promoting prison contraband, and when he appeared for sentencing, the trial judge received a pre-sentence diagnosis and report and a confidential letter with the probation officer's sentencing recommendation.[149] The defendant argued that he had a constitutional right under the Fourteenth Amendment of the U.S. Constitution and article I, section 5 of the Hawaii State Constitution to see the recommendation letter prior to sentencing.

Justice Hayashi, writing for the court, followed federal court interpretation in noting that a "defendant has a constitutional right to be sentenced based on accurate information."[150] He ruled, however, that "the Constitution does not require that all information must be disclosed to defendants."[151] Because some significant factual information could be denied defendants, recommendations similarly did not have to be made available to them.[152] The court found no state or federal right to access to the officer's recommendations, ruling that the standard of due process was lower in sentencing proceedings.[153]

In another sentencing case, the court determined that mandatory indeterminate sentencing without the possibility of probation did not deprive the defendant of his due process right.[154] In *State v. Bernades*, the defendant was sentenced to a mandatory twenty-year indeterminate

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these arguments should be "addressed to the legislature and not to the courts. Trial judges are not free to disregard the statute and institute their own methods of impanelling juries, no matter how superior they may think their chosen method is." Slip op. at 6. The court concludes by saying that the defendant does not have to establish that he was prejudiced by the "struck jury" system to challenge it, because the statutory language is unambiguous and applies uniformly to all trial courts in the state.

[148] 67 Haw. 408, 689 P.2d 754 (1984).

[149] *Id.* at 408, 689 P.2d at 755.

[150] *Id.* at 410, 689 P.2d at 756.

[151] *Id.* at 410, 689 P.2d at 757.

[152] *Id.*

[153] *Id.*

[154] State v. Bernades, 71 Haw. 485, 795 P.2d 842 (1990).

sentence[155] as required by statute for promoting a dangerous drug, a Class A felony. The court rejected the defendant's argument that the Hawaii Constitution provided a due process right to individualized sentencing with the possibility of probation.[156] The court reasoned that there was no constitutional right to probation and thus that the Legislature was free to authorize probation or not.[157] Defendant's due process challenge was therefore unsuccessful.[158]

In *State v. Handa*,[159] the defendant argued that *Hawaii Revised Statutes* section 804-4 contravened the bail clause[160] of the Hawaii State Constitution which provides "judicial discretion to dispense with bail . . . except when the defendant is charged with a offense punishable by life imprisonment."[161] Defendant Handa argued that *Hawaii Revised Statutes* section 804-4, which prohibited bail for certain offenses violated the bail clause but the court disagreed, finding that the statute did not conflict with the bail clause because the Constitutional Convention delegates intended the judge's discretionary powers to apply only at the pre-conviction stage.[162]

B. Double Jeopardy

The court has not significantly expanded double jeopardy protection.[163] In *State v. Kipi*,[164] defendant Kipi entered his ex-girlfriend's

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[155] According to HAW. REV. STAT. § 706-659, persons convicted of a Class A felony are sentenced to an indeterminate term of twenty years without the possibility of probation or suspension of sentence. The paroling authority determines the minimum length of imprisonment. *Id.* at 486, 795 P.2d at 843.

[156] *Id.* at 489, 795 P.2d at 844.

[157] *Id.*

[158] *Id.* at 490, 795 P.2d at 844.

[159] 66 Haw. 82, 657 P.2d 464 (1983).

[160] HAW. CONST. art. I, § 12.

[161] 66 Haw. at 84, 657 P.2d at 465. The defendant also challenged the statute based on equal protection and due process grounds, but the court rejected these claims. *Id.* at 88-89, 657 P.2d at 468.

[162] *Id.* at 85, 657 P.2d at 466.

[163] *See* State v. Kipi, 72 Haw. 164, 811 P.2d 815 (1991). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states, in relevant part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. HAW. CONST. art I, § 10 contains similar language: "[N]or shall any person be subject for the same offense to be twice put in jeopardy." *See also* State v. Dow, 72 Haw. 56, 806 P.2d 402 (1991) (holding that double jeopardy did not bar retrial of defendant who was charged with two counts under DUI statute).

[164] 72 Haw. 164, 811 P.2d 815 (1991).

house and threatened her and two other persons.[165] Kipi was charged with burglary in the first degree and terroristic threatening.[166] At the time of the alleged incident, a protective order was in effect that enjoined both Kipi and his girlfriend from "contacting, threatening or abusing each other . . ."[167] Kipi pleaded no contest to charges of criminal contempt and was sentenced to five months in prison.

Kipi argued that the double jeopardy rule barred his trial for burglary and terroristic threatening.[168] The court followed the United States Supreme Court's recent decision in *Grady v. Corbin*[169] which broadened the protection under the Double Jeopardy Clause beyond the *Blockburger* test[170] announced almost sixty years ago.[171] In *Grady*, the United States Supreme Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[172]

Justice Moon noted that under the *Blockburger* rule, double jeopardy principles would not have barred Kipi's prosecution for burglary and terroristic threatening, because the state would have to prove additional and different facts than those used to prove criminal contempt.[173] Under *Grady*, however, the court found that Kipi could not be prosecuted for the substantive criminal offense because it arose out of the same conduct that led to Kipi's no contest plea for criminal contempt. Justice Moon said that the *Grady* decision requires prosecutors to ensure that "all

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[165] *Id.* at 165, 811 P.2d at 816.

[166] *Id.*

[167] *Id.* at 166, 811 P.2d at 816.

[168] *Id.* at 171, 811 P.2d at 818.

[169] 495 U.S. 508, 110 S.Ct. 2084 (1990).

[170] The Grady court noted that in Blockburger v. United States, 284 U.S. 299 (1932), the United States Supreme Court held that the "Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not 'requir[e] proof of a fact which the other does not.'" 72 Haw. at 171, 811 P.2d at 818 (quoting Grady v. Corbin, 495 U.S. ___, 110 S.Ct. at 2087).

[171] 72 Haw. at 175, 811 P.2d at 820. In State v. Pia, 55 Haw. 14, 514 P.2d 580 (1973), the court said that the federal *Blockburger* standard was less rigorous than that imposed by Hawai'i law.

[172] 495 U.S. at ___, 110 S. Ct. at 2093.

[173] 72 Haw. at 171, 811 P.2d at 819.

charges arising out of a single occurrence must be joined in a single indictment.''[174]

Double jeopardy rights are waived when a defendant successfully moves for a mistrial.[175] Reprosecution is barred, however, when the defendant's mistrial motion is necessary because of judicial or prosecutorial misconduct that is intended to deny the defendant a constitutional right to a fair trial.[176] In *State v. Hoke*, two defendants allegedly committed a robbery and were subsequently arrested the next day on unrelated offenses. During the trial, the defendants successfully barred evidence that they had been arrested for another unrelated offense.[177]

During his closing argument, however, the prosecutor said that the ''defendants robbed places together.''[178] Defendants moved for mistrial, which was granted.[179] They then moved to dismiss the indictment, stating that because prosecutorial misconduct was responsible for the mistrial, double jeopardy barred a retrial.[180]

The court reaffirmed its holding in *State v. Pulawa*[181] that in order for double jeopardy to bar retrial, the defendants had to show that the prosecution *intended* to provoke a mistrial. The prosecutor's statement did not demonstrate intentional wrongdoing.[182] Chief Justice Lum refused to adopt a more liberal test to expand the circumstances where prosecutorial misconduct would bar retrial, stating that the *Pulawa* rule was sound.[183] The court refrained from expanding double jeopardy protection, stating that the defendants had failed to provide compelling reasons to justify such an expansion.[184]

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[174] *Id.* at 176, 811 P.2d at 821 (quoting Grady v. Corbin, 495 U.S. at ____, 110 S. Ct. at 2096 (Scalia, J., dissenting)).

[175] State v. Miyazaki, 64 Haw. 611, 618, 645 P.2d 1340, 1346 (1982).

[176] State v. Hoke, 69 Haw. 44, 46, 731 P.2d 1261, 1262 (1987) (citing State v. Pulawa, 58 Haw. 377, 569 P.2d 900 (1977), *cert. denied*, 436 U.S. 925 (1978)).

[177] 69 Haw. at 45, 731 P.2d at 1261.

[178] *Id.* at 46, 731 P.2d at 1262.

[179] *Id.*

[180] *Id.*

[181] 58 Haw. 377, 569 P.2d 900 (1977), *cert. denied*, 436 U.S. 925 (1978). Although the federal court cases relied upon in *Pulawa* had since been superseded, the court noted that the *Pulawa* rule was still consistent with the federal court rule. 69 Haw. at 47-48, 731 P.2d at 1262-63.

[182] 69 Haw. at 48, 731 P.2d at 1263.

[183] *Id.* at 47-48, 731 P.2d at 1262.

[184] *Id.* at 47-48, 731 P.2d at 1262-63.

C. Searches and Seizures

The court has interpreted article I, section 7[185] "as giving citizens a broad protection against unreasonable seizures of private property by government agents, subject to the exception of the exigent circumstances rule."[186] A brief review of selected cases where the court has interpreted the search and seizure clause yields mixed results. Article I, section 7 protects a person from "unreasonable searches and seizures" and the court has generally followed federal court precedent that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject to a few specifically established and well-delineated exceptions."[187]

Voluntary consent to a search is an exception to the general rule that warrantless searches are unreasonable.[188] In *State v. Mahone*,[189] the Lum Court followed other federal circuits in holding that a verbal disclaimer of ownership is sufficient to remove Fourth Amendment protection during a search.[190]

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[185] HAW. CONST. art. I, § 7 states:

> The right of people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Id.; *see also infra* notes 305-62 and accompanying text.

[186] State v. Kelly, 68 Haw. 213, 218, 708 P.2d 820, 824 (1985). In *Kelly*, the drug enforcement officers seized a photo album shipped through the mail that contained cocaine and installed a beeper. *Id.* at 214-15, 708 P.2d at 821-22. The court found that when the album was dropped in the mail, the defendant had a possessory interest in the photo album and had a legitimate expectation of privacy that no one would tamper with its contents. *Id.* at 217, 708 P.2d at 823.

[187] State v. Russo, 67 Haw. 126, 137, 681 P.2d 553, 561 (1984) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[188] 67 Haw. at 137, 681 P.2d at 562 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[189] 67 Haw. 644, 701 P.2d 171 (1985).

[190] *Id.* at 649, 701 P.2d at 175. *Cf.* State v. Joyner, 66 Haw. 543, 669 P.2d 152 (1983) (court found no abandonment of property when defendant remained silent when police asked him who owned the bag and the evidence indicated that defendant owned the bag).

The Lum Court has reiterated that consent in the constitutional sense means that it must be "freely and voluntarily given." State v. Russo, 67 Haw. 126, 137, 681 P.2d 553, 562 (1984).

The court has sometimes chosen to depart from federal decisions to give greater protection to persons who are subject to searches and seizures. In *State v. Kim*,[191] the court interpreted article I, section 7 to require a police officer to have "at least a reasonable basis of specific articulable facts to believe a crime has been committed to justify ordering a person out of a car after a traffic stop."[192]

The court has reaffirmed that a narcotic dog's sniff is not a "search," and approved the use of narcotics dogs to expose contraband.[193] But to prevent abuse, the court said it still must balance "the State's interest in using the dog against the individual's interest in freedom from unreasonable government intrusions."[194]

In *State v. Reed*,[195] the court recognized the need for police protection and held that "it is *per se* reasonable for the arresting police officer to conduct a warrantless, limited pat-down search of an arrestee's person and the area under the arrestee's immediate control for weapons, escape instrumentalities, or contraband."[196] But the court also emphasized, in an opinion written by Justice Hayashi, that: "we will not condone any impermissibly broad, unreasonable, warrantless searches of arrestees or their possessions which 1) are not supported by specific, recognized exceptions to the warrant requirement; or 2) constitute unlawful attempts to circumvent the controlling constitutional protections."[197]

In *State v. Ortiz*,[198] the Hawaii Supreme Court by a 3-2 vote vacated an Intermediate Court of Appeals (I.C.A.) ruling[199] that had created

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[191] 68 Haw. 286, 711 P.2d 1291 (1985).

[192] *Id.* at 290, 711 P.2d at 1294. In *Kim*, the court did not adopt the standard established by the United States Supreme Court in Pennsylvania v. Mimms, 434 U.S. 106 (1977). *Id.*

[193] State v. Snitkin, 67 Haw. 168, 681 P.2d 980 (1984).

[194] *Id.* at 172, 681 P.2d at 983 (state's interest in preventing drug trafficking outweighs the individual's interest in airspace around package).

[195] 70 Haw. 107, 762 P.2d 803 (1988).

[196] *Id.* at 115, 762 P.2d at 808. In *Reed*, the defendant moved to suppress a switchblade knife that the arresting police officer found while conducting a pat-down search of arrestee. *Id.* at 110, 762 P.2d at 805. The court upheld the pat-down, which was necessary to ensure the police officer's safety. *Id.* at 114, 762 P.2d at 807.

[197] *Id.* at 115, 762 P.2d at 808 (citing State v. Wiley, 69 Haw. 589, 752 P.2d 102 (1988); *see also* State v. Enos, 68 Haw. 509, 720 P.2d 1012 (1986) (it is per se reasonable for an officer to conduct a pat down for weapons after making an arrest for drunken driving, but a frisk after arrest that revealed contraband in pants pocket was held to be too expansive)).

[198] 67 Haw. 181, 683 P.2d 822 (1984).

[199] State v. Ortiz, 4 Haw. App. 143, 662 P.2d 517 (1983). In an opinion by Chief

a new "plain feel" exception to a warrantless search of the defendant's knapsack, but nonetheless agreed that the search was justified. A police officer approached the defendant at 2 a.m. after he observed the defendant hiding near businesses.[200] The police officer felt "what seemed like the butt to a handgun" through the fabric of defendant's knapsack.[201] He opened the knapsack and found a handgun, which Ortiz moved to suppress.

In an opinion by Justice Hayashi, the majority analyzed whether the warrantless search was justified under any exception to the warrant requirement. In applying the exception of a "protective search for weapons incident to an investigative stop" as set forth in *Terry v. Ohio*,[202] Justice Hayashi weighed the interests of the officer against the defendant's interest in freedom from governmental intrusion.[203] In determining that the police officer's interest outweighed the defendant's, the opinion said that "[p]olice officers need not risk a shot in the back by returning containers which they reasonably suspect contain a dangerous weapon but may lack probable cause to seize."[204] Justice Hayashi characterized opening the knapsack as a "de minimis" intrusion on the defendant's privacy[205] which did not violate article I, section 7 of the Hawaii Constitution.

This opinion also explained how far police may go beyond searching a person in a protective weapons search. The court extended the protective weapons search to parallel the search incident to a lawful arrest: "[I]f the police have an objectively reasonable belief a detainee is armed, they may make a protective weapons search of the area or

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[199] State v. Ortiz, 4 Haw. App. 143, 662 P.2d 517 (1983). In an opinion by Chief Judge Burns, the I.C.A. upheld the warrantless unzippering of Ortiz's knapsack and seizure of the gun under a new "plain feel rule" as a "logical analogy" to the plain view rule: "Under the plain view rule, if the original governmental intrusion into activities or areas in which the defendant has a reasonable expectation of privacy was justified . . . then objects inadvertently sighted in plain view may be seized without a warrant." *Id.* at 163, 662 P.2d at 531 (citations omitted). Similarly, the plain feel rule would have required that (1) the governmental intrusion was justified, (2) the feel was coincidental and (3) the police must immediately have known that they had evidence before them. *Id.* at 165, 662 P.2d at 532.

[200] 67 Haw. at 182, 683 P.2d at 824.

[201] *Id.*

[202] 392 U.S. 1 (1968).

[203] 67 Haw. at 187, 683 P.2d at 826.

[204] *Id.* at 187, 683 P.2d at 827.

[205] *Id.*

a container reasonably within the detainee's conceivable grasp."[206]

Justices Nakamura and Wakatsuki dissented, arguing that the protective weapons search should not apply because the officer was no longer in danger when he opened the knapsack.[207] They disagreed with the majority's expansion of the protective weapon search exception and the court's holding that the search of the closed knapsack was a "de minimus" intrusion of privacy.[208]

D. Summary

The Lum Court has in selected cases demonstrated a liberal view in criminal defense issues. In *Matafeo* dicta, Chief Justice Lum indicated that the Hawaii Constitution provided additional protection to the defendant beyond those articulated by the United States Supreme Court. In certain instances, the defendant does not have to show that the police acted in bad faith in destroying evidence if the evidence was "so critical to the defense as to make a criminal trial fundamentally unfair without it."[209] The court overruled precedent in *Batangan*, precluding expert testimony on credibility in child sex abuse cases, and found in *Suka* that the close physical presence of a neutral third party to an alleged victim during her testimony deprived the defendant of his right to a fair trial.

The court departed from federal precedent to bar the use of the Allen instruction to deadlocked juries in *Fajardo* because it in effect "blasted" the verdict from them. The court protected a defendant's rights in a case involving trial delay. And because of the importance of a drivers' license in our modern society, the court extended the constitutional right to a jury trial in *O'Brien* to include those who are charged with driving under the influence of alcohol.

But in the sentencing phase, the court has upheld indeterminate sentencing without probation and restricted the information that the defendant is entitled to review prior to sentencing. In *Hoke*, the court refrained from expanding double jeopardy protection in situations of prosecutorial misconduct.

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[206] *Id.* at 189, 683 P.2d at 828.

[207] *Id.* at 191, 683 P.2d at 829.

[208] *Id.* at 196, 683 P.2d at 833.

[209] 71 Haw. at 187, 787 P.2d at 673 (quoting Arizona v. Youngblood, 488 U.S. at 61 (Stevens, J., concurring)); *see supra* note 97 and accompanying text.

The court has, in selected cases, extended some additional protection to people against unreasonable searches and seizures during traffic stops and when narcotic dogs sniff for contraband. But the court has granted police authority to conduct limited pat-down searches of arrestees and clarified the scope of protective weapons searches.

IV. The Right to Due Process and Fair Treatment in Administrative Proceedings

The Fifth and Fourteenth Amendments of the United States Constitution and article I, section 5 of the Hawaii Constitution guarantee the right to due process.[210] The process due to an individual varies according to the type of governmental action in question, its impact on individual interests, and the government's interests in the matter.[211] When an individual's liberty or property interest is affected by government action, the individual must be afforded, at a minimum, adequate notice and a meaningful opportunity to be heard before an impartial arbiter before a decision is made.[212] *Hawaii Revised Statutes* chapter 91, the Hawaii Administrative Procedures Act (HAPA), governs Hawai'i's administrative agencies. In addressing issues involving administrative agencies, the Hawaii Supreme Court has balanced the factors identified in *Mathews v. Eldridge*:[213] the nature of the private interest affected; the risk to that interest posed by the procedure; the likelihood that the proposed procedure would better protect that interest; and the burden upon the government resulting from the new procedure.[214]

International Brotherhood of Electrical Workers v. Hawaiian Telephone Company[215] illustrates how the court determines whether a valid interest is affected. The Hawaiian Telephone Company (HawTel) claimed that the Due Process Clause required notice and a hearing before the Department of Labor and Industrial Relations could grant claims by striking workers for unemployment compensation.[216] HawTel claimed it was deprived of property through increased tax assessments, thus

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[210] Haw. Const. art. I, § 5 states: "No person shall be deprived of life, liberty or property without due process of law . . . ."

[211] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

[212] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[213] 424 U.S. 319 (1976).

[214] *Id.* at 335.

[215] 68 Haw. 316, 713 P.2d. 943 (1986).

[216] *Id.* at 332, 713 P.2d at 956.

triggering the Due Process Clause.[217] It argued that distributing benefits to striking workers resulted in increased tax assessments on HawTel to replenish the state employment fund.[218] Counsel for HawTel could not, however, document evidence of such a claim.[219] The court found that no property interest existed and thus that no further analysis of due process was required.[220]

The due process required in administrative agencies' decisions are not only governed by the Constitution but also by *Hawaii Revised Statutes* chapter 91. In *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*,[221] Chief Justice Lum, in an opinion written for a 4-1 majority, examined the Honolulu City Council's decision to grant permits under both a constitutional and a statutory analysis. The appellant challenged the validity of the City and County of Honolulu's procedures in granting Special Management Area use permits.[222] They claimed that contested case hearings were required before the permit could be issued.[223] Justice Lum applied a two-part test: (1) whether a valid property interest was affected and (2) if so, what process was due.[224] He found that no valid property or liberty interest existed—because neither aesthetic nor environmental interests qualified as a property interest[225]—and therefore that due process procedures were not required.[226]

Although Justice Lum could have ended his analysis here, he went on to apply the *Mathews* balancing test to determine if due process was satisfied if a property or liberty interest had been affected. He concluded that even if the environmental claim fell within the meaning of a "property" interest, sufficient due process was provided because the appellants had both notice and an opportunity to be heard through the two public (but not "contested case") hearings that were held prior to the issuance of the permit.[227]

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[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* at 332-33, 713 P.2d at 956.

[221] 70 Haw. 361, 773 P.2d 250 (1989).

[222] *Id.* at 365, 773 P.2d at 254.

[223] *Id.* at 376, 773 P.2d at 260.

[224] *Id.* (citing Aguiar v. Hawaii Hous. Auth., 55 Haw. 478, 495, 522 P.2d 1255) (1974).

[225] 70 Haw. at 377, 773 P.2d at 261.

[226] *Id.*

[227] *Id.* at 378, 773 P.2d at 261.

Justice Lum then addressed appellant's statutory claim—that the requirements of due process under HAPA were violated—by giving a strict interpretation of the language of the statute. He examined the language in *Hawaii Revised Statutes* section 91-1 that defines "agency,"[228] and ruled that this definition exempts the legislative branch.[229] Because the City Council is the legislative body for Honolulu, it falls within that exception. Even though quasi-judicial actions were taken by the City Council, HAPA does not apply.[230] The due process requirements of notice and an opportunity to be heard were satisfied by the public hearings and the more stringent requirements under HAPA were not required.[231]

In his dissent, Justice Nakamura questioned the majority's conclusion that the constitutional requirements of due process were satisfied. He argued that the appellants did have a valid property interest,[232] based on *Hawaii Revised Statutes* section 205A-21.[233] He also pointed out that although the language of HAPA exempts the legislature, the exemption was of "no consequence"[234] because the City Council was acting in a quasi-judicial capacity in administering state law and not in a legislative fashion.[235] For quasi-judicial proceedings, due process requires a full and fair hearing and not merely informational hearings.

Another requirement of due process in quasi-judicial administrative proceedings is an impartial tribunal, which was addressed in *Sussell v.*

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[228] HAW. REV. STAT. § 91-1 defines "agency" as follows: "'Agency' means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." *Id.*

[229] *Id.* at 370, 773 P.2d at 257.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 389, 773 P.2d at 267.

[233] HAW. REV. STAT. § 205A-21 states:

Coastal Zone Management—Findings and Purposes

The legislature finds that, special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided. The legislature finds and declares that it is the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii.

Id.

[234] 70 Haw. at 385, 773 P.2d at 265.

[235] *Id.* at 387-88, 773 P.2d at 266.

Honolulu Civil Service Commission.[236] Malcolm Sussell was demoted by Mayor Frank Fasi when his duties as Administrator of the Oahu Civil Defense Agency were shifted to the Administrative Assistant of the City's Managing Director.[237] Mr. Sussell viewed this shift as contrary to his civil service status and sought a review by the Honolulu Civil Service Commission.[238] The Commission failed to act for nine months, during which time the composition of the commission changed due to Mayor Fasi's new appointments for two of the four commissioner positions.[239] The Commission determined that Mr. Sussell's position was not a civil service position.[240] The circuit court reversed and remanded the case.[241] Upon remand, Mr. Sussell attempted to disqualify the board members, claiming prejudicial bias.[242] The circuit court required that actual bias be demonstrated before the members were disqualified.[243] The supreme court reversed the circuit court's decision based on the view that "a fair trial in a fair tribunal is a basic requirement of due process" and that an appearance of impropriety is enough to raise doubts as to the fairness of a tribunal.[244]

Fairness in administrative proceedings also requires the administrative agency to promulgate rules within its authority. The Hawaii Supreme Court is consistent with the federal courts in deferring to the administrative agency's authority in promulgating rules. In *Hyatt Corporation v. Honolulu Liquor Commission*,[245] the court found that the Honolulu Liquor Commission had the requisite authority to adopt a rule providing that businesses open for the public could not discriminate on the basis of race, religion, sex, or ancestry.[246] Hyatt was charged

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[236] 71 Haw. 101, 784 P.2d 867 (1989).

[237] *Id.* at 104, 784 P.2d at 868.

[238] *Id.* at 104, 784 P.2d at 869.

[239] *Id.*

[240] *Id.* at 105, 784 P.2d at 869.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 106, 784 P.2d at 869.

[244] *Id.* at 107, 784 P.2d at 870 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

[245] 69 Haw. 238, 738 P.2d 1205 (1987).

[246] *Id.* at 239-40, 738 P.2d at 1206. RULES OF THE LIQUOR COMMISSION OF THE CITY AND COUNTY OF HONOLULU, STATE OF HAWAII, Rule 7-21 provides:

> Unlawful Discrimination. (a) No licensee whose premises are open for business to the general public shall refuse, withhold from, or deny to any person, the full and equal enjoyment of any of the licensee's accommodations, advantages, facilities, goods, privileges, or services on the basis of that person's race, religion, sex or ancestry.

Id.

with violating this rule and sought to have the rule declared void on the basis that the Commission did not have the authority to promulgate it.[247] The court, however, validated that rule finding that the Liquor Commission has broad discretionary powers and that Rule 7-21 is in accord with public policy disfavoring discrimination.[248]

In summary, the Hawaii Supreme Court has followed federal precedent in analyzing due process claims in administrative proceedings. The court first subjects constitutional due process claims to the threshold question of whether a property or liberty interest is affected. The court's majority did not find such an interest in *Sandy Beach Defense Fund v. City Council,* and also ruled that the quasi-judicial decision affecting the environment in that case was not subject to the requirements of HAPA.[249] This decision appears to be inconsistent in spirit with the more rigorous due process view in *Sussel v. City & County,* where an agency decision (subject to HAPA) was overturned because of questions regarding the impartiality of a Board member.[250]

V. The Right to Privacy

Hawai'i's Constitution contains two privacy provisions: article I, section 6[251] which was added in 1978 to give new protections to an individual's right to privacy, and article I, section 7,[252] which is the more traditional formulation to provide protection from unreasonable searches, seizures, and invasions of privacy and is the Hawai'i counterpart to the Fourth Amendment of the United States Constitution.[253]

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[247] *Id.* at 240, 738 P.2d at 1206.

[248] *Id.* at 243-44, 738 P.2d at 1208-09.

[249] *See supra* notes 221-35 and accompanying text.

[250] *See supra* notes 236-44 and accompanying text.

[251] Haw. Const. art. I, § 6 states: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." *Id.*

[252] Haw. Const. art. I, § 7 states:

> The right of people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Id.

[253] Stand. Comm. Rep. No. 69, *reprinted in* I Proceedings of the Const. Convention of Haw. of 1978, at 674 (1980).

The 1950 Hawaii Constitution first provided protection for individuals from unreasonable searches and seizures in what was then numbered as article I, section 5 (and is now article I, section 7),[254] deriving its language from the Fourth Amendment.[255] Delegates to the 1968 Constitutional Convention amended this provision to include language to protect individuals from unreasonable "invasions of privacy" and to protect "communications sought to be intercepted." The 1968 Constitutional Convention Committee Report indicates that the delegates sought to expand privacy protection under section 5.[256]

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[254] HAW. CONST. art. I, § 5 (1950) read as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things seized.

Id.

U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,shall not be violated; and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[255] COMM. WHOLE REP. No. 5, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1950, at 301 (1960). The drafters of the 1950 Constitution intended that the State benefit from federal decisions construing the Fourth Amendment. *Id.*

[256] The Committee on Bill of Rights, Suffrage and Elections explained the new language:

> Your Committee is of the opinion that inclusion of the term "invasions of privacy" will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of the areas of a person's life which are defined as necessary to insure "man's individuality and human dignity."

STAND. COMM. REP. No. 55 (Majority), *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1968, at 233-34 (1973).

The Committee of the Whole, in amending section 5, further stated:

> The protection against unreasonable invasions of privacy, as proposed by Committee Proposal No. 11, is intended to include protection against unreasonable interception of communications. Accordingly, your Committee has included the words "or the communications sought to be intercepted" at the end of Section 5, not only to indicate that the broad scope of the term "invasions of privacy" shall include protection of a person against unreasonable interception of communications, but also to avoid any interpretation, by the absence of such words, that warrants issuing need not be supported by particular description of the

In part because of the confusion over the scope of the privacy right added to section 5 in 1968, delegates to the 1978 Constitutional Convention created what is now article I, section 6 to recognize privacy as a fundamental right, and retained article I, section 5, which was renumbered to become section 7.[257] The two provisions were intended to serve different purposes and section 5 has been applied only to criminal cases.[258]

A. Article I, Section 6

Article I, section 6 guards a person's right to privacy in contexts other than criminal proceedings. It is designed to protect two types of interests: privacy in the "informational sense" and in the "personal autonomy" sense.[259] The Lum Court has begun to interpret the scope of this protection in both contexts.

In five out of the six cases[260] where plaintiffs have claimed invasions of privacy under section 6, the Lum Court has rejected the claim. Although the delegates to the 1978 Hawaii Constitutional Convention adopted the amendment specifically to recognize privacy as a fundamental right, the court has interpreted the privacy provision narrowly.

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communications sought to be intercepted.

COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1968, at 356 (1973).

[257] The Committee Report explained:

> In 1968 the Constitution was amended to include the prohibition against unreasonable invasions of privacy, but its inclusion within a section patterned after the Fourth Amendment right against unreasonable searches and seizures and the debate during the 1968 constitutional convention have engendered some confusion as to the extent and scope of the right . . . Thus it may be unclear whether the present privacy provision [referring to Article I, Section 5 (now Section 7)] extends beyond the criminal area. Therefore, your Committee believes that it would be appropriate to retain the privacy provision in Article I, Section 5 but limit its application to criminal cases, and create a new section as it relates to privacy in the informational and personal autonomy sense.

STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 674 (1980).

[258] *Id.*

[259] *Id.*

[260] A seventh case discussing this provision (along with § 7), State v. Rothman is discussed *infra* at notes 328-40 and accompanying text. In *Rothman*, the court relied on both § 6 and § 7 in holding that the installation of pen registers required a search warrant.

1. Protection of information

Privacy in the "informational" sense concerns "the possible abuses in the use of highly personal and intimate information in the hands of government or private parties but is not intended to deter the government from the legitimate compilation and dissemination of data."[261] The Lum Court has stated that this right protects an individual's interest in avoiding disclosure of personal matters.[262]

In *Nakano v. Matayoshi*,[263] Justice Nakamura's opinion for the court upheld a county ethics code that required county employees to disclose personal and private financial information, such as sources of income, property holdings, and creditors owed. Although the court recognized that individuals have a legitimate expectation of privacy in their personal financial affairs,[264] the court did not extend full protection to public officials because article XIV of the Hawaii Constitution subjects public employees to a code of ethics that limits their rights.[265]

Information must be highly personal and intimate to warrant privacy protection. In *Painting Industry of Hawaii v. Alm*,[266] the court, in an opinion written by Chief Justice Lum, held that the Department of Commerce and Consumer Affairs was required to disclose terms of a settlement agreement between the Department and a private contractor involving license law violations.[267] In construing *Hawaii Revised Statutes* sections 92-50 and 92E-1, which implemented the constitutional right of privacy,[268] the court determined that these enactments did not violate

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[261] STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 674 (1980).

[262] Nakano v. Matayoshi, 68 Haw. 140, 148, 706 P.2d 814, 819 (1985).

[263] *Id.*

[264] *Id.* at 148, 706 P.2d at 819.

[265] *Id.* at 148-49, 706 P.2d at 819.

[266] 69 Haw. 449, 746 P.2d 79 (1987).

[267] *Id.* at 454, 746 P.2d at 82.

[268] *Id.* at 452, 746 P.2d at 81. The Department argued that disclosure of a personal record violated HAW. REV. STAT. § 92E4. It further contended that the settlement agreement was a personal record because it was "about" the contractor's managing employee. *Id.* at 453, 746 P.2d at 81.

HAW. REV. STAT. § 92E-1 defines a personal record as:

> "Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's educational, financial, medical or employment history, or items that contain or make reference to the individual's name, identifying

the responsible employee's right of privacy because the settlement agreement did not contain "highly personal and intimate" information.[269]

Similarly, the court has ruled that a subpoena of a person's bank records does not violate his federal or state constitutional right to privacy. In *State v. Klattenhoff*,[270] the defendant, who was convicted for theft, argued that he had a reasonable expectation of privacy to his bank records. Justice Padgett, writing for the court, adopted the federal rule[271] in holding that a person has no such expectation.[272] Bank records, the court ruled, are instruments in commercial transactions that the banks own because they are business records. When they reveal their affairs to a bank, depositors run the risk that the government will obtain this information.[273]

The court has not yet identified a privacy right in the "informational" sense that is protected under article I, section 6. The *Painting Industry* opinion indicates that medical, financial, educational, or employment records might be considered "highly personal and intimate" information that would warrant privacy protection.[274] Despite the indication in *Nakano* that persons have an expectation of privacy in their financial matters, the *Klattenhoff* decision holds that they have no reasonable expectation of privacy in bank records.

2. *Personal autonomy privacy*

The second type of privacy interest protected by article I, section 6 is privacy in the "personal autonomy" sense. In determining the scope of protection under this provision, the court has examined the records from the 1978 Constitutional Convention for guidance.[275] The Lum

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number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. "Personal record" includes a "public record" as defined under section 92-50.

Id.

[269] 69 Haw. at 454, 746 P.2d at 82.

[270] 71 Haw. 598, 801 P.2d 548 (1990).

[271] United States v. Miller, 425 U.S. 440 (1976).

[272] 71 Haw. at 606, 801 P.2d at 552.

[273] *Id.* (citing United States v. Miller, 425 U.S. 435, 443 (1976)).

[274] 69 Haw. at 454, 746 P.2d at 82.

[275] The Committee on Bill of Rights, Suffrage and Election of the Constitutional Convention of Hawaii of 1978 described the provision that became art. I, § 6 as

Court has found no personal privacy interest to protect prostitution in one's home[276] or to limit the government from conducting mandatory drug testing of police officers,[277] but it has ruled that this provision protects the purchase, and thus also the sale and distribution, of obscene materials.[278]

In *State v. Mueller*,[279] the court held in an opinion written by Justice Nakamura that a woman did not have a constitutionally protected privacy right to engage in unsolicited prostitution in her own home. The court examined the legislative history of article I, section 6, and found that the 1978 Constitutional Convention sought to protect "certain highly personal and intimate matters, [where] the individual should be afforded freedom of choice, absent a compelling state interest."[280] The Constitutional Convention's committee report said that this right was "similar to the privacy right discussed in cases such as *Griswold v. Connecticut*,[281] *Eisenstadt v. Baird*,[282] *Roe v. Wade*,[283] etc."[284]

The *Mueller* court, held, however, that this privacy right did not protect an individual's decision to engage in unsolicited prostitution in

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follows:

> Your Committee believes that the right of privacy encompasses the common law right of privacy or tort privacy. This is a recognition that the dissemination of private and personal matters, be it true, embarrassing or not, can cause mental pain and distress far greater than bodily injury. For example, the right can be used to protect an individual from invasion of his private affairs, public disclosure of embarrassing facts, and publicity placing the individual in a false light. In short, this right of privacy includes the right of an individual to tell the world to "mind your own business.". . . . It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy.

STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 674 (1980).

[276] State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983).

[277] McCloskey v. Honolulu Police Dep't, 71 Haw. 568, 799 P.2d 953 (1990).

[278] State v. Kam, 69 Haw 483, 748 P.2d 1372 (1988).

[279] 66 Haw. 616, 671 P.2d 1351 (1983).

[280] 66 Haw. at 625, 671 P.2d at 1357 (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1024 (1980)).

[281] 381 U.S. 479 (1965).

[282] 405 U.S. 438 (1972).

[283] 410 U.S. 113 (1973).

[284] 66 Haw. at 625, 671 P.2d at 1357 (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1024 (1980)).

the individual's own home.[285] The court found no federal decision that recognized this activity as a fundamental right.[286] Although the Constitutional Convention Report could be read to support the view that article I, section 6 was intended to expand the federal right to privacy, the framers referred specifically to the three United States Supreme Court cases cited above. The court refused, therefore, to infer "a talismanic effect" from the privacy provision.[287] The *Mueller* opinion acknowledges that no strong reasons have been identified for criminalizing prostitution,[288] but nonetheless refuses to rule that the right to privacy affords any protection to this activity.

The court also rejected the privacy claim related to drug testing in *McCloskey v. Honolulu Police Department*.[289] A Honolulu Police officer argued that the Police Department's drug testing policy violated her right to privacy because it intruded upon her bodily integrity, was overbroad and unnecessary, and did not adequately protect against improper disclosure of information.[290] The court rejected this argument and refused to decide explicitly whether the mandatory drug testing policy implicated a right to privacy under the Hawaii Constitution. Instead, the court said the policy was valid even if this action infringed on a privacy interest, because it was a necessary means to achieve a compelling state interest.[291]

The court's "strict scrutiny" analysis required the state's action to be "structured with precision" and to be the least intrusive means to achieve the desired result.[292] The court concluded that the drug policy served a compelling state interest to insure that police officers safely perform their jobs, protect the public safety, and preserve the integrity of the Honolulu Police Department and its ability to perform its job.[293]

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[285] 66 Haw. at 623, 671 P.2d at 1356.

[286] *Id.*

[287] *Id.* at 630, 671 P.2d at 1360.

[288] *Id.* at 626-27 n.6, 671 P.2d at 1358 n.6.

[289] 71 Haw. 568, 799 P.2d 953 (1990).

[290] *Id.* at 575, 799 P.2d at 957.

[291] *Id.* at 576, 799 P.2d at 957.

[292] *Id.* at 575-76, 799 P.2d at 957 (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973)).

[293] *Id.* at 576-77, 799 P.2d at 558; *see also* Doe v. City and County of Honolulu, 8 Haw. App. 571, 816 P.2d 306 (1991) (Intermediate Court of Appeals applied *McCloskey* to hold that the Honolulu Fire Department's drug testing programs did not violate the firefighters' right to privacy).

The drug testing was also deemed a reasonable search under article I, section 7, because the need to conduct the program outweighed the police officers' diminished expectation of privacy. The court followed a United States Supreme Court decision that upheld suspicionless drug testing for customs employees.[294]

Although the *McCloskey* result is similar to decisions in other states,[295] the Lum Court's analysis is nonetheless odd in that the court was unwilling to recognize that mandatory drug testing of police officers invaded the individual's right to privacy. The court could still have found the testing constitutional even with a privacy finding because it also found a compelling interest to justify the governmental invasion in the safety interest of the community.

In both *Mueller* and *McCloskey*, the court quotes from the Committee of the Whole's Report of the Constitutional Convention:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis . . . . This privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, etc. . . . . As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated.[296]

Although the framers' committee report could be read to expand privacy rights, the court has been reluctant to take a broad view of the framers' intent. The lone exception is *State v. Kam* where the court did depart from federal precedents to find a privacy right to sell and

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[294] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), *cited in* 71 Haw. at 579-80, 799 P.2d at 959.

[295] *See, e.g.*, Annapolis v. United Food, 565 A.2d 672 (Md. 1989) (mandatory drug testing program for police officers and firefighters upheld); City of East Point v. Smith, 365 S.E.2d 432 (Ga. 1988) (city's urinanalysis testing of police captain to detect marijuana use was reasonable); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985) (police department policy ordering an member to submit to urinalysis testing upon suspicion of drug abuse did not violate Fourth Amendment); Seelig v. Koehler, 556 N.E. 2d 125 (N.Y. 1990) (random drug testing program for correction officers was reasonable).

[296] COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1024 (1980) (citations omitted).

distribute pornographic material.[297] In that opinion, written by Justice Hayashi, the court reversed the convictions of two individuals convicted of promoting pornographic material, holding that the statute violated the privacy rights of the purchasers to view sexually explicit material.[298]

Justice Hayashi began his analysis by examining the United States Supreme Court's decision in *Stanley v. Georgia*[299] that a person has a fundamental privacy right to read and view pornographic material in the person's own home.[300] Although the United States Supreme Court had also held "that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others,"[301] the Lum Court reached the opposite conclusion, finding that this "correlative right" is protected under article I, section 6 of the Hawaii Constitution.[302] The court reasoned that to prohibit the sale of such material would render the privacy right meaningless.[303] The state could thus prohibit the sale of the material therefore only if it could demonstrate a compelling state interest, which it failed to do.[304]

Justice Hayashi distinguished the court's earlier *Mueller* decision by pointing out that Ms. Mueller did not have a federally-recognized fundamental right to engage in prostitution in her home comparable to the right recognized in *Stanley* to view pornography at home. Ms. Mueller did, however, have a fundamental right to make decisions regarding sexual and reproductive activities, recognized in the United States Supreme Court decisions of *Griswold*, *Eisenstadt*, and *Roe*. The court did not explain why this right becomes unprotected for Ms. Mueller when she seeks to engage in sex in her home for commercial gain, even though the *Stanley* right to view obscene material in one's home remains protected when one engages in commercial acts of buying and selling the obscene material to obtain the material.

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[297] 69 Haw. 483, 748 P.2d 372 (1988).

[298] *Id.* at 495, 748 P.2d at 376. The court granted the sellers standing to assert the privacy rights of buyers to purchase pornographic materials to read or view in their home. *Id.* at 489, 748 P.2d at 375.

[299] 394 U.S. 557 (1969).

[300] 69 Haw. at 489, 748 P.2d at 376.

[301] *Id.* at 490, 748 P.2d at 376 (citing United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973)).

[302] 69 Haw. at 495, 748 P.2d at 380.

[303] *Id.*

[304] *Id.*

It is unclear how the court will interpret article I, section 6 in the future. The *Kam* court found that the right to distribute pornographic material was protected by the Hawaii Constitution by reasoning that the failure to so find would render meaningless the right to view pornographic material in one's own home, a right already recognized under the United States Constitution. The *Mueller* decision failed, by contrast, to find that the right to privacy protects unsolicited commercial sexual activity, even though the United States Supreme Court has interpreted the United Staes Constitution to protect sexual and reproductive activities in general. In *McCloskey*, the court refused to determine whether drug testing infringed on the police officers' privacy interests, but found that the state had a compelling interest in conducting such tests in any event.

B. Article I, Section 7

As explained in the introduction of this section, article I, section 7[305] of the Hawaii State Constitution protects against unreasonable searches, seizures, and invasions of privacy in the criminal context, and is based on the Fourth Amendment of the United States Constitution, with references to privacy and intercepted communications added in 1968.[306] When a person has a legitimate expectation of privacy, the government cannot conduct a search without a warrant, except in certain narrowly defined situations.[307]

The Hawaii Supreme Court has adopted the two-prong test set forth in *Katz v. United States*[308] to determine when a person has a legitimate privacy interest: the individual must have exhibited an actual expectation of privacy and the expectation must be one that society would deem reasonable.[309]

As mentioned above, the Lum Court has in selected cases interpreted sections 6 and 7 of article I to protect rights not protected under the United States Constitution, but in most instances it has been content to adhere to federal precedents. A case decided in 1982, the last year of the Richardson Court, illustrates this tension. In *State v. Lester*,[310]

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[305] *See supra* notes 252 and 256 and accompanying text; *see also* discussion of related cases *supra* notes 185-208 and accompanying text.

[306] *See supra* notes 254-58 and accompanying text.

[307] State v. Mahone, 67 Haw. 644, 701 P.2d 171 (1985).

[308] 389 U.S. 347 (1967).

[309] *Id.* at 357.

[310] 64 Haw. 659, 649 P.2d 346 (1982).

the court held by a sharply divided vote that "participant" or "consensual" electronic monitoring by the government did not violate the defendant's right to privacy. Justice Lum, writing only for himself and Justice Ogata,[311] found admissible a tape-recorded conversation at a public park between a government agent and the defendant that revealed incriminating statements the defendant made about his wife's murder.[312] According to the court, the defendant did not have a reasonable expectation of privacy in this conversation.[313] The court cited United States Supreme Court precedents[314] that permitted such monitoring on the ground that the agent was free to testify about the conversation in any event and the tape merely corroborated the agent's credibility.[315]

The court also found that article I, section 7 of the Hawaii State Constitution did not require a warrant for this type of participant monitoring. It looked to the framers' intent that article I, section 7 be construed according to a "reasonable-expectation-of-privacy" test.[316] The term "privacy" was used in article I, section 7 "not in the sense of a fundamental right, but as a test of whether the prohibition against unreasonable searches and seizures applies."[317]

Justice Menor concurred with the result because Lester's conversation occurred in a public park. But he said that the government was not entitled to record conversations without a warrant in situations where the conversation was immediately transmitted to other listening agents or occurred in a private place.[318]

Justice Nakamura and Chief Justice Richardson dissented, asserting that the delegates to the 1968 Constitutional Convention intended to provide more expansive protection for individuals under article I, section 7 than the protection provided in United States Supreme Court decisions.[319] They believed that section 7 was designed to protect against "unreasonable invasions of privacy by the government."[320]

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[311] Retired Justices Ogata and Menor were temporarily assigned to this case. *Id.* at 659, 649 P.2d at 348.

[312] 64 Haw. at 663, 668, 649 P.2d at 350, 353.

[313] *Id.* at 668, 649 P.2d at 353.

[314] Lopez v. United States, 373 U.S. 427, 439 (1963); United States v. White, 401 U.S. 745, 751 (1971).

[315] 64 Haw. at 664-65, 649 P.2d at 351.

[316] *Id.* at 667-68, 649 P.2d at 353.

[317] *Id.* (quoting COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 2024 (1980)).

[318] *Id.* at 674-75, 649 P.2d at 356.

[319] *Id.* at 684, 649 P.2d at 362.

[320] *Id.*; see *supra* note 256 and accompanying text for the Constitutional Convention's

In *State v. Okubo*,[321] the Lum Court revisited these issues because the composition of the court had changed[322] and by a 3-2 vote affirmed Justice Lum's reasoning in *Lester*.[323] The defendants, who were indicted for bribing two police officers, sought to suppress warrantless taped conversations between the officers and the defendant, including those conducted in a public restaurant.[324] The court followed *Lester* in ruling that warrantless monitoring did not violate article I, section 7, because the police officers had "consented" to the taped conversation.[325]

This time Justices Nakamura and Wakatsuki dissented, arguing that the delegates to the 1968 Hawaii Constitutional Convention intended to expand protection under article I, section 7 to require a warrant for all electronic eavesdropping.[326] They argued that "knowledge that government must justify its need to engage in electronic eavesdropping would definitely 'secure a measure of privacy and a sense of personal security throughout our society' as intended by the framers."[327]

In contrast to these cases, the Lum Court has identified a protectable privacy interest when the government seeks to use pen registers to monitor an individual's incoming or outgoing telephone calls.[328] In *State v. Rothman*,[329] the court, in an opinion written by Justice Padgett,

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[320] *Id.*; see *supra* note 256 and accompanying text for the Constitutional Convention's committee report.

[321] 67 Haw. 197, 682 P.2d 79 (1984).

[322] The court said:

> [B]ecause of the change in the composition of this court, we granted certiorari only to review the important issues. We affirm the reasoning in the plurality opinion of *Lester, supra*, and the I.C.A.'s decision in *Okubo, supra*, and find the consensual monitoring of the conversation valid under Article I, Section 7 of the Hawaii Constitution and [HAW. REV. STAT.] § 803-42(b)(3).

Id. at 200, 682 P.2d at 81.

[323] *Id.*

[324] *Id.* at 198-99, 682 P.2d at 79-80.

[325] *Id.* at 199-200, 682 P.2d at 80-81.

[326] *Id.* at 201, 682 P.2d at 81-82.

[327] *Id.* at 202, 682 P.2d at 82 (quoting United States v. White, 401 U.S. 745 (1971) (Harlan, J., dissenting)). In State v. Lee, 67 Haw. 307, 686 P.2d 816 (1984), the court held that warrantless consensual monitoring in physician's private office did not violate art. I, § 7. The court said the *Lester* and *Okubo* courts interpreted "invasions of privacy" to give "defendants [no] greater protection than that guaranteed in the Fourth Amendment to the U.S. Constitution." 67 Haw. at 309-10, 686 P.2d at 818. Justices Wakatsuki and Nakamura again dissented and said that *Lester* and *Okubo* should be overturned. 67 Haw. at 317, 686 P.2d at 822.

[328] State v. Rothman, 70 Haw. 546, 779 P.2d 1 (1989).

[329] *Id.*

found that persons using telephones have a reasonable expectation of privacy to telephone numbers they call and receive on their private lines.[330] The Office of Narcotics Enforcement had obtained a warrant to install a pen register on Rothman's telephone line and ordered the telephone company to supply a list of all incoming and outgoing telephone calls from the line, but the warrant was procedurally deficient.[331] The state presented two alternative arguments: (1) that no warrant was required to obtain the numbers of incoming and outgoing calls and (2) that, in any event, the warrant issued was valid.[332]

The court recognized that the government cannot tap phones or require the telephone company to do so unless it obtains a warrant.[333] In doing so, the court departed from the United States Supreme Court's decision in *Smith v. Maryland*[334] which held that the Fourth Amendment did not require a warrant for the installation of a pen register because it was not a "search."[335] Even though article I, section 7 parallels the Fourth Amendment, the Hawai'i court held that a person using telephones has a reasonable expectation of privacy to the telephone numbers made and received.[336] Failure to obtain a warrant violated article I, section 6, Hawai'i's express privacy provision.[337]

Although the court relied upon both sections 6 and 7 in its analysis, it failed to mention that section 7 has an express provision dealing with electronic surveillance that is missing from the Fourth Amendment.[338] The court chose not to rely on the expansive language adopted in 1968, although it had occasion to do so.

In addition, the court declined to adopt the good faith rule adopted by the United States Supreme Court.[339] This aspect of the decision

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[330] *Id.* at 556, 779 P.2d at 7.

[331] *Id.* at 548, 779 P.2d at 3. The warrant was titled "in the Circuit Court of the First Circuit State of Hawaii" but signed by a district court judge and filed in the District Court of the First Circuit. *Id.*

[332] *Id.* at 554-55, 779 P.2d at 7.

[333] *Id.* at 556, 779 P.2d at 7.

[334] 442 U.S. 735 (1979).

[335] 70 Haw. at 555, 779 P.2d at 7.

[336] *Id.* at 556, 779 P.2d at 7.

[337] *Id.* at 556, 779 P.2d at 8.

[338] *See* Karen L. Stanitz, Casenote, State v. Rothman: *Expanding Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619, 632 (1991).

[339] The United States Supreme Court adopted the good faith rule in United States v. Leon, 468 U.S. 897 (1984). It provides that if the officer acted in good faith in obtaining the warrant, the exclusionary rule will not be invoked to prevent the evidence obtained from being introduced at trial. *Id.* at 920-22.

was dicta,[340] however, and it remains unclear if the court in future cases will adopt the good faith rule.

The court also found a privacy interest protected by article I, section 7 in individuals' garbage. In *State v. Tanaka*,[341] the court, through Justice Hayashi, held that police cannot search opaque, closed trash bags placed on the street or located in a trash bin without a search warrant.[342] In applying the *Katz* test, the court found that under article I, section 7, individuals have a reasonable expectation of privacy in their trash.[343] Because business records, bills, correspondence, and other refuse reveal much about a person, police are tempted to search trash bags and learn of a person's activities.[344] "It is exactly this type of overbroad governmental intrusion that [a]rticle I, [s]ection 7 of the Hawaii Constitution was intended to prevent."[345] This result provides greater protection of privacy than federal courts currently provide.[346]

In two cases involving family and home situations, the court has rejected privacy claims. A parent cannot challenge a search warrant issued as a result of information supplied by a child[347] nor can a defendant assert a constitutionally protected right to remain free in his or her home after harming someone residing there.[348]

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[340] The trial judge in *Rothman* determined that the officer did not obtain the warrant in good faith when he took the warrant to the district court judge instead of the circuit judge. 70 Haw. at 557, 779 P.2d at 8.

[341] 67 Haw. 658, 701 P.2d 1274 (1985).

[342] *Id.* at 659-60, 701 P.2d at 1276. State v. Tanaka was a consolidation of three cases. In two cases, police officers trespassed onto private property to search opaque, closed trash bags located in a trash bin for evidence of gambling activities. In the third case, police acted on an anonymous tip that defendant was involved in gambling and seized the trash bag located on the curbside of defendant's property. *Id.*

[343] *Id.* at 662, 701 P.2d at 1277.

[344] *Id.*

[345] *Id.* The court also said, "In our view, article I, section 7 of the Hawaii Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights." *Id.* at 662, 701 P.2d at 1276. *See also* State v. Ching, 67 Haw. 107, 678 P.2d 1088 (1984) (defendant had a reasonable expectation of privacy in a metal, sealed cylinder during an inventory search of lost property) (Hayashi, J.); State v. Biggar 68 Haw. 404, 716 P.2d 493 (1986) (individuals have a reasonable expectation of privacy in a closed public toilet stall)(Lum, C.J.).

[346] 67 Haw. at 661, 701 P.2d at 1276. *Compare, e.g.*, United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979) *cert. denied*, 444 U.S. 1081, (1980); United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); United States v. Shelby, 573 F.2d 971, 973-74 (7th Cir. 1978), *cert. denied* 439 U.S. 841 (1978).

[347] State v. Graham, 70 Haw. 627, 780 P.2d 1103 (1989) (Nakamura, J.).

[348] State v. Kameenui, 69 Haw. 620, 753 P.2d 1250 (1988) (Lum, C.J.).

But the court has given limited privacy protection to probationers. In *State v. Fields*,[349] the defendant pleaded guilty to promoting a dangerous drug and was placed on five years' probation.[350] One of the special conditions of probation provided that she was "subject at all times during the period of her probation to a warrantless search of her person, property, or place of residence for illicit drugs and substances by any law enforcement officer, including her probation officer."[351] In determining whether this condition deprived the probationer of her rights under article I, section 7, the court weighed the societal interest in curbing the probationer's further criminal conduct against her privacy interest.[352]

Justice Nakamura, writing for the court, determined that Hawai'i's Constitution did not permit a police officer to search probationer absent probable cause, because such a search would be unrelated to rehabilitation.[353] But a probation officer could conduct such searches because the probationer has a diminished expectation of privacy in relation to the probation officer.[354] Probation involves close supervision by the correctional supervisor, and the court agreed that the "substantial governmental interest in the success of the program designed to rehabilitate a convicted criminal"[355] permitted searches without a warrant.

The court nevertheless specified that the correctional supervisor can conduct such searches only if he or she has a "reasonable suspicion supportable by specific and articulable facts" that the probationer is taking drugs to justify such an intrusion.[356] The "reasonable suspicion" standard requires that the official have information that logically points to the conclusion, but other possible explanations are also possible. This standard demands less certainty than the "probable cause" standard, which requires that the information point to the conclusion with a likelihood much higher than other possible explanations.[357]

In *State v. Morris*,[358] the court held that a probation officer could order a probationer to submit to urinanalysis tests as a condition of

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[349] 67 Haw. 268, 686 P.2d 1379 (1984).
[350] *Id.* at 272, 686 P.2d at 1384.
[351] *Id.* at 271, 686 P.2d at 1384.
[352] *Id.* at 283, 686 P.2d at 1390.
[353] *Id.* at 278-79, 686 P.2d at 1388.
[354] *Id.* at 280, 686 P.2d at 1389.
[355] *Id.* at 283, 686 P.2d at 1390.
[356] *Id.* at 281, 686 P.2d at 1389.
[357] *Id.* at 283 n.11, 686 P.2d at 1390 n.11.
[358] ___ Haw. ___, 806 P.2d 407 (1991).

probation. Chief Justice Lum reiterated for the court that probationers have a diminished expectation of privacy with respect to "minimal intrusions of drug testing" which further the state's interests.[359]

Justice Wakatsuki dissented from this result, arguing that because the probation officer had no reasonable suspicion that the probationer had taken any drugs at the time he ordered the testing, the search should be invalid under *Fields*.[360] "Otherwise, any warrantless taking of urine from a probationer for analysis opens the door to harassment of the probationer at the whim of the probation officer."[361] Justice Wakatsuki distinguished *Morris* from *McCloskey* where the court upheld warrantless urinanalysis testing of police officers, arguing that the state's safety interests in *McCloskey* were stronger than in *Morris*.[362]

C. *Summary*

The Lum Court has recognized protectable privacy interests protected under article I, section 7 of Hawai'i's Constitution in incoming and outgoing telephone calls made on a private line and in an individual's garbage. The court has, however, recognized only limited privacy interests for probationers and no protectable interests in situations involving consensual monitoring.

VI. The Right to Speak Freely

The First Amendment to the Constitution of the United States[363] and article I, section 4 of the Hawaii Constitution[364] explicitly protect the right to speak freely. Both at the federal and state levels, this right is subject to limitations and government regulations that vary according to the nature of the speech involved and the party asserting such a regulation.

The decisions by the Lum Court in this area have tended to be cautious, avoiding sweeping pronouncements and utilizing statutory

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[359] *Id.* at ____, 806 P.2d at 410.

[360] *Id.* at ____, 806 P.2d at 411.

[361] *Id.*

[362] *Id.* at ____, 806 P.2d at 412.

[363] U.S. Const. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."

[364] Haw. Const. art. I, § 4 reads: "No law shall be enacted . . . abridging the freedom of speech or of the press . . . ."

interpretations and procedural devices whenever appropriate to avoid addressing constitutional issues. In *State v. Hirayasu*,[365] for instance, where the appellant claimed the that the governing ordinance[366] restricting the posting of signs violated his right to speak freely under both the Hawaii and United States Constitutions, the court declined to address the constitutional challenge, ruling instead that there was insufficient evidence to convict the appellant under the ordinance.[367] Chief Justice Lum's opinion for the court held that the conviction could not stand because the trial court had not made any specific finding as to whether the "size, location, movement, content, coloring or manner of illumination [of the sign] constituted a traffic hazard or a detriment to traffic safety."[368] The court thereby avoided addressing whether the ordinance unconstitutionally infringed upon the right to free speech.[369]

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[365] 71 Haw. 587, 801 P.2d 25 (1990).

[366] HONOLULU, HAW., REV. ORDINANCES § 21A-3.90-2(E) (1986) states:

> It shall be unlawful to erect or maintain: . . . (E) Any sign which be reason of its size, location, movement, content, coloring or manner of illumination constitutes a traffic hazard or a detriment to traffic safety . . . by diverting or tending to divert the attention of drivers of moving vehicles from the traffic movement of the public streets and roads.

Id.

Although appellant was not cited for violating paragraph (D) which prohibits political campaign signs, the court also referred to this paragraph:

> (D) Any political campaign sign, including poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol and any other advertising device, the purpose of which is to announce the candidacy of any person or persons seeking public elected office or offices, when such sign is displayed out-of-doors.

Id. § 21A-3.90-2(D).

[367] 71 Haw. at 590, 801 P.2d at 26-27.

[368] *Id.* at 590, 801 P.2d at 27.

[369] The federal district court subsequently ruled that this ordinance is unconstitutional in Runyon v. Fasi, 762 F. Supp. 280 (D. Haw. 1991). The court relied upon criteria identified in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981): restrictions on the time, place, and manner of speech are permissible if they are content neutral, serve a significant governmental interest, and allow other forms of communication. 762 F. Supp. at 283. The court found the ordinance unconstitutionally restrictive because it was not content neutral. Distinctions between political speech and commercial speech are made without justification. *Id.* at 284. The court also determined that the city failed to select the least drastic alternative in promoting the city's goals of safety and aesthetic beauty. *Id.*

In comparison to *Hirayasu*, the federal court examined the entire ordinance including subsections (D) and (E) in determining its constitutionality. The state court in *Hirayasu* focused primarily on subsection (E).

An example of the court's use of a procedural device to avoid reaching a constitutional issue is *Wilder v. Tanouye*,[370] where the Hawaii Supreme Court reversed the Intermediate Court of Appeal's finding that an inmate had a valid claim of a deprivation of First Amendment rights. John P. Wilder was a prison inmate in the Oahu Community Correctional Center who wrote to Representative Cecil Heftel complaining of prison conditions.[371] Harry Tanouye, the prison supervisor, informed Wilder that the letter violated one of his conditions of probation.[372] Wilder claimed that Tanouye, acting under the "color of Hawaii law" deprived him of his First and Fourteenth Amendment rights guaranteed by the United States Constitution as well as rights under Hawai'i's Constitution.[373] The I.C.A. recognized that prison inmates retain free speech rights that do not conflict with penal objectives, and treated Wilder's claim as being a claim under 42 U.S.C. § 1983.[374] Tanouye asserted that Wilder's claim was moot because the written warning of the probation violation was removed from Wilder's file.[375] The I.C.A. agreed that the claims for injunctive and declaratory relief were moot but allowed Wilder's claim for money damages.[376]

The Hawaii Supreme Court, with Justice Nakamura writing for the majority, reversed the I.C.A., stating that "the viability of Wilder's claim for compensatory damages turns on whether his First Amendment rights were violated and whether the violation resulted in compensable injury."[377] Because Wilder was in fact free to write to Representative Heftel once Tanouye reversed his ruling, Wilder's right to free speech was not violated. Justice Nakamura found that damages are not awardable on "the abstract importance of First Amendment rights"

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[370] 71 Haw. 30, 779 P.2d 390 (1989), *rev'g* 7 Haw. App. 247, 782 P.2d 347 (1988).

[371] *Id.* at 32, 779 P.2d at 391.

[372] *Id.*

[373] *Id.* at 33, 779 P.2d at 391.

[374] 42 U.S.C. § 1983 (1988) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[375] 71 Haw. at 32-33, 779 P.2d at 391.

[376] *Id.*

[377] *Id.* at 37, 779 P.2d at 393.

under a section 1983 suit.[378] Although Wilder claimed both a state and federal constitutional infringement, Justice Nakamura did not distinguish the claims but addressed both as a section 1983 violation.[379] Because Wilder did not suffer actual injury, the court granted summary judgment to Tanouye, dismissing Wilder's suit because "the claim was not one that could be sustained," and thus avoided confronting the constitutional issues.[380]

Another example of the court's tendency to avoid constitutional questions is *Burdick v. Takashi*,[381] in which the Hawaii Supreme Court, in an opinion written by Justice Padgett, gave a one word answer ("No") to the question posed by the federal district court whether Hawai'i's election officials are required by the Hawaii Constitution to permit the casting of write-in votes.[382] The opinion then turned to the statutory language and ruled that because there was a conflict between a vague statute (*Hawaii Revised Statutes* section 16-22, which seems to give the chief election officer the discretion to allow write-in votes) and a specific statute (*Hawaii Revised Statutes* section 12-1, which requires the nomination of candidates), section 12-1 should govern, and therefore that write-in votes cannot be cast or counted for general or special elections.[383] With regard to primary elections, the statutory framework of *Hawaii Revised Statutes* section 12-22 does not allow write-in candidates.[384]

Estes v. Kapiolani Medical Center[385] is another case where the court avoided a full constitutional analysis, this time by invoking the "state action" doctrine and concluding that the case involved only private conduct. A private hospital objected to the appellants' two attempts to distribute anti-abortion materials in the interior walkway of the hospital.[386] In response to their removal from the premises, the appellants claimed infringement on their rights to free speech guaranteed under

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[378] *Id.* at 37, 779 P.2d at 394.

[379] *Id.*

[380] *Id.* at 37, 779 P.2d at 393.

[381] 70 Haw. 498, 776 P.2d 824 (1989).

[382] *Id.* at 498, 776 P.2d at 825.

[383] *Id.* at 499, 776 P.2d at 825.

[384] *Id.* at 500, 776 P.2d at 826.

[385] 71 Haw. 190, 787 P.2d 216 (1990); *see also* Lisa A. Laun & Mark D. Lofstrom, Casenote, Estes v. Kapiolani Women's and Children's Medical Center: *State Action and the Balance Between Free Speech and Private Property Rights in Hawaii*, 13 U. HAW. L. REV. 233 (1991).

[386] 71 Haw. at 191, 787 P.2d at 218.

article I, section 4 of the Hawaii Constitution.[387] The appellant had argued that although the hospital was a private institution it was a quasi-public facility because it performed a public function and therefore should be deemed a public facility for free speech purposes.[388]

Justice Wakatsuki, writing for the court, recognized that there are instances where the state and the individual have a "sufficiently close nexus" so that the individuals' actions are treated as the actions of the state, thus implicating constitutional guarantees.[389] The appellants, however, failed to show with clear and convincing evidence that the State "directed, encouraged or supported the Hospital's no solicitation policy."[390] Nor did they show a "clear and convincing nexus between the Hospital's no-solicitation policy and its funding, regulation, or business relationship between the Hospital and the State."[391] Because no nexus was shown, Justice Wakatsuki rejected the appellant's argument and stated that this dispute involved a purely private hospital. The police enforcement of the hospital's directives did not, therefore, amount to state action.[392] He stated that the constitutional right to free speech "erects no shield against merely private conduct, however discriminatory or wrongful" in determining whether free speech rights were violated.[393]

It is interesting to compare the *Estes* decision with *Silver v. Castle Memorial Hospital*,[394] where the Hawaii Supreme Court ruled that a private hospital *did* have to meet constitutional standards in the context of peer review evaluations. The appellants in *Estes* had argued that *Silver* supported the proposition that Kapiolani Hospital was a quasi-

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[387] *Id.* at 192, 787 P.2d at 218. Appellants had earlier filed a similar action in federal district court raising the same claim; that court dismissed the case, ruling that "state action" was not involved and therefore that the claim did not come under the federal constitution. *Id.*

[388] *Id.*

[389] *Id.* at 193, 787 P.2d at 219 (citing Blum v. Yaretsky, 475 U.S. 991, 1004 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974)).

[390] 71 Haw. at 193, 787 P.2d at 219.

[391] *Id.* at 194, 787 P.2d at 219.

[392] *Id.*

[393] *Id.* at 193, 787 P.2d at 219 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

[394] 53 Haw. 475, 497 P.2d 564 (1972). The court utilized the public function test to determine whether the hospital administrative board's decision to deny staff privileges was subject to judicial review. The court held that there was sufficient grounds to establish that hospital owed a fiduciary duty to the public and therefore the administrative board's decision was subject to judicial review. *Id.* at 479-80, 497 P.2d at 568.

public facility.[395] Justice Wakatsuki, however, distinguished *Silver* by quoting from language in *Silver* where the court had said it "do[es] not mean to characterize appellee as anything other than a private hospital."[396] Although Justice Wakatsuki focused on this passage in *Silver*, the court's decision in *Silver* appears to be less certain on this point. The *Silver* opinion, written by Justice Kobayashi, states that:

> [I]f 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 breaks down and becomes meaningless, especially if the hospital's patients are considered to be of primary concern.[397]

This passage seems to infer that judicial review using constitutional standards would be proper for the hospital's action in *Estes*.[398]

Justice Wakatsuki emphasized federal precedents in determining whether violation of appellants' rights occurred. Appellants had argued that the court should adopt the holding of a California case, *Robins v. Pruneyard Shopping Center*,[399] where a privately owned shopping center was not allowed to restrict expressive activity unrelated to commercial purposes. Justice Wakatsuki, however, distinguished *Robins* by focusing on the difference between the language of the First Amendment and the more liberal language in California's Constitution. He noted that Hawai'i's provision regarding free speech is virtually identical to that of the federal constitution and therefore adopted the reasoning of the federal cases.[400]

Although the courts reasoning in *Estes* appears to be inconsistent with *Silver*, its result may nonetheless be correct because the exercise of free speech in a hospital—whether public or private—may be incompatible with the purposes of the hospital.[401] Although areas exist such

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[395] 71 Haw. at 194, 787 P.2d at 219.

[396] *Id.* at 195, 787 P.2d at 220 (quoting 53 Haw. at 482, 497 P.2d at 570).

[397] 53 Haw. at 482, 497 P.2d at 570.

[398] Laun & Lofstrom, *supra* note 385, at 266.

[399] 592 P.2d 341 (Cal. 1979).

[400] 71 Haw. at 196-97, 787 P.2d at 220-21.

[401] *See* Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding union access to an interschool mail system). The Supreme Court set out three criteria to determine the right to access to public property depending on the character of the property. The first category is "quintessential public forums" such as streets and parks where government cannot enforce a content-based exclusion unless a compelling state interest is served. The second category is public property which the

as sidewalks and parks that "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely,"[402] the interior walkways of a hospital are not historically or traditionally associated with free speech rights. A hospital—whether public or private—arguably could thus limit the appellants' conduct.[403]

In the area of defamation, the Lum Court has addressed the constitutional issues of free speech more directly and has followed the federal standard. In the two related cases of *Mehau v. Gannett Pacific Corp.*[404] and *Beamer v. Nishiki*,[405] the Hawaii Supreme Court addressed the applicable standard to defamation claims. In *Mehau*, where the plaintiffs claimed defamation by several defendants for publishing, broadcasting, and telecasting statements as to alleged underworld connections, Justice Nakamura applied the standard set forth in *New York Times Co. v. Sullivan*.[406] The party claiming defamation must prove with clear and convincing proof that the defamatory statement was made with actual malice, i.e., with "knowledge of falsity or with reckless disregard for the truth."[407] In *Beamer v. Nishiki*,[408] where the plaintiff filed suit with regard to a campaign advertisement in the 1978 Lieutenant Governor campaign claiming Billie Beamer was under the

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state has opened to the public for expressive activity, such as an outdoor stage. Again the government cannot enforce content-based restrictions, but the government is not required to "indefinitely maintain the open character" of the facility. The third category consists of public property traditionally or by designation that is not a forum for public communication. The government may restrict speech in these instances as long as the regulation is reasonable. *Id.* at 45-46; *see also* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding restriction against demonstrating on a public sidewalk while school was in session because distracting demonstrations were "incompatible" with the mission of the school).

[402] 71 Haw. at 196, 787 P.2d at 220 (quoting Amalgamated Food Employees Union Local, 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968)).

[403] 71 Haw. at 196, 787 P.2d at 220; *see also* Laun & Lofstrom, *supra* note 385, at 261 (the authors argue that the court by limiting its discussion to the state action doctrine ignored an opportunity to establish a strong precedential analysis examining the entire hospital as an improper forum for expressive conduct as compared to the limited interior walkways).

[404] 66 Haw. 133, 658 P.2d 312 (1983).

[405] 66 Haw. 572, 670 P.2d 1264 (1983).

[406] 376 U.S. 254 (1964).

[407] 66 Haw. at 144, 658 P.2d at 320 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)).

[408] 66 Haw. 572, 670 P.2d 1264 (1982).

control of Larry Mehau and George Ariyoshi, the Hawaii Supreme Court set out a four-part test a plaintiff must meet to prove a defamation claim.[409]

The Hawaii Supreme Court concluded in the *Mehau* case that the actual malice standard is equally applicable to media and nonmedia defendants when an action is brought by a public official or public figure.[410] The court applied this standard because a distinction between the two categories would result in a situation "where media defendants, with a greater capacity for damaging an individual's reputation because of their wide dissemination of information, would be accorded greater rights than other speakers in society."[411]

In conclusion, the Lum Court has decided relatively few cases involving the right to speak freely. For most claims of infringement on this constitutional right, the court has tended to utilize statutory interpretation and procedural devices, as in *Hirayasu* and *Wilder*, instead of addressing the constitutional issues. In *Estes*, the court also avoided a constitutional analysis of the free speech issues but probably reached the same result that the United States Supreme Court would have reached in that case. Because the court has examined only a few cases concerning the right to free speech, a definitive pattern is not apparent.

VII. The Right to Participate in Elections: Hawai'i's Resign to Run Provision

Hawai'i's voters amended the Hawaii State Constitution in 1978 to include article II, section 7, otherwise known as the "resign-to-run-provision."[412] The Lum Court has interpreted article II, section 7

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[409] *Id.* at 578-79, 670 P.2d at 1271. To prove defamation, the plaintiff must establish four elements:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher [actual malice where the plaintiff is a public figure]; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. (citing Restatement (Second) of Torts § 558 (1977)).

[410] 66 Haw. at 144-45, 658 P.2d at 320-21 (citing Rodriguez v. Nishiki, 65 Haw. 430, 436-37, 653 P.2d 1145, 1149 (1982)).

[411] *Id.*

[412] Haw. Const. art. II, § 7 states: "Any 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." *Id.*

narrowly, ruling in *Cobb v. State by Watanabe*[413] that it does not require state officeholders seeking federal office to resign their elected office.[414] In an opinion by Chief Justice Lum, the court's majority ruled that State Senator Steve Cobb did not have to resign his state senate seat in order to become a candidate for the United States House of Representatives.[415]

In this 3-2 decision, the court held that the provision was ambiguous on its face and that its legislative history revealed that the drafters at the 1978 Constitutional Convention did not clearly intend for the resign-to-run provision to include candidates for federal office.[416] Aware that every "resign to run" provision affects the rights of voters and candidates, the court was "reluctant to read into [a]rticle II, section 7 any resignation requirement that was not clearly intended."[417]

Justice Nakamura and I.C.A. Judge Heen argued in their dissent that both the framers and voters intended that public officials "cannot use [their] elected office as a 'safe haven from which to make [a] political foray[] and return if he proves unsuccessful.'"[418] The majority's ruling "renders [a]rticle II, section 7 ineffectual where the most sizeable group of officeholders capable of launching political forays for more powerful, prestigious, and lucrative federal offices from the safe haven of state offices is concerned."[419]

According to the dissenters, the legislative history suggested that the philosophy of the resign-to-run amendment was to prevent "political opportunism" and therefore required Senator Cobb to resign his office.[420] As the drafters of the amendment at the 1978 Constitutional Convention explained:

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[413] 68 Haw. 564, 722 P.2d 1032 (1986).

[414] *Id.* at 566, 722 P.2d at 1034; *see also* Fasi v. Cayetano, 752 F. Supp. 942 (1990). The U.S. District Court held that art. II, § 7 required Mayor Fasi to resign his office as Mayor of Honolulu if he sought to have his name placed on the ballot as a candidate for Governor of the State of Hawaii. *See generally* Linda C.J. Young, Recent Development, Fasi v. Cayetano*: Challenging Hawaii's "Resign-to-Run" Amendment*, 13 U. HAW. L. REV. 327 (1991).

[415] 68 Haw. at 564, 722 P.2d at 1033. Senator Cobb represented the 12th Senatorial District and his term ran from November 6, 1984 to November 8, 1988. *Id.* at 565, 722 P.2d at 1033.

[416] 68 Haw. at 564, 722 P.2d at 1033.

[417] *Id.* at 565-66, 722 P.2d at 1033.

[418] *Id.* at 567, 722 P.2d at 1034 (quoting STAND. COMM. REP. No. 72, *reprinted in* I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 678 (1980)).

[419] 68 Haw. at 568-69, 722 P.2d at 1035.

[420] *Id.* at 567-68, 722 P.2d at 1035.

> 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 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.[421]

VIII. Religious Freedoms

The Constitution of the United States[422] and of Hawai'i[423] explicitly protect the right to free exercise of religion and prohibit the establishment of a religion by the government. When the Lum Court has examined claims based on the free exercise of religion, it has focused upon whether the challenged government regulation actually burdens the exercise of religion. The court has reviewed only a few cases addressing the freedom of religion issue, and the court's decisions in these cases are consistent with federal precedents.

The court has used what is known as the "*Andrews* test"[424] to determine if the right to freedom of religion is infringed. Under this test, the court first asks "whether the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief."[425] Second, the court looks at "whether or not the parties' free exercise of religion had been burdened by the regulation."[426] The court then looks at the "extent or impact of the regulation on the parties' religious practices."[427] Finally, the court asks "whether or not the state had a compelling interest in the regulation which justified such a burden."[428] In applying this standard, the Lum Court has focused on the second part of the test, whether or not a regulation burdens a party's free exercise of religion.[429]

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[421] *Id.* at 567, 722 P.2d at 1035 (quoting Stand. Comm. Rep. No. 72, *reprinted in* I Proceedings of the Const. Convention of Haw. of 1978, at 678 (1980)).

[422] U.S. Const. amend. I provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[423] Haw. Const. art. I, § 4 reads: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[424] State v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982).

[425] *Id.*

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] The religious claim must be based upon an integral part of the religious practice. The Intermediate Court of Appeals has addressed this issue in State v. Blake, 5 Haw.

The Lum Court first addressed the freedom-of-religion issue in *Koolau Baptist Church v. Department of Labor*.[430] The church claimed an exemption from a state statute requiring contributions to the unemployment compensation fund for wages paid to lay teachers and staff.[431] It argued that such a requirement interfered with its free exercise of religion and violated the Establishment Clause.[432] The court rejected both claims and noted that "[n]ot all burdens on religion are unconstitutional."[433] A state may regulate religious practices in order to promote health, safety, and welfare. To trigger the *Andrews* balancing test, a challenger must show "significant conflict between permissible goals of the state and religious practice."[434] Because the court found no significant conflict, it did not apply the balancing test.

After rejecting the free exercise claim, the court examined the Establishment Clause issue, drawing upon the federal precedent in *Lemon v. Kurtzman*,[435] where the Supreme Court set forth the following

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App. 411, 695 P.2d 336 (1985). Defendant was convicted for possession of marijuana (a petty misdemeanor in the third degree) in violation of HAW. REV. STAT. § 712-1249 (1976). Defendant argued that enforcement of the statute resulted in an unconstitutional deprivation of his religious rights because marijuana use was an integral part of the religion of Tantrism, necessary to practice kundalini yoga. *Id.* at 417, 695 P.2d at 338. The court rejected the defendant's claim and stated that although the defendant was assumed to be "sincere in his religious beliefs," *id.*, the evidence presented did not establish that marijuana use was an essential part of his religion. The defendant had the burden of proving that the practice of marijuana use was "an integral part of a religious faith and that the prohibition of [marijuana] results in a virtual inhibition of the religion or the practice of the faith." *Id.* at 418, 695 P.2d at 340 (citing People v. Mullins, 123 Cal. Rptr. 201, 207 (1975)). Because the defendant could not prove that the regulation was burdening his religious belief and practice (the district court had found marijuana use to be optional in Hindu Tantrism), the court ended its application of the test and did not determine whether a compelling state interest existed or not. The court did conclude, however, that the state interest in prohibiting marijuana use outweighed the "defendant's claimed religious interests." 5 Haw. App. at 418, 695 P.2d at 340.

[430] 68 Haw. 410, 718 P.2d 267 (1986).

[431] *Id.* at 413, 718 P.2d at 269.

[432] *Id.*

[433] *Id.* at 417, 718 P.2d at 272 (quoting United States v. Lee, 455 U.S. 252, 257 (1982)).

[434] 68 Haw. at 419, 718 P.2d at 273 (quoting Young Life v. Division of Employment & Training, 650 P.2d 515, 524 (Colo. 1982) (*citing* Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 599 (1961))).

[435] 403 U.S. 602 (1971).

criteria: "whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters excessive government entanglement with religion."[436] The court concluded that the record-keeping requirements were not excessive entanglements and hence that the Establishment Clause was not violated.[437]

The most recent religion case reaffirms the court's requirement that a significant showing of a burden on religious practices is necessary before striking down a governmental action. In *Dedman v. Board of Land and Natural Resources*,[438] the Board approved development of geothermal energy in the Kilauea Middle East Rift Zone. The appellants claimed that drilling in the area would infringe upon their exercise of native religious practices as "Pele Practitioners."[439] The religious view of appellants is that the area and phenomena associated with volcanic activity are related to the goddess Pele and therefore the area sacred.[440] The appellants view drilling in this area as a desecration.[441] No question was raised as to the sincerity of the appellants' religious claims, and therefore the court addressed only the second part of the *Andrews* test—whether the exercise of religion was burdened.[442] The court determined that the appellants were not burdened because a land exchange moved the location of the drilling site five to ten miles from the area associated with Pele and because the Board stated that tapping has not diminished the "eruptive nature" of Kilauea.[443] The appellants also failed to demonstrate a burden because no testimony was presented stating whether any religious practices were conducted on the land.[444] The court found that "approval of the geothermal plant does not regulate or directly burden Appellants religious beliefs, nor inhibit religious speech."[445]

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[436] 68 Haw. at 419, 718 P.2d at 273 (quoting Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305 n. 30 (1985); *Kurtzman*, *supra* note 435 at 612-13).

[437] 68 Haw. at 421, 718 P.2d at 274.

[438] 69 Haw. 255, 740 P.2d 28 (1987).

[439] *Id.* at 259, 740 P.2d at 31.

[440] *Id.*

[441] *Id.* at 261, 740 P.2d at 32.

[442] *Id.* at 260, 740 P.2d at 32.

[443] *Id.* at 261-62, 740 P.2d at 33.

[444] *Id.* at 261, 740 P.2d at 33.

[445] *Id.* at 261, 740 P.2d at 32.

The court's decision in *Dedman* is consistent with the United States Supreme Court's recent decision in *Lyng v. Northwest Indian Cemetery Protective Association*,[446] which also applied a narrow view of the Free Exercise Clause. Organizations and individuals in *Lyng* claimed that the Forest Service's plans to allow timber harvesting and road construction in an area of the national forest interfered with their religious beliefs and practices.[447] The Court, however, rejected this claim and found that the government's actions did not violate or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[448] The Court viewed the Free Exercise Clause as "afford[ing] an individual protection from certain forms of governmental compulsion; [but] it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[449]

It is not clear what would satisfy the Hawai'i court's requirement of a substantial burden on the free exercise of religion, because the Lum Court has not provided examples of what would constitute a burden. The geothermal activity in *Dedman* clearly impacted the religious beliefs of the appellants, because they viewed the geothermal drilling as a direct attack on the essence of their deity, but the court nevertheless failed to recognize a sufficiently "substantial burden." What then would constitute a "substantial burden" to the exercise of religion?

IX. Conclusion and a Modest Proposal

The Lum Court has operated conscientiously and carefully to protect the rights guaranteed to Hawai'i's citizens in Hawai'i's Constitution. Most of its decisions reflect a sensitivity to the claims presented, and most are consistent with federal decisions. In the area of criminal procedure, the court has incrementally added to the federal protections in selected areas.[450] In two jury selection cases, the court has acted boldly to protect the rights of ethnic minorities and women.[451]

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[446] 485 U.S. 439 (1988).

[447] *Id.* at 448.

[448] *Id.* at 449.

[449] *Id.* at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986)).

[450] *See supra* notes 84-209 and accompanying text.

[451] State v. Batson, 71 Haw. 300, 788 P.2d 841 (1990); State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990); *see supra* notes 36-44 and 75-83 and accompanying text. As

When dealing with rights somewhat unique to Hawai'i's Constitution—such as the Equal Rights Amendment or the right to privacy—the court's decisions seem particularly cautious and the opinions seem reluctant to provide an overview of the scope of these rights. We still do not know how Hawai'i's Equal Rights Amendment should be interpreted, even though it has been in our Constitution for twenty years. The court has recognized a protectable privacy in commercial access to obscene material,[452] but not in unsolicited commercial sexual activity.[453] The court also refused to acknowledge that police officers have a privacy interest in their bodily fluids.[454] From these decisions, it is difficult to discern the boundaries of Hawai'i's right to privacy. As indicated in another article in this issue, the court has also shied away from or been insensitive to issues related to native Hawaiian rights.[455]

The court has also been reluctant to address free speech issues, as best illustrated by its one-word answer to the question posed by the federal district court on whether the Hawaii Constitution protects the right to write-in a candidate on an election ballot.[456] The United States Supreme Court deemed the federal constitutional issues raised by this case to be sufficiently complex to warrant the issuing of a writ of certiorari so that a full decision could be rendered.[457]

The primary criticism that can be aimed at this court is, therefore, not so much that its decisions are wrong, but rather that its opinions are sometimes incomplete and that its frequent use of memorandum decisions[458] leaves many questions unanswered. Because Hawai'i is a

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discussed *supra*, the *Levinson* opinion does not fully address the complex issue of whether the Equal Protection Clause should apply to the exercise of peremptory challenges by a defendant, an issue that is now before the United States Supreme Court. *See supra* note 83.

[452] State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988); *see supra* notes 297-304 and accompanying text.

[453] State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983); *see supra* notes 279-88 and accompanying text.

[454] McCloskey v. Honolulu Police Dept. 71 Haw. 568, 799 P.2d 953 (1990); *see supra* notes 289-96 and accompanying text.

[455] Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992).

[456] Burdick v. Takushi, 70 Haw. 498, 776 P.2d 824 (1989); *see supra* notes 381-84 and accompanying text.

[457] Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991), *cert. granted*, ___ U.S. ___ , 112 S.Ct. 635 (1991).

[458] *See* David K. Frankel, *The Hawai'i Supreme Court: An Overview*, 14 U. HAW. L. REV. 5 (1992).

young state and because many of its constitutional provisions have been recently amended, many constitutional issues remain unresolved. It is important for the Hawaii Supreme Court to address these issues when cases present them, and to provide clear guidance to the lower courts and the residents of Hawai'i on the meaning of our Constitution.

One modest proposal can be offered that might help to solve this problem of the court's reluctance to address some of the controversies presented to it: the size of the Hawaii Supreme Court should be expanded from five justices to seven. Several problems are created by a five-person court that could be alleviated with a slightly larger court:

** In a five-member court, it takes only three justices to render a decision, and a single justice may be able to wield substantial persuasive authority over one or several other justices and thus dominate the court's decisionmaking process.[459]

** A three-two decision is such a narrow judgment that it does not always offer the community the sense of authority needed to legitimize a controversial judicial decision.

** Five persons cannot begin to reflect the diversity of a state like Hawai'i, with its many ethnic groups. At the time of this writing (March 1992), for instance, the court has no justices of Hawaiian or Filipino ancestry, and of course also has no women, which is a particularly notable omission. A larger court would be more likely to have justices that represent a broader cross-section of Hawai'i's population, and thus would have members that could understand and draw upon the many different traditions and customs of the communities of these islands.

** More dissents are likely to be written if the court is larger, thus bringing greater illumination to the complex issues that the court confronts.

** And finally, and perhaps most importantly, a body of five is less likely to reach bold, courageous, or unpopular decisions than a larger body. This phenomenon occurs because in a body of five the members still see themselves as individually responsible for the decision whereas in a larger body their views are given strength by the other members

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[459] In studies of the operations of juries of six and twelve, for instance, researchers have found that the smaller juries are likely to be more erratic, because they may be dominated by a particularly persuasive juror or because they do not adequately reflect the diversity of the community, and that larger juries are more likely to reflect the composite judgment of all the jurors and the community as a whole. *See* VAN DYKE, JURY SELECTION PROCEDURES, *supra* note 36, at 197-200.

of the body and the decision is perceived to be a group or collective outcome.

An increase from five to seven would not, of course, change any of these factors dramatically, but it probably would help to transform the court from a group of individuals to a collective body. Such a change could reinforce the court's legitimacy and strengthen its role as protector and interpreter of the rights codified in Hawai'i's Constitution.

The Lum Court and Native Hawaiian Rights

by Melody Kapilialoha MacKenzie*

I. Introduction

Since Herman Lum became Chief Justice of the Hawaii Supreme Court in 1983, the court has issued relatively few opinions dealing with Native Hawaiian issues. Those few opinions may not be sufficient to allow a fair assessment of the Lum Court's attitude toward Native Hawaiian rights. Only five published decisions can be identified as dealing with "purely" Native Hawaiian issues. The rest, while brought by Hawaiians and affecting Native Hawaiian concerns are not strictly Hawaiian rights cases. The few cases heard and determined by the court indicate that the Lum Court is not receptive to Native Hawaiians rights. Indeed, *none* of the cases expands or advances those rights.

With one important exception, *Ahia v. Department of Transportation*,[1] all of the court's Native Hawaiian rights decisions have been rendered by a unanimous court. Many of the decisions issued are in fact memorandum opinions and have no precedential effect. These opinions are discussed here because they mark a disturbing trend by the court to issue memorandum opinions even where a published opinion could clarify or develop the existing body of law.

II. The Native Hawaiian Trusts

Perhaps the clearest opportunity for the Lum Court to play a more dynamic, but still judicially appropriate, role in recognizing Native

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[1] 69 Haw. 538, 751 P.2d 81 (1988) (Nakamura, J.).

Hawaiian rights is in interpreting the two Native Hawaiian trusts—the Hawaiian Home Lands Trust and the Public Land Trust. The court's task in these instances would be merely to construe the applicable statutes establishing the trusts consistent with the state's fiduciary responsibility. The court's decisions, however, have been disappointingly conservative, merely confirming the status quo or worse.

A. The Hawaiian Home Lands Trust

In 1921, the United States Congress passed the Hawaiian Homes Commission Act (HHCA),[2] setting aside between 188,000 acres and 203,000 acres of public trust lands for homesteading by Native Hawaiians.[3] Under the HHCA, Native Hawaiians could obtain ninety-nine year leases at the rate of a dollar per year, for residential, pastoral, and agricultural lots. The HHCA also provided for services to assist the beneficiaries with the establishment of these homesteads. Congress, however, restricted eligibility for the program to Native Hawaiians of fifty percent or more Hawaiian blood. Primary responsibility for administration and management of the Hawaiian Homes program was transferred to the State of Hawaii as a condition of statehood.[4] The program is now administered by a state agency, the Department of Hawaiian Home Lands, whose executive board is the Hawaiian Homes Commission. The federal government, however, still retains responsibility for certain aspects of implementing the original act and Congress has retained the power to amend the act.[5]

In 1985, the Hawaiian Homes Commission (Commission), leased 4.3 acres of Hawaiian Homes lands to the Department of Transportation (D.O.T.) for a public boat ramp at Kaulana, Kama'oa-Pu'u'eo, Ka' for $10,575, or the construction of certain improvements designed to accelerate homesteading in the area. Several beneficiaries challenged the Commission's authority, under section 204 of the HHCA, to lease the area to a public agency. Section 204(2) authorizes the Commission

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[2] 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. at 167-205 (1985) (adopted in the HAW. CONST. art. XII, § 1).

[3] See MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 43-76 (1990), for a detailed analysis of the HHCA and its implementation.

[4] Hawaii Admission Act §§ 4, 5, 73 Stat. 4 (1959), *reprinted in* 1 HAW. REV. STAT. at 86-89 (1985).

[5] *Id.*; HHCA § 223, 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. at 167-205 (1985).

to lease lands not required for homesteading to the public. The beneficiaries contended that a government agency, such as the D.O.T., is not a member of the public within the meaning of section 204(2).

The Hawaii Supreme Court in *Ahia v. Department of Transportation*, in a three-to-two decision, agreed with the Commission that section 204 allows such a disposition.[6] In a lengthy opinion, Justice Nakamura, writing for the majority, determined that the elimination of the term "general public" in an earlier version of section 204(2) and the substitution of the term "public" indicated an intention by the legislature to include government agencies.[7] According to the majority, the term "general public" refers to the people or community at large, but does not include organized government.[8] The legislative committee reports on the amendment indicated that one of its purposes was to "grant the Department of Hawaiian Home Lands (Department) full authority to manage available Hawaiian home lands not required for leasing[.]"[9] The committee reports, however, gave no reason for the deletion of "the general public" and the substitution instead of "the public."[10] The court concluded, however:

> In light of the stated purpose to invest the Commission with 'full authority to manage retained available . . . lands,' we think the amendment could only have been meant to dispel any notion that the Commission was not vested with such authority, including the power to lease to the government or its agencies 'available lands not required for leasing [as homestead lands to beneficiaries].'[11]

The majority opinion did not specifically address whether this disposition constituted a breach of the Commission's trust responsibility, but given the court's handling of other issues raised by the beneficiaries, it is unlikely that the majority would have found a breach of the trust. For instance, the beneficiaries had asserted that the lands in question were immediately needed for homesteading purposes. In disposing of that issue, the majority recognized that the Kama'oa-Pu'u'eo lands had never been leased to Native Hawaiians for homesteading, but justified the Commission's decision to lease the lands to the D.O.T.

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[6] 69 Haw. 538, 751 P.2d 81 (1988).

[7] *Id.* at 548, 751 P.2d at 88.

[8] *Id.* at 547, 751 P.2d at 88.

[9] *Id.* at 547, 751 P.2d at 87 (citing SEN. STANDING COMM. REP. No. 600-76, *reprinted in* 1976 HAW. SEN. J. 1141).

[10] *Id.*

[11] *Id.*

as one that would bring water to the area and make it possible to start a homesteading program.[12]

The minority opinion,[13] written by Justice Padgett, with Justice Hayashi concurring, addressed the breach of trust question. Under the second paragraph of HHCA section 204(2), in giving a lease for "commercial, industrial, or other business purposes" the Department is required to give preference to Native Hawaiians. The appellants, Native Hawaiian beneficiaries, had alleged that they were willing and able to take the lease in question. The majority opinion rejected the notion that the lease was for a commercial purpose. Justice Padgett pointed out, however, that the two terms are not mutually exclusive; a boat ramp may be used by the public but can also serve a commercial purpose if fees are charged.[14] The minority concluded that as long as the lease had commercial as well as public aspects to it, the Commission had a fiduciary responsibility to, at least, give consideration to making the lease to beneficiaries.[15] Justice Padgett also took the Commission and Department to task, reminding them that they, unlike other government agencies, are held to higher fiduciary responsibilities in dealing with beneficiaries.[16]

The minority opinion then examined the construction of section 204(2). Another provision of HHCA, section 207(c), allows the Department to grant utility easements and licenses for public purposes. If section 204(2) can be read as giving the Department the authority to lease lands for public purposes, then, Padgett argued, the provisions of section 207(c) are "mere surplusage, devoid of any effect."[17]

Advocating a "holistic" approach, Justice Padgett concluded that the HHCA contains a "complete framework for dealing with the trust lands."[18] This framework allows the Commission to make certain dispositions for public purposes and, with restrictions, to make leases to the public. It does not, in the minority's judgment, grant the Commission the unrestricted power to make leases for public purposes to other government agencies.[19] Justice Padgett, in an important foot-

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[12] *Id.* at 550, 751 P.2d at 89.
[13] *Id.* at 552, 751 P.2d at 89 (Padgett, J., dissenting).
[14] *Id.* at 553, 751 P.2d at 90.
[15] *Id.* at 554, 751 P.2d at 91.
[16] *Id.* at 553, 751 P.2d at 91.
[17] *Id.* at 556, 751 P.2d at 92.
[18] *Id.* at 557, 751 P.2d at 93.
[19] *Id.* at 557-58, 751 P.2d at 93.

note, recognized that his construction of the HHCA would require legislative action to validate certain dispositions of trust lands made by the Department. He concluded, however,

> [I]f there is to be a power, in the Department, to turn over trust lands to other government agencies, it should be as a result of express language enacted by the legislature and approved by Congress with a full public debate on the desirability and the terms thereof. We owe the trust and its Native Hawaiian beneficiaries no less.[20]

In another case involving a dispute between the Department of Hawaiian Home Lands and an individual lessee, Justice Padgett, writing for a unanimous court, held that a special proceeding instituted by the Hawaiian Homes Commission to enforce a decision to terminate a homestead lease was a civil action which, under Rule 4 of the Hawaii Rules of Civil Procedure, requires the service of a summons and allows the defendant twenty days to answer. In *In re Smith*,[21] a Native Hawaiian homesteader who had been loaned $25,000 by the Commission for construction of his home, withheld payments because of defective electrical wiring done by the contractor, who had been contracted by the Commission to build the house.[22] No summons to Smith was issued by the circuit court and Smith was not given an opportunity to respond as required by Rule 4.[23]

The supreme court held that the circuit court lacked jurisdiction to enter a judgment granting the Hawaiian Homes Commission's petition to recover Smith's leasehold and ordering Smith to vacate the leasehold. The court found that the Commission's procedure of filing a special proceeding to ask the circuit court to enforce a "Writ of Assistance" was not cognizable under any court rules and the entire proceeding violated Smith's due process' rights.[24]

The *Smith* decision is the only published opinion in which the Lum Court has unanimously supported the rights of a Native Hawaiian individual or organization. The court may have been influenced by the equities of the situation—Smith was not able to get insurance for his home because of the wiring deficiencies, the Commission had not required the contractor to correct the deficiencies, and Smith had been

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[20] *Id.* at 558 n.1, 751 P.2d at 93 n.1.
[21] 68 Haw. 466, 719 P.2d 397 (1986) (Padgett, J.).
[22] *Id.* at 467, 719 P.2d at 399.
[23] *Id.* at 469, 719 P.2d at 400.
[24] *Id.* at 471, 719 P.2d at 401.

making his payments into an informal escrow account. Moreover, the court did not treat the case as a native rights case but analyzed it merely as a violation of individual due process rights.

B. The Public Land Trust

The Hawaii Supreme Court, in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,[25] based its ruling on the "political question" doctrine and refused to determine two important questions on entitlements to the Office of Hawaiian Affairs from the public land trust.

The public land trust originates in language found in the Joint Resolution of Annexation[26] ceding Hawai'i's sovereignty and conveying about 1.7 million acres of Government and Crown Lands to the United States. The resolution provided that existing laws of the United States relative to public lands would not be applicable to Hawai'i. Another provision of the joint resolution stated that "all revenues from or proceeds of [the public lands] . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[27]

The 1900 Organic Act establishing Hawai'i's territorial government provided that the public lands, with certain exceptions, would remain in the possession, use, and control of the Territory.[28] Another provision of the Organic Act stated that the proceeds from the territory's sale, lease, or other disposition of these ceded lands should be deposited in the territory's treasury for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation."[29]

Upon statehood, the public lands (the former Government and Crown lands) were returned to the state as a public trust. Section 5(f) of Hawai'i's Admission Act states that the lands, and income and

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[25] 69 Haw. 154, 737 P.2d 446 (1987) (Nakamura, J.).

[26] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898).

[27] *Id.* A U.S. Attorney General's Opinion characterized the joint resolution's provision: "The effect of [the language] was to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for education or other purposes." 22 OP. ATT'Y GEN. 574 (1899).

[28] Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 141 (1900).

[29] *Id.* § 73(4)(e).

proceeds from the sale or other disposition of the lands, shall be held by the state as a public trust for five trust purposes, including the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act as amended.[30]

Prior to 1978, the state had interpreted the section 5(f) provision to require that the proceeds and income from the public land trust be used for the fulfillment of any one of the five trust purposes and the state chose to make that one purpose public education. At the 1978 Constitutional Convention, however, the Hawaiian Affairs Committee sought to clarify and implement the Admission Act's trust language relative to Native Hawaiians. As a result, three new sections were added to the state constitution fundamentally altering the state's role in implementing the section 5(f) trust language. Article XII, section 4 specified that the lands in the public land trust (with the exception of the Hawaiian Home Lands) are held by the state as a public trust for Native Hawaiians and the general public. Article XII, section 5 established an Office of Hawaiian Affairs (O.H.A.) to be governed by a nine-member board of trustees, which would hold title for the benefit of Hawaiians and Native Hawaiians to all real or personal property, set aside or conveyed to it. Article XII, section 6 set forth the powers of the O.H.A. board of trustees and made it clear that a pro rata portion of the income and proceeds from sale or other disposition of the public land trust was included within the property that O.H.A. was to hold in trust.

The Constitution did not specify, however, what O.H.A.'s pro rata share would be. In 1980, the state legislature set the amount to be received by O.H.A. from the proceeds and income generated by the public land trust at twenty percent.[31] However, many issues relating to the public land trust and its proceeds and income remained. Disputes over whether specific parcels of land were part of the trust, questions as to whether "income" meant gross or net income, and problems in defining "proceeds" plagued O.H.A. and hampered it in carrying out its responsibilities to Native Hawaiians.

It was against this background that *Trustees of the Office of Hawaiian Affairs v. Yamasaki*[32] was decided. O.H.A. Trustees filed two separate suits. The first suit, brought against the Attorney General, the Chair

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[30] Hawaii Admission Act § 5(f), 73 Stat. 4 (1959).

[31] Act 273, 10th Leg., 2nd Sess., 1980 Haw. Sess. L. 525 (codified in HAW. REV. STAT. § 10-13.5 (1980)).

[32] 69 Haw. 154, 737 P.2d 446 (1987).

of the Board of Land and Natural Resources, and the Director of Finance, in their official capacities, sought a declaration that O.H.A. was entitled to twenty percent of the damages received by the state in settlement of a lawsuit for the illegal mining of sand from Pohaku Beach, ceded lands, on Moloka'i.[33] The state had received land from Molokai Ranch valued at $1,279,006 as damages in the suit.[34] O.H.A. alleged that it was entitled to receive an undivided twenty percent interest in the land or a cash amount equal to twenty percent of the appraised value of the land.[35] The Trustees also sought mandatory relief to enforce the judgment.[36]

The second suit, brought against the Director of Transportation and the Aloha Tower Development Corporation, sought a declaration that O.H.A. was entitled to twenty percent of the income and the proceeds from sales, leases, or other disposition of lands surrounding harbors on all the major islands, land on Sand Island, land on which Honolulu International Airport is located, and land on which the Aloha Tower Complex stands.[37]

The state moved to dismiss the actions contending that O.H.A. lacked standing to sue and the suits were barred by sovereign immunity.[38] After consolidation for hearing, the circuit court denied the state's motions but granted leave to seek interlocutory appellate review.[39] State officials appealed. The Hawaii Supreme Court declined to rule on the sovereign immunity or standing questions stating that, after examining the facts, they found the issues "to be of a peculiarly political nature and therefore not meet for judicial determination."[40]

With regard to the questions raised in the first action, the court stated:

> Nothing in [Hawaii Revised Statute] § 10.5, where the public land trust is described, serves as statutory base for a ruling that such damages are funds derived from the public land trust or that a pro rata portion of

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[33] *Id.* at 165-66, 737 P.2d at 453.

[34] *Id.* at 166 n.14, 737 P.2d at 453 n.14.

[35] *Id.* at 166, 737 P.2d at 453.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 167, 737 P.2d at 454.

[39] *Id.*

[40] *Id.* at 175, 737 P.2d at 458 (quoting Colegrove v. Green, 328 U.S. 549, 552 (1946)).

> the land conveyed to the State in lieu of the damages should in turn be conveyed to the Trustees of OHA. Either ruling would be rendered possible only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion.[41]

In looking at the second case, the court was influenced by the fact that the state had already made commitments for the revenues from the harbors and airports.[42] Construction of the state's harbors and airports is financed through bond sales and a state guarantee that revenues obtained from the operation of these facilities will be used to repay bondholders. The court concluded:

> Were the circuit court to enjoin the Director of Transportation as prayed by the Trustees, he would be compelled to renege on the State's pledge. It would be unrealistic, to say the least, for us to conclude this could have been the intent of the legislature when the language of [Hawaii Revised Statute section] 10-13.5 was adopted.[43]

Moreover, the court appeared to believe that even when O.H.A.'s share of the public lands trust fund was fixed at twenty percent by the state legislature, the trust res was undetermined. The court found evidence of this in the act authorizing the legislative auditor to complete the inventory of ceded lands and study the use and distribution of revenues from ceded lands. The court noted that all four committees to which the measure was referred found there were uncertainties with respect to ceded lands comprising the trust and the funds derived therefrom.[44] The court also noted that the Legislative Auditor's Final Report of December 1986 stated that the uncertainties surrounding the trust and funds derived therefrom could not be resolved without further legislative action.[45] Consequently, the court, following the lead of the Legislative Auditor, concluded that the issues were better left for resolution by the legislature than the judiciary.[46]

Two and half years later, the O.H.A. Trustees and Governor Waihee announced a settlement of the ceded lands dispute, which was ultimately approved by the legislature.[47]

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[41] *Id.* at 174-75, 737 P.2d at 458.

[42] *Id.* at 175, 737 P.2d at 458.

[43] *Id.*

[44] *Id.* at 173, 737 P.2d at 457.

[45] *Id.* at 174, 737 P.2d at 457-58.

[46] *Id.* In October 1987, the United States Supreme Court declined to review the *Yamasaki* decision. 484 U.S. 898 (1987) (denying certiorari).

[47] Under the terms of the settlement, approved by the 1990 Legislature as Act 304,

In 1991, the relationship between individual Native Hawaiians and the public trust lands under the Aloha Tower Development Complex was reviewed by the court. In *Kaapu v. Aloha Tower Development Corporation*,[48] Kekoa Kaapu challenged the procedures used by the Aloha Tower Development Corporation to select a developer for the Aloha Tower complex. After filing a lawsuit for injunctive relief, Kaapu filed a notice of pendency of action at the bureau of conveyances. The trial court subsequently granted an order expunging the notice. On reviewing that order, the supreme court examined the lis pendens statute and the property interest it was designed to protect. Kaapu claimed an interest in the land because as a Hawaiian or Native Hawaiian, he had a "recognized, though unsettled, interest in ceded lands which underlie much of the 'Aloha Tower' project area . . . ."[49] In determining whether that interest was sufficient to give Kaapu standing to file a notice of lis pendens, the court inferred that an individual Native

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both the trust corpus and trust revenues have been defined. Act 304 provides that all Hawaii Admission Act section 5(b), 5(e), and Pub. L. No. 88-233 lands, with the exception of Hawaiian Homes trust lands, are subject to the trust, regardless of departmental jurisdiction. This means that all lands in these categories, whether administered by the Department of Land and Natural Resources, D.O.T., or any other state department, are subject to the O.H.A. entitlement.

Revenues have been segregated into two categories—sovereign and proprietary income.

Sovereign income is the income which the state generates as an exercise of governmental or sovereign power. This income is not subject to the O.H.A. trust provision. Among the revenues included in the sovereign category are personal and corporate income taxes, general excise taxes, fines collected for violations of state law, and federal grants or subsidies.

Proprietary income is the income generated from the use or disposition of the public trust lands. Included in this category are rents, leases, and licenses for the use of trust lands, minerals, and runway landing fees. Proprietary income is subject to the O.H.A. trust provision.

The settlement also sets forth specific guidelines for determining amounts due for previous years including the use of the sovereign and proprietary income categories to segregate income generated on trust lands calculated from the effective date of the 20 percent formula (June 16, 1980) and payment of the allowed statutory interest compounded annually on the actual amounts due. After all the calculations have been made and the total amounts due for previous years are determined, the trustees and governor have agreed that O.H.A. may take amounts due for previous years in the form of money, land, or a combination of money and land. While the exact amounts are still being calculated, it is estimated that O.H.A. will be entitled to an additional $7-8 million a year as a result of the settlement.

Act 304, 15th Leg., 2nd Sess., 1990 Haw. Sess. L. 947.

[48] 72 Haw. 267, 814 P.2d 396 (1991).

[49] *Id.* at 268, 814 P.2d at 397.

Hawaiian's interest in lands under the Aloha Tower Development could be no greater than that given to the O.H.A. by statute. Under applicable statutes, O.H.A. merely has a right to a percentage income from the development of the lands, it does not have a claim to title or control over the use or development of the land. Consequently, the court concluded, "[i]f the trustees [of O.H.A.] have no more than that power, then appellant has no more than that power . . . . [Kaapu's] remedy may lie in seeking injunctive relief, which [he] has done; however, he is not entitled to place a cloud on the subject property."[50]

More recently, the supreme court issued a memorandum opinion in a case alleging a breach of O.H.A.'s fiduciary duties. In *Kepoo v. Burgess*,[51] four Hawaiians and Native Hawaiians challenged O.H.A.'s authority to use section 5(f) funds to conduct a referendum on the whether the blood quantum distinction between "Hawaiians" and "Native Hawaiians" should be eliminated.[52] Appellants alleged a breach of fiduciary duty in that the O.H.A. Trustees advocated a single definition of "Native Hawaiian" as one with *any* amount of Hawaiian blood and expended trust funds to inform and educate the Hawaiian community about the single definition referendum.

The circuit court had granted O.H.A.'s summary judgment motion, finding that: "The betterment of the conditions of native Hawaiians can be achieved in many ways. Programs such as the single definition referendum that promote self-definition is one of the many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit."[53] The supreme court found no reversible error and summarily affirmed.[54]

The authority of the O.H.A. trustees to use section 5(f) funds for various activities has been raised previously[55] and undoubtedly will be raised again. The supreme court could have used the *Kepoo* case to

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[50] *Id.* at 270, 814 P.2d at 398.

[51] S. Ct. No. 14770 (June 25, 1991).

[52] A "Native Hawaiian" as defined in the Hawaiian Homes Commission Act, and applicable federal and state law dealing with the public land trust, is one with not less than fifty per cent Hawaiian blood. A "Hawaiian" is one with any percentage of Hawaiian blood. HAW. REV. STAT. § 10-2 (Supp. 1991).

[53] Kepoo v. Burgess, Civ. No. 88-2987-09, (Haw. 1st Cir.) (summary judgment granted Aug. 28, 1990).

[54] S. Ct. No. 14770 (June 25, 1991).

[55] *See* Price v. Akaka, 928 F.2d 824 (9th Cir. 1990).

give guidance to the trustees and beneficiaries on the authorized uses of trust funds. It chose not to do so. Moreover, in the *Kepoo* decision, the supreme court noted its

> disagreement with [the O.H.A. trustees'] assertion that the legislature may alter the intended purposes of the section 5(f) public trust. In creating the section 5(f) public trust, Congress directed that all proceeds of the trust were to be used for 'one or more' of five statutory purposes. . . . We therefore believe that the statutory purposes of the section 5(f) trust may not be changed without Congressional approval.''[56]

If indeed, as the memorandum opinion indicates, O.H.A. raised the argument that the state could change the trust purposes established in section 5(f) of the Admission Act, then the court should have published an opinion dispelling that notion, rather than merely allude to it in a decision lacking precedential effect.

III. Religious Freedom

In *State v. Lono*,[57] members of the Temple of Lono were arrested and charged with camping without a permit at Kualoa Regional Park. Kualoa is a sacred site and the location of an ancient heiau dedicated to Lono. Park regulations did not allow extended camping periods, and Temple members had entered and remained in the park for periods from three weeks to four months in order to perform various ceremonies. One of the religious practices involved sitting in a meditative state until experiencing *h'ike a ka pō* or night visions, providing inspiration and guidance. In their defense, Temple members challenged the park regulation as an infringement upon religious freedom. The trial court determined that defendants ''religious interest in participating in dreams at Kualoa Regional Park are not indispensable to the Hawaiian religious practices, and further the Defendants' practices in exercising their religious beliefs . . . are philosophical and personal and therefore not entitled to First Amendment protection.''[58] The Hawaii Supreme Court also gave short shrift to the religious freedom argument, affirming the trial court in a memorandum opinion.[59]

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[56] S. Ct. No. 14770 (June 25, 1991) at 2.

[57] S. Ct. No. 9571 (Apr. 3, 1985).

[58] Order Denying Motion to Dismiss at 4, *State v. Lono*, Case Nos. CTR 1-21 (Sept. 2, 1982); CTR 1-26 (Sept. 9, 1982); CTR 22 (Sept. 10, 1982); and CTR 5-8 (Oct. 1, 1982).

[59] 67 Haw. 679 (S. Ct. No. 9571, Apr. 3, 1985).

In the only published opinion dealing with the exercise of Native Hawaiian religion, *Dedman v. Board of Land and Natural Resources*,[60] the Hawaii Supreme Court applied the test adopted by the United States Supreme Court in *Wisconsin v. Yoder*.[61] In *Yoder*, members of the Amish sect refused to permit their children to continue formal education beyond the eighth grade. The Amish valued and practiced agricultural work and feared higher education would endanger their children's salvation. Their refusal to allow their children to attend school, however, violated Wisconsin's compulsory school attendance laws. The Supreme Court reviewed the burden imposed by the school attendance law on Amish religion. The Court then held that the state's interest in education was sufficiently compelling to overcome the Free Exercise Clause protection of Amish religious practices.[62]

In *Dedman*, Native Hawaiians challenged a Board of Land and Natural Resources' (B.L.N.R.) decision permitting geothermal development in an the Wao Kele 'O Puna rainforest, an area significant to native religious practitioners who honor the deity Pele.[63] The Pele practitioners claimed that the proposed development would impinge on their right to free religious exercise, since geothermal development requires drilling into the body of Pele and taking her energy and lifeblood.[64]

The Hawaii Supreme Court first acknowledged the sincerity of the religious claims at issue.[65] It then considered whether the B.L.N.R.'s approval of the proposed geothermal development would unconstitutionally infringe upon Native Hawaiian religious practice.[66] On this question, the court found controlling the absence of proof that religious ceremonies were held in the area proposed for development.[67] Without evidence of a burden on the free exercise of native religion, the court did not reach the compelling state interest question. Accordingly, the

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[60] 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).

[61] 406 U.S. 205 (1972).

[62] *Id.* at 234.

[63] Dedman v. Bd. of Land and Natural Resources, 69 Haw. 255, 256, 740 P.2d 28, 31 (1987) (Lum, C.J.), *cert. denied*, 485 U.S. 1020 (1988).

[64] *Id.* at 259-260, 740 P.2d at 32. According to Native Hawaiian religious belief, the area proposed for geothermal development is considered the home of Pele, the volcano goddess.

[65] *Id.* at 260, 740 P.2d at 32.

[66] *Id.*

[67] *Id.* at 261, 740 P.2d at 33.

court concluded that no Free Exercise Clause violation had occurred.[68]

The Lum Court's application of a narrow analysis of free exercise infringement accounted for its failure to find any burden on Native Hawaiian religious practices. Under the court's view, a burden on the free exercise of religion exists when government action regulates or directly impinges on Native Hawaiian religious practices. Furthermore, only government conduct which compelled irreverence of religious beliefs or penalized individuals for their religious actions would warrant free exercise protection. Certainly, few native religious practitioners could meet this standard.

Any doubt concerning the Hawaii Supreme Court's constitutional analysis of free exercise protection dissolved with the United States Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*[69] and its subsequent refusal to review the *Dedman* decision.[70] *Lyng* reinforces the limited interpretation of the Free Exercise Clause advanced in *Dedman* and thereby places the unfettered practice of Native Hawaiian religion at serious risk. Moreover, the distinctiveness of Native Hawaiian religion, markedly different from traditional Judeo-Christian doctrines, makes it especially vulnerable and renders its continued protection under the Free Exercise Clause elusive.

In the *Dedman* case, the state constitutional amendment protecting traditional and customary rights of Native Hawaiian *ahupua'a* tenants was not specifically implicated. This may have been because those challenging the B.L.N.R. action did not claim to live within the *ahupua'a* where the land was located nor to have such rights. Thus, the Hawai'i courts have never interpreted this constitutional amendment in the context of a religious freedom claim.[71] However, given the fact that the Hawaii Supreme Court in *Dedman* failed to give any greater protection to native religious practitioners under Hawai'i's own constitutional religious freedom provision,[72] it would appear unlikely

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[68] *Id.* at 261-62, 740 P.2d at 32-33.

[69] 485 U.S. 439 (1988).

[70] 485 U.S. 1020 (1988) (denying cert. for *Dedman*, 69 Haw. 255, 740 P.2d 28 (1987)).

[71] *But see* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 11-12, 656 P.2d 745, 751-52 (1982) (finding that HAW. REV. STAT. § 1-1 may be used as a vehicle for the continued existence of those commoner's rights which continue to be practiced and cause no harm to the interests of others).

[72] HAW. CONST. art. I, § 4 reads, in part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

that the Lum Court would be sympathetic to an argument based on *ahupua'a* tenant rights.

Most recently, the Hawaii Supreme Court has reviewed a group of trespass convictions arising out of Hawaiian protests over geothermal development in the Wao Kele 'O Puna rainforest. In a series of memorandum opinions[73] issued in the fall of 1991, the court gave little credence to arguments that the geothermal developer violated the defendants' free exercise of religion by prohibiting access to the development site. The defendants wished to conduct a religious ceremony at the site to heal damage to Pele caused by geothermal drilling. In *State v. McGregor*,[74] the most detailed of the memorandum opinions, the court examined whether there was a sufficiently close nexus between the state and the challenged action, in this case prohibiting McGregor from entering the geothermal well site area to conduct a religious ceremony. If such a nexus existed, then the action of the geothermal developer could be treated as an action of the state itself.[75] Not surprisingly, the court found that the defendant had not met her burden of showing by clear and convincing evidence that the state directed, encouraged, or supported the private developer in prohibiting access to the geothermal drill site.[76] The court thus determined that there was no state action and that McGregor's arrest for trespassing did not violate her free exercise of religion.[77]

IV. HAWAIIAN CUSTOMARY ADOPTION—*HĀNAI*

Adoption comprised an integral part of ancient Hawaiian life and customary adoption continues to exist even today. Perhaps the most generally recognized form of adoption is *hānai*, meaning "to feed." *Hānai* refers to a child who is reared, educated, and loved by someone other than the natural parents. The *hānai* relationship occurs most often within the family, so the child is rarely raised by strangers. Tradition-

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[73] State v. Lee, S. Ct. No. 14984 (Oct. 15, 1991); State v. Kanahele, S. Ct. No. 15069 (Oct. 15, 1991); State v. Lee, S. Ct. No. 14874 (Oct. 16, 1991); State v. Luning, S. Ct. No. 15063, State v. Eaton, S. Ct. No. 15279, State v. Kaipo, S. Ct. No. 15280, State v. Kaleiwahea, S. Ct. No. 15281, State v. Dedman, S. Ct. No. 15092 (Dec. 18, 1991).

[74] S. Ct. No. 14985 (Sept. 26, 1991).

[75] *Id.* at 3.

[76] *Id.* at 4.

[77] *Id.*

ally, the permanent quality of the *hānai* relationship made it a near equivalent of legal adoption. However, early Hawai'i cases recognized that not all *hānai* relationships carried with them the right to inherit property. In 1841, the Hawaii Legislature adopted its first written law of adoption and subsequently, Hawai'i's courts refused to give legal recognition to *hānai* or other customary adoptions unless the statutory adoption procedures had been followed.

Today, Hawai'i's courts continue to distinguish between legal adoption and *hānai* relationships. In an opinion written by Justice Padgett in *Maui Land and Pineapple Co. v. Naiapaakai Heirs of John Keola Makeelani*,[78] the Hawaii Supreme Court refused to reconsider the case law surrounding customary adoption. In that case, the *hānai* children of John Keola claimed an interest in his property based on customary adoption. The Hawaii Supreme Court stated:

> [W]hile adoption by custom was recognized in early times beginning in 1841 and continuing until the present time (and thus in effect during the period when appellants were hanaied by John Keola), there were written statutes of adoption which had to be followed in order to constitute the adoptee's legal heirs of the adopters. Even prior to the enactment of any statutes on the subject of adoption, the mere fact that one was a "keiki hanai" did not, by Hawaiian custom, carry with it a right of inheritance.[79]

The appellants had argued that the court should adopt the doctrine of equitable adoption, which had been used in Alaska to uphold Alaskan Native cultural adoptions with attendant inheritance rights.[80] In the Alaska case, the Alaska Supreme Court had placed great emphasis on differences between the Anglo-American judicial system and the traditional Alaska Native practices and the cultural difficulties experienced by Alaska Natives in dealing with the Anglo-American judicial system. The Alaska court held that equitable adoption, in which the factual circumstances of each case are examined to determine whether there was an intent to adopt, "is an appropriate vehicle which can be utilized in intestate succession cases to avoid hardship created in part by the

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[78] 69 Haw. 565, 751 P.2d 1020 (1988) (Padgett, J.).

[79] *Id.* at 568, 751 P.2d at 1021-22.

[80] Calista Corporation v. Mann, 564 P.2d 53 (Alaska 1977) (applying the equitable adoption doctrine to allow two native Alaskan women who had been adopted in the culturally accepted manner of their tribes to receive shares of stock in their parents' native corporations organized under the Alaska Native Claims Settlement Act).

diversity of cultures found within this jurisdiction."[81] The Hawaii Supreme Court, however, was unwilling to accord any significance to the difficulties experienced by Native Hawaiians in confronting the differences between Hawaiian cultural practices and the Western judicial system.[82]

V. Conclusion

The Native Hawaiian rights cases decided by the Hawaii Supreme Court since 1983 appear to fall into a pattern which can be characterized as a fidelity to established precedent and an avoidance of "hard" issues.

Both *Dedman*[83] and the *Naaiapaakai*[84] decision on customary adoption demonstrate the Lum Court's adherence to established precedent. The court has not ventured beyond the status quo. It has consistently declined the opportunity to expand the law and give recognition to the unique cultural and religious claims of Native Hawaiians. Even in *Ahia v. Department of Transportation*,[85] where the court could have stayed well within precedent and ruled, as urged by the minority, on the breach of trust issue, the majority chose to rest its decision on a strained and questionable reading of the H.H.C.A.

The court's tendency to avoid "hard" issues is exemplified by the *OHA v. Yamasaki*[86] decision. In *Yamasaki*, the court sua sponte ruled on the basis of the political question doctrine, a doctrine that had never been raised or argued by the state. Indeed, the only questions before the supreme court in *Yamasaki* were O.H.A.'s standing to bring suit and whether sovereign immunity could be asserted by one arm of the state against another arm of the state. These initial issues could have been determined by the court and the cases returned to the circuit court for further proceedings which might have, given the opportunity,

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[81] *Id.* at 61-62.

[82] Contrast the *Naiapaakai* case with the supreme court's decision in Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (allowing a recovery for emotional distress caused by seeing a step-grandmother hit by a car). The *Leong* case shows a willingness by the Court at that time to recognize the diversity of cultural practices in Hawai'i. *Id.* at 410-11, 520 P.2d at 766.

[83] 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988); see *supra* part III for a discussion of *Dedman*.

[84] 69 Haw. 565, 751 P.2d 1020 (1988); see *supra* part IV for a discussion of *Naiapaakai*.

[85] 69 Haw. 538, 751 P.2d 81 (1988); see *supra* part II.A. for discussion of *Ahia*.

[86] 69 Haw. 154, 737 P.2d 446 (1987); see *supra* part II.B. for discussion of *Yamasaki*.

clarified the legislature's intent in enacting the O.H.A. entitlement provision.

Finally, this article has cited numerous cases which have been decided by the supreme court in memorandum opinions. While there may be many justifiable reasons, including judicial efficiency, for issuing memorandum opinions, the court should not ignore the need of the legal community and, indeed, the community at large, for judicial guidance. Will questions that have been raised on appeal be argued again and again because of the court's reluctance to issue published and precedent setting opinions? What are the costs to litigants and the public by relitigating principles previously decided by the court in memorandum opinions? More importantly, is the court, by its silence, abdicating its role to create and guide the development of our common law? These are difficult and troubling questions not only for Native Hawaiians, but for Hawai'i as a whole.

The Lum Court and the First Amendment

by Jeffrey S. Portnoy*

I. Introduction

Herman Lum began his tenure as Chief Justice of the Hawaii Supreme Court in 1983. Since then, the Lum Court has addressed numerous issues associated with the freedoms granted by the First Amendment of the United States Constitution. When the Lum Court has had occasion to address First Amendment issues, the court has usually addressed issues raised in the context of purported violations of article I, section 4 of the Constitution of the State of Hawaii. Article I, section 4 provides that "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble and to petition the government for a redress of grievances." However, because the wording of article I, section 4 is nearly identical to the First Amendment of the United States Constitution,[1] federal First Amendment cases are often used in

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[1] U.S. Const. amend. I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

interpreting the provisions article I, section 4 of the Hawaii Constitution.

There are several distinct provisions in the First Amendment and its counterpart in the Hawaii State Constitution. While there is not a plethora of cases decided by the Lum Court addressing First Amendment issues, the court has had occasion to interpret most of its major provisions.[2] When viewed as a whole, these cases demonstrate a generally restrictive interpretation of the First Amendment.

This article will examine the Lum Court's rulings as to various provisions of article I, section 4 and its federal counterpart, the First Amendment, starting with cases interpreting the religion clauses. It will then look at cases dealing with free speech and press issues, including obscenity. Finally, this article will discuss Hawai'i's constitutionally protected right of privacy.

II. Religion

The First Amendment contains two distinct clauses designed to protect religious freedom. One is the Establishment Clause, which prohibits any law "respecting an establishment of religion."[3] The other is the Free Exercise Clause, which bans laws "prohibiting the free exercise" of religion.[4] The only case decided by the Lum Court addressing the Establishment Clause is *Koolau Baptist Church v. Department of Labor and Industrial Relations*.[5] That case involved a challenge by a church-affiliated private school to a statutory provision requiring the

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[2] Our research was unable to discover any cases discussing the right of the people peaceably to assemble or to petition the government for a redress of grievances.

[3] U.S. Const. amend I.

[4] *Id.*

[5] 68 Haw. 410, 718 P.2d 267 (1986) (Nakamura, J.). *See also* Cammack v. Waihee, 673 F. Supp. 1524 (D. Haw. 1987), where Judge Alan C. Kay examined the religion provisions of the Haw. Const. and concluded that the Hawai'i court would not interpret the Haw. Const. any differently than the federal courts would interpret the U.S. Const. in the limited area of Establishment Clause jurisprudence. 673 F. Supp. at 1528; State v. Lono, 67 Haw. 679 (S. Ct. No. 9571, Apr. 3, 1985), where the Hawaii Supreme Court, in affirming a trial court ruling in a memorandum opinion, declined to consider a Free Exercise challenge by members of the Temple of Lono who argued that a park regulation prohibiting extended camping periods at Kualoa Regional Park infringed upon their religious practice of sitting in a meditative state until they experienced *ho'ike a ka pō* or night visions. *Id.*

school to make contributions to the state's unemployment compensation fund on wages paid to the lay teachers and staff of the school.[6]

In reversing a circuit court's ruling that the extraction of unemployment insurance taxes from the church contravened the First Amendment, the Lum Court analyzed the church's argument that the statute violated the Establishment Clause.[7] The court addressed the issue within the framework established by the United States Supreme Court in *Lemon v. Kurtzman*.[8] That framework provides that the criteria to be used in determining whether a statute violates the Establishment Clause is whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters excessive government entanglement with religion.[9]

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[6] HAW. REV. STAT. ch. 383 (1985) provides a measure of protection against wage loss resulting from temporary unemployment. Every employer in the state for whom service is performed by an employee is required to make contributions to an unemployment compensation fund unless the service performed is excluded from coverage under HAW. REV. STAT. § 383-7. In *Koolau Baptist*, the provision at issue was HAW. REV. STAT. § 383-7(9) (1985). Section 383-7(9) provided in pertinent part as follows:

> Excluded service. "Employment" does not include the following service:
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> . . . .
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> (9) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under § 501(a) of the Federal Internal Revenue Code (other than an organization described in § 401(A) or under § 521 of such code), if (i) the remuneration for such service is less than $50, or (ii) the service is performed by a fully ordained, commissioned, or licensed minister of a church in the exercise of his minister's ministry or by a member of a religious order in the exercise of duties required by such order;
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> (B) Service performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university. . . .

Id. (1985).

[7] 68 Haw. at 419-20, 718 P.2d at 273-74.

[8] 403 U.S. 602 (1971).

[9] *Id.* at 612-13. The three-part test announced in *Lemon* officially remains the standard to be used in Establishment Clause jurisprudence. Nevertheless, the continuing validity of this framework has been called into doubt by recent cases addressing Establishment clause issues. In Lynch. v. Donnelly, 465 U.S. 668 (1984), the majority argued that "no fixed per se rule can be framed" in this area and that the three-part test in *Lemon* merely raised issues into which a court might find it "useful to inquire." *Id.* at 678-79. The *Lynch* Court also pointed out that the *Lemon* "test" was not even applied in two Establishment Clause cases subsequent to *Lemon*, Marsh v. Chambers, 463 U.S. 783 (1983), and Larson v. Valente, 456 U.S. 228 (1982). Furthermore, in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the majority indicated that the focus of Establishment Clause jurisprudence is whether legislation "constitutes an

The church alleged that its inclusion in the coverage of the Hawaii Employment Security Law resulted in a violation of the Establishment Clause because the law, as applied to it, created excessive, highly intrusive relationships of government with a religious organism.[10] In rejecting this argument, the Lum Court found unpersuasive the argument that the statute required schools to meet extensive registration, record keeping, financial reporting, and informational requirements. Instead, the court cited with approval the case of *Tony and Susan Alamo Foundation v. Secretary of Labor*,[11] which held that the record keeping requirements of the Fair Labor Standards Act, although burdensome, do not result in excessive entanglement.[12] Applying this reasoning in *Koolau Baptist*, the court held that the inclusion of the church in the coverage of the Hawaii Employment Security Law did not result in a violation of the Establishment Clause.[13]

Obviously, it is difficult to reach a conclusive opinion as to the court's interpretation of the Establishment Clause by examining only one opinion. However, the opinion demonstrates a narrow interpretation of the Establishment Clause in light of the court's willingness to allow the church to be burdened by statutory regulations and its apparent unwillingness to address potential problems the statutory scheme could create. Moreover, such an interpretation would be consistent with the court's narrow reading of the Free Exercise Clause.

The Lum Court's first opportunity to discuss the Free Exercise Clause also occurred in *Koolau Baptist*. The court was confronted with the issue of whether the extraction of contributions to maintain the state's unemployment compensation fund impinged upon the free exercise of religion by the church and its members.[14]

The court discussed, at length, the general principles associated with the Free Exercise Clause as pronounced by the United States Supreme Court. The court pointed out that "activities of individuals, even when

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endorsement of one or another set of religious beliefs or of religion generally." *Id.* at 8.

[10] 68 Haw. at 419-20, 718 P.2d at 273.

[11] 471 U.S. 290 (1985).

[12] *Id.* at 305-06.

[13] 68 Haw. at 420, 718 P.2d at 274. In reaching this conclusion, the court declined to address arguments by the church raising potential problems this statute may have in the future, choosing instead to deal with such problems should they appear before the court. *Id.*

[14] *Id.* at 416-19, 718 P.2d at 271-73.

religiously based, are often subject to regulations by the state in the exercise of their power to promote the health, safety, and general welfare. . . ."[15] Additionally, the court noted that the Free Exercise Clause does not require an exemption from a governmental program unless the program imposes "a substantial burden—that is, one which would inhibit the practice of religion and in effect be a coercion to forego the practice."[16]

In adopting the United States Supreme Court's narrow interpretation of the Free Exercise Clause, the Lum Court concluded that the state's program did not impinge upon the free exercise of religion by the church and its members.[17] This restrictive view was also followed in *Dedman v. Board of Land and Natural Resources*,[18] the only other Free Exercise case decided by the Lum Court.

In *Dedman*, the court was faced with a challenge to the Board of Land and Natural Resources' decision to permit geothermal energy development in the Kilauea middle east rift zone on the island of Hawai'i. The plaintiffs in *Dedman* asserted that the Board's decision violated their right to freely exercise their religion.[19]

In affirming the Board's ruling, the court, in an opinion authored by Chief Justice Lum, reiterated the standard announced in *Koolau Baptist* that the plaintiffs had to demonstrate that the Board's decision imposed a substantial burden on religious interests.[20] The court added that the plaintiffs had to demonstrate the coercive effect of the law as it operated against them in the practice of their religion.[21]

Among the arguments advanced by the plaintiffs were that the construction of the geothermal energy plants would "desecrate the body of Pele" by digging into the ground and would "destroy the goddess by robbing her of vital heat."[22] The plaintiffs argued that this would "interfere with their ritual practices" and would "disable them from

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[15] *Id.* at 417-18, 718 P.2d at 272 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

[16] *Id.* at 418, 718 P.2d at 272 (quoting JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 111, at 1054 (2d ed. 1983)).

[17] *Id.* at 419, 718 P.2d at 273.

[18] 69 Haw. 255, 740 P.2d 28 (1987) (Lum, C.J.).

[19] *Id.* at 256, 740 P.2d at 30.

[20] *Id.* at 261, 740 P.2d at 33.

[21] *Id.* (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963)).

[22] *Id.* at 261, 740 P.2d at 32.

training young Hawaiians in traditional beliefs and practices.''[23]

The Lum Court refused to invalidate the Board's actions based on these "mere assertions of harm to religious practices" indicating that to do so, "would contravene the fundamental purpose of preventing the state from fostering support of one religion over another.''[24] The court affirmed the Board's decision concluding that "[t]he free exercise clauses of the state and federal constitutions are 'written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.'''[25]

It would be unfair to draw any positive conclusions on the Lum Court's position in the area of religion by analyzing only one opinion. What this opinion reveals, nevertheless, is an apparent unwillingness to extend protection in the area of religion beyond those mandated by the United States Supreme Court. This conclusion is consistent with the court's narrow interpretation of First Amendment rights in general.

III. Freedom of Speech

The Lum Court has not had occasion to address many pure speech related issues. Nevertheless, in reading the few freedom of speech cases that have come before the Lum Court, one can reasonably conclude that the court has narrowly interpreted the right to free speech.

The court's views on freedom of speech were most clearly expressed in *Estes v. Kapiolani Women's and Children's Medical Center*.[26] *Estes* involved an attempt to distribute leaflets and express anti-abortion views on the walkways to the entrances of Kapiolani Medical Center. In that case, the plaintiffs, in distributing the pamphlets, did not physically block the ingress or egress of persons entering or leaving the hospital.[27] Nevertheless, the plaintiffs were told by the hospital security to leave the premises. They refused, and the hospital sought police help in removing the plaintiffs.[28]

The plaintiffs thereafter filed a lawsuit alleging that their constitutional rights guaranteed by article I, section 4 of the Hawaii Consti-

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[23] *Id.*

[24] *Id.* at 262, 740 P.2d at 33.

[25] *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas J., concurring)).

[26] 71 Haw. 190, 787 P.2d 216 (1990) (Wakatsuki, J.).

[27] *Id.* at 191, 787 P.2d at 218.

[28] *Id.*

tution were violated, and that the hospital should be enjoined from enforcing a policy prohibiting solicitation on the hospital grounds. This injunctive action was dismissed by the lower court.[29]

In affirming the lower court's dismissal, the Lum Court, through Justice Wakatsuki, emphasized that the constitutional guarantee of free speech is a guarantee only against abridgement by the government.[30] Therefore, the court emphasized 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."[31]

The court scrutinized the activities of the hospital to determine whether it would be fair to treat the hospital's activities as those of the state. The court acknowledged that the hospital received large amounts of public funds to carry out various activities and functions, was heavily regulated by the state, and to some extent enjoyed a virtual monopoly status in the community for the provision of some services.[32] The court added that the University of Hawaii, a state institution, leased several floors of the hospital building to house one department of the medical school.[33] Nevertheless, the court held that this did not establish a sufficiently close nexus between the hospital and the state to treat the hospital as an entity of the state.[34]

A further reason for not finding state action was that the hospital's no solicitation policy was not in response to a government law or directive.[35] Furthermore, the police involvement in enforcing the hospital's right against trespass did not convert the hospital's policy into state action.[36]

The court's free speech philosophy however, was most clearly expressed in its refusal to treat the privately owned property at issue as though it were publicly held. First, the court reviewed *Marsh v.*

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[29] *Id.* at 192, 787 P.2d at 218.

[30] *Id.* at 192-93, 787 P.2d at 218 (citing Hudgens v. NLRB, 424 U.S. 507, 513 (1976)).

[31] *Id.* at 193, 787 P. 2d at 219 (citing Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)).

[32] *Id.* at 192, 787 P.2d at 218-19.

[33] *Id.*

[34] *Id.* at 193-94, 787 P.2d at 218-19.

[35] *Id.* at 194, 787 P.2d at 219.

[36] *Id.* (citing Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc., 673 F.2d 771 (5th Cir. 1982); Tauvar v. Bar Harbor Congregation of Jehovah's Witnesses, 633 F. Supp. 741 (D. Me. 1985)).

Alabama,[37] where the United States Supreme Court held that under certain circumstances, privately owned property could be treated, for First Amendment purposes, as though it were publicly held.[38] In delineating the boundaries of this rule, the Lum Court noted that the United States Supreme Court has indicated that places such as sidewalks, streets, parks, and retail business districts, "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot be denied broadly and absolutely."[39]

However, in deciding whether the private property at issue in *Estes* was one of the areas historically associated with the exercise of First Amendment rights, the Hawaii Supreme Court took pains to define the area where plaintiffs' conduct took place in the most narrow manner, thereby preventing the area from being associated with the exercise of First Amendment rights. Specifically, the Hawaii Supreme Court stated that "[u]nlike sidewalks (*Marsh v. Alabama*) or areas fronting retail stores (*Logan Valley*, *Hudgens*), we hold that the *interior walkway to the main walkway to the hospital* is not historically nor traditionally associated with the exercise of free speech rights."[40]

The court avoided describing the area more generally as, for example, "the area around the entrance to the hospital." Such a description would probably have brought the area among those associated with the exercise of First Amendment rights.

Furthermore, in reaching its conclusion, the Hawaii Supreme Court refused to adopt the holding of the California Supreme Court in *Robins v. Pruneyard Shopping Center*.[41] In *Pruneyard*, the California Supreme Court held that a privately owned shopping center was not free to forbid expressive activity unrelated to any commercial purposes. Therefore, the defendant shopping center was prohibited from preventing plaintiffs from setting up tables at the shopping center to gather signatures on a petition.[42]

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[37] 326 U.S. 501 (1946).

[38] *Id.* at 509. In *Marsh*, the court concluded that sidewalks were an example of private property that should be treated as though it were publicly held for First Amendment purposes.

[39] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968).

[40] 71 Haw. at 196, 787 P.2d at 220 (emphasis added).

[41] 592 P.2d 341 (Cal. 1979).

[42] *Id.*

In refusing to adopt the holding of *Pruneyard*, the Hawaii Supreme Court stated that the language of the California Constitution was markedly different from the language of the First Amendment.[43] Because of this, the Lum Court concluded that the California courts historically accorded free speech protections greater than those accorded by the First Amendment.[44] However, because the Hawaii Constitution adopted language nearly identical to that of the First Amendment, the Lum Court decided to adopt the holdings of those federal cases which narrowly interpreted free speech protections afforded by the First Amendment which the court believed prohibited the conduct at issue in *Estes*.[45]

Consistent with this narrow reading of free speech rights was the Hawaii Supreme Court's holding in *Wilder v. Tanouye*.[46] In that case, plaintiff Wilder was an inmate of the Oahu Community Correctional Center. The plaintiff wrote Congressman Cecil Heftel complaining about conditions at the prison. In a written memo, the plaintiff was informed by the supervisor of his prison module that writing the letter, without first attempting to resolve the problem informally with the staff, violated a condition of the plaintiff's transfer to the prison's general population.[47]

Wilder proceeded to file a grievance claiming his constitutional right to write a congressman had been violated.[48] Wilder later filed a complaint in the circuit court alleging that a state employee, while acting under color of Hawai'i law, violated his First and Fourteenth Amendment rights guaranteed by the United States Constitution, as well as his rights under the Hawaii Constitution.[49] Shortly after the complaint was filed, the state employee rescinded the written warning issued to Wilder.[50]

The Intermediate Court of Appeals (I.C.A.) heard an appeal from a grant of summary judgment in favor of the defendant. In vacating

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[43] Art. I, § 2 of the CAL. CONST. 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."

[44] 71 Haw. at 197, 787 P.2d at 221.

[45] *Id.*

[46] 71 Haw. 30, 779 P.2d 390 (1989) (Nakamura, J.).

[47] *Id.* at 32, 779 P.2d at 391.

[48] *Id.*

[49] *Id.*

[50] *Id.*

the summary judgment, the I.C.A., treating the complaint as a civil rights complaint brought under 42 U.S.C. § 1983,[51] stated that "[p]rison inmates retain[ed] First Amendment rights which do not conflict with legitimate penal objectives" and "[p]rison officials may not retaliate for prisoners' exercise of permissible First Amendment freedoms."[52] Accordingly, the court held that there were genuine issues of material fact regarding Wilder's claim and, therefore, the award of summary judgment was improper.[53]

The Hawaii Supreme Court granted certiorari and rejected this broad interpretation by the I.C.A. and reinstated the summary judgment awarded in favor of the defendant.[54] The court, through Justice Nakamura, emphasized that the focus of the plaintiff's claim for compensatory damages turned on two issues. First, whether his First Amendment rights were violated, and second, whether the violation resulted in a compensable injury.[55]

As to whether the plaintiff's First Amendment rights were violated, the court pointed out that the plaintiff was not prevented from writing to Congressman Heftel. Rather, if any violation occurred, "it was when [the defendant] advised Wilder that the communication of complaints breached an agreed condition of his return to the prison's general population and warned him about further disciplinary action if this happened again."[56] The plaintiff, as a result, merely alleged an injury based on the value or importance of his First Amendment rights.[57] Because such damages were not authorized by 42 U.S.C. § 1983, the court held that the plaintiff did not suffer a compensable injury.[58]

In the two freedom of speech opinions issued by the Lum Court, the court has demonstrated a reluctance to expand free speech protections beyond what is required by the United States Supreme Court. Again, as in the area of religion, there are only a limited number of cases in this area. Nevertheless, the court's restrictive approach to free

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[51] 42 U.S.C. § 1983 (1982).

[52] 7 Haw. App. 502, 507, 782 P.2d 347, 350 (1988) (citations omitted).

[53] *Id.* at 508, 782 P.2d at 351.

[54] 71 Haw. at 31, 779 P.2d at 390.

[55] *Id.* at 37, 779 P.2d at 393.

[56] *Id.*

[57] *Id.* (citing Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 309 n.13 (1986)).

[58] 71 Haw. at 36, 779 P.2d at 393 (citing *Stachura*, 477 U.S. at 309 n.13).

speech is consistent with its narrow interpretation of First Amendment protections in general.

IV. OBSCENITY

Related to issues of free speech and privacy is the issue of obscenity. The Lum Court has addressed only one case dealing with this issue.[59] However, before discussing that case, it is necessary to review two opinions written by Justice Nakamura, a member of the Hawaii Supreme Court prior to Lum's ascension to Chief Justice. These opinions demonstrate an inclination by the Hawaii Supreme Court to give broad protections to free speech in the area of obscenity, at least in part because of the Hawai'i constitutional right to privacy.

The first of these opinions is *State v. Bumanglag*.[60] That case discussed the additional protections necessary when rights of free speech and expression are implicated in seizures of material. In *Bumanglag*, the court emphasized the necessity of some form of judicial intervention as a prelude to the seizure and retention of allegedly obscene material.[61] The task of distinguishing legitimate from illegitimate speech was held to rest in a judicial office rather than in the police.[62]

The court in *Bumanglag* struck down the burden of proof requirement set out in section 712-1216(1) of the *Hawaii Revised Statutes*.[63] The court emphasized the necessity of a stringent standard scrutinizing attempts to alter the burden of proof where First Amendment freedoms are involved.[64]

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[59] State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (Hayashi, J.).

[60] 63 Haw. 596, 634 P.2d 80 (1981) (Nakamura, J.).

[61] *Id.* at 606, 634 P.2d at 87.

[62] *Id.*

[63] HAW. REV. STAT. § 712-1216(1) (1976) provided in pertinent part: "The fact that a person engaged in the conduct specified by sections 712-1214 or 712-1215 is prima facie evidence that he engaged in that conduct with knowledge of the character and content of the material disseminated or the performance produced, presented, directed, participated in, exhibited, or to be exhibited. . . ." *Id.*

That provision was read in conjunction with HAW. REV. STAT. § 701-117 (1976), which provided: "Prima facie evidence of a fact is evidence which, if accepted in its entirety by the trier of fact, is sufficient to prove the fact, provided that no evidence negativing the fact, which raises a reasonable doubt in the mind of the trier of fact, is introduced." *Id.*

[64] 63 Haw. at 620, 634 P.2d at 96.

This philosophy was followed in *State v. Furuyama*.[65] In *Furuyama*, the court again emphasized the necessity of some judicial procedure prior to the seizure of allegedly obscene material.[66] Specifically, the court stated that a police officer may not effect a warrantless arrest when First Amendment freedoms are involved.[67]

In *State v. Kam*,[68] the Lum Court's only opportunity to address obscenity, the court followed the expansive approach expressed in Justice Nakamura's earlier opinions. At issue in *Kam* was whether section 712-1214(1)(a) of the *Hawaii Revised Statutes* infringed on the right to privacy provided by article I, section 6 of the Hawaii Constitution.[69] Section 712-1214(1)(a) provided in pertinent part: "A person commits the offense of promoting pornography if, knowing its content and character, he: (a) disseminates for money consideration any pornographic material. . . ."[70] Defendant Kam, a bookstore clerk, was convicted under this statute for selling an adult magazine to an undercover police officer.[71] Kam raised the claim that section 712-1214(1)(a) infringed on the right to privately own sexually explicit material by making it impossible for persons to buy pornographic items.[72]

In holding that section 712-1214(1)(a) was unconstitutional as applied to the sale of pornographic material to a person intending to use those items in the privacy of his or her house, the Hawaii Supreme Court, through Justice Hayashi,[73] acknowledged that the state would not be able to prohibit an individual from possessing and viewing such materials in the privacy of his or her own home.[74] Although the Hawaii Supreme Court acknowledged the United States Supreme Court's position that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have

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[65] 64 Haw. 109, 637 P.2d 1095 (1981) (Nakamura, J.).

[66] *Id.* at 116, 637 P.2d at 1100.

[67] *Id.* at 117, 637 P.2d at 1100.

[68] 69 Haw. 483, 748 P.2d 372 (1988) (Hayashi, J.).

[69] The court in *Kam* also held that § 712-1214(1)(a) was neither overbroad nor vague. *Id.* at 488, 748 P.2d at 375.

[70] HAW. REV. STAT. § 712-1214(1)(a) (1976).

[71] 69 Haw. at 484, 748 P.2d at 374.

[72] *Id.* at 489, 748 P.2d at 376.

[73] Justice Nakamura recused himself in the matter.

[74] *Id.* at 489, 748 P.2d at 376 (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

someone sell or give it to others,[75] the Lum Court stated that it was not bound by that decision because the Hawaii Constitution granted greater privacy rights than the United States Constitution.[76]

Accordingly, the court held that the state must demonstrate a compelling governmental interest before it could prohibit the sale of sexually explicit material.[77] Because the state failed to demonstrate such an interest, the court reversed the defendant's convictions.

V. DEFAMATION

Another line of cases closely related to freedom of speech (and press) are those dealing with defamation. These cases reveal that the Lum Court narrowly interprets the right to free speech in defamation jurisprudence and, more importantly, that the court exercises judicial restraint in this area. In discussing the Lum Court's view on defamation, it is necessary to review two opinions written by Justice Lum in the latter part of 1982, prior to his appointment to the position of chief justice.

The first of these cases is *Rodriguez v. Nishiki*.[78] *Rodriguez* involved a defamation action brought by members of the Hawaiian entertainment industry against the author of a newspaper article and a local politician. The trial court heard cross-motions for summary judgment, denying the defendants' motion and awarding summary judgment in favor of the plaintiffs.[79] However, the Hawaii Supreme Court, through then Associate Justice Lum, reversed the award of summary judgment in favor of the plaintiffs. In reversing, the court first emphasized the requirement that public figures bringing defamation actions must meet a high standard of proof to establish that the publisher of the defamatory

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[75] 69 Haw. at 490, 748 P.2d at 376 (citing United States v. 12 200-Ft. Reels of Super 8 Mm. Film, 413 U.S. 123, 128 (1973)).

[76] 69 Haw. at 491, 748 P.2d at 377. Article 1, section 6 of the HAW. CONST. specifically protects the right of privacy. This provision is discussed in more detail *infra* part VI.

[77] 69 Haw. at 494, 748 P.2d at 380. This is a more stringent standard than the rational basis test employed by the United States Supreme Court. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, *reh'g denied*, 414 U.S. 881 (1973); United States v. Orito, 413 U.S. 139 (1973); 12 200-Ft. of Reels of Super 8 Mm. Film, 413 U.S. 123 (1973).

[78] 65 Haw. 430, 653 P.2d 1145 (1982) (Lum, J.).

[79] *Id.* at 434, 653 P.2d at 1148.

statement acted with actual malice.[80] The court proceeded to examine two possible approaches to summary judgments in defamation actions.[81]

The first approach was termed the "radical approach."[82] This approach departed from the normal summary judgment procedure in two ways:

> (1) Instead of viewing evidence in the light most favorable to the nonmovant, the trial court evaluates all evidence in its most reasonable light, and (2) instead of asking whether a jury could find actual malice with convincing clarity, the trial court determines whether it can find actual malice with convincing clarity.[83]

The court explained that the courts that have applied this approach have justified its use as being necessary to protect the defendants' rights of freedom of press and speech in defamation actions through the liberal use of summary judgment in their favor.[84] This test makes it much easier for a libel defendant to obtain summary relief.

The more restricted approach, however, was adopted by the Hawai'i court. This standard does not disturb the normal summary judgment procedure with regard to resolution of factual disputes in defamation actions.[85] This standard was adopted because, according to the court, if there is a factual dispute about a defendant's state of mind with regard to actual malice, summary judgment should not be granted.[86]

The reversal of summary judgment in the *Rodriguez* case revealed the court's desire to exercise restraint in defamation cases by making it easier for such matters to go to a jury.[87] Consistent with this

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[80] *Id.* at 438, 653 P.2d at 1150.

[81] *Id.*

[82] *Id.* at 439, 653 P.2d at 1151.

[83] *Id.*

[84] *Id.* (citing Wasserman v. Time, Inc., 424 F.2d 920, 922-23 (D.C. Cir. 1970) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970)).

[85] 65 Haw. at 439, 653 P.2d at 1151. According to the *Rodriguez* Court, summary judgment is normally granted in cases where the record reveals that there is no genuine issue of material fact. Under this standard, the moving party carries the burden of showing that he is entitled to a judgment as a matter of law, and in ruling on the motion, the court is required to view the record in the light most favorable to the party opposing the motion. *Id.* at 438, 653 P.2d 1150-51 (citations omitted). It should be noted that Rodriguez was decided before the United States Supreme Court's ruling in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which liberalized the availability of summary judgment awards.

[86] 65 Haw. at 439, 653 P.2d at 1151.

[87] This conclusion is consistent with the Lum Court's quote from Hutchinson v.

philosophy is the opinion written by Justice Lum a little more than one month later in *Kohn v. West Hawaii Today, Inc.*[88] In *Kohn*, the court discussed the proof required of a private plaintiff in establishing malice on the part of a media defendant. The media defendant in that case asserted that a media defendant's negligence must be shown through expert testimony.[89] This forced the court to decide whether, just like in other cases of alleged professional negligence (doctors, lawyers, etc.), the plaintiff would have to demonstrate a breach of the applicable standard of care through expert testimony.

The court refused to adopt the rule suggested by the defendant. Rather, the court decided to employ a case-by-case determination in deciding whether expert evidence should be required.[90]

Consistent with its view that a jury should usually determine culpability in defamation cases, the court held that the determination of the defendant's negligence[91] was for the jury to decide, even without the aid of outside expert evidence.[92] Accordingly, the court affirmed the trial court's denial of the defendant's motion for directed verdict.[93]

The first defamation case decided by the Lum Court was *Mehau v. Gannett Pacific Corp.*[94] That case, continued the court's philosophy of limiting summary disposition of defamation cases.

The plaintiffs in that action were members of the State Board of Land and Natural Resources and were, therefore, clearly public persons.[95] The plaintiffs filed a defamation suit against several defendants from the press and electronic media[96] as well as a state

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Proxmire, 443 U.S. 111, 120 n.9 (1979) ("The proof of 'actual malice' calls a defendant's state of mind into question, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition."). 65 Haw. at 439, 653 P.2d at 1151.

[88] 65 Haw. 584, 656 P.2d 79 (1982) (Lum, J.).

[89] *Id.* at 586, 656 P.2d at 81.

[90] *Id.* at 590, 656 P.2d at 83.

[91] Because this case was brought by a private individual, the court pointed out that, while the plaintiff does not have to prove actual malice, he must prove some degree of fault. *Id.* at 586-87, 656 P.2d at 81 (citing Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 536, 543 P.2d 1356, 1366 (1975)).

[92] 68 Haw. at 590, 656 P.2d at 83.

[93] *Id.*

[94] 66 Haw. 133, 658 P.2d 312 (1983) (Nakamura, J.).

[95] *Id.* at 145, 658 P.2d at 321 ("[T]here is no question that Mehau and Kealoha are plaintiffs whose recovery of damages from the defendants is conditioned upon a showing of 'actual malice.'").

[96] The defendants included Gannett Pacific Corporation, dba Honolulu Star Bulletin;

legislator.[97] The circuit court awarded summary judgment to the legislator and all of the media defendants except one, the Valley Isle Publishers (Valley Isle).[98]

The Hawaii Supreme Court, through Justice Nakamura, affirmed the denial of summary judgment as to Valley Isle. However, the court reversed the award of summary judgment in favor of United Press International (UPI) and the legislator concluding that the plaintiffs should have been afforded an opportunity to prove they were defamed and damaged by those two parties.[99]

In reviewing the circuit court's rulings on the motions for summary judgment, the court reiterated its adherence to the summary judgment procedure set out in *Nishiki*.[100] Even though the court acknowledged the circuit court's desire to protect free debate on public issues by granting summary judgment in favor of the various media defendants,[101] the court, through Justice Nakamura, stated that the Supreme Court could not affirm the circuit court's awards of summary judgments in favor of the UPI and the legislator.[102]

In setting aside the summary judgment awarded in favor of UPI, the court explained that a jury could find that UPI's republication of the charges of criminality on the part of the plaintiffs was not made in good faith or were such that only a reckless person would have put them in circulation.[103] Among the factors cited were the source of the information (Valley Isle was a new publication allegedly given to sensationalizing the "news") and the anonymity of some of the authors of some of the crucial accusations published by Valley Isle. Accordingly, the court concluded that there was a factual dispute as to defendant UPI's state of mind with regard to actual malice.[104]

Lee Enterprises, Inc., dba KGMB-TV; Hawaii Tribune-Hearald, Limited, dba Hawaii Tribune-Herald; Wester Telestations, Inc., dba KITV; KHON-TV, Inc.; KHVH, Inc., dba KHVH radio; United Press International; and the Valley Isle Publishers, which published the Valley Isle. *Id.* at 137 n.1, 658 P.2d at 316 n.1.

[97] The legislator was Kinau Boyd Kamalii who was then a member of the State House of Representatives. *Id.* at 137 n.2, 658 P.2d at 317 n.2.

[98] *Id.* at 137, 658 P.2d at 317.

[99] *Id.*

[100] *Id.* at 144-45, 658 P.2d at 321. The court also discussed at length the governing concepts surrounding the First Amendment. 66 Haw. at 142-45, 658 P.2d at 319-21.

[101] *Id.* at 146, 658 P.2d at 321.

[102] *Id.*

[103] *Id.* at 146-47, 658 P.2d at 322 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

[104] 66 Haw. at 147, 658 P.2d at 322.

On the other hand, the court affirmed the awards of summary judgment in favor of the other media defendants. The court asserted either that they were justified in relying on UPI's reputation as a reliable source of news or that they adequately identified Valley Isle as the source of the alleged defamatory charges.[105]

In discussing its reversal of the award of summary judgment in favor of the sole non-media defendant, the Hawaii Supreme Court, contrary to the circuit court, more narrowly limited the legislator's right to free speech and refused to allow the award of summary judgment to be based on a claim of legislative privilege.[106] Having removed the claim of privilege, the court concluded that there was a factual dispute about the legislator's state of mind with regard to actual malice.[107] Accordingly, the court reversed the award of summary judgment.[108]

The next and most recent defamation case decided by the Lum Court was *Beamer v. Nishiki*.[109] *Beamer* involved a defamation action filed by one candidate for the office of lieutenant governor against another candidate for the same office, and against Valley Isle Publishers, Inc. The Hawaii Supreme Court, through Justice Hayashi, addressed the appeal of a grant of summary judgment awarded to the plaintiff.

The court's hesitancy to uphold summary judgments for any party in a defamation action is evident in its lengthy discussion of the elements necessary to prove defamation.[110] In *Beamer*, the court explained defamation in a way that virtually ensures a trial court subsequently applying these elements will almost always be precluded from awarding summary judgment.

The first element discussed was whether the plaintiff established a "false and defamatory statement concerning another."[111] The court stated that whether a statement is defamatory or not is a question of fact not law.[112] Quoting from *Fernandes v. Tenbruggencate*,[113] the court

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[105] *Id.* at 148, 658 P.2d at 323. Defendants KHON-TV and Scott Shirai, a newscaster responsible for the story, were dismissed from the suit as a result of a settlement. *Id.* at 138 n.3, 658 P.2d at 317 n.3.

[106] *Id.* at 152, 658 P.2d at 325.

[107] *Id.* at 153, 658 P.2d at 325.

[108] *Id.*

[109] 66 Haw. 572, 670 P.2d 1264 (1983) (Hayashi, J.).

[110] *Id.* at 578-85, 670 P.2d 1271-75.

[111] *Id.* at 579-82, 670 P.2d at 1271-72.

[112] *Id.* at 580, 670 P.2d at 1271.

[113] 65 Haw. 226, 228, 649 P.2d 1144, 1147 (1982) (citing Schermerhorn v. Rosenberg,

explained that whether a communication is defamatory depends "upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."[114] Furthermore, the court cited several cases for the proposition that it is for the jury to consider the context of a statement and determine whether it lowers a plaintiff's reputation in the community.[115] In accord with these rulings, the court left it to the jury to make the determination in *Beamer*.[116]

The other element discussed in detail by the court was whether the plaintiff established actual malice on the part of the defendants.[117] Here, the court explained that proof of actual malice calls the defendant's state of mind into question and does not readily lend itself to summary disposition.[118] The court again decided that the existence or absence of malice is generally for the jury.[119]

The Lum Court's definition of actual malice in *Beamer* makes it very difficult for summary judgment to be awarded in a defamation suit involving a public person or public figure. Moreover, the court's broad interpretation of what is the defamatory nature of a statement seems to make summary disposal of all defamation cases difficult.

Decided in 1983, *Beamer* is the most recent Lum Court decision in the area of defamation. However, since 1983, several defamation cases have been decided by the United States Supreme Court which should impact the Lum Court's approach in this area.

One case is *Philadelphia Newspapers, Inc. v. Hepps*.[120] In *Hepps*, the Supreme Court held that a private figure suing a media defendant must bear the burden of proving not only fault but also falsity of the

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426 N.Y.S.2d 274, 282 (1980); Kahanamoku v. Advertiser Publishing Co., Ltd., 25 Haw. 701 (1920)).

[114] *Id.* at 228, 649 P.2d at 1147 (quoting Schermerhorn v. Rosenberg, 426 N.Y.S.2d 274, 282 (1980)).

[115] 66 Haw. at 580, 670 P.2d. at 1272 (citing Fong v. Merena, 66 Haw. 73, 74 n.1, 655 P.2d 875, 876 n.1 (1982); *Fernandes*, 65 Haw. at 228, 649 P.2d at 1147; Chedester v. Stecker, 64 Haw. 464, 469, 643 P.2d 532, 535 (1982)).

[116] *Id.* at 582, 670 P.2d at 1272.

[117] *Id.* at 582-85, 670 P.2d at 1272-75.

[118] *Id.* at 582-83, 670 P.2d at 1273 (quoting *Rodriguez*, 65 Haw. at 439, 653 P.2d at 1151 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964))).

[119] *Id.* at 582-85, 670 P.2d at 1273-75.

[120] 475 U.S. 767 (1986).

defendant's statement.[121] This result was distinguished from the common law rule that placed the burden of proof on the defendant.[122]

Another case, *Harte-Hanks Communications, Inc. v. Connaughton*,[123] made it clear that, in order to recover damages for a defamatory falsehood, a public figure must establish with "clear and convincing proof" that the false statement was made with actual malice.[124] The court erased any doubts that a less severe standard requiring merely a showing of highly unreasonable conduct would be sufficient. The court stated that "a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice."[125]

These cases impose federal constitutional requirements that should lead the Lum Court to view trial court summary judgments in favor of defendants in defamation cases in a more positive light.

VI. PRIVACY

No discussion of First Amendment issues in Hawai'i would be complete without a discussion of the right of privacy. Neither the First Amendment nor any other provision of the United States Constitution contains an express provision "guaranteeing to persons the right to carry on their lives protected from the 'vicissitudes of the political process' by a zone of privacy or a right of personhood."[126] However, the United States Supreme Court has indicated "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and concluded that one of these "guarantees create zones of privacy."[127] Among the guarantees creating this zone of privacy are those in the First Amendment.[128]

In Hawai'i, however, the right of privacy has been written into the state constitution. Article I, section 6 of the Hawaii Constitution

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[121] *Id.* at 776-77.
[122] *Id.*
[123] 491 U.S. 657 (1989).
[124] *Id.* at 659.
[125] *Id.* at 665.
[126] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 893 (1978).
[127] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[128] *Id.* at 484.

provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."[129]

In analyzing this right to privacy, except for the court's opinions in *State v. Kam*[130]and *State v. Rothman*,[131] and some liberal dicta in *State v. Mueller*,[132] the Lum Court has narrowly interpreted the right of privacy provided by the Hawaii Constitution.[133]

Mueller was the first case decided by the Lum Court to discuss the right of privacy created by article I, section 6. At issue in *Mueller* was whether the right of privacy created by the United States and Hawaii Constitutions included in its scope the right of a prostitute to conduct prostitution in her own house.[134]

In affirming the defendant's conviction for prostitution, the court discussed at length the history of article I, section 6 and the federal cases discussing the right of privacy.[135] Despite affirming the defendant's conviction, the court made some effort not to unduly limit the privacy protections afforded by article I, section 6. Significantly, the court noted that because, under federal law, the guaranteed freedom from

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[129] HAW. CONST. art. I, § 6.

[130] 69 Haw. 483, 748 P.2d 372 (1988).

[131] 70 Haw. 546, 779 P.2d 1 (1989).

[132] 66 Haw. 616, 626, 671 P.2d 1351, 1358 (1983).

[133] It should also be noted that the state constitution has two sections addressing the right of privacy. As mentioned, art. I, § 6 provides for a general right of privacy. In addition, art. I, § 7 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Id.

The Hawaii Supreme Court has held that the provisions in art. I, § 6 and art. I, § 7 are distinct. *See* State v. Okubo, 3 Haw. App. 396, 403, 651 P.2d 494, 500 (1982); State v. Lester, 64 Haw. 659, 667-68, 649 P.2d 346, 353 (1982). Art. I, § 7 is part of the guarantees against warrantless searches and seizures, and therefore, is directly associated with the guarantees created by the U.S. CONST. amend. IV. Therefore, the cases discussing the right of privacy as it relates to art. I, § 7 are beyond the scope of an article addressing the guarantees of the First Amendment. For a good discussion of the right of privacy created by art. I, § 7 see, e.g. *Okubo*; State v. Lo, 66 Haw. 653, 675 P.2d 754 (1983); State v. Lee, 67 Haw. 307, 686 P.2d 816 (1984).

[134] 66 Haw. at 618, 671 P.2d at 1353-54.

[135] *Id.* at 620-29, 671 P.2d at 1354-58.

intrusion extended to sexual activities among unmarried adult couples[136] and to autoerotocism in the home,[137] "there is room for argument that [in Hawai'i] the right encompasses any decision to engage in sex at home with another willing adult."[138]

The court's comments were criticized by Justice Padgett in his concurring opinion.[139] Justice Padgett pointed out that the issues of marital relationships, birth control, abortion, and pornography were not before the court.[140] Accordingly, he argued, the court should have refrained from attempting to broaden the scope of the constitutional right to privacy as it related to such matters.[141] According to Justice Padgett, all that needed to be addressed was that "[t]he rights of privacy guaranteed by the federal and state constitutions do not bar the state from prohibiting, by statute, commercial sexual activities even if they are conducted, without advertising, as a cottage industry."[142]

The next case to address the right of privacy was *Nakano v. Matayoshi*.[143] In *Nakano* and in the subsequent cases addressing the rights of privacy, Justice Padgett's restrictive interpretation appears to have been accepted by the Lum Court.

In *Nakano*, the court considered the constitutionality of the ethics code governing the conduct of the employees of Hawaii County.[144] Section 2-91.1 of the County Code compelled "regulatory employees" of the county to disclose their income and financial interests biennially to the County Board of Ethics.[145] Plaintiff Nakano sued in his capacity

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[136] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[137] Stanley v. Georgia, 394 U.S. 557 (1969).

[138] 66 Haw. at 626, 671 P.2d at 1358.

[139] *Id.* at 631, 671 P.2d at 1360 (Padgett, J., concurring).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 631, 671 P.2d at 1361.

[143] 68 Haw. 140, 706 P.2d 814 (1985) (Nakamura, J.).

[144] HAW. COUNTY, CODE § 2-91.1 (1983).

[145] 68 Haw. at 143, 706 P.2d at 814. Regulatory employee was defined by § 2-91.1(a)(7) of the County Code to include:

(A) Supervisors of inspectors employed by the Department of public works;
(B) Inspectors employed the department of public works;
(C) Supervisors of liquor control investigators;
(D) Liquor control investigators;
(E) Buyers and purchasing agents;
(F) Supervisors of real property tax appraisers;
(G) Real property tax appraisers;

as the County's regulatory employees' representative asserting, among other things, that the code infringed upon their right to privacy.

The Lum Court, through Justice Nakamura, affirmed an award of summary judgment in favor of the Mayor of the County of Hawaii and the Board of Ethics of the County. In affirming, the court stated that the expectation of financial privacy of public "officials having significant discretionary or physical powers" is not protected to the same extent as that of other citizens.[146] The court concluded that the regulatory employees were officials with significant discretionary powers.[147] Furthermore the court found that the detailed reporting requirements of section 2-91.1 were compatible with article XIV of the Hawaii Constitution.[148] Accordingly, the court held that any intrusion into financial privacy was consistent "with the diminished privacy public officials may reasonably expect."[149]

This narrow interpretation of privacy rights was maintained in *Painting Industry of Hawaii Market Recovery Fund v. Alm*.[150] In that case, the Lum Court, through Chief Justice Lum, discussed the definition of "public records" and "personal records" as set forth in sections 92-50 and 92E-1 of the *Hawaii Revised Statutes*.[151] Section 92-50 defined a public record as:

> [A]ny written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made or

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(H) Planners employed by the planning department;

(I) Supervisors of inspectors employed by the department of water supply;

(J) Inspectors employed by the department of water supply;

(K) The legislative auditor.

Id.

[146] 68 Haw. at 149, 706 P.2d at 819 (citing HAW. CONST. art. XIV which directs each political subdivision [to] adopt a code of ethics which shall apply to appointed and elected officers and employees" and "include . . . provisions on gifts, confidential information, use of position, contracts with government agencies, post employment, financial disclosure and lobbyist registration and restriction").

[147] *Id.* at 149, 706 P.2d at 819-20.

[148] *Id.* at 150, 706 P.2d at 820.

[149] *Id.* at 151, 706 P.2d at 821.

[150] 69 Haw. 449, 746 P.2d 79 (1987) (Lum, C.J.).

[151] HAW. REV. STAT. §§ 92-50 and 92E-1 were repealed in 1988 and replaced by the provisions of HAW. REV. STAT. ch. 92F entitled the Uniform Information Practices Act.

> is required to be made by law, or which any public officer or employee has received or is required to receive for filing, but shall not include records which invade the right to privacy of an individual.[152]

In addressing the scope of section 92-50, the court acknowledged that the right of privacy provided by article I, section 6 "clearly encompasses privacy of information held by the government."[153] However, pursuant to section 92E-1, the court limited the protections provided by the right of privacy to "highly personal and intimate information."[154]

Having narrowly defined the protections of article I, section 6, the court concluded that "highly personal and intimate information" under section 92E-1 only includes information relating to medical, financial, education, or employment records.[155] It was not held to cover the settlement agreement at issue in the case between the Department of Commerce and Consumer Affairs (D.C.C.A.) and the corporate public works contractor regarding license law violations by the contractor.[156] Accordingly, the court allowed the D.C.C.A. to disclose the settlement agreement as a public record under section 92-50.[157]

The court temporarily departed from its narrow interpretation of privacy rights in its opinion in *State v. Kam*.[158] In *Kam*, the Lum Court was confronted with the issue of whether the government could prohibit, absent a demonstration of a compelling governmental interest, the sale of sexually explicit material intended for use in the privacy of one's home.

In an earlier ruling on this issue, the United States Supreme Court held that the constitutionally protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.[159] However, the Lum Court,

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[152] HAW. REV. STAT. § 92-50 (1985).

[153] 69 Haw. at 453, 746 P.2d at 82.

[154] *Id.* at 453-54, 746 P.2d at 82 (citing COMM. OF THE WHOLE REP. NO. 15, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980)).

[155] *Id.* at 454, 746 P.2d at 82.

[156] *Id.*

[157] *Id.*

[158] 69 Haw. 483, 748 P.2d 372 (1988).

[159] United States v. 12 200-Ft. Reels of Super 8 Mm. Film, 413 U.S. 123 (1973).

in addressing this issue, ruled that it was not bound by the United States Supreme Court's decision. Instead, the court pointed out that the Hawaii Constitution granted greater privacy rights than the United States Constitution.[160] Therefore, the court held that the state must demonstrate a compelling governmental interest, which it failed to do in *Kam*, before it could prohibit the sale of sexually explicit material.[161]

The court also took a nonexpansive view of article I, section 6, in *State v. Rothman*.[162] *Rothman* concerned itself with a trial court order suppressing, among, other things, all information seized as a result of the installation of a pen register on the defendant's telephone line, all evidence derived from the seizure, and all information supplied to the prosecuting authorities by the Hawaiian Telephone Company as to the numbers of incoming calls on that line pursuant to a warrant.[163]

The primary focus of the *Rothman* opinion was on the interpretation of Hawaii's statutory scheme regulating electronic eavesdropping.[164] However, the court also addressed privacy rights related to the installation of the pen register.[165]

In discussing whether the installation of a pen register was a "search" for which a warrant was required by the Fourth Amendment, the Lum Court declined to follow the United State Supreme Court holding in *Smith v. Maryland*,[166], which held that the installation was not a search for which a warrant was required. Although the Lum Court acknowledged that article I, section 7 of the state constitution paralleled the Fourth Amendment of the United States Constitution,[167] it nevertheless determined that the Hawaii Constitution had additional privacy protections set forth in article I, section 6.[168]

In discussing article I, section 6, the court concluded "that persons using telephones in the State of Hawaii had a reasonable expectation of privacy with respect to the telephone numbers they call on their private lines and with respect to calls made to them on their private lines."[169] Accordingly, the court concluded that the government should

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[160] 69 Haw. at 491, 748 P.2d at 377.
[161] *Id.* at 494, 748 P.2d at 380.
[162] 70 Haw. 546, 779 P.2d 1 (1989).
[163] *Id.* at 547, 779 P.2d at 2.
[164] HAW. REV. STAT. ch. 803, §§ 41-49 (1985).
[165] 70 Haw. at 555-56, 779 P.2d at 7-8.
[166] 442 U.S. 735 (1979).
[167] 70 Haw. at 555-56, 779 P.2d at 7.
[168] *Id.* at 556, 779 P.2d at 7.
[169] *Id.*

have obtained a proper and legal warrant if they wanted to tap private telephone lines or require the telephone company to supply it with information.[170]

The result reached by the Lum Court in *Rothman* clearly affords broader protections to the right of privacy than that reached by the United States Supreme Court in *Smith*. However, any attempt to conclude that the *Kam* and *Rothman* decisions demonstrated a shift in the Lum Court to an expansive interpretation of privacy rights is clearly dissuaded by the three most recent opinions by the court in this area.

The first of these cases is *McCloskey v. Honolulu Police Department*.[171] *McCloskey* involved a challenge to the Honolulu Police Department's (H.P.D.'s) drug urinalysis screening program. Plaintiff, an H.P.D. police officer, argued that the program violated her right to privacy as guaranteed by article I, section 6.

After a long discussion of section 6, the court declined to decide whether the program implicated the plaintiff's right to privacy.[172] Instead, through Chief Justice Lum, the court ruled that even if the program implicated the plaintiff's fundamental right to privacy, the program satisfied the difficult strict scrutiny test.[173] The court concluded the drug testing program was the only effective way to deal with the problem of drug use by police officers and therefore was the "necessary" and "least restrictive" method to meet a compelling governmental interest.[174]

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[170] *Id.* at 556, 779 P.2d at 7-8.

[171] 71 Haw. 568, 799 P.2d 953 (1990) (Lum, C.J.).

[172] *Id.* at 575-76, 799 P.2d at 956-57.

[173] *Id.* at 576-77, 799 P.2d at 957-58. Government action is usually entitled to a presumption of validity. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). However, when government action denies a fundamental right, a court will review that action with *strict scrutiny*. *Id.* (emphasis added). This means that the government carries a heavy burden of justification and must demonstrate that its program is in furtherance of a compelling government interest and that the government has selected the least drastic means for effectuating its objectives. *Id.* In *McCloskey*, the court declined to determine whether compelled urinalysis testing might implicate a right to privacy under the state constitution. Instead, the court argued that, even if the government action denies a fundamental right, the program was the least restrictive method to meet a compelling governmental interest. *McCloskey*, 71 Haw. at 576-77, 799 P.2d at 957-58.

[174] 71 Haw. at 577, 799 P.2d at 958.

The court's narrow interpretation of privacy rights was continued in *State v. Klattenhoff*.[175] The defendant in *Klattenhoff* asserted that he had a reasonable expectation of privacy in his personal bank records which was allegedly violated when the state obtained those records by subpoena.[176] Accordingly, the defendant maintained that evidence pertaining to his personal bank records should not have been admitted into evidence by the trial court.[177]

In rejecting the defendant's argument, the court cited the holding of the United State Supreme Court in *United States v. Miller*,[178] which concluded that there is no reasonable expectation of privacy in bank records.[179] Notwithstanding the apparent additional protections provided by the right of privacy in the Hawaii Constitution, the court refused to follow a minority view held by some states that, as a matter of state constitutional law, there is a reasonable expectation of privacy in bank records.[180]

Finally, the court continued its narrow construction in *State v. Morris*,[181] the Lum Court's most recent opinion addressing the right to privacy. At issue in *Morris* was the scope of a probationer's right of privacy. Specifically, the defendant probationer in *Morris* argued that it was improper for his probation officer to order him to submit to urinalysis tests without a reasonable suspicion of drug use by the probationer.[182]

In rejecting the probationer's argument, the court, through Chief Justice Lum, opined that probationers have a diminished expectation of privacy.[183] Accordingly, the court concluded that the statute allowing the state to impose drug testing on probationers furthered a reasonable state interest.[184]

The court rejected the probationer's reliance on *State v. Fields*[185] where the Hawaii Supreme Court held that a warrantless search of proba-

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[175] 71 Haw. 598, 801 P.2d 548 (1990) (Padgett, Acting C.J.).

[176] *Id.* at 599, 801 P.2d at 549.

[177] *Id.* at 605, 801 P.2d at 552.

[178] 425 U.S. 435 (1976).

[179] *Id.* at 440-43.

[180] 71 Haw. at 606, 801 P.2d at 552.

[181] 72 Haw. 67, 806 P.2d 407 (1991) (Lum, C.J.).

[182] *Id.* at 71, 806 P.2d at 411.

[183] *Id.* at 71-72, 806 P.2d at 411. The court in *Morris* did not indicate whether they were discussing the protections provided by art. I, § 6 and/or art. I, § 7.

[184] 72 Haw. at 71, 806 P.2d at 410.

[185] 67 Haw. 268, 686 P.2d 1379 (1984).

tioner's person, property, or place of residence is valid when "justified by a reasonable suspicion supportable by specific and articulable facts that dangerous drugs and substances are being secreted by the probationer."[186] The court dismissed *Fields* as inapposite in that it "did not address the specific issue of whether the condition of drug testing was reasonable."[187]

The majority's conclusion was criticized in a dissent by Justice Wakatsuki. Justice Wakatsuki cited *Fields* as holding that a warrantless search of a probationer without reasonable suspicion runs afoul of the federal constitution.[188] He argued that the court in *McCloskey*[189] upheld the H.P.D.'s drug testing program only after specifically finding it to be reasonable. Justice Wakatsuki maintained that he failed to find any support for a claim that the "search" in *Morris* was reasonable.[190] Accordingly, he would have found that the urinalysis testing required in *Morris* was constitutionally invalid, thus requiring the suppression of any evidence therefrom.[191]

VII. Conclusion

There are not enough cases decided by the Lum Court to reveal a definite First Amendment philosophy. However, in deciding First Amendment issues, the Lum Court appears to generally follow holdings of the United States Supreme Court and does not generally afford protections greater than those that are required by the federal constitution. This philosophy is most clearly demonstrated in the freedom of religion and speech cases. The court has also adopted a narrow view in defamation cases. The one area where the Lum Court appears willing to afford more protections than what is generally required under the federal constitution is in obscenity jurisprudence. Lastly, in the area of privacy, the Lum Court appears to follow a generally conservative view in limiting its view of the extent of the privacy amendment.

This is not a court that has demonstrated any real interest in expanding First Amendment rights. Its decisions have shown that the Lum Court is generally conservative in its First Amendment rulings,

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[186] *Id.* at 283, 686 P.2d at 1390.
[187] 72 Haw. at 71-72, 806 P.2d at 410.
[188] *Id.* at 73, 806 P.2d at 412.
[189] 71 Haw. 568, 799 P.2d 953 (1990).
[190] 72 Haw. at 74-75, 806 P.2d at 412.
[191] *Id.* at 75, 806 P.2d at 412.

and has usually not found it necessary to provide greater protections to Hawai'i residents under our state constitution than the protections afforded under the First Amendment to the United States Constitution as defined by the United States Supreme Court. In a state that is as politically liberal as this one, this is certainly a surprising judicial philosophy.

The Hawaii Supreme Court Under the Lum Court: Commentary on Selected Employment and Labor Law Decisions

by Ronald Brown*

I. Introduction

During the tenure of Chief Justice Herman Lum, a number of key labor and employment law decisions have been decided along with a larger number of undistinguished cases reviewing labor related matters raised before state administrative agencies. Over fifty cases can be categorized as labor and employment related, with a large percentage of those being concerned with workers' compensation and other benefit/disability issues. For discussion purposes in this brief review, five descriptive categories of decisions are designated: (1) decisions involving benefits/disability rights; (2) decisions concerning contractual limitations on at-will employment; (3) decisions construing state antidiscrimination laws; (4) decisions defining the contours of "strike-related disqualification" under unemployment compensation; and (5) decisions defining standards applicable to public sector arbitration.

The key opinions in labor and employment cases are often written by former labor attorney Justice Nakamura, but just as often also by others, including Justices Wakatsuki and Padgett and, more recently, Justice Moon. Although the Hawaii Supreme Court does not receive a large volume of cases, it has received a variety of interesting labor law cases which has permitted it to join other states in resolving similarly occurring current issues in the five categories identified.

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Although an insufficient number of labor cases have arisen during the "Lum years" to afford discussion of great bold themes and patterns that have emerged, there is enough case law to discuss the direction and the proclivities of the court as its decisions have addressed the labor and employment issues in the five categories of cases set out above. Some noteworthy trends have had sufficient impact on the bar to cause it to adjust its practice and, perhaps, also to inscribe into Hawai'i legal history some impressions, or "footprints" of the Lum Court. A preview of the general "tendencies" of the court in these areas would be that the court (1) "decides" under benefit/disability cases; (2) "creates" in the area of at-will employment; (3) "protects" against limitations on antidiscrimination laws; (4) "grants" unemployment benefits to strikers; and, (5) "favors" public sector arbitration.

II. Noteworthy Areas of Highlighted Decisions

Among the numbers of labor-related cases decided by the Hawaii Supreme Court during the "Lum years," the following categories and case highlights have been chosen to illustrate the work, the patterns, and the tenor of the court's decisions.

A. Benefits/Disability Decisions

The court appears to treat benefits/disability cases in a manner similar to that of a traffic officer, by moving the lines into their proper location as to the meaning and application of legislative or administrative definitions and procedures relating to coverage and qualifications for the benefits, and, similarly, by acting as a referee, in upholding or setting aside disability decisions.

As to the somewhat mundane statutory benefit entitlement cases, *Agsalud v. Clarke*[1] is representative. Here the court upheld the decision that an enterprise was a "farm" and thus exempt from the employment security law.[2] Likewise, in *Ono v. Hawaiian Telephone*[3] the court reversed a decision by the Labor Industrial Relations Appeals Board which had held that an employee who tripped over a shopping center sidewalk median 200 feet from his place of employment was entitled to compensation under the workers' compensation law.[4] The court remanded

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[1] 66 Haw. 388, 662 P.2d 1120 (1983) (per curiam).

[2] *Id.* at 388-89, 662 P.2d at 1120-21.

[3] 68 Haw. 479, 718 P.2d 1085 (1986) (Padgett, J.).

[4] *Id.* at 479, 718 P.2d at 1086.

the case and provided clarification that the law's operative criteria of employer contribution to the maintenance of common areas should be only one factor when determining compensability.[5]

In *Brooks v. Department of Labor and Industrial Relations Appeals Board*,[6] the court performed "referee" chores in making a judgment call that an individual can be disqualified by certain misconduct from receiving unemployment compensation benefits.[7] Similarly, in *Komatsu v. Board of Trustees, Employees' Retirement System*,[8] the court reviewed disability law determinations and found that exposure to noxious organisms from an air conditioning system constituted an "occupational hazard" under disability retirement provisions.[9] In *Lopez v. Board of Trustees, Employees' Retirement System*,[10] by contrast, the court found that certain "work demands" did not constitute an "occupational hazard."[11]

In two other illustrative disability determination cases, the court in *Lewis v. Board of Trustees, Employees' Retirement System*,[12] held that the "odd lot" doctrine was not applicable to permanent incapacitation for employment for purposes of service-connected disability retirement.[13] In resolving the issue in *Papa v. Board of Trustees, Employees' Retirement System*,[14] the court determined that an employee injured in the line of duty was "totally disabled" within the meaning of the statute.[15]

All of these decisions are very important, and the court served its purpose of resolving cases and clarifying the labor laws and their application. However, in this area of the labor law cases, it is this process and function that is more noteworthy than the decisions themselves, which are somewhat mundane and "jurisprudentially unexciting."

B. Contractual Limits on At-Will Employment

Drawing upon the 1982 precedent-setting Richardson Court decision in *Parnar v. Americana Hotels, Inc.*[16] that prevented an employer from

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[5] *Id.* at 480, 718 P.2d at 1016.
[6] 68 Haw. 19, 704 P.2d 881 (1985) (Hayashi, J.).
[7] *Id.* at 21, 704 P.2d at 882.
[8] 67 Haw. 485, 693 P.2d 405 (1984) (Nakamura, J.).
[9] *Id.* at 495, 693 P.2d at 412.
[10] 66 Haw. 127, 657 P.2d 1040 (1983) (per curiam).
[11] *Id.* at 131, 657 P.2d at 1042.
[12] 66 Haw. 304, 660 P.2d 36 (1983) (per curiam).
[13] *Id.* at 307, 660 P.2d at 38.
[14] 66 Haw. 105, 657 P.2d 1027 (1983) (per curiam).
[15] *Id.* at 108-09, 657 P.2d at 1030.
[16] 65 Haw. 370, 652 P.2d 625 (1982) (Hayashi, J.); *see also*, Susan M. Ichinose,

wrongfully discharging an at-will employee for reasons which would violate public policy,[17] the Lum Court added two additional and significant limitations on the ability to discharge at-will employees. Both limitations are grounded in or related to contract law.

The first, *Ravelo v. County of Hawaii*,[18] established a cause of action under the doctrine of promissory estoppel due to an "employee's" (or offeree's) detrimental reliance on an employer's promise of employment.[19] The court held that a broken promise can require payment of reliance damages, notwithstanding the employer's legal ability to immediately terminate the at-will employment relationship.[20] In *Ravelo*, the County of Hawaii, as employer, accepted plaintiff's application to become a police officer and promised plaintiff he would be sworn in as a police recruit on a specific date.[21] The plaintiff and his wife thereafter detrimentally relied on this representation by severing employment and incurring other expenses related to moving to the new job, but were then informed by the employer that the plaintiff would not be hired.[22]

Plaintiff filed suit under tort and contract theories which the circuit court rejected, noting that the plaintiff, under the employment conditions, even if prevailing, would be a probationary employee, terminable at-will.[23] The Hawaii Supreme Court, per Justice Nakamura, agreed: "[W]e cannot fault the circuit court's perception that the averments in the complaint could not sustain an action premised on a breach of a formal contract or tortious conduct."[24] However, the court held that the plaintiff could recover under the theory of promissory reliance, adopting *Restatement (Second) of Contracts* section 90 as the basis.[25] The court went on to add, "[H]ence, we expect that relief here, if appropriate, will extend to [plaintiff's wife] as well as [to the plaintiff] and

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Hawaii's Supreme Court Recognizes Tort of Retaliatory Discharge of an At-Will Employee, 17 HAW. B. J. 123 (1982).

[17] *Parnar* at 380, 652 P.2d at 632.

[18] 66 Haw. 194, 658 P.2d 883 (1983) (Nakamura, J.).

[19] *Id.* at 199, 658 P.2d at 887.

[20] *Id.*

[21] *Id.* at 196, 658 P.2d at 885.

[22] *Id.*

[23] *Id.* at 197-98, 658 P.2d at 885-86.

[24] *Id.* at 198, 658 P.2d 886.

[25] *Id.* at 199-200, 658 P.2d at 887.

that any relief granted will not place [the plaintiff] in a better position than performance of the promise to hire him as a police recruit would have."[26]

Two observations are in order at this point. First, the court did not find, nor create, a "formal," explicit contractual limitation on at-will discharges, but it did provide a legal limitation on the employer's ability to abruptly terminate an at-will employee where that employee satisfies the standards of *Restatement (Second) of Contracts* section 90. The type of relief afforded by the court under the *Restatement* is reminiscent of traditional theories of "implied-in-law" remedies wherein the usual requirements of offer, consideration, and acceptance may be dispensed with in the interests of justice and the need for relief, i.e., where reliance (rather than expectation) damages will be appropriate. A second point of interest is that the plaintiff's wife's reliance damages were also included, as an "intended" third party promisee without the court's full development of that theory. While the holding in *Ravelo* has been analyzed and criticized for not further developing the "reasonableness" of the reliance nor the clear "intention" to benefit the plaintiff's wife,[27] it should be noted the this review by the supreme court was an appeal on the legal issues, and the case was *remanded* to the lower court for further proceedings not inconsistent with the decision.

A second case by the Lum Court which recognized limitations on employers' right to terminate at-will employees was *Kinoshita v. Canadian Pacific Airlines, Ltd.*[28] The court held that employment provisions granted by the employer can create contractual procedural requirements which must be followed before a lawful discharge can occur.[29] These rights may be contained in employment manuals or other employee rules.[30] What renders this case significant is the way in which the court found that a *contract* was in existence (in this case an employment manual) which did limit the employer's ability to discharge at-will employees.

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[26] *Id.* at 201, 658 P.2d at 888. The Court quoted the RESTATEMENT'S comment "d" regarding partial enforcement, which observes that damages will often be "limited to restitution, or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise." *Id.* at 201 n.4, 658 P.2d at 888 n.4.

[27] *See*, Cheryl Volta Brady, Ravelo v. County of Hawaii: *Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163 (1986).

[28] 68 Haw. 594, 724 P.2d 110 (1986) (Nakamura, J.).

[29] *Id.* at 603-04, 724 P.2d at 117.

[30] *Id.* at 604, 724 P.2d at 117.

Plaintiffs were part-time employees arrested for suspected involvement with illegal drugs.[31] The employer, after learning of the arrests, suspended them without pay. After an investigation, the employer terminated them while denying them a right to appeal pursuant to the employees' rules manual provided by the employer.[32] The employee plaintiffs filed a number of charges including wrongful discharge. The plaintiffs' case in the First Circuit Court was removed to federal district court which found for the employer, holding that the employee rules in the manual were not binding. Plaintiffs appealed to the Court of Appeals for the Ninth Circuit which found that its decision depended on state law for which there was no clear precedent.[33] Thus, the Ninth Circuit certified a question for a Hawaii Supreme Court decision on the issue of whether the employer's employment rules were a valid and enforceable contract under state law.[34]

The Hawaii Supreme Court, in examining the facts, determined that: (1) the plaintiffs were at-will employees,[35] (2) the employer had promulgated its rules (and created purported rights therein) in part to stem a union's attempt to organize its employees,[36] (3) the employer had the right to make unilateral changes to the policy,[37] and (4) the plaintiff employees had never bargained for nor reached any mutual agreement as to the binding nature of the rules.[38]

Nonetheless, the Hawaii Supreme Court, again through Justice Nakamura, held that the employer's statements of policy contained in rules or manuals were binding even without mutual agreement, even though the employer could unilaterally change them, and even though the applicable provisions came into effect after the plaintiff employees had already been hired. The court stated the employer had used the rules to thwart unionization and had otherwise created an environment seeking to induce reliance by employees on the validity of the employer's rules.[39] The court noted that an "employment contract 'does not always follow the traditional model, in which contractors bargain over

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[31] *Id.* at 559, 724 P.2d at 114.
[32] *Id.*
[33] *Id.* at 597, 724 P.2d at 113.
[34] *Id.*
[35] *Id.* at 600, 724 P.2d at 115.
[36] *Id.* at 603, 724 P.2d at 117.
[37] *Id.* at 604, 724 P.2d at 117.
[38] *Id.*
[39] *Id.* at 603, 724 P.2d at 117.

terms, and courts seek to implement individual intentions.'"[40] The court further stated that "a modern employment contract is often a standardized agreement . . . between the employer *organization* and the *class* of employees."[41]

The court also relied on *Restatement (Second) of Contracts* section 211(2) to hold that the employer had intended to create expectations and induce reliance by employees as a group, as in standardized contracts, and therefore that it should not be able to escape liability on the grounds that a particular employee was unaware of the rules or did not receive a promise.[42]

Analytically, the interesting point of this case is its disregard of traditional contractual principles in finding a remedy to limit the at times harsh results of at-will employment. It appears that little more than an employment relationship and an employment manual need exist for an employer to be bound by a vague, unspecified reliance by employees generally on the representations contained therein. And whether that might constitute "implied-at-law" detrimental reliance, or some other variation of promissory estoppel, or an openly created implied duty of fair treatment and job security for employees, the decision is clearly result-oriented and creates a contractually-based limitation on at-will discharges.

A common theme in both *Ravello* and *Kinoshita* is the court's concern for employees' presumably reasonable *reliance* on employer representations. This reliance, perhaps creatively applied, is used to place obstacles in the way of an employer's common-law right to effortlessly discharge at-will employees. However, its success in providing a modicum of job protection at the argued sacrifice of traditional principles of law may be short-lived as both limitations can be eliminated by an employer's changed management practices and validly drafted and obtained disclaimer clauses. What the decision does accomplish, however, is to clearly move the statute of limitations from the two years for wrongful discharge based on tort actions to six years for breach of contract.[43]

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[40] *Id.* at 604, 724 P.2d at 117 (quoting Mark Pettit Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 583 (1983)).

[41] *Id.* (emphasis in original). The court stated that traditional requirements to create formal contracts may have to give way to other contractual theories so as to "mitigate the severity" of the at-will doctrine. *Id.* at 601, 724 P.2d at 116.

[42] *Id.* at 603, 724 P.2d at 117.

[43] *See*, Joan Engelbart, Recent Developments, 9 U. HAW. L. REV. 783 (1987); Leslie

C. Construing State Antidiscrimination Laws

Legal issues have arisen during the years of the Lum Court involving the interpretation of statutory rights against discrimination, and questions have been posed and resolved over arguments for limitation or expansion of their provisions. An examination of some leading cases shows that these rights in a wide variety of settings have been protected against erosion and allowed to expand under judicial guidance.

In its most recent holding in *Ross v. Stouffer Hotel*,[44] by a three-two decision, the court interpreted the state statutory ban against marital status discrimination to include and prohibit an employer from terminating one of its two employees who had recently married but failed to meet the employer's policy that upon marriage among employees, one must resign or transfer.[45]

The Hawaii Supreme Court overturned the circuit court decision which, like the dissent in the supreme court, agreed with the employer that it was not marital status but rather *whom* the plaintiff married that was the reason for the termination. The majority of the supreme court disagreed and found that marriage and marital status were the reasons for termination.[46] The court examined the split of authority outside Hawai'i on this issue and noted that while reasonable minds may differ, it supported the view that public policy encouraging marital relationships was furthered by fully protecting the marital status and holding as it did.[47] It did note that statutory exceptions existed which would permit legitimate employer discrimination but that they were not established in this case.[48]

Thus, the Lum Court when presented with a statutory construction issue on an antidiscrimination provision went with the more liberal interpretation, leaving the two-Justice dissent to claim this type of decision was better left to the legislature.[49]

In 1987, in *Hyatt Corp. v. Honolulu Liquor Comm'n*,[50] the court upheld the Honolulu Liquor Commission's authority to adopt protective an-

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A. Hayashi, *Canadian Pacific Cases:* Kinoshita *&* Nakashima*: What Really Happened to the Employer?* 22 HAW. B. J. 75 (1989).

[44] 72 Haw. 350, 816 P.2d 302 (1991) (Padgett, J.).

[45] *Id.* at 354, 816 P.2d at 304.

[46] *Id.* at 355, 816 P.2d at 304.

[47] *Id.* at 353, 816 P.2d at 303.

[48] *Id.* at 355, 816 P.2d at 304.

[49] *Id.* at 359, 816 P.2d at 304 (Wakatsuki, J., dissenting).

[50] 69 Haw. 238, 738 P.2d 1205 (1987) (Lum, C.J.).

tidiscrimination rules.[51] Arguments that such authority should be limited and construed restrictively were rejected by the court which found that the Commission was vested with unusually broad discretionary powers and that "the public policy of the State of Hawaii disfavoring racial discrimination . . . is beyond question."[52] Therefore, the court again protected the state's antidiscrimination provisions against arguments of limitation.

In *Puchert v. Agsalud*,[53] an airline employee was discharged after he was unable to perform acceptable work due to a work injury.[54] The Labor Department dismissed his complaint as untimely, construing the state's antidiscrimination statute[55] to require the filing of the complaint within thirty days of his discharge or only after he is able to return to his former job and not any sooner (as was done here).[56] Prior to filing the statutory complaint, the plaintiff filed a grievance under an applicable collective bargaining agreement which ended in an arbitration decision which modified the employer's first dismissal of plaintiff. The employer subsequently discharged the plaintiff again for not following the requirements of the arbitration decision. Ten months later, the plaintiff filed a statutory complaint which the state denied and the circuit court upheld on review.[57]

The supreme court, in an opinion by Justice Wakatsuki, reversed and held that plaintiff could file under the statutory antidiscrimination provision.[58] It stated that such protective legislation

> should be liberally construed to accomplish the humanitarian objective of the legislation . . . . The construction . . . allowing . . . the employee with the avenue by which he may be afforded a remedy for the violation of his rights would be more consonant with the legislative enactment of remedial social legislation for workers *than would a technical reading* . . . .[59]

A rejected argument of limitation of the statutory right was that federal preemption under the Railway Labor Act and its coverage of these issues (matters covered by the collective bargaining agreement)

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[51] *Id.* at 243, 738 P.2d 1209.
[52] *Id.* at 244, 738 P.2d at 1208-1209.
[53] 67 Haw. 25, 677 P.2d 449 (1984) (Wakatsuki, J.).
[54] *Id.* at 28, 677 P.2d at 453.
[55] HAW. REV. STAT. § 378-32(2) (1976).
[56] 67 Haw. at 34, 677 P.2d at 452-53.
[57] *Id.* at 28-29, 677 P.2d at 453.
[58] *Id.* at 37, 677 P.2d at 458-59.
[59] *Id.* at 36, 677 P.2d at 457-58 (emphasis added).

prevented the state and state law from dealing with the matter.[60] The court found no preemption limitation since the complaint of unlawful discharge for having suffered work injury compensable under the state's workers' compensation law found its source in that law and not in the collective bargaining agreement.[61] Moreover, the claim was not identical to any claim plaintiff could have made under the collective bargaining agreement.[62]

The court, in sophisticated review and analysis of technical areas of federal and state law cases involving federal-state relations under the National Labor Relations Act and the Railway Labor Act, also concluded that the application of state law in this case did not interfere with the scheme of the Railway Labor Act. The Hawaii Supreme Court reviewed and adopted the rationale of non-Hawai'i precedent holding that state statutes prohibiting unlawful discharges for injuries compensable under workers' compensation laws are only "of peripheral concern to the federal laws because [they have] nothing to do with collective bargaining or union organization . . . [and are] pre-eminently a matter of state concern."[63]

The court also rejected as "irrelevant" the state's argument that a liberal interpretation would "open the flood gates" and thereby create "a great inconvenience and an onerous administrative burden to the agency."[64]

In *Flores v. United Air Lines, Inc.*,[65] an employee, discharged because of her inability to perform work, claimed a statutory right to first preference to reemployment under a state statute.[66] The Director of Labor and Industrial Relations determined that a plain reading of the statute showed that the Department of Labor had no jurisdiction over the unlawful discharge complaint inasmuch as there was an applicable collective bargaining agreement covering the situation which, under its wording, the statute properly precluded the continued employment or reemployment of plaintiff after exhaustion of contractual benefits.[67]

The Hawaii Supreme Court disagreed and found that the "plain meaning" of the statute did not lead only to the conclusion of no

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[60] *Id.* at 33, 677 P.2d at 455.
[61] *Id.* at 31-33, 677 P.2d at 454-55.
[62] *Id.* at 31, 677 P.2d at 454-55.
[63] *Id.* at 40, 677 P.2d at 455.
[64] *Id.* at 37, 677 P.2d at 458.
[65] 70 Haw. 1, 757 P.2d 641 (1988) (Nakamura, J.).
[66] *Id.* at 5, 757 P.2d at 643.
[67] *Id.* at 6, 757 P.2d at 644.

jurisdiction.[68] The court held that while the termination of benefits to continued employment under the collective bargaining agreement may be sufficient to meet statutory requirements to end employment, it will not necessarily also preclude the statutory right to *reemployment*.[69] The court held that the Director's "ungenerous application" of the statute should be set aside and noted that the statutory reemployment provision "is voided only by a provision preventing reemployment in an applicable collective bargaining agreement."[70]

Thus, the Hawaii Supreme Court again promoted statutory rights by rejecting arguments and interpretations which would otherwise limit them. It continued to construe antidiscrimination laws in a non-restrictive way so as to remove from its own agenda and back to the agenda of the legislature or labor negotiators any limitations on the rights granted under the anti-discrimination statutes.

Lastly, a holding by the Hawaii Supreme Court in *Sussel v. Honolulu Civil Service Commission*[71] set the general tone of the court's expectation in public sector employment decision-making matters. The court borrowed the higher standard governing judges and overruled the circuit court's disqualifying standard of "actual bias" by holding that a civil service commissioner reviewing an employee's appeal of an adverse personnel decision could be disqualified under the higher "appearance of impropriety" standard.[72]

The court found that where the Mayor had fired the plaintiff, and the Chairman of the Civil Service Commission, who must review the personnel appeal and had known the Mayor for many years, had contributed to his political campaign, and had an economic interest with the City through personal ownership of the management company of the public bus system, the appearance of impropriety existed.[73] The court concluded: "[W]e see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality . . . ."[74] In sum, the court established a high standard for public adjudicators in determinations of state statutory rights. This high standard works to create trust in the system, and when combined with the court's continued decisions

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[68] *Id.* at 8, 757 P.2d at 645.

[69] *Id.* at 11, 757 P.2d at 646.

[70] *Id.* at 11-12, 757 P.2d at 646.

[71] 71 Haw. 101, 784 P.2d 867 (1989) (Nakamura, J.).

[72] *Id.* at 110, 784 P.2d at 871.

[73] *Id.*

[74] *Id.*

not allowing limitations on statutory rights, real protection under these anti-discrimination laws is permitted and a legal environment is created which permits meaningful enforcement of these rights.

D. Defining Contours of "Strike-Related Disqualification" Under Unemployment Compensation Laws

The Hawaii Supreme Court, under the tenure of Chief Justice Lum, has been called upon several times to provide guidance in the interpretation of how strike-related activities affect the disqualification for the same under the unemployment compensation statute. In 1987, in *Abilla v. Agsalud*,[75] the court enforced the clear language of the unemployment compensation statute which disqualified employees unemployed due to a "lock out" by the employer.[76] In upholding for the denial of benefits, the court rejected the argument, accepted by a few other states, that benefits should depend on whether or not claimants were involuntarily unemployed through no fault of their own.[77] In adopting the policy that the state administering agency should remain neutral in labor disputes, lest the agency and the courts might be called upon to determine "'both the justice of the parties' cause and the reasonableness of the strike or lockout as a means of enforcing their demands,'"[78] the court found that the "labor dispute" disqualification clearly included lockouts because the statute explicitly read "strike, lockout, or other labor dispute."[79]

In 1986, in *International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone*,[80] the Hawaii Supreme Court "waded in" to a long running controversy involving unemployment compensation benefits paid to employees who struck against the employer in 1974. The state agency and lower court had upheld payment of benefits despite a series of complex arguments ranging from preemption by other federal statutes to lack of regulatory authority to waive registration requirements, to arguments over whether the 1974 strike had substantially curtailed the employer's operations (thus removing the disqualification), and to

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[75] 69 Haw. 319, 741 P.2d 1272 (1987) (Nakamura, J.).

[76] *Id.* at 321, 741 P.2d at 1273.

[77] *Id.* at 330, 741 P.2d at 1279.

[78] *Id.* at 328, 741 P.2d at 1277 (quoting Leonard Lesser, *Labor Dispute and Unemployment Compensation*, 55 YALE L.J. 167, 178 (1945)).

[79] *Id.* at 332, 741 P.2d at 1279. *See*, HAW. REV. STAT. § 383-30(3)(B)(i).

[80] 68 Haw. 316, 713 P.2d 943 (1986) (Padgett, J.).

whether the law violates other federal statutes. The Hawaii Supreme Court likewise rejected these arguments which would have eliminated the payments of benefits to the strikers. Justice Padgett, in an opinion often reading like a treatise on statutory construction, laboriously went through all of the arguments and concluded that the statutory benefits were properly awarded to the striking employees.[81] Justice Padgett deftly cut to the core of complex arguments presented in a manner that may cause readers to wonder why those arguments had persisted for so many years.

In a 1990 case, disputes regarding payment of unemployment compensation benefits to striking employees continued. In *Dole Hawaii Div.-Castle & Cooke Inc. v. Ramil*,[82] employees at the employer's can manufacturing plant were laid off in December 1984 and January 1985 for an indefinite period due to the closing of the employer's local tuna cannery and subsequently began receiving unemployment compensation benefits.[83] Under an existing collective bargaining agreement these employees retained seniority rights and were required to call the employer weekly to determine if work was available.[84] The agreement expired on January 31, 1985.[85] On February 5, 1985, in anticipation of a labor strike on February 6, 1985, the employer gave recall offers to the laid-off employees.[86] Claimants, instead of accepting the recall offers and reporting to work, joined the strike and were later denied unemployment benefits for the period that they were on strike.[87]

On appeal to the Employment Security Appeals Referee, benefits were granted on the grounds that the work offered was "new work" available due to the strike and per the "strikebreaker" provision of *Hawaii Revised Statutes* section 383-30 (3)(B)(i), pursuant to which claimants are allowed to reject the work without benefit disqualification. The circuit court reversed finding the "strikebreaker" provision inapplicable.[88]

The Hawaii Supreme Court, calling for deferral to the expertise of state agencies,[89] overruled the circuit court and restored the award of

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[81] *Id.* at 319, 713 P.2d at 952.
[82] 71 Haw. 419, 794 P.2d 1115 (1990) (Moon, J.).
[83] *Id.* at 421, 794 P.2d at 1117.
[84] *Id.* at 422, 794 P.2d at 1117.
[85] *Id.* at 421-22, 794 P.2d at 1117.
[86] *Id.* at 422, 794 P.2d 1117.
[87] *Id.*
[88] *Id.* at 423, 794 P.2d at 1118.
[89] *Id.* at 424, 794 P.2d at 1118-19.

benefits.[90] The court found that claimants were indefinitely laid off, which constituted a termination, so that their recall was "new work" within the meaning of the statute.[91] The court noted that the so-called "strikebreaker" provision was passed with the intent that unemployed workers should not be pushed into becoming strikebreakers or lose unemployment benefits.[92] Furthermore, the court found, per Justice Moon, that the recall offers to work at "new work," vacant due to a labor dispute, could be refused under the law, without disqualification from benefits.[93] Therefore, claimants were entitled to continuation of their benefits even during the strike period, notwithstanding the strike activity disqualification.

Since this was a case of first impression, Justice Moon relied on many non-Hawai'i legal precedents as he carefully and with great craftsmanship analyzed the legislative intent, formulated the statutory construction based on this intent, and determined and defined the contours of when an employee is "terminated" so that "new work" is present for purposes of entitlement to unemployment compensation benefits. The court followed the generally accepted approach of liberally construing social legislation.

E. Public Sector Arbitration: Defining Standards

In a series of four cases decided in 1983, often per curiam, the Hawaii Supreme Court clarified the role of the court vis-a-vis the arbitration process, particularly regarding possible statutory intrusions or limitations on that process. Paralleling the "trilogy" in the private sector, the Hawaii Supreme Court largely defined the role of the courts as one that defers to arbitration.

On the issue of the proper role of the court in compelling arbitration, in *UHPA v. Univ. of Hawaii*,[94] the court held that courts should compel arbitration where, in the court's judgment, the collective bargaining agreement calls for it, even though by statute certain management rights are reserved for the employer's determination.[95] Once those rights are exercised, as for example, by the establishment of promotion

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[90] *Id.* at 432, 794 P.2d at 1122.
[91] *Id.*
[92] *Id.* at 428, 794 P.2d at 1119.
[93] *Id.* at 425, 794 P.2d at 1118-19.
[94] 66 Haw. 207, 659 P.2d 717 (1983) (per curiam).
[95] *Id.* at 212-13, 659 P.2d at 720.

and tenure criteria, the agreed upon review procedures—here arbitration—must be followed.[96] Citing case law from other states, the court explained its policy rationale as follows: "Since strikes by public workers can be very disruptive and dangerous to the health of the state, calming tensions through arbitration is more imperative in the public sector than in the private sector."[97]

Therefore, the court, in interpreting the statutory management's right clause, refused to expand its meaning so as to limit or prevent arbitration. The court stated, "[W]e would require more direct language in a statute to allow it to take away the bargained-for remedy of arbitration."[98]

As to the proper role of judicial review in the enforcement of arbitration awards, the court again followed the lead of the United States Supreme Court in *UHPA, Daeufer v. University of Hawaii*[99] when it held that deferral is the appropriate standard, assuming the arbitrator acted within his or her authority.[100] In this case, the court noted that the collectively bargained for employment agreement limited the power of the arbitrator in that he could not substitute his judgment for that of a University official unless he found the University official's decision to be arbitrary and capricious.[101] The court remanded the case to the arbitrator for a determination of whether the University official had acted arbitrarily or capriciously,[102] upholding the arbitrator's authority to grant tenure and promotion.[103]

In another case decided the same day, *University of Hawaii v. UHPA, Wiederholt*,[104] the Supreme Court further clarified the court's role by interpreting an identical contract provision (in the next year's agreement) and concluded that while the arbitrator had authority to grant tenure in those cases where the employer had been arbitrary or capricious, the arbitrator did not also have authority to form an ad hoc tenure review committee to decide that issue.[105] Citing *United States*

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[96] *Id.* at 211-12, 659 P.2d at 720.
[97] *Id.* at 212, 659 P.2d at 720.
[98] *Id.*
[99] 66 Haw. 214, 659 P.2d 720 (1983) (per curiam).
[100] *Id.* at 225-26, 659 P.2d at 727.
[101] *Id.* at 218, 659 P.2d at 724.
[102] *Id.* at 227, 659 P.2d at 729.
[103] *Id.* at 221, 659 P.2d at 724.
[104] 66 Haw. 228, 659 P.2d 729 (1983) (per curiam).
[105] *Id.* at 231, 659 P.2d at 731.

Steelworkers of Amer. v. Enterprise Wheel & Car Corp.,[106] the court noted that the parties bargained for the decision of the arbitrator, not that of others.[107]

Thus, the Hawaii Supreme Court appeared to establish the standard that courts should not normally intrude into the arbitrator's decision so that judicial review and intervention is appropriate only where the arbitrator exceeds her or his authority. However, the court then went on to provide further *guidance* to the arbitrator, stating: "[A]lthough we do not pass judgment on the arbitrator's finding of arbitrary and capricious conduct . . . we do pause to emphasize the standard which must guide him: . . . lack [of] any rational basis whatsoever . . . . The official's decision need not be the most fair, logical, or judicious one; it need only be rational."[108] The problem is, of course, that the source of this standard is the contract language, and, initially at least, it is the job of the arbitrator to give the contract term meaningful definition. Then, the *usual* standard of judicial review would not "second-guess" the arbitrator's judgment,[109] but rather inquire only whether the arbitrator properly reached his or her decision using the contract standard, as well as whether the award drew its essence from the agreement and, of course, whether it might be limited in the public sector by particular statutes (not here in question). Thus, the court arguably backed off from its own standard by in fact judicially intervening to provide the working definition of the arbitrator's contractual authority which it was partially at least the function of the arbitrator to decide, at least in the first instance.

In a final lesson of the court's role in arbitration, an arbitration award was vacated in *University of Hawaii v. UHPA, Watanabe*.[110] The arbitrator exceeded his authority by introducing criteria for his decision which was different than that of the employer (which was authorized

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[106] 363 U.S. 593 (1960).

[107] 66 Haw. at 231, 659 P.2d at 731.

[108] *Id.*

[109] In *Daeufer*, the court stated the applicable standard of review as being "[w]here the basis of the arbitrator's award . . . could have rested on an interpretation and application of the agreement, there should be no 'second guessing' by the court." 66 Haw. at 214, 659 P.2d 720 (1983) (citing In re Arbitration Between Local Union 1260 and Hawaiian Telephone Co., 49 Haw. 53, 411 P.2d 134, 136 (1966)).

[110] 66 Haw. 232, 659 P.2d 732 (1983) (per curiam).

by statute).[111] Where the employer's handbook required a candidate to have a Ph.D., it was improper for the arbitrator to negate that requirement and grant an award for promotion.[112] The court reiterated its earlier rule that the arbitrator must follow the employer's criteria and determine only if the employer itself has failed to properly apply its own criteria.[113] The court concluded that "by deciding contrary to statute that the Faculty Handbook does not apply, the arbitrator exceeded his powers. [*Hawaii Revised Statutes* section] 658-9(4) allows us to vacate the award for that reason."[114] Interestingly, the decision directed the arbitrator to rehear the case.

In sum, the Hawaii Supreme Court in 1983 decided four arbitration cases and emphasized its support of arbitration as a means of resolving disputes, particularly in the public sector. It sought to establish the role of the court in compelling arbitration and reviewing arbitration awards, being mindful of special statutory limitations in the public sector especially regarding the authority of arbitrator. The court may have intervened too heavily in *University of Hawaii v. UHPA, Wiederholt*[115] by trying to "guide" and perhaps "second guess" the arbitrator rather than merely reviewing arbitration decisions.

III. Summary Critique

The Hawaii Supreme Court during the tenure of Chief Justice Herman Lum has made a credible and substantial contribution to the development of labor and employment law in the state. It has provided clear guidance on a variety of employment and labor areas and, by so doing, has also provided the users of that law with the opportunity to change the law, change policies, or to draft around some of its decisions.

In the benefits/disability area, the court through its decisions drawing legal lines around when entitlement occurs, allows the insurers, the legislators, employers, and unions to respond accordingly, which of course continually generates issues in this area of the law. This is the proper function of the court as the ultimate arbiter of government benefit programs. The court provided reasoned bases for its statutory

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[111] *Id.* at 235, 659 P.2d at 733-34.
[112] *Id.* at 235, 659 P.2d at 734.
[113] *Id.*
[114] *Id.*
[115] 66 Haw. 228, 659 P.2d 729.

construction and therefore fulfilled its purpose of resolving disputes over entitlement.

As to the category of contractual limitations on at-will employment, the court has joined the lead of other states in searching for employee rights that limit the common law rule that categorizes most employees as at-will employees who can be summarily discharged without reason. Moving beyond the Richardson Court's *Parnar* decision,[116] the court rather creatively established two additional limitations on at-will discharges.

The first, set forth in *Ravelo*,[117] permits an admittedly at-will employee to rely on the promises of its employer, even where that detrimental reliance extends beyond the time of the employer's ability to lawfully terminate the employment. Though not based in traditional contract rights, the modern *Restatement (Second) of Contracts* doctrine of promissory estoppel was accepted by the Hawaii Supreme Court, breaking new ground and judicially recognizing and/or creating a limitation on the facile ability of an employer to terminate an at-will employee.

The second judicially-created limitation on at-will discharges is found in the *Kinoshita*[118] case where the court openly departed from traditional, formal contract principles to find a remedy under other contract theories designed to allow remedies to mitigate against the harshness of the at-will doctrine. By holding that employer manuals, rules, and policies will often be found by the court to constitute an enforceable contract notwithstanding apparent legal shortcomings, it has notified the Hawai'i bar that employers will be held liable and obligated to follow their own rules in employment relationships, including those with their at-will employees. Those employers not wanting this result may, of course, change their management practices and have their lawyers draft appropriate disclaimer clauses. Eventually, issues as to the validity of these clauses will reach the Hawaii Supreme Court, as they have in other jurisdictions.

What can be said of the court in this area of labor and employment law is that it saw a problem where employees lacked protection against summary discharge, and it created judicial protections. In this area, the court continued its tradition of being "employee-friendly," though who really wins is left to the lawyers, as usual, who can, just as the court, creatively respond to the decisions of the court.

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[116] 65 Haw. 370, 652 P.2d 625 (1982).
[117] 66 Haw. 194, 658 P.2d 883 (1983).
[118] 68 Haw. 594, 724 P.2d 110 (1986).

The third area where the court is involved in construing state antidiscrimination laws is one where its record has been one of "protecting" the prohibitions as against numerous legal arguments of statutory construction which would limit its coverage. While the *Ross*[119] decision allows one to argue whether the court "protected" or "expanded" coverage, the decision extends marital status protection to rules limiting spousal employment and certainly avoided narrowing the prohibition on statutory construction limiting coverage. This measure of protection to employees certainly is not without limit. As the court noted, the law also created statutory exceptions of which employers can easily avail themselves where legitimate interests are shown.

In the other three cases discussed in this area, a common theme emerges that the court does not easily accept arguments of statutory construction which would limit protections against discrimination. In *Hyatt*,[120] it rejected arguments that the Liquor Commission lacked authority to issue regulations to combat discrimination; in *Puchert*,[121] it protected claimant's rights to seek government relief as against arguments of federal preemption; and in *Flores*,[122] the court rejected a narrow construction of the statute which would have allowed easy contractual limitation of statutory rights.

Finally, the court set an ethically high standard for labor agency decision makers' review of employment appeals involving procedural due process requirements.[123] It chose to impose the higher judicial standard of requiring administrative decision makers to avoid even the appearance of impropriety in reviewing the labor and employment appeals requests of claimants.

All in all, when faced with choices, the Hawaii Supreme Court has almost always decided these cases in favor of construing laws so as to provide employees the the fullest possible protection against discrimination.

The fourth category of labor cases reviewed involved the construction of the labor dispute disqualification of the unemployment compensation law. The court ably discussed complex issues involving lockouts, preemption, "strikebreaker" provisions, and, except in *Abilla*,[124] found

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[119] 72 Haw. 350, 816 P.2d 302 (1991).
[120] 69 Haw. 238, 738 P.2d 1205 (1987).
[121] 67 Haw. 25, 677 P.2d 449 (1984).
[122] 70 Haw. 1, 757 P.2d 641 (1988).
[123] Sussel v. Honolulu Civil Service Comm'n, 71 Haw. 101, 784 P.2d 867 (1989).
[124] 69 Haw. 319, 741 P.2d 1272 (1987).

that employees had not been disqualified, at least in the cases coming before the court. The case law may also reveal the clever shadow maneuvering taking place between labor and management as each seeks an advantage from the "neutral" government administering agency in the award or non-award of benefits during labor disputes. For example, in *Dole Hawaii Div.-Castle & Cooke, Inc.*,[125] each maneuvered to maintain or to cut off the ongoing benefits of the unemployed workers who were either about to be re-employed or on strike. The sophisticated legal arguments presented and discussed shows the ability of the court to very competently deal with very difficult areas of labor law.

The last area of cases reviewed by the Lum Court deals with public sector grievance arbitration and the role of the courts vis-a-vis that process. The court, in a series of four cases decided at the same time in 1983, set forth the standards in this area. The court appears to have followed (though not "blindly") the private sector's general approach of judicial deferral by compelling arbitration in most cases[126] and enforcing arbitration awards[127] except in those cases where the arbitrator exceeds his or her authority.[128] Though, to be certain, special circumstances exist in the public sector that differ from the private sector (particularly regarding statutory constraints), the Hawaii Supreme Court may have taken a road somewhat different from the mainstream of "Mainland" case law in its stating its deference to the arbitrator's judgment, but then actually intervening by prematurely "guiding" and explicitly defining the basis by which the arbitrator will judge.[129] Reasonable minds may differ on the extent to which *Watanabe* impacts on judicial deference to arbitral authority, since courts always have reserved the right to determine if the authority of the arbitrator has been exceeded.

In sum, the Hawaii Supreme Court under the tenure of Chief Justice Herman Lum has had many opportunities to review interesting and significant labor and employment cases. The court's decisions, reviewed here, generally have been "friendly" to labor and employees and protective of statutory rights. Where clear rights did not exist, the court judicially recognized some rights. The Justices ably resolved the controversies presented. Their decisions provide the required clear

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[125] 71 Haw. 419, 794 P.2d 1115 (1990).

[126] *UHPA*, 66 Haw. 207, 659 P.2d 717 (1983).

[127] *Daeufer*, 66 Haw. 214, 659 P.2d 720 (1983).

[128] *Weiderholt*, 66 Haw. 228, 659 P.2d 729 (1983); *Watanabe*, 66 Haw. 232, 659 P.2d 732 (1983).

[129] *Watanabe*, 66 Haw. 232, 659 P.2d 732.

guidance needed by the players in this area so they can adjust their relationships in accordance with the law.

The "Lum Court" then is characterized in this area of labor and employment law decisions as a court that has provided stability, predictably, and well-reasoned and well-written decisions, philosophically reflecting perhaps the influence of the Hawaii pro-labor environment of the 1960s and 1970s which were carried forward by labor legislation. In sum, the court has acquitted itself well as it "decided," "created," "protected," "granted," and "favored" its citizens under state laws.