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COMMENTS

CASENOTES

RECENT DEVELOPMENT

The Role of *Res Judicata* in Bankruptcy Claim Allowance Proceedings

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I. Introduction

The primary purposes of the Bankruptcy Code are to financially rehabilitate a distressed debtor and to assemble and liquidate the debtor's assets for equitable distribution to creditors.[1] Bankruptcy cases occur only in federal courts and are authorized under Article I, Section 8 of the United States Constitution.[2] No matter which chapter of the Bankruptcy Code controls the case, with narrow exceptions, the property of the debtor's estate includes all legal or equitable interests that the debtor held when the case commenced.[3] Once the assets of the estate have been assembled, creditors are entitled to dividends determined by the amount in which their claim has been allowed. The allowance process for secured, unsecured and priority claims is controlled by Section 502[4] of the Bankruptcy Code. Where the claim is

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[1] H.R. Rep. No. 595, 95th Cong., 1st Sess. at 10 (1977) [hereinafter *House Report*].

[2] "The Congress shall have Power To . . . establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. 1, § 8, cl.4.

[3] 11 U.S.C. § 541(a) (1988).

[4] 11 U.S.C. § 502 (1988).

secured, Section 506 also applies. Tax claims are controlled by Section 505, in addition to the other sections.

The claim allowance process has two elements: filing and allowance. All claims must go through the allowance process, although the process is simplified in Chapter 11 cases for claims that are scheduled by the debtor as liquidated, undisputed and non-contingent. Such claims are deemed filed in Chapter 11 cases.[5] In Chapter 7 and Chapter 13 cases, all creditors who seek to have their claim allowed must file a copy of claim with the clerk of court.[6] For claims that are unliquidated, contingent or disputed, various provisions of the Bankruptcy Code and Bankruptcy Rules provide a process for estimating and determining the amount in which the claim will be allowed.[7] A claim which is filed or deemed filed will be allowed in the bankruptcy case unless it is disputed.[8] If an objection is made to the claim, the bankruptcy court determines the amount in which the claim should be allowed after notice and a hearing.[9] Where the bankruptcy case commences after a creditor's claim has become a judgment in favor of the creditor, an objection to the claim will require the Bankruptcy Court to determine the extent to which the judgment precludes the bankruptcy court from reexamining either the validity of the claim or the amount in which it should be allowed.

In this study, we shall examine the appropriate role of the principles of *res judicata* in claim allowance proceedings in bankruptcy. This examination shall involve a consideration of the differences between nonbankruptcy adjudication and the claim allowance process, a review of nonbankruptcy federal statutory law bearing on the question, a survey and criticism of the relevant United States Supreme Court cases, and a survey of the most important lower court decisions on the subject. Finally, we shall review the Bankruptcy Code itself to determine what inferences may be gleaned concerning Congressional intent on the balancing of the competing goals of *res judicata* and the bankruptcy policy of equitable distribution among creditors. We shall then suggest an approach for resolving the tension that frequently arises between those goals in the case of insolvent estates.

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[5] 11 U.S.C. § 1111(a) (1988).

[6] 11 U.S.C. § 502(a) (1988).

[7] Fed. R. Bankr. P. 3001-3008, 11 U.S.C. § 502(b)-(j) (1988).

[8] 11 U.S.C. § 502(a) (1988).

[9] 11 U.S.C. § 502(b) (1988). The term "after notice and a hearing" is defined in § 102(1), and does not always require an actual hearing.

As a practical matter, a bankruptcy court need never reach the issue of the preclusive effect of a pre-bankruptcy judgment unless the validity or amount of the claim on which judgment was rendered appears to have been wrongly decided. Where a bankruptcy debtor's assets are insufficient to satisfy its liabilities, a judgment that establishes a creditor's claim in an amount greater than the creditor's proper entitlement will, if preclusive, reduce the dividend which the debtor's other creditors will receive from the debtor's assets or future income.[10] An erroneous judgment against an insolvent debtor, if preclusive, therefore adversely affects the debtor's other creditors, rather than the insolvent debtor. The existence and magnitude of this effect is controlled only by the amount of the error in the judgment; it is irrelevant whether the improper judgment was the result of fraud, collusion, or some other reason.

In the colorful language of an earlier era, the Supreme Court has said that *res judicata* renders white that which is black and straight that which is crooked.[11] For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person.[12] Stated more prosaically, when *res judicata* is applicable, it makes judgments binding even though they are wrong, because the policies advanced by *res judicata*[13] outweigh the interest of the unsuccessful litigant in having an error in a decided matter corrected, no matter how obvious or substantial the error is. The potential harshness of the doctrine[14] is mitigated by the fact that, in the non-bankruptcy context, the victim of any error in the preclusive judgment has already had one full and fair opportunity to be heard, including (in most cases) the right to appeal any errors in the judgment. However, where the unsuccessful litigant is an insolvent debtor that is

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[10] For example, if the debtor has $100,000 of assets and $150,000 of liabilities (when correctly determined), all of which are unsecured, each creditor will receive 66.67¢ on each dollar of its allowed claim. If a claim whose proper amount is $25,000 was wrongly adjudged to be a $75,000 claim and that judgment is preclusive in bankruptcy, then the liabilities increase to $200,000, and each creditor will receive only 50¢ on each dollar of its allowed claim.

[11] Jeter v. Hewitt, 63 U.S. (22 How.) 352, 363-64 (1859).

[12] Brown v. Felsen, 442 U.S. 127, 132 (1979).

[13] These policies are summarized in *Brown*: "*Res judicata* . . . encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown*, 442 U.S. at 131. A more detailed discussion of the policies underlying the rules of *res judicata* is found in 18 Charles A. Wright, *et al.*, Federal Practice and Procedure § 4403 (1981).

[14] Segal v. American Tel. & Tel. Co., 606 F.2d 842, 846 (9th Cir. 1979).

later involved in a bankruptcy case, the impact of the judgment falls upon its creditors, who had no such opportunity. Since bankruptcy is designed to assure that creditors receive appropriate distributions from the estate of their insolvent debtors, with all creditors' claims being subject to the claim allowance process, a conflict can exist between bankruptcy policies regulating distributions to creditors and the policies underlying the doctrine of *res judicata*. This article analyzes when and how that conflict arises, and how courts have resolved it in the past. We also suggest an approach that we believe to be more consistent with bankruptcy principles than the approach currently prevailing.

Before proceeding, it is useful to posit four hypothetical situations in which a mechanical application of preclusion doctrine by the bankruptcy court will adversely affect the other creditors of the debtor/litigant:

1. Pressed by the lack of resources for a legal defense in a distant forum and by the knowledge that no shareholder's equity was at stake, the debtor's management allows the entry of judgment by default for the failure to defend a claim whose validity was doubtful or whose amount is well over the creditor's entitlement;
2. Owing either to the incompetence of its legal counsel or the preoccupation of its management with financial affairs, the debtor fails to respond to a request for admissions under Rule 36, Fed. R. Civ. P. Pursuant to Rule 36(a), the debtor becomes bound by deemed admissions, resulting in a summary judgment on matters that could otherwise have been successfully contested;
3. Contemptuous of the adverse party, the debtor's management engages in a prolonged process of evasiveness and obstruction in discovery, eventually resulting in a judgment by default against the recalcitrant debtor;
4. The debtor is sued for an amount well in excess of its net worth, on a liability theory that appears to be marginal. Although the creditor's damage claims go well beyond a reasonable interpretation of the facts or law, debtor's counsel recommends that the debtor present no competing evidence to contest damages, as part of a tactical decision to avoid a compromise verdict on liability. Debtor's management chooses to bet the company on this tactic. The decision misfires. The jury awards damages against the debtor in the full amount requested. The lack of competing evidence on damages makes an appeal of the damage determination impossible.

The common thread in these four examples is that, clearly in the first three cases and less clearly in the fourth, the existence or size of the creditor's judgment was attributable to the debtor's financial distress

or to some defensive lapse by the pre-petition debtor or its counsel. By hypothesis, the amount of the judgment is well in excess of the judgment that the creditor would have obtained had the debtor presented an able and effective defense. In all four examples, the judgment was not the result of an examination of the merits of the debtor's position. With these examples in mind, we can begin the analysis.

II. A Comparison and a Contrast of State Collection Law and Federal Bankruptcy Goals

A proper understanding of the preclusive effect of pre-petition judgments in bankruptcy claim allowance proceedings begins with an appreciation of the different procedures and goals of nonbankruptcy collection proceedings and bankruptcy proceedings. Civil collection proceedings in a nonbankruptcy forum are adversarial and bilateral. The parties are typically two: the debtor who is defending a claim, and the creditor who is prosecuting it. Unsecured creditors of the parties would not ordinarily be given notice of the proceeding. Even if they were, they have no right to appear, whatever the solvency of the debtor.[15] Thus, although the financial interests at stake in the case of an insolvent debtor are those of its other creditors rather than those of its shareholders or management, it is the debtor's management which determines whether and how to defend the creditor's claim.

The nonbankruptcy court does not ordinarily concern itself with the effectiveness, independence or loyalty of the counsel that the debtor retains to represent it.[16] In some situations, the financial distress of the debtor may make the cost of presenting a vigorous defense impossible to bear. In other cases, the motivation to present such a defense may be suspect. For example, in the smaller bankruptcy cases where management and ownership frequently overlap, the debtor's management may prefer to use its limited resources to pay or contest debts for which both they and the debtor are personally liable, rather than to

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[15] Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343 (9th Cir. 1977); Rigco, Inc. v. Rauscher Pierce Refsnes, Inc., 110 F.R.D. 180 (N.D. Tex. 1986); Jet Traders Inv. Corp. v. Tekair, Ltd., 89 F.R.D. 560 (D. Del. 1981). Cases from state courts are collected at 59 Am. Jur. 2d, *Parties* § 149 nn.80-81 (1987).

[16] In contrast, Section 327 of the Bankruptcy Code requires that the professional persons working for the debtors hold or represent no interest adverse to the estate and be disinterested persons. The debtor can only engage legal counsel with bankruptcy court approval. 11 U.S.C. § 327(a).

defend questionable claims not involving the personal liability of management. This can lead to a halfhearted defense of a doubtful claim, or none at all.

Even where these factors are not present, the issues in the pre-bankruptcy litigation do not include all issues relevant in bankruptcy proceedings. The issues in collection litigation focus on whether the debtor has done something giving rise to liability under state or federal nonbankruptcy law, and (if so) the amount which the creditor is entitled to recover against the debtor. The effect of the determinations of these issues upon non-parties to the litigation, i.e., the other creditors of the debtor, is not a pertinent consideration for the court.[17] This becomes most apparent for judgments against a debtor obtained by default, or awarded as sanctions for the failure of the debtor to meet its obligations under court rules and procedures.[18] The nonbankruptcy court's attention is confined to protecting its own processes and balancing the relative equities of the diligent creditor and the rule-breaking debtor. This focus can produce appropriate results where a solvent debtor is concerned. However, when the debtor is insolvent, the punishment does not fit the crime. The onus of the default judgment falls upon the innocent non-party creditors of the debtor, whose recovery on their own claims would be diminished by the judgment, if the judgment is given preclusive effect.

The problem of misplaced consequences is not confined to judgments by default or judicial sanctions. Any time the pre-petition lawsuit involves claims against the debtor that exceed the creditor's pecuniary loss, the interests of other creditors of an insolvent debtor are affected. Such non-compensatory claims would include claims for trebled or other statutory damages, such as for antitrust[19] or RICO[20] violations, or for penalties or punitive damages. The purpose of such awards is to punish the debtor for the conduct involved and to deter others from

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[17] As the court states in In re Vichele Tops, Inc., 62 B.R. 788, 792 (Bankr. E.D. N.Y. 1986):

Law suits are proceedings which seek to balance rights, duties, equities, and entitlements. While courts, in nonbankruptcy matters, consider primarily the interests of the parties before it, a court of bankruptcy has a broader scope. It must interpret its enabling legislation in the light of its purpose.

[18] Rules 37(b)(2)(A) and 36(a), Fed. R. Civ. P., authorize orders that disputed matters are taken to be established in cases of failure to meet discovery obligations. Many states have adopted procedural rules modeled on the federal rules.

[19] 15 U.S.C. §§ 1-5300 (1988 & Supp. v.1993).

[20] 18 U.S.C. §§ 1961-1968 (1988 & Supp. v.1993).

similar conduct, rather than to compensate the judgment creditor for the losses it has sustained in its dealings with the debtor. While these can be worthy goals in the context of solvent debtors, when the debtor is insolvent, the persons ultimately sustaining the punishment are innocent of the misconduct.

Even claims for compensatory losses can have some element of misplaced consequences to them. Consider, for example, the situation of a claimant holding a judgment against a Ponzi scheme's promoter for the unpaid profits promised to her in a collapsed scheme, relative to other creditors of the insolvent promoter who have yet to receive even the return of their principal. The claimant's judgment for undelivered profits is easily seen as a proper remedy against the promoter for breach of the promoter's promise. However, if the judgment holder had recovered her entire investment before she filed suit, the propriety of the judgment for profits as a basis for diluting the other creditors' recovery of their principal is more doubtful.

Finally, nonbankruptcy collection actions do not endorse the fundamental bankruptcy policy of equality of distribution among creditors.[21] In fact, both their goal (from the standpoint of the litigant-creditor) and their effect is the opposite.[22] The diligent creditor is the one rewarded by the enforcement of a judgment against the assets of its debtor. The fact that this may leave other creditors holding similar and equally meritorious claims with insufficient resources from which to collect those claims is no concern of either the litigant-creditor or the nonbankruptcy court. The proceeding in the nonbankruptcy court does not seek to mediate the competing demands of creditors of the same debtor; it decides only the issues pertinent to the narrow contest between the two litigants before it.

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[21] "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete. [Citations omitted]. . . . [T]he theme of the Bankruptcy Act is equality of distribution." Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941). "Equality of distribution among creditors is a central policy of the Bankruptcy Code. . . . [C]reditors of equal priority should receive pro rata shares of the debtor's property." Begier v. I.R.S., 496 U.S. 53, 58 (1990).

The Code's legislative history calls equality of distribution among creditors "the prime bankruptcy policy." *House Report*, *supra* note 1, at 178.

[22] The House Report describes the collection process during the phase immediately before the bankruptcy commences: "[C]reditors are . . . racing to the courthouse to dismember the debtor during his slide into bankruptcy." *House Report*, *supra* note 1, at 177.

Bankruptcy cases, however, involve both similar and far different concerns than state collection law proceedings, because the function of bankruptcy law is to determine and implement in a single collective proceeding the entitlement of all concerned.[23] Performance of this job is not always consonant with the policies underlying *res judicata* doctrines; as one court has phrased it, bankruptcy courts have a job to do and sometimes they must ignore *res judicata* in order to carry out Congress' mandate.[24] The Code's legislative history describes the nature of the job of the bankruptcy courts as "sort[ing] out *all* of the debtor's legal relationships with others, and [applying] the principles and rules of the bankruptcy laws to those relationships."[25] In *Sampsell v. Imperial Paper & Color Corp.*,[26] the Supreme Court refers to this task as "adjudicat[ing] equities arising out of the relationship between the several creditors."[27] The difference between the goals and approaches of state collection law and federal bankruptcy law has been summarized by Professor Warren:

> State collection law provides a circumscribed set of procedures for balancing the interests of a non-paying debtor with those of a collecting creditor, creating a system that accommodates only limited factual inquiry but is readily accessible for resolving routine disputes. Federal bankruptcy law creates a multifaceted, integrated system for coping with the competing concerns of a wider range of interested parties in more complicated relationships and more distressed circumstances.[28]

The goal of a bankruptcy proceeding is a distribution that is equitable to the debtor, to the creditor, and among the creditors.[29] One appellate court has expressed the same concept in more practical but less elegant terms:

> When there is not enough to go around, the bankruptcy judge must establish priorities and apportion assets among creditors with the same

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[23] In re American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988).

[24] Browning v. Navarro, 887 F.2d 553, 561 (5th Cir. 1989), *reh'g denied*, 894 F.2d 99 (1990). *Browning*, which is discussed *infra* part V.A., proceeded to discount this reasoning and to apply preclusion concepts.

[25] *House Report*, *supra* note 1, at 10, (emphasis added).

[26] 313 U.S. 215 (1941).

[27] *Id.* at 219.

[28] E. Warren, Business Bankruptcy 5 (1993).

[29] 3 Collier on Bankruptcy §60.01 at 732 (14th ed. 1977) (emphasis added).

> priority, but the starting point is legal entitlements that exist outside of bankruptcy.[30]

The difference between the objectives and perspectives of the bankruptcy claim allowance process and those of nonbankruptcy collection proceedings was the pivotal concept in *Vanston Bondholders Protective Committee v. Green*.[31] The issue in *Vanston* was the amount to be allowed to a fully secured creditor on its claim in a reorganization proceeding involving an insolvent estate. The creditor was the indenture trustee for the bondholders of the debtor, and the bonds contained the usual requirements for the payment of periodic installments of principal and interest. While the reorganization proceedings were pending, these installment payments were suspended. When the proceedings terminated, the secured creditor claimed not only payment in full of its principal and interest, but also the payment of interest on the overdue periodic installments, as the bonds provided. The bankruptcy estate objected to the allowance of interest on the overdue interest, arguing that this would contravene state law, and would be inequitable because the moratorium on installment payments resulted from an order of the court administering the bankruptcy.

Without deciding whether the claim for interest-on-interest was enforceable under state law, the Supreme Court sustained the disallowance of that portion of the claim. The Court reasoned that the allowance of claims filed in bankruptcy involves two steps, and the enforceability of the claim under non-bankruptcy law is only the first part. Proceeding to the second part of the allowance process, the Court considered whether allowing interest on the overdue interest payments would be inconsistent with bankruptcy principles of equitable distribution.

> A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. . . . [A]ssuming, *arguendo*, that the obligation for interest on interest is valid under the law of New York, Kentucky, and the other states having some interest in the indenture transaction, we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. [citation omitted].
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> In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state

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[30] In re American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988) (emphasis added).

[31] 329 U.S. 156 (1946).

> where it sits. . . . [B]ankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.[32]

Because allowing interest-on-interest from the insolvent state would dilute the dividend to unsecured creditors, and because the delay in the installment payments was caused by the need for an orderly liquidation and was pursuant to court order, the Supreme Court found it inequitable to allow that portion of the claim, regardless of its enforceability under state law. In reaching this result, *Vanston* made explicit what was implicit in the Supreme Court's statement in *Sampsell*: The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete.[33]

The claim allowance process was recognized, both in *Sampsell* and *Vanston*, to involve a balancing of the equities among the creditors of the estate. No similar activity occurs when pre-petition judgments are entered by nonbankruptcy courts. Both before and after the enactment of the Bankruptcy Code in 1978, the *Vanston* decision has been cited by lower courts for the principle that the allowance of a claim is strictly a matter of federal law, and is left to the bankruptcy court's just exercise of its equitable powers.[34] These cases implement the two-part approach to claim allowance explicitly endorsed in *Vanston*. A creditor's claim must first be addressed in terms of its enforceability under nonbankruptcy law. Once that matter is resolved favorably to the creditor, the creditor has passed the "starting point,"[35] and the second phase begins. In the second phase, the Bankruptcy Court may review the creditor's claim to determine whether its allowance in its full amount is "just and fair in relation to other creditors."[36] If the pre-

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[32] *Id.* at 161-63.

[33] *Sampsell*, *supra* note 26, at 219.

[34] *See, e.g.*, In re Fantastik, 49 B.R. 510 (Bankr. D. Nev. 1985); In re Brints Cotton Marketing, Inc., 737 F.2d 1338 (5th Cir. 1984); In re John Clay & Co., 43 B.R. 797 (Bankr. D. Utah 1984); In re Spanish Oaks Trails Lanes, Inc., 16 B.R. 304 (Bankr. D. Ariz. 1981); In re Jones, 72 B.R. 25 (Bankr. C.D. Cal. 1987). In In re Johnson, 960 F.2d 396 (4th Cir. 1992), the Court reached the same conclusion without citing *Vanston*.

[35] In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988).

[36] In re Shelter Enterprises, Inc., 98 B.R. 224, 229 (Bankr. W.D. Pa. 1989); In re Beverages International, Ltd., 50 B.R. 273, 279 (Bankr. D. Mass. 1985); A. De Natale & P. Abram, Doctrine of Equitable Subordination as Applied to Non-Management Creditors, 40 Business Lawyer 417, 419 (1985).

petition judgment was considered preclusive as to the amount in which the claim must be allowed, this second phase would never occur. Therefore, in the words of the Supreme Court in *Pepper v. Litton*,[37]

> [A] bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. [Citation omitted]. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry.
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> In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.[38]

Without that sifting process, unmeritorious or excessive claims might dilute the participation of the more legitimate claimants.[39]

We shall examine *Pepper* in greater detail in Section IV of this article. For now, it is sufficient to note *Pepper*'s consistency with the view that the claim allowance process, unlike the procedures of nonbankruptcy courts, does not stop at the determination that the creditor's claim is legally enforceable in the amount requested under nonbankruptcy law.

III. The Statutory Backdrop: The Full Faith and Credit Act

In federal courts, preclusion doctrine with respect to prior state court proceedings has its basis in both decisional and statutory law. Two years after the Supreme Court's decisions in *Heiser v. Woodruff*[40] and *Vanston*,[41] Congress enacted the Full Faith and Credit Act, 28 U.S.C. Section 1738.[42] This statute provides that the judicial proceedings of any state shall have "the same full faith and credit in every court within the United States" as they have "by law or usage in the courts of such State . . . from which they are taken."

Bankruptcy courts are federal courts[43] to which Section 1738 would apply by its plain terms. Nevertheless, Section 1738 has a spotty history

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[37] 308 U.S. 295 (1939).

[38] *Id.* at 305, 307-08.

[39] Gardner v. New Jersey, 329 U.S. 565, 573 (1947).

[40] 327 U.S. 726 (1946). *Heiser* is discussed in detail in the following section.

[41] 329 U.S. 156 (1946).

[42] Chapter 646, 62 Stat. 947 [hereinafter *Section 1738*].

[43] 28 U.S.C. § 15 (1988). The history of the bankruptcy courts prior to the 1984 amendments of the Bankruptcy Code is discussed in 1 Collier on Bankruptcy § 1.02 (15th ed. 1994).

of application in bankruptcy decisions, which have frequently ignored its existence. Instead the courts have sometimes applied judicially developed federal rules of preclusion, despite the statute's emphasis on the importance of state preclusion doctrines.[44] This tendency can be seen both in cases granting pre-petition judgments preclusive effect[45] and in cases denying preclusive effect to those judgments.[46] There is no way to justify such an approach. While the preclusive effect of state court judgments in bankruptcy proceedings is controlled by federal law, both decisional and statutory law bear upon the critical questions. Most of the modern bankruptcy cases involving state court judgments adopt an analysis under Section 1738,[47] which is inapplicable to pre-bankruptcy judgments of federal courts.[48]

In *Marrese v. American Academy of Orthopaedic Surgeons*,[49] the Supreme Court held that the preclusive effect of a state court judgment in a subsequent federal lawsuit is controlled by Section 1738. If state preclusion law would not afford the prior judgment preclusive effect, then it would have no such effect in federal court.[50]

The year after *Marrese*, the Supreme Court again addressed Section 1738 in a nonbankruptcy context. In *Parsons Steel, Inc. v. First Alabama*

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[44] J. Ferreill, *The Preclusive Effect of State Court Decisions in Bankruptcy*, 58 Am. Bankr. L.J. 349, 357 (1984); Bicknell v. Stanley, 118 B.R. 652, 660 (S.D. Ind. 1990); In re Wagner, 79 B.R. 1016, 1019 (Bankr. W.D. Wis. 1987).

[45] *See, e.g.*, Kapp v. Naturelle Inc., 611 F.2d 703 (8th Cir. 1979); In re Comer, 723 F.2d 737, 739 (9th Cir. 1984); In re Corey, 892 F.2d 829 (9th Cir. 1989), *cert. denied* 498 U.S. 185 (1990). Arguably, the failure to explicitly address the statute in these bankruptcy cases may be the result of a mistaken conclusion that the application of Section 1738 is self-evident and requires no discussion.

[46] *See, e.g.*, In re Shuman, 78 B.R. 254 (Bankr. 9th Cir. 1987), affirming in part and reversing in part 68 B.R. 290 (Bankr. D. Nev. 1986).

[47] *See, e.g.*, Browning v. Navarro, 887 F.2d 553 (5th Cir. 1989); Kelleran v. Andrijevic, 825 F.2d 692 (2nd Cir. 1987); In re Daghighfekr, 161 B.R. 685 (Bankr. 9th Cir. 1993).

[48] If the only basis to apply preclusion doctrine in bankruptcy was Section 1738, which is inapplicable to federal judgments, we would confront the anomaly that pre-petition federal court judgments were entitled to less deference in claim allowance proceedings than state court judgments.

[49] 470 U.S. 373, *reh'g denied*, 105 S.Ct. 2127 (1985).

[50] *Id.* at 383. *Accord* Haring v. Prosise, 462 U.S. 306 (1983). State law would ordinarily determine the issue whether the parties in the earlier proceeding and the parties in the subsequent proceeding are "privies": i.e., whether their relationship is such that it is appropriate to give the parties in the second proceeding the benefit and burden of the determinations in the first proceeding.

Bank,[51] the court stated that no exception to the requirement of federal recognition of state court judgments under Section 1738 will be recognized unless a federal statute subsequently enacted contained either an express or implied partial repeal. Following general principles of statutory interpretation, *Parsons* announced that repeals by implication are disfavored and, whenever possible, Section 1738 and the other federal statutes involved should be read to make them consistent.[52]

In *Migra v. Warren City Dist. Bd. of Educ.*,[53] the Court described the mandate of Section 1738 as requiring that a federal court give to a state-court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." This formulation highlights the problem of applying full faith and credit in the bankruptcy context: while there are state court receiverships and insolvency proceedings, no state law of bankruptcy nor state bankruptcy courts exist. The federal bankruptcy court therefore cannot determine what preclusive effect a state bankruptcy court would afford to the judgment in weighing the relative rights of creditors.

While no bankruptcy court has squarely confronted the issue, there have been a few situations in which the courts have found that important federal policies justified overriding the provisions of the Full Faith and Credit Act. In *Yacovone v. Bolger*,[54] the court found that the federal interest in retaining discretionary control of employment decisions respecting postmasters overrode the full faith and credit that would otherwise be due to a governor's pardon of the postmaster from his state court conviction for criminal conduct. In *American Mannex Corp. v. Rozands*,[55] the court stated that federal tax policy may override collateral estoppel to permit federal relitigation of a state court determination that bears on liability for federal taxes. Courts have also adopted limitations on full faith and credit when there is an attempt to apply a state court judgment in a subsequent case brought in an area of exclusive federal jurisdiction,[56] and in certain types of civil

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[51] 474 U.S. 518 (1986).

[52] It is noteworthy that, in *Parsons*, the Court of Appeals had held that a trustee in bankruptcy who was not a party to an earlier federal court action was nevertheless bound by the judgment reached in that action under principles of claim preclusion. Parsons Steel, Inc. v. First Alabama Bank, 747 F.2d 1367 (11th Cir. 1984). The Supreme Court failed to reach this issue, reversing the appeals court on other grounds.

[53] 465 U.S. 75, 81 (1984).

[54] 645 F.2d 1028 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 844 (1981).

[55] 462 F.2d 688 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972).

[56] *See generally*, 18 Charles A. Wright, *et al.*, Federal Practice and Procedure § 4470 (1981).

rights litigation.[57] Attempts to establish express or implied appeals of Section 1738 have been unsuccessful with respect to antitrust claims,[58] RICO litigation[59] and Truth-in-Lending litigation.[60] Only two courts have recognized that an analysis of the effect of Section 1738 in bankruptcy proceedings poses unique issues relating to the specialized nature of bankruptcy proceedings.[61] Civil litigation in federal courts is generally similar to civil litigation in state courts: in both forums it is bilateral, and the issues before the courts are confined to deciding the legal and equitable rights between the litigants. Thus, in federal nonbankruptcy cases in which Section 1738 comes into play, it is usually not difficult to determine how a state court would have treated the prior judgment had the later action been filed in state court. However, we have already seen that the claim allowance process in federal bankruptcy cases differs in its philosophy and procedures from state collection actions, and has no direct analogy to collective proceedings requiring equitable distributions under state law. Consequently, the mandate that federal courts implement Section 1738 by treating the judgment in the prior action in the same manner as a state court would is a meaningless directive, because there are no state court bankruptcy proceedings that weigh rights among creditors. In bankruptcy, determining the role of the comity, finality and reliance interests that Congress meant to protect by Section 1738 requires a more sophisticated analysis. A simple invocation of *Marrese*, *Parsons* and *Migra* leaves many critical questions unanswered.

IV. The Seminal Cases: *Pepper v. Litton* and *Heiser v. Woodruff*

Any discussion of the role of *res judicata* in bankruptcy cases must include an examination of the seminal Supreme Court decisions, *Pepper v. Litton*[62] and *Heiser v. Woodruff*.[63] Although these cases are the foun-

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[57] *Id.* at § 4471 (1994 Supp.).

[58] *Marrese*, *supra* note 49.

[59] Palmer v. Nationwide Mut. Ins. Co., 945 F.2d 1371 (6th Cir. 1991).

[60] Thomas v. General Elec. Credit Corp., 780 F.2d 1123 (4th Cir. 1986).

[61] Kohn v. Leavitt-Berner Tanning Corp., 157 B.R. 523 (Bankr. N.D.N.Y. 1993); In re Comstock Financial Services, Inc., 111 B.R. 849 (Bankr. C.D. Cal. 1990). These cases are discussed below in Section V.

[62] 308 U.S. 295 (1939).

[63] 327 U.S. 726 (1946).

tainhead of *res judicata* jurisprudence in bankruptcy, their modern significance is easily misunderstood. Both cases preceded the 1946 enactment of the Full Faith and Credit Act.[64] Neither case analyzed the nature of the claim allowance process and its relationship to the role of preclusion law. Both cases have been cited or quoted for the broader aspects of their reasoning, although the facts of both cases posed far narrower issues than the grounds relied upon in the majority opinions, and the principles for which both cases are often cited could readily be characterized as *dicta*. Finally, neither case attempted to analyze the language or intent of the bankruptcy statutes then in effect,[65] treating the issues purely as matters of judge-made decisional law, rather than as issues of statutory intent. Despite these limitations, no coherent doctrine of the role of *res judicata* can be developed without harmonizing these decisions.

In *Pepper v. Litton*, the defendant (Litton) was the dominant and controlling stockholder of the corporate debtor. He obtained a judgment by confession against the corporation in a Virginia state court for salary that had allegedly accrued to Litton over the last five years. After the corporation went bankrupt, its bankruptcy trustee moved in state court to have the judgment set aside on the ground that the state law procedures on confession of judgments had not been followed. The trustee raised no issue of fraud or abuse of fiduciary power at that time. The state court concluded that the judgment was improper, but denied the trustee's motion to set it aside. Because the only unsecured creditor in the bankruptcy case was an entity which, by virtue of other actions, was estopped from challenging the judgment, the state court ruled that this estoppel extended to the trustee.

The state court's judgment was affirmed on appeal. The issue concerning Litton's rights as a judgment holder then arose in the context of a claim allowance proceeding in bankruptcy court. The bankruptcy court held that the state court's decision against the trustee did not prevent the bankruptcy court from considering the judgment's validity. It went on to decide that the judgment had been procured by fraud, and disallowed the Litton's claim. The federal Court of Appeals reversed the judgment on *res judicata* grounds. On further appeal, the United States Supreme Court reversed the decision of the Court of Appeals and affirmed the bankruptcy court's decision.

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[64] 28 U.S.C. § 1738 (1988).

[65] Both cases arose under the Bankruptcy Act of 1898.

The Supreme Court noted that the judgment holder was relying upon a judgment that had not been challenged on its merits by the trustee. The Court stated, "On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles."[66] Since the only issue presented by the trustee in his state court challenge to the judgment concerned the procedures for a confession of judgment, rather than the validity of the underlying claim, the Supreme Court concluded that the issue later considered by the bankruptcy court "was not an issue in the trial of the cause in the state court and could not be adjudicated there."[67]

Having concluded that *res judicata* did not bar the bankruptcy court from determining whether the defendant's claim should be allowed, the opinion then addressed whether that claim was properly disallowed. Citing its earlier decision in *Lesser v. Gray*,[68] the court expansively announced that

> [A] bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. . . . [a]nd the mere fact that a claim has been reduced to judgment does not prevent such an inquiry.[69]
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> * * *
>
> In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.[70]

This broad language has left courts and lawyers to disagree whether the scope of *Pepper* was restricted to cases of fraud or collusion by

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[66] *Pepper*, 308 U.S. at 302-303.

[67] *Id.* at 303. The opinion gives no indication whether, under Virginia rules, the trustee had the right to challenge the judgment on the grounds of fraud or abuse of fiduciary power. If this right existed, then the trustee had a full and fair opportunity to raise in the state court the same issues later raised in the bankruptcy court.

Modern procedural rules would permit vacating a judgment obtained by fraud or other misconduct of an adverse party. *See, e.g.*, Rule 60(b)(3), Fed. R. Civ. P. If one assumes that the trustee *could have* challenged the judgment on its merits in state court but chose only to raise the narrower grounds, modern concepts of claim preclusion would treat the trustee as if he *did* raise all the defenses which he had the full and fair opportunity to raise. Restatement (Second) of Judgments § 18(2) (1982). This was apparently the law even when *Pepper* was decided. *See, e.g.*, Chicot County Dist. v. Bank, 308 U.S. 371 (1940).

[68] 236 U.S. 70 (1915).

[69] *Pepper*, 308 U.S. at 305.

[70] *Id.* at 307-08.

insiders, or was intended to apply to "any claim," regardless of "the mere fact" that it had been reduced to judgment. When read narrowly, *Pepper* is easily confined either to situations of insider misconduct, or perhaps to situations where the pre-petition claim was not challenged on its merits. It is the thesis of this article that this narrow reading of *Pepper* is incorrect.

Seven years later, the majority opinion in *Heiser v. Woodruff* seemed to substantially narrow *Pepper v. Litton*, leaving doubt as to the vitality of *Pepper* in situations where the judgment holder was not a fiduciary of the debtor and where the judgment was not obtained by fraud.

Heiser had sued Woodruff in a California federal district court, claiming that Woodruff had obtained gems from Heiser by false pretenses and had subsequently converted the gems. Heiser obtained a judgment by default for more than one-quarter million dollars.

Prior to bankruptcy, Woodruff moved to set aside the district court judgment, claiming that the gems were worthless and that Heiser had procured the judgment through perjurious allegations in the complaint and false testimony as to the value of the gems. The district court held a hearing on the issue, at which oral and documentary evidence were presented. After that hearing, the district court rejected Woodruff's claims and declined to set aside the judgment.

Following this defeat, Woodruff filed for voluntary bankruptcy in Oklahoma, and Heiser then filed his proof of claim based upon the pre-petition judgment. The bankruptcy trustee and the bankrupt then filed a joint motion in the California district court for relief from the default judgment obtained by Heiser, again relying upon the claim of fraud concerning the value of the gems. However, no evidence or testimony was presented by the trustee to support this challenge. The California district court denied their motion, and the Ninth Circuit affirmed.

In the Oklahoma bankruptcy court, Woodruff's creditors objected to Heiser's claim. The bankruptcy court sustained those objections and disallowed the claim in full. On appeal, the district court reversed, holding that the California proceedings had *res judicata* effect. The Tenth Circuit reversed the district court, relying upon *Pepper v. Litton* and upon the fact that the bankruptcy trustee had failed to present evidence to the California court in connection with the trustee's challenge of the judgment.[71] The Circuit Court decision adopted the broader rationale of *Pepper*: that the bankruptcy court, as a court of equity, has

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[71] Heiser v. Woodruff, 150 F.2d 869 (10th Cir. 1945).

the power to inquire into the validity of the claim upon which the judgment was based.[72]

The Supreme Court reversed the Tenth Circuit and held that the estate was precluded from disallowing the judgment. The opinion began by acknowledging that the allowance of claims, including claims based upon judgments, is a matter of federal bankruptcy law, not state law. Federal bankruptcy law would preclude the allowance of a fraudulent judgment where the issue of fraud had not been previously adjudicated, and would authorize the subordination of a creditor's claim to prevent the consummation of a course of conduct that would be fraudulent as to other creditors.[73] Nevertheless, the court found this principle inapplicable, stating:

> [W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. . . .[A]nd it is well settled that where the trustee in bankruptcy unsuccessfully litigates an issue outside the bankruptcy court the decision against him is binding in the bankruptcy court.[74]

Had *Heiser* stopped here, there would have been no tension between *Heiser* and *Pepper*. *Pepper* held that a judgment against the pre-petition debtor does not preclude the bankruptcy estate from challenging the validity, amount or priority in which a claim should be allowed. The facts of *Heiser* required the court to consider whether, if the bankruptcy estate chooses to litigate the validity of the judgment in a nonbankruptcy court and loses, the estate could obtain a second chance to prevail by raising the same issues in the bankruptcy forum. Both the majority and the concurring opinions in *Heiser* answered this question with a resounding "no."[75]

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[72] *Id.*

[73] From an economic point of view, for insolvent estates there is no significant distinction between the subordination of a fraudulent or inequitable claim and its disallowance. Where an estate is insolvent, subordinating a claim to the payment of all other creditors is functionally the equivalent of disallowing the claim; in both cases the creditor affected receives nothing. Subordinating the claim to the payment only of some other creditors is substantially different from disallowing the claim.

[74] Heiser v. Woodruff, 327 U.S. at 733-34.

[75] This issue had already been decided by the Supreme Court, two years after

Although a more carefully crafted opinion would have ended here, the decision in *Heiser* did not.[76] Instead, the majority continued:

> Undoubtedly, since the bankruptcy act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons or the parties or the subject matter of the suit, or because it was procured by fraud of a party. . .But it is quite another matter to say that the bankruptcy court may reexamine the issues determined by the judgment itself. It has, from an early date, been held to the contrary. . . Neither *Pepper v. Litton*. . .on which respondents chiefly rely, nor the other cases which they cite, sustain the contention that the bankruptcy court in passing on the validity of creditors' claims, may disregard the principle of *res judicata*. [Citations omitted.][77]

It is this language, which discusses issues not posed by the facts of the case, that has led many courts to view *Heiser* broadly. Under a broad reading, *Heiser* establishes that a nonbankruptcy judgment has full preclusive effect in claim allowance proceedings unless the judgment is defective for want of jurisdiction or was procured by the fraud of a party.[78]

Pepper, in Arkansas Corporation Commission v. Thompson, 313 U.S. 132 (1941). *Thompson* involved the question whether the bankruptcy court's power under Section 64a(4) of the Bankruptcy Act to hear and determine questions as to the amount and legality of taxes gave the trustee the right to re-litigate a post-petition tax assessment which he had unsuccessfully contested in another tribunal. The Court held that the prior decision precluded the trustee from asking for a review of the assessment by the bankruptcy court:

> Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact — the value of the property taxed.

313 U.S. at 142. *Heiser* failed to cite *Thompson*.

[76] This was the point of Justice Rutledge's concurring opinion in *Heiser*. In rejecting the preclusive effect of a pre-bankruptcy judgment, the court in Margolis v. Nazareth Fair Grounds & Farmers Market, 249 F.2d 221 (2d Cir. 1957) noted that much of *Heiser*'s pronouncements on *res judicata* are *dicta*.

[77] *Heiser*, 327 U.S. at 736-37.

[78] *See*, as examples of this broad reading, Kelleran v. Andrijevic, 825 F.2d 692 (2d Cir. 1987); Teachers Ins. & Annuity Ass'n. of America v. Butler, 803 F.2d 61 (2d Cir. 1986); Kapp v. Naturelle, Inc., 611 F.2d 703 (8th Cir. 1979). These cases are discussed below in Section V.

The bankruptcy trustee is the representative of the creditors of the estate,[79] and there can be little question that the interests of the creditors of the estate should be bound to and should enjoy the benefits of judgments in actions in which the trustee has participated. Thus, as Justice Rutledge's concurring opinion in *Heiser* notes, there is no element of unfairness or inequity in precluding the estate from relitigating in the bankruptcy claim allowance process the very issues that the trustee unsuccessfully raised or could have raised in the nonbankruptcy forum.[80] Woodruff's bankruptcy trustee would not have been able to avoid *res judicata* even under the broad interpretation of *Pepper*. *Heiser* therefore posed only a narrow and easy issue that the court had already addressed in *Thompson*: does bankruptcy law give an unhappy trustee the opportunity to collaterally attack a decision that the trustee lost on the merits in another forum? The more significant issue for future bankruptcy cases, however, was the one which the facts of *Heiser* did not pose — the preclusive effect of the judgment when *the estate* did not and could not challenge it in a nonbankruptcy court.

Heiser's dicta on the preclusion issue ignored the profound change in relationships that results from the filing of a bankruptcy petition. Unlike the pre-petition debtor, whose relationship to its creditors is adversarial, a bankruptcy trustee or debtor-in-possession is a fiduciary for creditors and other parties with interests in the estate, including shareholders.[81] The duties of a debtor and its management and the people to whom those duties are owed are markedly different from the duties of a trustee or debtor-in-possession.[82] Professor Warren has summarized the effect of the commencement of the bankruptcy case:

> A profound shift in the relationship between debtors and creditors occurs at the filing of a bankruptcy petition. A new estate is created, comprising both the legal and economic interests of the old debtor and the collective economic and legal interests of the creditors. Creditors lose their indi-

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[79] 11 U.S.C. § 323(a) (1988). The trustee or debtor-in-possession acts as a fiduciary for the estate's unsecured creditors. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, (1985); In re Herberman, 122 B.R. 273 (Bankr. W.D. Tex. 1990); In re Gem Tire & Service Co., 117 B.R. 874 (Bankr. S.D. Tex. 1990); In re Q.P.S., Inc., 99 B.R. 843 (Bankr. W.D. Tenn. 1989).

[80] *Heiser*, 327 U.S. at 741.

[81] In re Cochise College Park, Inc., 703 F.2d 1339 (9th Cir. 1983); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985).

[82] D. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back — Something May be Gaining on You,"* 68 Am. Bankr. L.J. 155 (1994).

> vidual collection rights against the debtor, and they are forced to deal with an estate operating on behalf of all the creditors.[83]

Despite this fundamental difference between the pre-bankruptcy debtor and its bankruptcy estate, *Heiser* reaches the unexplained conclusion that judgments against the debtor are preclusive against the estate absent fraud or lack of jurisdiction. Yet the majority opinion in *Heiser* cites with approval the case of *In re Continental Engine Co.*, 234 F. 58 (7th Cir. 1916), which held that:

> The reduction of an alleged debt to judgment in a State court before bankruptcy does not exempt it from attack by or on behalf of creditors who would be injuriously affected by its allowance, when such allowance is sought in bankruptcy proceedings.[84]

Unless one reads into this excerpt limitations which are not stated, it is difficult to reconcile the approach of *Continental Engine* with *Heiser*'s conclusion that "the bankruptcy court may [not] reexamine the issues determined [against the debtor] by the judgment itself."[85]

The *Heiser* decision thus left the application of *res judicata* doctrines in claim allowance proceedings in confusion and disarray. In 1975, the leading bankruptcy commentator viewed the state of the law as follows:

> In allowing or disallowing a claim, the bankruptcy court will not permit the relitigation of an issue already adjudicated between the same parties by a court of competent jurisdiction . . . .
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> * * *
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> The doctrine of *res judicata*, as applied to the bankruptcy court in deciding whether a claim should be allowed, disallowed or subordinated, is subject to the paramount equitable powers of bankruptcy courts to prevent the perpetration of fraud and collusion. This principle, applicable especially to judgments by default or *pro confesso*, is also at the core of some of the cases refusing to recognize the binding force of a deficiency judgment where a mortgagee bought in the mortgaged property for a nominal consideration.[86]

While the first paragraph is clearly correct when understood as referring to prior litigation in which the estate has participated, the second is an odd and inconsistent mixture of ideas. A mortgagee that successfully

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[83] E. Warren, Business Bankruptcy 61 (1993).

[84] In re Continental Engine Co. This case is cited in *Heiser*, 327 U.S. at 736.

[85] *Heiser*, 327 U.S. at 736.

[86] 3A Collier on Bankruptcy ¶ 63.07 (14th ed. 1975).

bids very little at a foreclosure auction is not practicing fraud or collusion,[87] nor is it abusing the role of an insider or fiduciary of the debtor. It may, however, be claiming "too much" from the estate relative to other creditors, if it purchases valuable property at the foreclosure for a nominal consideration, and then claims a substantial dividend from an insolvent estate with respect to its deficiency judgment. The concept of "claiming too much," i.e., the primacy of the right of other creditors to obtain an equitable distribution over the policies favoring the preclusive effect of a prior judgment, is consistent with *Pepper* but is alien to the broader view of *Heiser*. Nevertheless, the concept of "claiming too much" is easily reconciled with the *narrower* view of *Heiser*, which confines *Heiser* to situations in which the bankruptcy estate has already had its day in court, and which views *Pepper* as extending beyond cases of fraud or collusion.

A similar confusion of concepts can be found in Professor Moore's 1992 analysis of *Heiser*, which states that:

> The results probably would not have been different, even if the trustee had not proffered the issue of fraud in the California district court, since the trustee is considered to be in privity with the debtor, and the debtor had fairly litigated the issue of fraud as part of the merits of the claim.[88]

Moving onto the opposite side of the issue, however, the treatise also concludes:

> . . . the trustee has the additional power to have a judgment claim disallowed or subordinated, even though the judgment is binding on the debtor, when its enforcement in bankruptcy would, as to the creditors, run counter to sound principles of bankruptcy distribution, subject to the proposition that an issue which has been fairly adjudged is not open to readjudication.
>
> In other words, there is not complete privity between the debtor and the trustee, who not only takes the debtor's estate but also represents creditors; and although a judgment may be binding upon the debtor, it is not always conclusive upon the creditors or their trustee.[89]

When the estate has "privity with the debtor" that is not "complete privity," we are left to ask when the privity is sufficiently complete

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[87] BFP v. Resolution Trust Corp., ___U.S. ___, 114 S.Ct. 1757, 128 L.Ed. 2d 556 (1994) (holding that the price received at a regularly conducted foreclosure sale is the property's reasonably equivalent value for the purposes of fraudulent transfer law).

[88] J. Moore, 1B Moore's Federal Practice, ¶ 0.419 [3.-6] (1992). This portion of the treatise was rewritten in 1994.

[89] *Id.*

under bankruptcy law to make a pre-petition judgment preclusive in a claim allowance proceeding. The answer does not emerge from the two Supreme Court decisions on *res judicata* in bankruptcy that came after *Heiser*.

Twenty-three years after *Heiser*, the Supreme Court addressed the issue of preclusion in bankruptcy proceedings in *Brown v. Felsen*.[90] *Brown* involved the doctrine of claim preclusion in dischargeability proceedings brought under Section 17a(2) of the Bankruptcy Act. The creditor, who held a state court judgment on its debt, sought a ruling that the debt was non-dischargeable in bankruptcy. The debtor was attempting to establish the claim-preclusive effect of the prior state court judgment, where the issue of the debtor's fraud could have been litigated, but was not. This novel defensive use of claim preclusion *against* the creditor was initially successful in both the district court and the court of appeals, but was reversed by the Supreme Court.

The Supreme Court gave four reasons for its conclusion that the state court judgment did not operate with claim-preclusive effect in the debtor's favor. Because Congress had granted exclusive jurisdiction to bankruptcy courts on dischargeability issues, the Court reasoned that affording preclusive effect in bankruptcy to the state court judgment would force litigants in state court to raise fraud issues at a premature stage, which would interfere with the process of orderly state court adjudication.[91] Second, the Court concluded that permitting preclusion would lead to unnecessary litigation before state court judges lacking the necessary expertise to properly resolve the dischargeability issues.[92] Third, the Court noted that the traditional reasons for preclusion, namely, judicial economy, encouraging reliance on judicial decisions and promoting finality, did not apply where the debtor attempts to invoke claim preclusion to prevent the creditor from countering the debtor's claims with matters not previously important.[93] Finally, while recognizing that the issue of fraud might have been litigated in the state proceeding, the Court found that the issue of dischargeability could not have been litigated, and therefore claim preclusion on that issue could not apply.[94] In reaching its decision denying claim-preclusive

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[90] 442 U.S. 127 (1969). *Brown* is discussed in depth in J. Ferriell, *The Preclusive Effect of State Court Decisions in Bankruptcy* (Part 2), 58 Am. Bankr. L.J. 349 (1984).

[91] *Id.* at 134-135.

[92] *Id.* at 136.

[93] *Id.* at 132.

[94] *Id.* at 133.

effect to the earlier judgment, the Court noted that the question of issue preclusion from the state court proceedings had not been presented by the facts of the case, and that resolution of questions of issue preclusion would depend upon whether there were bankruptcy policies that would militate against preclusion.[95]

Because *Brown* relied so heavily upon the grant of exclusive bankruptcy court jurisdiction over dischargeability proceedings under Section 17 of the Bankruptcy Act, it is not controlling on the scope of preclusion doctrine invoked against bankruptcy estates in claim allowance or other bankruptcy proceedings. While only bankruptcy courts administer the claim allowance process, the bankruptcy courts do not have exclusive jurisdiction over the question of determining the validity and amount of a debtor's obligation to a creditor, or the nature of a debtor's ownership interest in property. Nonbankruptcy courts routinely decide such issues, although not in the context of determining the amount in which a creditor's claim should be allowed relative to other creditors of the same debtor. Nevertheless, except for its discussion of the jurisdictional issue, the Court's reasoning in *Brown* suggests a limited role for preclusion law in bankruptcy proceedings involving the unique aspects of the claim allowance process, where the issue is the amount in which the judgment holder's claim should be allowed to participate in the distribution of estate assets relative to other creditors.

Brown provides some support, although inconclusively, for the view that *res judicata* doctrines are attenuated in claim allowance proceedings. *Brown* declined to allow preclusion in bankruptcy where the effect would be to force litigants in nonbankruptcy courts to raise issues pertinent to bankruptcy at a premature state, and thereby to interfere with the usual procedures of the state court adjudication. In nonbankruptcy courts, the solvency of the debtor and the rights of the litigant-creditor compared with other creditors of the same debtor are generally irrelevant to the determination of the entitlement of the creditor to a judgment. Where the debtor is solvent, such questions are premature and unnecessary. Even where the debtor is insolvent, evidence of the debtor's wealth or poverty is generally excluded as unduly prejudicial and inviting a verdict based upon sympathy, envy, or other emotions.[96]

Bankruptcy cases are quite different. In bankruptcy cases, evidence of the nature and amount of the debtor's obligations to its other

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[95] *Id.* at 139.

[96] 1 S. Gard, Jones on Evidence § 4:47 (1992 Supp.).

creditors clearly pertains to issues concerning the dividend to the creditors of a bankruptcy estate. To make the state court decision preclusive as to the amount in which the creditor's claim should be allowed in the bankruptcy proceeding would lead to one of two undesirable results: either the state court decision is controlling (although made without the relevant information on the effect that its decision would have on the other creditors of the same debtor), or the state court is required to consider the issues of the effect on other creditors at a premature stage, i.e., before a bankruptcy case has been commenced.

Brown suggests that there should be a limited scope for preclusion doctrine where preclusion would force state court judges to address issues on which they lack the necessary expertise. In *Brown*, these comments were addressed to the issue of non-dischargeability. Weighing the relative rights of creditors, however, is a matter on which bankruptcy courts have developed a long tradition of rules and principles.[97] While nonbankruptcy receiverships sometimes pose similar issues, there can be little question that nonbankruptcy courts lack both the body of precedent and the level of experience in assessing the relative rights of creditors of an estate that bankruptcy judges have acquired.[98]

Brown also observes that the policies in favor of preclusion (i.e., judicial economy, encouraging reliance on judicial decisions, and the utility of repose) do not apply where the bankruptcy question relates to an issue that was unimportant in the state court.[99] As already noted, the issues concerning the solvency of the debtor and the policies of ratable and equitable distribution of the estate's assets among its various creditors raise exactly that type of issue. The state court decides only that the creditor's claim is valid and enforceable under state or federal nonbankruptcy law. Whether its recognition in the same amount, or its recognition at all, would contravene some bankruptcy principle of equitable or ratable distribution is unimportant until a bankruptcy petition is filed.

Finally, in observing that the question of issue preclusion was not presented by the facts, *Brown* notes that the applicability of nonbankruptcy doctrines of issue preclusion in bankruptcy cases would depend upon the existence of bankruptcy policies that might militate against

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[97] B. Weintraub & R. Resnick, Bankruptcy Law Manual § 10.05[2].

[98] *Id.*

[99] Brown v. Felsen, 442 U.S. 127, 134 (1979).

preclusion.[100] It is precisely this type of analysis that was lacking in *Heiser*, and that will be developed more fully below.

The most recent of the Supreme Court's pronouncements on the role of *res judicata* in bankruptcy proceedings came in 1991, with the decision in *Grogan v. Garner*.[101] Before the bankruptcy, the creditor had sued the debtor for securities fraud, and had obtained a verdict in its favor from a jury. The civil suit had used the "preponderance of the evidence" standard of proof. The debtor appealed from the verdict and filed for bankruptcy while the appeal was pending, listing the fraud judgment as a dischargeable debt. After the fraud judgment was affirmed on appeal, the debtor filed an action under Section 523(a) of the Bankruptcy Code, seeking a determination that the debt was dischargeable.[102]

The bankruptcy court had found that the elements of fraud had been proven in the nonbankruptcy litigation, and that the doctrine of collateral estoppel required a holding that the debt was non-dischargeable.[103] The Court of Appeals reversed, finding that the Bankruptcy Code required proof of non-dischargeable fraud at the higher "clear and convincing evidence" standard, so that the earlier judgment would not be preclusive.[104] To resolve a conflict between the Circuits,[105] the Supreme Court granted certiorari.

The *Garner* decision focused upon whether Congress intended the "preponderance" standard to apply to the discharge exceptions in Section 523(a). The Court held that it did. There was little discussion of the more general question of the role of preclusion law in bankruptcy proceedings, and there was no discussion of the potential differences between bankruptcy and nonbankruptcy litigation. The Court addressed in two sentences the rule that, if there were no differences in the standard of proof, the nonbankruptcy judgment would have collateral estoppel effect in the bankruptcy case.

> Our prior cases have suggested, but have not formally held, that the principles of collateral estoppel apply in bankruptcy proceedings under the current Bankruptcy Code. . . . We now clarify that collateral estoppel

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[100] *Id.* at 132.

[101] Grogan v. Garner, 498 U.S. 279 (1991).

[102] In re Garner, 73 B.R. 26 (Bankr. W.D. Mo. 1987).

[103] *Id.*

[104] In re Garner, 881 F.2d 579 (8th Cir. 1989).

[105] *See* cases collected in Grogan v. Garner, 498 U.S. 279, 283 n.7-8 (1991).

> principles do indeed apply in discharge exception proceedings pursuant to § 523(a).[106]

Garner cited *Brown* and *Heiser*, but not *Pepper*, in this analysis of collateral estoppel.

Garner did little to clarify whether the broad or the narrow reading of *Heiser* was correct. The question in *Garner*, however, was more similar to the one posed in *Heiser* than the one posed in *Pepper*. As in the pre-petition litigation, the interests at stake in *Garner* were primarily those of the debtor, rather than the estate or its creditors.[107] If the pre-petition judgment was non-dischargeable, the debtor would remain liable for the judgment after receiving his discharge. There was no claim in *Garner* that the pre-petition judgment would distort distributions to creditors of the bankruptcy estate; neither the existence nor the amount of the liability were challenged during the bankruptcy as being erroneous. In *Garner*, as in *Heiser* and *Thompson*, the party affected had a full and fair opportunity to litigate in a nonbankruptcy court, had availed himself of that opportunity and had lost. As in *Heiser* and *Thompson*, the *Garner* decision determined that bankruptcy gave no second chance to address the very issues previously determined on their merits.[108] *Garner* differed from *Heiser* in only two important respects. First, unlike *Heiser*, *Garner* involved the collateral estoppel effects of a *pre*-petition judgment in a subsequent bankruptcy. Second, *Garner* involved a proceeding in an area under the exclusive jurisdiction of the bankruptcy courts, i.e., dischargeability proceedings.[109] *Garner*, however, shed little light on the extent to which the principles of *res judicata* apply to pre-petition judgments in claim allowance proceedings. The issue remains to be squarely confronted by the Supreme Court in future decisions.

V. A Survey of Lower Court Decisions

The failure of the United States Supreme Court to clearly define the role of *res judicata* in bankruptcy proceedings has caused inconsistency

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[106] *Id.* at 284, n.11 (citations omitted).

[107] *Cf. In re Oakes*, 135 B.R. 511 (Bankr. N.D. Ohio 1991) and *In re Robbins*, 151 B.R. 364 (Bankr. W.D. Va. 1993)(holding that fees of debtor's counsel for the defense of a dischargeability action are not compensable for lack of benefit to the estate).

[108] *Grogan*, 498 U.S. at 282, n.4 (1991).

[109] *Brown v. Felsen*, 442 U.S. 127 (1979).

among the lower courts which were forced to confront these issues.[110]

A. The Strict Application of Preclusion Law in Claim Allowance Proceedings.

Under a broad reading of *Heiser*, most lower courts have adopted the view that the preclusion doctrine should be applied strictly in bankruptcy claim allowance proceedings.[111] These courts endorse the rule that the only bankruptcy exceptions to *res judicata* involve judgments rendered without jurisdiction or procured by fraud or collusion.[112] This view is exemplified by *Teachers Insurance & Annuity Association of America v. Butler*,[113] which considered whether the bankruptcy court was required to honor an earlier district court judgment against the debtor for its breach of a loan commitment agreement. The Second Circuit held that the preclusive effect of an earlier state court judgment must be recognized in the bankruptcy claim allowance process, regardless of the bankruptcy court's general equity powers.[114] The rationale for this decision was more metaphorical than legal. The court felt that allowing relitigation of the claim in bankruptcy court would result in "slipping arguments through the backdoor that had been turned away at the frontdoor."[115] Although citing *Heiser*, the Court did not rely on Section 1738, because the pre-bankruptcy judgment was that of a federal court.

The year after *Butler*, in *Kelleran v. Andrijevic*,[116] the Second Circuit addressed the question of the preclusive effect of a state court default judgment procured in the absence of fraud or collusion. The bankruptcy

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[110] *Compare* Sullivan v. Radermacher, 122 B.R. 720 (Bankr. D. Me. 1991)(precluding the debtor from contesting the existence, validity, and amount of debt on a default judgment for unlawful battery) *with* In re Lockwood, 14 B.R. 374 (Bankr. E.D.N.Y. 1981)(holding that equitable principles underlying the bankruptcy court permit it to re-examine a state court default judgment).

[111] *See, e.g.*, In re Farrell, 27 B.R. 241, 243 (Bankr. E.D.N.Y. 1982). Bankruptcy court decisions relying on *Heiser* are too numerous to be discussed, and our focus shall be restricted to decisions following the *Heiser* analysis at the Circuit Court level. A collection of recent trial-level cases may be found in B. Russell, Bankruptcy Evidence Manual §§ 1-11 (1993).

[112] *See, e.g.*, Kelleran v. Andrijevic, 825 F.2d 692 (2d Cir. 1987); In re Johnson, 149 B.R. 284 (Bankr. D. Conn. 1993).

[113] Teachers Insurance and Annuity Association of America v. Butler, 803 F.2d 61 (2d Cir. 1986).

[114] *Id.* at 66.

[115] *Id.*

[116] Kelleran v. Andrijevic, 825 F.2d 692 (2d Cir. 1987).

court had determined in the claim allowance proceedings that the creditors' judgment claims were meritless and without binding effect. The Second Circuit reversed on the basis that the bankruptcy court is "bound to the liability determination in the state judgment unless an exception existed to prevent the operation of the judgment's preclusive effect."[117] The *Kelleran* court reconciled its holding to a prior decision of the Second Circuit in *Margolis v. Nazareth Fair Grounds & Farmers Market*,[118] which held that the equitable principles of the bankruptcy court justify a re-examination of a fraudulently-procured default judgment. Distinguishing *Margolis* as involving creditor fraud, the *Kelleran* court held that preclusion was required where the default judgment of the creditor was not fraudulently obtained.

Following and narrowing *Heiser*'s reasoning, the United States Court of Appeals for the Tenth Circuit in *In re Laing*,[119] elaborated on the fraud exception to *res judicata* in bankruptcy. In *Laing*, the defendant (Laing) defaulted on a bank note, which was secured by an airplane owned by a joint venture between Laing and his attorney, Johnson. After the bank had commenced foreclosure proceedings, Bradshaw, a friend of Johnson, obtained an assignment of the note and sued Laing in state court to collect its balance. Shortly after Bradshaw received a judgment in his favor, Laing filed for bankruptcy. Laing then objected to the allowance of Bradshaw's state court judgment, arguing that the collusive conduct of Bradshaw and Johnson prohibited Bradshaw's recovery on Laing's note.

The Tenth Circuit held that, in the absence of fraud or collusion, the bankruptcy court must afford a state court judgment preclusive effect. Nevertheless, it explained that the bankruptcy courts can use the fraud exception only for fraud committed on the court, and not fraud that was at issue in the former suit.[120] Based on this definition of the fraud exception, the Tenth Circuit held that Laing's allegations of fraud and collusion, which were addressed in the state court action, could not serve as a basis for collateral attack of the state court judgment.

The claim of fraud on the court was also at the heart of *Browning v. Navarro*,[121] a case involving a Byzantine history of litigation among the

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[117] *Id.* at 694.

[118] Margolis v. Nazareth Fair Grounds & Farmers Market, 249 F.2d 221, 223-225 (2d Cir. 1957).

[119] In re Laing, 945 F.2d 354 (10th Cir. 1991).

[120] *Id.* at 357.

[121] Browning v. Navarro, 887 F.2d 553 (5th Cir. 1989).

parties that the court characterized, without exaggeration, as "The Hatfields and the McCoys."[122] The facts of this case are so unique and protracted as to be unworthy of restating in detail. The debtor had sustained a judgment for $82 million dollars. Thereafter, the debtor commenced a civil rights action against the judgment holder, and filed a voluntary bankruptcy case while that civil rights action was pending. The civil rights action was dismissed during the pendency of the bankruptcy case, because the debtor had an adequate state remedy in the form of an appeal from the underlying judgment. It appears that the debtor's bankruptcy trustee did not participate in the civil rights action and was not attempting to challenge the $82 million judgment. The *res judicata* issue arose in the context of an adversary proceeding to compel the trustee to turn over assets to satisfy the judgment.

The court in *Browning* held that the debtor was precluded from challenging the judgment in the bankruptcy proceeding, even if it was obtained by fraud, because the debtor could have raised the fraud claim in the dismissed civil rights action, though the debtor had not done so. It stated that, as a rule, bankruptcy courts are bound by both branches (issue and claim preclusion) of *res judicata*,[123] and that equity did not "in the instant case" outweigh *res judicata*.[124] It also stated that any problems in a state judicial system should be remedied within that system.[125] The court concluded that the debtor's fraud theory was precluded by the dismissal of the civil rights action and the debtor's failure to obtain appellate relief from the judgment. No comment was made upon the fact that the representative of the debtor's creditors, the trustee, was not involved in either the prior litigation or the bankruptcy challenge to the judgment.

Some portions of *Browning* suggest a more limited role for *res judicata* in bankruptcy than in other contexts. The court stated that the contours of *res judicata* are different for bankruptcy courts than they are for other courts because tasks that have been delegated to the former by Congress may not be interfered with by the decisions of other courts.[126] It also noted that bankruptcy courts have a job to do that sometimes requires them to ignore *res judicata* in order to carry out Congress' mandate.[127]

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[122] *Id.* at 554.
[123] *Id.* at 561.
[124] *Id.* at 562.
[125] *Id.*
[126] *Id.* at 561, *citing Pepper v. Litton.*
[127] *Id.*, *citing Pepper* and *Brown v. Felsen.*

The conclusion that equity did not "*in the instant case*" outweigh *res judicata* suggests a fact-specific outcome, rather than a universal rule. In short, *Browning* expressed a sensitivity to the notion that the principles of *res judicata* may not operate in bankruptcy the same way they do in other litigation, but it failed to suggest when and how those differences arise.

The United States Court of Appeals for the Seventh Circuit adopted the broad view of *Heiser* in *In re Bulic*,[128] a case very similar to *Laing*. In *Bulic*, the debtors argued that the bankruptcy court should exercise its equitable powers to set aside a pre-petition state court judgment in favor of their brother, who allegedly committed perjury and fraud in the state court proceedings. Because the debtors' accusations of perjury and deceit against their brother had been contested in the state court action, the Seventh Circuit rejected the challenge. In emphasizing that the equity powers of the bankruptcy court are subject to the preclusion doctrine, the court remarked:

> Even if the bankruptcy court's equitable powers are great, there are limits to that authority. One of them is 28 U.S.C. § 1738, the statutory clause requiring that state court judgments be given full faith and credit in federal courts as they would in the state that issued them.[129]

The Eighth Circuit also endorsed the broad interpretation of *Heiser* in *Kapp v. Naturelle, Inc.*,[130] which (like *Kelleran*) involved perhaps the strongest case for limiting the role in bankruptcy of preclusion doctrines — the default judgment. In *Kapp*, the debtor sought to have the claims of thirteen judgment creditors disallowed in his personal bankruptcy on the basis that they were corporate debts for which he, although president of the corporation, was not personally liable. After an independent examination of the evidence, the bankruptcy judge had concluded that the creditors possessed claims only against the corporation, and equity therefore required that the claims be disallowed in Kapp's personal bankruptcy. On appeal, the Eighth Circuit reversed the bankruptcy court's disallowance of the claims and held that, regardless of the merit of the creditor's claims, default judgments were final for purposes of *res judicata*. The court reasoned that the law of *res judicata*, or claim preclusion, prevents litigation of all grounds for, or defenses to, recovery previously available to the parties or their privies. There-

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[128] In re Bulic, 997 F.2d 299 (7th Cir. 1993).

[129] *Id.* at 304.

[130] Kapp v. Naturelle, Inc., 611 F.2d 703 (8th Cir. 1979).

fore, although the claim was not actually asserted or determined in the non-bankruptcy proceeding, the court held that the non-bankruptcy court judgment possesses *res judicata* effect in the claim allowance context.[131]

Although arising in the context of an estate's claim against a creditor, rather than a creditor's claim against an estate, the First Circuit gave a pre-bankruptcy judgment preclusive effect in *In re Giorgio*.[132] Citing *Heiser*, the court concluded that "ordinary principles of *res judicata* apply to bankruptcy proceedings."[133]

As we complete our review of the Circuit Court decisions that have adopted or followed the broad view of *Heiser* concerning *res judicata* in bankruptcy, two decisions of the Ninth Circuit are worthy of note for their result, rather than their unusual reasoning. The earlier of the two is *In re Comer*,[134] which was an appeal from a judgment declaring the claim of the debtor's spouse of unpaid alimony and child support nondischargeable. Two years before the bankruptcy commenced, the debtor's spouse had obtained a state court judgment by default, awarding her monetary damages for breach of a marital separation agreement. The year before the bankruptcy, the debtor unsuccessfully attempted to vacate the judgment in a state court on the same grounds he would later use to challenge it in bankruptcy court. After the bankruptcy case commenced, the spouse filed a complaint under Section 523 to determine the dischargeability of the debt, and the debtor tried to introduce evidence attacking the validity and extent of the obligation on the judgment. The debtor's efforts were rebuffed by the bankruptcy court, the bankruptcy appellate panel and the Ninth Circuit.

The decision in *Comer* cited neither *Heiser* nor Section 1738, but nevertheless concluded that bankruptcy courts recognize and apply the basic principles of *res judicata* in determining the effect to be given in bankruptcy proceedings to judgments rendered in other courts.[135] It noted that the evidence the debtor hoped to present in bankruptcy

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[131] *Id.* at 707.

[132] In re Giorgio, 862 F.2d 933 (1st Cir. 1988).

[133] *Id.* at 936. The Third Circuit adopted a similar view without explanation in In re Roloff, 598 F.2d 783, 789 (1979), where the court accepted the bankruptcy court's statement that a foreclosure action that results in a judgment by default is "conclusive between the parties as to the cause of action upon which the action underlying the judgment is based."

[134] In re Comer, 723 F.2d 737 (9th Cir. 1934).

[135] *Id.* at 739.

court to challenge the judgment had previously been offered in an unsuccessful pre-petition challenge to the judgment by the debtor. Nevertheless, the reasoning did not seem to make this fact crucial, and instead implied that the only bankruptcy exceptions to traditional *res judicata* doctrine concern the exclusive jurisdiction of the bankruptcy court to determine dischargeability issues.[136] Because the amount of the debtor's obligation to his spouse was not such an issue, *res judicata* barred the bankruptcy court from looking behind the default judgment.

Comer's rationale became confused when the court commented upon factual matters concerning the prior litigation:

> Failing to apply *res judicata* under these circumstances would allow a bankrupt who has had full incentive to litigate, and who has fully litigated, an issue in state court . . . to have that same issue relitigated in the bankruptcy courts.[137]

It is unclear whether this is meant to restrict *Comer* to cases in which the debtor has fully and fairly (although unsuccessfully) contested the merits of the claims reduced to a pre-petition judgment, or whether the reference to "these circumstances" is merely surplusage. Consistent with its failure to mention Section 1738, *Comer* also failed to address the preclusive effect of the default judgment under the law of the state that issued it, or the preclusive effect of the order denying the motion to vacate that judgment under the law of the state where that motion was heard. Finally, *Comer* failed to consider any unity or dissimilarity between the interests at stake in the bankruptcy proceeding and those at stake in the pre-petition proceeding. In short, while *Comer* is probably correctly decided, there is little in the *Comer* opinion that resembles a meaningful analysis of the *res judicata* issues or that justifies the court's broad but perfunctory comment about the rule of *res judicata* in bankruptcy proceedings.

An even less instructive analysis can be found in *In re Corey*,[138] a case that followed the Ninth Circuit's decision in *Comer* by five years but failed to cite it. In *Corey*, a Chapter 11 plan had been confirmed in reliance on the approving vote of certain creditors (the Loui's), and over the negative vote of other claimants (the Ellis entities). The claims of the Loui's were based on a pre-petition judgment against the debtor, Corey. The claims of the Ellis entities were unliquidated and disputed.

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[136] *Id.* at 740

[137] *Id.*

[138] In re Corey, 892 F.2d 829 (9th Cir. 1989).

Before the confirmation hearing, the Ellis claims had been estimated by the bankruptcy court at zero, in a proceeding under Section 502(c). Thus, the negative votes of the Ellis entities were not counted in the confirmation process, and the plan was confirmed.

In the bankruptcy court, the Ellis entities had challenged the allowance of the Loui's claim on grounds not specified in the opinion, other than the court's comment that the challenge was based on "the Constitution and state and federal law."[139] The Ninth Circuit sustained the bankruptcy court's conclusion that the Ellis entities were not creditors of the debtor and had no right to object to the confirmed plan. The decision could and should have ended there. Not being creditors of the estate or other parties in interest, the Ellis entities had no standing to object to the allowance of the Loui claims against the estate. Instead, the Ninth Circuit proceeded to conclude that the attack upon the Loui's claim was "a collateral attack upon the judgment of a state court" and that it was therefore "beyond the jurisdiction of federal courts to consider."[140] As in *Comer*, the Ninth Circuit cited neither Section 1738 nor *Heiser*. The *Corey* opinion does not even refer to the doctrines of *res judicata* or issue/claim preclusion, while finding the pre-petition judgment of the state court conclusive on the rights of the judgment holders in bankruptcy.

Corey's reliance upon jurisdictional concepts seems misplaced. Congress unambiguously gave the bankruptcy courts jurisdiction over the process of claim allowance under Section 502 of the Bankruptcy Code.[141] Whether, in exercising that jurisdiction, a bankruptcy court should consider a pre-petition judgment to be conclusive as to the amount in which the claim should be allowed is not a question of the scope of the bankruptcy court's jurisdiction; it is a question of the substantive rules that guide or control the exercise of that jurisdiction. The *Corey* case appears to be rightly decided, but not for the reasons stated.

B. Decisions Invoking Broad Equitable Principles.

A minority of lower courts have adopted a broad reading of the United State Supreme Court's decision in *Pepper*, and have viewed the equitable powers of the bankruptcy court as a basis to deny preclusive

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[139] *Id.* at 834.

[140] *Id.*

[141] The jurisdictional grant is contained in 28 U.S.C. § 1334 (1988 & Supp. III 1991 & IV 1992).

effect to a pre-petition judgment that was somehow improper or excessive.[142] These courts rely upon *Pepper* for the proposition that the bankruptcy courts have the full power "to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence,"[143] even when the claim has been reduced to judgment. While they would view fraud or collusion as a basis for a *res judicata* exception, unlike *Heiser*, they would not confine the exception to those circumstances.

An early example of this perspective at the appellate level is the Second Circuit's decision in *Margolis v. Nazareth Fair Grounds & Farmer's Market*.[144] There, the debtor (Nazareth) owed Margolis a substantial sum of money evidenced by notes. To raise funds for Nazareth's corporation, Margolis had Shongut make a loan to Nazareth, the proceeds of which were deposited into Margolis' personal bank account. Shortly after Margolis and Shongut received state court judgments for the collection of their notes against Nazareth, Nazareth filed for reorganization in the bankruptcy court. Although the claims of Margolis and Shongut were reduced to state court judgments, the bankruptcy referee disallowed these claims on the basis that Nazareth had received no consideration for issuing the notes. On appeal, the Second Circuit, relying on *Pepper*, affirmed the bankruptcy court's decision, reasoning, "To the extent that equitable principles require re-examination by the bankruptcy court of the bases for the judgment where these bases have been or could have been previously adjudicated the doctrine of *res judicata* is inapplicable. . . ."[145] Consistent with its reasoning that the bankruptcy courts are not bound by the strict notions of *res judicata*, the Second Circuit in *Margolis* discounted as *dicta* the language in *Heiser* that advocated the bankruptcy court's strict application of claim preclusion.[146] The current vitality of *Margolis* has been severely eroded by the subsequent decisions of the Second Circuit in *Butler* and *Kelleran*.

Although not involving a pre-petition judgment, the reasoning of the United States Court of Appeals for the Eleventh Circuit in *In re GAC*

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[142] *See, e.g.*, Margolis v. Nazareth Fair Grounds & Farmer's Market, 249 F.2d 221 (2d Cir. 1957); In re Lockwood, 14 B.R. 374 (Bankr. E.D.N.Y. 1981); In re Garafano, 99 B.R. 624 (Bankr. E.D. Pa. 1989); In re Lewis, 157 B.R. 555 (Bankr. E.D. Pa. 1993).

[143] Pepper v. Litton, 308 U.S. at 305.

[144] Margolis v. Nazareth Fair Grounds and Farmers Market, 249 F.2d 221 (2d Cir. 1957).

[145] *Id.* at 224.

[146] *Id.*

Corp.,[147] provides indirect support for affording priority to equitable claim allowance interests over preclusion principles. *GAC* was a case arising under Chapter X of the Bankruptcy Act of 1898.[148] The creditor had filed a claim for punitive damages in connection with a securities fraud. *GAC* relied heavily on the bankruptcy court's equitable powers in justifying its disallowance of the punitive damage claim. The court stated that this claim was not allowable because its payment would be unfair to the other creditors of the estate. In reaching this conclusion, the Eleventh Circuit explained:

> Novak's final contention is that the bankruptcy court erred by striking his claim for punitive damages. The bankruptcy court concluded that such claims are not appropriate in the bankruptcy context because the rationale for punitive damages is to punish the wrongdoer, whereas allowing such claims in bankruptcy would have the effect of punishing innocent third parties, i.e., the other creditors. . . .
>
> We agree with the bankruptcy judge that the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing. Such a result would be inequitable, and the punitive damages claim was properly stricken.[149]

The Eleventh Circuit deemed paramount the bankruptcy court's authority to disallow claims on the basis of equity — that is, to evaluate the allowability of a claim by its effect on other creditors of the estate.

Six years before *Kelleran*, a bankruptcy court in the Second Circuit denied preclusive effect to a judgment resulting from discovery abuse. In *In re Lockwood*,[150] the court considered whether a bankruptcy court could re-examine the facts behind a state court judgment against debtors entered after they failed to comply with a discovery order. The court concluded that the default was due to a lack of diligence by the debtors' attorney, and the debtors therefore should not be bound in bankruptcy by the prior state court judgment. In support of its decision, the court stated, "where equitable principles require reexamination by the bankruptcy court of a claim that has been reduced to judgment, the doctrine of *res judicata* is inapplicable."[151]

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[147] 681 F.2d 1295 (11th Cir. 1982).
[148] 11 U.S.C. §§ 881-885 (1898).
[149] In re GAC Corp., 681 F.2d at 1301.
[150] In re Lockwood, 14 B.R. 374 (Bankr. E.D.N.Y. 1981).
[151] *Id.* at 378.

C. Decisions Invoking a Lack of Privity.

A third line of precedent has rejected the preclusive effect of prior state court judgments in bankruptcy claim allowance proceedings based on the lack of privity. Courts following this approach reason that the roles of the parties in a state court suit are different from the role of the parties in a bankruptcy proceeding.[152] Unlike a debtor-defendant in a civil suit, a trustee in bankruptcy must protect the interests of the debtor and the interests of its creditors;[153] therefore, the trustee is not the representative of a single creditor or of the debtor. Due to the dissimilarity in objectives and interests, the privity element of *res judicata* was found to be lacking between a pre-petition debtor and the bankruptcy estate in several cases.[154]

The Bankruptcy Appellate Panel for the Ninth Circuit adopted this approach in *In re Shuman*,[155] which addressed whether the bankruptcy trustee was precluded from relitigating the state court's classification of the debtor's pension and profit-sharing plans as valid spendthrift trusts. The *Shuman* court concluded that the interests of the creditors in a bankruptcy case are not represented in a pre-petition civil suit:

> The doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity with parties to an earlier action. A privy may include those whose interests are represented by one with authority to do so. A person who technically is not a party to the prior action may be bound by the prior decision only "if his interests are so similar to a party's that the party was his virtual representative in the prior action." [Citation omitted]. The trustee is not the "virtual representative" of one judgment creditor or the debtor. The trustee has powers greater than any single creditor. The defense of a cause of action by a

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[152] In re Giorgio, 62 B.R. 853, 863 (Bankr. D.R.I. 1986), *rev'd*, 81 B.R. 766 (D.R.I. 1988), 862 F.2d 933 (1st Cir. 1988).

[153] In re Shuman, 78 B.R. 254, 256 (Bankr. 9th Cir. 1987).

[154] *See, e.g.*, In re Kreiss, 46 B.R. 164, 166-167 (Bankr. E.D.N.Y. 1985) (holding that trustee not barred by *res judicata* from challenging the validity of will codicils, which were previously deemed valid by the state court, because the interests of the creditors were not represented at the state court hearing); In re Windrush Associates, 105 B.R. 195, 197 (Bankr. D. Conn. 1989) (trustee not in privity with the debtor. Thus, the state court's determination that the price at the foreclosure sale was adequate was not determinative of the question under Section 548 whether reasonably equivalent value was received.).

[155] 78 B.R. 254 (Bankr. 9th Cir. 1987).

> debtor pre-bankruptcy does not necessary represent the rights of the bankrupt trustee.[156]

This reasoning appears to make the outcome of the preclusion issue turn on the factual question of the similarity of interests between the estate and the pre-petition debtor on the issues concluded by the judgment.

The *Shuman* decision involved a fairly unique problem. Ordinarily, a pre-petition debtor and a bankruptcy trustee subsequently appointed for that debtor have a common economic interest in maximizing the assets to which the debtor had lawful claims. Nevertheless, this is not true with respect to a spendthrift trust in which the debtor is the beneficiary. If the spendthrift aspect of the trust is valid, the debtor's beneficial interest remains outside the reach of his/her creditors, but is available to the debtor at the discretion of the trustee of the trust. Thus, the debtor has an interest in maintaining the trust's status as a spendthrift trust. Nevertheless, the trustee has reason to assail that status, since a beneficial interest in a spendthrift trust is not a part of the estate in bankruptcy.[157] The trustee's interests in *Shuman* were aligned with those of the unsuccessful creditor in the pre-bankruptcy lawsuit, rather than those of the debtor. Given the divergence between the interests of the bankruptcy trustee and those of the pre-petition debtor, the *Shuman* court concluded that the pre-petition judgment was not binding on the bankruptcy trustee.

The United States Court of Appeals for the Fifth Circuit in *Coleman v. Alcock*[158] similarly concluded that the bankruptcy court was not bound by a pre-petition judgment because of a lack of privity between the trustee and either the bankrupt or a judgment creditor. In *Coleman*, the bankruptcy trustee was seeking to set aside transfers in fraud of creditors under state law. The question was whether he was precluded from doing so by the *res judicata* effect of a prior state court judgment upholding the transfers in an action brought by a creditor against the debtor and those suspected in the transfer. The Court described the role of the trustee in bankruptcy in these terms:

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[156] *Id.* at 256 (quoting A & A Concrete Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986)) (citations omitted).

[157] 11 U.S.C. § 541(c)(2) provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

[158] Coleman v. Alcock, 272 F.2d 618 (5th Cir. 1960).

> The Trustee is, of course, a successor of the Bankrupt for many purposes. But he is much more both in the extraordinary rights with which the Bankruptcy Act invests him, and as a general representative of the creditors. Unless he intervenes and takes on the role of an active litigant subjecting himself thereby to the usual incidents of such action, he is not bound by the judgment merely because the Bankrupt was a party defendant in the prior litigation.[159]

The Fifth Circuit held that the trustee was not in privity with either the pre-petition debtor or those creditors challenging the fraudulent transfer. Since the trustee had not participated in the prior proceedings personally or through a privy, the trustee was allowed to challenge the transfers previously sustained.

In *In re Nevada Natural Inc.*[160] the court denied preclusive effect to a pre-petition default judgment in a claim allowance context. Holding that a lack of privity between a debtor and the bankruptcy trustee justified the denial of preclusive effect to a prior pre-petition judgment, the court remarked:

> The doctrine of *res judicata* provides that one is not barred from litigating a claim unless he was a formal party or in privity with a party to the first action. Since the trustee is a representative of creditors and was not a formal party to the previous litigation, the only way he could be barred from litigating the claim asserted by the defendants is if he were in privity with the debtors.[161]

D. Decisions Invoking Vanston's Reasoning.

Only two decisions have addressed the role of *res judicata* through an analysis of the claim allowance process. The court in *Kohn v. Leavitt-Berner Tanning Corp.*,[162] considered whether a pre-petition debt for lease rent must be allowed in its full amount because it had been reduced to a judgment. The landlord relied upon Section 1738. The court

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[159] *Id.* at 621. Note that *Coleman*'s rationale reads *Heiser* in the narrow manner discussed in Section IV. *See also* the *dictum* in In re Giorgio, 862 F.2d 933, 936 (1st Cir. 1988) ("[A] bankruptcy trustee sometimes has somewhat broader powers; he need not always stand in the bankrupt's shoes; but when he steps outside them, he does so in exercise of his duty to protect creditors, as, for example, when the bankrupt's preferential transfer of assets threatens to harm them.").

[160] In re Nevada Natural, Inc., 92 B.R. 934 (Bankr. N.D. Okl. 1988).

[161] *Id.* at 936. (citations omitted).

[162] 157 B.R. 523 (Bankr. N.D.N.Y. 1993).

found that the allowance of the claim in less than the full amount of the judgment was consistent with Section 1738 based on the following reasoning about the allowance process:

> . . . First the court must 'determine the amount of [a creditor's] claim as of the date of the filing of the petition . . .' In a case such as the one at bar, this means accepting as non-reviewable the amount of the claim as determined by the state court. This figure then forms the basis for the second part of the analysis, wherein the court determines how much of the claim should be allowed. Applying the principles of equity inherent in the code, the court looks behind the judgment to ascertain the relationship between the parties.[163]

The utility of *Kohn* is undermined, however, by the fact that the allowance of the rent claim for its full amount would have violated the express statutory limitations on allowance contained in Section 502(b)(6). In the presence of this limitation, a finding of the express repeal of Section 1738 as to the preclusive effect of judgments for rent would have been easily made, even if claim allowance proceedings were *not* essentially different from the pre-petition proceedings.[164] It is only by implication from its dicta that *Kohn* can be read as authority for a limited role of preclusion doctrine in claim allowance proceedings that do not involve an express statutory limitation on the amount in which a claim shall be allowed.

The second case using the *Vanston* analysis as a basis to modify the application of *res judicata* principles in bankruptcy is *In re Comstock Financial Services, Inc.*[165] In *Comstock*, the debtor had been in the business of selling securities. Prior to the commencement of the debtor's Chapter 11 case, investors commenced lawsuits in state court against the debtor and its principals, based on claims for violation of securities laws and of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The lawsuits sought general damages, treble damages, pre- and post-judgment interest and attorney's fees. The investors also sought to impose a constructive trust upon all assets of the debtor. These lawsuits were temporarily stayed by the bankruptcy filing.

After the bankruptcy case was converted to a Chapter 7 proceeding and a trustee was appointed, the creditors moved in the bankruptcy

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[163] *Id.* at 527.

[164] *See* In re Weeks, 28 B.R. 958 (Bankr. W.D. Okla. 1983)(holding that the express limitations of Section 502(b)(7) on claim allowance are not subject to the doctrine of *res judicata*).

[165] 111 B.R. 849 (Bankr. C.D. Cal. 1990).

for an abstention order, so that the nonbankruptcy litigation could proceed. The motion was unopposed and was granted with the proviso that "in the event of a judgment or other recovery . . ., such judgments or other recovery, if any, shall be brought before this court for collection against the estate in the case of [Debtor]."[166]

The investors then moved in the state court for a default judgment against the trustee, who failed to respond to both the state court complaint and the request for a default judgment. Judgments were granted as to all the relief requested by the investors, including the interest, treble damages and constructive trust. The investors then filed an "Enforcement Motion" in the bankruptcy court, requesting the bankruptcy court to enforce their judgments against the estate and to compel the trustee to distribute all of the estate assets to them. The trustee opposed the motion, claiming that the abstention order only allowed the investors to liquidate the amount of their claims in the nonbankruptcy court, and that the bankruptcy court retained sole authority to determine the allowability of those claims.[167]

The bankruptcy court held that (a) the prior judgments did not bar the trustee from making objections to the "allowance, disallowance or subordination of claims";[168] (b) the imposition of the constructive trust was beyond the jurisdiction of the nonbankruptcy court and was inconsistent with bankruptcy principles of equitable distributions;[169] (c) the portion of the judgments comprising a claim for post-petition interest was prohibited by Section 502(b)(2) and, if allowed at all, would be subordinated under Section 726(a)(5) and paid pro-rata with all other creditors;[170] and (d) the portion of the damage amount awarded by the state court which exceeded compensatory damages would be allowed, but only as a subordinated claim under Section 726(a)(4).[171]

Since the default judgment was issued by a state court, the first issue confronted by the court was the effect of the Full Faith and Credit Act. Citing *Pepper v. Litton*,[172] *Katchen v. Landy*,[173] and *Granfinanciera, S.A. v. Nordberg*,[174] the court ruled that disputes over the liquidation

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[166] *Id.* at 852.
[167] *Id.* at 853.
[168] *Id.* at 859.
[169] *Id.*
[170] *Id.* at 860.
[171] *Id.*
[172] 308 U.S. 295 (1939).
[173] 382 U.S. 323 (1966).
[174] 109 S.Ct. 2782 (1989).

and allowance of bankruptcy claims are within the exclusive jurisdiction of the bankruptcy courts.

The trustee argued that the Full Faith and Credit Act requires the court to give the judgments preclusive effect only "insofar as they establish Debtor's liability to the Creditors and the amount of damages to which they are entitled,"[175] but does not preclude the trustee from having the judgment claims disallowed or subordinated pursuant to the provisions of the Bankruptcy Code. The trustee's argument relied on a claimed distinction between the "liquidation" of a claim, as to which the judgments were preclusive, and the "allowance" of the claim. In this second process, the trustee argued that the judgments had no preclusive effect. The trustee based his argument on Section 502(c) of the Bankruptcy Code[176] and 28 U.S.C. Section 157(b)(2)(B),[177] which suggest a distinction between the concepts of claim liquidation and claim allowance. Although the court found it reasonable to conclude that "liquidation" is merely one step in the allowance process,[178] it did not rule on that basis. Instead, its conclusion that the prior judgments did not preclusively determine the amount in which the investors' claim would be allowed was based on two reasons.

First, the court decided that the issues of allowance and subordination were issues that were not litigated and could not have been litigated in the nonbankruptcy court.[179] The exclusive *in rem* jurisdiction of the

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[175] *Comstock*, 111 B.R. at 855.

[176] 11 U.S.C. § 502(c) provides:

(c) There shall be estimated for purposes of allowance under this section —

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

11 U.S.C. § 502(c)(1988).

[177] 28 U.S.C. § 157(b)(2)(B) defines as a core proceeding in bankruptcy:

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11 . . . .

28 U.S.C. § 157(b)(2)(B)(1988)).

[178] *Comstock*, 111 B.R. at 856.

[179] "Trustee in this case is not attempting to relitigate claims or issues decided by the Judgments with regards to securities trading law violations or violations of RICO. Trustee is asserting claims concerning the allowability of the Judgments that were not asserted in state court and which may be asserted only in this court." *Id.* at 858.

bankruptcy court over the property of the estate made it "practically impossible" for a nonbankruptcy court to rule upon allowability, "the purpose of which is to insure equitable distribution of the property of the estate."[180] Therefore, the decision of the nonbankruptcy court was on a different "claim" for purposes of *res judicata* jurisprudence, and claim preclusion did not apply in the claim allowance proceeding.[181]

The court's second reason was fact specific: portions of the judgments of the non-bankruptcy court "were clearly not contemplated by the bankruptcy court when it entered the Abstention Order,"[182] and were outside "the limiting language in the Abstention Order."[183] The only example of this problem which the Court gave was the imposition of a constructive trust on the assets of the estate.

When the issue became the preclusive effect of the judgments establishing a constructive trust, the court gave two additional reasons why the judgments were not binding on the trustee. Both reasons relied on the general equity powers of the bankruptcy court. First, the court found that the property of the judgment holders could not be traced into the commingled assets of the estate.[184] This seems to be a finding that the constructive trust wrongfully imposed as a matter of nonbankruptcy law, rather than a bankruptcy principle on preclusion issues. The court also found that constructive trusts are disfavored in bankruptcy because they disrupt the equitable distribution of estate property to all creditors.[185]

The remainder of the decision related to portions of the judgments controlled by specific bankruptcy statutes on allowance and subordination. The portion of the judgments providing for post-petition interest were disallowed as claims for unmatured interest under Section 502(b)(5),[186] subject to possible allowance as a subordinated claim (pro-

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[180] *Id.*

[181] *Id.*, at 857-58.

[182] *Id.* at 858.

[183] *Id.* at 859.

[184] *Id.*

[185] *Id.* at 859-60.

[186] 11 U.S.C. 502(b)(5) provides:

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such

rata with other creditors not holding judgments) under Section 726(a)(5).[187]

The trustee's request to disallow the judgments for RICO treble damages was rejected because Section 726(a)(4)[188] allows claims for multiple or punitive damages as subordinated claims in a Chapter 7. The court noted, however, that disallowance (rather than subordination) might have been appropriate in a Chapter 11 case, where Section 726 would not apply.[189]

The *Comstock* court reached its conclusions primarily in reliance upon *Pepper*, and without any citation to *Vanston* or other cases addressing the nature of the bankruptcy process or, the claim allowance process in bankruptcy. Nevertheless, *Comstock* reflects an uncommon sensitivity to the difference between the nature and purpose of bankruptcy claim allowance and the nature of nonbankruptcy creditor lawsuits. It therefore represents the most well-reasoned of the decisions which have found a narrowed role for *res judicata* in bankruptcy claim allowance proceedings.[190]

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amount except to the extent that —

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

11 U.S.C. 502(b)(5)(1988).

[187] 11 U.S.C. 726(a)(5) provides:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed —

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection . . .

11 U.S.C. 726 (a)(5)(1988).

[188] 11 U.S.C. 726(a)(4) states:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed —

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not

compensation for actual pecuniary loss suffered by the holder of such claim

11 U.S.C. 726(a)(4)(1988).

[189] *Id.* at 860.

[190] For the sake of completeness, we shall also mention a fourth bankruptcy exception to *res judicata*, that appears to apply only to judgments in favor of creditors which

VI. Gleanings From The Bankruptcy Code

Bankruptcy law is code-based, and the most pertinent point to begin an analysis of the role of *res judicata* in bankruptcy should be the bankruptcy statute. The overriding consideration in bankruptcy is that equitable principles govern.[191] Nevertheless, the equitable powers of the bankruptcy courts can only be exercised within the confines of the Bankruptcy Code.[192] It is therefore a universal but surprising failing of the case law that no court has ever attempted to resolve issues concerning the application of *res judicata* in bankruptcy by reference to either the statutory language or less direct evidence of legislative intent. Instead, the subject has been uniformly treated as a matter controlled by decisional[193] and non-bankruptcy statutory law. While this would certainly be the case for *res judicata* issues arising in other civil contexts, it seems inappropriate for a code-based system, such as bankruptcy.

This significant shortcoming in the legal analysis turns out to be less serious than expected only because an analysis of the Bankruptcy Code yields no express indication of the proper role of preclusion doctrine.

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violate "a fundamental public policy declaration" of state law. In re Hamlett, 63 B.R. 492, 493 (Bankr. M.D. Fla. 1986)(usury under Florida law). Perhaps this decision was implicitly holding that a Florida state court would not have given *res judicata* effect to the judgment even if bankruptcy had not intervened.

Dahar v. Biron, 64 B.R. 30 (D.N.H. 1986) is another decision finding a *res judicata* exception in bankruptcy proceedings, and is based on an undecipherable rationale. Here the court allowed a bankruptcy trustee to sue for a determination of the estate's title to a diamond ring, despite the fact that a creditor had obtained a pre-bankruptcy default state court judgment against the debtor on the same issue. Citing dischargeability cases, the court holds that "the doctrine of *res judicata* is of limited scope in bankruptcy proceedings." *Id.* at 31. As in *Hamlett*, there is no discussion of Section 1738.

[191] Bank of Marin v. England, 385 U.S. 99, 103 (1966).

[192] Northwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); In Re Sanford, 979 F.2d 1511 (11th Cir. 1992); In Re Tucson Yellow Cab Co., Inc., 789 F.2d 704 (9th Cir. 1986). A second restriction on the use of bankruptcy principles of equity is that they can be exercised only for the "care and preservation of the estate." In re Tucson Yellow Cab, 789 F.2d 701, 704 (9th Cir. 1986). There is no reason to expect this restriction to conflict with equitable limitations on the role of *res judicata* in the claim allowance process.

[193] "Courts have identified these fundamental policies and elaborated them into detailed rules of *res judicata* almost entirely on their own, with little meaningful guidance from statutes or constitutional provisions. *Res judicata* is very much a common law subject." 18 Charles A. Wright, et al., Federal Practice and Procedure § 4403,19 (1981 ed.).

As we shall see, there are a number of suggestions in the Bankruptcy Code and its legislative history about the role intended by Congress for the principles of *res judicata*, but they are not clear or decisive. Nevertheless, the preponderance of this inconclusive evidence suggests that Congress intended the interests protected by the doctrine of *res judicata* to be subordinated to the unique bankruptcy policy favoring equitable distribution among creditors, where the competing goals come in conflict. This conclusion is based not on any one sentence or section of the Code, but upon a review of the provisions of the whole law, its history, object and policy.[194]

A. Statutory and Legilsative Materials That Suggest A Limited Role For Res Judicata In Bankruptcy.

Except for Sections 505(a)(1) and (a)(2)(A),[195] there are no provisions of the Bankruptcy Code which explicitly mandate or limit the *res judicata* effect of a pre-petition judgment. On the contrary, the Code defines the term "claim" in a way that makes no distinction between creditor rights that have been reduced to judgment and those that have not.

> "[C]laim" means—
>
> (A) [R]ight to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) [R]ight to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . .[196]

All claims, including judgments, are subject to the same allowance process described in Sections 502, 505 and 506. Except for certain tax claims covered by Section 505, the Code gives no special protection in this process to payment rights that a creditor has reduced to judgment, let alone an exemption from any aspect of the allowance process for such rights.

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[194] "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." Kelly v. Robinson, 479 U.S. 36, 43 (1986) (construing Code Sections 101 and 523).

[195] These statutes, which deal with exceptions to the preclusive effect of certain judgments on tax claims, are discussed in subsection (B) of this section.

[196] 11 U.S.C. § 101 (5) (1988 & Supp. V 1993).

The strongest statutory basis to argue for a limited role for *res judicata* in claim allowance proceedings relies upon the legislative history of Section 510.[197] This section sets forth the authority of the Bankruptcy Court to subordinate all or any part of an allowed claim in the distribution of assets.[198] It is not the text of Section 510 that is pertinent here, but the commentary on this section contained in the House Report. An appreciation of this commentary requires a brief review of the discussion in Section IV of this article concerning the cases of *Pepper v. Litton*[199] and *Heiser v. Woodruff*.[200]

Pepper has traditionally been viewed as establishing the bankruptcy court's broad powers to subordinate or disallow[201] claims on equitable grounds,[202] including those embodied in a judgment. *Heiser* is commonly viewed as narrowing *Pepper*'s *res judicata* exception to cases where the pre-petition judgment is defective for want of jurisdiction or was procured by fraud.[203] The House Report's commentary on Section 510

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[197] Section 510(c) provides:

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may —

(1) under principles of equitable subordination, subordinate for purpose of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing a subordinated claim shall be transferred to the estate.

11 U.S.C. § 510 (c) (1988).

[198] Subordination is not the same as disallowance, but it can have a similar economic effect in the case of insolvent estates. A claim is disallowed if it has no legal basis, is nonexistent or illegal. If the claim is valid but the claimant has been guilty of misconduct, it may be allowed but subordinated. A subordinated claim receives a dividend after all claims in senior classes have been fully paid. If the claim is subordinated to the payment of all unsecured claims, then the subordinated claim will receive no dividend where the estate is insolvent, since the liabilities exceed the assets available to pay them. Thus, the subordinated creditor of an insolvent estate would usually receive no greater share of its assets than a creditor holding a disallowed claim. Nevertheless, unlike a disallowed claim, a subordinated claim would be entitled to vote and would enjoy most other claimholder rights in the bankruptcy. 3 Collier on Bankruptcy, § 510.02 (15th ed. 1994).

[199] 308 U.S. 295 (1939).

[200] 327 U.S. 726 (1946).

[201] In *Pepper*, the creditor's claim was disallowed on equitable grounds, and not merely subordinated.

[202] H.R. No. 595, 95th Cong., 1st sess. 359 (1979).

[203] *Heiser*, 327 U.S. at 726-732.

refers with approval to *Pepper* while making no reference to *Heiser*. It also makes clear that Section 510 was not intended to limit or restrict equitable principles of disallowance or subordination located in bankruptcy case law.

> (This subsection) permits the court to subordinate, on equitable grounds, all or any part of an allowed claim or interest to all or any part of another allowed claim or interest, and permits the court to order that any lien securing claims subordinated under this provision be transferred to the estate. This section is intended to codify case law, such as *Pepper v. Litton*, 308 U.S. 295 (1939), and *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307 (1938), *and is not intended to limit the court's power in any way*. The bankruptcy court will remain a court of equity, proposed 28 U.S.C. 1481; *Local Loan v. Hunt*, 292 U.S. 234, 240 (1934). Nor does this subsection preclude a bankruptcy court from completely *disallowing* a claim in appropriate circumstances. See Pepper v. Litton, supra. *The court's power is broader than the general doctrine of equitable subordination* and encompasses subordination on any equitable ground.[204]

The House Report thus chooses to emphasize the equity powers of the bankruptcy court to *disallow* claims that have been reduced to judgment in appropriate circumstances. It did not restrict those circumstances to the narrow categories suggested by *Heiser*.

The significance of this commentary would have been greater if it were found in the portions of the House Report discussing the allowance process under Section 502. Section 510 does not purport to deal with the allowance or disallowance of claims, but only with their subordination. No similar discussion of *Pepper* or of equitable principles of disallowance can be located in the legislative history of Section 502. This weakens the import of the legislative history, but it does not eliminate it. It is clear that the commentary on Section 510 did not address only the subordination of claims, but also their disallowance on equitable grounds, when appropriate. The lack of similar commentary in Section 502 may be nothing more than a drafter's recognition that the endorsement of the general principles of *Pepper*, once stated, need not be repeated everywhere they are relevant.

Section 502(j) also provides some evidence of the relative stature of the principles of finality and the goal of equitable distribution in bankruptcy. Section 502(j) reads, in pertinent part:

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[204] H.R. No. 595, 95th Cong., 1st sess. 359 (1979).

> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case . . . . This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.[205]

Congress last amended Section 502(j) in 1984.[206] Before the amendment, a claim could be reconsidered only "before a case is closed."[207] The 1984 amendment deleted this language from the statute. The effect of this liberalizing change is that there is no longer a clear time limit within which to bring reconsideration motions.[208]

Orders disallowing[209] and allowing[210] claims are final, appealable orders, and are entitled to *res judicata* effect.[211] The reconsideration of such orders poses as great a threat to the policies of *res judicata* as does the failure to give preclusive effect to the prior judgment of another tribunal. In both cases, the re-opening of the issues is inconsistent with the conservation of judicial and litigant resources, with the use of the appellate process to redress any errors in the decision, and with the legitimate expectation of parties that a matter once settled would stay settled. Nevertheless, where cause exists to review whether the original determination to allow or disallow the claim was proper, Congress has provided for the review, even when the request for review comes so late that the bankruptcy case is closed. Thus, where the final orders of the bankruptcy court are involved, Congress has clearly subordinated the interests of finality and repose to the goal of assuring that the distributions to creditors are in their proper and equitable amounts.

A few other provisions of the Bankruptcy Code provide some suggestion that Congress has cast the balance in favor of equitable distribution policies where they conflict with the policies of *res judicata*, although the inferences are more indirect and uncertain. Section 362

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[205] 11 U.S.C. 502(j) (1988).

[206] Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, § 445 codified as 11 U.S.C. § 502(j).

[207] 3 Collier on Bankruptcy § 502.10 (15th Ed. 1994).

[208] M. Zelmanovitz & E. Jacobsen, *The Reconsideration of Contingent and Disputed Claims Under Bankruptcy Code Section502(j)*, 23 Seton Hall L. Rev. 1612, 1635 (1993).

[209] Walsh Trucking Co., Inc. v. Insurance Co. of North America, 838 F.2d 698 (3d Cir. 1988); U.S. v. Coast Wineries, 131 F.2d 643 (9th Cir. 1942).

[210] In re Moody, 849 F.2d 902 (5th Cir. 1988); In re Saco Local Development Corp., 711 F.2d 441 (1st Cir. 1983).

[211] In re Camp, 170 B.R. 610 (Bankr. N.D. Ohio 1994).

of the Bankruptcy Code provides that the filing of a bankruptcy petition serves to stay litigation, the enforcement of liens, and other judicial actions that potentially interfere with the trustee's distribution of the debtor's estate.[212] This statute has been interpreted to make void the judicial proceedings of nonbankruptcy courts that occurred in violation of the automatic stay.[213] Clearly there is prejudice to the goals of comity — harmonious relationships with other governmental entities and judicial tribunals — when their proceedings are invalidated by the bankruptcy stay. Nevertheless, that is the effect of the violation of the stay, however innocent or well-intentioned it may have been, in order to protect and advance bankruptcy goals.

Similarly, Congress did not insulate judicial liens from avoidance as preferential transfers under Section 547 of the Bankruptcy Code. Under Section 547(b), an estate may avoid a preferential transfer of the debtor's property to or for the benefit of a creditor where that transfer was on account of an antecedent debt, occurred within 90 days of the filing of the bankruptcy petition (or one year if the creditor was an insider), at a time when the debtor was insolvent, and allowed the creditor to receive more than it would obtain under a Chapter 7 distribution. The purpose of Section 547 is to promote the principle of equality of loss and prevent parties from benefitting from precipitous litigation on the eve of bankruptcy.[214] Where the preferential transfer consists of the creation of a judicial lien by a nonbankruptcy court, the lien is subject to avoidance under Section 547 under the same terms and conditions as non-judicial transfers of property.[215] As with violations of the automatic stay, the applicability of this statute to the acts of nonbankruptcy tribunals represents a subordination of the interests of comity and finality to the advancement of bankruptcy principles of equitable distribution.

B. Statutory And Legislative Materials That Suggest No Limitations On The Role For Res Judicata In Claim Allowance.

Thus far, we have reviewed the provisions of the Bankruptcy Code and its legislative history suggesting that *res judicata* has a narrower role

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[212] 2 Collier on Bankruptcy § 362.01 (15th ed. 1994).

[213] *See, e.g.*, Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); In re Shamblin, 890 F.2d 123 (9th Cir. 1989).

[214] In re Enserv Co., Inc., 64 B.R. 519 (Bankr. 9th Cir. 1986); In Re Gulino, 779 F.2d 546 (9th Cir. 1985).

[215] In re Group Development Corp., 43 B.R. 665 (Bankr. M.D. Fla. 1984); 4 Collier on Bankruptcy §547.03[A] (15th ed. 1994).

to play in bankruptcy cases than in other federal proceedings. The Code also lends itself to arguments in the opposite direction, although they are less convincing.

The only explicit statement in the Bankruptcy Code regarding the scope of preclusion doctrine is contained in Section 505(a). Subsection (a)(1) of this section ostensibly eliminates the doctrine of *res judicata* with respect to claims for taxes, tax fines or tax penalties:

> Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

This sweeping abolition of preclusion doctrine is then partly retracted by subsection (a)(2)(A) of the statute:

> (2) the court may not so determine — (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or . . .

The net effect is that the bankruptcy court is authorized to re-litigate a tax previously determined if the prior determination was uncontested, or was decided by default.[216]

These subsections re-enact the substance of Section 2a(2A) of the Bankruptcy Act, as amended in 1966.[217] As amended, Section 2a(2A) invested courts of bankruptcy with jurisdiction to

> Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review.

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[216] In re Bruce W. Brooks General Contractor, Inc., 27 B.R. 9 (Bankr. D. Or. 1982); In re Buchert, 69 B.R. 816 (Bankr. N.D. Ill. 1987). This was also true under the Bankruptcy Act. *See, e.g.*, In the Matter of Century Vault Co., Inc., 416 F.2d 1035 (3rd Cir. 1969).

[217] 80 Stat. 270 (1966).

The 1966 legislation was a codification and extension of the 1941 Supreme Court decision in *Arkansas Corporation Commission v. Thompson.*[218] In *Thompson*, the Court determined that a bankruptcy trustee could not re-litigate in the bankruptcy court a property tax assessment that the trustee had unsuccessfully contested in a nonbankruptcy tribunal. In reaching this conclusion, *Thompson* stated:

> Nothing in the language of the Act requires such a construction. And the policy of revising and redetermining state tax valuations contended for by the trustee would be a complete reversal of our historic national policy of federal non-interference with the taxing power of states.[219]

Through the 1966 amendment, Congress made clear that the rule of *Thompson* should be extended to cases in which it was the pre-petition debtor, rather than the trustee, which litigated the tax question on its merits, and that the decision of the nonbankruptcy tribunal on the tax question was entitled to no preclusive effect unless it was contested.

The inferences from section 505 as to the preclusive effect of judgments for non-tax obligations point in both directions. The presence of a *res judicata* exception for certain tax claims, when contrasted with the absence of a similar exception for non-tax claims, suggests that an exception for the latter is inconsistent with Congressional intent. Such a reading would be consistent with ordinary maxims of statutory construction.[220] We submit, however, that such an inference of Congressional intent would be misplaced. The necessary corollary of this inference is that, for whatever reason, Congress chose to grant a narrower scope for preclusion principles when the context involved tax claims in bankruptcy than when non-tax claims were involved. This conclusion would contravene the "historic national policy of federal non-interference with the taxing power of states" that was noted in *Thompson*,[221] and that is reflected in the provisions of the Tax Injunction Act.[222] Nothing in the legislative history of the pertinent provisions of the Bankruptcy Act or the Bankruptcy Code suggests that Congress deemed final judgments or orders on tax claims to be less worthy of the benefits of the doctrine of *res judicata* than non-tax claims.

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[218] *Thompson*, *supra*, n.75.

[219] *Thompson*, 313 U.S. at 145.

[220] *Expressio unius est exclusio alterius.* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); Sundance Land v. Community First Federal Savings and Loan, 840 F.2d 653 (9th Cir. 1988).

[221] *Thompson*, 313 U.S. at 145.

[222] 28 U.S.C. § 1341 (1988).

On the contrary, the concern which motivated the exception to *res judicata* for uncontested tax claims is equally applicable to non-tax claims. The debate in the House of Representatives with respect to the pertinent language of Section 64a(4) of the Bankruptcy Act (dealing with tax claims) explains the reason for the *res judicata* exception in these terms:

> The point is that the debtor often neglects to take the proper steps, and, the creditors do not know anything about what is happening. They have no day in court. When that happens the creditors should not be foreclosed from going to the Bankruptcy Court and finding out just what the situation is . . . .
>
> Very often arbitrary assessments are made which have no relation to what they should be, and there should be some central forum where the bankruptcy court can go into the surrounding facts and determine what the fair and equitable amount should be.[223]

We are thus left with no clear answer why, having made an express exception to the doctrine of *res judicata* for tax claims, Congress was silent as to an exception for non-tax claims. The answer with respect to the drafters of the Bankruptcy Code appears to be that they tracked the Bankruptcy Act. The Bankruptcy Act contained an exception to *res judicata* for tax claims but no similar exception for non-tax claims, and this disparity was carried forward into the modern statute. Deciding why the drafters of the Bankruptcy Act created such a disparity is difficult. It is clear, however, that Congress was aware of the *Thompson* decision when it enacted the Bankruptcy Code.[224] *Thompson* is cited in the Committee Reports as "good law to permit abstention where uniformity of assessment is of significant importance."[225] This is not necessarily a Congressional endorsement of the Supreme Court's recognition of a historic national policy of federal non-interference with the taxing power of states. Nevertheless, without cause to believe that Congress disagreed with this policy, the most reasonable inference is that Congress did not single out tax claims for *less* protection under preclusion doctrines than was intended for non-tax claims, and that

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[223] Statements of Mr. Reuben G. Hunt in the 1937 House hearings, quoted in 3A Collier on Bankruptcy Section 64.407, n.38 (14th ed. 1975).

[224] The House Report makes specific reference to *Thompson*, 313 U.S. at 356. H.R. No. 595, 95th Cong., 1st sess. 356 (1977). The Senate Report also refers to *Thompson*. S. Rep. No. 989, 95th Cong., 2d sess. 67 (1978).

[225] *Id.*

Congress tilted the balance between *res judicata* and equitable distribution in favor of the latter.[226]

Section 502(b) of the Bankruptcy Code may also provide support for the conclusion that *res judicata* operates the same way in bankruptcy as in other civil proceedings. Section 502(b) states that, if an objection to a claim is asserted, after notice and hearing the Court shall allow the claim in an amount determined by the Court, except where one or more of eight enumerated circumstances exist.[227] For the issues in this

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[226] It is arguable that judgments for tax claims have limited preclusive effect because, under Section 507(a)(7), tax claims have a priority over unsecured claims. They also enjoyed a similar priority status under Section 64a(4) of the Bankruptcy Act. Because an erroneous or excessive judgment on a priority tax claim would have a more detrimental effect on the distributions to general creditors than a similar error on an unsecured claim, it is possible that Congress deliberately chose to withhold a preclusion limitation for non-tax claims, where errors would be less dangerous.

We have rejected this argument for several reasons. First, there is no evidence in the legislative history to support this inference as to the intent of Congress. Second, the logic of this inference would suggest a statutory limitation for the preclusive effect of judgments on secured claims, as well, since secured claims get paid even before priority claims. No such limitation was enacted. Finally, the corollary of this argument is that Congress intended tax claims to be subject to greater scrutiny by bankruptcy courts than non-tax claims. This seems to be contrary to the federal policy of non-interference in state tax collection matters previously discussed. *See supra* notes 221-224 and accompanying text.

[227] The statute provides:

> (b) Except as provided in subsection (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that —
>
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
>
> (2) such claim is for unmatured interest;
>
> (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
>
> (4) is such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
>
> (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
>
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds —
>
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of

study, there are two pertinent questions: whether claim disallowance for reasons of equitable distribution policy[228] falls within one of these eight grounds for disallowance, and (if not) whether Subsections 502(b)(1) - (8) comprise the exclusive grounds for partial or complete disallowance of a claim that is filed or deemed filed. If the first question is answered in the affirmative, the section question need not be reached.

Section 502(b)(1) authorizes the disallowance of a claim to the extent that it is "unenforceable against the debtor and property of the debtor under any . . . applicable law for a reason other than because such claim is contingent or unmatured." If the "applicable law" includes federal decisional law with respect to equitable distributions, then bankruptcy case law exceptions to the *res judicata* effect of a non-bankruptcy judgment would be authorized under Section 502(b)(1). Insider misconduct, interest-on-interest and relative inequity among creditors are not expressly included as grounds for claim disallowance under Subsections 502(b)(1)-(8). One would therefore have to conclude that *Pepper*, *Heiser* and *Vanston* were repealed by the Bankruptcy Code, if the eight subsections of Section 502(b) were the exclusive grounds for disallowance, and if the phrase "allowable law" in Section 502(b)(1) did not include the federal law of equitable distribution.[229]

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such lease,
following the earlier of —
(I) the date of the filing of the petition; and
(ii) the date on which such lessor repossessed, or the lessee surreidered, the leased property; plus
(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
(7) is such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds-
(A) the compensation provided by such contract, without acceleration, for one year following the earlier of-
(I) the date of the filing of the petition; or
(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates.
(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor. (11 U.S.C. §502(b)).

[228] *E.g.*, disallowance under the principles of *Pepper* and *Vanston*.

[229] Each of these cases involved claim disallowance based on the federal common law of equitable distribution in bankruptcy, rather than unenforceability of the claim under non-bankruptcy law.

As a general matter, the implication of a statutory repeal of a judicially created bankruptcy concept is disfavored.[230] A claim that Congress implicitly overruled *Pepper* when it enacted section 502(b) is impossible to reconcile with the endorsement of the *Pepper* decision in the legislative history of Section 510. Finally, the numerous cases from lower courts disallowing claims for punitive damages, excessive default rates of interest, fines and penalties[231] decided under the Bankruptcy Code cannot be reconciled with the view that the doctrine of equitable distribution has been repealed by Section 502(b). It is therefore appropriate to view the reference in Section 502(b)(1) to "applicable law" as incorporating both non-bankruptcy and bankruptcy law, including the body of decisional law authorizing claim disallowance under principles of equitable distribution. This conclusion makes it unnecessary to consider the issue whether the grounds for disallowance specified in Subsections 502(b)(1)-(8) are the exclusive grounds for disallowing a claim.

VII. Toward A Resolution

Both parts of the approach to preclusion issues under Section 1738 pose troublesome issues in bankruptcy proceedings. The first part of the analysis requires the bankruptcy court to determine whether, under state law, the pre-bankruptcy state court judgment would be given preclusive effect against the bankruptcy trustee in a subsequent state court proceeding.

The simplest context in which this issue arises is when the bankruptcy court must determine the extent of the property interests of the bankruptcy estate. Under Section 541,[232] the property of the estate

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[230] The normal rule of statutory construction in bankruptcy is that, if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. Midatlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1985); Kelly v. Robinson, 479 U.S. 36 (1986). The silent abrogation of judicially created concepts is particularly disfavored when construing the Bankruptcy Code. In re Colortex Industries, Inc., 19 F.3d 1371 (11th Cir. 1994).

[231] *See, e.g.*, In Re Hillsborough Holdings Corp., 146 B.R. 1015 (Bankr. M.D. Fla. 1992)(collecting cases); In Re Apex Oil Co., 118 B.R. 683 (Bankr. E.D. Mo. 1990); In re Oahu Cabinets, Ltd., 12 B.R. 160 (Bankr. D. Haw. 1981); In re Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986); In re A.H. Robins Co., Inc., 89 B.R. 555 (E.D.N.Y. 1988).

[232] 11 U.S.C. § 541(a)(1) (1988).

includes all legal and equitable interests of the pre-petition debtor. Under Sections 502(b)(1) and 558,[233] a bankruptcy estate has all the defenses to a claim that the pre-petition debtor had. Therefore, any nonbankruptcy right of a debtor to challenge the preclusive effect of a pre-petition judgment determining the debtor's rights in property would also be available to its estate in bankruptcy, regardless of the solvency of the estate. The scope and extent of these rights are determined by each state's nonbankruptcy law, and the discussion of nonbankruptcy exceptions to the preclusive effect of an earlier judgment is beyond the scope of this study. By the same reasoning, the right of a bankruptcy debtor to invoke preclusion doctrine either as a defense to a claim or as a basis to assert its own claims against a non-debtor is unaffected by the existence of a bankruptcy proceeding, and is controlled by nonbankruptcy law.

It is a more difficult question whether the bankruptcy trustee or debtor-in-possession, as the representative of the interests of the debtor's creditors, may have greater rights under state law to avoid the preclusive effect of a pre-petition judgment than the debtor had.[234] Where the question concerns the nature and extent of the debtor's interest in property, there are no issues relating to differences in the jurisdiction or function of the non-bankruptcy and the bankruptcy court systems which might bear upon the preclusion issue. The bankruptcy court faced with the task of evaluating competing claims to a specific asset or fund is doing nothing beyond what the nonbankruptcy court has already done. Thus, state law would ordinarily find the estate bound by and benefitting from the rules of *res judicata* on such issues.[235] However, in some states, litigation in one capacity, individual or representative, does not preclude litigation by the same entity in a different capacity.[236] In jurisdictions following this approach, the estate

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[233] 11 U.S.C. § 558 (1988) ("The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.").

[234] Before relying upon a bankruptcy exception to preclusion doctrine, practitioners should initially address the availability of the nonbankruptcy exceptions, under principles similar to those discussed *supra* notes 49-61 and accompanying text.

[235] Restatement of Judgments § 89(c) (1942); Restatement (Second) of Judgments § 43 (1982); Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983). *Contra* Dahar v. Biron, 64 B.R. 30 (D.N.H. 1986).

[236] Restatement (Second) of Judgments § 36(2) (1982). *See, e.g.*, Hurt v. Pullman,

can argue that the interests and motivations of the debtor involved in the litigation are distinct from those of its creditors, and can make a factual showing that the creditors would be unfairly burdened by affording preclusive effect to a proceeding in which the trustee did not participate.[237] Unlike the pre-petition debtor, which represents its own interests in pre-bankruptcy litigation and whose relationship with its creditors is arms-length or adversarial, the trustee and debtor-in-possession are fiduciaries whose duty is to represent the best interests of creditors.[238] Those interests may be aligned with those of a diligent and effective pre-petition debtor,[239] but they will not always be. Where the pre-petition debtor has not fully and fairly protected its rights in litigation before the bankruptcy, the disparity between the interests of the debtor and the interests of the bankruptcy estate may be significant enough under state law to overcome the policies in favor of preclusion for nonbankruptcy reasons. Clearly, this argument is likely to have its greatest (and perhaps its only) success in situations involving insolvent estates, where the burden of any preclusive effect falls on the creditors of the debtor, rather than on the debtor that participated in the pre-bankruptcy litigation or its shareholders.[240]

Inc., 764 F.2d 1443 (11th Cir. 1985); Pepper v. Zions First Nat. Bank, 801 P.2d 144 (Utah 1990).

[237] Whenever the estate has reason to challenge the preclusive effect of a prior judgment, an unfair or incorrect result in the prior proceeding is presumably involved. There would be little point in contesting the preclusive effect of the earlier judgment if it was sound, and if the relitigation of the issues on their merits was likely to produce the same result. Where preclusion doctrine is applicable, it is because the policies of finality, comity and judicial economy outweigh the losing party's interest in further review of the dispute, even if it was wrongly decided. Where the challenge to the prior judgment is made by a successor-in-interest, it is premised on the notion that preclusion involves a higher element of unfairness, because the persons represented by the successor did not have an opportunity for a hearing on the issues determined in the first proceeding.

[238] *See supra* notes 152-161 and accompanying text.

[239] When a motivated and effective debtor defends its own interests in litigation, the incidental effect is a defense of the interests of the creditors who rely on the debtor's income or assets for repayment.

[240] The question whether the creditors of the insolvent debtor should be precluded, as a matter of state law, from challenging a pre-petition judgment against the debtor can be considered a variant of the issue of preclusion by way of virtual representation. In probate proceedings and a few other contexts, courts have recognized the need to make rulings that bind persons unknown or not yet born, while recognizing that those persons have not had a day in court. Under the doctrine of virtual representation,

Without specifying whether they were relying on state law principles of preclusion, a number of trial and appellate bankruptcy courts have concluded that the interests of the bankruptcy trustee, as representative of the estate's creditors, and the interests of the pre-petition debtor are substantially different. As a result, they have held that the requisite element of "privity" between the pre-petition debtor and the estate is lacking, and have denied preclusive effect to the prior determinations.[241] These cases may be criticized for failing to employ the analysis required under Section 1738. The bankruptcy court confronting the preclusion question must first decide whether, as a matter of state law, the judgment would have had preclusive effect relative to a successor (such as a nonbankruptcy receiver or conservator) representing the collective interests of creditors of the litigant-debtor. If it would have, then the next phase of the Section 1738 analysis must be reached: determining whether the fact of bankruptcy alters what would otherwise be the result under state law. The "privity" cases have failed to distinguish between these two similar but distinct issues.

Where the preclusion issue arises in the context of claim allowance, the estate can invoke all of the preceding arguments to avoid preclusive effect and a few additional ones. The use of a Section 1738 analysis for claim allowance issues raises a conundrum. It is impossible to determine what preclusive effect a state court would give to a prior judgment in a claim allowance proceeding for two reasons: (1) the process of claim allowance is uniquely a part of the bankruptcy statutory scheme, and (2) the bankruptcy process is exclusively administered by the federal courts. On this basis, a leading bankruptcy commentator has concluded that pre-petition judgments of state courts have no *res judicata* effect in bankruptcy at all.[242] The differences between claim allowance proceedings in bankruptcy and collection proceedings in nonbankruptcy courts permit an analogy to important nonbankruptcy

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the existence of a preclusive effect on non-parties is determined by the quality of the representation of their interests by those who did litigate, and by the alignment between the interests of the litigants and those of the non-parties. 18 Charles a. Wright, et al., Federal Practice and Procedure, § 4457 (1981). If this approach was applied to the situation of an insolvent debtor, the critical factor would become the adequacy of the manner in which the pre-petition debtor defended its rights (and, by proxy, the rights of its creditors) in the nonbankruptcy court.

[241] *See supra* notes 152-161 and accompanying text.

[242] 3 Collier on Bankruptcy § 502.02 (15th Ed. 1994). The treatise relies for this statement on pre-Code authority, and on a single case decided under the Bankruptcy Code which was reversed on appeal, although on other grounds.

principles limiting the preclusive effect of a prior determination. A judgment may lack preclusive effect in a later proceeding if there are material differences in the quality or extensiveness of the procedures followed in the two courts,[243] if the system of federal remedies was materially different from those available under state law,[244] or if the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory scheme.[245] As we have discussed in Section II[246] of this article, the fact that a claim is collectible in a certain amount under state law is a necessary but not a sufficient condition to its allowance in bankruptcy, and the nonbankruptcy court would lack the required information to address the questions of bankruptcy policy and relative rights of creditors that affect the allowance of the claim.[247] Perhaps most significantly, the nonbankruptcy court handling the collection action is not charged with the responsibility of evaluating the interests of non-litigants, such as non-party creditors, and the procedures of those courts give the non-litigant creditors no means to be heard.[248] The difference between the purpose and scope of the proceedings in the bankruptcy and the nonbankruptcy forums implies, both under nonbankruptcy principles of preclusion law and under bankruptcy principles controlling the claim allowance process,[249] that a pre-bankruptcy judgment should not be conclusive of the exis-

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[243] Restatement (Second) of Judgments § 28(2) (1982). *See, e.g.*, Smith By and Through Smith v. Armontrout, 632 F. Supp. 503 (W.D. Mo. 1986), aff'd 812 F.2d 1050 (8th Cir. 1987), *cert. denied*, 483 U.S. 1033 (1987); F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422 (N.D. Ohio 1984).

[244] Restatement (Second) of Judgments § 86(2) (1982). In discussing § 1738, Comment d states that relitigation may be appropriate where the issue involves the application of federal law to a complex fact pattern in which the legal frame of reference is an important element of making the determination. This appears to closely describe the process of claim allowance in bankruptcy, without referring to it. "Only the court that has exclusive *in rem* jurisdiction over the property of the bankruptcy estate can assure the equitable distribution of the property of the estate. In re Comstock Financial Services, Inc., 111 B.R. 849, 855 (Bankr. C.D. Cal. 1990).

[245] Restatement (Second) of Judgments § 26(1)(d) (1982).

[246] *See supra* part II.

[247] "In many cases creditors' claims are liquidated prior to the commencement of a bankruptcy case. In such cases, it is impossible for a nonbankruptcy court to consider claims based upon the allowability provisions of the Bankruptcy Code before a bankruptcy case is commenced." *Comstock*, 111 B.R. at 858.

[248] In contrast, any party-in-interest in the bankruptcy may object to the allowance of a creditor's claim. Fed. R. Bankr. P. 3007.

[249] *Comstock*, 111 B.R. at 859.

tence or extent of the debtor's liability for the purpose of claim allowance.[250]

> While the determination of the existence and amount of a claim in a civil litigation is strictly a proceeding in personam, the determination as to the allowance and relative priority of a claim against a debtor is viewed as a proceeding in rem. The bankruptcy court to whose jurisdiction the administration of the bankruptcy estate is committed would not be bound by a prior court's determination on the question of priority because the "subject matter in litigation," the right of creditors to share in the bankruptcy assets, would not be the same.[251]

This conclusion concerning the limited role of preclusion doctrine in claim allowance proceedings does not rely upon a conclusion that the Bankruptcy Code comprises an "implied repeal" of Section 1738. When the pre-petition judgment is accepted as conclusively determining the rights of the creditor under nonbankruptcy law, it receives full faith and credit from the bankruptcy court. However, the determination of a claim's allowability is the exclusive province of the bankruptcy judge.[252] The bankruptcy court can treat the judgment merely as the starting point of the allowance process. This does not make the judgment ineffective; it means that the issues concluded by the judgment are only a part of the weighing of equities among the creditors of the estate.

VIII. CONCLUSION

Since long before *Pepper* and *Heiser*, there has been tension between the goals of the doctrine of *res judicata* and the goals of the bankruptcy law with respect to equitable distributions among creditors. This tension may be summarized as a competition between the desire of all courts

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[250] Although expressly endorsing this analysis in holding that the state court judgment "forms the basis for the second part of the [Section 502(b)] analysis, wherein the court determines how much of the claim should be allowed," Kohn v. Leavitt-Berner Tanning Corp., 157 B.R. 523, 527 (N.D.N.Y. 1993) involved only the routine application of the express limitations on claim allowance of Section 502(b)(6) to a landlord's claim based on a judgment.

[251] A. DeNatale & P. Abram, *supra* note 38, at 420-21. *Comstock* states: "Any decision regarding the satisfaction or treatment of such liquidated claims under bankruptcy law are within the exclusive *in rem* jurisdiction of the federal courts presiding over bankruptcy matters." 111 B.R. at 859.

[252] In re Hydora, 94 B.R. 608 (Bankr. W.D. Mo. 1988); In re Smith, 142 B.R. 862 (Bankr. E.D. Ark. 1992); 3 Collier on Bankruptcy § 502.02 (15th ed. 1988).

for finality and the desire of bankruptcy courts to fairly divide among creditors the assets of an insolvent estate. The strength of these competing pulls is reflected clearly in *Browning v. Navarro*,[253] where a history of unending and bitter litigation was just enough to tip the scales against the Court's acknowledgment that the job of the bankruptcy courts requires a different approach to *res judicata* than is applicable in other forums.

Although equality of distribution may be the prime bankruptcy policy,[254] Congress has left little guidance on the way to balance that policy against the policies underlying preclusion law. A study of the Bankruptcy Code and its legislative history yields uncertain results. Nevertheless, the suggestion from Section 502(j) and the legislative history underlying Section 510 is that the scales weigh against the goal of finality, when it competes with the goal of equitable distribution. This is to be expected, since the latter goal is unique to bankruptcy, while the former is a more generalized concern of the judicial system. However, it was also predictable that the majority of bankruptcy courts and of appellate courts facing bankruptcy issues, when confronted with the request to strain their limited resources by reviewing matters previously decided in another forum, would follow the uncertain lead of *Heiser* and conclude incorrectly that fraud, collusion and lack of jurisdiction are the only bankruptcy exceptions to *res judicata*.

Although the claim allowance process calls for an attenuated role for the doctrine of *res judicata*, that does not mean it is wholly inapplicable. The same reasons that support the use of *res judicata* in nonbankruptcy forums exist in bankruptcy court. Even in bankruptcy, litigation must eventually come to an end, people should perceive a utility to resolving their disputes in courtrooms, people should be entitled to rely upon the effect of a decision in their favor, and judicial and litigant resources must be conserved, where possible.[255] Relationships between state and federal courts should not be needlessly strained. Nevertheless, where these goals cause a serious conflict with the fundamental policy of the equitable distribution of an estate's assets among its creditors, the bankruptcy court should balance and attempt to harmonize the competing policies. That balance should reflect the fact that the job of the bankruptcy court in the claim allowance process differs from the job

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[253] 887 F.2d 553 (5th Cir. 1989), *reh'g denied*, 894 F.2d 99 (1990).

[254] *See supra* note 23.

[255] These policies are discussed in 18 Charles A. Wright, *et al.*, Federal Practice and Procedure § 4403 (1981).

of a nonbankruptcy court in civil litigation. We suggest some rules that might be useful for that purpose.

A. The Role Of Insolvency

Where the estate is solvent, there is no need to modify principles of *res judicata* to assure an equitable distribution among creditors. If there are enough assets to satisfy all claims even if the pre-petition judgment is preclusive, the only person affected by giving it preclusive effect is the debtor. This is also true where the issue is the dischargeability of the debt, or the amount owing by the debtor on a non-dischargeable debt. In these cases, the interests of the debtor's other creditors are not affected by the pre-petition judgment, and the policies in favor of preclusion should prevail. A solvent debtor in bankruptcy should have no greater right to avoid a pre-petition judgment than a debtor not involved in a bankruptcy case.

B. The Opportunity To Litigate Is Far Less Important Than Actual Litigation.

We have already noted that the authority commonly relied upon as the basis for applying limited *res judicata* exceptions in bankruptcy, *Heiser v. Woodruff*, was a case in which the estate's representative had fully and fairly litigated the estate's position in a non-bankruptcy court. There is no Supreme Court precedent dealing with judgments by confession, by default, or as sanctions.

Judgments by confession, default judgments and judgments awarded as sanctions for litigation misconduct or neglect should not be entitled to preclusive effect in claim allowance proceedings.[256] These situations involve the greatest potential for injury to the interests of the debtor's other creditors, and the smallest prejudice to the goal of judicial economy. The reason for these judgments is the failure of the debtor's management to protect its interests or the lack of resources for the debtor to mount a defense. In effect, the judgment holder's position is enhanced by the debtor's financial distress and the judgment creditor's diligence relative to other creditors, a result at odds with the principles

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[256] Margolis v. Nazareth, 249 F.2d 221, 224 (2d Cir. 1957); Kelleran v. Andrijivic, 825 F.2d 692, 699 (2d Cir. 1987)(Blumenfeld, J., dissenting).

of equitable distribution in bankruptcy.[257] When the debtor is insolvent, the consequences of the debtor's neglect fall upon the wrong parties. Though the debtor may have failed to avail itself of a full and fair opportunity to litigate, its creditors did not.

In the case of judgments by default, there is also minimal jeopardy to reliance interests. Given the liberality with which judgments by default are vacated in civil courts, it is doubtful that any significant degree of reliance on the judgment occurred, unless the judgment preceded the bankruptcy by a significant period. If a default judgment is not of long standing, the reasonableness of any significant reliance by the judgment holder is doubtful.

The failure to give preclusive effect to matters not actually contested before and adjudicated by a judicial or administrative tribunal would conform the treatment of secured, unsecured and priority claims to that of tax claims controlled by Section 505(2)(A).[258]

C. Matters Fully And Fairly Litigated Should Rarely Be Re-opened.

Conversely, where the debtor has fully and fairly litigated its position, the presumption should be that the judgment will be respected as to issues of the debtor's liability on the obligation and the amount owing, especially if the debtor has appealed from the judgment. Bankruptcy courts have no monopoly on the skills needed to correctly decide disputes, and were not constituted to review supposed errors by non-bankruptcy courts. Where a debtor has aggressively defended its position in the nonbankruptcy court, the likelihood of an outcome in the bankruptcy court that is materially different from the outcome in the nonbankruptcy court is small, and the quantum of judicial and litigant resources invested in the nonbankruptcy proceeding is highest. In these circumstances, the injury to comity, finality and judicial economy interests is greatest, if such judgments are denied preclusive effect.[259]

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[257] While the judgment is not itself a transfer of property, it contravenes the goals of the anti-preference provisions of § 547, which are designed to discourage the creditor's race to the courthouse.

[258] In re Bruce W. Brooks General Contractor, Inc., 27 B.R. 9 (Bankr. D. Or. 1982) (a tax liability determined by default in an administrative proceeding falls outside the *res judicata* requirement of 11 U.S.C. § 505(2)(A) (1988)); In re Buchert, 69 B.R. 816 (Bankr. N.D. Ill. 1987)(same result on a tax liability in an uncontested judicial foreclosure).

[259] *Compare* In re Yagow, 62 B.R. 73 (Bankr. D.N.D. 1986) (holding that Bankruptcy court could reconsider its own order allowing a secured claim where the validity of the lien was not actually disputed in prior proceedings, since there was no prejudice to the secured creditor and court time was not wasted).

Finally, debtors should not be encouraged to file bankruptcy cases as a way of obtaining in bankruptcy the form of judicial review that appellate courts are meant to give. Where the appeal period has not run before the bankruptcy petition is filed, the estate should obtain its relief through the appellate process. However, where a judgment is based on a manifest error of law, or resulted from a debtor's failure to present the law or facts inconsistent with the judgment, a strong argument against preclusion exists.

The closest case in this category involves the "bet your company" defense, in which a high-risk tactical judgment by the debtor's management or its counsel proves to be disastrously bad. While this is also a case of misplaced consequences, it is a less compelling case for a preclusion exception than a default judgment or judgment for sanctions. The debtor and its counsel were working to advance the debtor's interests, rather than working against or neglecting them. Every lawsuit involves tactical judgments, some of which may seem ill-advised from the perspective of hindsight. Where the misjudgment is sufficiently egregious, the estate may have a malpractice claim as a source of reimbursement. Where such a remedy is unavailable, the need to separate poor judgment calls from those that merely worked out poorly is a difficult and tenuous task in which the bankruptcy court should not be immersed, because the burden on the court from re-trying the claim is substantial, and the debtor defended its rights extensively, though not effectively. However, a judgment resulting from a debtor's complete failure to submit pertinent evidence, such as one where the debtor offered no evidence on the quantum of damages, can be readily viewed as a form of judgment by default.

D. Judgments For Amounts That Are Not Compensatory Are Not Preclusive As To Amounts Allowable.

Section 726(a)(4) subordinates claims for fines, penalties, forfeitures, multiple, exemplary or punitive damages in a Chapter 7 case. There is no similar provision in Chapter 11.[260] Nevertheless, claims for penalties, fines and forfeitures are commonly disallowed in Chapter 11.[261]

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[260] Section 103(b) provides that Subchapters I and II of Chapter 7 apply only to Chapter 7 cases. Section 726 is part of Subchapter II.

[261] *See supra* n.188.

There is no reason why a judgment for a fine or penalty should have a different priority for distribution of the estate's assets than a claim of the same type that has not been reduced to a judgment.[262] It may sometimes be appropriate to allow the compensatory portion of a judgment to have preclusive effect for the usual reasons underlying the policies of *res judicata*. There is only slight damage to the goals of finality and comity, or to the conservation of judicial and litigant resources, from denying preclusive effect to the non-compensatory portions of the judgment while the compensatory portion is considered to be binding. Disallowing or subordinating the non-compensatory portions of the judgment does not mean re-trying the dispute. It means only that those portions of the judgment will not be recognized on a par with other unsecured claims, either because of subordination or disallowance,[263] while the other portions of the judgment remain intact.

There is, of course, an adverse effect on the deterrence policies of such awards, if they are not recognized as preclusive. Nevertheless, if those policies were not sufficient to require the recognition of a claim against the debtor for non-compensatory amounts that had not become a judgment, the fact that the bankruptcy claim was based on a judgment does not make those policies stronger. This is not to say that claims for non-compensatory amounts should always be subordinated or disallowed. Nevertheless, the decision whether to do so should be made without regard to their reduction to the form of a judgment.

E. Relevant Standards.

In addressing these issues, the bankruptcy courts can be guided by case law developed under Sections 502(j) of the Bankruptcy Code and Bankruptcy Rule 3008.[264] Section 502(j) provides:

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[262] In Kohn v. Leavitt-Berner Tanning Corp., 157 B.R. 523 (N.D.N.Y. 1993), a judgment by default for rent owed by the debtor was allowed only in the amount permitted by § 502(b)(6), despite the fact that New York law gave default judgments preclusive effect. Accord, In re Weeks, 28 B.R. 958 (Bankr. W.D. Okla. 1983).

[263] The facts of each case will determine whether bankruptcy goals are best achieved by disallowing the excessive element of claims reduced to judgment, or by subordinating such claims. Compare In re Comstock Financial Services, Inc., 111 B.R. 849 (Bankr. C.D. Cal. 1990) (subordinating a judgment for treble damages under RICO in a Ch. 7 case) with In re A.H. Robins Co., Inc., 89 B.R. 555 (Bankr. E.D. Va. 1988) (disallowing punitive damage claims otherwise payable from a victim's trust fund in a Ch. 11 case).

[264] Fed. R. Bankr. P. 3008 ("A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.").

> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. . . .[265]

The factors considered under Section 502(j)[266] include prejudice to the debtor and other creditors from allowing reconsideration, the length of the delay in seeking reconsideration and its impact on efficient court administration, whether the delay was beyond the reasonable control of the person responsible for it, whether the party seeking reconsideration acted in good faith, whether there is a substantial basis for reconsideration, and whether the failure to allow reconsideration would unfairly penalize a party for another's neglect.[267]

When the bankruptcy court reconsiders its own orders, it is subordinating the interests of judicial economy, reliance and finality to the goal of allowing only proper distributions of the estate's assets to its creditors. The issues are therefore similar to those involved in determining the extent to which a pre-petition judgment should have preclusive effect. However, there are some dissimilarities.

One constraint upon the use of Section 502(j) for the reconsideration of an order allowing or disallowing a claim arises where the request for reconsideration is based upon alleged errors of fact or law in the order of allowance. Allowing reconsideration in such situations seems to undermine the right and duty to appeal from an erroneous final order when review is sought.[268] No similar problem arises where the bankruptcy court is asked to deny preclusive effect to a pre-petition judgment in which the debtor did not fairly and fully defend its interests before the bankruptcy, since the creditors represented by the estate could not have availed themselves of the opportunity to appeal.

On the other hand, reconsideration under Section 502(j) does not threaten the interests of comity and federalism that are challenged when the bankruptcy court denies preclusive effect to a pre-petition state court judgment. When the bankruptcy court reviews its own orders under Section 502(j), issues of inter-governmental relations between the federal and state judiciaries do not arise.

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[265] 11 U.S.C. 502(j) (1988).

[266] *Id.*

[267] In re Resources Reclamation Corp. of America, 34 B.R. 771 (Bankr. 9th Cir. 1983); In re F/S Communications Corp., 59 B.R. 824 (Bankr. N.D. Ga. 1986)(noting that there may be a less lenient standard outside the Ninth Circuit).

[268] 3 Collier on Bankruptcy (15th Ed. 1994); In re Colley, 814 F.2d 1008 (5th Cir. 1987).

The interpretation of cause for reconsideration under Section 502(j) is influenced by judicial interpretations of Rule 60(b), Federal Rules of Civil Procedure.[269] This rule, which also applies in cases under the Bankruptcy Code,[270] provides that the court may relieve a party from [its own] final judgment or order for various reasons, including mistake, inadvertence, surprise or newly discovered evidence. While Rule 60 is directed at court action to provide a litigant relief from that court's own judgments, motions made under this rule (like motions made under Section 502(j)) involve the weighing of policy interests similar to those involved in the development of preclusion law, and should therefore provide some guidance on the grounds for and limitations of bankruptcy exceptions to preclusion doctrine.

These suggested standards to determine when *res judicata* principles should give way in claim allowance proceedings are tentative. We believe that the mechanical approach supposedly required by *Heiser* is mistaken, and is *not* required by *Heiser*. The job of the bankruptcy courts can be properly done only by adopting a flexible approach to the role of preclusion law in claim allowance proceedings. The process of case-by-case adjudication will eventually lead to the development of rules to guide the use of *res judicata* in bankruptcy proceedings, and those rules should recognize the unique and collective nature of bankruptcy cases.

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[269] In re H.K. Porter Co., Inc., 156 B.R. 149 (Bankr. W.D. Pa. 1993); In re Colley, 814 F.2d 1008 (5th Cir. 1987), cert. denied, 484 U.S. 898 (1987).

[270] R. 9024, Fed. R. Bankr. P.

Rx for Abusive Debt Collection Practices: Amend the FDPCA

I. INTRODUCTION

Mary Crossley, a sixty-eight year old widow, received a letter threatening her with legal action if she did not pay a $297.79 debt in full.[1] After the widow explained her inability to pay the entire bill, the debt collector[2] responded that she should sell her house and become a "bag lady."[3] Interpreting the letter as a threat to sell her home, she panicked, quitting her part-time job as a noon-time aid for the Philadelphia School Board so that she could cash in her modest contributions of approximately $800 to pay off the debt.[4]

Abusive collection practices, such as the example above, are more likely to occur today[5] in light of the recent economic recession.[6]

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[1] Crossley v. Lieberman, 868 F.2d 566, 567 (3d Cir. 1989).

[2] *See* definition of "debt collector," as used in the Fair Debt Collection Practices Act (FDCPA), *infra* note 79 and accompanying text.

[3] *Crossley*, 868 F.2d at 567-568.

[4] *Id.* at 568.

[5] "With the rise of these unethical and often illegal practices, and our continuing economic recession, these unfair collection tactics pose a serious threat to consumers." Albert B. Crenshaw, *Bill Collectors' Abusive Tactics Under Scrutiny*, WASH. POST, Sept. 13, 1992, at H3 (quoting Rep. Esteban E. Torres).

[6] During times of recession, there are high levels of unemployment. *See infra* text accompanying note 9. Because of poor financial planning or unforeseen circumstances, such as the loss of employment or business failures, consumers are often unable to meet their financial obligations. David A. Schulman, *The Effectiveness of the Federal Fair Debt Collection Practices Act*, 2 BANK. DEV. J. 171 (1985).

In May 1993, California was in the longest and deepest recession since World War II. For the first time since 1970, California's economic performance was worse than the nation's. 79 Fed. Res. Bull. 453 (May 1993).

Hawaii was also in a deep recession in 1993. Weakness in the Hawaiian economy can be traced directly to the factors that contributed to the recession in the rest of the country: the onset of the Persian Gulf War, the "airfare wars," and cutbacks in defense spending. Problems in Japan also had widespread impacts on the Hawaiian economy. Japan's financial market difficulties have had direct repercussions on non-residential construction activity in Hawaii. *Id.*

Staggering numbers of individual and corporate bankruptcies[7] and business failures[8] have caused a high level of unemployment,[9] which has contributed to consumer defaults.[10] Consequently, creditors[11] are assigning accounts to professional debt collectors[12] earlier and encouraging them to collect more from consumers who may still be able to

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[7] Bankruptcy and delinquency cause a domino effect in the economy. Businesses, affected by decreasing revenue and out-and-out lost revenue, are forced to cut back on research and development, reinvestment, and new jobs. Some are forced into bankruptcy. In turn, consumers suffer higher prices and the local economy suffers another blow. *Bankruptcy and Delinquency Cause Domino Effect in the Economy*, COLLECTOR, Dec. 1992, at 6. The term "consumer" is defined as "one that utilizes or consumes economic goods." WEBSTER'S NEW INTERNATIONAL DICTIONARY 490 (3d ed. 1971).

[8] Nationally, chapter 7 filings increased 71% to 679,662 individuals in the period between 1987 and 1992. About 80% of all bankruptcies are individual failures, and 20% are business. Carol Smith, *How to Fail in Business, Many Find Road to Bankruptcy is Paved with Credit Cards*, L.A. TIMES, May 30, 1993, at D1.

[9] The Twelfth Federal Reserve District's (covering Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Utah, and Washington) unemployment rate, which had been running in line with that of the nation over the last several years, was 8.7% in January 1993, or 1.6 percentage points above the national average. This high rate largely reflected California's 9.5% unemployment rate in January 1993. 79 Fed. Res. Bull. 453 (May 1993). The number of jobless workers in the United States was 8.25 million in Nov. 1993. John M. Berry, *Unemployment Drops to 6.4%*, WASH. POST, Dec. 4, 1993, at A1.

[10] The most common cause of default is a temporary interruption of disposable income, usually the result of unemployment or an unexpected major expense such as medical costs. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1051 (1979); William A. Reilly II, *Debt Collection Practices: Iowa Remedies for Abuse of Debtors' Rights*, 68 IOWA L. REV. 753 n.7 (May 1983).

[11] The term "creditor," as used in the FDCPA, means "any person who offers or who extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (1993). *See also* Schulman, *supra* note 6, at 173 ("'creditor' is any person who offers or extends credit creating a debt or to whom a debt is owed.").

Hereinafter, unless otherwise noted, "debt," as defined in the FDCPA, means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5)(1993). *See also* Schulman, *supra* note 6, at 173 ("a 'debt' is any obligation or alleged obligation of a consumer to pay money.").

[12] Consumers are more likely to pay a debt if they believe that the creditor has turned the debt over to a collection agency. Schulman, *supra* note 6, at 177 n.42; 123 CONG. REC. 10,242 (1977) (remarks of Rep. Annunzio).

pay.[13] As a result, the debt collection industry is expanding rapidly.[14] As shown in the American Collectors Association[15] (ACA) Cost of Operations Survey, an estimated 232 million bad debt[16] accounts, aggregating $70.6 billion, were placed for collection with professional collection businesses in 1991.[17]

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[13] Suzanne Woolley, *Beware, Bully-Boy Bill Collectors*, BUS. WK., Nov. 16, 1992, at 98 ("It boils down to trying to put as much pressure as possible on the consumer to squeeze out that last dollar.") (quoting Robert A. Sherman). When legal methods do not work, otherwise reputable merchants and lenders are willing to give the case to an illegal operator and look the other way. Crenshaw, *supra* note 5. Hereinafter, unless otherwise indicated, the term "consumer" is defined as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3)(1993). *See also* Collection Operations in the Current Economy, COLLECTOR, Feb. 1983, at 5-7 (survey by the American Collectors Association (ACA) finding increased use of professional debt collection services on consumer debt).

[14] Jan Lewis, *Unfair Debt Collection Practices: Avenues of Relief*, TRIAL, Sept. 1992, at 72. Nearly 31% of chief financial officers surveyed said credit and collections has grown more in importance during the recession than any other accounting function at their company. *Credit & Collections Prove Lucrative in Recessionary Times*, COLLECTOR, Dec. 1992, at 7.

[15] ACA, established in 1939, is an international trade association of debt collection service companies with more than 3,750 members. Its members include sole proprietorships, partnerships, and corporations ranging from one-person offices to firms with more than 500 employees. ACA describes itself as a clearinghouse of information to provide programs designed to maintain the highest professional and ethical collection standards. ACA states its mission is to help members comply with a strict code of ethics and applicable state and federal law through educational material, seminars, research, legislative updates, and guidance with individual problems. AMERICAN COLLECTORS ASSOCIATION, SELECTING A PROFESSIONAL COLLECTION SERVICE, LEAFLET NO. 3932, 1 (1993). ACA's Education Department has a training product that helps members train employees on the requirements and prohibitions of the FDCPA. *Playing Fair: Complying with the FDCPA* is a 65-minute videotape that comes with activity sheets for trainees to complete, ACA's FDCPA manual, and a 62-page trainer's manual. Debra Ciskey, *Playing Fair*, COLLECTOR, Dec. 1992, at 28.

[16] *See* definition of "debt," *supra* note 11.

[17] *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA). In 1990, businesses referred $66.5 billion in debts to collection agencies — up from $14.5 billion in 1980. J. Lewis, *supra* note 14, at 72; $3.9 billion in debts were turned over to ACA members for collection in 1976. 123 CONG. REC. 9, 10,240 (1977) (statement by Rep. Annunzio). *See also* Letter from John W. Johnson, Executive Vice-President, ACA, to Congressman Esteban E. Torres, Chairman, Subcomm. on Consumer Affairs & Coinage (Sept. 16, 1992)("If a professional collection agency contacted each consumer debtor only once on one account per [consumer], each year, it would mean more than 12 million such contacts are made. The actual figure would be several times that amount, because of the multiple accounts for the average [consumer].").

Collection services, benefiting both creditors and consumers, are a necessary part of a sophisticated economy.[18] The debt collection industry advises and counsels consumers with financial problems,[19] helps businesses to design credit policies to minimize bad debts,[20] and returns billions of dollars to the United States economy annually.[21]

When accounts are assigned to collection service companies,[22] a debt collector may seek formal legal collection remedies such as wage garnishment and property execution.[23] Such actions are often effective in collecting debts; however, a debt collector must often obtain a judgment before initiating garnishment and execution actions.[24] Al-

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[18] For example, suppose a business operates with a profit margin of two percent, and one-half of one percent of that business' gross sales end up in past-due accounts that have been referred to a professional collection service. This means that 25% of that business' profit is lost unless a debt collection specialist can make some recovery. *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102 Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA).

[19] *See generally* Nina M. Douglas, *ACA Member Takes on the Press*, COLLECTOR, Dec. 1992, at 27.

[20] *Id.*

[21] ACA estimates that each person in the United States pays $230 more for goods and services per year because of bad debt. Other consequences of nonpayment include business failures and the subsequent loss of jobs. *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102 Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA).

[22] Rates and fees are usually charged on a contingency basis or on a combination of up-front fee and lower percentage. AMERICAN COLLECTORS ASSOCIATION, *supra* note 15, at 3. The commission averages between 25 and 35 percent of what they collect for businesses. Lewis, *supra* note 14, at 72.

[23] Property execution and wage garnishment are the two principal forms of coercive execution. Reilly, *supra* note 10, at 754, n.10. Debt collectors know that consumers are more likely to pay their debts if they are threatened with legal action. *See* Knowles v. Credit Bureau of Rochester, 1992 WL 131107 (W.D.N.Y. 1992) (holding that letter stating "FAILURE TO PAY WILL LEAVE OUR CLIENT NO CHOICE BUT TO CONSIDER LEGAL ACTION" was not a threat to take unintended action in violation of FDCPA).

One may bring suit only in a jurisdiction where any real property securing the obligation is located, where the consumer signed the contract sued upon, or where the consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a) (1993). The statute protects the consumer from suffering a default judgment due to the difficulty and expense of defending a suit in a foreign forum. H.R. REP. No. 95-131, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1699.

[24] A number of Supreme Court decisions in the 1970s have curtailed the availability of pre-judgment creditor remedies. The more recent decisions, however, appear to allow pre-judgment remedies in most circumstances, providing those remedies satisfy some reasonably rigorous procedural guidelines. Whitford, *supra* note 10, at 1053, n.14.

though most debtors will not contest liability,[25] obtaining a judgment is expensive.[26] Because of the costs and delay[27] involved in litigation, the debt collector is likely to employ extra-judicial methods initially.[28] Such methods include telephone calls and letters informing the consumer that the outstanding debt will damage his or her credit rating.[29] While many debt collectors collect debts in a non-coercive manner, many others harass consumers and engage in debt collection abuses.[30]

II. BACKGROUND

Congress enacted the first comprehensive federal debt collection statute, the Fair Debt Collection Practices Act[31] (FDCPA), in

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[25] *See id.* at 1053.

[26] The most obvious costs of coercive execution are court costs and sheriff fees. *Id.* at 1053. For a small debt, court costs and attorney's fees could exceed the amount of the debt. *Id.*

[27] For example, upon filing a complaint with the small claims court on Maui, it takes approximately one month for processing. Interview with George S. Shimada, Membership Comm. Chairperson, Hawaiian Collectors Ass'n (HCA), in Wailuku, Haw. (Jan. 28, 1994). *Cf.*, Interview with Barbara Iida, Supervisor, 2d Cir. Dist. Ct., in Wailuku, Haw. (Apr. 2, 1994)(Although processing would normally take approximately 1 day to 2 weeks, the significant amount of litigation taking place causes the delay in processing). Thereafter, the serving of a complaint by the sheriff and the actual obtaining of a judgment takes approximately one additional month. Interview with George S. Shimada, *supra.*

[28] ELIZABETH WARREN & JAY LAWRENCE, THE LAW OF DEBTORS AND CREDITORS (Teacher's Manual 3 2d ed. 1991).

[29] The extra-judicial collection method most generally used is the dunning letter. This letter, containing a request for payment, can be either cordial or hostile depending on the policy of the debt collector and the length of time that the debt is outstanding. Debtors often do not respond to a polite request for payment. Consequently, debt collectors seek other methods to recover the money due and owing, including telephone calls, personal visits, and threats of lawsuit. DAVID G. EPSTEIN, DEBTOR-CREDITOR LAW IN A NUTSHELL, 7 (West 1991).

The vast majority of delinquent debts are collected through "consensual" debtor payments made after some kind of bargaining with the debtor. Whitford, *supra* note 10, at 1051.

[30] *See, e.g.*, Paulemon v. Tobin, 30 F.3d 307 (2d Cir. 1994) (threatening to communicate directly with a represented person and by making deceptive or misleading statements violated the FDCPA); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993) (stating falsely that creditor had given agency authority to initiate legal proceedings against debtor violated FDCPA); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981)(implying that the consumer lacked the common sense to handle financial matters properly violated the FDCPA).

[31] *See generally* 15 U.S.C. §§ 1692a through 1692o (1993).

1977.[32] The FDCPA was enacted to respond to pervasive abuses associated with debt collection practices by safeguarding consumers[33] and their dealings with businesses,[34] and ensuring that those debt collectors who refrain from using abusive debt collection practices[35] are not competitively disadvantaged.[36] Prior to passage of the FDCPA, many states had enacted legislation to protect the interests of consumers.[37] In addition, section 45(a) of the Federal Trade Commission (FTC) Act (FTCA),[38] enacted in 1914, prohibits unfair or deceptive practices.[39] Nevertheless, state law and the FTCA had not been effective in deterring abusive debt collection practices because such laws were not drafted to prevent these specific abuses.[40]

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[32] Schulman, *supra* note 6, at 171; Wayne K. Lewis, *Regulation of Attorney Debt Collectors — The Role of the FTC and the Bar*, 35 HASTINGS L.J. 669 (Mar. 1984); J. Lewis, *supra* note 14, at 72; Henry D. Menghini & Jason D. Ponfil, *Fair Debt Collection Practices Act: The Debtor Strikes Back*, 47 J. Mo. B. 115, 1994 WL, at *1 (Mar. 1991).

[33] It is not just the individual who owes a valid debt that is subjected to outrageous treatment. Others such as persons who are contacted because of mistaken identity or because of mistaken facts, as well as their friends, relatives, and neighbors — all are subject to the tactics of the disreputable debt collector. 123 CONG. REC. 10,241 (1977)(statement by Rep. Annunzio).

[34] "The law recognizes that dignity and self-respect are legitimate interests of debtors and in some cases rise above the interests of creditors." Reilly, *supra* note 10, at 754.

[35] "In essence, what this means is that every individual, whether or not he owes a debt, has the right to be treated in a reasonable and civil manner." 123 CONG. REC. 10,241 (1977) (statement by Rep. Annunzio).

[36] 15 U.S.C. § 1692(a)(1993).

[37] Menghini & Ponfil, *supra* note 32, at *1; Martin L. Rogalski, *An Examination of the FDCPA: The Pendulum Swings Toward the Debtor*, 1978 DET. C.L. REV. 663 (1978); Joseph W. Gelb, *Consumer Credit Litigation*, 354 PLI/Comm LEXIS 101, at *2 (June 1, 1985).

Laws comparable to the FDCPA were enacted in virtually every state after the FDCPA took effect. *See, e.g.*, CAL. CIV. CODE §§ 1788-1788.32 (West 1993); FLA. STAT. ANN. § 559.55-.78 (West 1993); LA. REV. STAT. ANN. § 9:3562 (West 1992); MD. CODE ANN., [COM. LAW I] §§ 14-201-204 (Michie 1992); MASS. GEN. LAWS ANN. ch. 93 § 49 (West 1992); S.C. CODE ANN. § 37-5-108 (Law. Co-op. 1991). Major Hostetter, *Fair Debt Collection Practices*, 1993-JUNE ARMY LAW. 47, 1993 WL, at *2 n.11 (June 1993). *See also* HAW. REV. STAT. § 480D-3 (1992).

[38] 15 U.S.C. § 45(a)(1993).

[39] *Fair Debt Collection Practices Act Enforcement Effective, Fewer Consumer Complaints, FTC Testifies*, FTC NEWS, Sept. 10, 1992, at 2. Section 45(a) authorizes the FTC to prevent persons, partnerships, or corporations from using unfair methods of competition or unfair and deceptive acts or practices "in or affecting commerce." W. Lewis, *supra* note 32, at 679.

[40] Schulman, *supra* note 6, p. 172. Specific abuses include those abuses discussed *infra* pp. 10-11.

The FDCPA prohibits a broad range of practices, including: the use of false or deceptive means to collect a debt,[41] communica-

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State laws do not and cannot regulate interstate debt collection practices. Thirteen States have no debt collection laws at all and altogether 24 States . . . have either no law or toothless laws. Of the 38 State debt collection laws, only eight are strong laws. These statistics clearly show that it is weak laws, not lax enforcement of the laws, which gives rise to so much collection abuse.

123 CONG. REC. 10,241 (1977) (statement by Rep. Annunzio).

The states that have no debt collection laws are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, and South Dakota. Another 11 States — Alaska, Arkansas, Indiana, Louisiana, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia, and Wyoming — with another 40 million citizens, have laws which are so weak or incomplete that they provide little or no effective protection. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.

Id. at 27,386 (statement by Sen. Riegle).

The few states that have strong laws may prefer to enforce this legislation on a state level. FDCPA's section 817, exemption for State regulation, provides for that. *Id.* at 10,241 (statement by Rep. Annunzio). In theory, states with strong laws could pursue harassing collectors, but they rarely do. Crenshaw, *supra* note 5.

At the present time there is no Federal debt collection law. There are several Federal laws that can be construed to relate to debt collection practices, but they were not written with debt collection abuse in mind and have not been successful in stopping debt collection abuse. For instance, Postal Service statutes were enacted to stop activities such as mail fraud or extortion, rather than unethical debt collection practices. These statutes frequently require specific intent which is difficult to prove. The Federal Communications Commission (FCC) Act's provision against phone harassment also has a specific intent requirement making it difficult to enforce.

None of these Federal statutes gives consumers the important right to stop collection abuses by private suit. In the debt collection area, the Federal Trade Commission (FTC) has only a set of debt collection guidelines.

123 CONG. REC. at 10,241 (statement by Rep. Annunzio).

The legislative history of the FDCPA also indicates that Congress believed that FTC Act section 5 cease and desist orders were not an effective means of controlling abuses by the relatively small and unstable debt collection agencies. W. Lewis, *supra* note 32, at 683 n.86.

[41] 15 U.S.C. § 1692e (1993). The FDCPA applies only to consumer debts. The rationale is that businesses are capable of taking measures to protect themselves from abusive debt collection practices. 123 CONG. REC. H2921 (daily ed. Apr. 4, 1977) (remarks by Rep. Annunzio); *see generally* Munk v. Fed. Land Bank of Wichita, 791 F.2d 130 (10th Cir. 1986)(holding that debt that was secured by a mortgage on a farm was not a debt covered by the FDCPA because the debt was not incurred for personal, family or household purposes).

tions[42] with third parties concerning a debt,[43] harassment, threats of violence, the use of obscene or profane language,[44] and threats of any action that the debt collector does not intend to take.[45] In addition, the debt collector must provide written notice to the consumer concerning the obligation,[46] verify the debt if requested to do so by the consumer,[47] and, upon the consumer's request, cease any communications with the consumer not expressly provided for in the statute.[48]

To achieve its purpose of protecting consumers from abusive debt collection practices,[49] the FDCPA allows private actions for actual damages,[50] plus statutory damages up to $1,000,[51] along with costs and attorneys' fees.[52]

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[42] The term "communication," as used in the FDCPA, means "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2)(1993).

[43] 15 U.S.C. § 1692c(b)(1993).

[44] 15 U.S.C. § 1692d (1993).

[45] 15 U.S.C. § 1692e(5)(1993).

[46] 15 U.S.C. § 1692g (1993).

[47] *Id.*

[48] *Id.*

[49] *See* discussion *supra* notes 33-36 and accompanying text.

[50] 15 U.S.C. § 1692k (1993). *See* Carolyn S. Schwartz, *Enforcement of Money Judgments: Debt Collection, Foreign Judgments and Effect of Bankruptcy*, 686 PLI/Comm 7 WL, at *3 (1994). This may also include damages for humiliation, embarrassment, mental anguish and emotional distress. Statement of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50,097, 50,101 (Dec. 13, 1988)(to be codified at 16 C.F.R. pt. 901) (proposed Dec. 13, 1988). Violations of the statute may also cause injury to the debtor's reputation, loss of privacy, loss of consortium, and strain within a marriage or family relationship. J. Lewis, *supra* note 14, at 73; W. Lewis, *supra* note 32, at 694; Miller v. Payco-General Am. Credits, 943 F.2d 482, 484 (4th Cir. 1991).

[51] Two circuits are irreconcilably split in their interpretations of 15 U.S.C. section 1692k(a)(2)(A). *Compare* Wright v. Fin. Servs. of Norwalk, Inc., 996 F.2d 820 (6th Cir. 1993)(holding that debt collector is statutorily liable for each failure to comply with any revision of the FDCPA) *with* Harper v. Better Business Servs., 961 F.2d 1561 (11th Cir. 1992) (rejecting the argument that the Act authorized damages of $1,000 per violation stating that the plain language of section 813 provides for maximum statutory damages of $1,000 per action). The issue of the $1,000 limitation is further discussed in Schulman, *supra* note 6, at 184-185; Laurie A. Lucas & Alvin C. Harrell, *1993 Update on the Federal Fair Debt Collection Practices Act*, 48 BUS. LAW. 1159, 1167 (May 1993). In a class action suit, the statutory damages can amount to the lesser of either $500,000 or one percent of the debt collector's net worth. 15 U.S.C. § 1692k(2)(B)(1993); J. Lewis, *supra* note 14, at 73.

[52] 15 U.S.C. § 1692k (1993); *see generally Sixth Circuit Holds $1,000 Statutory Damages Available for Each FDCPA Violation*, NCLC Rep. (Debt Collection & Repossession Ed.),

The FDCPA was not intended to enable consumers to avoid payment of their legitimate debts.[53] Nevertheless, because the FDCPA is a strict liability statute, proof of one violation is sufficient to support a summary judgment for the aggrieved consumer.[54] In addition, the consumer need not show actual damages to succeed in an action against a debt collector.[55] Even a consumer who admits owing the entire debt has standing to assert violations of the FDCPA.[56]

Many debt collectors, aware of potential liability,[57] have corrected their collection practices to comply with the FDCPA.[58] FTC[59] reports to Congress have shown that the number of complaints[60] has decreased

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July to Aug. 1993, vol. 11, at 25; Schulman, *supra* note 6, at 177; J. Lewis, *supra* note 14, at 73; Menghini & Ponfil, *supra* note 32, at *7.

The FDCPA does not specifically mention punitive damages; however, there is no evidence of legislative intent to prohibit them. Lewis, *supra* note 14, at 74.

[53] 123 CONG. REC. 9,10241 (statement by Rep. Annunzio); *see also* Schulman, *supra* note 6, p. 172.

[54] 15 U.S.C. § 1692e (1993); Dutton v. Wolhar, 809 F. SUpp. 1130 (D. Del. 1992); W. Lewis, *supra* note 32, at 700.

[55] 15 U.S.C. § 1692k(b)(1) (1993); *Woolfolk*, 783 F. Supp. at 724; Baker v. GC Servs. Corp., 677 F.2d 775, 780 (9th Cir. 1982); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990); Hostetter, *supra* note 37, at *2. Policy supports the award of statutory damages without proof of actual damages. The only actual damages that a plaintiff would be likely to incur would be for the emotional distress caused by abusive debt collection practices and, unless the violations are extreme and outrageous, traditional stringent evidentiary hurdles would be difficult to overcome. 123 CONG. REC. 28, 112-13 (1977) (remarks of Rep. Annunzio); Consumer Credit Protection Act, Pub. L. No. 95-109, 1977 U.S.C.C.A.N. (91 Stat.) 1700. The FTC and consumers can also bring suit against an attorney for violating the provisions of the FDCPA. Congress originally considered debt collection by attorneys as incidental to the general practice of law, and assumed that local bar associations would adequately protect consumers from abusive collection practices by attorneys. *See infra* notes 181-92 and accompanying text.

[56] 15 U.S.C. § 1692k (1993); *see Baker*, 677 F.2d at 780.

[57] *See* text accompanying note 15.

[58] *Fair Debt Collection Practices Act Enforcement Effective, Fewer Consumer Complaints, FTC Testifies*, *supra* note 39, at 1.

[59] The FTC is the promulgating agency for the FDCPA. Lucas & Harrell, *supra* note 51, at 1159.

[60] Examples of the complaints asserted include: allegedly improper telephone techniques such as calling before 8 a.m. or after 9 p.m.; using ethnic or racial slurs; calling consumers at work when the debt collector knows the debtors' employers prohibit such calls; contacting "unobligated third parties" such as relatives, neighbors, on the consumer's employer; and misrepresenting that civil or criminal action will be taken against the consumer, that their wages will be garnished or their property attached, or that they will be arrested. *Complaints and Compliance*, COLLECTOR, Apr. 1993, at 21.

from more than 4,000 per year in the late 1970's to approximately 2,000 in 1992.[61] This decrease is likely due to compliance with the FDCPA.[62]

Compliance with the FDCPA has helped to curb abuses.[63] Nevertheless, because of: (1) an increase in the amount of litigation commenced by consumers over the last few years;[64] (2) unintended consequences that could not have been anticipated by Congress when the FDCPA was first enacted, such as the increase in the amount of litigation concerning the FDCPA provisions; and (3) conflicting judicial interpretations that make it difficult for legitimate collectors to know exactly what they have to do to comply with the FDCPA,[65] Congress should amend certain provisions of the FDCPA to increase its effectiveness.

This article examines the effectiveness of the FDCPA by exploring four provisions in the context of recent case law. Section I defines "debt collector;"[66] discusses, in subsections A and B, respectively, the FDPCA's exclusion of creditors and government officials from the definition;[67] and considers whether broadening the definition to include in-house collectors and governmental employees would provide greater consumer protection and, in effect, further implement the purposes of the FDCPA.[68] Section II examines conflicting judicial interpretations

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[61] *Fair Debt Collection Practices Act Enforcement Effective, Fewer Consumer Complaints, FTC Testifies*, *supra* note 39, at 1; Crenshaw, *supra* note 5; Letter from John W. Johnson to Congressman Esteban E. Torres, *supra* note 17; *Complaints and Compliance*, *supra* note 60, at 21 (statement of David Medine, Assoc. Dir. for Credit Practices, FTC) ("[The FDCPA] has been a major success. Consumers have been armed with significant self-help remedies and reports of widespread improper collection practices are no longer heard.").

[62] *Complaints and Compliance*, *supra* note 60, at 21. Despite the decrease in complaints between the late 1970's and 1992, the FTC reported that the number of complaints it has received between 1990 and 1992 increased 100%. Lucas & Harrell, *supra* note 51, at 1169. The short-term increase in complaints between these years may be the result of: a much larger economy; a population increase since 1990; far more credit transactions in 1992 than in 1990; and the fact that white-collar workers having their first contact with debt collectors are more sensitive to the telephone calls. Letter from John W. Johnson to Congressman Esteban E. Torres, *supra* note 17.

[63] *See supra* notes 57-62 and accompanying text.

[64] Lucas & Harrell, *supra* note 51, at 1169.

[65] *See generally* Crenshaw, *supra* note 5.

[66] *See infra* note 79 and accompanying text.

[67] *See infra* notes 77-168 and accompanying text.

[68] *See infra* notes 98-144, 169-80 and accompanying text.

of section 1692e(11), which prohibits debt collectors from making false or misleading representations in connection with the collection of debts,[69] and suggests a remedy for these inconsistencies.[70] Section III discusses Congress' failure to specify a format or standard for section 1692g's validation notice requirement,[71] and proposes two options that would remedy the problems facing debt collectors and consumers.[72] Section IV discusses section 1692k, which imposes costs and reasonable attorney's fee on a debt collector who violates the FDCPA.[73] Section IV explores attorneys' abuses of section 1692k in the context of recent case law,[74] and proposes a remedy to end these abuses.[75]

The author concludes that, although the FDCPA has been effective in reducing abusive collection practices, the recommendations made in this article will provide greater protection to consumers and fairness to all parties involved in debt collection.[76] Finally, the author proposes that Congress adopt the proposed revisions to increase the FDCPA's effectiveness.

III. Discussion

A. Expansion of the FDCPA's Scope of Application

1. Congress should expand the FDCPA's definition of "debt collector" to include in-house collectors

a. *The FDCPA excludes an in-house collector from the definition of "debt collector"*

The broad prohibitions of the FDCPA[77] apply only to a "debt collector."[78] A debt collector is defined as "any person who uses any

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[69] *See infra* notes 206-26 and accompanying text.
[70] *See infra* notes 227-44 and accompanying text.
[71] *See infra* notes 246-79 and accompanying text.
[72] *See infra* notes 280-82 and accompanying text.
[73] *See infra* notes 283-90 and accompanying text.
[74] *See infra* notes 291-312 and accompanying text.
[75] *See infra* notes 313-25 and accompanying text.
[76] *See infra* notes 326-32 and accompanying text.
[77] *See supra* notes 41-48 and accompanying text.
[78] FDCPA (15 U.S.C. §§ 1692 et seq.) is applicable only to consumer debt collectors, and has no application to the collection of commercial accounts. Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257 (D. Idaho 1983).

instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[79] This definition has led to litigation and scholarly debate because the FDCPA regulates only one percent of all debt collection practices conducted in the United States.[80]

The Act excludes banks, credit unions, loan companies,[81] retailers, and private individuals from the "debt collector" definition because (1) their primary business purpose is the extension of credit, not the collection of debts,[82] and (2) the debts they regularly collect are due to them, not to others.[83] Creditors are thus generally excluded from the definition;[84] however, the definition specifically applies to "any creditor who . . . uses any name other than his own which would indicate that a third person is involved in the collection."[85] Conducting ninety-nine percent of all debt collections in the United States,[86] such creditors, known as "in-house collectors,"[87] are subject to the FDCPA only when they do not use their true business name during the collection process.[88] Thus, the vast majority of debt collection is excluded from the protections of the FDCPA.[89]

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[79] 15 U.S.C. § 1692a(6)(1993); *see also* Lucas & Harrell, *supra* note 51, at 1163-64.

[80] Arthur J. Sabin, *Complying with the Federal Fair Debt Collection Practices Act*, 76 ILL. B.J. 339, 340 (Feb. 1988); *see also* 123 CONG. REC. 27,387-88 (1977) (remarks of Sen. Riegle); Schulman, *supra* note 6, at 192, 193.

[81] *See, e.g.*, Kicken v. Valentine Production Credit Ass'n, 628 F. Supp. 1008 (D. Neb. 1984)(concluding that a loan company not a "debt collector" under the FDCPA).

[82] Schulman, *supra* note 6, at 173 n.19.

[83] *Id.*; Sabin, *supra* note 80, at 340.

[84] Schulman, *supra* note 6, at 174.

[85] Statements of General Policy or Interpretation Staff Commentary on the FDCPA, *supra* note 50, at 50102.

[86] Shep Russell, *The FDCPA: New Protection for Consumers*, 32 ARK. L. REV. 505, 512 (1978).

[87] In-house collectors are personnel who specialize in collection of accounts which require more personal handling if the size of the operation warrants this degree of specialization. Sally Deanne Grant, *Resort to the Legal Process in Collecting Debts From High Risk Credit Buyers in Los Angeles — Alternative Methods for Allocating Present Costs*, 14 UCLA L. REV. 879, 885-886 (1967). Large retailers and finance companies are the firms that have specialized, in-house collection operations. Michael Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement*, 70 VA. L. REV. 339, 349 (Mar. 1984).

[88] S. REP. No. 382, 95th Cong., 1st Sess. 3, *reprinted in* 1977 U.S.C.C.A.N. 1697-98; Schulman, *supra* note 6, at 174.

[89] Sabin, *supra* note 80, at 340.

b. Reasons for the FDCPA's limited scope

Congress' reasons for limiting the scope of the FDCPA to independent debt collectors include: (1) one-third of the states' debt collection laws regulate creditors;[90] (2) because debt collectors usually work on accounts that are at least six months overdue, these accounts are usually difficult to collect and are more likely to result in the use of harsh collection tactics;[91] (3) independent debt collectors are the primary source of egregious collection practices;[92] (4) in-house collectors generally restrain themselves from engaging in abusive debt collection practices because of their desire to protect and maintain the goodwill of their customers;[93] (5) creditors are usually larger and more stable than third party debt collectors;[94] and (6) existing FTC remedies and enforcement are sufficient to regulate in-house collection practices.[95]

While these reasons may have been valid when Congress first drafted the FDCPA, they are no longer convincing. Approximately fifty percent of the total number of complaints[96] received by the FTC were against in-house collection activities.[97] Such statistics suggest that Congress

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[90] "Only two-thirds of the States that do have debt collection laws do not cover creditors." 123 CONG. REC. 10,242 (1977) (statement by Rep. Annunzio).

[91] *Id.*; *see also* Dickenson v. Townside TV & Appliance, Inc., 770 F. Supp. 1122, 1130 (S.D. W. Va. 1990).

[92] S. REP. No. 382, 95th Cong., 1st Sess. 2 (1977), *reprinted in* U.S.C.C.A.N. 1695, 1696; *see* U.S. v. Central Adjustment Bureau, Inc., 823 F.2d 880, 880-81 (5th Cir. 1987). The Supreme Court held that Congress can attack particular evils on a step by step basis. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

[93] *See* 123 CONG. REC. 10,242 (1977)(statement by Rep. Annunzio); Schulman, *supra* note 6, at 192-93. *See also Fair Debt Collection Practices Act Enforcement Effective, Fewer Consumer Complaints, FTC Testifies*, *supra* note 39, at 2; Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1485-1486 (M.D. Ala. 1987) ("Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.")(quoting S.Rep. No. 95-382, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 & 1697) (emphasis added by Judge Thompson).

[94] Schulman, *supra* note 6, at 193; 123 Cong. Rec. at 10,242 (1977) (statement by Rep. Annunzio)("Therefore, if a federal agency, such as the FTC, takes action against a major creditor, it usually has a deterrent effect throughout the entire industry. This is not the case with the debt collection industry.").

[95] H.R. Rep. No. 131, 95th Cong., 1st Sess. 7 (1977).

[96] *See Complaints and Compliance*, *supra* note 60.

[97] Letter from John W. Johnson to Congressman Esteban E. Torres, *supra* note 17.

should amend the FDCPA to include in-house collectors in the definition of "debt collector."

c. Reasons for expanding the "debt collector" definition to include in-house collectors

There are many valid reasons for expanding the definition of "debt collector" to include in-house collectors. During difficult economic times, in-house collectors are likely to engage in more aggressive collection tactics to bring in greater returns because the goal of in-house collectors, similar to the goal of third party debt collectors, is high profit.[98]

The goodwill maintenance justification[99] may be true of larger, well-known companies; however, direct sellers, small loan companies, and low-income retailers also conduct in-house collections.[100] Many of these smaller companies may not have the same desire as larger companies for good rapport because any outstanding debts could mean the difference between net losses and net gains for the fiscal year.[101] For the same reason, the often low-profit margin of these smaller businesses may reduce the incentives to avoid abusive collection practices.[102]

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[98] In addition, consumers are imposed with steep finance charges. Carolyn Schierhorn, *Controlling Consumer Debt*, BUILDING SUPPLY HOME CENTERS, Oct. 1992, vol. 163, no. 5, at 81.

[99] *See* text accompanying note 93.

[100] Schulman, *supra* note 6, at 193 ("This justification may be true of larger, more reputable entities; however, past experience has shown that in-house collections are also made by direct sellers, local small loan corporations and low income retailers."). Although large chains can shift consumer accounts receivable to outside services, smaller retailers need to deal with the dilemma themselves. Schierhorn, *supra* note 99. Nevertheless, large retailers and finance companies are the firms that have specialized in-house collection operations. Pertschuk, *supra* note 87, at 349; *see also* Grant, *supra* note 87 at 886.

[101] Schulman, *supra* note 6 at 193 ("Many of these smaller entities may not have the same desire as larger companies for healthy customer relations"). See also Pertschuk, *supra* note 87, at 349 ("Because the [FDCPA] makes it more difficult for the outside debt collector to recover sums owed, both debt collectors and small creditors (retailers and finance companies) lose while large creditors gain.").

[102] Schulman, *supra* note 6, at 193 (" . . . the low-profit margin of these smaller entities may force them to resort to abusive collection activities, since any outstanding debts could be the difference between net losses and net gains for the fiscal business year").

In light of today's economy,[103] it is more likely that companies will use abusive collection practices to increase collections and improve cash flow.[104] The potential increase in abusive collection practices raises the issues whether a consumer has any remedies against an in-house collector and, if so, whether the remedies available to that consumer are sufficient.

In determining whether a consumer has any remedies against an in-house collector, it is necessary to review a consumer's alternative causes of action and to assess the effectiveness of each of them. Potential causes of action may arise under state statutes, common law, and the FTCA. As discussed below,[105] however, each is deficient in protecting consumers from abusive collection practices. Thus, Congress should amend the FDCPA to provide greater consumer protection. The court in *Lane v. Marine Midland Bank*[106] provides a thorough review of these alternative causes of action and their deficiencies.

In *Lane*, the consumer alleged that he suffered physical, emotional, and other injuries as a result of reckless or intentional abusive debt collection acts by an in-house collector.[107] Lane sued Marine for alleged violations of state and federal statutes and for intentional infliction of emotional distress under common law.[108]

The court held that Lane had no right of action against Marine under the FDCPA because Lane failed to establish that Marine was a "debt collector."[109] The court explained that the FDCPA is directed at the activities of third-party collectors. The FDCPA is not intended to remedy actions by the creditor itself, unless the creditor, ". . . in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."[110] Because Lane failed to fulfill this jurisdictional requirement, the court dismissed this first claim.[111]

Lane based his second cause of action upon the New York Debt Collection Procedures Act (NYDCPA).[112] The court barred Lane from

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[103] *See* discussion *supra* note 6 and accompanying text.

[104] *See* discussion *supra* notes 7-17 and accompanying text.

[105] *See infra* notes 107-131 and accompanying text.

[106] 112 Misc.2d 200, 446 N.Y.S.2d 873 (1982).

[107] *Id.*

[108] *Id.*

[109] *Id.* at 202.

[110] *Id.*

[111] *Id.* at 203.

[112] *Id.* at 200. *See* N.Y. GEN. BUS. LAW art. 29-H (1993).

civil relief because the NYDCPA provides no private cause of action.[113] The NYDCPA is enforceable only by the attorney general or the district attorney.[114]

The NYDCPA, discussed in *Lane*, is similar to the FTCA[115] and other FTCA states' counterparts.[116] The FTCA authorizes the FTC to prevent persons, partnerships, and corporations from using unfair methods of competition or unfair and deceptive acts or practices "in or affecting commerce."[117] The FTCA also gives no private right of action to enforce its provisions.[118] The FTC is required to act when "it shall appear . . . [to be in] the interest of the public."[119] Nevertheless, the FTC, like other governmental agencies, is constrained by limited resources and cannot act upon all instances of unfair practices.[120] The FTC must therefore make enforcement choices that ensure maximum public benefit from the resources expended.[121]

All states have enacted consumer protection statutes[122] which resemble the FTCA by prohibiting one or both of the following: unfair methods of competition, and unfair or deceptive acts or practices.[123] Unlike the FTCA and the NYDCPA in *Lane*, however, some state statutes provide a private right of action.[124] Although a private right of action benefits

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[113] 112 Misc.2d at 202.

[114] "The attorney general or the district attorney of any county may bring an action in the name of the people of the state to restrain or prevent any violation of this article or any continuance of any such violation." N.Y. GEN. BUS. LAW § 602(2)(1993).

[115] 15 U.S.C. § 45(a)(1993); Trans World Accounts v. FTC, 594 F.2d 212 (9th Cir. 1979) (using letter format closely resembling telegrams, which threatened imminent legal action, was held to be deceptive).

[116] Gelb, *supra* note 37, at *2.

[117] 15 U.S.C. § 45(a)(2)(1993).

[118] Telephone Interview with Clarke Brinkerhoff, Staff Attorney, FTC (Jan. 27, 1994); Summey v. Ford Motor Credit Co., 449, F. Supp. 132 (D.S.C. 1978). *But see* Guernsey v. Rich Plan, 408 F. Supp. 582 (N.D.Ind. 1976) (permitting private suit under § 5 of the FTCA alleging violation of previously entered consent order).

[119] 15 U.S.C. § 45(b) (1993).

[120] Lewis, *supra* note 32, at 692.

[121] FTC case selection criteria should include such considerations as: (1) the prevalence of the practices; (2) the nature and extent of the consumer injury; (3) the ability of existing institutions, statutory or regulatory schemes, or alternative remedies to correct the problem; (4) the potential effectiveness of FTC involvement. *Id.* at 692-693.

[122] Gelb, *supra* note 37.

[123] *Id.* Courts interpreting state statutes often follow interpretations of the FTCA. *Id.*, at *6.

[124] *Id.*, at *2. States providing private rights of action include: California, Connecticut, Florida, Massachusetts, New York, and Pennsylvania. *Id.*

the consumer, some of these statutes are more limited in coverage than the FTCA.[125] Only twenty one states have enacted statutes providing all of FTCA's consumer protection statute prohibitions.[126] Other state statutes prohibit only unfair and deceptive practices,[127] while other statutes prohibit only deceptive practices.[128] Thus, because (1) the FTCA does not provide a private right of action, and (2) many state statutes are deficient in their coverage, consumers in many states have inadequate remedies against in-house collectors.

Unsuccessful in asserting a cause of action under the NYDCPA, Lane based his third claim on the common law theory of intentional infliction of emotional distress.[129] The court require d Lane to prove (1) "reckless or intentional" conduct (2) that results in mental or physical distress and (3) is "outrageous."[130] To give Lane an opportunity to establish intentional infliction of emotional distress, the court denied Marine's motion to dismiss the tort claim.[131]

In summary, the *Lane* court explained that: (1) the FDCPA's narrow scope of abusive debt collection regulation prohibits consumers to assert claims against in-house collectors; (2) some state debt collection statutes, such as the NYDCPA, are deficient because they do not provide a private cause of action for consumers;[132] and (3) common law tort theories, such as intentional infliction of emotional distress, impose a significant burden on consumers to establish the necessary elements of

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[125] For example, the following states prohibit only deceptive acts and practices, thereby do not regulate against unfair methods of competition: Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, New Jersey, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, and Wyoming. *Id.* at *11.

[126] The only states which have statutes coextensive with the FTC Act are: Alaska, Connecticut, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

[127] The jurisdictions that prohibit only unfair or deceptive practices are: California, Delaware, District of Columbia, Georgia, Kentucky, Maryland, Michigan, New Mexico, Ohio, Oregon, and Tennessee. *Id.*

[128] The jurisdictions that prohibit only deceptive practices are: Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, New Jersey, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, and Wyoming. *Id.*

[129] *Lane*, 112 Misc.2d at 203.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 201.

the tort. Considering that the FTCA, state statute, and tort action alternatives are often subject to restrictions and are generally difficult for a consumer to establish, asserting a violation of the FDCPA is more effective in seeking compensation for abusive collection practices.[133]

Consumers, like Lane, when experiencing abusive collection practices, may assert causes of action based on major tort theories, such as invasion of privacy,[134] infliction of emotional distress,[135] defamation,[136] interference with contractual relations, battery, false imprisonment, fraud, and extortion.[137] The elements of these tort theories vary among jurisdictions.[138] Such claims, however, place a significant burden

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[133] *See, e.g.*, Schulman, *supra* note 6, at 171-172.

[134] Today, most states have adopted common law of the right to privacy. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th Ed. 1971). Unreasonable public disclosure of private facts, and intrusion upon seclusion, are the only two forms of invasion of privacy that are likely to arise when a creditor employs abusive collection practices. *See generally* Symposium: Toward a Resolution of the Expanding Conflict Between the Press and Privacy Interests, 64 IOWA L. REV. 1061 (1979).

[135] *See infra* note 139.

[136] Dean Prosser defines defamation as a "false communication that tends to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held." W. PROSSER, *supra* note 135, § 111, at 739; 3 RESTATEMENT (2d) OF TORTS § 682 (1976). Defamation requires both that the defamatory communications be published to third persons and that the information be false. *See* Royston v. Vander Linden, 197 Iowa 536, 537, 197 N.W. 435, 436 (1924).

[137] Schulman, *supra* note 6, at 171 n.7; J. Lewis, *supra* note 14, at 72.

[138] For example, the elements of Intentional Infliction of Emotional Distress in Minnesota are: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe. Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 34 (Winter 1993). The elements required in Hawai'i are: (1) the act is intentional; (2) the act is unreasonable; and (3) the actor should recognize it as likely to result in illness. Fraser v. Blue Cross, 39 Haw. 370, 375 (1952). The rule for intentional infliction of emotional distress is stated in the Restatement, Torts 2d, as follows: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (2d) OF TORTS § 46. In New Mexico, "courts (and courts applying New Mexico law) have refused to equate a defendant's conduct with extreme and outrageous conduct." Heather Call, *Tort Law — Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila*, 23 N.M. L. REV. 387, 389 (1993). Case law illustrates that, although intentional infliction of emotional distress is a recognized tort theory in New Mexico, the courts have refused to apply it liberally, thereby greatly limiting its scope. Call, *supra* note 138.

on the consumer to establish valid causes of action.[139] For example, to establish intentional infliction of emotional distress, the consumer must show outrageously abusive collection practices that cause severe emotional distress.[140] Such a burden makes it difficult for a consumer to prevail.[141]

Although potential causes of action may arise under state statutes, common law, the FTCA, and the FDCPA, each is deficient and ineffective in protecting consumers against abusive collection practices by in-house collectors. The scope of the FDCPA is unfairly limited to independent or third-party debt collectors.[142] The focus on third-party debt collectors discriminates against small businesses who rely on third-party debt collectors, compared to larger firms that do their own collecting.[143] In addition, the focus discourages creditors from referring delinquent accounts to professional collectors. Because of these reasons, complaints,[144] and the potential for continued abuse by unscrupulous in-house collectors, it is imperative to regulate both creditors and third-party debt collectors by expanding the FDCPA's definition of "debt collector" to include in-house collectors.

2. Congress should expand the FDCPA's definition of "debt collector" to include governmental employees

A consumer in Alabama wrote a check for $3.50 that was dishonored by his bank for non-sufficient funds (NSF).[145] He then received a letter

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[139] To recover on invasion of privacy grounds, consumers are required to prove publicity and highly offensive activity by creditors. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890). The consistent failure faced by debtors in invasion of privacy cases suggests that the remedy is insufficient to protect the interests of the abused debtor. Reilly, *supra* note 10, at 766.

There are a variety of reasons why a defamation claim may fail or be limited: (1) the plaintiff may be barred by First Amendment limitations under the federal constitution or its state equivalent; (2) the fact/opinion limitation may apply, precluding recovery for an opinion; (3) a common law absolute or qualified privilege may apply, precluding recovery for defamation either because the privilege is absolute or because the plaintiff is unable to make the showing necessary to overcome the qualified privilege; (4) the plaintiff also may be unable to recover anything other than special damages because of a failure to demand a retraction; (5) the plaintiff may fail to prove one of the essential elements of the defamation claim; or (6) in a slander case, the plaintiff may lose because he is unable to establish either slander per se or pecuniary loss. Steenson, *supra* note 138, at 87.

[140] Warren & Brandeis, *supra* note 139.

[141] *See supra* text accompanying note 139.

[142] 123 CONG. REC. 10,254 (1977) (remarks of Rep. Rousselot).

[143] *Id.* at 10,255; *see* Pertschuk, *supra* note 87, at 349.

[144] *See* discussion *supra* p. 18.

[145] ACA, *Those Unfair Collection Tactics*, COLLECTOR, Sept. 1993, at 20.

threatening him with arrest and prosecution in a criminal court unless he paid $95.50 within ten days.[146]

Such action would most likely be illegal, if the letter came from a debt collector who is regulated by the FDCPA.[147] Nevertheless, these tactics are legal when used by an Alabama district attorney.[148]

a. The FDCPA does not include governmental employees in the definition of "debt collector"

Like in-house creditor collectors, governmental employees involved in the collection of debts are exempt from regulation by the FDCPA.[149] The FDCPA specifically excludes from the definition of "debt collector" "any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his official duties."[150]

Similar to the Alabama consumer's situation discussed above, consumers in other states are receiving letters from district attorneys, county attorneys, or sheriffs that threaten them with arrest.[151] The

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[146] *Id.*

[147] "A private collection agency may not legally threaten someone with arrest who has written an NSF check. Nor may the private collection agency say that the check writer will be prosecuted unless the agency intends to do so and regularly files suit over checks for similar dollar amounts." *Id.* In addition, a collection agency may not threaten to sue consumers without appropriate authority from their clients to begin a lawsuit. Daniel Wise, *Collection Agency Threats Restricted*, N.Y. L. J., Sept. 17. 1993, at A1.

[148] ACA, *supra* note 145 at 20. In many states, government officials are authorized to charge processing and service fees. In some states, further charges may apply. For example, in California, a fee of $110 may be charged to attend a mandatory class on personal finances. *Id.* at 22.

[149] *See generally* Basil J. Mezines, *Unfair Competition*, COLLECTOR, Dec. 1992, at 18; *see also* Gary v. Spires, 473 F. Supp. 878 (D.S.C. 1979) (exempting administrator of county check clearing house from FDCPA regulation because governmental officials not included in definition of debt collector).

[150] 15 U.S.C. § 1692a(6)(C)(1993). The exemption applies only to governmental employees in the performance of their "official duties." The FDCPA, therefore, does not apply to an attorney employed by a county government who also collects bad checks for local merchants where that activity is outside his official duties. *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, see supra* note 50, at 50,101. A state educational agency that is engaged in the collection of student loans is included in the exemption. *Id.* at 50,103; *see generally* Mezines, *supra* note 149, at 18.

[151] ACA, *supra* note 145 at 20.

letters often imply that the arrest will occur at their place of business and prosecution will result, unless they remit the amount owed plus applicable fees.[152] The following are examples of statements made in letters to consumers from government officials:

> If payment is not received within 10 days from the above date, your name will then be entered into the National Crime Information Computer System and shall remain there until the warrant(s) have been executed against you . . . .
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> . . . .
>
> A warrant for your arrest has been issued concerning a worthless check. This warrant is presently being held in my office. This letter is to inform you . . . that you may be eligible for DEFERRED PROSECUTION (The letter then says that to get deferred prosecution, the consumer must surrender to the District Attorney's Office within 10 days and pay $____ in restitution and fees in full to that office.) . . . .
>
> . . . .
>
> Failure to pay these checks and fees by will result in a warrant being issued for your arrest and will possibly result in a criminal record and jail sentence.[153]

While governmental employees clearly threaten arrest and prosecution if the check writers do not pay the amount of the NSF check plus any applicable fees,[154] only a small percentage of such cases are ever prosecuted.[155] In most cases, when a consumer fails to respond to the letters, governmental employees simply return the NSF checks to the person(s) to whom the check was written.[156] In other words, governmental employees make references to tentative legal action, giving the impression that legal action will result. Using such heavy-handed techniques and making references to specific deadlines by which payment must be made or references to the need for urgency would constitute a violation under the FDCPA if made by a "debt collector."[157]

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[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] Even though forging checks is a much more serious offense than writing an NSF check, 73% of forged checks for amounts under $100,000 are never prosecuted. ACA, *supra* note 145, at 22.

[156] *Id.*

[157] It is a violation of the FDCPA to "threat[en] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5) (1993).

The defendant in *Pipiles v. Credit Bureau of Lockport, Inc.*[158] conducted activities similar to those of the governmental employees discussed above.[159] Nonetheless, because the defendant in the following case was included in the definition of "debt collector," it was subject to the FDCPA and, therefore, held liable for its actions.

Pipiles involved a document entitled "48 HOUR NOTICE" (notice) mailed by Credit Bureau of Lockport, Inc. (Bureau) to the consumer, Pipiles, for a debt totaling $135.[160] Pipiles charged that the notice threatened action that was not intended to be taken and, therefore, violated the FDCPA.[161]

Section 1692e(5) proscribes the "threat to take any action that cannot legally be taken or that is not intended to be taken." Section 1692e(10) forbids, in relevant part, "the use of any false representation or deceptive means to collect or attempt to collect any debt." Pipiles contended that the following language in the notice constituted false representations and threatened action that the Bureau did not intend to take: "Notice Is Hereby Given That This Item Has Already Been Referred For Collection Action;" "We Will At Any Time After 48 Hours Take Action As Necessary And Appropriate To Secure Payment In Full;" and "Pay This Amount Now If Action Is To Be Stopped."[162] Pipiles testified that she "thought they'd take [her] to court, sue [her], and wreck [her] credit."[163] The Bureau testified that it would take no further action on debts under $150, other than to "try to contact by phone."[164]

Although it was a close question, the court concluded that the notice violated FDCPA sections 1692e(5) and (10).[165] The court ruled that the

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[158] 886 F.2d 22 (2d Cir. 1989).

[159] *See also* Gaetano v. Payco of Wisconsin, Inc., 774 F. Supp. 1404 (D. Conn. 1990) (holding defendant not licensed to operate in consumer's home state violated section 1692e(11) by threatening to act in that state).

[160] *Id.* at 23.

[161] Pipiles also asserted that the Notice (1) misrepresented the character and amount of a debt, in violation of section 1692e(2)(A); (2) used a false representation or deceptive means to collect or attempt to collect a debt, in violation of section 1692(e)(10); and (3) failed to disclose clearly that the Bureau was attempting to collect a debt and that any information obtained would be used for that purpose, in contravention of section 1692e(11). *Id.*

[162] *Id.* at 24.

[163] *Id.* at 25.

[164] *Id.*

[165] *Id.*

notice threatened imminent legal action unless payment was promptly received.[166] Therefore, the court held that the Bureau violated the FDCPA.[167]

State and county officials who engage in practices similar to *Pipiles* are exempt from the FDCPA as long as their collection activities are within the performance of their "official duties."[168] Thus, Congress should expand the definition of "debt collector" to include governmental employees.

b. Reasons for expanding the "debt collector" definition to include governmental employees

There are many reasons for expanding the definition of "debt collector" to include governmental employees. First, good faith is lacking when governmental employees, knowing that only a small fraction of cases will actually be prosecuted, continue to send threatening statements to NSF check writers.[169] Government collection programs should not refer to legal action to give the consumer the impression that legal action will result.[170] Such an action would be illegal if done by a "debt collector."[171]

Because the FDCPA does not regulate the collection tactics of governmental employees, it leaves consumers, who have been threatened with legal action by governmental employees, with little protec-

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[166] Nevertheless, the only "action" underway was the dispatching of the notice itself, and the only prospective future "action" was an attempt at telephone contact. *Id.* at 25-26; *see also* Baker v. GC Servs. Corp., 677 F.2d 775, 778-79 (holding that further telephone and mail solicitation is not equivalent to threatened action).

[167] *Baker*, 886 F.2d at 26.

[168] 15 U.S.C. § 1692a(6)(C)(1993).

[169] *See* Mezines, *supra* note 149, at 18. The small fraction of NSF check cases actually being prosecuted is most likely because of the government's limited resources and inability to prosecute wrongdoers for every law violation. It is difficult to ascertain just what percentage of NSF checks are actually prosecuted by the district, county, or prosecuting attorney's offices. Nevertheless, considering 73% of forged checks for amounts under $100,000 are never prosecuted, the percentage of NSF checks being prosecuted is just a fraction of the percentage of prosecutions for those committing outright check forgery. This is because forging checks is a much more serious offense than writing an NSF check. ACA, *supra* note 145, at 22.

[170] Mezines, *supra* note 149, at 18.

[171] *See supra* text accompanying note 157.

tion.[172] Furthermore, additional costs, including processing fees, are imposed on consumers.[173] These costs could not be imposed on consumers if a "debt collector" handled the accounts because of section 1692f(1).[174] This provision prohibits "[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[175]

Congress should amend section 1692a(6)(C) to include local county and state governmental employees in the definition of "debt collector"[176] for the following reasons: (1) governmental employees threaten prosecution that will not be taken;[177] (2) similar actions constitute a violation under the FDCPA;[178] (3) consumer's potential fear of a governmental agency may be greater than that of a private corporation's debt collector simply because, in the former, the government is involved in the debt collection; (4) the exemption of governmental employees from FDCPA regulation leaves consumers with little protection;[179] and (5) governmental employees impose unnecessary costs on consumers.[180]

3. Summary

The original FDCPA specifically did not apply to in-house collectors and governmental employees.[181] Similarly, the original FDCPA did not

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[172] *But see* Hawai'i Revised Statutes section 662-15, which allows an exception to the State's waiver of its immunity for liability for "any claim arising out of . . . false arrest, malicious prosecution, abuse of process, . . . misrepresentation, deceit . . . ." HAW. REV. STAT. § 662-15 (1985).

[173] Mezines, *supra* note 149, at 18. In addition to the merchant's service fee, which a debt collector subject to the FDCPA may collect in some states, a processing fee may be imposed on the consumer. ACA, *supra* note 145.

[174] A debt collector is prohibited from imposing processing fees on the consumer. *See, e.g.*, West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983)(attempting to collect a $15 service charge on bad checks was not authorized by state law); Johnson v. Statewide Collections, Inc., 778 P.2d 93 (Wyo. 1989)(violating FDCPA when agency added a service charge to a returned check "in the absence of a contractual agreement creating the debt [because] no statutory authority permits such a claim").

[175] 15 U.S.C. § 1692f(1) (1993).

[176] Mezines, *supra* note 149, at 18.

[177] *Id.*; *see also* ACA, *supra* note 145, at 20.

[178] *See supra* notes 158-67 and accompanying text.

[179] *See generally* Mezines, *supra* note 149, at 18.

[180] *See generally* ACA, *supra* note 145, at 20-22.

[181] *See* discussion *infra* pp. 17-18, 30.

apply to attorneys collecting debts as attorneys on behalf of and in the name of a client.[182]

Since passage of the FDCPA in 1977, "attorneys have increasingly entered the debt collection business[183] and used the exemption to evade compliance with the [FDCPA]."[184] The House of Representatives Committee on Banking, Finance, and Urban Affairs believed that some attorneys were taking advantage of their exemption from the FDCPA by engaging in debt collection while ignoring the standards and limitations by which non-attorneys are bound.[185] Furthermore, because attorneys had an unfair competitive advantage by not being subject to the FDCPA provisions, they engaged in abusive collection practices.[186] As a result, Congress amended the FDCPA and removed the attorney exemption provision on July 9, 1986.[187] Removal of the exemption, in effect, requires any attorney who comes within the definition of "debt collector" to comply with the provisions of the FDCPA.[188] The policy

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[182] H.R. REP. No. 99-405, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1752.

[183] *Id.* at 1754.

> Representatives of a major national law firm, testifying in a hearing before a subcommittee of the U.S. Senate on May 25, 1983, estimated that there are 5,000 practicing attorneys in the United States who handle consumer collection accounts on a regular basis, or a number approximately equal to the total lay collection industry. In addition, this law firm estimated that in 1982 it alone received 365,471 consumer accounts for collection, representing a total dollar value of more than $355 million. This is roughly ten times the volume of collections handled by the average ACA member agency, as determined by a recent national survey. This law firm also testified that it filed about 30,000 collection lawsuits in 1982, which means that nearly 92% of the accounts handled that year did not involve legal action.

Id. at 1754 (quoting John W. Johnson, Exec. Vice-Pres., ACA). *See* Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (generating 70-80% of attorney's legal fees in relation to legal work performed toward the collection of debts).

[184] H.R. REP. No. 99-405, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S.C.C.A.N. 1752; Sabin, *supra* note 80, at *2; Menghini & Ponfil, *supra* note 32, at *1.

[185] Sabin, *supra* note 80, at *2.

[186] *Id.*

[187] Menghini & Ponfil, *supra* note 32, at *1; Sabin, *supra* note 80, at *2; Lucas & Harrell, *supra* note 51, at 1160. *See, e.g.*, Paulemon v. Tobin, 30 F.3d 307 (2d Cir. 1994) (holding that creditor's attorney who sent debt collection letter to debtor's attorney was a "debt collector" under FDCPA, even if Act had "litigation" exception); Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507 (9th Cir. 1994) (practicing at least 80% in area of collection fell within definition of "debt collector").

[188] H.R. REP. No. 99-405, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986

reasons for the 1986 amendment include: (1) growth of the attorney collection industry;[189] (2) consumer harm;[190] (3) unfair competition;[191] and (4) lack of bar association disciplinary proceedings.[192]

Policies for including attorneys in the definition of "debt collector" are analogous to policies for including in-house collectors and governmental employees in the definition.[193] Similar policies include: (1) greater consumer protection; (2) unfair competition; (3) insufficient alternative remedies; and (4) abusive collection practices by parties exempt from FDCPA regulation. In light of these similarities, there is no justifiable reason for in-house collectors and governmental employees to be exempt from the FDCPA. The objective of the FDCPA is to protect the consumer from harassment by a debt collector. Therefore, the failure of the FDCPA to cover in-house collectors and governmental employees, who have exhibited abusive collection practices similar to that of attorneys, is not justified. The proposed amendment would reduce abusive tactics of in-house collectors and governmental employees by requiring them to adhere to the standards of conduct that Congress enacted to govern consumer debt collection activities.

Consumers deserve greater protection from abusive debt collection practices. The protection provided by the FDCPA is inadequate because debt collectors who are currently subject to the FDCPA represent only a small minority of all debt collectors.[194] The proposed revision would provide protection to all consumers, including consumers who suffer from actions of in-house collectors and governmental employees. Because of the under-inclusiveness of FDCPA, consumers, such as the individual in *Lane*[195] and the check writer in Alabama,[196] have little, if any, protection against abusive debt collection practices. Therefore, Congress should amend the FDCPA to regulate the debt collection

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U.S.C.C.A.N. at 1753. The mere filing of a lawsuit by an attorney does not subject him to the FDCPA. Basil J. Mezines, *Filing a Suit Isn't Enough for FDCPA to Apply to Attorney,* COLLECTOR, Jan. 1994, at 21.

[189] H.R. REP. No. 99-405, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 1754.

[190] *Id.* at 1754-56.

[191] *Id.* at 1756.

[192] *Id.* at 1757.

[193] *See* discussion *supra* notes 77-180 and accompanying text.

[194] Schulman, *supra* note 6, at 197; *see* discussion *supra* note 80 and accompanying text.

[195] *See* discussion *supra* notes 106-33 and accompanying text.

[196] *See* discussion *supra* notes 145-46 and accompanying text.

practices of in-house collectors and governmental employees, in addition to third-party debt collectors.

B. Clarification of the Mini-Miranda Disclosure Requirement

1. Congress should clarify the Mini-Miranda disclosure requirement because it continues to be a source of litigation under the FDCPA

Much of the recent and threatened litigation against debt collectors is specifically designed to avoid payment of just debts by exploiting the inconsistency[197] in case law on the interpretation of FDCPA section 1692e(11).[198]

Section 1692e(11) generally prohibits debt collectors from making false or misleading representations in connection with the collection of debts.[199] The provision specifically requires a debt collector to "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose"[200] ("Mini-Miranda" warning).[201]

Litigation under section 1692e(11) arises when the debt collector omits the Mini-Miranda warning in either an oral or written communication to the consumer.[202] The consumer asserts that the failure to make this disclosure clearly in all communications constitutes an FDCPA violation.[203] Some courts have held that the plain meaning of

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[197] *See infra* notes 206-26 and accompanying text. The inconsistencies in case law have resulted in numerous suits against debt collectors by UAW attorneys. Basil Mezines, *FTC Supports Two ACA Amendments To The Fair Debt Collection Practices Act*, (Oct. 1992) at 2.

[198] *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA).

[199] 15 U.S.C. § 1692e(11)(1993).

[200] *Id.*

[201] The "Mini-Miranda" warning is a term commonly used by debt collectors to describe the statement required by section 1692e(11): "This Is An Attempt To Collect A Debt And Any Information Obtained Will Be Used For That Purpose." *ACA's "Mini-Miranda" Provision Adopted*, COLLECTOR, Dec. 1993, at 35.

[202] *See, e.g.*, Beattie v. D.M. Collections, Inc. 754 F. Supp. 383 (D. Del. 1991)(asserting that a debt collector failed to provide the "Mini-Miranda" warning during telephone conversation was dismissed as bona fide error because the consumer failed to prove that the agency had not maintained reasonable procedures to avoid violations).

[203] *See infra* notes 206-09 and accompanying text.

the FDCPA requires the Mini-Miranda warning be given in all oral and written communications.[204] Other courts have held that the warning must be given only in the first written communication to the consumer.[205]

In 1985, the United States Court of Appeals for the Ninth Circuit held, in *Pressley v. Capital Credit & Collection Services, Inc.*,[206] that the Mini-Miranda disclosure need only be given in the first communication.[207] Although the consumer (Pressley) argued that the plain language of section 1692e(11) clearly required the Mini-Miranda warning to be given in all communications to the consumer,[208] the court looked to the legislative history for guidance. Upon review, the court stated that the FDCPA's purpose "is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors."[209]

The court in *Pressley* held that the Mini-Miranda warning was unnecessary for oral or written communications after the first written communication with the consumer.[210] The *Pressley* court stated that an affirmative warning in all communications was unnecessary because (1) it was clearly obvious from the communication that a debt collector is attempting to collect a debt; (2) not all of the communications with the consumer request information;[211] (3) there was no evidence that Capital Credit & Collection Service, Inc.'s (Capital) actions were in any way abusive, false, deceptive, or misleading;[212] (4) *Pressley* involved a follow-up notice which only demanded a payment as requested earlier;[213] and, most importantly, (5) requiring Capital to make affirmative disclosures in every communication to the consumers would not be "within the spirit nor the intention of its makers."[214]

Contrary to the holding in *Pressley*, the United States Court of Appeals for the Second Circuit held, in *Pipiles*,[215] that the plain language of the

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[204] *See, e.g.*, discussion *infra* notes 215-25 and accompanying text.

[205] *See* discussion *infra* notes 206-14 and accompanying text.

[206] 760 F.2d 922 (9th Cir. 1985); *see also* Lucas & Harrell, *supra* note 51, at 1162 (discussing *Pressley*).

[207] 760 F.2d at 926.

[208] *Id.* at 924.

[209] *Id.* at 924-925, *citing* 15 U.S.C. § 1692e.

[210] *Id.* at 925.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] 886 F.2d 22 (2d Cir. 1989). *See* discussion of Pipiles v. Lockport, Inc., *supra* notes 158-67 and accompanying text.

statute unambiguously requires that the Mini-Miranda warning be given in all communications made to collect a debt.[216] In *Pipiles*, the consumer (Pipiles) charged that the document entitled "48 HOUR NOTICE" violated section 1692e(11).[217] Pipiles claimed that the Bureau failed to disclose clearly that the Bureau was attempting to collect a debt and that any information obtained would be used for that purpose.[218] It was clear from the face of the notice that the Bureau intended to obtain payment of a debt.[219] In addition, there is no requirement that the notice quote verbatim the language of the statute.[220] Nevertheless, the court held that the Bureau's failure to state that any information obtained would be used for the purpose of collecting the debt in question violated section 1692e(11).[221]

The court gave three reasons for its conclusion. First, the plain language of the provision made it clear that the debt collector must comply with the disclosure requirement in all communications with the consumer, regardless of whether any information is sought.[222] Second, the requirement furthered the purpose of the FDCPA, which is to prevent abusive collection practices.[223] By requiring disclosure in all communications, Congress has ensured that, even if the first notice is not received by the consumer, subsequent notices will nonetheless provide the consumer with requisite disclosures.[224] Third, even if there was little discernible purpose in repetition, Congress could exercise its legislative judgment to adopt a reasonable margin of safety to insure its remedial goal.[225]

With courts in *Pressley* and *Pipiles* irreconcilably split in their interpretations of section 1692e(11), the subsection requires clarification.[226]

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[216] *Id.* at 27; *see also* Carroll v. Wolpoff & Abramson, 961 F:2d 459 (4th Cir. 1992)(holding follow-up collection letter to consumer violated FDCPA by failing to inform the consumer that the debt collector was attempting to collect a debt and that any information obtained would be used for that purpose); Anthes v. Transworld Systems, Inc., 765 F. Supp. 162, 169 & n.9 (D. Del. 1991) (holding "[validation] notices only have to be given once").

[217] 886 F.2d at 23.

[218] *Id.*

[219] *Id.* at 26.

[220] *Id.*

[221] *Id.* at 23.

[222] *Id.*

[223] 15 U.S.C. § 1692 (1993).

[224] 886 F.2d at 27. *See* Lucas & Harrell, *supra* note 51, at *3.

[225] 886 F.2d at 27.

[226] *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA).

2. Congress should enact the requirement for a debt collector to issue the Mini-Miranda disclosure only in the first written communication with a consumer

Legislators saw the need to clarify section 1692e(11) as a result of the conflicting judicial interpretations.[227] On October 28, 1993, the United States Senate Banking Committee approved a provision[228] requiring the issuance of the Mini-Miranda warning only in the first written communication with a consumer,[229] in accordance with *Pressley*.[230]

a. Reasons for requiring a debt collector to issue the Mini-Miranda disclosure only in the first written communication with a consumer

The proposed amendment would explicitly require debt collectors to provide notice only on the first written communication with a consumer.[231] If the measure becomes law, several benefits would result. The proposal would protect the debt collector from unnecessary litigation over a mere omission of the Mini-Miranda warning. In addition, requiring the disclosure in every contact with the consumer would not enhance meaningful consumer protection, and would impose restrictions that go beyond the prohibition of false and misleading practices.[232]

Most importantly, requiring the Mini-Miranda warning only on the first written communication with a consumer would assist in establishing a constructive relationship between the consumer and debt collector. Such a relationship can result in a satisfying repayment arrangement.[233] A constructive relationship would be easier to establish because the disclosure only in the first communication would be less threatening

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[227] *ACA's "Mini-Miranda" Provision Adopted*, *supra* note 201, at 35.

[228] *Id.* "The provision was added as part of a manager's amendment to S. 783, the Consumer Reporting Reform Act of 1993 (Bryan, D-Nev.), and passed unanimously." *Id.*

[229] *Id.* The full Senate is not expected to take up this legislation until late 1994. Until the measure becomes law, debt collectors are urged to issue the Mini-Miranda warning to consumers in every written and oral communication. *Senate Banking Committee Approves ACA "Mini-Miranda" Amendment*, CRED-ALERT, Vol. 23, No. 1, Jan. 1994, at 1.

[230] *See supra* notes 206-14 and accompanying text.

[231] *More on the Mini-Miranda*, COLLECTOR, Jan. 1994, at 24.

[232] S. REP. No. 783, 103d Cong., 1st Sess. 29 (1993).

[233] *Id.*; Interview with George S. Shimada, *supra* note 27.

than the disclosure in every written and oral communication.[234] Moreover, the repetitious language is unnecessary because it is often obvious by the contents of the letters and the telephone conversations to the consumer that the debt collector is attempting to collect a debt and that any information being obtained will be used for the purpose of collecting a debt.[235] In addition, the general prohibitions against deceptive practices contained in section 1692e(10)[236] provide sufficient consumer protection against deceptive debt collection techniques.[237]

b. Congress should require that the first written communication be sent restricted delivery via certified mail to remedy the problem of potential litigation

Connecticut attorney Joanne Faulkner[238] criticized the proposed amendment requiring a disclosure only in the "initial written communication" with a consumer.[239] She asserted that the amendment would invite a lot of litigation, because the debt collector would have to prove that the consumer actually received the first communication from the collection agency.[240] If Congress requires the disclosure only in the "initial written communication," thereby placing the burden on the consumer to prove that the debt collector failed to provide the Mini-Miranda warning, it would discourage the consumer from asserting frivolous claims. In comparison, requiring redundant disclosures increases the risk that a debt collector may make an inadvertent technical violation.[241] The proposed amendment would, in effect, reduce unnecessary litigation based on section 1692e(11).[242]

The problem of potential litigation may be partially remedied by requiring that the first written communication be sent restricted delivery

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[234] S. REP. No. 783, 103d Cong., 1st Sess. 29; Interview with George S. Shimada, *supra* note 27; Telephone Interview with Russ Masui, Pres., HCA (Jan. 28, 1994).

[235] Interview with George S. Shimada, *supra* note 27.

[236] 15 U.S.C. § 1692e(10)(1993). The provision prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." *Id.*

[237] S. REP. No. 783, 103d Cong., 1st Sess. 29 (1993).

[238] Ms. Faulkner practices law in New Haven, Connecticut as a sole practitioner. MARTINDALE-HUBBELL LAW DIRECTORY CT81P (1993).

[239] Memorandum from Carleton W. Fish, Director of Public Affairs, ACA, to John W. Johnson, Exec. Vice-Pres., ACA (Nov. 18, 1992) (referring to remarks of Joanne Faulkner).

[240] *Id.*

[241] S. REP. No. 783, 103d Cong., 1st Sess., 29 (1993).

[242] *Id.*

via certified mail, return receipt requested.[243] This would afford the debt collector a cost-effective[244] solution to the serious problem of proof of the debtor's receipt of the Mini-Miranda warning.

3. Summary

The courts' conflicting interpretations of section 1692e(11) created much of the recent litigation against debt collectors.[245] These inconsistencies, along with Congress' failure to provide a clear-cut rule of when the Mini-Miranda warning needs to be given to the consumer, require Congress to clarify section 1692e(11).

In reviewing the conflicting policies set forth in *Pressley* and *Pipiles*, Congress should amend the FDCPA to allow a debt collector to issue the Mini-Miranda warning only in the first written communication and require that the first written communication be sent restricted delivery via certified mail, return receipt requested.

C. Clarification of the Validation Notice Requirement

1. The validation notice requirement has been a source of litigation under the FDCPA

The FDCPA requires a debt collector to send a written notice within five days after the consumer is first contacted, stating that if the consumer disputes the debt in writing within thirty days after receipt of the notice, the debt collector will obtain and mail a validation of

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[243] Schulman, *supra* note 6, at 182. Restricted delivery service permits a mailer to direct delivery only to the addressee or addressee's authorized agent. The addressee must be an individual (or natural person) specified by name. Telephone Interview with Louise Takara, Clerk, United States Postal Serv. (Apr. 18, 1994).

[244] The cost of postage for restricted delivery service is an additional $4.50. Telephone Interview with Louise Takara, *supra* note 243.

[245] *See, e.g.*, Colmon v. Payco-Gen. Am. Credits, Inc., 774 F. Supp. 691 (D. Conn. 1990); Gaetano v. Payco of Wisconsin, 774 F. Supp. 1404 (D. Conn. 1990); Anthes v. Transworld Systems, Inc., 765 F. Supp. 162 (D. Del. 1991); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383 (D. Del. 1991); Stojanovski v. Strobl & Manoogian, 783 F. Supp. 383 (E.D. Mich. 1992); Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992).

the debt to the consumer.[246] If the consumer, within the thirty day period, disputes the debt in writing, the debt collector must cease all collection efforts until the validation of the debt has been obtained and mailed to the consumer.[247]

There is no established criteria for the format of the validation notice requirement; as a result, debt collectors often print the validation notice with a font considerably smaller[248] or larger[249] than the other language in the letters to the consumers. Some agencies have printed the validation notice on the reverse side of the form,[250] with a different color print,[251] while others provided a mere oral validation.[252]

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[246] 15 U.S.C. § 1692g(a)(1993).

> Oftentimes, the consumer will dispute the full or partial amount of the debt, the collection charges, the interest, or will have a valid defense to the debt liability. The Act, therefore, requires that the debt collector provide either in the collector's initial communication, a written notice stating the amount of the debt, the name of the creditor to whom it is owed, and a statement notifying the collector that unless he disputes the debt in writing within [30] days, the debt collector will consider the debt valid.

Schulman, *supra* note 6, at 177.

The purpose of this provision is to "eliminate the recurring problems of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. REP. No. 382, 95th Cong. 1st Sess. 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. Congress included the debt validation provisions in order to guarantee that consumers would receive adequate notice of their legal rights. *Id.* at 1702. This legislation was designed to protect consumers who are not aware of the complexities of the law. Therefore, notice must be given to inform them of their rights under the law. Ost v. Collection Bureau, Inc., 493 F. Supp. 701, 702 (D.N.D. 1980) (holding that format of validation notice indicated that debt collector attempted to evade the spirit of the notice statute and mislead the consumer into disregarding the notice).

[247] 15 U.S.C. § 1692g(b)(1993).

[248] *See, e.g.*, Knowles v. I.C. System, Inc., Civ. No. 90-822E (U.S.D.C. NY Jan. 14, 1991 (holding that although the print of the validation notice was smaller than that contained in the rest of the letter, bold-faced type and paragraph location made notice readily apparent to any reasonable recipient); Siler v. Management Adjustment Bureau, No. 91-65E, 1992 WL 3233 (W.D.N.Y. Feb. 18, 1992) (printing "in a smaller, lighter typeface" was not in compliance with the FDCPA).

[249] *See, e.g.*, Swanson v. Southern Oregon Credit Servs., Inc., 869 F.2d 1222 (9th Cir. 1988)(violating FDCPA because message in the notice overshadowed and contradicted the validation notice).

[250] *See, e.g.*, *Ost*, 493 F. Supp. at 702-703 (failing to refer to the notice on the back of the form was one factor in court's conclusion that the communication mislead the debtor in disregarding the notice); Riveria v. M.A.B. Collections, Inc., 682 F. Supp. 174 (violating FDCPA by placing validation notice on the reverse side of the collection

The court in *Swanson v. Southern Oregon Credit Services, Inc.*,[253] held that collection letters that use both obscured and prominent or bold faced print in the text of the notice violate the FDCPA.[254] In *Swanson*, the debt collector, Southern Oregon Credit Services, Inc. (SOCS),[255] sent various notices to Swanson and made an indeterminate number of telephone calls in an attempt to collect a debt.[256] Swanson alleged that the first notice sent to Swanson violated the validation of debts provision of section 1692g(a).[257] The notice sent to Swanson contained, in bold faced type several times larger than the debt validation notice required by section 1692g, the following: "IF THIS ACCOUNT IS PAID WITHIN THE NEXT 10 DAYS IT WILL NOT BE RECORDED IN OUR MASTER FILE AS AN UNPAID COLLECTION ITEM. A GOOD CREDIT RATING - IS YOUR MOST VALUABLE ASSET."[258] Beneath this language, in small, standard-face type, was the notice required by the statute.[259] While Swanson admitted that the initial communication from SOCS contained the basic language required by section 1692g,[260] he argued that: (1) the "visual effect" of the large type language "overshadowed" the debt validation notice, and (2) the notice's language and tone constituted an impermissible threat of harm to his credit rating.[261]

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notice); Miller v. Payco-General Am. Credits, 943 F.2d 482 (having messages appearing on the face of the form flatly contradicts the information contained on the back).

[251] *See, e.g.*, *Riveria*, 682 F. Supp. at 174 (printing in smaller type and lighter ink did not fulfill the requirements of the Act).

[252] *But see* Johnson v. Statewide Collections, Inc., 778 P.2d 93 (Wyo. 1989)(validating a debt orally does not satisfy FDCPA). Section 1692g(a)(3)(1993) does not expressly require that the debtor's notification be in writing. A debt collector is not required to send a written validation of a debt; an oral validation is sufficient. *Statement of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, *supra* note 50, at 50108. Nevertheless, the FTC Staff explicitly states that its commentary is a guideline intended to clarify the staff interpretations of the statute, but is not binding on the Commission or the public. *Id.* at 50101.

[253] 869 F.2d 1222.

[254] *Id.* at 1230.

[255] *Id.* at 1224.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 1225.

[259] *Id.*

[260] *Id.*

[261] *Id.*

The Ninth Circuit Court of Appeals rejected the lower court's conclusion that SOCS satisfied the section 1692g requirement.[262] The court held that the notice required by Congress must be conveyed "effectively" to Swanson.[263] The notice must be large enough to be read easily, and other messages or notices appearing in the initial communication cannot overshadow or contradict the validation notice.[264] The court concluded that the letter "represented an attempt on the part of [SOCS] to evade the spirit of the notice statute and mislead [Swanson] into disregarding the [required debt validation] notice."[265] Accordingly, the court held that SOCS' initial communication with Swanson violated section 1692g of the FDCPA.[266]

Similarly, in *Miller v. Payco-General American Credits, Inc.*,[267] the consumer (Miller) asserted that the defendant, Payco-General American Credits (Payco), did not effectively convey the required information to him.[268] Across the top of the one page letter to Miller was the title, "DEMAND FOR PAYMENT," in large, red bold-faced type.[269] In the middle of the page, again in large, red type, was the statement "THIS IS A DEMAND FOR IMMEDIATE FULL PAYMENT OF YOUR DEBT."[270] This statement was proceeded by the following written sentences, in black bold faced type: "YOUR SERIOUSLY PAST DUE ACCOUNT HAS BEEN GIVEN TO US FOR IMMEDIATE ACTION. YOU HAVE HAD AMPLE TIME TO PAY YOUR DEBT, BUT YOU HAVE NOT. IF THERE IS A VALID REASON, PHONE US AT [telephone number] TODAY. IF NOT, PAY US — NOW."[271] At the very bottom of the page, in the smallest type[272] to appear on the form, was the statement, "NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION.[273] Payco printed the validation notice on the reverse of the document.[274] The

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[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 1226.
[266] *Id.*
[267] 943 F.2d 482.
[268] *Id.* at 483.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.* Letters were one-eighth of an inch high. *Id.*
[273] *Id.*
[274] *Id.*

court held that Payco violated the FDCPA for failing to convey adequately the validation notice by use of a considerably smaller font for the essential direction to read the reverse side of the letter.[275]

Because neither *Swanson* nor *Miller* specified what would constitute clear disclosure,[276] debt collectors have been plagued with lawsuits claiming that validation notices were contradicted or overshadowed by other messages or larger print.[277] Congress' failure to specify a format for the section 1692g validation notice has resulted in inconsistent court rulings of what constitutes sufficient notice.[278] The lack of clarity makes it difficult for legitimate collectors to know exactly what they have to do to comply with the FDCPA.[279] Clarification would discourage frivolous disputes and enable the consumer to assess whether he or she has a claim against the debt collector for an insufficient validation notice.

2. Congress should amend the validation notice requirement either by mandating a specific format for all notices or defining a standard to ensure the required notice be effectively conveyed

Congress has two alternatives in remedying the problem of costly and unnecessary litigation resulting from lack of clear FDCPA regulations.

First, Congress could require that validation notices be in the same type size as the majority of the text and appear on the front of the first page. Congress could then require agencies to standardize all of their notices to abide by the requirements imposed by Congress. Such

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[275] *Id.* at 485.

[276] *See also* Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991)(holding that notice containing a threat that suit would be filed if the debt was not paid within 10 days and stating that the consumer had 30 days to dispute the debt violated section 1692g); *see also* Lucas & Harrell, *supra* note 51, at 1161 (discussing *Graziano*).

[277] Mezines, *supra* note 198, at 2.

[278] Courts are split on whether the Act should require that disclosures be conspicuous. *Compare* Ost v. Collection Bureau, Inc., 493 F. Supp. 701 (holding disclosed information must be conspicuous) *with* Blackwell v. Professional Business Servs. of Georgia, 526 F. Supp. 535 (N.D. Ga. 1981) (holding that validation notice need not be conspicuous). The FTC takes the position that the disclosures need not be conspicuous; however, an illegible notice does not comply with the FDCPA. *Statements of General Policy or Interpretation Staff Commentary On the Federal Debt Collection Practices Act*, *supra* note 50, at 50108.

[279] Crenshaw, *supra* note 5, at H3.

technical provisions may arguably be over-inclusive and overly burdensome. Nevertheless, because it is important that the validation notice be conveyed effectively to consumers, the interest in establishing a uniform disclosure requirement outweighs the debt collectors' burden of having to amend their notices to be consistent with the specific format Congress mandates.

Second, Congress could amend section 1692g by requiring that the validation notice be "clear and conspicuous."[280] Because there are decisions defining the "clear and conspicuous" standard in a variety of contexts,[281] such a standard would clarify any confusion for debt collectors.[282]

Because courts in *Swanson* nor *Miller* have not provided a specific standard for the validation notice, Congress should adopt either of the two proposals provided above to ensure that the validation notice is effectively conveyed to consumers.

D. Limitation on the Liability for Plaintiff's Attorney Fees

1. Consumer law attorneys abuse the FDCPA attorney fee provisions

Attorneys who are familiar with the FDCPA provisions try to extract more money in the settlement process than they could reasonably expect to recover for a non-aggrieved client in court.[283] They are able to do this effectively because it often is cost-free for their clients to try a case for a nominal verdict; however, it costs the defendant his own

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[280] *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA).

[281] *See, e.g.*, Warner-Lambert Company, 86 F.T.C. 1398, 1514 (1975), *aff'd as modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Figgie International, Inc., 107 F.T.C. 313, 401 (1986).

[282] *The Fair Debt Collections Practices Act, 1992: Hearings on P.L. 95-109 Before the Subcomm. on Consumer Affairs & Coinage*, 102d Cong., 2d Sess. (1992) (statement of Carleton W. Fish, Dir. of Public Affairs, ACA); *Fair Debt Collection Practices Act Enforcement Effective, Fewer Consumer Complaints, FTC Testifies, supra* note 39, at 4.

[283] Interview with George S. Shimada, *supra* note 27; *see generally* Charles D. Bertrand, *Action to End UAW Harassment*, COLLECTOR, Oct. 1992, at 7, 60 (quoting Judge Suhrheinrich) ("The suspicion raised in my mind is whether the UAW Legal Services Plan, of whom this statute seems to be a favorite, is more interested in the mandatory statutory award of attorney's fees than they are in protecting the rights of debtors against dishonest debt collectors."); Basil Mezines, *U.S. Court of Appeals' Judge Attacks UAW Legal Services Plan*, COLLECTOR, Oct. 1992, at 47.

attorney's fees as well as the plaintiffs' legal fees at no risk to the plaintiff nor to them.[284]

For example, Richard J. Rubin, an attorney practicing consumer law and litigation in New Mexico,[285] has become well-off by specializing in suing debt collectors.[286] Rubin admits that he relies on technical violations of the law to bring cases, makes arbitrary settlement demands irrespective of damages,[287] and earns far more in attorneys' fees than his clients are entitled to collect.[288] Rubin's rationale is that Congress has allowed such tactics by providing for private enforcement of the FDCPA as well as for the recovery of reasonable attorneys' fees.[289] Rubin is one of only a handful of private attorneys in the country who specialize in handling consumer claims against abusive debt collectors under the FDCPA.[290]

In *Hubbard v. National Bond and Collection Associates, Inc.*[291], a chapter 13 consumer, Hubbard, alleged violations of the FDCPA, arising from a letter that the defendant (National) sent to Hubbard after Hubbard had filed for bankruptcy.[292] Hubbard alleged that (1) the letter constituted improper communication because National knew, as a result of the chapter 13 filing, that Hubbard was represented by counsel;[293] (2) National misrepresented the character of the debt as collectible when it was not because of the automatic stay;[294] (3) National threatened

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[284] Letter from Charles D. Bertrand, President, ACA, to Ralph Deeds, Int'l Personnel Dir., General Motors Corp. (Dec. 14, 1992).

[285] MARTINDALE-HUBBELL LAW DIRECTORY NM41P (1993).

[286] Mark Hansen, *When Rubin Sues, Defendants Settle*, A.B.A. J., Jan. 1993, at 28.

[287] *Id.* at 29. The great majority of claims are settled at his standing offer, which is typically $7,500. *Id.*

[288] *Id.* at 28.

[289] 15 U.S.C. § 1692k (1993). *See* Smith v. Law Offices of Mitchell N. Kay, 762 F. Supp. 82 (D. Del. 1991)(holding that plaintiff is prevailing party entitled to attorney fees if successful on significant issue in the litigation that brings him benefit); Bertrand, *supra* note 283, at 7.

[290] Hansen, *supra* note 286. Others, whose practice involves a substantial amount of these claims, include staff attorneys of the United Auto Workers Legal Services Plan. Letter from Charles D. Bertrand to Ralph Deeds, *supra* note 284. *See generally* Bertrand, *supra* note 283; Mezines, *supra* note 283, at 47.

[291] 126 B.R. 422 (D. Del. 1991).

[292] *Id.* at 425. After National Bond and Collection Associates, Inc. sent the letter to Hubbard, Hubbard contacted National and informed National of the bankruptcy proceeding; National ceased all further communication. *Id.*

[293] *Id.* at 426. *See* 15 U.S.C. § 1692c(a)(2) (1993).

[294] *Hubbard*, 126 B.R. at 427. *See* 15 U.S.C. § 1692e(2)(A)(1993).

legal action when, because of the automatic stay, it could take none;[295] and (4) National used false and deceptive means in attempting to collect the debt.[296] The court refused to find National in violation of the FDCPA.[297] The court premised its holding on the fact that National's violation of the automatic stay was "accidental."[298] In effect, the court reasoned that the accidental violation of the automatic stay negated Hubbard's allegations of FDCPA violations.[299]

The *Hubbard* case is a good example of an attorney seeking to expand the bounds of the FDCPA beyond anything that would be protective for his client. The only conceivable motivation for the suit was the attorney's recovery of fees at no risk to the client.[300]

In *Perez v. Perkiss*,[301] the plaintiff, Perez, subsequent to obtaining a jury verdict in his favor, filed a motion for attorney fees.[302] In addition to awarding $200 for actual damages, the court awarded Perez $1,000 in statutory damages and attorneys' fees of $10,110.[303] The court awarded attorneys' fees even though Perez was represented as part of the UAW's employee representation plan and did not actually owe attorneys' fees.[304] Consequently, the total recovery was approximately fifty-six times Perez's actual damages as determined by a jury. Perkiss contended that the hourly rate,[305] travel time, and consultation time

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[295] *Hubbard*, 126 B.R. at 426. *See* 15 U.S.C. § 1692e(5)(1993).

[296] *Hubbard*, 126 B.R. at 427. *See* 15 U.S.C. § 1692e(10) (1993).

[297] *Hubbard*, 126 B.R. at 430.

[298] *Id.* at 428-29. The court explained the relationship between the FDCPA and the Bankruptcy Code as follows:

> Allowing a debt collector, under limited circumstances, to send a single initial debt collection notice to a debtor without creating liability under the FDCPA does not undermine the automatic stay provisions of the Bankruptcy Code. The FDCPA was not enacted to enforce the Bankruptcy Code's automatic stay provisions; it was enacted "to eliminate abusive debt collection practices." Automatic stays are adequately enforced by the contempt power of bankruptcy courts and specific provisions of the Bankruptcy Code.

Id. (Citations omitted).

[299] *Id.* at 429.

[300] Letter from Charles D. Bertrand to Ralph Deeds, *supra* note 284.

[301] 742 F. Supp. 883 (D. Del. 1990).

[302] *Id.*

[303] *Id.* at 892.

[304] *Id.*

[305] *Id.* at 888, 890. Billing rates were $100 per hour for one attorney and $150 per hour for another attorney. *Id.*

were excessive and undocumented and that the number of hours worked was unreasonable and duplicative.[306] The court rejected the argument because it believed that such rates were reasonable for a fair debt jury trial.[307] Nevertheless, the court disallowed the travel and consultation times because Perez's attorney failed to establish that such hours were reasonably expended for the activities noted.[308]

The *Hubbard* and *Perez*[309] cases illustrate attorneys' attempts to impose costly legal fees on debt collectors merely because they informed consumers that they have been retained to collect a debt. Attorneys appear to be more interested in the mandatory statutory award of attorney's fees than they are in protecting the rights of consumers.[310] As foreseen by many members of Congress, the prospect of recompense, which is not related to actual damages, turns "collections . . . into a big game."[311]

The prospect of abuse of windfall statutory damages and attorney's fees creates a need to encourage settlement of legitimate claims.[312]

2. Congress should enact a provision allowing a debt collector to be exempt from paying the plaintiff's attorney's fees in certain circumstances

To remedy the problems discussed above, the debt collector should be encouraged to make a settlement offer, including attorney's fees and other costs incurred. In addition, Congress should add a provision specifically exempting the debt collector from paying the consumer's attorney's fees.[313] This exemption would only apply if all of the following requirements are met: (1) the consumer refuses to settle; (2) litigation arises; and (3) the amount of damages awarded is less than or equal to the specified amount that was initially offered.[314] Such a provision

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[306] *Id.* at 890.

[307] *Id.*

[308] *Id.* at 889.

[309] *See also* Vigil v. Burdge Enterprises, 15 Clearinghouse Rev. 170 (D.N.M. 1981) ($5,279 in attorneys' fees was awarded to two legal service attorneys using hourly rates of forty and fifty dollars).

[310] Letter from Charles D. Bertrand to Ralph Deeds, *supra* note 284.

[311] *See* H.R. REP. No. 131, 95th Cong., 1st Sess. 29 (1977) (Supplemental Views of Reps. Hansen, Kelly Rousselot, and Grassley). "We also run the risk of tempting honest people to avoid paying bills by entrapping the debt collector in a technical violation of the law. Credit and collections will turn into a big game." *Id.*

[312] ACA, Suggested Technical Amendment to FDCPA 4 (Mar. 3, 1993).

[313] *Id.*

[314] *Id.*

would, in effect, promote early settlement of claims against debt collectors and prevent abuse of the court system by eliminating situations where litigation continues solely for the benefit of the consumer's attorney.[315] Furthermore, taxpayers would benefit by keeping lawsuits out of court unless necessary.[316]

Attorneys such as Rubin[317] argue that Congress: (1) designed the FDCPA to encourage litigation;[318] and (2) wanted to give consumers an incentive to test abusive debt collection practices in the courts.[319] Thus, attorneys argue that the attorneys' fee award provision, under the status quo, is appropriate.[320] For example, in *Nunez v. Interstate Corporate Systems*,[321] in allowing the award of reasonable attorneys' fees in any action to enforce liability under the FDCPA, the court noted:

> Were we to hold otherwise, we would defeat the congressional purpose of encouraging the bringing of suit by small claimants as a means of ending abusive debt collection practices by creating the impediment of substantial costs and fees to enforcing any judgment where the abusive debt collector has also engaged in a transfer in fraud of creditors.[322]

Although such arguments are sound, the FDCPA does not justify attorneys to assert groundless claims against debt collectors.[323] Rather, as provided by the FDCPA, its purpose is to "eliminate abusive debt collection practices by debt collectors . . . ."[324] The proposed amendment to the FDCPA, as discussed above, is necessary to fulfill the FDCPA's main objective: to eliminate abusive debt collection practices.[325]

IV. Conclusion

Records show a considerable decrease in abusive debt collection practice since the FDCPA became effective in 1978.[326] Nevertheless,

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[315] *Id.*
[316] *Id.*
[317] *See supra* notes 285-90 and accompanying text.
[318] Hansen, *supra* note 286, at 28.
[319] *Id.*
[320] *See generally* Perez v. Perkiss, 742 F. Supp. 883 (D. Del. 1990).
[321] 799 P.2d 30 (CA. Az. 1990).
[322] *Id.* at 31-32.
[323] *See generally* Bertrand, *supra* note 283, at 7, 60 (quoting Judge Suhrheinrich).
[324] 15 U.S.C. § 1692 (1993).
[325] ACA, *supra* note 312, at 4.
[326] *See supra* notes 59-61 and accompanying text.

(1) the FDCPA does not regulate in-house collection activities, which account for the majority of the debt collection activities conducted in the United States; (2) approximately one-half of the "complaints" received by the FTC are against in-house collectors; and (3) abusive collection practices by governmental employees are a significant concern. In light of these concerns, no reason adequately justifies the exclusion of in-house collectors and governmental employees from the FDCPA's definition of "debt collector." Therefore, Congress should broaden the present form of the FDCPA's definition of "debt collector" to include in-house collectors and governmental employees.[327]

Congress should also amend sections 1692e(11) and 1692g to resolve conflicting judicial interpretations. In order for consumers to avoid the repetitive disclosures of the Mini-Miranda warning, which (1) are perceived as threatening to some consumers, and (2) make it difficult to establish a constructive relationship between the debtor and debt collector, Congress should require the Mini-Miranda warning only in the first communication with a consumer.[328] Imposing additional burdens on the debt collector would provide little additional protection for consumers and would increase the risk that a debt collector acting in good faith may make an inadvertent technical violation. The debt collector may prove that he disclosed the Mini-Miranda warning by mailing the first communication, along with the disclosure, restricted delivery via certified mail, return receipt requested.[329]

Congress should also amend the FDCPA by defining an appropriate format or standard for the validation notice. Because the courts have failed to provide a specific format or standard, Congress should require the validation notice be either in the same type size as the majority of the text and be on the front of the first page, or "clear and conspicuous." Such a clarification would eliminate confusion regarding the adequacy of the validation notice. In effect, the amendment would eliminate unnecessary litigation concerning the validation notice requirement.[330]

Finally, Congress should modify the attorneys' fees provision because of the potential for abuse of attorneys' fees, and the evidence of excessive attorney's fees being awarded. Congress should exempt a debt collector from paying the consumer's attorney's fees in cases in

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[327] *See supra* notes 78-196 and accompanying text.

[328] *See supra* notes 197-245 and accompanying text.

[329] *See supra* notes 243-44 and accompanying text.

[330] *See supra* notes 246-282 and accompanying text.

which the damages award, upon litigation, is less than or equal to the specified amount that was initially offered. Thus, this exemption would apply only when attorneys refuse to settle in order to extract more money than they could reasonably expect to recover. Such a provision would, in effect, discourage the consumer's attorney from conducting unnecessary, costly litigation.[331]

If these proposals are adopted, numerous benefits would result. The amendments would effectively provide equity to all parties involved in debt collection; clarify the FDCPA in light of divergent court opinions; result in better enforcement; deter attorneys from filing groundless claims as an incentive to collect disproportionate legal fees and, thereby reduce the court's burdensome load of cases which undermine the effectiveness of the FDCPA; and, most importantly, provide consumers, such as Mary Crossley,[332] with the best possible protection from abusive debt collection practices, regardless of who is collecting the debt.

Lynn A.S. Araki*

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[331] *See supra* notes 283-325 and accompanying text.

[332] *See supra* notes 1-4 and accompanying text.

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Curing A Bad Reputation: Reforming Defamation Law

Table of Contents

I. INTRODUCTION

> [O]ur traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.[1]

Defamation law in the United States is undergoing a long overdue re-evaluation.[2] The need to protect freedom of speech and the press, values enshrined in the First and Fourteenth Amendments, often clashes with society's interest in preventing and redressing attacks on an individual's reputation.[3] Since its landmark decision in *New York Times Co. v. Sullivan*[4] in 1964, the United States Supreme Court has sought to accommodate two competing interests: ensuring that vigorous debate

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[1] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 772 (5th ed. 1984).

[2] The need to reform defamation law has inspired much comment from scholars, lawyers and media professionals. *See generally* Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535 (1988); Randall P. Bezanson & Brian C. Murchison, *The Three Voices of Libel*, 47 WASH. & LEE L. REV. 213 (1990); C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REF. 1 (1989); Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273 (1990); Paul A. LeBel, *Special Issue: Defamation and the First Amendment: New Perspectives*, 25 WM. & MARY L. REV. 779 (1984); Rodney A. Smolla, *Dun and Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987); Robert C. Vanderet, Jens B. Koepke & Wendy L. Bloom, *Media Law and Defamation Torts: Recent Developments*, 27 TORT & INS. L.J. 333 (1992).

[3] Rosenblatt v. Baer, 383 U.S. 75, 89 (1966). Regarding the importance of safeguarding personal reputation, *see also* the concurring opinion of Justice Stewart:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Id. at 92.

[4] 376 U.S. 254 (1964). For an account of the background of the case, *see* ANTHONY LEWIS, MAKE NO LAW 5-182 (1991).

on public issues can flourish while still affording protection to individuals against unwarranted attacks on their good name.[5]

This report contains six sections: Section I chronicles the current level of discontent with defamation law; Section II presents a history of the major developments in defamation law; Section III examines defamation law in Hawaii; Section IV evaluates the strengths and weaknesses of the latest reform proposal, the Uniform Correction or Clarification of Defamation Act, and compares it to the Annenberg Libel Reform Act; Section V discusses how other nations are handling defamation law reform and the effect that forum shopping by plaintiffs suing American media companies may have on defamation reform in the United States; and Section VI concludes that over the short term, piecemeal reform is the most viable option.

II. Discontent with Defamation Law

Defamation law is a mass of byzantine case law in search of codification. A great deal of it makes no sense.[6] As expressed by lawyer Floyd Abrams,[7] a constitutional law specialist, "American libel law manages to achieve the worst of two worlds: It does little to protect reputation. It does much to deter speech."[8] There is little disagreement that a free state requires a free press.[9] But several observers[10] believe the law has gone too far in protecting the press at the expense of

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[5] Hutchinson v. Proxmire, 443 U.S. 111, 133-34 (1979).

[6] Keeton, *supra* note 1, § 111, at 771.

[7] Abrams, a member of the New York City law firm of Cahill Gordon & Reindel, has represented The New York Times and NBC, among others, in First Amendment suits.

[8] Floyd Abrams, *Why We Should Change the Libel Law*, N.Y. Times, Sept. 29, 1985, (Magazine), at 34.

[9] William Blackstone, English jurist (*quoted in* Vermont Royster, *Thinking Things Over: A Look at Libel*, Wall St. J., Oct. 31, 1984, at 30).

[10] Among them is attorney Gerry Spence, who represented a former Miss Wyoming in a suit against Penthouse Magazine. *See* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982). The $26.5 million initially awarded was later set aside on appeal. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Colum. L. Rev. 603, 608 (1983).

Spence says that the courts, intimidated by the press, have subscribed to the notion that it is un-American to limit what people want to say. *See* Betty Wong, *Legal Perspective: In Wake of Westmoreland, Sharon Cases, Libel Suits Against the Media Decline*, Wall St. J., Oct. 17, 1988, at B8.

reputation and has devolved into the constitutional privilege to defame.[11]

A. Media Defendants in Defamation Actions

When the media are defendants in a defamation action, the scales of justice are usually tipped in their favor: the public interest in a free press is often found to outweigh the individual's interest in safeguarding reputation. The imbalance has provoked strong criticism in nonmedia circles, particularly among those who allege the media have defamed them. They view themselves as having been twice victimized: first by the media, then by the legal system.

Significant legal hurdles await anyone contemplating a defamation suit against the media. This is especially true for public officials and public figures, who must prove that the media defendant acted with actual malice, that is, with knowledge of falsity or reckless disregard of the truth. Thus, the principal issue in a defamation suit is not whether the challenged statement is false, but whether the defendant is at fault.[12] Cases turn on the defendant's state of mind.[13]

For private figures, the standards of liability vary with each state, but are less rigorous: the threshold requirements are that a private plaintiff prove the challenged statement is false and establish at least some degree of fault (often negligence). Only to recover presumed or punitive damages must a plaintiff prove actual malice by clear and convincing evidence.[14] However, once over those hurdles, a successful private plaintiff faces virtually no limit on recovery. The average total award in defamation suits during 1992-93 exceeded $1 million.[15]

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[11] *See, e.g.*, Gerry Spence, *The Sale of the First Amendment*, A.B.A. J., Mar. 1989, at 52, in which the famed attorney (who represented televangelist Jerry Falwell in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)) characterizes many cases purporting to be about free speech as camouflages for struggles pitting commercial interests of power against the human rights of people. As he put it, "[F]reedom of speech has been reduced to a tool, like the Roto-Rooter's snake that periodically is plunged down the sewer line to ensure the free flow of commerce through the pipes." *Id.* at 54.

[12] *See, e.g.*, David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 855 (1986).

[13] *Id.*

[14] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[15] A study released in February 1994 by the Libel Defense Resource Center [hereinafter LDRC] found that the average total libel award against a media defendant in 1992-93 was $1,061,136. LDRC BULL., Jan. 31, 1994, at 2. The LDRC is a New York City-based, nonprofit information clearinghouse organized by leading media groups to monitor developments and promote First Amendment rights in the libel field.

A defamation suit against the media usually entails lengthy court proceedings fraught with delays, motions, multiple issues, extensive discovery, numerous appeals and staggering litigation costs.[16] Plaintiffs did prevail in nearly three-fourths of all jury trials during the 1980s and in two-thirds during 1990-93.[17] But despite that initially high success rate, most of those judgments were overturned on appeal, usually on privilege-related grounds.[18] Only about twenty percent of all defamation suits ever go to trial.[19] More than eighty-five percent of media victories have resulted from summary judgment or other dismissal before trial.[20]

B. Reform Movement

The growing dissatisfaction with current defamation law[21] has spawned several reform proposals.[22] The latest is the Uniform Correction or Clarification of Defamation Act ("Correction Act").[23] Approved by the American Bar Association in February 1994, it focuses on one potential remedy aimed at making protracted litigation less likely in defamation disputes: retractions (although that term, which often carries

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[16] *See, e.g.*, Seth Goodchild, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315 (1986).

[17] The LDRC's February 1994 study also found that in the 213 defamation trials held between 1980-89, plaintiffs prevailed against media defendants in 66% of them (or 167 cases): in 74% of jury trials (i.e., 157 cases); in 47% of bench trials (9 cases); and in 4% of the directed verdicts (1 case). Of the 60 defamation trials reported during 1990-93, plaintiffs prevailed in 62% (37 cases). The breakdown was: 66% (35 cases) for jury trials; 67% (2 cases) for bench trials; and 0% (no cases) for directed verdicts. LDRC BULL., *supra* note 15, at 5.

[18] RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 106-07, 143-44 (1987).

[19] *Id.* at 107.

[20] *Id.* at 131.

[21] Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 26 (1989).

[22] *See generally* LOIS G. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT (1987); David A. Anderson, *Is Libel Law Worth Reforming?* 140 U. PA. L. REV. 487 (1991); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782 (1986); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

[23] For the full text, *see* Debra Gersh, *Reviled Proposal Toned Down*, EDITOR & PUBLISHER, Sept. 4, 1993, at 12-15.

a stigma for the media, is not used in the Correction Act).[24] The Correction Act provides incentives greater than those available under the current system to induce more, faster and fuller retractions. Specifically, "[i]f a timely and sufficient correction or clarification is made, a person may recover only provable economic loss [caused by the defamatory publication], as mitigated by the correction or clarification."[25] However, the Correction Act fails to address adequately another need for which defamation plaintiffs have been clamoring: a judicial determination that the statement at issue is false, especially when the media refuse to retract it. The Correction Act has no provision for a declaratory judgment.

Several other comprehensive proposals deal with problems which the Correction Act leaves unresolved. For example, the Annenberg Washington Program Proposal for the Reform of Libel Law ("Annenberg Act")[26] emphasizes retractions and rights of reply; it also provides a declaratory judgment option, which would be available to both plaintiffs and defendants.[27] The Barrett/Schumer Option[28] would allow public official and public figure plaintiffs to bring a declaratory judgment action: plaintiffs would not have to prove the defendant's state of mind but would be barred from recovering damages.[29] The Plaintiff's Option Libel Reform Act[30] would give all plaintiffs the choice of either pursuing a judicial declaration of truth or falsity, or suing for damages.[31]

Other possible reform measures include: limiting monetary recovery by denying punitive or presumed damages;[32] abandoning the actual

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[24] UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT Prefatory Note (1994) [hereinafter CORRECTION ACT]. "Clarification" may be a term more palatable to media defendants, while "correction" seems designed to appease defamation plaintiffs.

[25] *Id.* § 5.

[26] The Annenberg Washington Program Proposal for the Reform of Libel Law (1988) was issued under the auspices of the Annenberg Washington Program in Communications Policy Studies of Northwestern University.

[27] Smolla & Gaertner, *supra* note 21, at 33.

[28] The proposal was introduced in the U.S. House of Representatives as H.R. 2846 in 1985 by Congressman Charles Schumer (D-N.Y.), who drafted it along with Law Professor David A. Barrett of Rutgers University. The bill is reprinted in Franklin, *supra* note 22, at 832-35.

[29] *Id.* at 837.

[30] The proposal was drafted by Law Professor Marc A. Franklin of Stanford University. It is reprinted in full in Franklin, *supra* note 22, at 812-813.

[31] Barrett, *supra* note 12, at 852.

[32] *See, e.g.*, David Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY

malice standard;[33] granting the media absolute privilege when dealing with matters of public concern, but allowing the states to determine the standard of press protection for all other instances;[34] reducing the role of juries in at least the damages stage of defamation trials;[35] and increasing the use of processes outside the courts to resolve libel disputes, such as alternative dispute resolution[36] and press or media councils (such as the Honolulu Community Media Council)[37] to settle

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L. REV. 747, 774-78 (1984)(advocating abolition of punitive damages and limiting damages to compensation for actual injury); Nicole B. Cásarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667 (1994)(favoring elimination of punitive damages in public plaintiff libel actions and reasonable limits on presumed damages with a cap set by legislatures or the courts). *Id.* at 669, 699.

[33] *See generally* BRUCE FEIN, NEW YORK TIMES v. SULLIVAN: AN OBSTACLE TO ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE 11 (1984)(maintaining that the *N.Y. Times* case deters people from entering government service). For an opposing view (and a detailed look at the actual malice standard of the New York Times Rule and its antecedents), *see* W. WAT HOPKINS, ACTUAL MALICE TWENTY-FIVE YEARS AFTER TIMES v. SULLIVAN (1989)(concluding that the Rule works well in balancing the interest in public debate and in protecting reputations, and thus should be maintained for all persons involved in matters of public concern).

[34] Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan*, 25 ST. LOUIS U. L.J. 501 (1981).

[35] *See, e.g.*, Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989); Lewis, *supra* note 10.

[36] *See* Roselle Wissler, Gilbert Cranberg, et al., *Resolving Libel Cases Out of Court: How Attorneys View the Libel Dispute Resolution Program*, 75 Judicature 329 (1992) for a discussion of one alternative to litigation of defamation disputes designed by the Iowa Libel Research Project and the American Arbitration Association.

[37] Founded in 1970, the Honolulu Community Media Council is comprised of approximately forty-five members, who form a cross-section of the community. Bylaws specify that no more than one-third of the group's composition can be journalists. Lawyers, the clergy, professors, housewives and labor leaders are all represented. Currently headed by University of Hawaii Professor Richard S. Miller, the Council aims to resolve complaints by persons or organizations charging unfair treatment of the media, or by the media against public officials for the alleged mishandling or withholding of public information. Telephone Interview with Ah Jook Ku, Secretary (since 1975) of the Honolulu Community Media Council (Mar. 21, 1994).

For more on the Honolulu Community Media Council, *see, e.g.*, Vicki Viotti, *TV News Undergoes Critique*, HONOLULU ADVERTISER, Sept. 9, 1992, at A6; *Oahu's Two Dailies Lacking in Major Areas, Panel Says*, HONOLULU ADVERTISER, Oct. 31, 1991, at A9. For further discussion of the efficacy of news councils, *see, e.g.*, Jonathan Friendly, *National News Council Will Dissolve*, N.Y. TIMES, Mar. 23, 1984, at B18; John Hughes,

defamation disputes without litigation.[38] The United States can also look to other countries which have wrestled with the defamation issue, such as Canada.[39] England[40] and Australia[41] are currently re-assessing the effectiveness of their defamation laws, mirroring our own struggle for an equitable balance between safeguarding free speech and individual reputation.

C. *Media Resistance to Change*

Any movement to reform defamation law in the United States faces the formidable obstacle of media reluctance to change the rules which have thus far afforded them substantial legal protection.[42] Thus, they feel no urgency to reform the law. The number of libel suits involving the media has declined in recent years.[43] The rate of defense wins at trial has been on the rise since 1990.[44] Fewer awards overall have been assessed against the media,[45] with a sharp decrease in the frequency of

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Could a Press Council Improve Journalism? CHRISTIAN SCIENCE MONITOR, Feb. 17, 1994, at 19; Susan Sevareid, *News Council Lets People Who Are Mad at the Media Blow Off Steam*, L.A. TIMES, May 2, 1993, at A22.

[38] John A. Ritter & Matthew Leibowitz, *Press Councils: The Answer to Our First Amendment Dilemma*, 1974 DUKE L.J. 845 (1974).

[39] Kathleen A. O'Connell, *Libel Suits Against American Media in Foreign Courts*, 9 DICK. L. REV. 147, 157-62 (1991).

[40] *See generally* Sean Thomas Prosser, *The English Libel Crisis: A Sullivan Appellate Review Standard Is Needed*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 337 (1992); Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993).

[41] Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1 (1991).

[42] *See, e.g.*, Ben Dunlap, Jr., *The Uniform Defamation Act: Is Too Much Being Asked of the Press in the Quest for Libel Law Reform?* 15 HASTINGS COMM. & ENT. L.J. 21, 54 (1992).

[43] The LDRC reports that the number of libel and related media trials was down markedly in 1992-93, with 12 trials per year versus 17.5 per year for 1990-91 and 25.4 per year for the decade of the 1980s. LDRC BULL., *supra* note 15, at 3.

[44] *Id.* In 1992-93, media defendants won 45.5% of all jury trials, compared to 25.8% for 1991-92 and 26.3% for the decade of the 1980s. The win rate for all trials (including directed verdicts and bench-tried cases) also rose, reaching 47.8% in 1992-93, compared to 32.4% for 1990-91 and 34.3% for the 1980s overall. *Id.*

[45] *Id.* The number of awards against media defendants fell from an average of 15.8 per year during the 1980s to 10.5 per year in 1990-91 and to 5.5 per year in 1992-93. *Id.*

punitive and multimillion dollar awards.[46] And despite a nascent defamation insurance crisis in the mid-1980s,[47] when million dollar awards against media defendants were at their peak, the nationwide market has now stabilized,[48] including the one in Honolulu.[49] Policies are generally available to cover defamation risks under the current law. Thus, if a media defendant loses a judgment, the worst consequence it is likely to suffer is a hike in insurance premiums; only rarely will a media company go out of business.

The paramount fear among the media is that defamation "reforms" might make it easier for plaintiffs to prevail and thus lead to an increase in lawsuits seeking damages.[50] Such a scenario could hobble the media and have a chilling effect on freedom of expression.[51] The cloud of self-censorship might hover ominously over newsrooms, potentially

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[46] *Id.* at 4. The LDRC found that 18.2% of awards for 1992-93 exceeded $1 million, while the adjusted incidence of $1 million awards for 1990-91 was 52.2% and 22.8% for the 1980s. *Id.*

[47] *See generally* Donald Baer, *Insurers to Libel Defense Counsel: "The Party's Over,"* AMERICAN LAWYER, Nov. 1985, at 69-72.

[48] Chad E. Milton, *Copyright, Trademark and Unfair Competition Litigation from the Insurer's Perspective*, 374 PLI/PAT 653 (1993).

[49] The editor of THE HONOLULU ADVERTISER (weekday circulation: 110,000) said his newspaper has experienced no difficulty in obtaining libel insurance coverage, although the number of insurers offering such policies is down. Telephone Interview with Gerry Keir, Editor of THE HONOLULU ADVERTISER (Mar. 1994). Similarly, an executive with HONOLULU MAGAZINE (monthly circulation: 30,000) said his publication has had no trouble obtaining libel coverage and premiums have remained stable. Telephone Interview with Nick Tinebra, Vice President of Finance of HONOLULU MAGAZINE (Mar. 1994).

But the publisher of THE HONOLULU WEEKLY (controlled circulation: 33,000) said her publication has never carried libel insurance because it is too expensive and the deductible is so high ($10,000). She noted, however, that her publication has ample legal help: several lawyers own part of the WEEKLY and would likely defend it against libel suits should any be filed against it (so far, she says, none has). Telephone Interview with Laurie Carlson, Publisher of THE HONOLULU WEEKLY (Mar. 1994).

[50] *See, e.g.*, Goodchild, *supra* note 16. *See also* DONALD M. GILMORE, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW ix (1992)(asserting that "the rich and famous, the politically powerful, the anointed of our society" have used libel litigation as "a devastatingly effective weapon for silencing those who dare to challenge the morality of power, privilege, and prestige.").

[51] Goodchild, *supra* note 16. Increasing numbers of Strategic Lawsuits Against Public Participation ("SLAPPs") indicate that governmental and nongovernmental plaintiffs recognize the intimidating power of filing libel suits against the media and private citizens who voice opposition to their actions. *See, e.g.*, GILMORE, *supra* note 50, at 40-41.

resulting in less aggressive reporting and in the avoidance of controversial topics.[52] Also, large judgments against small or medium-sized media companies might drive them out of business,[53] thus providing fewer forums for freedom of speech.[54]

However, if defamation law is to be reformed, media support is essential because nonmedia plaintiffs and defendants lack a collective voice to raise on behalf of changes in the law. As a group, they are too unorganized. There is also no organized plaintiff's libel bar. Furthermore, state courts have been reluctant to innovate because defamation law since *New York Times*[55] largely rests on a federal constitutional basis.[56] And without political impetus for change, legislators are unlikely to push for reform.[57]

D. Impetus for Reform

But there are compelling reasons for the media to reconsider the need for defamation law reform, especially when they are not embroiled in the heat of a crisis. Although media defendants won most of the defamation suits filed against them recently, several multimillion dollar judgments were entered against them during the 1980s and early 1990s;[58]

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[52] Goodchild, *supra* note 16.

[53] THE ALTON TELEGRAPH (daily circulation: 38,000) had a profit margin of $200,000 annually. But after the Illinois newspaper lost a $1.5 million libel judgment (*Green v. Alton Telegraph Co.*, No. 77-66 (Madison County, Ill. 1980), *appeal dismissed*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982)) and incurred more than $600,000 in defense costs, it was forced to file for bankruptcy. It did not go out of business, but has severely curtailed investigative reporting. Cook, *supra* note 35, at 278-79. *See also* Alex S. Jones, *Libel Threat Is Increasing Even for Small Publications*, N.Y. TIMES, Feb. 3, 1992, at D8.

[54] Even the global computer network, Internet, is not immune from libel suits. In what is believed to be one of the first such lawsuits against the global computer network, a direct mail company sued the writer of the CYBERWIRE DISPATCH "newswire" for writing a critical article, calling the company a "scam" and charging it with making misleading sales pitches. Jared Sandberg, *Suarez Corp. Settles Defamation Lawsuit Against Newsletter*, WALL ST. J., Aug. 24, 1994, at B6.

[55] 376 U.S. 254 (1964).

[56] Anderson, *supra* note 22, at 504.

[57] *Id.*

[58] According to findings by the LDRC released in February 1994, damages awarded during 1992-93 dropped off notably in all categories from 1990-91. For example, the average total award of just over $1 million was reduced from an adjusted average of over $8 million from the prior two years. The average punitive award plummeted

that could happen again.[59] With no ceiling on punitive damages, juries have not hesitated to award six- and seven-figure punitive damage awards against media defendants, reflecting apparent grassroots disenchantment with the media.[60]

Defending suits is time-consuming[61] and expensive, often totaling millions of dollars.[62] This fact is not lost on the relatively few insurers

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from more than $7 million to just over $0.5 million. Both total and punitive awards were also significantly lower than averages for the 1980s: $1.5 million (average total award for the decade) and $1.6 million (average punitive award for the decade). The average compensatory award during 1992-93 was $0.9 million compared to over $2.6 million in 1990-91. LDRC BULL., *supra* note 15, at 3.

But the Center cautions against projecting long-term trends based on the data for such a brief period. For example, during 1987-88, the LDRC found that the average media libel award fell to less than $0.5 million, only to have the average award soar in succeeding years to $4 million and then to more than $8 million by 1990-91. The issue of mega-libel awards, in its view, has not been resolved. *Id.*

[59] In 1994, Philip Morris filed what may be the largest defamation action ever, a $10 billion lawsuit, against Capital Cities/ABC, Inc. and two employees for a television report alleging that the tobacco industry laced cigarettes with extra nicotine to make them more addictive. *See, e.g.*, Elizabeth Jensen & Eben Shapiro, *Philip Morris Suit Against ABC News Seeks $10 Billion, Alleges Defamation*, WALL ST. J., Mar. 25, 1994, at B12; Michael Janofsky, *Philip Morris Accuses ABC of Libel*, N.Y. TIMES, Mar. 25, 1994, at A15.

[60] Chicago attorney Don Reuben characterized the public's view toward the media in less than flattering terms:

> [Members of the media] are rude and accusatory, cynical and almost unpatriotic. They twist facts to suit their not-so-hidden liberal agenda. They meddle in politics, harass business, invade people's privacy, and then walk off without regard to the pain and chaos they leave behind. They are arrogant and self-righteous, brushing aside most criticism as the uninformed carping of cranks and ideologues. To top it off, they claim that their behavior is sanctioned, indeed sanctified, by the U.S. Constitution.

Journalism Under Fire, TIME, Dec. 12, 1983, at 76-77 (*quoted in* Goodchild, *supra* note 16, at 357).

[61] The actual malice standard causes plaintiffs to seek extensive discovery of editorial decision-making processes, which is often the only way to ascertain whether a defendant acted knowingly or recklessly. In Herbert v. Lando, 568 F.2d 974, 982 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979), discovery lasted eight years. Lewis, *supra* note 10, at 611-12. In Hawaii, businessman Larry Mehau's lawsuit against United Press International (for republishing a weekly newspaper's report that Mehau was the "godfather" of organized crime in the state) took thirteen years to settle. *See After 13 Years, Mehau Settles His UPI Lawsuit*, HONOLULU ADVERTISER, July 20, 1990, at A3.

[62] Goodchild, *supra* note 16, at 322. CBS allegedly spent as much as $5 million to defend the defamation suit brought by General William Westmoreland in *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985). Abrams, *supra* note 8, at 90. ABC paid $7

in the media insurance field,[63] who pay out a greater percentage of monies for defense costs than for actual damages.[64] Consequently, insurers are likely to exert more pressure on the media to bring their defense costs under control in return for coverage renewal,[65] especially if the media suffer a spate of significant losses, as they did in 1986.[66] The alternative could be severe restrictions on the availability of defamation insurance (e.g., forms of coverage, amount limitations, exclusion of punitive damages,[67] etc.), which could have as chilling an effect upon the media as any attempts to infringe on First Amendment protections.

In addition to the financial ramifications, defamation suits often exact a personal cost. Defending the suits causes time and effort to be siphoned away from the normal pursuits of the job. And in extreme circumstances, the experience can take a heavy physical toll. For example, CBS newsman Mike Wallace was hospitalized for exhaustion after taking part in the defense of the *Westmoreland* suit filed against his network.[68] Another incentive to reform defamation law in the United States lies in the rising number of defamation suits being brought against American media companies abroad, with plaintiffs beginning

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million before settling with the Synanon Foundation. Charles P. Wallace, *ABC Payoff: Unanswered Questions*, L.A. TIMES, July 3, 1982, at 1.

[63] Milton, *supra* note 48.

[64] Ann L. Heavner, *Libel Insurance: Notes for the Practitioner*, 227 PLI/PAT 27 (1986). The article mentioned that one unnamed underwriter said that aside from huge awards by juries, the one element that sends "shock waves" through an insurance company is the awareness that a defense is out of control.

[65] *Id.*

[66] *Id.* During the peak of the crisis, it was not unusual for media insurance buyers to experience premium hikes of between 25% to 200%, higher deductibles, severely reduced coverage terms and defense participation terms of 20%. Individual syndicates at Lloyds of London, the primary reinsurers for most American domestic insurers of defamation insurance, were unwilling to reinsure many of the major America media and communications corporations. The maximum amount for all Lloyds syndicates reinsuring any one American primary carrier ranged from $1 million to $5 million, down from $15 million one year earlier. *Id.*

[67] Milton, *supra* note 48, at 3. Some states, such as New York, California and Illinois (but not Hawaii) already limit or proscribe insurance against punitive damages (although for First Amendment reasons, such proscriptions may be constitutionally suspect for media insureds). *See also* BARBARA DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 185-86 (1986)(listing the states which have declared insurers' reimbursement of punitive damages to be against social policy and thus forbid the practice); Peter Pae, *Pittsburgh Paper Sues Insurer to Pay Punitive Damages*, WALL ST. J., July 13, 1989, at B6.

[68] Goodchild, *supra* note 16, at 324 (citing WASH. POST, Jan. 4, 1985, at D1).

to forum shop to maximize their chances of recovery.[69] As the American media expand into international markets, foreign plaintiffs have sometimes found English and Canadian libel laws more sympathetic to their claims.[70]

III. Development of Defamation Law

Defamation law, aimed at protecting a person's reputation from false statements, predates the Norman Conquest.[71] The earliest remedies consisted of a public apology and possibly some form of physical punishment, such as cutting off the defamer's tongue.[72] After the Conquest, church courts had jurisdiction over defamation claims; physical punishment was out and public vindication was the sole remedy.[73] Monetary damages became available once the common law courts obtained jurisdiction in the early sixteenth century.[74]

A. Common Law

Defamation, comprised of slander (spoken defamation) and libel (written defamation) was, until the 1964 *New York Times Co. v. Sullivan*[75] decision, a strict liability offense under the modern common law.[76] To

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[69] O'Connell, *supra* note 39, at 148. *See also* Charles Goldsmith, *British Libel Statutes Are Facing Reform*, Wall St. J., May 14, 1993, at A7D (discussing a former Washington Post correspondent's decision to sue Time Magazine for libel in Great Britain, as opposed to the United States).

[70] O'Connell, *supra* note 39, at 148.

[71] J. Lovell, *The "Reception" of Defamation by the Common Law*, 15 Vand. L. Rev. 1051, 1052 (1962)(*cited in* Douglas R. Matthews, *American Defamation Law: From Sullivan, Through Greenmoss, and Beyond*, 48 Ohio St. L.J. 513, 514 n.12 (1987)).

[72] *Id.*

[73] Keeton, *supra* note 1, § 111, at 772.

[74] *Id.*

[75] 376 U.S. 254 (1964).

[76] Rex v. Woodfall, Lofft 776, 781, 98 Eng. Rep. 914, 915 (1774). *See also* Restatement (First) of Torts §§ 558, 563, 564, 579, 580 (1938).

Currently, to establish a prima facie case for either slander or libel, the plaintiff must prove four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party (i.e., communicating that statement to a person other than the plaintiff); (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Restatement (Second) of Torts § 558 (1977). *See also* Keeton, *supra* note 1, § 113, at 810.

prevail, a plaintiff need only prove that the defendant made a non-privileged defamatory statement about the plaintiff to a third person.[77] Truth was an affirmative defense.[78]

For slander per se,[79] where the defamatory meaning was apparent on the face of the statement, harm was presumed and the jury could award damages without further proof. But for slander per quod, where the defamatory meaning arose only from extrinsic facts, not from the face of the statement, the plaintiff needed to prove actual pecuniary harm, called special damages.[80] To recover for libel, the plaintiff did not have to show such special harm[81] (although some courts required the plaintiff to do so if the defamatory nature of the statement was not evident on its face).[82]

Recognizing that allowing recovery for damages could have a "chilling effect" on legitimate speech, the common law developed privileges. They include: absolute privileges, applied to such statements as those made during governmental proceedings or by a government official acting within the scope of official duties;[83] and qualified or conditional privileges, which would be lost if the defendant abused them, such as

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[77] RESTATEMENT (FIRST) OF TORTS § 558. *See also* KEETON, *supra* note 1, § 111, at 771.

[78] KEETON, *supra* note 1, § 113A, at 813. Under the common law, everyone had a qualified privilege of "fair comment" on matters of public interest. *Id. See also* RESTATEMENT (FIRST) OF TORTS § 606.

[79] Slander per se consists of four categories: words imputing to the plaintiff (1) a criminal offense punishable by imprisonment in a state or federal institution, or regarded by public opinion as involving moral turpitude, RESTATEMENT (SECOND) OF TORTS § 571; (2) an existing venereal disease or other loathsome and communicable disease, *id.* at § 572; 3) conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, *id.* at § 573; and (4) serious sexual misconduct, *id.* at § 574.

[80] RESTATEMENT (SECOND) OF TORTS §§ 570, 575.

[81] KEETON, *supra* note 1, § 112, at 794-95.

[82] *Id.* Before the U.S. Supreme Court decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), American courts differed regarding the necessity for proving special damages in two types of cases: 1) when the publication was innocent on its face and became defamatory only to those who were aware of defamatory facts "extrinsic" to the matter published (libel per quod); and when the statement published was susceptible of more than one meaning, one of which was innocent. But since *Gertz*, recovery of presumed or punitive damages is not permitted against the media unless the plaintiff proves through clear and convincing evidence that the defendant acted with actual malice. *Id.*

[83] RESTATEMENT (SECOND) OF TORTS §§ 583-592A.

when the publication was knowingly false, unprivileged information was included, or information exceeding the scope of the privilege was published.[84]

B. Constitutionalizing Defamation Law: New York Times Co. v. Sullivan

Before the seminal case of *New York Times Co. v. Sullivan*,[85] the United States Supreme Court had held that defamatory statements were outside the protection of the First Amendment and that defamation was largely a matter of state law.[86] But in *New York Times*, the Court ruled that the First Amendment limited a state's power to establish its own defamation law. The Court found "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[87]

Consequently, the Court recognized the need for a federal rule that would prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[88] The policy concern was that a state "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'"[89]

With *New York Times*, the Supreme Court began balancing the interests of preserving freedom of expression against protecting an individual's reputation in light of constitutional policies. Each case that followed sculpted further refinements onto the face of defamation law. Among the key features that define the law's contours are the status

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[84] *Id.* at §§ 593-598A.

[85] 376 U.S. 254 (1964).

[86] *See* Roth v. United States, 354 U.S. 476, 482-83 (1957) (stating that "[l]ibelous utterances are not within the area of constitutionally protected speech."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting that libelous speech is among the "limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

[87] New York Times Co. v. Sullivan, 376 U.S. at 270.

[88] *Id.* at 279-80.

[89] *Id.* at 279.

of the plaintiff (public official or public figure versus private individual) and the subject matter of the statement (public issue versus private). Those features, in turn, determine which standard of liability a plaintiff must meet in order to recover a specific category of damages.

C. Further Defining Media Protection

In *Curtis Publishing Co. v. Butts*,[90] the Court extended the *New York Times* rule beyond public officials to public figures. The Court explained:

> [M]any who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. . . .[A]lthough they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities.[91]

The Court viewed the *New York Times* rule as "an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest."[92]

The Court then began to enunciate the standards it would apply in determining whether the statement at issue satisfied the *New York Times* rule. In *Garrison v. State of Louisiana*,[93] the Court explained that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."[94] Subsequently, in *St. Amant v. Thompson*,[95] the Court held that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[96] The Court also required that both public officials and public figures prove actual malice by clear and convincing evidence.[97]

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[90] 388 U.S. 130 (1967).
[91] *Id.* at 164.
[92] *Id.* at 164-65.
[93] 379 U.S. 64 (1964).
[94] *Id.* at 74.
[95] 390 U.S. 727 (1968).
[96] *Id.* at 731.
[97] Gertz v. Robert Welch, Inc., 418 U.S. 323, 324 (1974).

Nowhere did the Court's divergent thoughts about how to reconcile defamation law with the First Amendment emerge more clearly than in *Rosenbloom v. Metromedia*.[98] The eight justices who took part in that decision issued five separate opinions, none of which garnered more than three votes. Writing for the Court, Justice Brennan was joined by only Chief Justice Burger and Justice Blackmun when he stated that the *New York Times* rule should be applied to private persons whenever the challenged statements concerned matters of general or public interest. However, three years later, the Court repudiated the plurality's decision in *Rosenbloom* with its holding in *Gertz v. Robert Welch, Inc.*[99] The majority refused to extend the *New York Times* privilege to defamation actions involving a private individual because such a person

> relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.[100]

In *Gertz*, the Court crystallized its thoughts regarding the proper role of states in defamation actions, largely limiting their impact. It held that the states could define the standard of liability for a broadcaster or publisher who injured a private individual with a defamatory falsehood and should have "substantial latitude" in enforcing an appropriate legal remedy.[101] However, the majority believed that important constitutional protections were also necessary. In *Gertz*, the Court held that the states could not impose strict liability in defamation cases: some showing of fault was required.[102] That approach "recognizes

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[98] 403 U.S. 29 (1971).

[99] 418 U.S. 323 (1974).

[100] *Id.* at 345. *See* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (holding that the wife of the son of a wealthy industrialist was not a public figure because she had not thrust herself voluntarily into the public eye: she was compelled to go to court to get a divorce.); Hutchinson v. Proxmire, 443 U.S. 111, 135-36 (1979) (holding that a behavioral scientist was not a public figure because he had not thrust himself or his views into a public controversy to influence others; any notoriety or access to the media he acquired was the direct result of the alleged defamation.). *See also* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167-68 (1979)(stating that "[a] libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.").

[101] *Gertz*, 418 U.S. at 345-46.

[102] *Id.* at 348.

the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."[103]

The Court also held that the states could not allow private plaintiffs to recover presumed or punitive damages for defamation if the plaintiffs proved less than actual malice; they could recover damages only for actual injury.[104] However, as subsequently held in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[105] a private plaintiff suing over statements involving strictly private matters need not show actual malice to recover presumed and punitive damages. Proof of negligence sufficed.[106]

Which standard of review is required for actual malice? Ten years after *Gertz*, the Supreme Court dealt with that issue in *Bose Corp. v. Consumers Union of United States, Inc.*[107] It held that in cases involving the First Amendment, appellate judges have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity" rather than simply to apply the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure.[108] In other words, whether the evidence in the record supports a finding of actual malice is a question of law to be reviewed de novo. As the Court elaborated in *Harte-Hanks Communications, Inc. v. Connaughton*,[109] actual malice is not satisfied by a showing of ill will. Rather, "a public figure plaintiff must prove more than an extreme departure from professional standards."[110]

The Supreme Court increased the burden of proof on private plaintiffs in *Philadelphia Newspapers, Inc. v. Hepps*.[111] It held that they must prove falsity (in addition to establishing fault) when suing a media defendant over speech of public concern.[112] Proof of actual malice was insufficient to recover damages. This was a reversal of the common law, which presumed that defamatory speech was false and placed the

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[103] *Id.*

[104] *Id.* at 350.

[105] 472 U.S. 749 (1985).

[106] *Id.* at 761. However, the question of whether proof of negligence is actually required in a case of purely private libel against a nonmedia defendant has not been decided yet.

[107] 466 U.S. 485 (1984).

[108] *Id.* at 514.

[109] 491 U.S. 657, 667 (1989).

[110] *Id.* at 665.

[111] 475 U.S. 767 (1986).

[112] *Id.* at 776.

burden of proving truth on the defendant.[113] Thus, the effect of *Hepps* is that except for private plaintiffs suing over purely private matters,[114] plaintiffs in all other defamation cases bear the burden of proving truth. The goal is "to ensure that true speech on matters of public concern is not deterred."[115] But the decision dealt a setback to another legitimate state interest: that of protecting a private individual's reputation.[116]

The Supreme Court further narrowed the grounds on which a defamation action could lie. In *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*,[117] the Court held that characterizing the negotiating stance of a public figure as "blackmail" was neither slander, when said in a heated public meeting, nor libel, when reported in the press. Writing for the majority, Justice Stewart noted that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[118]

In *Hustler Magazine, Inc. v. Falwell*,[119] the Supreme Court barred recovery for an emotional distress action arising from an ad parody that imputed sexually deviant behavior to a televangelist. And in *Masson v. New Yorker Magazine, Inc.*,[120] the Court held that deliberately altering the plaintiff's words did not rise to the level of knowledge of falsity under the *New York Times* rule unless the alteration materially changed the meaning that the statement conveyed.[121] The Court noted that "the use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case."[122]

D. Limiting the Scope of New York Times

Some critics contend that since the *New York Times* ruling, defamation law has been wrapping a protective coating around media defendants,

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[113] *Id.*

[114] *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

[115] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

[116] Thomas P. Branigan, *Truth or Consequences: Philadelphia Newspapers, Inc. v. Hepps*, 1986 DET. C.L. REV. 1219, 1225 (1986).

[117] 398 U.S. 6 (1970).

[118] *Id.* at 14.

[119] 485 U.S. 46 (1988).

[120] 501 U.S. 496 (1991).

[121] *Id.* at 517.

[122] *Id.*

largely insulating them from liability, while leaving those with damaged reputations out in the cold.[123] But the Supreme Court has limited the scope of its landmark 1964 decision in some ways. As previously discussed, *Dun & Bradstreet*[124] excused a private plaintiff suing over a private matter from having to prove actual malice to recover damages. Some cases have narrowed the application of the actual malice test by refining the definition of who is a public figure, such as in *Hutchinson v. Proxmire*,[125] *Wolston v. Reader's Digest Ass'n*,[126] and *Time, Inc. v. Firestone*.[127] Other decisions have had the effect of restricting the media's procedural rights, such as in *Keeton v. Hustler Magazine*,[128] where the Court found that a publication can be sued even in a jurisdiction which accounts for only a small part of its circulation. The Court has also declined to extend First Amendment protection to the editorial process, refusing to bar inquiry into the state of mind of media defendants in *Herbert v. Lando*.[129] And in *Milkovich v. Lorain Journal Co.*,[130] the Court stated that there is "no wholesale defamation exemption for anything that might be labeled 'opinion'."[131] The Court reasoned that a separate constitutional privilege for opinion was unnecessary. Safeguards already in place against defamation liability ensured freedom of expression.[132] Citing its decision in *Hepps*,[133] the Court noted that before media defendants could be held liable for statements of public concern, the statement must be proven false and fault must be established.[134]

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[123] Jerome A. Barron, *Punitive Damages in Libel Cases—First Amendment Equalizer?* 47 WASH. & LEE L. REV. 105, 116 (1990).

[124] 472 U.S. 749 (1985).

[125] 443 U.S. 111 (1979).

[126] 443 U.S. 157 (1979).

[127] 424 U.S. 448 (1976).

[128] 465 U.S. 770 (1984).

[129] 441 U.S. 153 (1979). The Court held that allowing broad discovery of the editorial process was necessary to enable the plaintiff to obtain evidence to prove the defendant's state of mind, which is a critical element of a defamation action against a media defendant. *Id.* at 169-72.

[130] 497 U.S. 1 (1990).

[131] *Id.* at 18.

[132] *Id.* at 21.

[133] 475 U.S. 767 (1986).

[134] *Milkovich*, 497 U.S. at 16 (*citing Hepps*, 475 U.S. at 776). In a recent controversial case distinguished from *Milkovich*, Moldea v. New York Times Co., 793 F. Supp. 335 (D.C. Cir. 1992), 15 F.3d 1137 (D.C. Cir. 1994), 22 F.3d 310 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 202 (1994), the author of a book, entitled INTERFERENCE: How ORGANIZED CRIME INFLUENCES PROFESSIONAL FOOTBALL, sued the newspaper for $10

In summary, current defamation law, shorn of its nuances, provides the following: (1) plaintiffs who are public figures or public officials must prove actual malice to prevail (*New York Times Co. v. Sullivan, Curtis Publishing Co. v. Butts*); (2) plaintiffs who are private figures need not satisfy the actual malice standard (*Gertz v. Robert Welch, Inc.*), but must prove falsity and establish fault when suing a media defendant over speech of public concern (*Philadelphia Newspapers, Inc. v. Hepps*); (3) if the challenged statement involves a public matter, plaintiffs must prove at least negligence and are barred from recovering presumed or punitive damages unless they can show actual malice (*Gertz v. Robert Welch, Inc.*); and (4) if the challenged statement involves a private matter, private plaintiffs need not show actual malice to recover presumed or punitive damages (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*).

IV. Defamation Law in Hawaii

The wording of Article I, Section 4 of the Hawaii Constitution is nearly identical with that of the First Amendment to the United States Constitution: Hawaii prohibits any law "abridging the freedom of speech or of the press." But while the U.S. Supreme Court has used the First Amendment as the basis for expanding free speech protection, Hawaii has chosen a somewhat different emphasis. Hawaii has been generally viewed as a pro-plaintiff state[135] with a pronounced tilt in favor of protecting an individual's reputation over safeguarding free expression.[136] The decisions rendered in many cases in Hawaii handed

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million over its review asserting that the book reflected "too much shoddy journalism." The issue was whether a book review must be held to the same standards of accuracy and honesty that apply to news stories. The federal appeals court panel, after initially holding the other way, reversed itself and ruled that the remark was not capable of a defamatory meaning. Unlike in *Milkovich*, where the statements complained of appeared in a newspaper column, the statements against Moldea "were evaluations quintessentially of a type readers expect to find in that genre." 22 F.3d at 315. *See also News Notes: DC Circuit Amends Decision in 'Shoddy Journalism' Action*, 22 Media L. Rep. (BNA) 1576-77 (1994).

[135] Susan Kee-Young Park, *Defamation: A Study in Hawaii Law*, 1 U. Haw. L. Rev. 84, 110 (1979).

[136] *But see* Richard S. Miller & Geoffrey K. S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. Haw. L. Rev. 55 (1992). The authors' thesis is that the pro-plaintiff tort revolution in Hawaii is over, as evidenced by rulings of the Hawaii Supreme Court during Chief Justice Herman Lum's tenure. The "rights of

down before statehood would probably be unconstitutional today under *New York Times* and its progeny.

A. Evolution of Case Law

The Hawaii Supreme Court, in *Fernandes v. Tenbruggencate*,[137] ascribes to the definition of defamation set forth in the Restatement (Second) of Torts, section 559, namely: "A communication is defamatory when it tends to 'harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.'"[138]

Traditionally, the Hawaii Supreme Court has narrowly interpreted the right to free speech in defamation cases,[139] while defining defamation broadly.[140] As in many other states, the publication requirement for defamation is satisfied as soon as the statement is communicated to a third party, no matter how slight the resultant harm.[141] Thus, when the plaintiff shows that the defamatory statement was made to just one

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victims and insureds have been kept within narrow bounds and opportunities to expand recovery have generally been rejected." *Id.* at 66. The authors attribute the shift to: 1) changes in community attitudes toward the alleged excesses of the tort and insurance systems, *id.* at 64; and 2) the problems of insurance availability and affordability, *id.* at 114. The current Chief Justice, Ronald Moon, has presented mixed signals. The authors say that although he has seemed to side more often with accident victims, he has also favored reducing insurance costs and has been part of the Court's move toward greater conservatism. *Id.* at 116.

[137] 65 Haw. 226, 649 P.2d 1144 (1982).

[138] *Id.* at 228, 649 P.2d at 1147.

[139] Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395, 421 (1992).

[140] *Id.* at 410. *See also* Fong v. Merena, 66 Haw. 72, 655 P.2d 875 (1982), in which the court defined defamation as a communication that tends so to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* at 74 n.2, 655 P.2d at 876 n.2 (quoting RESTATEMENT (SECOND) OF TORTS § 559). A prima facie case of defamation in Hawaii consists of four elements: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting to at least negligence on the part of the publisher (actual malice where the plaintiff is a public official or figure); and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Beamer v. Nishiki, 66 Haw. 572, 578-79, 670 P.2d 1264, 1271 (1983) (quoting RESTATEMENT (SECOND) OF TORTS § 558).

[141] Chedester v. Stecker, 64 Haw. 464, 469, 643 P.2d 532, 535 (1982).

other person, the defendant cannot escape liability by contending that the defamation was de minimis.[142]

The statute of limitations for defamation is two years after the cause of action has accrued.[143] The statute is interpreted such that "a claim for defamation accrues when the defamee discovers or reasonably should have discovered the publication of the defamation."[144] That liberal definition gives defamation plaintiffs in Hawaii more time to file suit than they would have in most other jurisdictions, where the statute of limitations usually begins to run from the date of publication.[145]

In *Tagawa v. Maui Publishing Co.*,[146] the Hawaii Supreme Court defined actual malice as "'deliberate falsification' of facts or 'reckless disregard' of the truth."[147] Reckless conduct, in *Mehau v. Gannett Pacific Corp.*,[148] is measured by whether the defendant had serious doubts regarding the truth of his publication. But *Tagawa* made it clear that a publisher could not avoid liability by merely asserting good faith and belief in the statement's accuracy when there are obvious reasons to doubt its veracity.

Private individuals bringing defamation actions against media defendants must prove only negligence to receive compensatory damages; but in such cases, a private individual suing for punitive damages cannot recover them unless actual malice is shown.[149] In *Cahill v. Hawaiian Paradise Park Corp.*,[150] the Hawaii Supreme Court refused to extend the *New York Times* rule to protect statements of public interest or concern.[151] However, the actual malice rule does apply to public officials

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[142] *Id.* at 469, 643 P.2d at 535.

[143] HAW. REV. STAT. § 657-4 (1985).

[144] Hoke v. Paul, 65 Haw. 478, 483-84, 653 P.2d 1155, 1159 (1982)(holding that each republication of reports by a police officer triggered a new limitations period).

[145] JEFFREY S. PORTNOY, MASS COMMUNICATION LAW IN HAWAII 17-18 (1994).

[146] 50 Haw. 648, 448 P.2d 337, *cert. denied*, 396 U.S. 822 (1968).

[147] *Id.* at 652, 448 P.2d at 340.

[148] 66 Haw. 133, 147, 658 P.2d 312, 322 (1983)(citations omitted).

[149] *See* Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 535-36, 543 P.2d 1356, 1365-66 (1975)(citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[150] 56 Haw. 522, 543 P.2d 1356 (1975). The court (quoting from its opinion in Aku v. Lewis, 52 Haw. 366, 378, 477 P.2d 162, 169 (1970)), stated: "In adopting the standard of reasonable care, we conclude that it is in society's interest in these circumstances to make defaming publishers less willing to speak due to the risk of being found negligent." 56 Haw. at 533, 543 P.2d at 1364.

[151] 56 Haw. at 535, 543 P.2d at 1365.

and public figures.[152] The court initially decides whether a particular statement can be found to be defamatory on its face or is potentially defamatory by innuendo.[153] All libel (except perhaps where extrinsic facts are required for proof) is seemingly treated as actionable per se,[154] meaning that general damages are presumed and special damages need not be shown.[155]

Judicial restraint characterizes the court's handling of defamation cases.[156] Generally, the court has been reluctant to uphold summary

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[152] In Tagawa v. Maui Publishing Co., 50 Haw. 648, 652, 448 P.2d 337, 340, *cert. denied*, 396 U.S. 822 (1968), the Hawaii Supreme Court adopted the actual malice standard articulated in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), i.e., "'deliberate falsification' of facts or 'reckless disregard' of the truth, i.e., reckless publication despite a high degree of awareness, harbored by the publisher, of the probable falsity of the published statements."

[153] The court must first decide "whether as a matter of law 'the communication is capable of bearing the meaning ascribed to it by the plaintiff and whether the meaning so ascribed is defamatory in character.'" Fernandes v. Tenbruggencate, 65 Haw. 226, 228 n.1, 649 P.2d 1144, 1147 n.1 (1982) (quoting RESTATEMENT (SECOND) OF TORTS § 614 cmt. b (1977)). But if the court finds the statements do not lend themselves to the meaning ascribed to them by the plaintiff, the case should not be sent to the jury. *Id.* The court will decide the question based on such factors as "'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.'" *Fernandes*, 65 Haw. at 228, 649 P.2d at 1147 (quoting Schermerhorn v. Rosenberg, 73 A.D.2d 276, 284 (1980)).

[154] Park, *supra* note 135, at 110.

[155] Generally, expressions are deemed libelous per se if they are of such character that the law presumes the plaintiff has suffered degradation or a loss of personal or business reputation. Such expressions are actionable per se: general damages are presumed and no proof of special damages is necessary. By contrast, expressions that are libelous per quod are not defamatory on their face: they require extrinsic facts to prove their defamatory meaning. Thus, special damages must be pleaded and proved for recovery. BLACK'S LAW DICTIONARY 916 (6th ed. 1990).

There is some confusion over the distinction between libel per se and libel per quod in Hawaii. In Kahanamoku v. Advertiser Publishing Co., 25 Haw. 701, 713 (1920), the Hawaii Supreme Court stated a definition of libel per se which is so broad that it apparently includes all libel. And in Baldwin v. Hilo Tribune-Herald, Ltd., 30 Haw. 610, 617-19 (1928), the court, stating that a libel defamatory on its face is actionable without proof of special damages, pointed out that other libel could also be so actionable. *See* Park, *supra* note 135, at 96-98.

[156] Portnoy, *supra* note 139, at 407. Portnoy notes that "This is not a court that has demonstrated any real interest in expanding First Amendment rights." *Id.* at 421. For a more general discussion of the Lum Court's conservatism, *see* Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the*

judgment for any party in defamation actions and has preferred to send cases to the jury.[157] For example, in *Rodriguez v. Nishiki*,[158] the court held that if there is a factual dispute about a defendant's state of mind regarding actual malice, summary judgment is inappropriate.[159] In *Kohn v. West Hawaii Today, Inc.*,[160] the court held that a jury, based on its lay inferences, is allowed to conclude without expert evidence that a journalist was negligent in publishing a statement which defamed a private individual, and that the trial court had not erred in refusing to grant defendant's motion for a directed verdict.[161] In *Cahill*, the court also ruled that if a statement "is susceptible to both an innocent and a defamatory meaning, it is for the jury to determine the sense in which it was understood."[162]

Truth is a complete defense.[163] Under the common law, the burden was on the defendant to plead and prove the truth of the statement at issue.[164] The Hawaii Supreme Court's adherence to that principle was evident in two notably pro-plaintiff decisions issued in the 1920s. The court held in *Kahanamoku v. Advertiser Publishing Co.*[165] that the plaintiff

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Realignment of Political Power in Post-Statehood Hawai'i, 14 U. HAW. L. REV. 17 (1992), which characterizes the court's increased reliance on memorandum opinions as exemplifying "institutional silence" and "vulnerability." *Id.* at 19-20.

[157] Portnoy, *supra* note 139, at 408. *But see* Basilius v. Honolulu Publishing Co., 711 F. Supp. 548, 550 (D. Haw. 1989) (stating that summary judgment is the preferred means of dealing with First Amendment cases, particularly those dealing with smaller media outlets).

[158] 65 Haw. 430, 653 P.2d 1145 (1982).

[159] *Id.* at 439, 653 P.2d at 1151. The court cited Hutchinson v. 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, . . . and does not readily lend itself to summary disposition." *Id.*

[160] 65 Haw. 584, 656 P.2d 79 (1982).

[161] *Id.* at 590, 656 P.2d at 83. The court noted that since the plaintiff was a private individual, he must prove some degree of fault by the newspaper, though not necessarily actual malice. *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)(holding that negligence is the applicable test of liability in actions by private individuals for publication of a defamatory falsehood by the news media)).

[162] 56 Haw. at 527, 543 P.2d at 1361 (citing Tagawa v. Maui Publishing Co., 49 Haw. 675, 679, 427 P.2d 79, 82 (1967)).

[163] Waterhouse v. Spreckels, 5 Haw. 246, 248 (1884); Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 128, 130-31 (1929). For a more recent case, *see* Basilius v. Honolulu Publishing Co., 711 F. Supp. 548, 552 (D. Haw. 1989)(granting summary judgment for defendants under the truth defense).

[164] KEETON, *supra* note 1, § 113, at 798.

[165] 25 Haw. 701 (1920).

need not even allege the falsity of the statement in the complaint (a holding that would be unconstitutional under the U.S. Supreme Court decision in *Bose* and is not current Hawaii law). Further, in *Wright v. Hilo Tribune-Herald, Ltd.*,[166] the court held that the evidence must establish the truth of the defamatory matter in its entirety to constitute a complete defense based on truth; merely demonstrating the "substantial truth" of the statement would not suffice.[167] However, by 1982, the court in *Kohn v. West Hawaii Today, Inc.*,[168] rather belatedly adopted the substantial truth standard, noting that "[m]any courts subscribe to the view that substantial truth is a defense to a defamation action."[169] The justices added that determining substantial truth is a question for the jury at the summary judgment level.[170]

The Hawaii Supreme Court has tended to extend less protection to officials and attorneys through absolute privilege than is available in other jurisdictions.[171] In *Ferry v. Carlsmith*,[172] the Hawaii Supreme Court in 1917 showed reluctance to recognize an absolute privilege to defame during judicial proceedings. The court, in stating that an attorney's privilege from prosecution for libel or slander during such proceedings did not extend to matters having no materiality or pertinence to the question involved in the suit, seemed to require that a defamatory statement reach a higher threshold of pertinence than that which was required in other jurisdictions.[173]

While the U.S. Supreme Court in *Barr v. Matteo*[174] grants absolute privilege to government administrators, Hawaii limits the privilege

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[166] 31 Haw. 128 (1929).

[167] *Id.* at 132.

[168] 65 Haw. 584, 656 P.2d 79 (1982).

[169] *Id.* at 590, 656 P.2d at 83.

[170] *Id.*

[171] Park, *supra* note 135, at 110.

[172] 23 Haw. 589 (1917).

[173] *Id.* at 591. Rather than require that the defamatory statement bear only "some reasonable relation . . . to the subject of the inquiry" in order to be accorded absolute privilege, the court stated that it must be "a fair comment upon the evidence and relevant to the matters at issue." *Id.* This is contra to RESTATEMENT (SECOND) OF TORTS § 586 cmt. c, which states that "the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege."

[174] 360 U.S. 564, 574 (1959)(holding that the issuance of a press release by an acting director of a government agency announcing his intention to suspend two agency employees was within the scope of his duties and was thus privileged, precluding a suit for libel against him).

afforded to state lawmakers and officials.[175] In *Medeiros v. Kondo*,[176] the court held that state employees are not unconditionally immune from defamation lawsuits. It lifted the shield of absolute immunity from nonjudicial government officials, who were motivated by malice in exercising their authority.[177] The court articulated its now much repeated theme that the best way to balance the interests of the injured party against the alleged defamer is to allow the action to proceed to adjudication.[178] And in *Mehau v. Gannett Pacific Corp.*,[179] the court held that a lawmaker's "absolute privilege" did not extend to speeches delivered to an audience of non-constituents after the legislative session had ended.[180]

Regarding conditional or qualified privileges, the Hawaii Supreme Court appears to make them available to a defendant only if the defendant publisher and the recipient of the defamatory information share a common, corresponding interest in the same subject matter, which would entitle the recipient to the information the defendant has.[181] The court, in defining the test for a qualified privilege in *Aku v. Lewis*,[182] seemed to require the presence of such an interest before recognizing a qualified privilege.[183] Two years later, in *Russell American Guild of Variety Artists*,[184] the court reiterated the corresponding interest theme as a prerequisite for a qualified privilege defense. The standard is consonant with the "common interest" conditional privilege at common law. But when only one party has a protectable interest in the matter, the conditional privilege available under the common law may not be available to a defendant in Hawaii as it would be in some other jurisdictions.[185]

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[175] PORTNOY, *supra* note 145, at 15.

[176] 55 Haw. 499, 504-05, 522 P.2d 1269, 1272 (1974).

[177] *Id.* at 503, 522 P.2d at 1271.

[178] *Id.* at 504-05, 522 P.2d at 1272.

[179] 66 Haw. 133, 658 P.2d 312 (1983).

[180] *Id.* at 152, 658 P.2d at 324-25.

[181] Park, *supra* note 135, at 93 and 110.

[182] 52 Haw. 366, 371, 477 P.2d 162, 166 (1970).

[183] Aku defined a qualified privilege as arising "when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral or social, and where the publication concerns subject matter in which the author has an interest and the recipients of the publication a corresponding interest or duty." *Id.* at 371, 477 P.2d at 166.

[184] 53 Haw. 456, 497 P.2d 40 (1972).

[185] Park, *supra* note 135, at 93.

Although defamation law in Hawaii may tend to favor plaintiffs, and there are no statutory privileges that the news media might use in libel cases,[186] the law is not one-sided. For example, vicarious punitive damages are barred.[187] Generally, a plaintiff may recover punitive damages only from those defendants who individually are shown to have the requisite malice required for punitives.[188] Under Hawaii Revised Statutes section 431:10-240, punitive damages are not insured unless they are specifically included in the policy. And the State Tort Liability Act does not waive governmental immunity from suit for claims arising from libel and slander.[189]

B. Media Protections

Compared with other jurisdictions, Hawaii courts have handled relatively few defamation cases.[190] Thus, jurisprudence regarding defamation is not fully developed in Hawaii, theoretically creating more uncertainty for the media and plaintiffs alike.

For example, no Hawaii appellate court has expressly defined what is meant by a public official or public figure[191] nor established a

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[186] Jeffrey S. Portnoy & Peter W. Olson, *Survey of Hawaii Libel and Privacy Law*, in LDRC 50-STATE SURVEY 1993-94, at 284.

[187] *See, e.g.*, Baldwin v. Tribune, 32 Haw. 87 (1931); Kahanamoku v. Advertiser, 26 Haw. 701 (1920).

[188] *See* Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989)(holding that the right to punitive damages must be proved by clear and convincing evidence).

[189] HAW. REV. STAT. § 662-15(4) (1985).

[190] For a comprehensive survey of defamation law in Hawaii, *see* Portnoy & Olson, *supra* note 186, at 278-91.

[191] *Id.* at 281. Portnoy and Olson note, however, that the Hawaii Supreme Court stated that anyone who holds "governmental office" qualifies as a public official. Mehau v. Gannett Pacific Corp., 66 Haw. 133, 143, 658 P.2d 312, 320 (1983). In Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975), the court appears to have adopted the *Gertz* pervasive/vortex public figure distinction in dicta. *Id.* at 540-41, 543 P.2d at 1368-69.

Two 1993 federal court decisions are also instructive. In Kroll Assocs. v. City and County of Honolulu, 833 F. Supp. 802 (D. Haw. 1993), the court ruled that a firm hired by the city to investigate corruption in the municipal bus system was neither a general nor a limited purpose public figure (employing the *Gertz* test, the court found that the firm had not voluntarily thrust itself into the public limelight in a bill payment dispute). *Id.* at 805-06. And in Partington v. Bugliosi, 825 F. Supp. 906 (D. Haw. 1993), the court held that a locally well-known criminal defense attorney (involved in a libel claim stemming from his representation of a client in a murder trial) was a limited purpose public figure. *Id.* at 917-18.

constitutionally-based test for distinguishing between fact and opinion.[192] Nor have the courts specifically stated what constitutes negligence in defamation cases.[193] No reported cases have dealt with *Dun & Bradstreet's* effect on actions not involving matters of public concern brought by private individuals.[194] Further, there are no jury instructions specially tailored for media cases.[195]

IV. Reform Proposals

Although there is consensus that defamation law needs to be reformed, there is little agreement about what must be done. Federal judges, law professors, media lawyers and a congressman are among those who have offered proposals for improvement.

A. The Uniform Correction or Clarification of Defamation Act

One of the most eagerly-awaited defamation reform proposals, the Correction Act, gained approval from the American Bar Association in February 1994.[196] The National Conference of Commissioners on Uniform State Laws, a group of three hundred lawyers, judges and law professors appointed by the states to develop model laws, took nearly four years to draft the Act.[197] Its purpose is to resolve or limit defamation disputes before litigation.[198]

1. Provisions

The Act provides opportunities for plaintiffs, who believe they have been defamed, to have the defendant correct or clarify the allegedly

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[192] Portnoy & Olson, *supra* note 186, at 280. As the authors note, however, a federal district court did apply the fact/opinion distinction advanced by *Milkovich* in Partington v. Bugliosi, 825 F.Supp. 906, 920 (D. Haw. 1993)(holding that allegedly libelous statements in Vincent Bugliosi's novel, And The Sea Will Tell, were not actionable because they reflected the author's opinion).

[193] Portnoy & Olson, *supra* note 186, at 282.

[194] *Id.* at 284.

[195] *Id.* at 287.

[196] *See, e.g.*, *Uniform Defamation Act*, 62 U.S.L.W. 2499-2500 (U.S. Feb. 15, 1994)[hereinafter *LW: Defamation Act*]; *News Notes: ABA, With Some Dissent, Adopts Defamation Proposal*, 22 Media L. Rep. (BNA) 1224-25 (1994)[hereinafter *BNA: Act Adopted*].

[197] Randall P. Bezanson, *Legislative Reform and Libel Law*, 338 PLI/Pat 629 (1992).

[198] Correction Act § 3 cmt.

defamatory statement instead of relying on the courts for redress. The Act states that the main advantage for plaintiffs is the quick means it affords for vindicating their names; for defendants, the Act provides a way to avoid expensive litigation, including large damage awards.[199]

The Act is comprised of fourteen sections[200] with the main thrust aimed at reforming state retraction statutes.[201] Under the Act, plaintiffs must make a "timely and adequate request"[202] for a correction or clarification. If they receive one that is "timely and sufficient"[203] (a

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[199] *Id.* at Prefatory Note.

[200] The sections are as follows: 1-Definitions; 2-Scope; 3-Request for Correction or Clarification; 4-Disclosure of Evidence of Falsity; 5-Effect of Correction or Clarification; 6-Timely and Sufficient Correction or Clarification; 7-Challenges to Correction or Clarification or to Request for Correction or Clarification; 8-Offer to Correct or Clarify; 9-Scope of Protection; 10-Admissibility of Evidence of Correction or Clarification; 11-Uniformity of Application and Construction; 12-Short Title; 13-Severability; and 14-Effective Date.

[201] Henry R. Kaufman, *Special Report: The Potential Reform of State Retraction Law Under the Uniform Correction or Clarification of Defamation Act*, in LDRC 50-STATE SURVEY 1993-94, at xvii. Currently, 33 states have retraction laws, which lack uniformity and have been generally ineffective. *Id.* at xviii.

[202] A request for correction or clarification is timely if made within the period of limitation for commencement of an action for defamation. CORRECTION ACT § 3(b).

A request for correction or clarification is adequate if it: (1) is made in writing and reasonably identifies the person making the request; (2) specifies with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication; (3) alleges the defamatory meaning of the statement; (4) specifies the circumstances giving rise to any defamatory meaning of the statement which arises from other than the express language of the publication; and (5) states that the alleged defamatory meaning of the statement is false. *Id.* § 3(c). In the absence of a previous adequate request, service of a [summons and complaint] stating a [claim for relief] for defamation and containing the information required in subsection (c) constitutes an adequate request for correction or clarification. *Id.* § 3(d). The period of limitation for commencement of a defamation action is tolled during the period allowed in § 6(a) for responding to a request for correction or clarification (i.e., within 45 days of receipt of request for correction or clarification, or 25 days after receipt of information material to the falsity of the allegedly defamatory statement, whichever is later). *Id.* § 3(e).

[203] A correction or clarification is timely if it is published before or within 45 days after receipt of a request for correction or clarification (§ 6(a)), or within 25 days after receipt of information material to the falsity of the allegedly defamatory statement (§ 4(c)), whichever is later.

A correction or clarification is sufficient if it: (1) is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of; (2) refers to the statement being corrected

correction or clarification issued within forty-five days of the request usually qualifies as timely, but the sufficiency requirement is more nebulous, see *infra*), plaintiffs could generally recover only provable economic loss in any later suit involving the statement at issue.[204] The same ceiling on damages would apply to plaintiffs who did not make a "good faith" effort to request a correction or clarification within ninety days of gaining knowledge of the publication,[205] and for failing to provide information regarding the falsity of the challenged statement, if such information is reasonably available.[206]

The Correction Act in its present form represents a compromise. It is only a small part of what began as an ambitious plan of comprehensive reform.[207] Originally, the Act would have provided for a new kind of suit, called a "vindication action," designed to establish the truth or falsity of the disputed statement. Plaintiffs would have been barred from recovering damages; defendants would have lost the constitutional defenses (i.e., actual malice liability standard) set forth in the *New York Times* decision. But media organizations strongly objected

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or clarified and: (i) corrects the statement; (ii) in the case of defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or to assert its truth; or (iii) in the case of a statement attributed to another person, identifies the person and disclaims an intent to assert the truth of the statement; and (3) is communicated to the person who has made a request for correction or clarification. CORRECTION ACT § 6(b). A correction or clarification is published in a medium reasonably likely to reach substantially the same audience as the publication complained of if it is published in a later issue, edition, or broadcast of the original publication. *Id.* § 6(c). If a later issue, edition, or broadcast of the original publication will not be published within the time limits established for a timely correction or clarification, a correction or clarification is published in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of if: (1) it is timely published in a reasonably prominent manner: (i) in another medium likely to reach an audience reasonably equivalent to the original publication; or (ii) if the parties cannot agree on another medium, in the newspaper with the largest general circulation in the region in which the original publication was distributed; (2) reasonable steps are taken to correct undistributed copies of the original publication, if any; and (3) it is published in the next practicable issue, edition, or broadcast, if any, of the original publication. *Id.* § 6(d). A correction or clarification is timely and sufficient if the parties agree in writing that it is timely and sufficient. *Id.* § 6(e).

[204] *Id.* § 5.

[205] *Id.* § 3(b).

[206] *Id.* § 4 cmt.

[207] Kaufman, *supra* note 201, at xvii.

and the uniform state law commissioners settled on the correction or clarification statute.[208]

2. The Act's advantages over current law

Although the Act is not optimal from the plaintiff's standpoint,[209] it is an improvement in some respects over current defamation law. For example, the Correction Act shifts the focus away from fault and the defendant's state of mind (i.e., the actual malice or negligence standards) to the falsity of the statement; it offers a relatively quick, straightforward method of vindicating a person's reputation (with a minimum of technical requirements to satisfy) if the defendant cooperates; and it applies to all defamations, public or private, media or nonmedia, thus simplifying the process of gaining redress for a defamation action.

3. The Act's shortcomings

The Correction Act is a first step toward reform, but little more. Rather than offering reform options that plaintiffs say they favor, such as rights of reply or a declaratory judgment provision, the statute deals with corrections and clarifications, which provide a more limited remedy. Dissatisfied plaintiffs may still sue, but there would be a cap on the amount of money they could recover: provable economic losses, or out-of-pocket damages, such as lost wages or income actually caused by the alleged defamation. Presumed, general, reputational and punitive damages are excluded.[210] Another provision of the Act unfavorable to plaintiffs states the following: "[W]here the defendant does not make a correction or clarification, it is conclusively presumed that the plaintiff's unreasonable failure to disclose available information contributed to that decision."[211] Under those circumstances, too, the plaintiff is limited to recovering damages of provable economic loss.

The Act arguably leaves too much control over the action in the defendant's hands, such as in determining what form the correction or clarification can take. For example, the statute allows defendants several ways in which to satisfy the sufficiency requirement for a correction

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[208] Kenneth Jost, *Model Libel Law Proposed*, A.B.A. J., Nov. 1993, at 32.

[209] *See infra*, IV(A)(3) of text and accompanying notes.

[210] CORRECTION ACT § 1 cmt.

[211] *Id.* § 4 cmt.

or clarification: the defendant could simply disclaim any libelous interpretation as unintentional or disavow any knowledge of whether a quoted assertion made by others was true or false.[212]

Perhaps the Act's most significant shortcoming from the plaintiff's viewpoint is that it gives defendants a substantial window of opportunity for issuing a clarification or correction, while still prohibiting the plaintiff from suing for punitive or general damages. A defendant could limit damages by complying with a request to issue a correction or clarification anytime before trial; the defendant would then be liable for only the plaintiff's provable economic losses and reasonable expenses of litigation, including attorneys' fees, incurred before the correction or clarification was published.[213] Thus, defendants could afford to take a wait-and-see attitude toward whether to issue a correction or clarification.

While plaintiffs stand to gain by obtaining the quickest clarification or correction possible to clear their name and limit expenses, media defendants, thanks to insurance, are usually under less pressure. Time and money tend to be on their side, which is especially true of the larger media companies. They have the luxury of assessing their chances of prevailing at trial before having to commit to making a clarification or correction. Under the Act, even after a trial has commenced, the defendant can still limit the plaintiff's recovery by making a correction or clarification that is acceptable to the plaintiff. Moreover, once the defamation trial has begun, recent statistics show the strategic advantage may be shifting to the defendant, at least regarding jury trials.[214] But reaching the trial stage may take years.

4. Media concerns

From the media's point of view, the concern is that there will be intense pressure to publish a "correction" quickly in order to abort a potential libel suit.[215] The Act may encourage hasty judgments about

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[212] Jane E. Kirtley, *The Uniform Correction or Clarification of Defamation Act: Puncturing a Trial Balloon*, 4 COMMUNICATIONS LAWYER 11-12 (1994).

[213] CORRECTION ACT § 8(a)(1)(ii).

[214] *See* discussion of the recently increasing success rate of defendants in jury trials as reported by the LDRC survey, *supra* notes 44-46.

[215] For a full discussion of the pitfalls and advantages of having retractions play an increased role in resolving defamation disputes, *see* John C. Martin, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEG. F. 293 (1993). The author concludes

the statement's accuracy and, in the process, sacrifice a reporter's reputation and the media's credibility on the altar of expediency. Critics of the Act contend that its major fallacy is the assumption that there is "a single, discernible 'truth' easily ascertainable and proven."[216] But truth, they say, is often colored by individual perspective and bias, and not so readily defined. Thus, the coerced correction may be only another version of the facts.[217]

Another media worry is that after receiving a correction, plaintiffs might have second thoughts and go on to sue them anyway,[218] especially for relief not linked to reputational harm, such as "false light" invasion of privacy, or for intentional or negligent infliction of emotional distress, which might not be subject to the Act. Litigation has traditionally been used to bring the media to heel. The plaintiff would be barred from recovering punitive and general damages, but that, in itself, might not deter litigation. Surveys show that the greatest concern of most defamation plaintiffs is not recovering money but securing a full admission of wrongdoing from the media.[219] Plaintiffs primarily want to clear their name. Historically, the media have been reluctant to admit any wrongdoing[220] and have seldom used either full retractions[221] or rights

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that lending more importance to retractions will increase incentives for publishers to use them as a "quick fix" to avoid suit or reduce damages, but lessen their deterrent effect, their utility as proof of malice and their use as a means to compensate plaintiffs justly. *Id.* at 303, 312.

[216] Kirtley, *supra* note 212, at 11.

[217] *Id.*

[218] The fears have a basis in fact. A state court jury in Illinois awarded a business executive nearly $2.25 million in libel damages for an erroneous statement made in THE WALL STREET JOURNAL in 1976, despite the fact that the newspaper published a correction the next day. Alex S. Jones, *Despite Correcting Its Error, Newspaper Loses Libel Case*, N.Y. TIMES, May 24, 1991, at B6.

[219] BEZANSON, *supra* note 18, at 24. The authors conducted the Iowa Libel Research Project, which examined 909 libel and privacy actions from 1974 to 1984. The goal was to explore options other than litigation for resolving defamation disputes. Most plaintiffs surveyed (71% of the 155 respondents) said they would have been satisfied with a retraction or correction; only about 4% said they favored money damages. *Id. See also* Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789 (1986).

[220] Because the media have been reluctant to admit a mistake, NBC's on-air apology for staging an explosion of a General Motors truck on its DATELINE NBC show generated a degree of public amazement. Steven Brill, *Ending the Double Standard*, AMERICAN LAWYER, Apr. 1993, at 5.

[221] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)(holding that a compulsory access law would intrude into the editorial function and thus would

of reply,[222] which might well have placated most defamation plaintiffs.[223] The Correction Act does provide a correction option, but as previously mentioned, the defendant has considerable leeway in satisfying the requirement.

Plaintiffs know that their chances of receiving a final judicial determination in their favor are slim. But for many, especially those who can afford protracted legal battles, that is not the primary goal. They can win simply by suing, through drawing attention to their cause, and casting themselves in the role of David pitted against a media Goliath.[224] Court proceedings provide plaintiffs with an emotional outlet through which to vent their rage toward the media and to obtain revenge for an unfavorable portrayal.[225] The media are well aware of this, and dread the so-called nuisance lawsuit. Where once the media focused on whether an article or program had defamatory material and whether the potential plaintiff would prevail, now the key question is whether the piece will attract a lawsuit, notwithstanding the merits of the claim.[226]

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violate the First Amendment). *Id.* at 258. But the opinion did not address whether a right of reply statute directed at providing a remedy for defamation is valid under the First Amendment.

[222] Jerome A. Barron, *The Right of Reply*, 15 HASTINGS COMM. & ENT. L.J. 1 (1992). Barron contends that the media have resisted granting reply and access because such measures interfere with an editor's autonomy and discretion. *Id.* at 3.

[223] Jerome A. Barron, *Media Accountability*, 19 SUFFOLK U.L. REV. 789, 803-04 (1985). *See also* GILMORE, *supra* note 50, at xi (chastising "an arrogant and self-righteous press that idealizes a free flow of information but has yet to learn how to provide space and time for reply to those it savages."); Gilbert Cranberg, *Fanning the Fire: The Media's Role in Libel Litigation*, 71 IOWA L. REV. 221 (1985)("The contact with the media transforms the golden opportunity for the press into a golden opportunity for the lawyer . . . . Instead of diverting complainants from court, the media contact propels them to court." *Id.* at 221.). Author Dan Moldea, who ultimately lost his protracted legal battle against the New York Times for defamation, said he only sued after his letter to the writer of the book review at issue went unanswered and his bid to have his letter to the editor published failed. Edwin Diamond, *Can You Prove the Hollandaise Was Curdled?* N.Y. MAG., Apr. 18, 1994, at 33. *See also supra* note 134.

[224] Barron, *supra* note 223, at 796 (citing Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985)).

[225] Goodchild, *supra* note 16, at 327.

[226] Goodchild, *supra* note 16, at 330-31 n.103 (citing Martin Garbus, *New Challenge to Press Freedoms*, N.Y. TIMES, Jan. 29, 1984, § 6 (Magazine), at 49). In response to what they deem as frivolous suits, some media companies have responded by filing counterclaims and countersuits. Jana Miller Brewer, Note, *'We're Mad As Hell and We Aren't Going to Take It Anymore': The Press Responds to Meritless Libel Suits*, 20 LOY. L.A. L. REV. 45 (1986).

Thus, media defendants are worried that the Act might not accomplish its main purpose: short-circuiting defamation litigation. They might still be saddled with the burdens of preparing for trial: intrusive and disruptive pre-trial discovery, hours of staff time spent completing interrogatories and appearing at depositions, and the constant threat that confidential sources and unpublished material will be imperiled.[227]

5. Prospects for the Act's adoption

The Correction Act, pared down from a more lengthy version and shorn of its controversial vindication provision,[228] is a relatively modest reform proposal. Even so, it appears unlikely to garner strong support in the short term nationwide, and faces even bleaker prospects in Hawaii.

a. National outlook

As is true of any proposed uniform law, the ultimate goal of the Correction Act is to be ratified intact by the legislatures of all fifty states, where different procedural and substantive laws bedevil any effort to make libel law serve the interests of a "national information marketplace."[229] The likelihood of passage, however, depends on the depth of support for it from some of the key groups most affected by it: the news media, plaintiffs' attorneys and insurers.

If the Act's recent history is any indication, the path to passage will not be easy. Since gaining easy approval from the National Conference of Commissioners on Uniform State Laws in August 1993,[230] the Act has generated a good deal of heat.[231] It was submitted to the ABA House of Delegates in February 1994,[232] a body which usually grants approval without much fuss.[233] Opposition to the Correction Act, however, was strong: one delegate even dubbed it "the Defaming

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[227] Kirtley, *supra* note 212, at 12.

[228] *See* Kaufman, *supra* note 201, at xviii.

[229] Marcia Coyle, *Group Pushes Libel Law Reform*, NAT'L L.J., May 17, 1993, at 3 (quoting Randall P. Bezanson, Dean of Washington and Lee University School of Law and reporter of the Defamation Act Drafting Committee of the National Conference of Commissioners on Uniform State Laws).

[230] The vote was 40 states to 8. Kaufman, *supra* note 201, at xvii.

[231] *See, e.g.*, *LW: Defamation Act* and *BNA: Act Adopted*, *supra* note 196.

[232] *BNA: Act Adopted*, *supra* note 196.

[233] *Id. See also LW: Defamation Act*, *supra* note 196, at 2499.

Publishers Relief Act.''[234] Eventually, the Act passed, but with less than a ringing endorsement.[235]

The next step for the Correction Act is consideration by the individual states.[236] John McCabe, legal counsel and legislative director of the National Conference of Commissioners on Uniform State Laws, said the Act will be introduced into selected state legislatures in 1995.[237] Having tracked the latest effort for defamation reform since 1989, he is less than optimistic about the Act's immediate prospects for passage. So far, he says, the Act has been "vehemently ignored" and the impetus for reform seems to have waned.[238] He contends that while there have been no signs of solid support for the Act, there has been opposition, for example, from the media, which he believes now favors the status quo.[239] McCabe also anticipates opposition in each state from the trial lawyers associations, which in the past have taken a dim view of reform efforts that limit damages for libel plaintiffs.[240]

John J. Walsh, the plaintiff's attorney who represented the former president of Mobil Oil in a highly publicized libel suit against the *Washington Post*,[241] says the Act's emphasis on measuring damages by

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[234] *Id.* The delegate was Stanley M. Brown of Bradford, New Hampshire. *Id.*

[235] *Id.* The final vote was 176-to-130. *Id.*

[236] Joseph W. Ryan, Jr., *A Timely Retraction Could Cut Damages Under Uniform Act Governing Defamation*, LITIG. NEWS, Aug. 1994, at 3.

[237] McCabe said the five state legislatures which are scheduled to consider the CORRECTION ACT first are those of Missouri, Colorado, Nebraska, Minnesota and Illinois. Telephone Interview with John McCabe, Legal Counsel and Legislative Director of the National Conference of Commissioners on Uniform State Laws (Sept. 12, 1994)[hereinafter *McCabe Interview*].

[238] *Id.*

[239] *Id. See also* Kirtley, *supra* note 212, at 8. Kirtley, an attorney and Executive Director of the Reporters Committee for Freedom of the Press in Washington, D.C., argues that the Act, while undermining a reporter's confidentiality privileges, will not eliminate libel suits and will engender court battles over the sufficiency of the correction. *Id.* at 11-12. She favors presenting the Act as a "model" law that could be tailored to suit the needs of each state. *Id.* at 12. For a contrary view, *see* William Glaberson, *A Plan to Encourage News Corrections*, N.Y. TIMES, Aug. 9, 1993, at D10 (quoting Henry R. Kaufman, general counsel of the Libel Defense Resource Center, expressing approval of the Act). *See also* Lee J. Levine & Daniel M. Waggoner, *The Uniform Correction or Clarification of Defamation Act: Overview of the Act*, 4 COMMUNICATIONS LAWYER 8 (1994). The co-authors, both communications law specialists who took part in drafting the Act, contend the Act will reduce the risks of defamation litigation for media defendants. *Id.* at 10-11.

[240] *McCabe Interview*, *supra* note 237.

[241] Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987). The suit lasted seven years,

economic loss effectively shortchanges a libel plaintiff.[242] For example, it does not take into account the loss in social standing or detriment to family relations which a defamatory statement can cause.[243] Like McCabe, Walsh believes the movement for wider reform of defamation has reached the end of the road, at least for the near future.[244]

Endorsing that view is Chad Milton, vice president and assistant general counsel of Media/Professional Insurance, Inc., the largest claims management company for libel cases.[245] Milton supports the Correction Act, which he says may have the effect of slowing the march to the courthouse and the consequent escalation of litigation costs.[246] He approves of the Act's attempt to rein in damage awards, which, he maintains, often bear little resemblance to the actual harm inflicted.[247]

b. Outlook in Hawaii

Could Hawaii benefit from the Correction Act? Yes, since the Act focuses on retraction and Hawaii currently has no retraction statute.[248] A viable alternative to settling defamation disputes by any means other than litigation would tend to lower libel insurance premiums in Hawaii, which are among the highest in the nation.[249] However, it is also true that state courts have not recently dealt with many defamation cases, particularly concerning the media.[250] So there appears to be no pressing need for the Act. Thus, in the short term, prospects for passage in Hawaii are not bright.

The concerns voiced nationally against the Act[251] find resonance in Hawaii. For example, Sterling Morita, President of the Society of

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totaled more than $2 million in legal fees and culminated in an appellate court's tossing out the $2 million awarded at trial. Jost, *supra* note 208, at 32.

[242] Telephone Interview with John J. Walsh, attorney with Cadwalader, Wickersham & Taft in New York City (Sept. 13, 1994). Mr. Walsh has represented plaintiffs in several media suits.

[243] *Id.*

[244] *Id.*

[245] Telephone Interview with Chad Milton, Vice President and Assistant General Counsel, Media/Professional Insurance, Inc. (Sept. 2, 1994).

[246] Milton said one of the main reasons for the increase in libel litigation costs is the fact that more and more plaintiffs are surviving summary judgment motions by defendants, thus prolonging the judicial process. *Id.*

[247] *Id.*

[248] *See, e.g.*, Portnoy & Olson, *supra* note 186, at 285.

[249] *Id.* at 288.

[250] *Id.* at 291.

[251] *See supra* text sections IV(A)(3)-(5)(a) and accompanying notes.

Professional Journalists in Hawaii and an editor with the *Honolulu Star Bulletin*, said his Society opposes the Act because it represents a step toward inhibiting free speech.[252] He is concerned that media companies might be tempted to establish liberal correction policies in order to avoid suit; but the ultimate result would be loss of the media's credibility.[253] He also says the Act may buoy some state legislators who harbor an anti-media bias;[254] they might try to use the Act to limit press scrutiny into their own activities.[255]

Nor does the Hawaii Trial Lawyers Association ("HTLA") favor the Act over the status quo.[256] Noting that defamation cases are relatively rare in Hawaii with few large damage awards against defendants, the HTLA questions whether the Act is needed. The organization's concern is that the Correction Act is "overly anti-plaintiff and gives publishers new protections in an area where they already have more protections than any other type of defendant in any other field."[257]

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[252] Telephone Interview with Sterling Morita, President, Society of Professional Journalists in Hawaii (Aug. 26, 1994)[hereinafter *Morita Interview*].

[253] *Id.*

[254] For example, a resolution passed the State House Judiciary Committee in 1993 asking Hawaii news reporters, editors, publishers and media owners to disclose voluntarily their "revenue sources and assets." The purpose was to hold the media to the same level of scrutiny they apply to government officials. *See* Thomas Kaser, *Lawmakers Back Media Disclosure Resolution*, HONOLULU ADVERTISER, Mar. 31, 1993, at A5. In addition, the State Senate passed a bill which singled out Honolulu's two daily newspapers for a special tax amidst allegations of excessive profits. The measure ultimately died. *See Bill on Special Newspaper Tax Dies*, HONOLULU ADVERTISER, Mar. 22, 1994, at A5.

[255] *Morita Interview*, *supra* note 252. Defamation suits involving disclosure of political campaign contributions are not uncommon in Hawaii. For example, Honolulu's former mayor brought suit against a local television station and the editor of a newsletter on political contributions for remarks the editor made on the air concerning the mayor's campaign finances. *See* David Waite, *Fasi Sues KHON, Editor—Says Broadcast Libeled Him*, HONOLULU ADVERTISER, Jan. 11, 1991, at A6. The mayor withdrew the suit five days after filing it. Fasi v. Lind, No. 91-0116-01 (1st Cir. Haw. filed Jan. 10, 1991). The Ninth Circuit later struck down as unconstitutional HAW. REV. STAT. § 11-216(d), which barred disclosure of information regarding investigations by the Hawaii Campaign Spending Commission. The court found the statute regulated speech on the basis of content. Lind v. Grimmer, 30 F.3d 1115 (9th Cir. 1994).

[256] Letter from James J. Bickerton, Member of the Board of Governors of the Hawaii Trial Lawyers Association to the author (Sept. 12, 1994)(on file with the author). The HTLA is a 300-member professional non-profit association mainly comprised of attorneys representing plaintiffs in civil matters. Founded in 1993, it is an affiliate of the Association of Trial Lawyers of America.

[257] *Id.* The HTLA envisions heightened litigation over such issues as whether the

B. The Annenberg Libel Reform Act

The Annenberg Libel Reform Act, written in the form of a statute, is a more comprehensive approach to handling defamation disputes.[258] Perhaps because it is so all-encompassing, it has not received much support from the media. The first joint effort by plaintiff and defense attorneys to address libel reform, it emphasizes finding and publicizing the truth instead of awarding damages.[259] The proposal relies on nonmonetary remedies, such as retractions, replies and declaratory judgments, to resolve the problem.

The Act consists of three stages. Stage I imposes more forceful retraction and reply mechanisms than those available under the Correction Act. Every potential plaintiff must seek a retraction or an opportunity to reply from the defendant[260] within thirty days of the publication date;[261] failure to do so bars the plaintiff from later bringing a defamation suit against the defendant.[262] If the defendant complies, the plaintiff is also barred from taking further legal action regarding the matter.[263]

If the defendant refuses to grant a retraction or right of reply, Stage II is triggered. Either the plaintiff or the defendant may file suit in a declaratory judgment action.[264] However, the plaintiff cannot recover monetary damages[265] and the defendant loses the protection of the constitutional fault requirements of negligence or actual malice.[266] The

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request for a correction or clarification was made in "good faith" and was "timely and adequate"; whether the correction or clarification itself was "timely and sufficient"; whether it was "published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of"; and when the plaintiff first gained "knowledge of the publication." The HTLA also dislikes both the option defendants have to offer a correction up until the time of trial, presumably long after the statement at issue was made, and the limitation on plaintiffs to recover only provable economic losses. *Id.*

[258] Smolla & Gaertner, *supra* note 21, at 26.

[259] Stephen Wermiel, *Libel Law Plan Could Eliminate Damage Awards*, WALL ST. J., Oct. 18, 1988, at B1.

[260] ANNENBERG LIBEL REFORM ACT § 3(a) (Proposed Official Draft 1988).

[261] *Id.* § 3(d).

[262] *Id.* § 3(a).

[263] *Id.* § 3(j).

[264] *Id.* § 4(a),(e).

[265] *Id.* § 4(b).

[266] *Id.* § 4(c).

sole issue at trial is whether the statement was true or false,[267] with the plaintiff having the burden of establishing falsity by clear and convincing evidence.[268] The loser must pay the winner's attorneys' fees.[269]

If neither party chooses the declaratory judgment option, Stage III takes effect: the plaintiff may begin a traditional defamation action and seek monetary damages. The plaintiff must establish, by clear and convincing evidence, that the statement was false and defamatory.[270] The minimum fault standard is negligence.[271] Recovery is limited to actual damages,[272] and there is no fee-shifting provision.[273]

The proposed Act erases the distinction between media and nonmedia defendants,[274] and between libel and slander.[275] It curtails the use of infliction of emotional distress and invasion of privacy causes of action.[276] The Annenberg Act uses a multifactor test to clarify the distinction between fact and opinion.[277] It also contains a broad neutral reportage privilege that protects a defendant who only quotes another's defamatory statement.[278]

The Annenberg Act has its critics, such as Pierre Leval, the federal district court judge who presided over the *Westmoreland*[279] trial. Judge Leval views the thirty days that a plaintiff has from the date of publication in which to request a retraction or reply as a trap for the unwary.[280] The plaintiff might not become aware of the defamatory statement until later (the Correction Act takes that possibility into account by having knowledge of the publication trigger the countdown). But once that deadline is missed, the plaintiff, in effect, "excuses" the

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[267] *Id.*

[268] *Id.* §§ (4)(d), 6(a).

[269] *Id.* § 10(b).

[270] *Id.* § 6(a).

[271] *Id.* § 7.

[272] *Id.* § 9(b).

[273] *Id.* § 10(c).

[274] *Id.* § 1(c).

[275] *Id.* § 9(a).

[276] *Id.* § 1(a).

[277] *Id.* § 2. The Act classifies editorials, letters to the editor, editorial cartoons, reviews, parodies, satires and fiction as opinion.

[278] *Id.* § 5.

[279] Westmoreland v. CBS, 770 F.2d 1168 (D.C. Cir. 1985).

[280] Smolla & Gaertner, *supra* note 21, at 30 (citing a letter from Judge Pierre N. Leval to Rodney A. Smolla (Sept. 6, 1988)).

defendant from having to grant a retraction or reply, and thus insulates the defendant from suit.[281]

The Annenberg Act offers several advantages over the Correction Act. The retraction and reply mechanisms have bite and are effective circuit breakers for litigation; the Correction Act does not really end litigation but rather reduces the amount or types of damages recoverable. Under Annenberg, timely compliance with a plaintiff's request for a retraction or right of reply bars the plaintiff from bringing suit;[282] noncompliance allows the plaintiff to bring legal action. Under the Correction Act, compliance only means the plaintiff is held to recovering provable economic loss, mitigated by the correction or clarification. There is less pressure on defendants to act quickly: they can offer to make a correction anytime before trial. The defendant will be liable for the plaintiff's reasonable expenses of litigation, including attorneys' fees incurred before the correction or clarification is published. If an action has already commenced, it will be dismissed with prejudice as soon as the defendant complies with the terms of the offer. Thus, the incentive to resolve the issue quickly is lost.

Under the Annenberg Act, once the plaintiff files suit, both the plaintiff and the defendant can choose to seek a declaratory judgment. Although it would be better if only the plaintiff had that option (since the defendant should be disfavored for having failed to grant the plaintiff's request), the Annenberg proposal at least makes the option available; the Correction Act does not. And because what matters most to plaintiffs who believe they have been defamed is having their names cleared, a judicial determination of the truth or falsity of the challenged statement is critical. The defendant's knowledge, so relevant when actual malice is the standard of liability, is irrelevant during such proceedings.

Only as a last resort is the traditional damage suit available as an option. But under Annenberg, the plaintiff must show by clear and convincing evidence that the statement was false (i.e., lacking substantial truth) and defamatory, not that the defendant acted with actual malice. The Correction Act has no such provision.

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[281] ANNENBERG LIBEL REFORM ACT § 3(d).

[282] The same potential downside of the provision to act quickly that applies to the CORRECTION ACT, namely, that weaker defendants might feel it expedient to give in rather than face a lawsuit, applies equally to the ANNENBERG LIBEL REFORM ACT.

C. Other Reform Options

Abolishing the actual malice standard is part of many nonmedia-inspired defamation reform proposals.[283] Legislation was introduced in Congress to abolish it.[284] The standard places a burden so great on public figures that they can recover only rarely for damages stemming from a false and defamatory statement.[285] And that lack of success may be having an adverse impact on American public life, driving out those unwilling to endure "the pitiless, constant, and often scurrilous scrutiny that is today the lot of those who participate in American public life."[286] The *New York Times* rule, while liberating the press from a chilling effect, may be casting "an equivalent chill on public life."[287] Supreme Court Justice Byron White recognized this when he wrote in *Dun & Bradstreet* that the Court had "struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation."[288]

That is why it may be ill-advised to advocate, as both the Correction Act and the Annenberg proposal do, the abolition of what may be the last best hope for defamation plaintiffs to even the score against media giants: punitive damages. Given the apparent pro-defendant slant of defamation law, punitive damages are the most powerful weapon plaintiffs, trial judges and juries have to hold the media accountable for their conduct;[289] they are "a form of empowerment for those who believe themselves to be both defamed and yet powerless to secure redress."[290] Even though they are rarely granted, much less sustained on appeal, punitive damages draw attention to a lawsuit, and thus

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[283] *See, e.g.*, Leval and Epstein, *supra* note 22.

[284] H.R. 1687, 99th Cong., 1st Sess. (1985).

[285] BEZANSON, *supra* note 18, at 121-23. According to the Iowa Libel Research Project, only about nine percent of public figure libel plaintiffs ultimately won their suits against media defendants between 1974 and 1984. *Id.* at 121.

[286] Barron, *supra* note 123, at 110.

[287] *Id.*

[288] Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985) (White, J., concurring).

[289] Barron, *supra* note 223, at 793.

[290] Barron, *supra* note 123, at 122.

create a forum for plaintiffs to bring their story to a broader audience and stimulate wider debate. The potential for punitive damages may also encourage lawyers to represent defamation plaintiffs on a contingency fee basis.

At the very least, punitive damages should not be sacrificed without a quid pro quo from the media, such as abolition of the actual malice standard. Although the *New York Times* rule has served the media well in shielding them from defamation damages, it has also exacted a steep price. The process subjects their greatest asset to attack: editorial integrity. Defending themselves under the banner of actual malice also forces the media to lay bare their editorial and investigative processes (exposing them at times to ridicule), and compels them to spend often astronomical sums to litigate.[291]

With punitive damage awards recently on the decline, there may appear to be less urgency now for the media to abandon the *New York Times* rule. But media complacency would be ill-advised. In an effort to circumvent First Amendment protections, plaintiffs have become more creative in fashioning their claims, especially against tabloids.[292] For example, some are basing lawsuits on how information was gathered, with a key issue being whether plaintiffs must prove actual malice when a media outlet publishes a truthful story if it is based on materials illegally gathered.[293] Libel plaintiffs are suing on such causes of action as the Racketeer Influenced and Corrupt Organizations Act (RICO)(which permits treble damages plus attorneys' fees), fraud, misrepresentation, invasion of privacy, trespass and intentional infliction of emotional distress.[294] Another new tactic is to file suits against smaller publications in order to prevent stories from reaching the major media.[295] There also appear to be forces at work outside the United States which may push the media toward loosening, if not severing, their attachment to the actual malice standard to ensure their longterm editorial and financial viability.

VI. Suing American Media in Foreign Courts

Despite the initially lukewarm reception to the Act, it is unlikely that the move to reform defamation will sputter to a halt. At least one

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[291] Leval, *supra* note 22, at 1295.

[292] Anne Stein, *Media Face Suits for News-Gathering*, 80 A.B.A. J. 34 (1994).

[293] *Id.*

[294] *Id.*

[295] *Id.* at 35.

sector of the media is eyeing the need for reform with greater urgency: media companies whose reach extends abroad. As American media have increased their presence around the world, so, too, has the industry's vulnerability to defamation suits in foreign countries grown.[296] Each nation calibrates the balance between freedom of expression and protection from reputational harm differently.[297] But at least one generalization holds true: once outside of the United States, American media companies are stripped of their actual malice armor. They face formidable barriers against their accustomed defenses, making it harder for them to prevail in a defamation lawsuit.[298]

A. Defamation Law in England, Canada and Australia

Even in countries which share a common law tradition with the United States, such as England, Canada and Australia, the media defendant faces a much more uphill battle to prevail in defamation lawsuits. Defamation law in those three countries lacks the umbrella of our First Amendment, which shields American media from the higher rate of adverse judgments raining down on their counterparts abroad.[299]

England has strict liability for libel; thus plaintiffs usually prevail at trial. When libel is found, the law presumes damages. Thus, juries are given relatively free rein to award substantial sums to compensate for the presumed harm dealt to the plaintiff's reputation, even though no proof of such harm is required.[300] Also, those damages in England are

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[296] *See generally* Laura R. Handman & Robert D. Balin, *The Interface Between Foreign and U.S. Defamation Law: The First Amendment Goes Global*, LDRC 50-STATE SURVEY 1992-93, at xviii-xlvii.

[297] *See, e.g.*, Melissa K. Bauman, Note, *Defamation in Hong Kong and the People's Republic of China: Potential Perils of Two Standards of Free Speech*, 15 HASTINGS INT'L & COMP. L. REV. 671 (1992); Edward Felsenthal, *Legal Beat: Libel Suits in Hungary*, WALL ST. J., Mar. 29, 1994, at B5; Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L. J. 371 (1992); Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53 (1990).

[298] *See, e.g.*, Don J. DeBenedictis, *Moving Abroad Libel Plaintiffs Say It's Easier Suing U.S. Media Elsewhere*, A.B.A. J., Sept. 1989, at 38; Amy Dockser, *Plaintiffs Take Libel Suits Abroad to Favorable Laws*, WALL ST. J., June 6, 1989, at B1.

[299] *See generally* Newcity, *supra* note 41; O'Connell, *supra* note 39; Prosser, *supra* note 40; Kimberly Richards, *Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?* 3 TRANSNAT'L LAW. 613 (1990); Weaver & Bennett, *supra* note 40.

[300] Prosser, *supra* note 40, at 338.

tax-free[301] and are rarely overturned on appeal.[302] It is no wonder that London has been called the "libel capital of the world."[303]

Not lagging far behind in that respect is Sydney, known as the defamation capital of Australia,[304] where virtually all categories of plaintiffs outpace their American counterparts in bringing defamation suits.[305] For example, defamation suits are filed in Sydney's Supreme Court at a rate at least forty times greater than in American courts.[306] Because Australian courts have not interpreted defamation law as expansively in favor of media defendants as American courts have, do not impose an actual malice standard, and favor preserving reputation more highly, plaintiffs enjoy a greater rate of success.[307] And Australian defendants are less likely to have an adverse trial verdict overturned on appeal.[308]

In Canada, once a statement is found to be defamatory, malice is legally presumed unless and until the judge rules that the statement was privileged; then the burden of proving malice shifts to the plaintiff.[309] In reality, the defendant carries the heavier burden of justifying the allegedly defamatory statement by proving truth. The applicable standard is "substantial truth"; the defendant's intent in making the statement is irrelevant.[310] The jury determines whether that burden has been met.[311] Malice is deemed proved if there is a failure to retract even after the defendant receives knowledge that the statement at issue is false.[312]

Canada moved to revise its common law of defamation in 1982. Under the Canadian Charter of Rights and Freedoms, Canadian law now seems to favor (at least in theory) the free speech rights of media defendants over the rights of potential plaintiffs regarding their repu-

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[301] O'Connell, *supra* note 39, at 152.

[302] Prosser, *supra* note 40, at 343. England's Court of Appeal interferes only if it seems that the jury was guilty of misconduct or made a "gross blunder." *Id.*

[303] O'Connell, *supra* note 39, at 152 (citing G. ROBERTSON & A. NICOL, MEDIA LAW: THE RIGHTS OF JOURNALISTS, BROADCASTERS AND PUBLISHERS 23 (1984)).

[304] Newcity, *supra* note 41, at 64.

[305] *Id.* at 65.

[306] *Id.* at 64.

[307] *Id.* at 3-4.

[308] *Id.* at 61.

[309] O'Connell, *supra* note 39, at 157.

[310] *Id.* at 157-58.

[311] *Id.* at 159.

[312] *Id.*

tations.[313] But without the enactment of some type of qualified privilege for the media, the Charter provisions have lacked practical value.[314] Thus, libel actions continue to be decided under the pro-plaintiff common law standard.[315]

Both England and Australia are currently engaged in a national debate over whether greater protection should be afforded to the media under defamation law. There are indications that in both countries, press freedoms have been unduly restricted, hampering the ability of the media to do their primary job of informing the public, stimulating debate and generally opening up forums of communication. In England, reform advocates favor improved court guidance of juries, a "Right to Reply" bill and jury verdicts confined to the issue of liability, with damages left to a judge to determine.[316] In Australia, discussion centers on whether a higher burden of proof should be imposed on defamation plaintiffs who are public figures.[317]

Overseas, perhaps no group is watching with greater interest than American media companies which have a significant presence in international markets. They realize that the strict actual malice standard that protects them in their own country often has little currency abroad.[318] This fact is well known to defamation plaintiffs, who have already begun to forum shop for jurisdictions where their claims have a greater chance of prevailing, including Singapore and Saudi Arabia.[319]

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[313] *Id.* at 160.

[314] *Id.*

[315] *Id.* at 161.

[316] Prosser, *supra* note 40, at 344.

[317] Newcity, *supra* note 41, at 6.

[318] *But see* DeRoburt v. Gannett Co., 558 F.Supp. 1223, 1226 (D. Haw. 1983) (applying English libel law and American First Amendment "actual malice" rules to a suit involving the then President of Nauru, who brought libel charges against the PACIFIC DAILY NEWS, published in Guam); DeRoburt v. Gannett Co., 83 F.R.D. 574, 581-82 (D. Haw. 1979).

[319] *See generally* Papandreou v. Time, Inc., 1989 P. No. 1668 (High Court of Justice, Queen's Bench filed Sept. 4, 1989) (involving Greece's then Prime Minister Andreas Papandreou, who filed a defamation suit against the American newsmagazine in an English court over corruption charges). Also, then Bahamian Prime Minister Lynden Pindling filed a $4 million suit (over stories linking him to his country's drug trade) against the National Broadcasting Company (NBC) in the Supreme Court of Ontario in 1989. An NBC lawyer, John McDougal, characterized that lawsuit, which Pindling ultimately dropped, as the first in which a non-Canadian sued an American television network in a Canadian court. O'Connell, *supra* note 39, at 161.

B. The Lure of Forum Shopping

Choice of law rules, which vary greatly from jurisdiction to jurisdiction, determine which country's laws will apply. As such, they often play a decisive role in the outcome of a case, especially where defamation is concerned, because the substantive laws and policies differ so greatly among nations.[320] Thus, choice of law rules may factor heavily in a plaintiff's decision of where to bring the lawsuit.[321] For example, in England and Canada, if the defamation occurs in the forum, the law of the forum applies; if it occurs completely outside the forum, courts in both countries usually apply the lex fori (law of the forum) or lex loci delicti (law of the place of the wrong) to tort actions.[322] Neither system takes into account the interests of the conflicting jurisdictions (under the so-called interest analysis of resolving conflict of law problems).[323]

C. Bachchan's Effect on Suing American Media Abroad

American-based media companies do have one potential source of comfort. Although American courts have traditionally recognized extraterritorial judgments through the concept of comity,[324] there is no guarantee that a non-U.S.judgment will be enforced. For example, American courts may refuse to enforce those judgments that violate American policy. In libel cases, courts are likely to consider the need to ensure First Amendment protection without jeopardizing comity.[325]

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[320] Richards, *supra* note 299, at 645.

[321] *Id.*

[322] *Id.* at 654-55 (citing McLeod, The Conflict of Laws 527-30 (1983)).

[323] *Id.*

[324] *See* Hilton v. Guyot, 159 U.S. 113, 181-82 (1895)(holding that a judgment for money in one country against a citizen of the forum will not be enforced in an American court unless there is reciprocity) (N.B. the decision is pre-Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

[325] Gregory T. Walter, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 Fordham Int'l L.J. 895, 897-98 (1993). In *Bachchan*, New York's Supreme Court refused to enforce a libel judgment awarded by London's High Court of Justice on the grounds that doing so would threaten free speech protections. Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (1992). *See also* DeRoburt v. Gannett Co., 83 F.R.D. 574 (D. Haw. 1979), where the U.S. district court held, in a suit brought by Nauru's then President against an American publication published in Guam, that U.S. public policy requires that the First Amendment be applied to libel cases brought in U.S. courts. For discussion of a more recent related case, *see supra* note 318.

The case of *Bachchan v. India Abroad Publications, Inc.*[326] concerned an international publication distributed in several different markets abroad. A New York state court refused to enforce a judgment against an American-based news organization because of the different liability standards prevailing in Britain and the United States.[327] The message was clear: the First Amendment cannot be circumvented in American courts.[328]

It was not the first time a plaintiff based abroad had sued an American-based media company in a foreign court, with hopes of bypassing the media's First Amendment protections.[329] Examples include the former Prime Minister of the Bahamas filing suit in Canada,[330] and the former Greek Prime Minister Andreas Papandreou suing *Time Magazine* in London.[331] Plaintiffs, especially high level politicians, have also brought suit in American courts, and have tried to apply civil law standards of defamation liability to their lawsuits, with little ultimate success. Among those who have attempted this route are former Israeli Defense Minister Ariel Sharon,[332] former Indian Prime Minister Morarji Desai[333] and the then President of the Pacific island nation of Nauru.[334]

But although the American media breathed easier following *Bachchan*, the decision may be of limited value. It was the ruling of only a New

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[326] 585 N.Y.S.2d 661 (1992).

[327] Ellen Joan Pollock & George Anders, *Libel Judgment From Britain Is Rejected*, WALL ST. J., Apr. 16, 1992, at B11.

[328] Bill White, *Limitations to the Enforcement of Foreign Judgments in Libel*, 19 J. CONTEMP. L. 300, 307 (1993).

[329] *See* Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing An End-Run Around U.S. Libel Law?* 16 HASTINGS COMM. & ENT. L.J. 235 (1994).

[330] Pindling v. National Broadcasting Co., No. 17549/84, 1989 Ont. C.J. LEXIS 98 (Ont. Sup. Ct.) (1989).

[331] Youm, *supra* note 329, at 255.

[332] Sharon v. Time, Inc., 599 F.Supp. 538 (S.D.N.Y. 1984). The jury found that the magazine was negligent in publishing a story about him, but that Sharon failed to meet the required actual malice test. For a fuller account of the case, *see* RODNEY A. SMOLLA, SUING THE PRESS 80-99 (1986).

[333] Desai v. Hersh, 719 F.Supp. 670 (N.D.Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir.), *cert. denied*, 113 S.Ct. 190 (1992). Desai sued over the book by SEYMOUR HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE (1983), in which Hersh accused Desai of selling India's secrets to the Central Intelligence Agency. Desai was unsuccessful in recovering damages under both U.S. defamation law for injury suffered in the United States and Indian libel law for injuries suffered there. *See* Youm, *supra* note 329, at 252.

[334] DeRoburt v. Gannett Co., 83 F.R.D. 574 (D. Haw. 1979).

York trial court.[335] The case involved speech of public concern, discussed matters of international interest and was republished based on the defendant's "good faith" reporting.[336] Also, the decision would only apply when a plaintiff requested an American court to enforce a libel judgment. If a multinational American-based media company were to be sued in a country where it holds substantial assets, the plaintiff would not have to seek the help of an American court in enforcing the judgment.[337] Enough assets would be available in that country for the foreign court to order enforcement.[338]

In response to their perception of growing vulnerability to foreign court judgments, American-based news media have already begun to take a more cautious approach to news presentation. For example, CNN now routinely has its lawyers review material for possible defamatory content before it is disseminated, a practice being emulated at most of the other national television networks and newspapers with international readership.[339] However, self-censorship as a means of defamation avoidance in foreign jurisdictions lurks as an expedient and ever-present possibility.

VII. Conclusion

Defamation law as it has evolved since the *New York Times* decision, has abdicated what had traditionally been its primary responsibility toward society: providing legal redress to those whose reputations have been unfairly attacked. The law's focus on preventing encroachments into the media's exercise of expressive freedom, while laudable and necessary, has largely overshadowed the personal harm which defamation can cause. What should be the lead issue in resolving defamation disputes, the truth or falsity of the statement, is often only a sidebar concern.

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[335] Youm, *supra* note 329, at 261.

[336] *Id.*

[337] *Id.* at 260.

[338] *Id.* at 263. Perhaps a more encouraging precedent for the American media is that of Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 24-26 (1986), where the European Court of Human Rights held that the media defendant need not prove truth because that burden of proof would violate the right to free speech in a democratic society. *Id.* at 262.

[339] Weaver & Bennett, *supra* note 40, at 1188-89.

The actual malice standard has arguably developed into a "shield for publishing falsehoods,"[340] which insulates the media from their own mistakes and biases.[341] But abolishing the actual malice standard is something only the United States Supreme Court, which originally set forth that standard and launched defamation law onto its current evolutionary path, can do. Considering the Court's current composition and recent history,[342] that is unlikely to happen. And given the heavy constitutional overlay coating defamation law, state courts are constrained in how much initiative they can take in advancing reform.

Recent efforts at comprehensive reform of defamation law have failed to take root, largely because of media opposition to any proposal they view as eroding their constitutional protections. Since there is no major constituency, political or legal, pushing the media to abandon the status quo, at best only piecemeal reform is likely to be achieved in the short term.

The Correction Act is a first step in that direction. But its chances for nationwide acceptance seem dim. Getting the ABA to approve the Correction Act, a relatively mild reform measure, was difficult; coaxing state legislatures to adopt it without tinkering with the delicate internal checks and balances that make it at least palatable to both plaintiffs and defendants could present a monumental challenge. The same holds true for adoption of the more comprehensive and controversial Annenberg Act.

Meaningful reform of defamation law will occur only if the media see that it is in their own best interest to make changes. The threat of lawsuits abroad, where defamation laws are not nearly as favorable to media defendants, may provide the needed nudge to reform. So might

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[340] Ellen M. Smith, Note, *Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws*, 14 MICH. J. INT'L L. 871, 896 (1993).

[341] Newcity, *supra* note 41, at 8 n.38 (citing R. ADLER, RECKLESS DISREGARD: WESTMORELAND V. CBS ET AL; SHARON V. TIME 144 (1986)).

[342] For example, the latest addition to the U.S. Supreme Court, Justice Stephen G. Breyer, wrote relatively few media-related decisions during his fourteen years on the U.S. Court of Appeals for the First Circuit. One opinion he authored was the court's decision in Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1982), which dismissed a libel action based on due process and First Amendment concerns. The U.S. Supreme Court later reversed, but considered only due process issues. *News Notes: Media Attorneys Upbeat About Breyer Nomination*, 22 MEDIA L. REP. (BNA) 1640-41 (1994). *See also Study Shows Court Reviewed Six Percent of Libel Appeals*, 22 MEDIA L. REP. (BNA) 2000-2001 (1994) (stating the U.S. Supreme Court granted certiorari in 12 libel and privacy cases between 1985 and 1994).

the ultimate realization that the litigation merry-go-round, so counter-productive to the interests of most plaintiffs and defendants, would stop if the emphasis on defamation law is placed where it belongs: on whether the statement is true, rather than on the media's motives for publishing the statement. Both sides in a defamation dispute have a vested interest in presenting the truth to the public. At stake for media defendants is their professional credibility; for plaintiffs, their good name. Failure to compromise on reform costs both dearly. Modest reform proposals like the Correction Act, even if they themselves are not enacted, stimulate dialogue regarding how to change defamation law. Years may pass before meaningful reforms are enacted. But as Chinese philosopher Lao Tzu said, "The journey of a thousand miles must begin with a single step."[343]

M. Linda Dragas*

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[343] Traditional translation *cited in* JOHN BARTLETT, FAMILIAR QUOTATIONS 57b (16th ed. 1992). *Compare with* THE WISDOM OF LAOTSE 283 (Lin Yutang ed. & trans. 1948)(translating it as: "A journey of a thousand *li* begins at one's feet.").

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The Reassertion of Native Hawaiian[1] Gathering Rights Within The Context of Hawai'i's Western System of Land Tenure

I. INTRODUCTION

Contemporary Hawaii law includes the mandate that Native Hawaiian culture must be protected or, if once lost, restored.[2] Article XII, section 7 of the Hawaii Constitution, adopted in 1978, embodies the emerging trend in Hawaii public policy to protect Native Hawaiian

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[1] The term "Native Hawaiian" has varying definitions. For instance, Hawaii Revised Statutes (HAW. REV. STAT.) § 10-2 defines "Native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." As used in this paper, however, the term "Native Hawaiian" refers to any person born of Hawaiian ancestry, regardless of blood quantum. *See* Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 522 n.2 (1992) (noting varying definitions of "Native Hawaiian"). For a critique of blood-quantum-based definitions of native Hawaiians, see HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM & SOVEREIGNTY IN HAWAI'I 134-36 (1993) (criticizing blood-quantum-based definitions of "Hawaiian" as representative of governmental efforts to define Hawaiians out of existence).

[2] *See e.g.*, HAW. CONST. art. X, § 4 (1978) (directing the State to promote the study of Hawaiian culture, history and language); HAW. CONST. art. XV, § 4 (1978) (declaring English and Hawaiian to be the official languages of Hawai'i); HAW. CONST. art XII, § 7 (1978) (directing the State to protect the traditional rights of Native Hawaiians); *See also* Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993) (mem.) ("[T]he rights of native Hawaiians are a matter of great public concern in Hawaii.").

culture: "The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a*[3] tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[4] The traditional rights encompassed by article XII, section 7 include Native Hawaiian gathering rights.[5]

The land system of ancient Hawaii revolved around the land division known as the *ahupua'a*.[6] Typically, each *ahupua'a* would encompass an area of land extending from the seashore to the mountains.[7] The division of land in this fashion "enabled a chief and his people to obtain fish and seaweed from the ocean, and fuel, canoe timber and mountain birds" from the uplands.[8] A tenant of an *ahupua'a* could traverse the lands within the *ahupua'a* in which he resided in order to gather from the land those items necessary for survival.[9] The uses of gathering rights were myriad:

> First, gathering allowed the tenant farmer to supplement a subsistence lifestyle with plants and animals that either could not grow or could not be supported on or near the tenant's houselot or cultivated plot of land. In this instance, gathering included items for both medicinal as well as religious purposes. Second, gathering allowed the tenants within an *ahupua'a*, when called upon by the resident chief, to retrieve large products from the land for communal purposes, such as a tree for a canoe or rafters for a *halau*.[10] Third, during times of famine, gathering helped the people to survive. When crops or sea life had diminished significantly due to drought or other adverse climate conditions, gathering or foraging for food became the primary means of survival for Hawaiians.[11]

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[3] Land division usually extending from the uplands to the sea. M. PUKUI & S. ELBERT, HAWAIIAN DICTIONARY 9 (2d ed., 1986).

[4] HAW. CONST. art. XII, § 7 (1978).

[5] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982) (affirming—in part because of article XII, section 7—the modern viability of gathering rights).

[6] Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975) (describing the role of the *ahupua'a* in traditional Hawaiian land tenure).

[7] Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968).

[8] *Id.* (citing In re Boundaries of Pulehunui, 4 Haw. 239 (1879)).

[9] *Kalipi*, 66 Haw. at 6, 656 P.2d at 749.

[10] Long house, as for canoes or *hula* instruction; meeting house. PUKUI & ELBERT, *supra* note 3, at 52.

[11] MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie, ed.) 223 (1991) [hereinafter MACKENZIE].

In *Kalipi v. Hawaiian Trust Co., Ltd.*,[12] decided in 1982, the Hawaii Supreme Court, pursuant to the public policy articulated in article XII, section 7,[13] recognized the contemporary validity of gathering rights.[14]

The supreme court's recognition of gathering rights, however, was not without reservation. The traversing of lands to gather items was non-objectionable in Hawaiian society because Hawaiians did not recognize the concept of land ownership: "[T]o aboriginal Hawaiians, a person could no more own a piece of land than a patch of ocean or a swath of sky. Land was held by the chiefs in trust for the gods and for the common benefit."[15] On the contrary, private ownership of land and the concurrent right to exclude are the cornerstones of Hawaii's modern system of land tenure.[16] Within the modern context gathering rights present a perceived menace to the private landowner.[17] In recognition of this tension, *Kalipi* tempered its decision by burdening the exercise of gathering rights with several restrictions, among them the restriction that gathering rights accrue to only *ahupua'a* residents.[18] The residency restriction, however, was short-lived. A decade after *Kalipi*, in *Pele Defense Fund v. Paty*,[19] the Hawaii Supreme Court

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[12] 66 Haw. 1, 656 P.2d 745 (1982).

[13] HAW. CONST. art. XII § 7 (1978); *See also* COMM. OF THE WHOLE REPORT NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1016 (characterizing the public interest behind article XII, § 7 in the following terms: "Delegates felt that this amendment would be an important and indispensable tool in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State.").

[14] *Kalipi*, 66 Haw. at 7-8, 656 P.2d at 749.

[15] Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 528 (1992).

[16] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (noting that the "right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property").

[17] *Kalipi*, 66 Haw. at 4, 656 P.2d at 748 (commenting that "permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land").

[18] *Id.* at 8, 656 P.2d at 749-50. In addition to the residency restriction, *Kalipi* also held that (1) gathering rights may only be exercised on undeveloped land, (2) the items gatherable under HAW. REV. STAT. § 7-1 are limited to the items enumerated in the statute, (3) the rights must be utilized in the practice of native customs, (4) the government may regulate gathering rights, and (5) gathering rights do not include the right to prevent the development of the *ahupua'a* or its resources. *Id.*

[19] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993) (mem.).

authorized the conditional abrogation of the residency restriction, thereby expanding the contemporary scope of gathering rights.

Gathering rights[20]—Native Hawaiian rights in general—will further develop as courts continue to follow the constitutional mandate of article XII, section 7.[21] This paper analyzes the restraints courts applying modern property law may place upon the restoration of Native Hawaiian rights. In particular, this paper assesses the impact of takings law on the *Pele* court's elimination of the residency restriction. This analysis will illuminate Takings Clause limitations which may constrain courts to limit further restoration of Native Hawaiian rights. Part II outlines the development and then elimination of the residency restriction. Part III outlines the "background principles" notion of takings law and then demonstrates how that principle might influence a court's analysis of the residency restriction. Part IV analyzes an uncritical

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[20] In Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, No. 15460, 1993 WL 15605, at *6 (Haw.App.), for instance, the Hawaii Intermediate Court of Appeals (I.C.A.) abrogated yet another restriction on gathering rights enumerated in *Kalipi*. The I.C.A. suggested—contrary to *Kalipi*—that lands burdened by gathering rights could not be developed irrespective of the traditional rights of Native Hawaiians. The court used art. XII § 7 as the vehicle to overturn this aspect of *Kalipi*. The court wrote:

> We are aware that *Kalipi* and *Pele* only guarantee access to undeveloped lands and do not require that any lands be held in their natural state for the exercise of native Hawaiian rights. [citations omitted] Also, *Kalipi* and *Pele* do not discuss the question of what happens to those gathering rights in a situation . . . where the property owner wishes to develop his property. However, it is our view, in light of article XII, § 7, that all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them.

No. 15460, 1993 WL 15605, at *6 (Haw.App.).

[21] *See* STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 640:

> [The Standing] Committee did not intend to have [article XII,] section 7 narrowly construed or ignored by the courts. [The] Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, [the] Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.

STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 640; *See also Pele*, 73 Haw. at 616, 837 P.2d at 1270 (defining the court's task to include developing the rights of article XII, § 7, in light of the court's conclusion that *Kalipi* merely "defined the rudiments of native Hawaiian rights protected by article XII, section 7").

application of the background principles notion to the residency restriction. Part V presents concluding remarks.

II. Native Hawaiian Gathering Rights: The Residency Restriction

In *Kalipi*, petitioner, a Native Hawaiian, claimed the right to enter privately owned lands to gather natural products[22] he alleged were necessary for use in accordance with traditional Native Hawaiian practices.[23] The defendants, private landowners, refused to grant Kalipi "unfettered access" to their lands.[24] Defendants argued that because gathering rights are "dangerous anachronisms which conflict with and potentially threaten the concept of fee simple ownership in Hawaii," they should not be recognized as a matter of policy.[25] The court acknowledged the tension between gathering rights and Hawaii's modern system of land tenure but then admonished that under article XII, section 7, "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail."[26] The court's

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[22] *Kalipi*, 66 Haw. at 4, 656 P.2d at 747 ("Among the products [Kalipi] gathered . . . [were] ti leaf, bamboo, kukui nuts, kiawe, medicinal herbs and ferns."). *Id.*

[23] *Id.* at 3-4, 656 P.2d at 747.

[24] *Id.* at 4, 656 P.2d at 747.

[25] *Id.*

[26] *Id.* at 4, 656 P.2d at 748. In Damon v. Territory of Hawaii, 194 U.S. 154 (1904), the United States Supreme Court made a similar declaration regarding the modern viability of unfamiliar ancient rights. Regarding Native Hawaiian fishing rights, the Court wrote:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such.

194 U.S. at 157. Hawaii courts have taken for granted the conclusion that gathering rights are intrusive despite the fact that the historical reality belies that conclusion. The characterization of gathering rights as intrusive ignores the Native Hawaiian's unique relationship to the land. For instance, "[a] central tenet of the Hawaiian culture is *aloha 'aina*, the love of the people for the land. This rich concept encompasses many values: the protection and conservation of nature, respect for the inherent value of living things, [and] the interdependence of people and nature . . . ." Friedman, *supra* note 1, at 522. Importantly, the characterization of gathering rights as intrusive practically compels the impositions of restrictions upon their practice. Restrictions upon the exercise of Native Hawaiian rights, however, should not be imposed as a reaction to rhetoric; rather, any restrictions should derive from the law or from actual, substantive conflict with modern rights.

interpretation of article XII, section 7 notwithstanding, the court's opinion evinces a great deal of concern for the modern landowner.

The court recognized two primary sources[27] of contemporary Native Hawaiian gathering rights: (1) Hawaii Revised Statutes (H.R.S.) section 7-1;[28] and (2) Native Hawaiian custom and tradition, as codified in H.R.S. section 1-1.[29] In delineating the contemporary scope of the

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[27] A third source of Native Hawaiian customary and traditional rights, "the reservation found in all relevant documents of original title in [Hawai'i], reserving the people's '*kuleana*' in lands converted to fee simple ownership" at the time of the *Mahele*, was recognized but not defined by the court. *Id.* at 4, 656 P.2d at 747. The awards by which Kalipi held the land upon which he asserted gathering rights contained a reservation translated to read "the *kuleanas* of the people are hereby excepted." *Id.* at 12, 656 P.2d at 752. All land awards under the *Mahele* contained a similar reservation, noting that fee simple title was conveyed by the award, but "subject always to the rights of native tenants." *See infra* text accompanying note 73. Dismissing this reservation as an independent source of Kalipi's asserted right to gather, the court found that "as with any gathering rights preserved by § 7-1 or § 1-1, we are convinced that traditional gathering rights do not accrue to persons, such as the Plaintiff, who do not live within the *ahupuaa* in which such rights are sought to be asserted." *Id.* at 13, 656 P.2d at 752. The court's cursory treatment of this source of native rights suggests that the rights retained by Native Hawaiians under the *kuleana* reservation are no more than those rights listed statutorily in HAW. REV. STAT. §§ 7-1 and 1-1. The court could have declined to define the rights of §§ 7-1 and 1-1 for the same reason it declined to discuss the *kuleana* reservation. Also, in *Pele*, the supreme court again failed to analyze the *kuleana* reservation as an independent source of Native Hawaiian rights. Pele Defense Fund v. Paty, 73 Haw. 578, 617-19, 837 P.2d 1247, 1270-71 (1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993). Instead, the *Pele* court concluded that the third source of Native Hawaiian rights is article XII, § 7 of the Hawaii constitution. *Id.* The I.C.A:, in Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, No. 15460, 1993 WL 15605, at *4 (Haw. App.), found that *Kalipi* itself recognized article XII, § 7—not the *kuleana* reservation—as the third source of Native Hawaiian gathering rights. Article XII, § 7 will be discussed in Section III, *infra*.

[28] HAW. REV. STAT. § 7-1 (1985) reads:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, housetimber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (1985).

[29] HAW. REV. STAT. § 1-1 (1985). Section 1-1 provides, in pertinent part:

> The common law of England, as ascertained by English and American decisions,

rights protected under those statutes, however, the supreme court retreated from its initial pronouncement that article XII, section 7 does not allow for the extinguishment of traditional rights merely because of their inconsistency with the modern system of land tenure. Importantly, the court concentrated on conforming gathering rights to fee simple rights, suggesting the former can exist only to the extent that they do not interfere with the latter. Thus, although traditional rights may not be "extinguished" by virtue of their inconsistency with modern land tenure, *Kalipi* suggests that they may be modified so as not to interfere with the privileges of fee simple ownership.

For instance, the court preceded its analysis of the scope of section 7-1 with the following interpretation of the controversy:

> The problem is that the gathering rights of § 7-1 represent remnants of an economic and physical existence largely foreign to today's world. Our task is thus to *conform* these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title.[30]

Having defined the tension in those terms, the court concluded:

> We believe that th[e] balance [between the interests of Native Hawaiians and the interests of private landowners] is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting the gathering rights of § 7-1 to assure that lawful occupants of an *ahupuaa* may, for the purpose of practicing native Hawaiian customs and traditions, enter undeveloped lands within the *ahupuaa* to gather those items enumerated in the statute.[31]

Similarly, regarding the scope of section 1-1, the court concluded that "the Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced [after the transformation to a Western system of land tenure] and *which worked no actual harm upon the recognized interests of*

> is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . .

HAW. REV. STAT. § 1-1 (1985).

[30] *Kalipi*, 66 Haw. at 7, 656 P.2d at 749 (emphasis added).

[31] *Id.* at 7-8, 656 P.2d at 749.

others."[32] Defining its task relative to modern landowners—not Native Hawaiians—the court concluded that a precondition to the exercise of gathering rights under section 1-1, too, is that the Native Hawaiian must reside within the *ahupua'a* in which gathering rights are asserted.[33] The residency restriction, however, was thereafter invalidated by *Pele Defense Fund v. Paty*.[34]

Pele Defense Fund (PDF) challenged the State of Hawaii's decision to exchange public "ceded"[35] lands, including the Wao Kele 'O Puna Natural Area Reserve, for privately owned lands of the Estate of James Campbell.[36] PDF brought suit in order to preserve continued access to the area by Native Hawaiians.[37]

PDF argued that because Wao Kele 'O Puna had "historically served as a common gathering area which could be utilized by tenants who resided in *ahupua'a* abutting Wao Kele 'O Puna, . . . its members [did] not need to establish that they [were] 'lawful occupants' of Wao Kele 'O Puna.'"[38] Instead, PDF argued that its members need only establish that they were "tenants of *ahupua'a* abutting Wao Kele 'O Puna and had traditionally used the area for gathering and other Native Hawaiian practices."[39] *Pele* resolved the residency issue in favor of PDF, holding—contrary to *Kalipi*—that the "Native Hawaiian rights protected by article XII, § 7 may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[40]

Apparently, gathering rights in ancient Hawaii at least occasionally accrued to other than *ahupua'a* residents.[41] *Pele's* conditional elimination

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[32] *Id.* at 11-12, 656 P.2d at 751-752 (emphasis added).

[33] *Id.* at 13, 656 P.2d at 752.

[34] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993) (mem.).

[35] *Id.* at 584, 837 P.2d at 1253 ("Hawaii's ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893. Upon annexation in 1898, the Republic of Hawaii ceded these lands to the United States. In 1959, when Hawaii was admitted into the Union, the ceded lands were transferred to the newly created state, subject to the trust provisions set forth in section 5(f) of the Admission Act.") *Id.* at 585, 837 P.2d at 1254.

[36] *Id.* at 584, 837 P.2d at 1253.

[37] *Id.*

[38] *Id.* at 616, 837 P.2d at 1269.

[39] *Id.*

[40] *Id.* at 620, 837 P.2d at 1272.

[41] *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 8-9 (1992)

of the residency requirement as a precondition to the exercise of gathering rights, therefore, comports the modern gathering right with its ancient predecessor. In this sense, the elimination of the residency requirement serves the state interest, embodied in Hawaii Constitution article XII, section 7, in restoring Native Hawaiian culture. However, are Hawaii's state or federal courts likely to conclude that the Takings Clause to the United States Constitution places any limits on the State's ability to reassert the culture of its indigenous people?

III. TAKINGS

Underlying the difficulty in defining the scope of gathering rights lies the perceived tension between the exclusionary expectations of the modern landowner and the intrusive nature[42] of gathering rights.[43] The Takings Clause of the Fifth Amendment to the United States Constitution[44] dictates that the line between these interests be drawn according to the historical definition of the nature of the fee simple title under the State's law of property.[45]

This section will first outline the basic precepts of Western property law, then, second, analyze whether and to what extent those precepts allow for the reassertion of the traditional and customary rights of Native Hawaiians.

A. The Right to Exclude

A fundamental element of the Western property system is the "right to exclude."[46] For instance, in *Loretto v. Teleprompter Manhattan CATV*

(describing the traditional land tenure system in the following terms: "[U]nder the communal system all people had access to land . . . . Communal access to land . . . meant easy access to the source of food and implied a certain generosity in the sharing of resources."). For an example of the traditional use of gathering rights outside the *ahupua'a* in which a Native Hawaiian resided, see Pele Defense Fund v. Paty, *supra* notes 35-40 and accompanying text.

[42] *See supra* note 26.

[43] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 4, 656 P.2d 745, 748 (1982).

[44] U.S. CONST. amend. V. (" No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). *Id.*

[45] *See generally* Lucas v. South Carolina Coastal Council, ___U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The Hawaii fee simple title did not develop until post-1848. *See infra* notes 65- 73 and accompanying text. Consequently, in the context of takings jurisprudence, the "historical" nature of the Hawaii fee simple title equates to the post-1848 (post-*Mahele*) definition.

[46] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("'[The

Corp.,[47] the petitioner's property was burdened by a New York law which required landlords to allow television cable companies to place cable facilities in their apartment buildings.[48] The Court determined that because the New York law authorized "a permanent physical occupation" the law constituted a taking, despite the fact that the facilities occupied only about $1^1/_2$ cubic feet of the landlord's property and regardless of the public interests that the law purportedly served.[49]

Further, in *Kaiser Aetna v. United States*[50] the Court held that the imposition of a navigational servitude was a taking because the servitude denied the landowner's of the right to exclude, which the court characterized as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[51] The court explained that "even if the Government invades only an easement in property, it must nonetheless pay compensation."[52]

In not every instance, however, will government-induced physical invasions of property constitute a taking.[53] In *Lucas v. South Carolina Coastal Council*[54] the Supreme Court articulated a general principle to guide courts in their determination whether in any particular instance the "opening of private property to public use constitutes a taking."[55] *Lucas* permits the government to burden private land with a public easement where the easement was a pre-existing limitation upon the landowner's title:

> [W]e assuredly would permit the government to assert a permanent easement that was a *pre-existing limitation* upon the landowner's title . . . . Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation),

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r]ight to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation."); Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 435 (1982) ("The right to exclude has traditionally been one of the most treasured strands in an owner's bundle of property rights.").

[47] 458 U.S. 419 (1982).

[48] *Id.* at 423.

[49] *Id.* at 438.

[50] 444 U.S. 164 (1979).

[51] *Id.* at 176.

[52] *Id.* at 180.

[53] *See infra* notes 54-57 and accompanying text.

[54] ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[55] Stevens v. City of Cannon Beach, ___U.S. ___, 114 S.Ct. 1332, 1334 (1994).

> but *must inhere in the title itself, in the restrictions that background principles of the State's law of property . . . already place upon land ownership*.[56]

The "background principles" notion was summarized by one commentator in the following terms:

> Simply stated, the *Lucas* rule says that government's right to constrain the use of property without paying compensation is limited by what it withheld from owners at the outset. Government cannot change the rules of the game after the game has started. To find the rules articulated when the game began, one is directed to historical definition.[57]

In Hawaii, the game (the transformation to a Western system of land tenure) began in 1848, the date upon which a Western system of property was adopted to replace the traditional Hawaiian land system.

Lucas may be read either broadly or narrowly.[58] If read broadly, *Lucas* mandates that the government cannot redefine property rights once those rights have been established, regardless of circumstance.[59] Such an interpretation of *Lucas*, which would require unqualified reliance upon Western historical definitions of property rights, could impose substantial limitations upon the ability of the State of Hawai'i to reassert the cultural heritage of Native Hawaiians. As will be shown below, once the Hawaiian government undertook to establish property rights, traditional Native Hawaiian rights were in large part no longer valued by those people charged with the implementation of property rights.[60] The Western historical definition of Hawaii property rights, therefore, contains minimal protection of Native Hawaiian rights.

On the other hand, if *Lucas* is read narrowly, its mandate does not apply where Western law has supplanted indigenous peoples' law under circumstances of coercion.[61] A narrow reading of *Lucas* might be more persuasive given Hawai'i's unique history. In particular, the Court's

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[56] *Lucas*, 112 S.Ct. at 2900 (emphasis added).

[57] Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993) [hereinafter Sax, *The Impact of Lucas*].

[58] K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1960).

[59] *Lucas*, 112 S.Ct. at 2893 (noting that where regulations "compel the property owner to suffer a physical 'invasion' of his property" the regulation constitutes a taking "no matter how minute the intrusion, and no matter how weighty the public purpose behind it"). *Id.*

[60] *See infra* Section III.

[61] *See generally* KAME'ELEIHIWA, NATIVE LAND, *supra* note 41 (chronicling the usurpation of Hawaiian society).

proposition that "government cannot change the rules of the game after the game has started"[62] does not ask whether the game was fairly begun. In Hawai'i, of course, as for many native Americans, the game (the conversion to a Western system of land tenure) was not fairly begun.[63]

Despite its failings, Hawaii state and federal courts will likely wrestle with *Lucas*' mandate that as Hawaii courts attempt to enforce state constitutionally recognized customary and traditional rights of Native Hawaiians, the courts must work within the historical definition of Hawaii property law. If Hawaii courts decide to adopt the narrow reading of *Lucas*, then the elimination of the residency requirement in *Pele* poses no takings problem. If, however, Hawaii courts adopt the broader reading of *Lucas*, then the background principles notion of that decision becomes problematic. The remainder of this article addresses the latter scenario.

Under an expansive reading of *Lucas*, to determine when, if ever, the enforcement of Native Hawaiian rights would constitute a taking, we must look to the "background principles" of Hawaii property law to determine the scope of gathering rights preserved upon Hawaii's transformation to a Western system of property. Accordingly, in the context of gathering rights, do the background principles of Hawaii property law limit gathering rights to *ahupua'a* residents?

B. Background Principles and the Residency Requirement[64]

In the mid-nineteenth century, the Hawaiian system of land tenure, of which gathering rights were an integral component, fell victim to Western intervention:[65]

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[62] Sax, *The Impact of Lucas*, *supra* note 57, at 944.

[63] *See, e.g.*, 139 Cong. 1993, S.J. Res. 19, 107 Stat. 1510 (apologizing to Native Hawaiians for the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, by agents and citizens of the United States); *See also* KAME'ELEIHIWA, NATIVE LAND, supra note 41, at 10-11 ("The foreigners' knowledge of capitalism gave them a certain advantage and power over Hawaiians, who only half understood the new system. To Hawaiians, this was an entirely new game into which they had been inadvertently thrust.").

[64] *See generally* MACKENZIE, *supra* note 11; J.J. CHINEN, THE GREAT MAHELE (1958); LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES (1992); Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848 (1975).

[65] *See* Levy, *supra* note 64, at 850-853.

> Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's.[66]

The "most important event in the reformation of the land system in Hawaii was the *Mahele*[67] of 1848."[68]

The *Mahele* signaled the end of the traditional system of land tenure in Hawaii.[69] The *Mahele* parceled out the land of the Kingdom between the Hawaiian government, the *konohiki*,[70] and the native tenants.[71] Most importantly, at the conclusion of the *Mahele* land in Hawaii was for the first time capable of fee simple ownership.[72]

All lands granted by the *Mahele*, however, retained a substantial restriction: they were granted "subject always to the rights of native tenants."[73] The nature of the fee simple grant in Hawaii, therefore, has never included the absolute right to exclude. The question, however, is the breadth of the gathering rights retained by Native Hawaiians. Were the gathering rights retained under the Western system limited to *ahupua'a* residents?

To determine the historical breadth of the rights Native Hawaiians carried into the Western system of land tenure, analysis must be made of the two primary sources of Native Hawaiian rights: (1) Hawaii Revised Statutes section 7-1, and (2) Hawaii Revised Statutes section 1-1. Furthermore, although written well-over a century after the *Mahele*,

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[66] State v. Zimring, 58 Haw. 106, 111, 566 P.2d 725, 729 (1977).

[67] Portion; division; division of 1848 (the great *mahele*). PUKUI & ELBERT, *supra* note 3, at 219. Although historically known as the "Great *Mahele*", I will follow the teaching of Lilikala Kame'eleihiwa and refer to the event simply as the *Mahele*. Kame'eleihiwa eliminates the adjective "Great" because the event was "a terrible disaster for the Hawaiian people" and the word "Great" inappropriately suggests "superior." KAME'ELEIHIWA, NATIVE LAND, *supra* note 41, at 8.

[68] CHINEN, *supra* note 64, at 15 ("The most important event in the reformation of the land system in Hawaii was the separation and identification of the relative rights of the king, the chiefs, and the *konohikis*, in the lands within the Islands. This event led to the end of the feudal system in the kingdom."). *Id.*

[69] *Id.*

[70] Headman of an *ahupua'a* land division under the chief. PUKUI & ELBERT, *supra* note 3, at 166.

[71] CHINEN, *supra* note 64, at 15.

[72] *Id.* at 15-16.

[73] *Id.* at 29 (citing 1925 Revised Laws of Hawaii 2152-2176; Harris v. Carter, 6 Haw. 195 (1877); In re Kakaako, 30 Haw. 666 (1928)).

the scope of article XII, section 7 of the Hawaii Constitution must also be determined because *Pele* interpreted article XII, section 7 to be an independent source of rights retained by Native Hawaiians following the *Mahele*.[74]

1. The Kuleana Act/Hawaii Revised Statutes Section 7-1

The phrase "rights of native tenants" was explained by the *Kuleana* Act of August 6, 1850.[75] In its original form, section 7 of the *Kuleana* Act read:

> When the landlords have obtained or may hereafter obtain allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, *aho* cord,[76] thatch, or *ki* leaf,[77] from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses which individuals have made for their own use.[78]

The *Kuleana* Act thus preserved the historical rights of tenants to gain access to the mountains and the sea to gather certain items.[79] The

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[74] *See infra* text accompanying notes 129-142.

[75] 1850 LAWS HAW. 202, *reprinted in* 1925 REV. LAWS HAW. 2141 (also known as the "Enactment of Further Principles"). *See* Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95 (1968) ("The rights of native tenants as owners [following the *Mahele*] were set forth in the Act of August 6, 1850."); McBryde Sugar Co. v. Robinson, 55 Haw. 260, 286-87, 517 P.2d 26, 41(1973) (Levinson, J., dissenting) ("Events [following the *Mahele*] made it clear . . . that the phrase 'rights of native tenants' was not self-explanatory, and that legislation was needed to define *hoaaina* rights with greater particularity. [Accordingly,] the Privy Council adopted four resolutions which were enacted by the Legislature as the . . . Enactment of Further Principles . . . .").

[76] Line, cord, lashing, fishing line, thong, kite string. PUKUI & ELBERT, *supra* note 3, at 8.

[77] Ti, a woody plant. PUKUI & ELBERT, *supra* note 3, at 145.

[78] 1925 REV. LAWS HAW. 2141.

[79] *See* Levy, *supra* note 64, at 857 ("The *Kuleana* Act withdrew the right to grow crops and pasture and merely provided *some* gathering rights, which meant little to a weak tenant surrounded by large fenced landholdings."); *See generally* MACKENZIE, *supra* note 11, at 226.

King purportedly insisted upon the inclusion of section 7 because he was concerned that "a little bit of land even with allodial title, if [the tenants] were cut off from all other privileges, would be of very little value."[80]

The Act was amended in 1851 to broaden the rights of Native Hawaiians under the Act.[81] The 1851 amendment to the *Kuleana* Act eliminated the requirement, in the original act, that before exercising the rights preserved under the Act, tenants needed to first prove necessity, and then seek permission from their landlord.[82] The Act was liberalized, and the rights of Native Hawaiians thereby broadened, because the legislature determined that, "[M]any difficulties and complaints have arisen, from the bad feeling existing on account of the *konohiki's* forbidding the tenants on the lands enjoying the benefits that have been by law given them."[83] The rights of section 7-1 are, therefore, held unconditionally; they are an inherent right of Native Hawaiians.[84]

The *Kuleana* Act today survives as Hawaii Revised Statutes section 7-1.[85] Section 7-1 mirrors the 1851 amendment to the *Kuleana* Act. In its present form, section 7-1 reads:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, *aho* cord, thatch, or *ki* leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.[86]

Interestingly, prior to *Kalipi*, Hawaii courts had never considered the gathering rights of section 7-1.[87] Therefore, in order to determine the

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[80] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 7, 656 P.2d 745, 749 (quoting Privy Council Minutes, July 13, 1850). *Id.*

[81] 1851 Haw. Sess. Laws 98-99.

[82] *Id.*

[83] *Id.*

[84] *See supra* text accompanying note 73.

[85] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 7, 656 P.2d 745, 749.

[86] HAW. REV. STAT. § 7-1 (1985).

[87] *Kalipi*, 66 Haw. at 6, 656 P.2d at 748.

scope of gathering rights under section 7-1, analogy must be made to the scope of comparable rights protected under that provision.

Oni v. Meek,[88] decided within a decade of the drafting of the *Kuleana* Act, was the first judicial interpretation of the Act's scope.[89] Oni, a *hoa'aina*[90] of Honouliuli, had brought suit to recover the value of two horses, taken by the defendant landlord and sold as strays.[91] The defendant owned, under three leases, the entire *kula*[92] land of the *ahupua'a* of Honouliuli.[93] The Hawaii Supreme Court considered and subsequently rejected the plaintiff's asserted right to pasture horses on the lands of the *ahupua'a* of Honouliuli.

In denying Oni the right to pasture his horses, the court considered the scope of the rights retained by Native Hawaiians under the new Western system of property. The court found, *inter alia*, that the rights enumerated in the *Kuleana* Act were limited to *ahupua'a* tenants.[94] The imposition of the residency restriction on the rights of the *Kuleana* Act indicates the *Oni* court narrowly read the rights retained by Native Hawaiians under the Western system of property.[95]

Because *Oni* was written contemporaneous to the drafting of the *Kuleana* Act, *Oni* stands as a principal component of the background principles of Hawaii property law with respect to the post-*Mahele* historical definition of those Native Hawaiian rights retained under the *Kuleana* Act.[96] The foundation of the *Oni* decision itself, however, is

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[88] 2 Haw. 87 (1858).

[89] Maivan Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 270 (1989).

[90] Tenant, caretaker, as on a *kuleana*. PUKUI & ELBERT, *supra* note 3, at 73.

[91] *Oni*, 2 Haw. at 87.

[92] Plain, field, open country, pasture. PUKUI & ELBERT, *supra* note 3, at 178.

[93] *Oni*, 2 Haw. at 87.

[94] *Id.* at 96.

[95] *See* MACKENZIE, *supra* note 11, at 223.

[96] *See, e.g.*, State v. Zimring, 58 Haw. 106, 114 n.9, 566 P.2d 725, 731 (1977) (interpreting the ownership of lands unassigned after the *Mahele*, the Hawaii Supreme Court cited a nineteenth century report of the Surveyor General of Hawaii, who gave "peculiar weight" to the treatment of unassigned property by the government of Kamehameha III; the Surveyor General commented: "These facts have peculiar weight, as they indicate the views held on this subject by the very parties who executed the original '*Mahele*'; and it must be admitted that Kamehameha III, and the able men who composed his Council and who organized this government, probably understood their own work better than those of a later generation."). The earliest decisions of Hawaii courts may not be entitled to such deference, however, due to a number of factors, including the fact that whatever level of participation Native Hawaiians

suspect. For instance, in addition to the finding that the rights of the *Kuleana* Act accrue to only *ahupua'a* residents, *Oni* also concluded that the rights enumerated under the *Kuleana* Act of 1850 were "*all* the specific rights of the *hoa'aina* (excepting fishing rights) which should be held to prevail against the fee simple title of the *konohiki.*"[97] This conclusion, however, was not well-supported.

The court, without convincing explanation, cited the 1851 amendment of the *Kuleana* Act as evidence that the legislature intended the Act to be all-inclusive.[98] The 1851 amendment, however, does not lend itself to this conclusion. In fact, the 1851 amendment to the statute *broadened* the scope of native rights under the *Kuleana* Act by eliminating the requirements that tenants had to first prove necessity, then seek permission from their landlords before exercising the rights preserved under the *Kuleana* Act.

The *Oni* court's conservative interpretation of the scope of Native Hawaiian rights preserved under the *Kuleana* Act was likely motivated by the policy considerations which initiated the *Mahele.* A principle behind the transformation to a Western system of land tenure was that private ownership of land was essential to development.[99] For instance, the Land Commission,[100] the governmental body by which the *Mahele* was implemented, commented:

> The Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper

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enjoyed in the *Mahele* may have been premised upon their misunderstanding of the system. The characterization of the *Mahele* as a "division" is illustrative. Although Western interpretations of the *Mahele* assume that a division of land was in fact intended by the *Mahele* and its authors, there is some doubt that it was a division of land—in the Western sense—that was intended. *See* KAME'ELEIHIWA, NATIVE LAND, *supra* note 41, at 9 (arguing that "the *Ali'i* [Chiefs] thought that they were sharing the Land . . . rather than 'dividing' the Land in the *Mahele.*"). *Id.*

[97] *Oni*, 2 Haw. at 95 (emphasis added).

[98] *Id.*

[99] *Id.*

[100] The Land Commission was a principal actor in the transformation to a Western system of property. *See* Levy, *supra* note 64, at 853 ("The Land Commission was charged to undertake 'the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property.'"). *Id.*

> cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim. They perceive by contact with foreign nations, that such is their uniform practice, and that the rules of right under that practice are contended for, understood and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things, now that they have come to be a nation in the understanding of older and more enlightened governments.[101]

The Western-oriented policy considerations which evidently precipitated the restrictive decision in *Oni* leave the decision open to substantial criticism under the State's current policy with respect to Native Hawaiians.[102] Nevertheless, the court's conclusion that the rights enumerated under the *Kuleana* Act are held by only *ahupua'a* tenants was, until *Pele*, followed by Hawai'i courts. Specifically, Hawai'i courts on different occasions held that the rights of access[103] and the water rights[104] of section 7-1 are limited to *ahupua'a* residents.

In *Robinson v. Ariyoshi*,[105] for instance, the United States District Court for the District of Hawaii considered a takings challenge to the

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[101] PRINCIPLES ADOPTED BY LAND COMMISSION, *reprinted in* 1925 REV. LAWS HAW. 2130.

[102] *See* HAW. CONST. art. XII, § 7 (1978).

[103] Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95 (1968) (finding that HAW. REV. STAT. § 7-1 defines the rights of native tenants); Rogers v. Pedro, 3 Haw. App. 136, 139, 642 P.2d 549 (1982) ("HRS § 7-1 . . . confers a right of way to tenants' allodial lands."); Santos v. Perreira, 2 Haw. App. 387, 390, 633 P.2d 1118 (1981) (concluding that the right of way under HAW. REV. STAT. § 7-1 "refers to a special right-of-way unique to ancient tenancies and *kuleanas*").

[104] Carter v. Territory, 24 Haw. 47, 67 (1917) ("Th[e rights of section 7 of the *Kuleana* Act], as we understand it, are rights in gross which may be exercised by the lawful occupants of *kuleanas* or separated portions of an *ahupuaa* against the *ahupuaa* itself after it has passed into private ownership."); McBryde Sugar Co., Ltd. v. Robinson, 55 Haw. 260, 287, 517 P.2d 26, 41 (1973) (Levinson, J., dissenting) ("The legislative history of [section 7 of the Enactment of Further Principles] shows that it was intended to be the sole and exclusive measure of the rights of the *hoaainas* as against the *konohikis* of the land within which the *kuleanas* were situated."), *cert. denied*, 417 U.S. 962 (1974); Reppun v. Board of Water Supply, 65 Haw. 531, 549, 656 P.2d 57, 69 (1982) ("[T]he riparian water rights of HRS § 7-1 were established to enable tenants of *ahupuaas* to make productive use of their lands.").

[105] 441 F.Supp. 559 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *cert. granted and judgment vacated by*, 477 U.S. 902 (1986).

Hawaii Supreme Court's conclusion, in *McBryde Sugar Co. v. Robinson*,[106] that Hawaii law does not recognize the concept of private ownership of the surplus waters of the State of Hawaii. The holding in *McBryde* rested in part upon the court's determination that section 7-1 "reserved to *landowners* the right to both 'drinking water' and 'running water.'"[107] In holding *McBryde* worked an unconstitutional taking of property without compensation by retroactively converting private property rights to public property rights, the United States District Court challenged *McBryde's* reading of the scope of section 7-1:

> [Section 7-1] was never meant to apply to the general public or to general land owners' rights! The heading of the section, with [great] crystal clarity, shows that it was intended to apply to "Building materials, water, etc.: landlords' titles subject to tenants' use." [internal citation omitted] The statute was never intended to apply to the general public or reserve anything for the 'people' of the Kingdom. It was solely aimed at giving the *hoaainas*, as former tenants at sufferance but now owners in fee of a *kuleana* within an *ahupuaa*, the right to take [the items enumerated in the statute] on all lands granted in fee simple. The statute obviously applied only to the rights of the tenants vis-a-vis their former landlords . . . .[108]

The language of the statute itself, as *Kalipi* noted, requires tenants to be "on" the land before they become entitled to take products "from the land on which they live."[109] The background principles of Hawaii property law, therefore, affirm the *Kalipi* court's determination that the gathering rights of section 7-1 are limited to *ahupua'a* tenants. *Pele* did not, however, challenge the *Kalipi* court's interpretation of section 7-1. Rather, the court relied upon H.R.S. section 1-1 (as modified by article XII, section 7 of the Hawaii constitution) for authority to eliminate the residency restriction as a precondition to the exercise of customary and traditional Native Hawaiian rights under that provision.

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[106] 54 Haw. 174, 504 P.2d 1330 (1973), *decision adhered to on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 962 (1974).

[107] *Id.* at 192, 504 P.2d at 1342 (emphasis added).

[108] *Robinson*, 441 F.Supp. at 567-68.

[109] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 8, 656 P.2d 745, 749-50 ("We see no reason to deviate from such unambiguous language. And nothing in our caselaw or the statute's history can reasonably be interpreted to require a contrary result."). *Id.* at 8, 656 P.2d at 750.

2. Hawaii Revised Statutes section 1-1

Gathering rights also survived the transformation to a Western system of property under the doctrine of custom, codified in Hawaii Revised Statutes section 1-1.[110] Section 1-1. provides, in pertinent part:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . .[111]

Section 1-1 protects a broader spectrum of Native Hawaiian rights than those enumerated in section 7-1.[112] Yet, are the rights of Hawaiian usage in section 1-1, as are the rights of section 7-1, limited to *ahupua'a* residents?

Kalipi characterized section 1-1 as a statutory attempt "to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices [after the *Mahele*] which did not unreasonably interfere with the spirit of the common law."[113] Accordingly, *Kalipi* held that where gathering rights have been traditionally continued in a particular area, section 1-1 "insures their continuance so long as no actual harm is done thereby."[114] Ultimately, however, the court found that the rights of section 1-1 accrue to only *ahupua'a* residents: "[T]here is an insufficient basis to find that [the rights protected under section 1-1] would, or should, accrue to persons who did not actually reside within the *ahupua'a* in which such rights are claimed."[115]

Pele abrogated *Kalipi*'s imposition of a residency requirement as a precondition to the exercise of native rights under section 1-1 in part by distinguishing the factual basis for the assertion of native rights in the respective opinions. Unlike Kalipi, PDF did not base its asserted right to exercise customary and traditional rights on land ownership

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[110] *Id.* at 10, 656 P.2d at 751.

[111] HAW. REV. STAT. § 1-1 (1985).

[112] Pele Defense Fund v. Paty, 73 Haw. 578, 618, 837 P.2d 1247, 1270 (1992), *cert. denied*, ____U.S.____, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993) (mem.) ("HRS § 1-1's 'Hawaiian usage' clause may establish certain customary rights beyond those found in HRS § 7-1."). *Id.*

[113] *Kalipi*, 66 Haw. at 10, 656 P.2d at 750-751.

[114] *Id.*

[115] *Id.* at 12, 656 P.2d at 752.

in the *ahupua'a* in which those rights were asserted; rather, PDF's claim was based on the assertion that their members had traditionally accessed Wao Kele 'O Puna for gathering.[116] Having distinguished *Kalipi*, *Pele* acknowledged that Native Hawaiian rights under section 1-1 are "associated with residency within a particular *ahupua'a*."[117] Nevertheless, the court found that by article XII, section 7 of the constitution, the constitutional convention had intended to vest in all Native Hawaiians the right to practice traditional and customary Native Hawaiian practices, regardless of residency.[118] The court, therefore, did not rely upon section 1-1 to eliminate the residency restriction as a precondition to the exercise of the traditional and customary rights usually associated with that provision. The following analysis will demonstrate that the court's elimination of the residency restriction may have been more constitutionally sound had the court rested solely on section 1-1, and not article XII, section 7.

Prior to *Kalipi* and *Pele*, it was not clear whether the customary rights of section 1-1 were vested in all Hawaiians or, rather, only *ahupua'a* residents. For instance, in *State v. Zimring*,[119] the Hawaii Supreme Court considered whether under the doctrine of custom land added to the acreage of Hawai'i by volcanic eruption became part of the public domain or part of the adjoining private landowner's title. As a preliminary matter, the court noted that in order to qualify as a

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[116] *Pele*, 73 Haw. at 618-19, 837 P.2d at 1271:

> Like Kalipi, PDF members assert native Hawaiian rights based on article XII, section 7 and HRS § 1-1 in an *ahupua'a* other than the ones in which they reside. Unlike Kalipi, PDF members claim these rights based on the traditional access and gathering patterns of native Hawaiians in the Puna region. Because Kalipi based his claims entirely on land ownership, rather than on the practiced customs of Hawaiians on Molokai, the issue facing us is somewhat different from the issue in *Kalipi*. In *Kalipi*, we foresaw that '[t]he precise nature and scope of rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case.'

Pele, 73 Haw. at 618-19, 837 P.2d at 1271.

[117] *Id.* at 619, 837 P.2d at 1271 (citing STAND. COMM. REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637: "The committee reported that 'although a tenant may not own any land in the *ahupua'a*, since these rights are personal in nature, as a resident of the *ahupua'a*, he may assert any traditional and customary rights necessary for subsistence, cultural or religious purposes."). *Id.*

[118] *Id.* For a critique of *Pele's* interpretation of article XII, § 7, *see infra* notes 129-142 and accompanying text.

[119] State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977).

Hawaiian usage under section 1-1, a practice must have been established before November 25, 1892, the date on which the original section 1-1 was approved.[120] Logically, because the Hawaiian usage must have been practiced contemporaneous with the private property system of land tenure, the practice must be established after 1848, the date at which private ownership of land first became an option in Hawaiian society.[121] The Hawaiian usage exception of section 1-1, therefore, is confined to a fairly narrow window—1848 to 1892—in Hawaiian history.[122] Importantly, this limitation on the scope of section 1-1 may explain why the *Pele* court preferred to rely upon article XII, section 7 as an independent source of customary and traditional Native Hawaiian rights.

The *Zimring* court, though, did not address the issue of residency. The court's silence on the issue of residency may be read as indicative of the court's conclusion—followed in *Pele* and elsewhere—that once a Native Hawaiian establishes a Hawaiian usage between 1848 and 1892, that usage may continue to be practiced regardless of residency. For instance, in his dissent to *McBryde Sugar Company, Ltd. v. Robinson*,[123] Hawaii Supreme Court Justice Levinson implied that the only relevant consideration under section 1-1 is whether the practice in question was sanctioned during the nineteenth century.[124]

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[120] *Id.* at 114-15, 566 P.2d at 731.

[121] *Id.* at 146, 566 P.2d at 748 (Vitousek, dissenting) ("To be relevant the usage alleged must deal with . . . privately owned land, but in Hawaii private ownership of land did not begin until the Great *Mahele* of 184[8]. Thus [Hawaiian] usage evidence must [establish a practice] between 184[8] and 1892 . . . ."). *Id.*

[122] *Id.* at 116-17, 566 P.2d at 732-33 (Vitousek, dissenting). Regarding Hawaiian customs practiced prior to the *Mahele*, the court suggested they "would be of little weight" because the *Mahele* had established a completely different system of land tenure:

> Under the traditional and more communal economic system in pre-*Mahele* Hawai'i, the *ahupua'a* were designed to be self-sufficient economic units. Thus, had a practice existed which allowed the landowners the use of lava extensions, such practice would have made good economic sense since denial of access to the ocean and fishing grounds would have rendered the *ahupua'a* something less than self-sufficient. The economic necessity for such a practice would not have carried over into a private property regime within the framework of a private enterprise economic system. Moreover, *the interests a landholder may have enjoyed under the traditional system, within which there was no private title and all land was held in trust for the people by the King, are of little relevance in determining private rights to title under a private property regime. Id.* (emphasis added).

[123] 55 Haw. 260, 517 P.2d 26 (1973); *cert. denied*, 417 U.S. 962 (1974).

[124] *Id.* at 291-94, 517 P.2d at 44-46 (Levinson, J., dissenting) (implying that under HAW. REV. STAT. § 1-1 the only relevant consideration is whether Hawaiian judicial precedent or usage prior to January 1, 1893, established the usage in question).

Section 1-1 is potentially a great vehicle for the assertion of customary and traditional Native Hawaiian rights. Hawaii Circuit Judge Vitousek, in his dissent to *State v. Zimring*,[125] noted that section 1-1 was designed "to provide the people of Hawaii with another source of law, one which is not derived from the legislature or from supreme court decisions,"[126] and, further, "[t]he position occupied by Hawaiian custom and usage in the jurisprudence of this State is far higher than that of traditional common law custom and usage. Hawaiian usage is law derived from our island's history and is of equal dignity with laws derived from our legislature and courts."[127] Consequently, the background principles of Hawaii property law do not indicate that the rights of Hawaii Revised Statutes section 1-1 are limited to *ahupua'a* residents. The breadth of the language in the statute and the judicial interpretations thereof indicate that the section was intended to allow for the continuance of Native Hawaiian practices that were practiced following Hawaii's adoption of a Western system of land tenure.[128] However, because *Pele* relied upon article XII, section 7 of the Hawaii constitution to eliminate the residency restriction as a precondition to the assertion of customary and traditional Native Hawaiian rights previously associated with section 1-1, to determine whether *Pele* withstands *Lucas* analysis it must be determined whether article XII, section 7 supports the proposition that Native Hawaiian rights may extend beyond the *ahupua'a* in which a Native Hawaiian resides.

3. *Article XII, section 7 of the Hawaii Constitution*

In eliminating the residency requirement as an absolute precondition to the exercise of Native Hawaiian gathering rights *Pele* relied upon

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[125] 58 Haw. 106, 566 P.2d 725 (1977).

[126] *Id.* at 150, 566 P.2d at 750 (Vitousek, dissenting),

[127] *Id.* at 153, 566 P.2d at 751 (Vitousek, dissenting) (citing In re Application of Ashford, 50 Haw. 314, 50 Haw. 452, 440 P.2d 76 (1968)).

[128] In practice, despite the potential breadth of HAW. REV. STAT. § 1-1, the statute's protection of Hawaiian usage may prove ineffective. As Judge Vitousek observed, "[a]s time progresses it will become increasingly difficult to produce competent evidence of historical usage." *Zimring*, 58 Haw. at 154, 566 P.2d at 752 (Vitousek, dissenting). For instance, one important evidentiary source of Hawaiian usage is *kama'aina* testimony. Inevitably, Judge Vitousek continued, "[t]hose who could have provided *kama'aina* testimony will have passed on, if they have not already." *Id.* Hawaii courts will therefore be presented with difficult evidentiary problems. This practical consideration perhaps explains the *Pele* court's attempt to elevate the substantive import of article XII, section 7 of the Hawaii Constitution, discussed *infra*, instead of solely relying upon HAW. REV. STAT. § 1-1.

article XII, section 7 of the Hawaii Constitution, an amendment added to the Hawaii Constitution in 1978, or 130 years after the *Mahele*.[129] Does article XII, section 7 support the proposition that the rights of Hawaii Revised Statutes sections 7-1 and 1-1 are vested in all Native Hawaiians? If so, does article XII, section 7 even qualify as a "background principle" of Hawaii property law, as meant by *Lucas*?[130]

Hawaii Constitution article XII, section 7, provides: "The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a tenants* who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[131] The *Pele* court held that the Native Hawaiian rights encompassed by Hawaii Constitution article XII, section 7 "may extend beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised" outside the *ahupua'a* in which the Native Hawaiian resides.[132]

The supreme court's opinion in *Pele*, although consistent with the public policy in protecting Native Hawaiian rights, arguably did not rest its elimination of the residency restriction upon a foundation that would withstand *Lucas*-like scrutiny. The only authority cited by *Pele* for the proposition that article XII, section 7 was intended to eliminate the residency restriction was a single standing committee report of the drafters of the amendment.[133] The report of the drafters of article XII, section 7, to which the court referred, includes the following passage:

> [Gathering rights] are personal rights. Rather than being attached to the land, these rights are inherently held by Hawaiians and do not come with the land. For instance, it was customary for a Hawaiian to use trails outside the *ahupua'a* in which he lived to get to another part of

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[129] *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[130] *See* Stevens v. City of Cannon Beach, 114 S.Ct. 1332, 1334 (1994) ("Our opinion in *Lucas* . . . would be a nullity if anything that a State court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. '[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.' Hughes v. Washington, 389 U.S. 290, 296-297, 88 S.Ct. 438, 442, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring). No more by judicial decree than by legislative fiat may a State transform private property into public property with compensation.").

[131] HAW. CONST. art. XII, § 7 (1978) (emphasis added).

[132] *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[133] *Id.* at 619-620, 837 P.2d at 1271-1272.

> the Island. Moreover, where a *hoa'aina* was dissatisfied with the *konohiki* of his *ahupua'a*, he was free to leave and to take up residence in another *ahupua'a*, thereby transferring his vested rights . . . to another area.[134]

From this language, and the Drafting Committee's further comment that article XII, section 7 was intended to reaffirm "*all* rights customarily and traditionally held by ancient Hawaiians,"[135] *Pele* concluded that article XII, section 7, was intended "to protect the *broadest possible spectrum* of native rights."[136]

The court's reliance upon article XII, section 7 for the proposition that gathering rights may accrue to other than *ahupua'a* residents does not withstand analysis. First, the language of the statute limits its application to *ahupua'a* tenants.[137] Second, although the report of the Drafting Committee contained language indicating that article XII, section 7 was intended to embrace the pre-*Mahele* historical nature of Hawaiian gathering rights,[138] that same report contains language in-

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[134] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 639-640.

[135] *Pele*, 73 Haw. at 619, 837 P.2d at 1272 (emphasis added).

[136] *Id.* (emphasis added). The court noted that the Committee on Hawaiian Affairs, the Drafting Committee, "contemplated that some traditional rights might extend beyond the *ahupua'a*; '[f]or instance, it was customary for a Hawaiian to use trails outside the *ahupua'a* in which he lived to get to another part of the Island.'" *Id.* (*citing* STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 640).

[137] *See supra* text accompanying note 131. *See also* STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 640 (commenting on the language of the amendment, the committee wrote: "Your Committee decided that the word tenants, as used [in article XII, section 7] has not lost its ancient restricted meaning and refers to the *hoa'aina* or native Hawaiians that inhabit an *ahupua'a*.").

[138] The *Pele* court cited the following excerpt from the Drafting Committee Report for the proposition that article XII, section 7 was intended to "protect the broadest possible spectrum of native rights":

> Your Committee . . . decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather Your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.

Pele, 73 Haw. at 619 (*citing* STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 640).

dicating that the rights purportedly granted under the amendment were still associated with residency within the *ahupua'a*. The Drafting Committee wrote, "[a]lthough a *tenant* may not own any land in the *ahupua'a*, since these rights are personal in nature, *as a resident of the ahupua'a*, he may assert any traditional and customary rights necessary for subsistence, cultural or religious purposes."[139] Thus, the Drafting Committee, which *Pele* argued eliminated the residency requirement, did not treat the issue consistently.

Furthermore, assuming the Drafting Committee intended to eliminate the residency requirement, this intention was unequivocally repudiated by the Committee of the Whole. The report of the Committee of the Whole, written subsequent to the report of the Drafting Committee, rejected such a reading of article XII, section 7, by explicitly stating that the amendment does not protect the rights of all Hawaiians:

> [The] Committee [of the Whole finds] that [article XII, section 7] does not attempt to grant unregulated, abusive and general rights to native Hawaiians; but rather it allows *tenants* of an *ahupua'a*, *not all native Hawaiians*, access rights to the mountain and the sea, as was traditionally and customarily asserted by their ancestors.[140]

The foregoing analysis questions *Pele's* interpretation of article XII, section 7. The *Kalipi* court was likely more accurate in terming the amendment an "expression of policy" and not an independent source of Native Hawaiian gathering rights.[141]

Whether Hawaii Constitution article XII, section 7 would qualify under *Lucas* as a "background principle" is itself doubtful. The court's reliance upon a 1978 constitutional amendment for definition of the scope of a mid-nineteenth century practice sounds too much like government changing the rules of the game after the game has already begun.[142] Therefore, *Pele's* reliance upon article XII, section 7 as an independent, substantive background principle of Hawaii property law would not likely withstand analysis under a broad application of *Lucas*.

IV. Analysis

The foregoing discussion suggests that a Hawaii court applying a broad reading of the background principles notion of *Lucas* would

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[139] Stand. Comm. Rep. No. 57, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawaii of 1978, 640 (emphasis added).

[140] Comm. of the Whole Rep. No. 12, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawaii of 1978, 1016 (emphasis added).

[141] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 5, 656 P.2d 745, 748 (1982).

[142] Sax, *The Impact of Lucas*, *supra* note 57, at 944.

perhaps have invalidated *Pele's* elimination of the residency requirement as a precondition to the exercise of Native Hawaiian gathering rights.

The background principles of Hawaii property law indicate that under H.R.S. section 7-1 gathering rights accrue to only *ahupua'a* residents. Further, although the Native Hawaiian rights protected under section 1-1 of the Hawaii Revised Statutes do not appear to be limited to *ahupua'a* residents, section 1-1 contains other limitations that render it a deficient source of Native Hawaiian rights.[143] Finally, analysis of article XII, section 7 of the Hawaii Constitution demonstrates that that amendment does not support the proposition that Native Hawaiian rights may accrue to other than *ahupua'a* residents.

Pele's resort to an unpersuasive committee report of the drafters of article XII, section 7 indicates the difficulty modern courts have with justifying the restoration of traditional rights upon historical definitions of Western property law. Although traditional Native Hawaiian rights were meant to survive Hawaii's adoption of a Western system of property, the unresponsiveness of Hawaii courts to early assertions of Native Hawaiian rights, as indicated by *Oni*, and the general suppression of Native Hawaiian culture resulted in a paucity of decisions defining the modern scope of Native Hawaiian rights. A court applying a broad reading of the background principles notion in *Lucas*, therefore, might have felt constrained by either the absence or conservative nature of precedent to limit the restoration of traditional Native Hawaiian rights.

Invalidation of *Pele*, however, would arguably not have served the Hawaii public policy in favor of the restoration and preservation of Hawaiian culture and tradition.[144] The conditional elimination of the residency restriction avails the rights of Hawaii Revised Statutes section 7-1 and section 1-1 to a broader segment of the Native Hawaiian population, which thereby increases the likelihood that Native Hawaiian custom and tradition will be protected. In this context, unqualified application of *Lucas* would have resulted in the inappropriate continued suppression of Hawaiian culture.

V. Conclusion

This analysis demonstrates that if Hawaii courts are inclined to adopt an expansive reading of *Lucas*—as is likely as long as Hawaii courts

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[143] *See supra* notes 122, 128, and accompanying text.

[144] *See supra*, note 2 and accompanying text.

continue to define Native Hawaiian rights in terms contradictory to Hawaii's modern system of land tenure—*Lucas* may ultimately limit the ability of the State of Hawaii to revitalize the traditional rights of Native Hawaiians. Hawaii courts, therefore, should recognize Hawaii's unique historical circumstance, a history that has seen the oppression of Native Hawaiian culture, and, currently, the rebirth of a contemporary respect for the value in that culture and not feel constrained to rely upon the absence or inequity of precedent to define the contemporary scope of Native Hawaiian rights.

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Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems

Table of Contents

I. INTRODUCTION

In *Dolan v. City of Tigard*,[1] the Supreme Court took a major step along a very unsettled road[2] by further clarifying to some degree what is a "taking" of property proscribed by the Fifth Amendment of the United States Constitution.[3] Any federal court, much less the highest

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[1] 114 S. Ct. 2309 (1994).

[2] From Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins.") to Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (stating the Court's taking decisions rest on "essentially ad hoc, factual inquiries"), the Court has not often found agreement in when a taking occurs. In the Court's last major "possessory" taking decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), five Justices backed the opinion while the other four Justices filed three separate dissenting opinions. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), a "regulatory" taking case, four Justices joined in Justice Scalia's majority opinion, Justice Kennedy concurred in a separate opinion, Justices Blackmun and Stevens each wrote dissenting opinions and Justice Souter filed an unusual separate "statement." Some Justices appear more eager than others to address the taking issue. In denying certiorari to an Oregon Supreme Court decision in an inverse condemnation action, Stevens v. City of Cannon Beach, 114 S. Ct. 1332 (1994), Justice Scalia (joined by Justice O'Connor) wrote a four-page dissent, airing some thoughts about the "background principles of the State's law of property," *id.* at 1334, that was left a question mark in *Lucas*. In writing that a decision favoring the property owner would indicate a "land-grab" of the entire coastline, *id.* at 1335, Scalia argued Supreme Court consideration "would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State." *Id.* at 1336.

[3] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Like many state constitutions, Hawaii's constitution also

court in the land, is loath to find itself a "super zoning board of appeals."[4] However, here the Court took on the case of a property owner denied a building permit after she refused to submit to certain conditions imposed by the City's planning commission. The City of Tigard wanted to exact a dedication of approximately 10% of the landowner's property for floodplain and open space requirements as

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requires compensation for "damaged" property: "Private property shall not be taken or damaged for public use without just compensation." HAW. CONST. art. I, § 20. At least one state's supreme court has emphasized the distinction: "Under constitutions which provide that property shall not be 'taken *or damaged*' it is universally held that it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation." Knight v. City of Billings, 642 P.2d 141, 145 (Mont. 1982) (quoting Less v. City of Butte, 72 P. 140, 141 (Mont. 1903)) (emphasis added). *But see* Int'l College of Surgeons v. City of Chicago, No. 91 C 1587, 91 C 5564, 1995 WL 9243, at *16 (N.D. Ill. Jan. 9, 1995) (concluding Illinois Constititution with phrase "or damaged" refers only to physical disturbance of property and offers no greater protection than federal Constitution) (unpublished opinion).

[4] *See, e.g.*, River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (observing that federal courts are not boards of zoning appeals); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1389 (11th Cir. 1993)("[F]ederal courts do not sit as zoning boards of review and should be most circumspect in determining constitutional rights are violated in quarrels over zoning decisions."). Erecting a "ripeness" barrier to federal judicial review of land use decisions, the Supreme Court held in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) that appellants must first obtain a final determination of what the government will permit and also seek compensation under state procedures before proceeding to federal court. The Ninth Circuit has held that because Hawaii case law shows no rejection of an inverse condemnation action nor that there is not a possibility of relief under HAW. REV. STAT. § 101-3 (condemnation of property - entry upon private property by agreement), Hawaii's procedures for seeking a remedy in state court are adequate under *Williamson County*. Austin v. City & County of Honolulu, 840 F.2d 678, 681 (9th Cir. 1987), *cert. denied*, 488 U.S. 852 (1988). In addition, in declining to review zoning decisions in parallel federal and state actions, federal courts have used so-called *Younger* (Younger v. Harris, 401 U.S. 37 (1971)) abstentions (finding that state proceedings are ongoing, proceedings implicate important state interests, and state proceedings are adequate to raise federal questions) or *Pullman* (Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)) abstentions (finding that claim involves sensitive issue of social policy, constitutional adjudication may be avoided by a state court's definitive ruling, and state law is sufficiently uncertain). Rodrigues v. County of Hawaii, 823 F. Supp. 798, 800-03 (D. Haw. 1993) (using *Younger* abstention to dismiss due process and taking claims where county imposed road-widening and intersection setbacks; application of *Younger* doctrine requiring dismissal is absolute whereas *Pullman* abstention is discretionary); *see also* Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994).

well as a pedestrian/bicycle path before granting the permit. Deciding that the conditions were not sufficiently "proportional" to the proposed development's impact, the Court held the permit conditions unconstitutional as an unauthorized exercise of the City's police power.

Land use decisions and conditional approval of such matters as building permits, zoning changes and subdivision plats are the routine, daily business of local government. Consequently, the *Dolan* decision, while that of a split Court,[5] has far-reaching ramifications on how city councils, planning commissions and zoning boards establish and enforce land use policies. The purpose of this casenote is to discuss, analyze, and predict the impact of *Dolan* not only in its national context, but also with particular reference to its application in Hawaii. Implementing the Court's heightened scrutiny by using a "rough proportionality" test will likely have a substantial impact in Hawaii, arguably one of the most heavily regulated of all the states in the area of land management.[6] After *Dolan*, government agencies of the State and its four counties will need to show not only that the exaction substantially advances a legitimate state interest and that there is the requisite connection between the nature of the exaction and the impact of the proposed development ("essential nexus"), but also must show a more particularized and proportional relationship between the extent of the exaction and the projected impact of the proposed development ("rough proportionality").[7]

Part II of this casenote provides a concise summary of the facts in *Dolan*. Part III discusses a brief history of "taking" caselaw, the various

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[5] In the 5-3-1 split decision, Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Joining in Justice Stevens' dissenting opinion were Justices Blackmun and Ginsburg. Justice Souter, in a move somewhat reminiscent of his separate "statement" in *Lucas* where he considered the writ of certiorari improvidently granted, 112 S. Ct. at 2925, filed a separate dissenting opinion, essentially stating that the *Dolan* case was not a "suitable vehicle" for examining taking law beyond the Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). *Dolan*, 114 S. Ct. at 2331 (Souter, J., dissenting). Newly installed Justice Breyer also indicated during confirmation hearings that he did not share the majority's view. Marianne Lavelle, *Battle Nears in U.S. House Over Takings: Dolan Spurs Effort to Pay Property Owners*, NAT'L L. J., July 25, 1994, at A6.

[6] DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 7 (1994). *See also* DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII (1984); JOHN DEGROVE, LAND GROWTH AND POLITICS ch. 1 (1985). For a thorough compilation of Hawaii's state and county land use laws, see ISAAC D. HALL, JR. ET AL., MAJOR LAND USE LAWS IN HAWAII (1992).

[7] *Dolan*, 114 S. Ct. at 2317-19.

types of exactions, and the spectrum of tests used to challenge their constitutionality, in order to provide a framework for understanding the importance of the Court's decision in *Dolan*. Part IV analyzes relevant parts of the Court's reasoning for its decision and examination of Chief Justice Rehnquist's "new" test for exactions. Part V surveys the initial responses to *Dolan* by various federal and state courts and endeavors to predict the impact of the decision on future litigation, especially within the context of the land management system in Hawaii. This section also addresses potential legislative responses as well as alternative approaches to administering land use regulations and exactions so as to not violate landowners' constitutional rights as determined under the two-prong *Dolan* test requiring both nexus and proportionality.

II. FACTS

Florence Dolan[8] is the owner of a 72,745 square foot commercial lot located in the central business district of Tigard, Oregon, a community of approximately 30,000 people.[9] The property is improved with a 9,700 square foot retail electric and plumbing supply store and is bordered on its west side by a small stream, Fanno Creek.[10] Seeking to expand the business, Dolan proposed to demolish the existing structure and replace it with a larger 17,600 square foot building.[11] In addition, the plans called for a paved parking lot of 39 spaces to replace the existing primarily gravel-surfaced parking area.[12] This new "impervious surface" would cover 20,200 square feet, about 40% of the undeveloped property.[13] Future plans also included a separate structure on the northeast portion of the lot for additional businesses and associated parking.[14]

Applying for a permit to redevelop the land, however, brought Dolan more than a few problems and an eventual trip to the United States

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[8] Mrs. Dolan's husband, John, died during the course of the litigation. She is therefore described in her brief as the "elderly widow." Brief for Petitioner [hereinafter Petitioner's Brief] at *3, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), 1994 WL 249537.

[9] *Dolan*, 114 S. Ct. at 2313-14.

[10] *Id.*

[11] Petitioner's Brief at *3.

[12] *Dolan*, 114 S. Ct. at 2313.

[13] Petitioner's Brief at *4.

[14] *Dolan*, 114 S. Ct. at 2313-14.

Supreme Court to resolve them. Obstacles to the development arose in three areas: open space requirements, floodplain restrictions and pedestrian/bicycle pathway requirements.

A. Open Space Requirements

Like Hawaii,[15] Oregon has a comprehensive state-wide land use plan.[16] Bolstered by two favorable decisions of the Oregon Supreme Court affirming the paramount importance of a comprehensive land management plan,[17] the Oregon legislature in 1973 translated its heightened environmental concerns into the Land Conservation and Development Commission (LCDC). The LCDC adopts and enforces mandatory "goals" to which the local governments' comprehensive plans and zoning ordinances must conform.[18]

In 1975, the LCDC established Goal 5 to conserve open space and protect natural and scenic resources.[19] The state regulations in effect require that local programs shall "insure open space" and "promote healthy and visually attractive environments."[20] Open space is further

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[15] By statute all of Hawaii's nearly 4 million acres is classified into four districts (urban, rural, agricultural and conservation) by the Land Use Commission under Chapter 205. HAW. REV. STAT. §§ 205-1 to -18 (1985 & Supp. 1992). The statewide planning system overseen by the Office of State Planning to coordinate all major state and county activities and to which any changes in land use must conform is set forth in Chapter 226. *Id.* §§ 226-1 to -107. The state plan requires the development of functional plans in eleven areas of state-wide concern such as conservation lands, historic preservation and housing. *Id.* § 226-52. Hawaii's state plan was the first comprehensive plan adopted by any state. See CALLIES, REGULATING PARADISE, *supra* note 6; DEGROVE, LAND GROWTH AND POLITICS, *supra* note 6, for discussion of Hawaii's system.

[16] OR. REV. STAT. §§ 197.005-197.860 (1991).

[17] Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23 (Or. 1973) (disallowing zone change because inconsistent with county's comprehensive plan); Baker v. City of Milwaukie, 533 P.2d 772 (Or. 1975) (stating that city's comprehensive plan is controlling land use instrument).

[18] Edward J. Sullivan, *Oregon Blazes a Trail*, *in* STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 50, 52 (Peter A. Buchsbaum & Larry J. Smith, eds., 1993).

[19] OR. ADMIN. R. 660-15-000(5).

[20] *Id.* Similarly, the Hawaii State Plan directs planning to "[p]romote the preservation of views and vistas to enhance the visual and the aesthetic enjoyment of mountains, ocean, scenic landscapes, and other natural features." HAW. REV. STAT. § 226-12(b)(3) (Supp. 1992). Further, one of 13 priority guidelines for statewide planning for regional growth distribution and land resource utilization is to "[p]rotect and enhance Hawaii's shoreline, open spaces, and scenic resources." *Id.* § 226-104(b)(13).

defined as land that, if preserved, would conserve scenic resources, protect streams, enhance the value of neighboring parks to the public and enhance recreation opportunities.[21] Implementation guidelines "encourage" local governments to "utilize fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques" to achieve the goal.[22]

In conformance with this goal, the City of Tigard (City) Community Development Code (CDC) obliges the owner of property in the central business district to comply with a 15% open space and landscaping requirement, thereby limiting all development to 85% of the parcel.[23]

B. Floodplain Restrictions

In conformance with LCDC Goal 7, to protect life and property from natural disasters and hazards,[24] the City adopted its Master Drainage Plan in 1981.[25] The plan designates certain 100-year floodplain areas, including the Fanno Creek drainage system, which flows across the southwestern portion of the Dolan property.[26]

The Drainage Plan established that an increased amount of impervious surfaces resulting from continued urbanization would increase risks of flooding adjacent property.[27] To ameliorate possible flood damage, the plan listed actions such as channel excavation along Fanno Creek.[28] In addition, the plan recommended that the 100-year floodplain remain free of development and that such land be preserved as greenway.[29] However, where land form alterations or developments are approved in the floodplain area, both the Comprehensive Plan and the CDC call for the dedication of open land area for greenway purposes,

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[21] OR. ADMIN. R. 660-15-000(5).

[22] *Id.* 660-15-000(5)(B)(7).

[23] Dolan v. City of Tigard, 114 S. Ct. 2309, 2314 (1994).

[24] OR. ADMIN. R. 660-15-000(7). Hawaii's plan also sets forth the goal of reducing harm to life and property from both natural and man-induced hazards such as flooding. HAW. REV. STAT. § 226-13(b)(5) (Supp. 1992).

[25] Brief for Respondent [hereinafter Respondent's Brief] at App. A, *2a, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), 1994 WL 123754.

[26] *Dolan*, 114 S. Ct. at 2313.

[27] *Id.*

[28] *Id.*

[29] *Id.* The Greenway area is defined with the same physical boundaries as the 100-year floodplain. TIGARD, OR., REV. ORDINANCES 85-13.

including portions for a pedestrian/bicycle pathway within the floodplain.[30]

C. Pedestrian/Bicycle Pathway Provisions

The LCDC also established Goal 12 to "provide and encourage a safe, convenient and economic transportation system."[31] This goal calls for transportation plans to "consider all modes of transportation including . . . bicycle and pedestrian"[32] and that planning for transportation modes take into account population densities and peak hour travel patterns.[33]

In 1975, Washington County, of which Tigard is part, established a Bicycle Pedestrian Pathway Master Plan.[34] However, that plan, relying on a 1% gasoline tax for pathway funding, was never fully implemented, concentrating instead on areas within school district boundaries.[35] Recognizing that county moneys may not be forthcoming, the City's plan states: "A major obstacle towards developing an extensive bicycle/pedestrian network is lack of public funds for such an effort. Opportunities, however, do exist in the developing areas of the County where unused right-of-way is available or where right-of-way could be acquired in conjunction with new developments or road improvements."[36]

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[30] TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.84.040.A.7.

[31] OR. ADMIN. R. 660-15-000(12).

[32] *Id.* While Hawaii's State Plan does not specifically address bicycle and pedestrian forms of transportation, a priority guideline is to "[e]ncourage safe and convenient use of low-cost, energy-efficient, nonpolluting means of transportation." HAW. REV. STAT. § 226-17(b)(11) (Supp. 1992). It also calls for development of "multi-modal" as well as a "variety" of transportation forms. *Id.* § 226-17(b)(1), (5). A Statewide Master Plan for Bikeways was developed in 1977 and the State's Mauka Area Plan for the Kakaako district in urban Honolulu requires developers to dedicate and improve easements for 6- to 8-foot wide pedestrianways to connect "platforms" of newly developed buildings at the 45-foot elevation. HAWAII COMMUNITY DEVELOPMENT AUTHORITY, MAUKA AREA PLAN - KAKAAKO COMMUNITY DEVELOPMENT DISTRICT at 42-43 (1990).

[33] OR. ADMIN. R. 660-15-000(12)(A)(5).

[34] Respondent's Brief at App. A, *8a.

[35] *Id.* at App. A, *9a.

[36] *Id.* at App. A, *8a. As of 1982, the City had completed 3.7 miles of pedestrian/bicycle pathways by way of its street overlay and widening program, and adjacent development. *Id.*

In formulating its comprehensive plan, the City conducted a study of transportation and congestion problems in the central business district and, in 1974, the City Council adopted the Tigard Area Comprehensive/Bicycle Pathway Plan.[37] Although the initial purpose of developing that particular plan focused on locating suitable pathways close to schools,[38] the general plan identified the "recreational benefits of a carefully planned system" in conjunction with the City's open space/greenway concept as a predominant concern.[39]

Consequently, the City's comprehensive plan sets out the pathways implementation strategy: "The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to ensure that the adopted plan is properly implemented, and require the necessary easement or dedications. . . ."[40] As codified in the City's ordinances, the granting of a permit requires that "developments which will principally benefit from such bikeways shall be conditioned to include the cost of bikeway improvements."[41]

D. Dolan's Permit Application

Dolan's proposed development on her land was a use permitted "of right" in the central business (CBD) zoning district.[42] The parcel,

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[37] *Id.* at App. A, *9a.

[38] *Id.* at App. A, *10a.

[39] *Id.* at App. A, *6a-7a.

[40] *Id.* at App. A, *38a.

[41] TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.164.110.B.

[42] *Id.* § 18.66.030.A.r. Permitted uses included: Retail sales, general. *Id.* Generally, zoning ordinances specify uses which are permitted as "of right" as opposed to other conditional uses which may be approved at the discretion of the zoning authority. The CITY AND COUNTY OF HONOLULU LAND USE ORDINANCE divides uses into three categories: principal (permitted "of right"); special accessory (related to the principal use on the same zoning lot), *id.* Article 9; and conditional (whereby certain minimum development standards and further conditions may be enforced at the discretion of the director of the Department of Land Utilization). *Id.* Article 4. Conditional uses are further distinguished by Type 1 and Type 2 designations, with proposed Type 2 uses requiring public hearings. *Id.* Table 4.1, note a. In addition, some principal or permitted uses involving permanent institutional facilities (such as schools and day care centers) that may have adverse impacts on surrounding land uses are also subject to a site plan review to minimize potential incompatibility with surrounding uses. *Id.* § 3.160. The determination of whether a particular land use fits into a designated use permitted "of right" is a frequent cause of disputes. *See, e.g.*, Houston v. Town of Waitsfield, 648 A.2d 864 (Vt. 1994) (holding that extraction of water from an

however, was also part of an Action Area (AA) Overlay Zoning District.[43] Although this meant that the underlying permitted use remained viable,[44] granting of a building permit was conditioned on a discretionary site development review.[45]

Subsequent to the first permit application in 1989, the City conditioned the approval on dedication of easements.[46] The City required dedication of the portions of Dolan's lot lying within the floodplain for the greenway, and further demanded dedication of an additional 15-foot strip immediately above the floodplain for a pedestrian/bicycle pathway.[47] The dedicated land would encompass approximately 7,000 square feet, or about 10% of the total property.[48] However, dedication would, under City practice, relieve Dolan of a portion of the 15% open space and landscaping requirement.[49] Dolan appealed the action to Oregon's Land Use Board of Appeals (LUBA),[50]claiming a taking

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underground aquifer for bottling and sale was not an agricultural use and thus not permitted on land zoned agricultural-residential); United States v. Village of Palatine, 37 F.3d 1230 (7th Cir. 1994) (finding unlicensed, unstaffed facility housing unrelated residents recovering from substance abuse did not qualify as "of right" in area zoned for single family detached homes and state-licensed group homes).

[43] Respondent's Brief at *2.

[44] TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.86.020.A.

[45] Dolan's proposed development was considered a "major modification" and thus had to undergo site development review. The review is not required for "minor modifications." *Id.* § 18.120.020-.080.

[46] A smaller issue argued by the parties in their briefs (and ignored by the Court) was whether the required dedication meant actual transfer of the fee simple title. The City asserted that fee ownership was not required, citing Portland Baseball Club v. City of Portland, 18 P.2d 811 (Or. 1933) for the rule that where land is dedicated for a public street, the fee remains in the original owner subject to the easement, with reversion to the original owner upon vacation of the street. Respondent's Brief at *18 n.16.

[47] Dolan v. City of Tigard, 114 S. Ct. 2309, 2314 (1994). The City initially imposed other conditions as well: a $14,256.02 county-wide traffic impact fee to accommodate additional traffic generated by the development; a "fee in-lieu of water quality" to mitigate effects of water runoff; and relocation of the building by 5 feet to allow for future relocation of the floodplain bank. Petitioner's Brief at *8 n.2.

[48] *Dolan*, 114 S. Ct. at 2314.

[49] *Id.*

[50] 20 Or. LUBA 411 (1991). The Land Use Board of Appeals was created in 1979 to review land use decisions by local governments, special districts and state agencies. Although at first the board simply issued "Recommended Orders" on planning goals (with affirmation or modification by the LCDC) and "Final Orders" on other matters, 1983 legislation empowered the LUBA to enter final orders on all land use matters, subject to review by the state's court of appeals. Sullivan, *supra* note 18, at 71.

of her property without just compensation in violation of the Fifth Amendment of the United States Constitution.[51] LUBA, however, found that Dolan had not exhausted her administrative remedies by first seeking a variance from the City.[52]

Dolan requested a variance but submitted only a half-page statement claiming that the City had violated her constitutional rights, the proposed variance would not conflict with the policy of the comprehensive plan, and that special circumstances of hardship were being imposed by the City.[53] Under the City's interpretation of the comprehensive plan and code, the burden is on the applicant to demonstrate that the development will not have adverse impacts.[54] Because the applicant did not carry her burden according to the City, the variance was denied.[55] In a 27-page final order, the Planning Commission found the dedication requirements to be "reasonably related" to the storm drainage, greenway and pedestrian/bicycle pathway purposes.[56] On appeal, the Tigard City Council approved the commission's order analyzing the variance request.[57] Now having exhausted her administrative remedies, Dolan appealed to LUBA for the second time.[58] LUBA disagreed with Dolan's contention that the relationship between the development's impact and the exactions was insufficient to justify the dedication of property, instead finding a "reasonable relationship" between the increased amount of impervious surface and significantly larger retail sales building with the required conditions.[59]

Appealing next to the Oregon Court of Appeals, Dolan argued that the United States Supreme Court decision in *Nollan v. California Coastal Comm'n*[60] demanded a heightened scrutiny requiring a "substantial relationship" or "essential nexus" between developmental impacts and

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[51] Respondent's Brief at *3.

[52] OR. REV. STAT. § 197.825(2)(a) (1993). LUBA jurisdiction is limited to "those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." *Id.*

[53] Respondent's Brief at App. E, *4e.

[54] TIGARD, OR., COMMUNITY DEVELOPMENT CODE § 18.32.250.A.1; Respondent's Brief at *4 n.6.

[55] Respondent's Brief at *6.

[56] Dolan v. City of Tigard, 854 P.2d 437, 439-40 (Or. 1993) (citing City of Tigard Planning Comm'n Final Order No. 91-09 PC at 13, 20-21).

[57] *Id.* at 440.

[58] Dolan v. City of Tigard, 22 Or. LUBA 617 (1992).

[59] *Dolan*, 854 P.2d at 440 (citing *Dolan*, 22 Or. LUBA at 621, 626).

[60] 483 U.S. 825 (1987). See discussion in Part III, *infra*.

government-imposed conditions.[61] The Court of Appeals wrote that Dolan misread *Nollan* and held that the proper test under both the United States and Oregon constitutions was the "reasonable relationship" test which was met by the findings of the development's "intensified use and the impacts and public needs to which the use will give rise."[62] In affirming the decision, the Oregon Supreme Court disagreed with Dolan that the "essential nexus" test of *Nollan* was more "stringent" than the "reasonably related" test.[63] Fusing the two tests together, the court held that there was an essential nexus and thus a reasonable relationship between the impact of the anticipated development and the required conditions.[64] Justice Peterson observed in his dissent: "If all that need be shown is that easements are needed for a legitimate public purpose the constitutional protection evaporates."[65] The United States Supreme Court applied a two-prong test, "essential nexus" and "rough proportionality" (similar in effect to Peterson's analysis), to reverse and remand the decision.[66]

III. Background

A. Basis for Taking: Unjustified Use of Police Power

The Fifth Amendment prohibits the taking of property by the government for a public purpose without just compensation.[67] Under the exercise of eminent domain, what is considered a public purpose

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[61] Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1992).

[62] *Id.* at 856.

[63] *Dolan*, 854 P.2d at 443.

[64] *Id.* at 443-44. In his dissenting opinion, Justice Peterson foreshadowed some of the analysis in the later United States Supreme Court decision by closely examining the Planning Commission's order that suggested the required "exactions were to be attached to *all* requests for improvements." *Id.* at 445 (Peterson, J., dissenting) (emphasis added). In decrying the simple finding of a legitimate public purpose and a generalized relationship to the exactions, Justice Peterson wrote: "The critical question before us is whether the order shows an *increased intensity of such magnitude* that it creates the need for the exaction of the easements." *Id.* at 446 (Peterson, J., dissenting) (emphasis added).

[65] *Id.* at 446.

[66] Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). On remand, the Oregon Supreme Court reversed the lower courts' decisions and remanded in turn to the City of Tigard. 877 P.2d 1201 (Or. 1994).

[67] U.S. Const. amend. V.

is broadly interpreted.[68] So long as the government pays the property owner for what is taken, there is no constitutional violation. For example, in *Hawaii Housing Authority v. Midkiff*,[69] the Court held that the Hawaii Land Reform Act of 1967 did not violate the public purpose requirement of the Fifth Amendment, with Justice O'Connor writing that the reduction of "perceived social and economic evils of a land oligopoly" was a legitimate public purpose, whether or not the goal was actually achieved.[70]

In addition to the power of eminent domain, however, the state has the authority to exercise its police power if its use properly addresses the health, safety and welfare of its citizens.[71] If the police power is legitimately used in the formulation and enforcement of regulations, then the property owner whose rights have been affected is due no compensation.[72] A constitutional violation occurs, however, when the

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[68] *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954) (upholding resale of condemned land to private redevelopment corporations); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (holding condemnation of residential neighborhood for construction of private automobile assembly plant to be legitimate state purpose). *But see, e.g.*, Mayor and Aldermen of the City of Vicksburg v. Thomas, 645 So.2d 940 (Miss. 1994) (invalidating city's condemnation of land for private riverboat gaming operation because purported public purpose and benefit too indirect and speculative).

[69] 467 U.S. 229 (1984).

[70] *Id.* at 242. O'Connor also stated that the public use requirement is "coterminous with the scope of the sovereign's police powers." *Id.* at 240. For a discussion of the apparent disappearance of the requirement "for public use" as the Constitution is now interpreted, see Jeb Rubenfeld, *Usings*, 102 YALE L. J. 1077 (1993).

[71] *See, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393, 417 (1922). Reference to a "morals" basis as well for the police power is usually relegated to older cases. Among some members of the present Supreme Court, even the "welfare" factor, when it involves environmental issues, seems more suspect. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct 2886, 2894-95 (1992). *See also* First English Evagelical Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989) ("When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights."). After the Supreme Court decision to remand in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), the California Court of Appeals still found no temporary taking since the ordinance restricting reconstruction in a flood zone related to public safety. *First English*, 258 Cal. Rptr. at 904.

[72] *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, (1962) (finding compensation not required where water-filled sand and gravel quarry subject to town's ordinance enacted to safeguard community); Hadacheck v. Sebastian, 239 U.S. 394,

police power is exercised to obtain what should properly come about only through government condemnation of property with just compensation paid to the owner.[73] The danger lies in the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[74]

Obviously, government officials, legislators, private citizens and jurists may not agree on whether a regulation based on the exercise of the police power has gone "too far"[75] in attempting to provide for the public health, safety and welfare. Jurisprudential perceptions of the police power doctrine range from the theory that its use has a tendency to be erosive in nature[76] to the view that the constitutionally acceptable limits on the police power are "elastic" and ever-changing.[77] In contrast to the Holmesian wariness of the police power, for example, Justice Douglas in *Berman v. Parker*[78] found it most difficult to ever find the outer limits of the state's power because great deference must be given to the legislature.[79] Indeed, not only did Douglas put great faith in the

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(1915) (concluding forced shutdown of existing brick factory to be uncompensable when ordinance prohibiting such use sought to protect what had become primarily residential area); Miller v. Schoene, 276 U.S. 272, (1928) (holding no compensation due landowner of cedar grove when regulation to prevent spread of cedar rust disease required destruction of trees). One commentator analogizes the relationship between use of the police power and public use under eminent domain by describing the distinction between self-defense and private necessity: "Self-defense allows one to inflict harm without compensating the person harmed, while private necessity creates only a conditional privilege, which allows the harm to be inflicted but only upon payment of compensation." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 110 (1985).

[73] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding condition requiring landowner dedicate a lateral shoreline easement to satisfy a visual access need was invalid); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding government requirement of a navigational easement in a private marina held a taking).

[74] *Lucas*, 112 S. Ct. at 2895.

[75] *Pennsylvania Coal*, 260 U.S. at 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[76] *Id.* at 415. "When this seemingly absolute protection [of private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Id.*

[77] *See* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 186 (Mont. 1964).

[78] 348 U.S. 26 (1954).

[79] *Id.* at 32. An attempt to define its reach or trace its outer limits is fruitless, for

wisdom of the legislature, he envisioned the goals of the police power to be more expansive than just the health, safety and welfare of the public: "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."[80] Nevertheless, as this note will show, this does not appear to be the majority view of the *Dolan* Court.

Operation of the police power through zoning controls first met major constitutional scrutiny in *Village of Euclid v. Ambler Realty Co.*[81] In deciding that restrictive zoning enacted by the Village was a proper exercise of the police power on its face, Justice Sutherland wrote that the judgment of the legislature must be controlling, so long as the validity of the zoning classification was "fairly debatable."[82] Nevertheless, two years later in *Nectow v. City of Cambridge,*[83] the Court, with Sutherland again writing the opinion, held that a specific application of the zoning regulations could be arbitrary and unreasonable, and therefore unconstitutional.

Following the decisions in *Pennsylvania Coal, Euclid* and *Nectow*, the Supreme Court left judicial review of land management decisions to local governments and state courts for the next fifty years.[84] In 1978, the Court revisited the taking issue in deciding that New York's historic preservation law regulating development of property designated a "landmark" was a valid exercise of the police power in promoting the

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each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary is the main guardian of the public needs to be served by social legislation. *Id.*

[80] *Id.*

[81] 272 U.S. 365 (1926).

[82] *Id.* at 388. Generally, the "fairly debatable" standard of deferring to the legislature has continued to be applied to comprehensive decisions over large tracts of land or impacting the general public. Nevertheless, "[i]nhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner." Board of County Comm'rs of Brevard County, 627 So.2d 469, 472 (Fla. 1993). Since Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973), many state courts scrutinize land use decisions on specific parcels more closely.

[83] 277 U.S. 183 (1928).

[84] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994).

public welfare.[85] Since that decision, the Court has examined a number of issues in the context of the Fifth Amendment's taking clause.[86] But to the extent that regulations involving land use are concerned, the basic issue is whether land use controls are simply an overlay on the property owner's fundamental rights,[87] or whether the focus is on the arguably legitimate interests of the community with the landowner's interests a secondary concern.[88]

B. Exactions

The early cases of zoning law looked at an ordinance's general validity or to a specific application of zoning regulations as to classification and permitted uses. Land use controls, however, have evolved from basic zoning practices embodied in text and map ordinances and based on a comprehensive plan to a more complex system of local government and private developer interaction, especially in the area of subdivisions, where government imposes conditions or "exactions"

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[85] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[86] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding Pennsylvania's Subsidence Act regulating the amount of support estate underneath structures that could be mined by coal companies, and although much like the regulation in Pennsylvania Coal, was not an unconstitutional taking of property on its face); Agins v. City of Tiburon, 447 U.S. 255 (1980) (finding that open space ordinance limiting development to only five single family homes on a 5-acre tract and enacted after landowner's purchase to not be a taking since the law sunstantially advanced a legitimate government purpose and did not deny owner all economically viable use of his land). The Court has also looked at non-land situations with respect to the taking clause. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (finding county's taking of interest earned on court interpleader fund to be a violation of the Fifth Amendment's taking clause); Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264 (1993) (holding employer's withdrawal liability under federal act did not violate employer's Fifth Amendment rights).

[87] *See, e.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 681 (1976) (Stevens, J., dissenting). Although Justice Stevens would argue over how extensive nuisance and land use regulations may be, his words do sum up this perspective of private property: "Subject to limitations imposed by the common law of nuisance and zoning restrictions, the owner of real property has the right to develop his land to his own economic advantage." *Id.*

[88] In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), Scalia described the latter viewpoint as "the notion pressed by the [Coastal] Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use [of the land]." *Id.* at 2900.

before granting a zoning reclassification or plat approval.[89] Early cases reflect the view that easily recorded subdivision plats were an improvement over recordation by metes and bounds and thus a privilege whereby government could exact some benefit in return.[90] Modern cases, however, focus on the need for on- and off-site improvements and other infrastructure attributable to a development.[91] In addition, the cost of improvements such as parks and roads as well as public facilities for water and waste treatment in times of municipal financial difficulties certainly motivates local government to exact as much as possible from the private sector; simply put, exactions result from the need to pay for growth.[92]

Exactions take several forms: dedications of land and easements, fees in-lieu of the required land dedication, off-site improvements, impact fees to finance capital facilities, and linkage and "fair share" requirements to provide community housing.[93]

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[89] *See, e.g.*, ROBERT L. FREILICH AND MICHAEL M. SCHULTZ, NATIONAL MODEL SUBDIVISION REGULATIONS, PLANNING & LAW 1-6 (1994).

[90] *See, e.g.*, Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928) (stating plat recordation is not a right but a privilege for which conditions reasonable and necessary to the public welfare can be demanded in return).

[91] For a discussion of recent cases, see Theodore C. Taub, *Development Exactions and Impact Fees*, C872 A.L.I.-A.B.A. 269 (Sept. 30, 1993).

[92] In attempting to deal with suburban growth and consequent demand for open space and other needs, the choice became: "[D]evise a method to keep such migration to a minimum; or assure that a revenue source is available to fund the cost of government attributable to the new residents." Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response, and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 783 (1974). In attempts to deal with lack of funding without increasing taxes, local governments have become increasingly creative. In Lancaster Redevelopment Agency v. Dibley, 25 Cal. Rptr. 2d 593 (Cal. Ct. App. 1993), the City of Lancaster had two goals: more affodable housing and construction of two overpasses to a future business park. Trying to kill two birds with one stone, the city's Low- and Moderate-Income Housing Incentive Program sought to encourage private construction of the housing by having the redevelopment agency purchase $24 million of traffic impact fee "offsets" (which could be banked for housing developers) through issuance of $30 million in bonds statutorily authorized only for housing. The $24 million would pay for the overpasses to the non-residential area but construction elsewhere of any affordable housing depended on developers volunatrily participating in the program. The court invalidated the scheme, finding that the city presented no evidence that the restricted funds could guarantee even a single unit of affordable housing. *Id.* at 597.

[93] For concise overviews of the different types of exactions and their legal challenges, *see* Taub, supra note 92; Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 Real Est. L. J. 7 (1994); JAMES C. NICHOLAS and DAN DAVIDSON, IMPACT FEES IN HAWAII: IMPLEMENTING THE STATE LAW (1992).

1. Dedications and in-lieu fees

Exactions requiring actual dedication of land and on-site improvements in a residential subdivision are primarily based on the state's need to protect the new homeowner: "[W]here subdivision of land is unregulated[,] lots are sold without paving, water, drainage, or sanitary facilities, and then later the community feels forced to protect the residents and take over the streets and provide for the facilities."[94] Typical on-site improvements that must be dedicated are roads,[95] sidewalks,[96] parks,[97] and school sites.[98]

Where the impact of an individual development does not require an entire school site or park, but still generates some degree of need, local government may assess a pro rata fee in lieu of actual dedication of land. In one of the early decisions finding such a scheme constitutional, the Wisconsin Supreme Court described the rationale for an in-lieu or "equalization" fee:

> Where a comparatively small tract of land is subdivided . . . and there is no adjoining land already devoted to school, park, or playground purposes to which a portion of the proposed subdivision might be attached, it usually would be impracticable to require dedication of any land of the subdivision. The two alternatives are either to relieve the subdivider from any obligation whatever in this direction, or to require payment of an equalization fee. . . .[99]

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[94] Blevens v. City of Manchester, 170 A.2d 121, 123 (N.H. 1961) (quoting BETTMAN, CITY AND REGIONAL PLANNING PAPERS 74 (1946)).

[95] *See, e.g.*, Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952) (concluding that subdivision approval requirement that builder provide access through suitably improved roads to be dedicated to the town was reasonable); Copeland v. City of Chatanooga, 866 S.W.2d 565 (Tenn. Ct. App. 1993) (holding required dedication of 12 foot right-of-way for future road expansion was proper exercise of police power).

[96] *See, e.g.*, State Dep't of Transp. v. Lundberg, 825 P.2d 641 (Or. 1992), *cert. denied*, 113 S. Ct. 467 (1992) (finding required dedication of property for sidewalk a valid zoning condition).

[97] *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of City of Danbury, 273 A.2d 880 (Conn. 1970) (finding statute and planning commission regulation requiring dedication of land for parks and playgrounds valid exercises of police power).

[98] *See, e.g.*, Bd. of Education of School District No. 68, Du Page County v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) (holding conditon that developer dedicate land for a school site was a reasonable regulation under police power in light of developer's contribution to creation of a school problem).

[99] Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 449-50 (Wis. 1965).

2. Off-site improvements and impact fees

A second area of exactions is the developer's contribution to off-site improvements for which the project created a need. For example, government frequently requires a developer to pay for road-widening where a residential or commercial development generates considerable new traffic.[100] Conversely, when the particular development does not in fact cause the need for highway-widening, as in the case of a retail store adjacent to an existing major thoroughfare,[101] the court will strike down the condition.

Because in many cases the improvements serve not only the particular development but also the surrounding community, developer contributions toward capital facilities such as schools, fire and police stations, and wastewater treatment plants are frequently collected through apportioned impact fees.[102] Such fees may be assessed by area,[103] housing units,[104] or even number of bedrooms[105] in an attempt to collect the funds on a proportional basis. Like all exactions, impact fees originated in an environment of fiscal/political impasse where existing government funds were insufficient to provide the needed infrastructure and where funding by way of increased taxes was deemed politically impractical.[106]

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[100] *See, e.g.*, Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page, 621 N.E.2d 1012 (Ill. Ct. App. 1993) *aff'd in part, rev'd in part*, No. 76503, 1995 WL 123705 (Ill. March 23, 1995).

[101] City of Stafford v. Gullo, 886 S.W.2d 524 (Tex. Ct. App. 1994) (finding developers could not be forced to pay for off-site road widening of existing major boulevard as condition of subdivision approval for new Wal-Mart store).

[102] *See* NICHOLAS, *supra* note 93, at 2-4. Impact fees are also known as "system development charges" in Georgia and Oregon, and "facility benefit assessments" in San Diego, California. *Id.* at 3.

[103] The Mauka Area Rules for the Kakaako District require payment of a fee for public facilities equal to the market value of 7.5% of the development's floor area. HAW. ADMIN. R. § 15-22-73(e).

[104] Robes v. Town of Hartford, 636 A.2d 342 (Vt. 1993) (finding sewage plant impact fee assessed with assumption that every home on average contained three bedrooms to be equitable).

[105] Herbert v. Town of Mendon, 617 A.2d 155 (Vt. 1992) (holding new construction impact fee assessed at $850 per bedroom invalid because statute required enactment as ordinance rather than resolution).

[106] The fiscal crisis in cities and states is certainly not abating. The capital debt of the City and County of Honolulu, for example, has increased from approximately $328 million in 1983 to $1.46 billion in 1994. Report by Leigh-Wai Doo, Chair - Committee on Budget and Finance, City Council, City and County of Honolulu,

Impact or development fees also typically require statutory authority to overcome the argument that they are actually illegally imposed taxes.[107]

3. Linkage and "fair share" housing mandates

The third and perhaps most controversial area of exactions involves requirements that developers provide a percentage of their developments as affordable housing units or make in-lieu payments. The issues generally involve 1) "linkage," where new commercial development generates a need for employee housing,[108] or 2) mandatory set-asides, where "affordable" units are required of new residential subdivisions under a "fair share" or inclusionary zoning theory that any new

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Honolulu's Financial Crisis, May 25, 1994, at 1 (on file with authors). Moody's Municipal Credit Report wrote in 1993 that when the City's debt is combined with the State's, Hawaii ranks second in the country for per capita debt and first in the nation in the ratio of debt to personal income. *Id.* at 5. Nor is the cost of public infrastructure decreasing. Honolulu's Budget Department in 1992 estimated the following costs for providing the following basic services to a community of 30,000 residents:

Service	*Construction*	*Annual Operation/Maint.*
Police station	$3,000,000	$2,731,000
Fire station	1,400,000	657,000
Roads	dedicated	978,000
Refuse	--------	686,000
Sewers	1,900,000	260,000
Parks	4,000,000	1,078,000
Traffic, street lights	dedicated	354,000
Water lines	dedicated or developer-paid	1,400,000

Letter from Paul T. Leong, Chief Budget Officer, City and County of Honolulu, to Leigh-Wai Doo, Councilmember, City and County of Honolulu 1-2 (Sept. 29, 1992) (on file with authors).

[107] *See, e.g.*, Henderson Homes, Inc. v. City of Bothell, 877 P.2d 176 (Wash. 1994) (invalidating park/open space fee as unauthorized tax); Sweet Home Water and Sewer Ass'n v. Lexington Estates, 613 So.2d 864 (Miss. 1993) (holding impact fee for sewer service invalid as unauthorized tax). California saw much litigation over the issue of development fees as taxes in the wake of Proposition 13 (CAL. CONST. art. XIII A, § 4). *See, e.g.*, Shapell Industries, Inc. v. Governing Bd., 1 Cal. Rptr. 2d 818, 830-31 (Cal. Ct. App. 1991); Carlsbad Municipal Water Dist. v. QLC Corp., 3 Cal. Rptr. 2d 318, 321 (Cal. Ct. App. 1992).

[108] *See* Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

market-rate development negatively impacts the availability of affordable housing.[109]

C. Constitutional Challenges to Exactions

Constitutional challenges of dedications and in-lieu fees in state courts generally involve one of three or four tests, although courts have not always consistently applied them.

1. Reasonable relationship

The least rigorous test, usually called the "reasonable relationship" test by courts and commentators, comes from a 1949 California Supreme Court decision in *Ayres v. City Council of Los Angeles*[110] where the City required the dedication of various strips of land for streets and landscaping in return for subdivision approval for a thirteen acre triangular parcel. The court required no specific findings, but rather rested its conclusion of a reasonable relationship on a general inference that any new subdivision adds to the traffic burden and that the

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[109] *See, e.g.*, Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975) (Mt. Laurel I) and Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 456 A.2d 390 (N.J. 1983) (Mt. Laurel II) (both holding that a developing municipality had an affirmative duty to provide its "fair share" of low and moderate income housing. *See also* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (upholding development fees conducive to creation of affordable housing). Using reasoning that could also be argued in land-scarce Hawaii, the court wrote that "it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing." *Id.* at 288. For recent discussions of linkage and "fair share" housing exactions, see Susan M. Denbo, Development *Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 REAL ESTATE L.J. 7 (1994); William W. Merrill III and Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW. 223 (1993); William W. Merrill III and Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STETSON L. REV. 469 (1993); Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186 (1991); James Berger, *Note, Conscripting Private Rsources to Meet Urban Needs: The Statutory and Constitutional Validity of Affordable Housing Impact Fees in New York*, 20 FORDHAM URB. L.J. 911 (1993).

[110] 207 P.2d 1 (Cal. 1949).

requirements were presumptively lawful in the absence of contrary evidence.[111]

2. Specifically and uniquely attributable

At the other end of the spectrum is the "specifically and uniquely attributable" test of *Pioneer Trust and Savings Bank v. Village of Mount Prospect*.[112] In this case, a developer of a 250-unit residential subdivision was required to dedicate a 6.7 acre (one acre for every sixty units) site for a new school and playground.[113] The Supreme Court of Illinois found that the existing school facilities were already near capacity before the new development was proposed, and thus the need for a new school was not specifically and uniquely attributable to the new development. Therefore, the court held it was unreasonable to require the developer to pay the total cost of remedying the situation.[114]

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[111] *Id.* at 7. More specifically, the developer argued that the conditions bore no reasonable relationship to the protection of public health, safety and welfare because the benefit to the landowner was small in relation to the beneficial return to the city at large. However, the court held that benefit to the entire city was incidental, future needs as well as immediate needs should be considered, and conditions should be deemed lawful so long as they were not inconsistent with other ordinances. In another case frequently cited as exemplary of the reasonable relationship standard, the California Supreme Court upheld an ordinance requiring a subdivision to provide two and one-half acres of park land or its cash equivalent for each 1,000 new residents. Associated Home Builders of Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971). The court held the exaction could be justified by general public need rather than needing to show that the developer "will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required." *Id.* at 611.

[112] 176 N.E.2d 799 (Ill. 1961). *See also* Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960). Ironically, inferring the need for some measure of proportionality, both *Pioneer Trust* and *Rosen* cite *Ayres* for the proposition that "the municipality may require the developer to provide the streets which are required by the activity within the subdivision but can not require him to provide a major thoroughfare, the need for which stems from the total activity of the community." *Pioneer Trust*, 176 N.E.2d at 801-02; *Rosen*, 167 N.E.2d at 234.

[113] *Pioneer Trust*, 176 N.E.2d at 800-01.

[114] *Id.* at 802. Illinois courts in subsequent cases did not apply the "specifically and uniquely attributable" rule strictly. *See* Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. Ct. App. 1981) ("[T]he Illinois Supreme Court is currently tending toward a more liberal interpretation of the validity of exactions ordinances while maintaining the requirements of proportionality and specific attributability."). The wording of "specifically and uniquely attributable" exists in the Road Improve-

3. Rational nexus

The intermediate test is generally referred to as the "rational nexus" test.[115] In *Wald Corp. v. Metropolitan Dade County*,[116] a Florida appeals court upheld a county required dedication of drainage canal rights-of-way and maintenance easements for plat approval of a subdivision in a flood-prone area.[117] After reviewing and rejecting the "reasonable relationship" standard set forth in *Ayres* and the "specifically and uniquely attributable" test of *Pioneer Trust*, the Florida court adopted the moderate "rational nexus" test as an in-between standard that would allow government flexibility in planning development but stop short of "unbridled interference with private property."[118] The "rational nexus" approach permits "local authorities to implement future oriented comprehensive planning without according undue deference to legislative judgments. It requires a balancing of the prospective needs of the community and the property rights of the developer."[119] The

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ment Impact Fee statute. ILL. STAT. ch. 605 § 5/5-906 (1994). Nevertheless, the term "means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon *generally accepted traffic engineering practices* as assignable to the new development paying the fees." *Id.* ch. 605 § 5/5-903 (1994) (emphasis added). In Northern Illinois Home Builders Ass'n v. County of Du Page, 621 N.E.2d 1012 (Ill. Ct. App. 1993), *aff'd in relevant part*, No. 76503, 1995 WL 123705 (Ill. March 23, 1995), the court upheld a road improvement impact fee as valid in concluding that the county's fee calculations complied with generally accepted traffic engineering practices with no need to individually tailor the calculation to each new development.

[115] The term "rational nexus" in land use cases is generally traced to Longridge Builders, Inc. v. Planning Bd. of Township of Princeton, 245 A.2d 336 (N.J. 1968). In invalidating a condition that a developer construct a road beyond its subdivision, the New Jersey Supreme Court wrote: "It is clear to us that, assuming the off-site improvements could be required of a subdivider, the subdivider could be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision. It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement." *Id.* at 337-38.

[116] 330 So.2d 863 (Fla. Ct. App. 1976).

[117] *Id.* at 864.

[118] *Id.* at 866.

[119] *Id.* at 868.

majority of states apply some version of the "rational nexus" test.[120]

4. Dual Rational Nexus

In addition, impact or development fees (as differentiated from land dedications and in-lieu fees) which government uses to finance new or improved capital facilities may be held to a more extensive test.[121] In the "dual rational nexus" test, "the local government must demonstrate a reasonable connection or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision."[122]

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[120] Theodore C. Taub, *Development Exactions And Impact Fees*, ALI-ABA COURSE OF STUDY: INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, 269, 274 (Sept. 30, 1993). Taub details the rational nexus test as "a two-prong test whose goal is to require that exactions which are imposed on a new development be only for the proportion of the new facilities and services whose need is created by the new development. The first prong of the test requires that the need for the additional facility or service be created by the development being assessed, and that the assessssment not exceed the cost of meeting the needs created by the new development. The second prong requires that the development being assessed derive some meaningful benefit from the use of the funds collected, although the benefit need not be exclusive to the development being assessed." *Id.* at 274. Although the term "rational nexus" was not used, another case commonly cited to illustrate the intermediate level test is Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). In upholding an ordinance imposing a $200 per lot fee for schools and parks upon subdivision approval, the court found what it labeled the "specifically and uniquely attributable" test to be "acceptable" provided that its application did not "cast an unreasonable burden of proof upon the municipality." *Id.* at 447. The *Jordan* test, however, does require some generalized proof: "[T]he municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx." *Id.*

[121] *See* Home Builders Ass'n of Central Arizona v. City of Scottsdale, 875 P.2d 1310, 1313-14 (Ariz. Ct. App. 1993) (action challenging validity of water resource development fee remanded in light of Supreme Court decision in *Dolan*).

[122] Hollywood, Inc. v. Broward County, 431 So.2d 606, 611-12 (Fla. Ct. App. 1983). In upholding an ordinance requiring a developer's contribution toward a county-level park system, the court also enunciated the need for the collected fees to be "specifically earmark[ed] . . . for use in acquiring capital facilities to benefit the new residents." *Id.* at 612.

D. Conditions: Possessory or Regulatory?

Taking clause analyses distinguish between government regulations that are "possessory" or "trespassory" and allow an actual physical occupation of land[123] and those that are "regulatory" and simply restrict the use of land.[124] An exaction, to the extent that it is an outright dedication of land, appears to fall in the first or possessory category.[125] Nevertheless, the distinction blurs when the government argues that a condition only becomes possessory when the landowner acts first in seeking the permit approval or rezoning classification. Prior to *Dolan*, the Supreme Court decision in *Nollan v. California Coastal Comm'n*[126] addressed this somewhat separate issue of a regulation that resulted in an exaction of property in exchange for government permission to build a house. In *Nollan*, the commission conditioned the granting of a coastal zone development permit to replace an existing bungalow with a 3-bedroom house on dedication of an easement allowing the public to pass along a portion of property parallel to the beach.[127] However, the commission's declared reason for the condition was to maintain a public view from the street,[128] logically requiring a vertical access through the property rather than the lateral access along the shore. Justice Scalia, writing one of his first majority opinions for the Court, stated that an "essential nexus" between the required condition

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[123] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding New York law requiring owner to permit installation of television cables on private property was a permanent physical occupation and thus constituted a taking).

[124] *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (coastal management regulation resulted in a taking by denying owner all economically beneficial use of land). *See also*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (regulation restricting use of property designated as a landmark did not cause a taking because the character of the action did not involve a physical occupation, mere diminution in value did not effect a serious economic impact, and preservation did not sufficiently interfere with owner's investment-backed expectations).

[125] As this note will show, the *Dolan* decision aligns exactions in the possessory category. As one court recently wrote in its restating of *Dolan*: "[W]hat triggers the heightened scrutiny of exactions is the fact that they are 'not simply a limitation on the use' to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government." Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994).

[126] 483 U.S. 825 (1987).

[127] *Id.* at 828.

[128] *Id.*

and the government's purpose was needed to obviate a taking.[129] Under this heightened scrutiny, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[130] This 1987 decision becomes the starting point for the Court's taking analysis in *Dolan*.

IV. Analysis

A. Rehnquist's Framework

In writing the majority opinion, Chief Justice Rehnquist lays out a carefully organized statement of what is clearly an extension of the analysis in *Nollan*. After stating the facts of the case in Part I, he provides the jurisprudential framework from which to conduct the preliminary constitutional analysis in Part II. Rehnquist then provides and applies a two-part test in Part III, the second phase of which Justice Stevens' dissenting opinion characterizes as "remarkably inventive."[131] Concluding that the dedications the City required of Dolan in exchange for granting the permit fail the second part of the test, the Chief Justice writes in Part IV that while the City's goals of reducing flood hazards and traffic congestion are "laudable," there are "outer limits" as to how those goals are constitutionally realizable.[132]

Mirroring the language of Justice Scalia's opinion in *Nollan* practically word for word, Chief Justice Rehnquist begins his analysis with the assertion that the City's dedication requirement would surely have been a compensable taking of private property had it not been conditioned on the granting of a permit.[133] The philosophical underpinning

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[129] *Id.* at 837.

[130] *Id.*

[131] Dolan v. City of Tigard, 114 S. Ct. 2309, 2323 (1994) (Stevens, J., dissenting).

[132] *Id.* at 2322. Similarly, Justice Scalia in *Nollan* could not find the uncompensated dedication of an easement without an essential nexus to a valid government purpose to be within the "outer limits" of legitimate state interests. 483 U.S. at 837.

[133] Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Dolan*, 114 S. Ct. at 2316. Compare the language in the first part of Scalia's analysis in *Nollan*: "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Nollan*, 483 U.S. at 831.

of the Fifth Amendment's Taking Clause, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"[134] likewise is set forth early in the opinion. Oft-cited, this principle of the equal protection aspect of an unconstitutional taking underlies many of the Court's takings analyses.[135]

It is important to note that Chief Justice Rehnquist immediately establishes the groundwork for analyzing Dolan's claim as a Fifth Amendment taking issue. Thus it requires the distinct and heightened judicial scrutiny of a taking analysis, rather than the substantive due process analysis argued for by Justice Stevens in his dissenting opinion.[136] The dissenting Justices see no need to hold the taking claim to anything greater than the minimal rational relationship scrutiny reserved for an alleged due process violation.[137] The majority dismisses Justice Stevens' argument that the government action in this case is

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[134] Armstrong v. United States, 364 U.S. 40, 49 (1960). In *Armstrong*, the federal government acquired title to navy personnel vessels when the contractor defaulted. Unpaid suppliers of materials for construction of the boats brought an action to recover compensation for property which the government argued fell under the aegis of "public works" and immune from petitioners' liens. The Court held that the property, however acquired, was for a public purpose and subject to the Fifth Amendment's guarantee of just compensation. *Id.* at 48-49.

[135] *See, e.g.*, *Nollan*, 483 U.S. at 836 n.4; First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987); Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring and dissenting); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting). The principle has been discussed as an "equal protection arm of takings jurisprudence." *See* J. Freitag, Note, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. R. 743, 762 n.114 (1994) (citing Note, Taking A Step Beyond: A Reconsideration of the Takings Rule in Nollan v. California Coastal Comm'n, 102 HARV. L. REV. 448, 451 (1988)).

[136] Justice Stevens reaches back over a century in citing Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) for the proposition that the Takings Clause is a limitation on the federal government rather than the states. *Dolan*, 114 S. Ct. at 2327 n.7 (Stevens, J., dissenting).

[137] Such a test requires only that the government regulation be rationally related to a legitimate government purpose. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955). Economic and social legislation concerning land use where no fundamental right is implicated will also be upheld against an equal protection challenge if it is "reasonable, not arbitrary" and bears a "rational relationship to a [permissible] state objective." Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (citations omitted) (alteration in original).

simply a business regulation[138] by denominating the action as a violation of a "provision of the Bill of Rights."[139] Rehnquist points out that even a "business regulation" is subject to being stricken when it infringes on fundamental rights such as the right to be free from unreasonable searches[140]and the right to free speech.[141] The majority of this Court views the Fifth Amendment right to just compensation as equally important so as to require heightened scrutiny.[142]

The Chief Justice also distinguishes Dolan's taking claim as a "possessory" claim, as in *Nollan*, as compared to the "regulatory" taking claim that the Court addressed in *Lucas*. In regulatory taking cases, the Court has determined that there is a proper exercise of the police power and no compensable taking of property if the land use regulation 1) "substantially advances" a legitimate government interest

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[138] Chief Justice Rehnquist takes Justice Stevens to task for relying on a law review article for the proposition that exactions are merely business regulations. *Dolan*, 114 S. Ct. at 2320. Stevens draws heavily on one commentator's analogy of the subdivision developer as a mere entrepreneur attempting to maximize profits. *Id.* at 2325 (Stevens, J., dissenting) (citing Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. Q. 871 (1967)). Stevens then reverses the analogy from subdivider to retail business developer. *Id.*, 114 S. Ct. at 2335. However, the part of Johnston's article not quoted by Stevens actually paints the subdivider as more "dangerous" than other business persons: "From the municipality's point of view, the danger from a defective subdivision is actually greater than the threat posed by defectively manufactured automobiles, refrigerators, or other durable goods. The subdivision remains, long after the automobiles have been relegated to the junk heap, to spawn conditions of slum and blight." Johnston, *supra* this note, at 923. This recalls Justice Sutherland's characterization of the apartment building as a "mere parasite" in upholding the zoning restrictions in *Euclid*. 272 U.S. at 394.

[139] Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).

[140] Chief Justice Rehnquist cites Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (striking down a statute authorizing a warrantless search of business premises to detect OSHA violations). *Dolan*, 114 S. Ct. at 2320.

[141] Here the Chief Justice refers to Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980) (striking a statute prohibiting advertising by a utility company to promote electricity use). *Dolan*, 114 S. Ct. at 2320.

[142] The debate within the Court over the measure of scrutiny to be used follows the Scalia/Brennan conflict in *Nollan*. Like Justice Stevens in *Dolan*, Justice Brennan argued that the rational relationship test was all that was required. Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 (1987) (Brennan, J., dissenting). Justice Scalia strongly disagreed that constitutional standards for takings challenges, due process challenges, and equal protection challenges are "identical." *Id.* at 836 n.3. The debate has continued in subsequent land use cases. *See* Richard M. Frank, *Inverse Condemnation Litigation in the 1990s - The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions* 43 WASH. U. J. URB. & CONTEMP. L. 85 (1993).

and 2) does not deny a property owner "economically viable use" of his land.[143] Here, however, the opinion enumerates two differences from the regulatory cases. First, the government action at issue is not a broad legislative action such as *Euclid*'s zoning ordinance or *Pennsylvania Coal*'s anti-subsidence statute but rather an adjudicative decision made with regard to an individual parcel.[144] Second, the conditions in question are not mere restrictions or limitations on land development but rather require that land be deeded to the local government.

Chief Justice Rehnquist points out in a footnote that the denial of economically viable use of the land is not an issue since it is clear that the parcel is in commercial use.[145] Significantly, he is not holding this possessory taking claim to the total taking rule established in *Lucas*.[146] To do otherwise would deny any remedy to a landowner because, as Justice Stevens pointed out in his dissenting opinion in *Lucas*, the property owner who loses 95% of his land's value may be denied relief by the strict application of the regulatory taking rule.[147] By affording relief to Dolan, the Court thus appears to make the distinction between a purely regulatory action that restricts development and an exaction that requires a conveyance of property interests to the government.[148] Chief Justice Rehnquist emphasizes this reasoning by implying that a regulation simply *restricting* development in the floodplain for flood control and open space purposes might have been evaluated differently than the requirement of outright dedication of land to the City: "The [C]ity has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."[149] The City could have achieved the same goals by a less burdensome requirement such as a private easement.

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[143] *Dolan*, 114 S. Ct. at 2316 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[144] *Dolan*, 114 S. Ct. at 2316.

[145] *Id.* at 2316 n.6.

[146] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).

[147] *Id.* at 2919 (Stevens, J., dissenting).

[148] Justice Peterson of the Oregon Supreme Court made this argument for a separate standard: That power of the government [to demand a large part of ownership rights] gives it tremendous leverage against landowners who seek to improve their property. Because of the profound potential adverse effects that the substantive rule [of *Lucas*] places on landowners, I read the federal precedents to require a high threshold that the government must meet in showing that the exaction is needed. *Dolan*, 854 P.2d at 448-49 (Peterson, J., dissenting).

[149] *Dolan*, 114 S. Ct. at 2320.

B. Property: No Poor Relation

Early in the opinion the majority delineates their high regard for property rights. Allowing public access through dedication of an easement would infringe on the property owner's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[150] The Chief Justice twice cites those words from the opinion he wrote as an Associate Justice in the 1979 Hawaii case of *Kaiser Aetna v. United States*.[151] In *Kaiser Aetna*, the federal government wanted to impose a navigational servitude and enforce public access to Hawaii Kai's Kuapa Pond after dredging and filling operations had opened a channel from the privately owned pond to the bay. In that opinion, Rehnquist described the right to exclude as a "fundamental element of the property right" and held that the imposition of a navigational servitude to allow public access would be an actual physical invasion of private property requiring compensation.[152]

Indeed, the dissent's "business regulation" argument elicits a strong response from the Chief Justice that property rights under the Takings Clause of the Fifth Amendment are "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment," and should not "be relegated to the status of a poor relation" to other fundamental

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[150] *Id.* at 2316 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). A reading of the transcript of the oral argument before the Court in *Dolan* is instructive of this Court's view of the right to exclude. In answering the Court's questions about the negative impact of the proposed greenway on the landowner, David Smith, Petitioner's attorney, focused on Mrs. Dolan's inability to construct a larger store. The Court, however, abandoned its line of seemingly Socratic questions to make known what it was really looking for:

> Question: "[A]fter she complied with the condition for the—for the permit, would the public have had access to the greenway?"
> Mr. Smith: "Yes, Your Honor."
> Question: "Well, that's—that's the one thing she couldn't—she could do now and couldn't do afterwards, which is keep other people out."
> Mr. Smith: "That is absolutely correct."
> Question: "Which is pretty important."
> Mr. Smith: "Yes, Your Honor, it is."

Transcript of Oral Argument at *10, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), 1994 WL 664939.

[151] 444 U.S. 164 (1979).

[152] *Id.* at 179-80.

rights.[153] Citing several warrantless search cases[154] as well as a freedom of speech case,[155] the Chief Justice makes it quite clear that the Fifth Amendment right to just compensation in a taking of property is on an equal footing with First and Fourth Amendment rights.[156]

Chief Justice Rehnquist also reaffirms the majority's respect for private property rights in rejecting the City's argument that the commercial nature of Dolan's property affords her less constitutional protection than a residential property owner.[157] Citing *PruneYard Shopping Center v. Robins*,[158] the City claimed that dedication of the easements would not impair the value of Dolan's retail property.[159] In *PruneYard*, high school students set up a table at a privately owned shopping center in order to distribute pamphlets and obtain signatures for a petition against Zionism.[160] The group maintained they were denied their rights to speech and petitioning under the California Constitution when they were asked to leave the property by a security guard.[161] The shopping center owner countered that his federally protected right to exclude others from private property would be violated if the students could exercise their right to solicit signatures guaranteed by the California Constitution.[162] Chief Justice Rehnquist, weighing the importance of the conflicting rights, wrote the majority opinion upholding the students' speech and petitioning rights. Nevertheless, in doing so, he wrote that the shopping center could "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions."[163]

In disposing of the "commercial property" argument in *Dolan*, Chief Justice Rehnquist points to the distinguishing factors in *PruneYard*: the City's power to require the dedication of private property is not

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[153] *Dolan*, 114 S. Ct. at 2320.

[154] Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974); New York v. Burger, 482 U.S. 691 (1982).

[155] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980).

[156] *Dolan*, 114 S. Ct. at 2320.

[157] *Id.* at 2321.

[158] 447 U.S. 74 (1980).

[159] *Dolan*, 114 S. Ct. at 2321.

[160] *PruneYard*, 447 U.S. at 76.

[161] *Id.*

[162] *Id.* at 80.

[163] *Id.* at 83.

comparable to the students' constitutionally protected rights to expression, nor does the permanent easement allow for any similar time, place and manner restrictions to limit public access.[164] If the City's exactions were upheld, Dolan's "right to exclude would not be regulated, it would be eviscerated."[165]

C. *The Specter of "Unconstitutional Conditions"*

Chief Justice Rehnquist turns to the "well-settled" doctrine of "unconstitutional conditions" early in his analysis.[166] Justice Stevens in his dissenting opinion calls this doctrine a "judicial innovation"[167] that has suffered from "notoriously inconsistent application."[168] Some other commentators describe it as an "anachronism"[169] and a "creature of judicial implication" that "roams about constitutional law like Banquo's ghost."[170] Yet in just one sentence and with no further justification, Rehnquist lays out a critical building block for his argument:

> Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—

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[164] *Dolan*, 114 S. Ct. at 2321.

[165] *Id.*

[166] *Id.* at 2317. For thorough discussions of the unconstitutional conditions doctrine see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term - Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993); Cass R. Sunstein, *Why The Unconstitutional Conditions Doctrine Is An Anachronism (With Particular Reference To Religion, Speech, And Abortion)*, 70 B. U. L. REV. 593 (1990); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[167] *Dolan*, 114 S. Ct. at 2328.

[168] *Id.* at 2328 n.12. "[I]t has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Id.*

[169] Cass R. Sunstein, *Why The Unconstitutional Conditions Doctrine Is An Anachronism (With Particular Reference To Religion, Speech, And Abortion)*, 70 B. U. L. REV. 593, 594 (1990).

[170] Richard A. Epstein, BARGAINING WITH THE STATE 9 (1993). One might infer that the doctrine of unconstitutional conditions is apparent only infrequently and not to all Justices: after being slain at Macbeth's direction, Banquo reappeared at will as a specter visible only to Macbeth. WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4.

> here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.[171]

Generally, the counter-argument to this use of the unconstitutional conditions doctrine theorizes that the government's "greater" right to act in granting or denying a privilege or benefit necessarily includes the "lesser" right to impose conditions on the benefit.[172]

The doctrine was used originally in cases reviewing state laws placing conditions on the permission for out-of-state insurance companies to transact business in-state.[173] In subsequent cases in the *Lochner*[174] era, the Court invalidated state regulations that imposed "unconstitutional conditions" on conducting in-state business such as a foreign telegraph company's required contribution to a permanent school fund[175] and conversion of a private trucking company to common carrier status in order to use state highways.[176] In the latter case, *Frost v. Railroad Comm'n*,[177] Justice Sutherland set forth the philosophical underpinnings of the unconstitutional conditions doctrine:

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[171] *Dolan*, 114 S. Ct. at 2317.

[172] *See, e.g.*, Frost v. Railroad Comm'n of California, 271 U.S. 583, 602 (1926) (Holmes, J., dissenting).

[173] For example, in *Insurance Company v. Morse*, 87 U.S. 445 (1874), the Supreme Court held unconstitutional a Wisconsin statute's provision that conditioned a New York company's selling of fire insurance on its agreement not to remove any litigation to federal court. The Court ruled that an out-of-state citizen's right to remove a case to federal court was "absolute" under the Constitution and could not be made a condition of doing business. *Id.* at 458. However, in another decision two years later scrutinizing the same statute, Doyle v. Continental Insurance Co., 94 U.S. 535 (1876), the Court focused on the state's right to exclude the foreign company entirely and that no compulsion was involved - the company had the option not to do business in-state. *Id.* at 542. Justice Hunt wrote both the *Morse* and *Doyle* decisions and reconciled the apparently contradictory rulings on the basis that the *Morse* decision addressed a narrower set of facts. *Id.* at 538-39. Justice Bradley in a dissenting opinion argued that the state had no right to impose "unconstitutional conditions." *Id.* at 543 (Bradley, J., dissenting). He continued: "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound." *Id.* at 543-44 (Bradley, J., dissenting).

[174] Lochner v. New York, 198 U.S. 45 (1905). The *Lochner* era Court generally held state regulation in economic matters to a higher scrutiny with far less deference to the legislature. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-4 (2nd ed. 1988).

[175] Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910).

[176] Frost v. Railroad Comm'n of California, 271 U.S. 583 (1926).

[177] 271 U.S. 583 (1926).

> [C]onstitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forgo a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.[178]

Justice Holmes, who generally argued against use of the unconstitutional conditions doctrine,[179] wrote in a dissenting opinion that the state's greater right to exclude altogether included the lesser power to impose conditions on the carrier since the company possessed no "private right" to use the highways.[180]

The doctrine in more recent years has been identified by the Supreme Court in striking down conditions on such benefits as tax exemptions,[181]

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[178] *Id.* at 593.

[179] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1459 (1989). From Holmes' perspective, the doctrine was a hard pill to swallow: I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power." *Western Union*, 216 U.S. at 54. His viewpoint maintained a broad distinction between a constitutionally protected "right" and a mere "privilege." *Id. See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8 at 680-81 (2nd ed. 1988). Illustrating the distinction are Holmes' oft-quoted words from an opinion as a Justice on the Massachusetts Supreme Court that a policeman "may have a constitutional right to talk politics but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892).

[180] *Frost*, 271 U.S. at 601-02 (Holmes, J., dissenting). Holmes' "greater includes lesser" argument actually quoted the second sentence of the following portion of Justice Sutherland's opinion in Packard v. Banton, 264 U.S. 140, 145 (1924): "[A] distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." In *Packard*, the Court upheld a New York regulation requiring operators of motor vehicles carrying passengers for hire to obtain liability insurance or post a personal bond with sureties. *Id.* at 141.

[181] *See* Speiser v. Randall, 357 U.S. 513 (1958) (holding veterans claiming tax exemption could not be required to execute a declaration of nonadvocacy of government overthrow); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding unconstitutional a tax exemption only for newspapers and religious, professional, trade, and sports journals but not general interest magazines).

unemployment compensation,[182] and subsidies for public broadcasting,[183] usually with Chief Justice Rehnquist filing a dissenting opinion.[184] The Court has also rejected application of the unconstitutional conditions doctrine in upholding conditions on family planning counseling[185] and restrictions on advertising casino gambling.[186] Chief Justice Rehnquist authored both majority opinions in these latter cases and indicated, at least under the particular sets of facts involved, the greater power of the government to provide the benefit included the lesser power to limit or condition the benefit.[187] Indeed, one commentator identifies the Chief Justice as being the closest member of the

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[182] *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding government could not deny unemployment compensation benefits because employee discharged for refusing to work on her Sabbath); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981) (holding government unemployment benefits could not be denied to terminated worker who quit because religious beliefs forbade participation in making armaments).

[183] *See* FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down a provision of Public Broadcasting Act of 1967 which prohibited editorializing by a noncommercial broadcasting station as a condition for receiving federal subsidies). In *FCC*, Rehnquist dissented, analogizing government to the "Big Bad Wolf," the public broadcasting station to "Little Red Riding Hood," and the federal monies to the food being taken to "grandmother." *Id.* at 402-03. Rehnquist argued for upholding the federal statute barring editorializing since the Big Bad Wolf provided some of the food in Little Red Riding Hood's basket and had told her in advance that acceptance of the food required abidance by the Wolf's conditions. *Id.* at 403.

[184] *See, e.g., Hobbie*, 480 U.S. at 146 (Rehnquist, J., dissenting); *Thomas v. Review Bd.*, 450 U.S. at 720 (Rehnquist, J., dissenting); *FCC*, 468 U.S. at 402 (Rehnquist, J., dissenting); *Arkansas Writers'*, 481 U.S. at 235 (Scalia, J., dissenting, Rehnquist, C.J., joining).

[185] Rust v. Sullivan, 500 U.S. 173 (1991) (upholding regulations prohibiting family planning Title X fund recipients and their patients from engaging in abortion counseling, referral, or advocacy).

[186] Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (holding government could restrict advertising of casino gambling to target only non-residents of Puerto Rico).

[187] In dismissing the argument that the unconstitutional conditions doctrine prevented the relinquishment of the "right" to engage in abortion advocacy and counseling in *Rust*, Rehnquist wrote that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Posadas*, Rehnquist also defended the restriction on casino advertising with the "greater includes the lesser" argument: "[I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Posadas*, 478 U.S. at 346.

present Court to espouse Holmes' rejection of the unconstitutional conditions doctrine as a "mistake" to be abandoned,[188] thus making his reliance on the doctrine in *Dolan* somewhat surprising. Nevertheless, application of the doctrine in the land use context does meet his approval.[189] Justice Scalia's opinion in *Nollan*, in which the Chief Justice joined, made first use of the doctrine by the Court in a land use case.[190]

In *Nollan*, although the doctrine was not referred to by name, Justice Brennan's dissent expressed the basic "greater includes the lesser" argument by explaining that the Coastal Commission could have denied the building permit altogether; therefore granting or denying the lesser benefit to build under a commission-imposed condition should also be a valid exercise of the police power.[191] Justice Scalia agreed—to a point: "[T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, *that serves the same end.*"[192] For Justice Scalia, the "greater includes the lesser" argument falls apart "if the condition substituted for the prohibition utterly fails

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[188] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1417 (1989).

[189] Rehnquist's use of the doctrine must be seen in light of his strong views on property rights. Even before becoming Chief Justice, one student commentator noted that Rehnquist was responsible for expanding respect for traditional property rights in the Burger Court. Stephen J. Massey, Note, *Justice Rehnquist's Theory of Property* 93 YALE L. J. 541 (1984). While expanding those rights, however, Rehnquist also promoted a different constitutional standard for rights in "new" property based on government benefits. "Rehnquist's general willingness to invoke the just compensation norm to require the government to pay compensation for property whose value it has reduced contrasts markedly with his reluctance to invoke the due process norm to require the government to provide greater procedural protections when wholly depriving citizens of jobs, welfare benefits, and other important interests." *Id.* at 555. It is not surprising then that he finds a justified use of the unconstitutional conditions doctrine in land use matters but not with other rights.

[190] *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 179-84 (1993).

[191] Nollan v. California Coastal Comm'n, 483 U.S. 825, 844 (1987) (Brennan, J., dissenting).

[192] *Id.* at 836 (emphasis added). Scalia would even have allowed a requirement that the Nollans provide a viewing spot on their property since that would provide the essential nexus with the commission's purpose: to protect the public's access to see the beach beyond any newly constructed house. *Id.*

to further the end advanced as the justification for the prohibition."[193] This "essential nexus"[194] between the condition and the government's purpose becomes the first prong of *Dolan*'s new test, failure of which makes a land use exaction an unconstitutional condition.

Application of the doctrine requires identification of a constitutionally protected right. With a number of the Court's decisions involving various rights to choose from to illustrate the unconstitutional conditions doctrine, Rehnquist cites two cases involving freedom of speech.[195] On a par with these First Amendment rights then, the Chief Justice isolates the violated right in *Dolan*: the "right to receive just compensation when property is taken for a public use."[196]

The right to receive just compensation was also the subject of an unconstitutional condition in *Loretto v. Teleprompter Manhattan CATV*

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[193] *Id.* at 837. Brennan did not require the same nexus. He concluded that the condition of a lateral access easement required by the Coastal Commission was a valid exercise of the police power since the state "could rationally have decided" that the impact on visual access was related to a more generalized public access to the coastline. *Id.* at 843-44 (Brennan, J., dissenting).

[194] *Id.* Earlier cases involving the unconstitutional conditions doctrine also seemed to require a nexus or "germaneness" between the condition and the government purpose. *See* Robert Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1460-61 (1989). Thus, by finding a regulation "germane" to the government purpose, Justice Sutherland, a main proponent of the unconstitutional conditions doctrine, was able to find constitutionally permissible conditions in Packard v. Banton, 264 U.S. 140 (1924) (upholding ordinance requiring posting of bond or liability insurance for operators of motor vehicles carrying paying passengers) and Stephenson v. Binford, 287 U.S. 251 (1932) (upholding validity of Texas statute requiring private contract carriers to obtain permits for highway usage and provide proof of insurance because conditions were closely related to legitimate purpose of highway safety).

[195] Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994). In Perry v. Sindermann, 408 U.S. 593 (1972), a non-tenured junior college professor spoke out in his capacity as head of the teachers' association against policies favored by the school's board of regents. When his contract was not renewed in apparent retaliation, the Court held that the discretionary benefit of his state job could not be conditioned on his waiver of free speech rights. In Pickering v. Board of Education of Township High School District, 391 U.S. 563 (1968), the Court held that a teacher who wrote a letter to the local newspaper criticizing the school board's use of tax revenue could not be fired by conditioning his employment on a waiver of his First Amendment rights. In addition, while many unconstitutional conditions cases seem to involve federal employment and other benefits, Rehnquist cites cases dealing with local or state govermental agencies, as in *Dolan*.

[196] *Dolan*, 114 S. Ct. at 2317.

Corp.,[197] although the doctrine itself was not mentioned. In *Loretto*, the Court found that a New York statute requiring a landlord to permit cable installation on the property to be a physical occupation and therefore was a taking if no compensation was paid.[198] The cable company had argued that the statute was inapplicable if the landlord ceased to rent the premises. This "broad use-dependency argument prove[d] too much" for Justice Marshall: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."[199]

In *Dolan*, Chief Justice Rehnquist cites the Ninth Circuit decision in *Parks v. Watson*,[200] although not for the unconstitutional conditions proposition. The *Parks* court did, however, specifically analyze a land dedication case in terms of that doctrine and it is instructive in how that doctrine can apply to land use. *Parks* involved a residential subdivision development that required a zoning change and vacation of platted streets belonging to the city of Klamath Falls, Oregon.[201] Although the developer was willing to pay for the vacated streets and give an easement to the City over a 20-foot strip of land, the City demanded dedication of the fee interest in the strip which would give the City ownership of four geothermal wells.[202] The court found that the City's manipulation of its vacation authority in order to leverage the land dedication and obtain ownership of the geothermal wells was the imposition of an unconstitutional condition.[203] "[J]ust as a public

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[197] 458 U.S. 419 (1982).

[198] *Id.* at 438.

[199] *Id.* at 439 n.17.

[200] 716 F.2d 646 (9th Cir. 1983).

[201] *Id.* at 649.

[202] *Id.* at 649-50.

[203] *Id.* at 652. As discussed *supra*, note 194, the doctrine requires the condition to be related or "germane" to the government purpose. The court found no nexus here: "Since the requirement that [the developer] give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation." *Id.* at 653. Use of the term "rational relationship" may be the reason Chief Justice Rehnquist did not cite *Parks* as illustrative of the unconstitutional conditions doctrine since he argues for a heightened scrutiny. The court in *Parks* also distinguished an earlier decision rejecting a claim of unconstitutional conditions in Honolulu Rapid Transit Co. v. Dolim, 459 F.2d 551 (9th Cir. 1972). The court wrote that in *Dolim*, the imposed condition (permitting the city to purchase the company's property in accordance with terms of the franchise agreement) "*directly related* to the subject of the franchise, public transportation." *Id.* at 651 (emphasis added).

employer may not condition an employment contract on the employee forsaking his first amendment rights, . . . the City may not condition street vacation on [the developer] waiving its fifth amendment right to just compensation for the geothermal wells.''[204]

The use of the unconstitutional conditions doctrine should not be underestimated. Despite the fact that the Chief Justice, for one, is reluctant to apply the doctrine to many cases involving the ''new property'' of government benefits,[205] the majority of the present Court appears to find it relevant in a land use context. And, arguably, in a land development exaction scenario, it moots the question of whether the development of land by the property owner is a right or a privilege. The focus becomes not the right to develop (or the right to exclude) but rather the right to be fairly compensated for private property taken through an unjustified use of the police power. Courts sometimes find an exaction valid by reasoning that the landowner ''voluntarily'' accepts the condition since she retains the option *not* to develop.[206] Yet this returns one to Justice Sutherland's argument in *Frost* supporting the unconstitutional conditions doctrine: ''a choice between the rock and the whirlpool''[207] is no choice at all. Chief Justice Rehnquist's reliance on the doctrine, therefore, seems to dispense with the circular argument that a property owner's acceptance of a permit condition or rezoning exaction is made voluntary by the very act of acceptance.

D. The ''New'' Test: ''Rough Proportionality''

Having laid the groundwork for his analysis, Chief Justice Rehnquist proceeds in Part III of the opinion to set out and apply first the *Nollan* test and then his ''new'' (in name, if not in doctrine) test, ''rough proportionality.'' The *Nollan* portion of this heightened scrutiny test

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[204] *Id.* (citing Perry v. Sinderman, 408 U.S. 593 (1972)).

[205] *See* note 189 and accompanying text.

[206] Typical of this reasoning is a Washington Supreme Court opinion interpreting the statute requiring dedications of land or easements for open space: ''[T]he word 'voluntary' means precisely that the developer has the choice of either (1) paying for those reasonably necessary costs which are directly attributable to the developer's project or (2) losing preliminary plat approval. The fact that the developer's choices may not be between perfect options does not render the agreement 'involuntary' under the statute.'' Trimen Development Co. v. King County, 877 P.2d 187, 192 (Wash. 1994) (quoting Cobb v. Snohomish County, 829 P.2d 169, 173 (Wash. Ct. App. 1991)) (emphasis omitted).

[207] *Frost*, 271 U.S. at 593.

requires first a determination that there is a legitimate state interest, and second that there is an essential nexus between that legitimate state interest and the condition demanded by the government.[208] The Chief Justice then distinguishes *Nollan*, where although the protection of visual access to the ocean was a legitimate government interest, the Court characterized the Coastal Commission's requirement of dedicating a *lateral* easement parallel to the shoreline as mere "gimmickry" in claimed satisfaction of the *vertical* visual access purpose.[209] Validation of the permit condition in *Nollan* never cleared the first hurdle.

In *Dolan*, however, there is no apparent gimmickry or "extortion."[210] Flood prevention and reduced traffic on city streets are "undoubtedly" legitimate purposes.[211] More importantly, Rehnquist found there exists an "obvious" nexus between rebuilding a larger commercial structure with a newly paved parking lot adjacent to a creek with a history of flooding and the City's interest in preventing flood damage.[212] Creation of an expanded impervious surface as a cause for increased stormwater run-off is an acceptable evidentiary assumption at this stage of the analysis.[213]

Likewise, the legitimate interest in relieving urban traffic congestion is easily connected, in theory, to the dedication of land for a pedestrian and bicycle pathway that will provide and encourage transportation alternatives to motorized vehicles on the public streets.[214] Again, in this case, Chief Justice Rehnquist seems to treat this phase of constitutional scrutiny somewhat casually and conducts only a general examination of the relationship between the permit condition and the avowed governmental purpose.

In the next part of Rehnquist's analysis, however, the Court begins to tread on unsettled ground. Here, the Court must decide if the impact of the proposed development is such that the City's permit conditions are "reasonably necessary to the effectuation of a substantial government purpose" so as to not constitute a Fifth Amendment taking.[215] Having successfully tied the *nature* of the conditions to the

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[208] *Dolan*, 114 S. Ct. at 2317 (citing *Nollan*, 483 U.S. at 837).

[209] *Dolan*, 114 S. Ct. at 2317.

[210] *Id.* at 2317.

[211] *Id.* at 2317-18.

[212] *Id.* at 2318.

[213] *Dolan*, 114 S. Ct. at 2318.

[214] *Id.*

[215] *Id.* (quoting *Nollan*, 483 U.S. at 834 and Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

government purpose, can the Court now find the constitutionally required relationship between the *extent* and the *degree* of the exactions and the projected impact of the development?[216] The burden placed on the property owner must be in proportion, albeit roughly, to the benefit she will receive.[217]

In deciding on the "rough proportionality" test, Chief Justice Rehnquist surveys a number of state decisions, going back some thirty years.[218] Like most commentators, he separates the state tests into three categories: those using a very generalized and "too lax" standard,[219] those applying the "very exacting . . . specifi[c] and uniquely attributable" test of *Pioneer Trust*, and those taking an "intermediate position."[220] Rehnquist describes this third test as "requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development."[221] As noted in Part III, most commentators associate the "reasonable relationship" test with the lowest level scrutiny as applied in *Ayres* or *Associated Home Builders v. City of Walnut Creek*, while the intermediate level is commonly termed "rational nexus."[222] Nevertheless, Chief Justice Rehnquist apparently

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[216] *Dolan*, 114 S. Ct. at 2318.

[217] *Id.* at 2319.

[218] Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). Chief Justice Rehnquist's use of twelve state court decisions does fall short of Justice Scalia's citation of 21 state cases in *Nollan*. 483 U.S. at 839. Justice Scalia, however, does not distinguish between different state tests but rather writes that finding the Nollan's permit condition invalid was consistent with the "approach taken" by all state courts (with the execption of California's). *Id.*

[219] For example, in Jenad, Inc. v. Scarsdale, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966), the court held that a permit condition requiring a $250 per lot in-lieu fee for parks, regardless of size, on a proposed 24-lot subdivision's plat approval was "merely a kind of zoning" that called for no further explanation. 218 N.E.2d at 676.

[220] *Dolan*, 114 S. Ct. at 2319.

[221] *Id.* at 2319.

[222] It should be noted that tests as named and tests as applied are not necessarily the same. In the example of what Rehnquist considered "too lax" a test for constitutional protection, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964), the court adopted with approval the "specifically and uniquely attributable" test. However, in applying it to an ordinance requiring dedication of one-ninth of a proposed subdivision's eleven acres for parks and playgrounds, the court wrote that the question regarding whether the development's specific impact required such a condition was "already answered by our Legislature" when it enacted the law. *Id.* at 188. The Montana Supreme Court's analysis seems further confusing in discussing the presumptive validity to be afforded a legislative act: it must be upheld

equates the two terms in citing *Simpson v. City of North Platte*[223] as the paradigm for middle level scrutiny:

> The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some *reasonable relationship or nexus* to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.[224]

In *Simpson*, property owners challenged a requirement that they deed a 40-foot right-of-way to the City in order to obtain a building permit for construction of a fast-food restaurant and parking lot.[225] Using a "reasonable relationship or nexus" test, the court held the condition invalid because the City offered no evidence that the project would create sufficient additional traffic to necessitate a proposed street project.[226]

The Chief Justice declines, however, to adopt the "reasonable relationship" test in those terms because it "seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[227] He then names (for the first and last time in the opinion) "rough proportionality" as the new test: "No precise mathematical calculation is required, but the city must make some sort of individualized deter-

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if there is "any rational basis," *id.* at 188; it must not be disturbed unless contrary evidence "preponderates against it," *id.* at 188; and the rule "laid down and down again[,] . . . it will not be condemned unless its invalidity is shown *beyond a reasonable doubt*." *Id.* at 185 (emphasis added).

[223] 292 N.W.2d 297 (Neb. 1980).

[224] *Id.* at 301 (emphasis added).

[225] *Id.* at 299-300.

[226] *Id.* at 301. *Simpson* also plays some terms loosely. In applying its test, the court points to 181 Inc. v. Salem County Planning Bd., 336 A.2d 501 (N.J. Super. Ct. Law Div. 1975) which in turn defines rational nexus: "[I]t must be *substantial*, demonstrably clear and present. . . . [The] dedication must be for *specific and presently contemplated* immediate improvements." Simpson, 292 N.W.2d at 301 (quoting *181 Inc.*, 336 A.2d at 506) (emphasis added).

[227] *Dolan*, 114 S. Ct. at 2319. Interestingly, after taking great pains to adopt "rough proportionality" instead of "reasonable relationship" as the name best suited to describe the requirement of the Fifth Amendment, Rehnquist at the end of the opinion "conclude[s] that the findings upon which the city relies do not show the required *reasonable relationship* between the floodplain easement and the petitioner's proposed new building." *Id.* at 2321 (emphasis added).

mination that the required dedication is related both in nature and extent to the impact of the proposed development."[228] The burden, then, is on the City to show the need for the exaction.[229]

Chief Justice Rehnquist clearly wants no confusion with any minimum rationality test. In a footnote, he addresses Justice Steven' argument that the party challenging any zoning regulation should bear the burden of proof.[230] Justice Stevens basically resubmits *Euclid*'s "fairly debatable" standard of presumptive validity for zoning legislation.[231] According to Chief Justice Rehnquist, however, the difference here is that the City made an adjudicative decision to condition the permit on an individual parcel and thus no deference to the legislature is due.[232] This reflects the shift, at least in land use decisions, from the "greatest weight [being] given to the judgment of the legislature"[233] to the insufficiency of simply proffering legislative declarations and conclusory assertions emphasized by Justice Scalia in *Lucas*.[234]

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[228] *Id.* at 2319-20.

[229] The state court decisions cited by Rehnquist as illustrative of the reasonable relationship test varied greatly in their deference to the legislature. While *Simpson* required the city to provide evidence that the project would create a need for a right-of-way dedication, the Texas Supreme Court in City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) stated that an "'extraordinary burden' rests on one attacking a city ordinance." *Id.* at 805 (emphasis in original).

[230] *Id.* at 2320 n.8.

[231] Obviously Justice Stevens views the issues of floodplain, open space and bicycle path regulations as part of a comprehensive citywide plan rather than the application of those regulations to a specific parcel. In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 683-84 (1976) (Stevens, J., dissenting), Justice Stevens cited Fasano v. Bd. of County Comm'rs of Washington County, 507 P.2d 23 (Or. 1973), with approval and wrote: "[State] courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels. In the former situation there is generally great deference to the judgment of the legislature; in the latter situation state courts have not hesitated to correct manifest injustice."

[232] *Dolan*, 114 S. Ct. at 2320.

[233] *Pennsylvania Coal*, 260 U.S. at 394. Holmes did continue, however: "but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.*

[234] *Lucas*, 112 S. Ct. at 2901. This also follows the reasoning in many state court decisions after *Fasano*. Most recently, the Florida Supreme Court abandoned the "fairly debatable" standard in instances where zoning policy is applied to a limited number of property owners, classifying it as a quasi-judicial action. Board of County Comm'rs v. Snyder, 627 So.2d 469 (Fla. 1993). In *Snyder*, judicial review is just the first step, however. The landowner has the initial burden in a rezoning to prove consistency

E. Rough Proportionality Applied: The City's Burden

In applying the "new" federal test, the City's permit denial easily passes the first prong of nexus but fails the second prong of rough proportionality. Chief Justice Rehnquist finds it "axiomatic" that the enlarged paved parking lot will increase runoff.[235] The City, however, offered no site-specific data, but only the conclusory assertion that "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain."[236] But as the dissenting Justice Peterson of the Oregon Supreme Court responded: "All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that."[237] Apparently the Chief Justice and four other Supreme Court Justices agreed with this position.

The City did provide more data in attempting to justify the pedestrian and bicycle pathway, estimating that the enlarged retail operation would generate an additional 435 vehicle trips per day.[238] Using that estimate combined with evidence that, generally, pedestrian and bicycle facilities are necessary to strategies to decrease traffic congestion,[239] and the fact that Dolan's building plans provided for a bike rack as mandated by ordinance,[240] the City concluded that requiring dedication of land for a path "could offset some of the traffic demand."[241] But under the new test, "could" is not enough. Chief Justice Rehnquist reiterates

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with a comprehensive plan. Then the burden shifts to the government to show its decision accomplishes a legitimate public purpose and is "not arbitrary, discriminatory, or unreasonable." *Id.* at 476.

[235] *Dolan*, 114 S. Ct. at 2320.

[236] *Dolan*, 832 P.2d at 855 (Oregon Court of Appeals quoting City of Tigard Planning Comm'n Final Order No. 91-09PC 21 (1991)). The City did in fact conduct a detailed study of the effects of buildout of the Fanno Creek watershed area prior to adopting its comprehensive plan in 1983. However, the City did not adopt its consultant's recommendation for cost apportionment that calculated the total impervious area at buildout. A proposed development's new impervious surface could then be compared against that denominator to figure a prportionate cost. Transcript of Oral Argument at *6, *22-23, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518), 1994 WL 664939.

[237] *Dolan*, 854 P.2d at 447 (Peterson, J., dissenting).

[238] *Dolan*, 114 S. Ct. at 2321.

[239] *Id.* at 2318.

[240] *Dolan*, 854 P.2d at 447 (Peterson, J., dissenting).

[241] *Dolan*, 114 S. Ct. at 2321-22 (quoting the City's findings).

the test: "No precise mathematical calculation is required, but the [C]ity must make some effort to quantify its findings . . . beyond the conclusory statement that it could offset some of the traffic demand generated."[242] Rehnquist concludes by describing the City's intentions as "laudable," but the means to accomplish them are not within the "outer limits" of what the Constitution permits.[243]

F. Summary

The key points both regulators and developers should note in this Supreme Court decision are as follows. First, this Court (at least the majority) asserts that property rights, including the common law right to exclude and the constitutional right to receive just compensation when the government appropriates land for a public purpose, are on par with other fundamental rights granted by the Bill of Rights, such as free speech and protection from unreasonable searches and seizures.

Second, because property rights are so viewed, this Court clarifies and extends its 1987 decision in *Nollan*, requiring not only that: a) there be a legitimate government interest, and b) the condition asked of the developer be substantially related to the enunciated government purpose, but also that c) the nature and extent of the condition be roughly proportional to the projected impact of the proposed development.

Third, in analyzing the proposed development's projected impact, conclusory statements and assumptions will not be sufficient to show any adverse impact; site-specific analysis relating the impact with the required condition is necessary.

Fourth, and perhaps most significantly, the burden in showing adverse effects generated by the development is not on the property owner. Rather the government must demonstrate that the conditions imposed are roughly proportional to the development's impact. The government's decision in applying land use policy to an individual parcel will not be presumptively valid when it involves a possessory action.

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[242] *Id.* at 2322.

[243] *Id.* This is somewhat reminiscent of Justice Scalia's statement in Nollan: "Whatever may be the outer limits of 'legitimate state interests' in the takings and-land use context, this is not one of them." *Nollan*, 483 U.S. at 837.

V. Impact

Now that the Supreme Court through Chief Justice Rehnquist has "encapsulate[d]"[244] the new standard of "rough proportionality," what are the likely impacts of the decision on local land use policies, particularly in Hawaii? In order to predict the local impact of the *Dolan* decision, it is useful to examine judicial responses in other jurisdictions that reflect the opinion's broad influence on different types of exactions.

A. Survey of Caselaw Following Dolan

1. Dedications

The Oregon Court of Appeals closely followed a *Dolan* analysis and arguably extended it. In *Schultz v. City of Grants Pass*,[245] owners of a 3.85-acre parcel applied to partition the property into two lots. The City conditioned the partition permit on dedicating several strips of land for rights-of-way totaling 20,000 square feet.[246] The City's initial findings included only the type of conclusory assertion that *Dolan* held to be inadequate: "The division of this property will increase the use of City streets which are immediately adjacent to the property."[247] However, the City filed supplemental findings which carefully calculated additional vehicle trips that the fully developed land could generate: 149 trips per day based on seventeen new homes.[248] Using the "rough proportionality" test, the court held that the City could not base its findings on the "full development potential" of seventeen homes but rather only on the projected impact of the "limited application" for partition into two lots.[249] Reworking the City's trip generation data to

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[244] *Dolan*, 114 S. Ct. at 2319.

[245] 884 P.2d 569 (Or. Ct. App. 1994).

[246] *Id.* at 573. The City also imposed storm drain conditions not ruled on by the court. *Id.* at 570.

[247] *Id.*

[248] *Id.* at 571.

[249] Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994). "[T]he city imagined a worst-case scenario—assuming that petitioners would, at some undefined point in the future, attempt to develop their land to its full development potential of as many as 20 subdivided residential lots, further assuming that petitioners would obtain all the necessary permits and approvals—and on the basis of that scenario, it calculated the impacts of the development and tailored conditions to address them." *Id.*

estimate the impact of one additional parcel, the court found that an increase of eight vehicle trips per day was hardly proportional to the requirement that the owners dedicate 20,000 square feet of land.[250] In making the distinction between applied-for and potential developmental impact, this court is arguably extending the reasoning of *Dolan*, and holding that the exaction should be required at building permit approval to measure the actual impact rather than at any preliminary stage.

The court also rejected the City's primary argument that the conditions were based on ordinances which are the "functional equivalent" of legislative decisions, presumptively valid and subject only to minimal scrutiny.[251] The court quickly pointed out that the City "mischaracteriz[ed]" its own actions and certainly misunderstood *Dolan*.[252]

Another Oregon case focused on the specificity of findings now necessary after *Dolan*. Before granting approval for a 21-lot residential development on 4.9 acres, Clackamas County required the owners to eliminate a one-foot "spite strip" separating the proposed subdivision from adjacent vacant land and to provide some surfacing, storm sewer, curb, and sidewalk along the property's frontage.[253] While the court found sufficient specificity to affirm the imposition of the spite strip condition, it remanded for further findings on the frontage improvements.[254] The court disagreed with the landowner's premise that the condition's invalidity could be ascertained by a formula comparing the subdivision's incremental traffic increase with the volume of a far more extensively used segment of the road.[255] However, while agreeing with the local hearings officer as to the appropriate traffic data formula, the County did not present the *Dolan*-required specificity of information to carry *its* burden, thus necessitating remand.[256]

The United States Supreme Court in its Fall 1994 term scrutinized yet another Oregon case involving dedication of land. In *Altimus v. Oregon*,[257] the Court vacated a decision upholding a condemnation valuation by an Oregon appellate court and remanded for reconsider-

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[250] *Id.*

[251] *Id.* at 572.

[252] *Id.*

[253] J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994).

[254] *Id.* at 362, 364.

[255] *Id.* at 364.

[256] *Id.* at 365.

[257] 115 S. Ct. 44 (1994), *vacating*, 862 P.2d 109 (Or. Ct. App. 1993), *cert. denied*, 871 P.2d 122 (Or. 1994).

ation in light of *Dolan*. In *Altimus*, the issue involved the valuation of two acres in a condemnation action for the purpose of highway widening and construction of a parallel frontage road.[258] Both parties agreed that the property's "highest and best use" was as "limited light industrial" which would be possible if the parcel was annexed by a nearby city and rezoned.[259] However, the state's witness testified that the City's policy of "forced dedication" upon rezoning (in this situation, one acre) would limit the fair market value for just compensation to only one acre. The landowners argued that the forced dedication policy was unconstitutional, unenforceable and therefore inadmissible as relevant evidence as to the parcel's value. Nevertheless, the appellate court held there was no error, citing an earlier decision holding that "evidentiary use . . . of a valid regulation of a condemnee's land use that is a relevant factor in determining just compensation does not constitute an unconstitutional taking."[260] After *Dolan*, it is clear that a forced dedication of land resulting from annexation and rezoning as a matter of policy and without a showing of proportional need may no longer be a "valid regulation" admissible as relevant evidence.

State courts have also been quick to cite *Dolan* in cases involving right-of-way dedications[261] and in-lieu park fees.[262] The Michigan Su-

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[258] *Altimus*, 862 P.2d at 110.

[259] *Id.*

[260] *Altimus*, 862 P.2d at 111, citing State Dep't of Transp. v. Lundberg, 825 P.2d 641 (Or. 1992), *cert. denied*, 113 S. Ct. 467 (1992). In Lundberg, the Oregon Supreme Court had found a sidewalk ordinance constitutional under *Nollan* since it "reasonably relate[d] to commercial development by providing pedestrian access" and as a buffer between pedestrian and vehicle use. *Lundberg*, 825 P.2d at 646.

[261] In State Dep't of Transp. v. Heckman, 644 So.2d 527 (Fla. Ct. App. 1994), the City of Oakland Park waived a platting requirement needed for parcel consolidation and a building permit in return for a seven foot right-of-way. The court cited *Dolan*'s "rough proportionality" test and "assum[ed] [the city] was not entitled to require the dedication." *Id.* at 529. However, the action against the state transportation department (which received the right-of-way from the city) failed on the theory that the city was acting as an agent for the state. *Id.* at 530. In Walz v. Town of Smithtown, 46 F.3d 162 (2nd Cir. 1995), the court invalidated a condition that landowners dedicate a 15-foot parcel for road widening in exchange for a street excavation permit to allow access to the public water system. Citing *Dolan*, the court wrote that the plaintiffs "surely had a right not to be compelled to convey some of their land in order to obtain utility service." *Id.* at *4.

[262] In Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994), the court held that the fees negotiated in lieu of dedicating 2 acres for park resulted from the development's direct impact. The court used its "reasonably related" test but cited *Dolan* as well.

preme Court even cited *Dolan* in a riparian rights case[263] involving the erosion of a beach and fast lands caused by construction of a government-built jetty, although a vigorous dissenting opinion argued that a *Dolan* analysis is limited to "determining the constitutionality of conditions attached by a governmental agency to the granting of a land use permit."[264]

2. Off-site improvements and impact fees

A clear example of how courts will utilize the "rough proportionality" test in analyzing off-site improvements is seen in a recent Eighth Circuit case. In *Christopher Lake Development Co. v. King County*,[265] the County required the developer of two residential communities in a watershed area with sinkholes to install a drainage system to connect the sinkholes in the entire area and to channel the outflow to a nearby river.[266] Because the developer's parcel comprised only 12% of the 301 acre watershed,[267] however, the court held that the property owner was entitled to recoup the portion of expenditures in excess of his pro rata share. While the court could find a legitimate purpose (drainage to prevent a public safety hazard) and an essential nexus (drainage system to alleviate the hazard), there was not a "rough" proportionality between the 100% payment for the system with only a 12% contribution to the problem.

Perhaps an even more significant decision relating to fees was the Supreme Court's vacating a California Court of Appeals decision just days after *Dolan* was decided.[268] In *Ehrlich v. City of Culver City*, a California appeals court validated both a $280,000 recreational facility mitigation fee and a $33,220 in-lieu "art" fee exacted from the developer of an upscale 30-townhome project on a 2.4 acre parcel.[269] The landowner had already shut down a private recreational facility that included a swimming pool and tennis courts for lack of profit.[270]

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[263] Peterman v. State Dep't of Natural Resources, 521 N.W.2d 499 (Mich. 1994).

[264] *Id.* at 516 (Griffin, J., concurring and dissenting).

[265] Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (8th Cir. 1994).

[266] *Id.* at 1271.

[267] *Id.* at 1271 n.4.

[268] The decision in *Dolan* was announced on Friday, June 24; on Monday, June 27, the Court vacated Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *vacated*, 114 S. Ct. 2731 (1994).

[269] *Ehrlich*, 19 Cal. Rptr. 2d at 471.

[270] *Id.*

Although the trial court found the fact that the facilities were private and that the developer "was at all times free to go out of business,"[271] the appellate court agreed with the City that the community needed a recreational facility, public or private, and that exacting a mitigation fee as a condition of permit approval was constitutional.[272] Relying on previous holdings[273] interpreting *Nollan* that "[m]oney exactions compelled as a condition of approval must be only rationally related to the governmental purpose," the court held that the mitigation fee was rationally related to the loss of community recreational facilities and could be lawfully imposed.[274] The court also wrote that even under heightened scrutiny, the fee passed constitutional muster because there was a "substantial nexus between the land-use restriction and the condition of approval."[275] The City, as part of its "Art in Public Places Program," also imposed a $33,220 in-lieu fee as a condition.[276] Here the Court of Appeals characterized the fee as analogous to a park land dedication requirement and a legitimate use of the police power.[277]

On remand, the California Court of Appeals, apparently unruffled by the Supreme Court's action in vacating its earlier decision, reached the same results even with the *Dolan* test.[278] The court continued to reason that a showing of nexus was not required between the development's impact and the need for recreational facilities, but rather between the loss of such facilities (although non-existent) and the "burden on the community."[279] "The $280,000 mitigation fee would

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[271] *Id.* at 472.

[272] *Id.* at 476. As the court stated: "Whether the facilities were provided to the public in the form of a privately-owned facility or one which was owned by the public is not significant on the issue of whether the governmental purpose is the same." *Id.*

[273] Blue Jeans Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992), *cert. denied*, 113 S. Ct. 191 (1992); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

[274] *Ehrlich*, 19 Cal. Rptr. 2d at 475-76.

[275] *Id.* at 476.

[276] *Id.* at 480. The city's ordinance stated: "Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization." *Id.* The in-lieu fee was calculated by taking 1% of the development's valuation at $3,322,000. *Id.*

[277] *Id.* at 480.

[278] Ehrlich v. City of Culver City, No. B055523 (Cal. Ct. App. Dec. 23, 1994) (ordered not published).

[279] *Id.*, slip op. at 21 n.3.

in some measure allow the City to replace the lost recreational facilities *opportunity*."[280] With respect to the in-lieu art fee, the court ruled that the City's police power could impose such a "requirement"—finding the fee "does not constitute an exaction, a development fee, a taking, or a tax."[281] A second appeal to the Supreme Court would surely afford the Court the opportunity to draw a brighter line in how far the reasoning in *Dolan* might be extended.

The Arizona Court of Appeals noted the importance of vacating the earlier *Ehrlich* decision in its reconsideration of a case involving a water source development fee.[282] Although it found the fee valid, the court wrote that the action on Ehrlich "indicate[d] that the Supreme Court would apply a takings analysis to a purely monetary condition."[283] This is significant because both federal and state courts in California had previously held in a line of cases following *Nollan* that the heightened scrutiny only applies to "possessory" takings of land and not to "regulatory" or "financial" takings.[284] In *Commercial Builders of Northern California v. City of Sacramento*, the Ninth Circuit upheld an ordinance requiring nonresidential developments that generated jobs to pay a fee into a housing trust fund that would help finance low-income housing.[285] In finding the exaction constitutional, the court stated that the "burden assessed against the developers thus [bore] a rational relationship to a public cost closely associated with the development."[286] The court

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[280] *Id.*, slip op. at 21 (emphasis added).

[281] *Id.*, slip op. at 38. Developers in Maryland who challenged development assessments were not able to rely on *Dolan* in Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994). Although the assessments had been found to be unauthorized under the County's police power in prior litigation, Maryland's highest court found them authorized as a tax within the County's authority and noted: "*Dolan*, which concerned the Fifth Amendment Takings Clause, is irrelevant to the issue of special benefit assessments." *Id.* at 724.

[282] The Arizona Supreme Court had remanded Home Builders Ass'n v. City of Scottsdale, 875 P.2d 1310 (Ariz. Ct. App. 1993), for reconsideration in light of *Dolan*, and the appellate court applied a *Dolan* analysis to the conditioning of a building permit on payment of a development fee to fund water development. Home Builders Ass'n v. City of Scottsdale, No. 1 CA-CV-92-0210, 1995 WL 61490 (Ariz. Ct. App. Feb. 16, 1995).

[283] *Id.* at *3.

[284] Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Blue Jeans Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992), *cert. denied*, 113 S. Ct. 191 (1992); *see also* Saad v. City of Berkeley, 30 Cal. Rptr. 2d 95 (Cal. Ct. App. 1994).

[285] *Commercial Builders*, 941 F.2d at 873.

[286] *Id.* at 874.

specifically rejected the developers' argument that a fee provision or financial exaction resembled a physical taking coming under the "purview of the fifth amendment," instead classifying the exaction as a land use regulation subject only to a "reasonableness analysis."[287] Although the Housing Trust Fund Ordinance resulted from a detailed study and could arguably survive a "rough proportionality" test, the Ninth Circuit's interpretation of *Nollan* as not requiring a showing that the "development is directly responsible for the social ill"[288] may need to be modified after *Dolan*.

In *Blue Jeans Equities West v. City and County of San Francisco*,[289] the California Court of Appeals followed *Commercial Builders* in holding that "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases."[290] The type of "regulatory" taking in this case, however, was the imposition of a traffic impact development fee on any new downtown office development, with the proceeds offsetting future ridership costs of the municipal railway system.[291] After the decisions in *Commercial Builders* and *Blue Jeans*, commentators predicted a "fundamental change" in the relations between developers and local governments as well as the extent of judicial review of increased and "politically palatable" exactions.[292] The Supreme Court's decision in *Dolan* combined with its vacating of *Ehrlich* undermine the conclusion that exactions collected as fees are not subject to heightened scrutiny.[293]

3. Non-possessory claims

The majority of jurisdictions are not applying a *Dolan* analysis to non-exaction "regulatory" situations. One exception was *Manocherian*

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[287] *Id.* at 875. At least one federal court questioned the analysis in the Ninth Circuit opinion. The court did not reach the issue of different levels of scrutiny in Adamson Companies v. City of Malibu, 854 F. Supp. 1476 (C.D. Cal. 1994) (upholding constitutionality of mobile home rent control ordinance), but wrote: "*Commercial Builders* held that the 'substantially advance' test does not require scrutiny any stricter than rational basis. This Court doubts that the Supreme Court meant 'rationally related' when it wrote 'substantially advance.'" *Id.* at 1502.

[288] *Commercial Builders*, 941 F.2d at 875.

[289] 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992).

[290] *Id.* at 118.

[291] *Id.* at 116.

[292] Kenneth B. Bley and Michael J. Tidus, *Developers Get Bad News On Impact Fees*, NAT'L L.J., Jan. 18, 1993, at 21.

[293] *See* Home Builders Ass'n v. City of Scottsdale, 1995 WL 61490 (Ariz. Ct. App. Feb. 16, 1995).

v. Lenox Hill Hospital,[294] where New York's highest court cited *Dolan* in striking down a state rent stabilization law by finding an insufficient "close causal nexus" between the legislation and the state's purpose in remedying a continuing housing shortage.[295] Justice Levine strongly objected to the extension of *Dolan*'s test to a purely regulatory action:

> Since neither the doctrine of unconstitutional conditions nor the metaphor of municipal extortion masquerading as conditional land development permit approval has ever been invoked to determine the validity of rules merely regulating the use of property, I conclude that the *Nollan* and *Dolan* heightened close causal nexus judicial scrutiny is really a judicial response to the special dangers in development permit cases of abuse of the regulatory process to achieve a physical taking of an applicant's property without just compensation.[296]

The dissent's argument is borne out in other cases where courts have been reluctant to apply *Dolan* in non-possessory takings claims. In a case where property owners alleged that usage restrictions on their land adjacent to an air base runway were unconstitutional in light of *Dolan*, the federal district court distinguished the regulations as "land use restrictions and [did] not impose upon plaintiffs the obligation to deed portions of their land to local governments or any further affirmative obligations."[297] Also, in an Arizona state case, the court stated that a sprinkler retrofit ordinance was not "a situation of private property being pressed into public service as in *Dolan v. City of Tigard*" in holding the regulation was not an unconstitutional taking of property.[298] Courts have also rejected a *Dolan* test in cases involving a

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[294] 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994).

[295] *Id.* at 392, 618 N.Y.S.2d at 860.

[296] *Id.* at 414, 618 N.Y.S.2d at 873 (Levine, J., dissenting).

[297] Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994). In another case involving only a restrictive land use regulation, the court rejected the plaintiffs' reliance on *Dolan* in appealing a decision to deny a zoning reclassification from residential to business use. In upholding implementation of the town's comprehensive plan, the court found that, unlike *Dolan*, where the local authority was making an adjudicative decision, the planning and zoning commission "was acting in a legislative capacity and, therefore, it is found that the burden rests with the plaintiffs to prove that the PZC's actions were arbitrary." Spring v. New Canaan Planning & Zoning Comm'n, No. CV 135583, 1994 WL 669205, *5 (Conn. Super. Ct. Nov. 14, 1994).

[298] Third & Catalina Assoc. v. City of Phoenix, No. 1 CA-CV 93-0337, WL 443108, *5 (Ariz. Ct. App. Aug 18, 1994).

landmarks ordinance,[299] parking lot landscaping requirements,[300] and a statute requiring a railroad to modify its bridges to accommodate drainage improvements.[301]

B. Local Impact

The state of Hawaii and its four counties[302] are arguably the foremost example of a heavily regulated, multi-permit state and local government system in the area of land management.[303] Layered on top of the counties' comprehensive plans and zoning ordinances are the many and various regulations administered by the State's Land Use Commission[304] and, in the case of state-designated conservation land, the Board of Land and Natural Resources.[305] The State also exercises control over special redevelopment districts through the Hawaii Community Development Authority.[306] Considering the different agencies

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[299] Int'l College of Surgeons v. City of Chicago, No. 91 C 1587, 91 C 5564, 1995 WL 9243 (N.D. Ill. Jan. 9, 1995) (unpublished opinion) (finding *Dolan* as exactions case was inapposite to consideration of landmarks ordinance as a facial or as applied taking).

[300] Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994).

[301] Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884 (N.D. 1995). The North Dakota Supreme Court distinguished its case from *Dolan*: "BN Railroad's duty in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation." *Id.* at 896.

[302] HAW. REV. STAT. § 4-1 (1985) divides the State into four locally governed districts: Hawaii, Maui, Kauai, and the City and County of Honolulu. Technically, however, there are five counties. The County of Kalawao primarily encompasses Molokai Island's Kalaupapa Settlement, established for the care of Hansen's disease sufferers, and is under the control and jurisdiction of the Department of Health. *Id.* § 326-34. Politically, it is part of the Maui district. *Id.* § 4-1(2).

[303] Recently elected Honolulu Mayor Jeremy Harris described the City's land management system: "We have the most complex, convoluted, labyrinth land-use process of anywhere I know of in the world." Rob Perez, *The Housing Crunch: Navigating the Regulatory Maze*, HONOLULU STAR-BULLETIN, Dec. 20, 1994, at D1. Among 23 cities, Honolulu ranked far behind all other municipalities in average time to get agricultural land approved for housing due to the "regulatory maze": 6 years. San Diego and Spokane had average times of 3 years, while most cities averaged less than one year. *A Long Haul Through Red Tape*, HONOLULU STAR-BULLETIN, Dec. 20, 1994, at D3.

[304] HAW. REV. STAT. ch. 205 (1985 & Supp. 1992).

[305] HAW. REV. STAT. § 26-15 (Supp. 1992).

[306] Under HAW. REV. STAT. § 206E-31 to 33 (1985 & Supp. 1992)) the State oversees development of the Kakaako district in urban Honolulu.

involved and the breadth of regulations ranging from environmental controls[307] to coastal zone management,[308] it is no surprise that the City and County of Honolulu's Permit Register lists 95 different types of county and state land use permits and approvals that might apply to a landowner seeking to develop land.[309]

The exaction of development-driven dedications and fees and the financing of new capital facilities are possible through a variety of sources authorized by state statute: impact fees,[310] development agreements,[311] community facilities districts financing,[312] and special benefit assessments.[313] Nevertheless, despite encouragement by at least one state agency that these alternatives be utilized in exactions,[314] counties by and large exercise their authority to exact dedications and funding for infrastructure improvements through ad hoc negotiations resulting in unilateral agreements and conditional zoning.[315] One local economist describes Hawaii's land management system as "creeping ad hoc exactionism to which there's no consistent pattern."[316]

Under the Land Use Ordinance of the City and County of Honolulu, the City Council is authorized to impose conditions upon application

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[307] Statutory authority for environmental impact statements are set out in HAW. REV. STAT. § 343-1 to 8 (1985 & Supp. 1992).

[308] HAW. REV. STAT. § 205A-1 to 49 (1985 & Supp. 1992).

[309] DEP'T OF LAND UTILIZATION, CITY AND COUNTY OF HONOLULU, PERMIT REGISTER (1992). The Register cross references federal, state and city agengies requiring land management approvals for every conceivable use from setting up of booths for the spraying of flammable liquids to redesignations of airports.

[310] HAW. REV. STAT. § 46-141 to 148 (Supp. 1992).

[311] HAW. REV. STAT. § 46-121 to 132 (1985).

[312] HAW. REV. STAT. § 46-80.1 (Supp. 1992).

[313] HAW. REV. STAT. § 46-80 (Supp. 1992).

[314] Office of State Planning, State of Hawaii, GOLF COURSE DEVELOPMENT IN HAWAII: IMPACTS AND POLICY RECOMMENDATIONS 71-90 (Jan. 1992). The OSP recommended the use of statutorily authorized impact fees, development agreements and development taxes as viable alternatives. *Id.*

[315] *Id.* at 72. In 1991, prior to enactment of the Impact Fee statute in 1992, the director of the Land Use Research Foundation questioned whether Hawaii would be able to change from its 15-year history of "ad hoc negotiated exaction system." Mari Taketa, *The Jaded Yen: After Years of Heated Courtship Japanese Tourists and Investors are Snubbing Hawaii - Can This Marriage Be Saved?*, HAWAII BUSINESS, JUNE 1991, at 30, 34. To date no county has enacted any impact fee ordinance following the state statute.

[316] Bank of Hawaii associate economist Paul Brewbaker quoted in Mari Taketa, *The Jaded Yen: After Years of Heated Courtship Japanese Tourists and Investors are Snubbing Hawaii - Can This Marriage Be Saved?*, HAWAII BUSINESS, JUNE 1991, at 30, 34.

for a zoning change.[317] The conditions must be premised on preventing adverse impacts on public health, safety and welfare and must be "reasonably conceived to fulfill needs directly emanating from the land use proposed."[318] The conditions imposed on the applicant are set forth in a "unilateral agreement running in favor of the council" that must be recorded with the state Bureau of Conveyances.[319] That such an agreement is voluntary is freely admitted to be an illusion by city officials.[320] The basic concept of the "unilateral" agreement has been criticized as "fundamentally flawed" because the "agreement" itself is unenforceable as a contradiction in terms.[321] Furthermore, the goals

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[317] CITY AND COUNTY OF HONOLULU, LAND USE ORDINANCE § 8.40 (1993).

[318] *Id.* § 8.40(b), (c) (1993).

[319] 8.40 Conditional Zoning (Agreements)

Before the enactment of an ordinance for a zone change, the City Council may impose conditions on the applicant's use of the property. The fulfillment of these conditions shall be a prerequisite to the adoption of the ordinance or any applicable part of it.

(e) The conditions shall be set forth in a unilateral agreement running in favor of the council, acting by and through its Chair. No ordinance with conditions shall be effective until the agreement, properly executed, has been recorded with the Bureau of Conveyances of the State of Hawaii, so that the conditions imposed by the agreement shall run with the land and shall bind and give notice to all subsequent grantees, assignees, mortgagees, lienors and any other person who claims an interest in such property. The agreement shall be properly executed and delivered to the City prior to council action on the ordinance with conditions; provided, however, that the council may grant reasonable extension in cases of practical difficulty. The agreement shall not restrict the power of the council to rezone with or without conditions. The agreement shall be enforceable by the City, by appropriate action at law or suit in equity, against the party and their heirs, successors and assigns.

CITY AND COUNTY OF HONOLULU, LAND USE ORDINANCE § 8.40(e) (1993).

[320] As the former director of the City's Director of the Department of Land Utilization stated on a radio talk show: "[T]he mechanism that is normally used here in Honolulu is the so-called unilateral agreement. And that's an agreement that the developers when they come at the time of the zoning, they make an agreement with themselves and then they record this agreement at the Bureau of Conveyances and it becomes a legal document. And the agreement with themselves, they didn't always exactly make up the things they wanted to agree to." Tape of Price of Paradise (POP) Radio Show No. 52, Land Regulation: Donald Clegg and David Callies (July 10, 1994) (on file with authors). It should be noted that the Director also stated he favored the passage of an ordinance establishing development agreements as the proper vehicle for development exactions.

[321] DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 46 (1994). The unilateral agreement would be unenforceable since arguably there is no

of conditional zoning can be met through more defensible means such as development agreements which are negotiated voluntarily between the developer and a government agency.[322]

Under such a regime of ad hoc negotiations and potentially arbitrary land management practices, the application of *Dolan*'s rough proportionality test should have major effects. The validity of some government proposals that are considered extremely questionable under *Nollan*'s test of "essential nexus" would not be defensible at all under *Dolan*'s two-prong test. The following are some past examples of government-imposed conditions reviewed in light of *Dolan*'s two-prong test: 1) Nexus (subsuming *Nollan*'s test) and 2) Rough Proportionality.

1. Prong 1 - nexus problems

Perhaps the most well-known attempt by local government in Hawaii to exact a development fee under legally challengeable circumstances was the proposal by the then-Mayor of Honolulu to require a $100 million fee (to be put in an government fund to be used for affordable housing) as a condition to develop a golf course.[323] Not only the source of great local controversy, Judge Beezer also cited the proposal[324] in his dissent in the Ninth Circuit decision in *Commercial Builders* as an example where "state and local governments have begun to stretch the use of exactions to the breaking point."[325] Although the majority in *Commercial Builders* found a link or nexus between commercial development that would generate jobs and a consequence (employees for those jobs would need housing), there seems to be no such linkage between golf course development and the need for affordable housing under the nexus prong of a *Dolan* analysis.

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consideration - the city makes no return promise that would be good consideration; in addition, the unilateral agreement is declared prior to any performance by the city via an approved ordinance or permit. "Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration." E. Allan Farnsworth, CONTRACTS § 2.2 (1990).

[322] *Id.*

[323] Sigfredo A. Cabrera, *Taxman, Spare That Golf Course*, WALL STREET JOURNAL, July 11, 1991, at A10. The Mayor's proposed ordinace was countered by council members' versions calling for a $25 million fee. *Id.* Neither proposed ordinance was enacted. *See also*, William Kresnak, *Fasi Golf Course Proposal Draws Foundation Fire*, SUNDAY STAR-BULLETIN AND ADVERTISER, Nov. 18, 1990, at D6.

[324] *Commercial Builders*, 941 F.2d at 877 n.4 (Beezer, J., dissenting).

[325] *Id.* at 877 (Beezer, J., dissenting).

In 1991 the State Legislature budgeted $75,000 for a study by the Office of State Planning (OSP) resulting in policy recommendations regarding compensatory payments to be imposed by state and county agencies for the mitigation of any adverse social, economic or environmental impacts generated by golf course development.[326] In a strongly worded discussion of any golf course development fee in light of even then-existing case law, the OSP report concluded:

> It would be impossible under this rational nexus test for a county to attempt to charge a fee greater than, or out of proportion to, the cost of public facilities needed due to the golf course development (as the City and County of Honolulu has suggested by means of a fixed $100 million fee per golf course). Such a "development premium" is neither an impact fee (or any other type of exaction) nor a tax. It is instead a charge on development purely for the privilege of building one and only one kind of land development: a golf course.
>
> It is completely unrelated to either the cost of public facilities needed to support it, or a general revenue plan for which taxes can be legitimately levied. Furthermore, there is no authorization for it by statute or by ordinance. Therefore, it has no basis in law. It is further flawed as a matter of policy. Why single out golf courses to pay for such as low-income housing by means of huge cash development premiums? Hopefully the rationale is not ability to extort.[327]

Although the $100 million golf course development fee was never enacted as the Mayor proposed, examples of other ad hoc golf development fees exist. In one development that included 2,000 houses and two 18-hole golf courses, a $100 million impact or "benefit assessment" fee was sought for each of the two golf courses in exchange for a needed zoning change.[328] The City Council, however, passed the zoning change ordinance with the developer agreeing to pay $25 million per golf course for a total of $50 million.[329]

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[326] Act 296, § 146, State Budget - General Appropriations Act (H.B. 139) (1991).

[327] Office of State Planning, State of Hawaii, GOLF COURSE DEVELOPMENT IN HAWAII: IMPACTS AND POLICY RECOMMENDATIONS 74 (Jan. 1992).

[328] David Waite, *Fasi To Land Board: Kill Horita's Kunia Project*, HONOLULU ADVERTISER, July 19, 1991, at A1; Andy Yamaguchi, *State Panel Refuses To Kill Royal Kunia: Rejects Fasi Bid To Block Construction Of Developer Horita's Project*, HONOLULU ADVERTISER, July 20, 1991, at A3.

[329] The Mayor also adjusted his position of requiring $100 million per course. In 1992 he returned unsigned the relevant zone change bill with the following message:

> I am returning Bill No. 134 unsigned as I believe that the amount of

In addition, developer establishment of a non-profit foundation with a $2 million initial contribution was tied to the approval of the rezoning ordinance ($100,000), and approval of grading permits for the golf course ($1,900,000).[330] The foundation's disbursements were to benefit the entire Waipahu community and were to specifically fund:

> (1) Scholarships, facility improvements or equipment purchases benefiting elementary, intermediate and high school(s) servicing residents of Waipahu;
> (2) Youth-related activities in Waipahu including anti-drug, crime prevention, and recreational programs or activities;
> (3) Health-related programs in Waipahu that provide rehabilitation and counseling;
> (4) Cultural programs or facilities in Waipahu that promote cultural education.[331]

The developer also agreed to a 60% set-aside for affordable housing units in order to gain the approval for the golf courses.[332] Both the non-profit foundation and the affordable housing serve very commendable community purposes; however, one would be hard-pressed to explain how the golf course itself generates a need for youth and cultural programs or affordable housing. Requiring exactions of these types in exchange for approval of a golf course development would face serious challenges under Prong 1, and appear certain to fail to pass muster under Prong 2 of *Dolan*.[333]

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community benefit assessment agreed to by the City Council is inadequate.

> The Council was originally willing to settle for $2,000,000 per course payable over a number of years. I insisted that this was too little and an additional $10,000,000 per course was agreed to by the developer. Again I stated the amount was inadequate and the Council added another $13,000,000 per course in an amendment to the Unilateral Agreement, acceptance of which, is the subject of this ordinance. This brings the assesssment to $25,000,000 per course. I felt at the time, and still feel, that $50,000,000 per course in community benefit for our citizens would be appropriate considering the benefit to the developers from the zoning and the impacts on the community. However, I am not vetoing Bill No. 134 so that the City may at least get half of the assessment to which it is entitled.

City and County of Honolulu, Mayor's Message No. 91, Mar. 11, 1992.

[330] CITY AND COUNTY OF HONOLULU, ORDINANCE 91-11, Exhibit B, Unilateral Agreement and Declaration For Conditional Zoning, 3-4 (1991).

[331] *Id.* at 4-5.

[332] Jerry Tune, *Horita States Case For Royal Kunia Project*, HONOLULU STAR-BULLETIN, Sept. 10, 1993, at A5.

[333] Indeed, even the exaction of affordable housing set-asides as a response to pure

In another golf course development, a Japanese developer received a construction permit in 1987 from the state Board of Land and Natural Resources for a project located on 1,400 acres of conservation land on Windward Oahu.[334] The developer apparently satisfied all other conditions except for construction deadline, and when the developer requested its third extension on the permit (due to claimed weather delays) the Board granted the extension with the understanding that a newly created impact fee would need to be negotiated.[335] A spokesperson for the Board indicated that the developer "may be required" to pay for physical improvements at a nearby high school gymnasium and purchase of a bowling alley site for conversion to a teen drug program facility, estimating the cost of these projects alone at $9 million.[336] Although these proposals apparently did not get beyond the "negotiating" stage, such exactions would not pass constitutional muster after *Dolan* without the government agency demonstrating how the development would in fact impact the community and how the exaction is related both in nature an extent to the impact.[337]

Questionable exactions demanded by city officials are not, of course, limited to golf course developments. In one project, where the developer sought rezoning of 1,781 acres of agricultural land to build a residential

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at-market residential development fails a strict nexus analysis under Prong 1 of *Dolan*. Even the City's former Director of the Department of Land Utilization could not see the connection: "I have yet to find a nexus between market housing and affordable housing. And that is, as you build market housing, do you create a need for affordable housing? And I think the answer is no. But there hasn't been a zoning in the last ten years that I know of where there's not been an affordable housing component that has been put into the equation for the unilateral agreement." Tape of Price of Paradise (POP) Radio Show No. 52, Land Regulation: Donald Clegg and David Callies (July 10, 1994) (on file with authors).

[334] James Dooley, *Golf Course 'Impact' Fee: $15 Million: Windward Links Already Under Construction But State Wants Money*, HONOLULU ADVERTISER, Nov. 10, 1990, at A1, A4.

[335] *Id.* at A1. In addition, a Board spokesperson discussed a proposed "membership impact fee" whereby the state would collect 5% of the membership sales income as well as monthly "user impact fees" to offset "direct and indirect negative impacts (of the project) in the community on a continuing basis." *Id.* at A4.

[336] *Id.* at A4.

[337] An situation where a golf course impact fee would be more defensible is the proposal by Maui County Council members to have county attorneys draft development agreements that provide for measurement of a golf course's impact on the community, including archeological and cultural effects. Lila Fujimoto, *Maui County Urged To Explore Impact Fees For Golf Courses*, HONOLULU STAR-BULLETIN, Mar. 1, 1991, at A14.

and commercial development, the city administration wanted 2,500 acres in return in order to construct a sports complex.[338]

In 1986, another developer memorialized a number of conditions in a unilateral agreement in order to obtain a rezoning from a restricted agricultural designation to residential, low density apartment, community business and preservation districts.[339] The conditions included a 50% set-aside for affordable housing (according to various income levels), dedication of two park sites, dedication of a 25,000 square foot site for a fire station, dedication of a 23-acre park and ride facility, and various on-site and off-site road improvements including widening of Kamehameha Highway and construction of the Paiwa interchange.[340] Except for the affordable housing set-aside, these conditions ostensibly meet the first prong of required nexus because a large residential and commercial development would logically create needs for parks, roads and even a fire station (still subject, of course, to the second prong of proportionality). However, several years later in exchange for the necessary permits to actually begin construction, the developer agreed to convey an additional 40 acres of land in Waipahu.[341] Among the uses proposed by the mayor were: to resell the land to a developer at a profit, or have the City develop the land for affordable housing, or develop, own and manage a shopping center on the site with proceeds used to subsidize affordable rental housing.[342] Such leveraged negotiation to obtain private property for open-ended uses will no longer be defensible under *Dolan*.

In a smaller scale exaction, perhaps more like the facts of *Dolan*, a property owner who sought a zoning change from residential and medium density apartment to neighborhood business for construction of a convenience store was required to build a bus shelter within the subject site.[343] Although perhaps not costly, the exaction still represents a condition unrelated to existing restrictions or the impact of the development. In addition, the argument that a bus shelter would draw customers and therefore benefit the property owner of a retail site is

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[338] *Blackmail Incorporated*, HONOLULU STAR-BULLETIN, July 19, 1993, at A12.

[339] CITY AND COUNTY OF HONOLULU, ORDINANCE 86-143, Exhibit B (1986).

[340] *Id.*

[341] David Waite, *Fasi Moves To Cash In On Land From Amfac*, HONOLULU ADVERTISER, Feb. 14, 1991, at A12.

[342] *Id.*

[343] CITY AND COUNTY OF HONOLULU, ORDINANCE No. 89-28, Exhibit B, Unilateral Agreement And Declaration For Conditional Zoning, 3 (1989).

the same type of reciprocity of advantage argument the majority of the *Dolan* Court found unconvincing.

Besides the question of the constitutional validity of exactions that do not appear to meet the first prong of the Dolan analysis, there is the underlying issue of the original purpose of zoning and its restrictions. Exactions that override long-term planning goals for the sake of providing community benefits that government cannot afford simply foster an erosive process that undermines the original goals of comprehensive planning. In testimony before the Honolulu City Council on the golf course fees, one community leader expressed the fear that "the selling of planning or zoning permissions to the highest bidders . . . rather than comprehensive planning to meet the long-range needs of the people, will drive land use decisions."[344] This viewpoint echoes the caveat of Justice Scalia in *Nollan* that illegitimate leveraging of the police power actually works against the realization of land use goals.[345]

2. *Prong 2 - proportionality problems*

Beyond the examples already discussed which would have great difficulty passing the nexus prong, there are a significant number of government-imposed conditions that have an obvious and direct relationship with the defined government purpose. Yet, after *Dolan*, that is not enough; the second prong of the test requires the condition to be roughly proportional to the development's impact.

In a fact pattern somewhat reminiscent of the invalid school site exaction in *Pioneer Trust*,[346] a developer on Maui finally gave up his four year effort to build a 1,050-unit residential project when he refused to shoulder a $3.1 million payment for construction of a new elementary

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[344] Testimony by the president of the League of Women Voters of Honolulu. William Kresnak, *Fasi Golf Course Proposal Draws Foundation Fire*, SUNDAY STAR-BULLETIN AND ADVERTISER, Nov. 18, 1990, at D6.

[345] One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice." *Nollan*, 483 U.S. at 837 n.5.

[346] See discussion in Part III, *supra*.

school in order to obtain a zoning change for the 147-acre parcel.[347] Although the developer had already agreed to donate a 5-acre park, provide 50 to 80 dwelling units for the elderly, market 532 units as affordable housing, and pay a proportionate share of water and sewer costs, the county council required a donation of land or in-lieu payment for new school construction as a condition for granting approval of the rezoning.[348] The Department of Education estimated that the development would generate 225 to 275 elementary school age children which would saturate the existing facilities, thus requiring construction of a new school.[349] Although the *Dolan* Court did not adopt the "specifically and uniquely attributable" test of *Pioneer Trust* in its analysis, the County would still need to demonstrate a rough proportionality between the development's impact in relation to the proposed exaction. Most troubling in this situation is the fact that during the four years of negotiations, the requested payment varied from a reduced contribution of $500,000 (but with a condition that a portion of proceeds from selling the housing units for the elderly—potentially $3 million—go to the County) to requests from the Department of Education for $6.3 to $7.3 million, all without similar demands on developers of other residential projects in the same area.[350] While the obvious nexus exists between new housing and new classrooms, burdening one developer and not others in requiring a contribution to new infrastructure needs is very troublesome in terms of an equal protection analysis as well. Furthermore, putting the burden of providing the entire school on a development the impact of which only generates a need for about ten to twelve classrooms, is not likely to comply with the "roughly proportional" in nature and extent test under Prong 2 of *Dolan*.

In a development in West Oahu, exactions for school and park sites, on-site and off-site improvements for water source development and distribution, roads, and drainage would seem to have no problem

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[347] *Kawamoto Gives Up On Maui Project*, HONOLULU STAR-BULLETIN, Mar. 1, 1994, at A4; *Maui Council Is Asking Too Much Of Developer*, HONOLULU STAR-BULLETIN, Mar. 2, 1994, at A20.

[348] *Id.*

[349] Lila Fujimoto, *Kawamoto Balks At Land Demand*, HONOLULU STAR-BULLETIN, May 31, 1990, at A6.

[350] Edwin Tanji, *State Puts The Bite On Kawamoto: $7 Million Demand Is Too Much For Him To Swallow*, HONOLULU ADVERTISER, Oct. 19, 1990, at A1; Edwin Tanji, *Kawamoto Makes Grade, Gets Project OK*, HONOLULU ADVERTISER, Feb. 14, 1991, at A5. Presumably the larger figures calculated contributions toward intermediate and high school level costs as well.

passing the nexus prong of *Dolan*. However, a closer look would require some "individualized determination" that the required conditions were in fact proportional to the development's impact. Suspect conditions would include the provision of a costly "flyover" ramp (a high cost, grade-separated alternative to a normal intersection with traffic signals)[351] that likely would not even be considered if the City were paying for the improvement, and that would also service many existing residences in addition to the new subdivision. In addition, the unilateral agreement contained language arguably requiring the developer to "assist" an adjacent older residential area with off-site improvement costs such as roads, water and sewer lines, as well as drainage to alleviate flooding in the existing residential area.[352] Again, once past the nexus hurdle, rough proportionality is the test to meet. Deficiencies in existing developments not generated by the proposed development should not be the responsibility of the new development, and any adverse impacts generated by the proposed development should be borne by the new development only on a pro rata basis.

In a recent proposed development on Oahu's North Shore consisting of 445 residential units (including 130 on-site affordable units) on a 1,144 acre site,[353] several exactions raise concerns under *Dolan*'s proportionality prong. Not only is the developer being required to construct 50 on-site affordable single-family residences, dedicate 6.47 acres to the City for an 80-unit elderly affordable housing project, and contribute $1,000,000 to support development of additional affordable homes at any site at the City's discretion, the City is also requiring a "Community Benefit Assessment" whereby the developer will dedicate about 6 acres of land for construction of a community facility with a transfer of ownership to the YMCA.[354] In addition, the developer will contribute up to $4.7 million of construction costs to the YMCA.[355] The request to include the community facility provision in the unilateral

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[351] CITY AND COUNTY OF HONOLULU, ORDINANCE 84-94, Exhibit A at 4.

[352] *Id.* at 3.

[353] Memorandum from Robin Foster, Chief Planning Officer, City and County of Honolulu, to Thomas N. Yamabe II, Chair, Planning Comm'n 3 (July 7, 1994) (on file with authors).

[354] Memorandum from Donald A. Clegg, Director, Dep't of Land Utilization, City and County of Honolulu, to Planning Comm'n 24-25 (July 8, 1994) (on file with authors).

[355] Letter from Mitsuru Kawasaki, President, Obayashi Hawaii Corp. to Don Anderson, Young Men's Christian Ass'n of Honolulu 2 (Jan. 25, 1994) (on file with authors).

agreement was initiated by the Department of Human Resources:

> Dedicate an area within the proposed development and provide funds to the City and County of Honolulu for the construction of a facility to house programs and services which address the North Shore community's social needs such as child care and elder care among others; or,
>
> Make cash payment in lieu of land to the City and County of Honolulu for the construction of a facility . . . at an alternative site.[356]

Undoubtedly such a facility is of great benefit to the North Shore community or indeed to any existing community, and undoubtedly the new residential development will generate some amount of need for a facility to provide child and elder care programs, among others. After *Dolan*, however, local government can only exact the proportionate share for the impact caused by the new project. If challenged, the City would have the burden of justifying the exaction by some measure of "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[357]

Besides the Land Use Commission and the Board of Land and Natural Resources, the State of Hawaii also requires exactions in its plans and rules for community development districts.[358] The Mauka Area Rules for the Kakaako District require that any development that increases floor area by more than 25% compared to the development's floor area on February 27, 1982 or at the time of permit application (presumably most if not all developments in the area would plan such an increase) must dedicate land equal to 7.5% of the development's floor area for public facilities.[359] Public facilities under these rules include parks and playgrounds, parking garages, school sites, community service centers as well as systems for storm drainage, water, and sanitary sewerage.[360] In lieu of dedicating land, a development

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[356] Memorandum from Robin Foster, Chief Planning Officer, City and County of Honolulu, to Thomas N. Yamabe II, Chair, Planning Comm'n 8 (July 7, 1994) (on file with authors). Interestingly, later in the highly controversial approval process for the development, the project's manager spoke of the YMCA proposal as one that "grew out of discussions with residents on community benefits." Pat Omandam, *YMCA Offer Adds Fuel to Controversy*, HONOLULU STAR-BULLETIN, Nov. 19, 1994, at A-8.

[357] *Dolan*, 114 S. Ct. at 2319-20.

[358] HAW. REV. STAT. § 206E-31 to 33 (1985).

[359] HAW. ADMIN. R. § 15-22-73(a), (e).

[360] HAW. ADMIN. R. § 15-22-73(c).

may pay the equivalent fair market value into a revolving fund for the purchase, creation, expansion, or improvement of public facilities within that district.[361] The arbitrary figure of 7.5% of floor area or in-lieu fee, however, is not tied to any needs assessment or site-specific analysis showing an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" as required under *Dolan*.[362] In addition, by being placed into a general revolving fund, the exacted payments may not be sufficiently "earmarked" for use to remedy the impacts that the particular project generated.[363] Compounding the problem is a provision that collected funds may be transferred to the City and County of Honolulu for public facilities use within the same district[364] thereby further losing control and traceability that the funds were specifically used to benefit the particular project for which the fees were collected. A much more defensible system is set forth in Hawaii's statute authorizing counties to charge impact fees for developments.[365]

While the examination of the legitimacy of exactions has focused on golf course and subdivision developers, it should be remembered that *Dolan* itself involved the constitutional rights of a developer of a much smaller parcel who was thwarted in her attempt to obtain a building permit. This effectively broadens the impact because it should also affect the way local governments operate in granting the less controversial permits and approvals involving homeowners or small business owners wishing to improve or develop their land, with or without any accompanying request for rezoning or boundary amendment.

With the analysis set forth in *Dolan* requiring a showing of nexus and proportionality and with the additional requirement that the burden be on the government to provide some individualized determination that the exaction meets both the nexus and proportionality prongs, it is difficult to see how exactions in Hawaii and particularly in Honolulu will continue to go unchallenged. The City's former Director of the Department of Land Utilization seems to expect litigation. On a radio talk show he responded to a question regarding any contemplated changes in the use of the unilateral agreement in exacting affordable

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[361] HAW. ADMIN. R. § 15-22-73(g), (h).

[362] *Dolan*, 114 S. Ct. at 2319-20.

[363] *See* Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. Ct. App. 1983), *cert. denied*, 440 So.2d 352 (1983).

[364] HAW. ADMIN. R. § 15-22-73(h).

[365] HAW. REV. STAT. §§ 46-141 to 148 (Supp. 1992).

housing set-asides by stating he would continue until "somebody tells me not to."[366] In addition, the Director also described the City's main worry down the road as being a class action lawsuit by home purchasers who wound up paying the additional costs of unconstitutional exactions passed on by developers.[367] To avoid reaching that stage, state and county agencies should become more "sensitized" to property rights after *Dolan*. There are many alternatives to arguably unconstitutional exactions and several are already authorized under existing state law.

C. Existing Alternatives

One road to "sensitivity" to private property rights is through avenues already authorized by existing state legislation. These alternatives include impact fees, development agreements, and community facilities districts.

1. Impact fees

The Hawaii State legislature in 1992 adopted the Hawaii Impact Fee Law[368] which establishes uniform general guidelines for county impact fee ordinances. Overall these guidelines appear to treat both government and development interests equitably in most respects, and they appear to be in substantial conformance with the *Nollan* and *Dolan* decisions. The statute requires: 1) a needs assessment study to identify

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[366] Clegg: "I suspect it [use of the unilateral agreement for housing exactions] will not be changed. And it'll be waiting—we're waiting to be challenged. And it's because we feel we need the affordable housing. So we'll go ahead and do it."

Roth (moderator): [asks whether the tie-in between market and affordable housing is not "problematic under the law"]

Clegg: "That may be true and I would contend [sic] to keep on putting these conditions into the unilateral agreements until somebody tells me not to."

Tape of Price of Paradise (POP) Radio Show No. 52, Land Regulation: Donald Clegg and David Callies (July 10, 1994) (on file with authors).

[367] Donald Clegg, Remarks at Land Use Class, William S. Richardson School of Law, University of Hawai'i at Manoa (Oct. 17, 1994). Passing the additional costs created by development exactions on to the consumer is the common practice. As one major Honolulu-based developer protested the imposition of a $3.8 million in-lieu fee for affordable housing and $3.4 million public facility dedication fees, he explained those costs, averaging $22,000 per condominium unit, would have to be passed on to the buyer. Greg Wiles, *Myers' Permit for King Street Condos Delayed*, HONOLULU ADVERTISER, Feb. 9, 1995, at A5.

[368] HAW. REV. STAT. §§ 46-141 to 148 (Supp. 1992).

the public facilities that would be impacted; 2) a substantial relation to the needs arising from the development; 3) the calculation for a proportionate share of the costs of the public facility capital improvements; and 4) a provision for refund of fees not expended after six years.[369] Fees imposed under such ordinances in accordance with the statutory guidelines would greatly facilitate solutions to Hawaii's infrastructure problems, and such fees would appear to have a high likelihood of withstanding a constitutional challenge, especially because proportionality is required. However, no county in the State of Hawaii has as yet adopted such an ordinance.[370]

2. Development agreements

Development agreements are another alternative that is in the best interests of both the government and the developer. Although at least one jurisdiction has held that a municipality may enter into a development agreement solely on the authority of home rule powers and the standard zoning enabling act,[371] this is not the majority rule, and Hawaii has taken the more accepted measure of enacting enabling legislation authorizing the counties to pass their own development agreement ordinances.[372] Although the counties arguably have the inherent authority to enter into bilateral development agreements, use of the enabling statute makes the legal basis for upholding such agreements even stronger. The County of Hawaii did enact a development agreement ordinance in April 1993, but has yet to finalize associated administrative rules necessary to implement the ordinance.[373] A City and County of Honolulu bill for a development agreement ordinance was introduced early in 1995.[374] If enacted, it will provide for hearings before both the Director of Land Utilization and the City Council, with adoption of the agreement by Council resolution.[375]

The primary merit of development agreements is that they are bilateral and voluntary with a sound basis in contract law for enforce-

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[369] *Id.*

[370] JAMES C. NICHOLAS and DAN DAVIDSON, IMPACT FEES IN HAWAII: IMPLEMENTING THE STATE LAW 1 (1992).

[371] Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989).

[372] HAW. REV. STAT. §§ 46-121 to 132 (1985).

[373] COUNTY OF HAWAII, ORDINANCE 93-37 (1993).

[374] CITY AND COUNTY OF HONOLULU, Bill 2 (1995).

[375] *Id.*

ment.[376] Arguably other benefits accrue as well. The municipality may not need do some of the supporting studies or make the individualized determinations that might otherwise be required to demonstrate nexus and proportionality.[377] Additionally, the municipality may be able to negotiate for certain community benefits that might otherwise lack the required essential nexus if exacted in a different manner. In return, the developer usually receives benefits in the form of vested rights to proceed with the proposed development based on the then existing agreed to regulatory framework.[378] While this approach is flexible and should significantly improve enforceability,[379] if the "bargain" becomes too onesided in favor of the municipality, then the court may find that all that has been done is to give the unilateral agreement a new name thus jeopardizing enforceability.[380]

3. *Community facilities districts*

A third option available to avoid the present ad hoc system of exactions is the use of statutorily authorized community facilities districts (CFD).[381] The Hawaii statute establishes uniform general guidelines for county enactment of community facilities districts ordinances.

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[376] Establishing a valid contractual relationship will be enforceable and will take the issue out of the "takings" arena. Where a developer entered into a settlement agreement with the Tahoe Regional Planning Agency and both sides incurred benefits and obligations, the Ninth Circuit found any taking analysis inapplicable. Leroy Land Dev. Co. v. Tahoe Regional Planning Agency, 939 F.2d 696, 698-99 (9th Cir. 1991). "Such a contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily, in good faith and is supported by consideration." *Id.* at 698.

[377] Although one commentator would still hold development agreements to a showing of nexus, Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URB. LAW. 23 (1990), that is very much a minority view. *See generally*, Daniel J. Curtin, Jr. and Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993); Barry R. Knight and Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreements*, 25 URB. LAW. 779 (1993); Theodore C. Taub, *Development Agreements*, C629 ALI-ABA 555 (July 31, 1991).

[378] DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 53 (1994).

[379] *Id.*

[380] *See* Judith W. Wagner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and Theoretical Foundations of Government Land Use Deals, 65 N.C. L. REV. 957, 1023-27 (1987).

[381] HAW. REV. STAT. § 46-80.1 (Supp. 1992).

Basically, this statute, like the earlier improvement district (ID) statute, facilitates the issuance of tax exempt bonds to finance public facilities that require major capital expenditures. Because the municipality is not the ultimate borrower under these bonds, they do not impact the "full faith and credit" of the county nor are they included in calculating the county's debt limit.[382] The bonds are special tax bonds similar to improvement district bonds except the security is a special tax levy rather than a lien on benefited property. The bottom line advantage is that a developer can finance major elements of infrastructure at municipal bond interest rates that are much lower than the rates either he or his homebuyer could otherwise obtain by conventional methods. All other things being equal, including profit margins, this savings is passed on to the end user homebuyer. Using a City and County of Honolulu Planning Department analysis of a 6,600-unit master-planned residential development, on-site and off-site infrastructure (such as roads, sewer, transportation, water, and drainage) amounted to $28,288 per unit.[383] Using a 30-year amortization for the aggregate $186,700,000 in borrowings results in an assessment of $2,035 per year per unit using a municipal bond interest rate of 6%, whereas it results in an assessment of $2,491 per year per unit using a conventional bond interest rate of 8%. Over the life of the financing, the *additional* cost of conventional financing would amount to approximately $90,208,000 or $13,668 per unit. Absent CFD or ID financing, the developer takes out relatively high rate construction loans to pay for infrastructure and other costs. These infrastructure costs and carrying costs are passed on as part of the cost of the unit sold to the homebuyer whose conventional loan is accordingly higher by that amount. With a CFD, the nominal purchase price to the homebuyer would be lower by the amount of infrastructure ($28,288) being financed directly under the CFD, and the considerable savings of the lower municipal interest rate is likewise passed on to the homebuyer.

Unfortunately, instead of using impact fees, development agreements, and community facilities districts, local government exactions on development largely continue to be imposed in the arbitrary and ad hoc

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[382] *Id.*

[383] Worksheet by Planning Dep't, City and County of Honolulu, Costs to Developer of Offsite Public Facilities (June 1994) (distributed at the Honolulu City Council Conference on Managing the Costs of Growth, June 21, 1994) (on file with Honolulu City Council).

manner as they have been for the past several decades.[384] In light of *Dolan*, these exactions are very likely to be held unconstitutional upon challenge. Current arbitrary ad hoc government action increases the risks of development, limits competition, and causes delay, all of which contribute to higher costs of development in Hawaii.[385]

D. A Legislative Response?

Another road to "sensitivity" to private property rights is through legislation. Even before the Supreme Court handed down the *Dolan* decision, a "Private Property Owners Bill of Rights" was proposed in Congress.[386] The proposal would require the federal government to compensate landowners for reductions in property value by over 50 percent resulting from federal restrictions on land use.[387] This mirrors a "model 50 percent" draft introduced recently in at least ten state legislatures that would provide for automatic compensation if more than half the property's value was lost due to any new regulations over zoning, wetlands, or wildlife habitats.[388]

While none of the "50 percent" bills have yet passed into law, some states have enacted milder legislation requiring a renewed respect for private property rights.[389] In 1993, Florida, a prime example of a heavily planned and regulated growth management state,[390] exercised some measure of "attitude adjustment" in its revamping of the state's

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[384] DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 43 (1994).

[385] The executive director of developer-sponsored Land Use Research Foundation describes the existing system in these words: "If the public wants a very slow-growth system full of a multitude of checkpoints, which is what we've had over the last 15 to 20 years, then the public has to accept high housing prices. You can't have it both ways." Rob Perez, *The Housing Crunch: Navigating the Regulatory Maze*, HONOLULU STAR-BULLETIN, Dec. 20, 1994, at D1, D3.

[386] Marianne Lavelle, *Battle Nears in U.S. House Over Takings: Dolan Spurs Effort to Pay Property Owners*, NAT'L L.J., July 25, 1994, at A6. At the time of this writing, the House approved its latest version of the bill, the Private Property Protection Act. *House OKs Property Rights Bill*, HONOLULU STAR-BULLETIN, Mar. 3, 1995, at A7.

[387] Lavelle, Battle Nears, *supra* note 386, at A6.

[388] Marianne Lavelle, *The 'Property Rights' Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1.

[389] *Id.*

[390] *See, e.g.*, James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

growth management statutes. The state's policies in the statute's statement of purpose were restated to add the following:

> It is the intent of the Legislature that all governmental entities in this state recognize and respect judicially acknowledged or constitutionally protected private property rights. It is the intent of the Legislature that all rules, ordinances, regulations, and programs adopted under the authority of this act must be developed, promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property. Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking, as provided by law. Any such relief must be determined in a judicial action.[391]

Other states' actions go further than a mere policy statement.[392] Delaware revised its code in 1992 to require review of proposed regulations by the State Attorney General to determine any effects on private property rights.[393] More detailed statutes in Utah[394] and Arizona[395]

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[391] FLA. STAT. ANN. § 163.3161 (Supp. 1993).

[392] During 1992-93, twenty-six states saw "takings" bills introduced. Marianne Lavelle, *The 'Property Rights' Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L. J., May 10, 1993, at 1. Most state proposals are based on former President Reagan's Executive Order 12,630, *Governmental Action and Interference with Constitutionally Protected Property Rights*, 53 Fed. Reg. 8859 (1988). To implement the order, the Attorney General issued guidelines for conducting a "Takings Impact Analysis." For concise discussions of the executive order, see James E. Brookshire and Marc A. Smith, *"Taking" a Closer Look*, 2 U. BALT. J. ENVTL. L. 1 (1992); Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 FED B. NEWS & J. 95 (1990); Robin E. Folsom, *Comment, Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639 (1993); Kirsten Engel, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulation*, 14 VT. L. REV. 213 (1989). For an argument promoting government agencies adjudicating takings claims, *see* Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 HARV. ENVTL. L. REV. 277 (1994). For two perspectives of state takings legislative proposals, *see* David J. Russ, *How the "Property Rights" Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVTL. L. 395 (1994); Page Carroccia Dringman, *Comment, Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245 (1994). A brief analysis of four different models for takings statutes is found in John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994).

[393] DEL. CODE ANN. TIT. 29, § 605 (Supp. 1993).

[394] UTAH CODE ANN. §§ 63-90-1 to 90a-3 (Supp. 1994).

[395] ARIZ. REV. STAT. ANN. §§ 37-221 to 223 (Supp. 1993).

also require adoption and use of guidelines to perform "constitutional taking implication assessments."[396]

Washington, like Florida and Hawaii, is another state that involves significant cooperation and coordination among state, county and municipal bodies exercising land use controls.[397] In 1991 the Washington legislature passed the Growth Strategies Act.[398] The legislative provisions potentially interfere with property rights in several control areas: urban growth, resource areas such as farmlands, critical areas such as wetlands, impact fees, transportation concurrency, and precondemnation blight.[399] As built-in protection for property rights, section 18 of the Act requires every government agency at all state and local levels to use a checklist prepared by the state attorney general's office in assessing proposed regulatory actions that affect private property rights.[400] Although a contesting party in a land use decision does not have a cause of action against an agency for failure to use the process, the advisory memorandum must be used by government agencies in administering the state's growth management policies and regulations.[401]

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[396] ARIZ. REV. STAT. ANN. § 37-223 (Supp. 1993).

[397] *See generally*, Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867 (1993); John M. Groen and Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1260 (1993).

[398] 1991 Wash. Legis. Serv. 1st Ex. Sess. Ch. 32 (S.H.B. 1025).

[399] *See* Groen and Stephens, *supra* note 397 at 1300-21.

[400] WASH. REV. CODE ANN. § 36.70A.370 (Supp. 1994).

36.70A.370. Protection of private property

(1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.

(2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

(3) The attorney general, in consultation with the Washington state bar association, shall develop a continuing education course to implement this section.

(4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section.

[401] *Id.*

The statute also requires at least annual updates of the process as well as development of a continuing education course in consultation with the state bar association.[402] Established by the State of Washington Attorney General's office, the process discusses caselaw and statutes, and also includes a section on "warning signals" which asks agencies to analyze their actions in terms of five questions:

> 1. Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?
> 2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?
> 3. Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?
> 4. Does the Regulation Have a Severe Impact on the Landowner's Economic Interest?
> 5. Does the Regulation Deny a Fundamental Attribute of Ownership?[403]

Presumably, after *Dolan*, there should be a sixth question asking:

> 6. Does the Regulation Impose a Condition that is Roughly Proportional to the Impact of the Landowner's Development?

It is important for Hawaii in its statutes and the counties in their land use ordinances to adopt similar language with respect to property rights to provide balanced guidance to government officials and employees to prevent over-zealous actions.[404] As Justice Holmes stated: "We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[405] What is even more important, in light of *Dolan* and the increased likelihood of successful challenges, is that government officials and

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[402] *Id.*

[403] State of Washington Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property A-6 - A-8 (Apr. 1993) (on file with authors).

[404] Undoubtedly adoption of statutory language recognizing the right to compensation would be difficult. When Hawaii legislators adopted essentially the same wording for its statute on development agreements, Haw. Rev. Stat. §§ 46-141 to 148 (Supp. 1992), as contained in California's, the following phrase is conspicuously absent: "Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities." CAL. GOV. CODE § 65864(c) (West 1994).

[405] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

employees actually carry out the performance of their duties in an equitable and consistent manner in conformance with the Constitutions of Hawaii and the United States.

VI. CONCLUSION

The need for sidewalks, roads, flood control measures, and other major capital facilities to accommodate the impact of development is undisputed. Additional amenities such as parks, open space and bicycle paths that augment a community's quality of life are surely commendable. The *Dolan* decision, however, reminds legislators, regulators and planners that the Constitution requires equitable allocation of the burden of paying for these needs and amenities. While the validity of many land use decisions will continue to rest on the particular facts involved, Chief Justice Rehnquist has set out the parameters of the "rough" test that courts need to apply: the condition must substantially advance a legitimate state interest, and there must be *both* "essential nexus" and "rough proportionality" between the land use condition and the nature and extent of the impact of the proposed development.

The opinion in *Dolan* demonstrates strong support of private property rights, a willingness to judicially review a local government's decision when those rights are jeopardized, and a shifting of the burden to government to show that an exaction is justified based upon some individualized determination.

Attention to these points will hopefully modify the attitude that the property owner can be held hostage through unjustified denials of permits and zoning reclassifications. It may be difficult to change the opinion of some members of the community regarding property owners and developers as exemplified by one commentator's "spin" on a well-known phrase: "Were Shakespeare alive, instead of venting his wrath on the lawyers, he might suggest the first thing we do is 'kill' the developers."[406] *Dolan*, however, serves as a timely warning that "kill-

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[406] Theodore C. Taub, *Development Exactions and Impact Fees*, ALI-ABA COURSE OF STUDY: INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 269, 304 (Sept. 1993). Taub's analogy is well-suited to describing the stereotypic attitude of some that developers' successes come at the expense of the general public and malign the common good. In Shakespeare's Henry VI, Dick the Butcher responds to rebel leader and would-be sovereign Jack Cade's promises of a social revolution: "The first thing we do, let's kill all the lawyers. Cade [answers:] Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? Some say the bee stings, but I say 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since." WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, 74-80 (David Bevington, ed., 1988).

ing" the developer with unreasonable conditions, while perhaps politically expedient, is unconstitutional.

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State v. Lessary: The Hawaii Supreme Court's Contribution to Double Jeopardy Law

I. Introduction

On its face, the text of the Double Jeopardy Clause of the United States Constitution is simple and straightforward. It reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[1] The Double Jeopardy Clause of the Hawaii Constitution also seems quite simple on its face: "[N]or shall any person be subject for the same offense to be twice put in jeopardy."[2] Furthermore, the basic concept of double jeopardy is relatively easy to understand: the government cannot prosecute or punish an individual for the same criminal offense more than once.

The apparent simplicity of double jeopardy law is, in fact, highly deceptive. Interpretation of the Double Jeopardy Clause[3] has become an extraordinarily confusing and frustrating area of law in recent years. Chief Justice Rehnquist, as an associate justice, wrote that double jeopardy law is "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[4]

The primary difficulty in double jeopardy law has been determining the precise meaning of the term "same offense."[5] Courts and scholars

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[1] U.S. Const. amend. V.

[2] Haw. Const. art. I, § 10.

[3] References to the "Double Jeopardy Clause" or "double jeopardy law" should be taken as referring to the concept of double jeopardy in general. In other words, such references apply to both the United States Constitution and the Hawaii Constitution unless otherwise noted.

[4] Albernaz v. United States, 450 U.S. 333, 343 (1981).

[5] Although most of the recent controversy has dealt with interpretation of the term "same offense," double jeopardy law also concerns issues such as conspiracy, criminal contempt, dual sovereignty, and collateral estoppel. These issues, though interesting, are beyond the scope of this casenote.

have experimented with a number of tests intended to give substance to that term. Unfortunately, no test has proven entirely successful. The result has been a great deal of uncertainty and confusion in double jeopardy law.

In January 1994, with its decision in *State v. Lessary*,[6] the Hawaii Supreme Court embarked upon its own voyage into Chief Justice Rehnquist's "Sargasso Sea." This casenote contends that the voyage was remarkably successful. The Hawaii court has crafted a solution to the problems of double jeopardy analysis that have plagued courts and scholars for years. It is a solution that satisfies the competing interests underlying double jeopardy law better than any attempt to date. Unfortunately, the court's approach is so subtle that it may escape notice altogether.

In six parts, this casenote examines double jeopardy law and the contribution made by the Hawaii Supreme Court. Part II describes the facts in *Lessary*. Part III examines the history and development of double jeopardy law, including descriptions of the three principal double jeopardy tests and an evaluation of those tests according to the interests underlying the Double Jeopardy Clause. Part IV explores the correct understanding of the *Lessary* decision. Because a number of problems are created if *Lessary* is interpreted as an application of the "same conduct" test, *Lessary* should be interpreted as establishing a new and distinct test instead. Part V describes the probable impact of the *Lessary* decision on Hawai'i law and on the law of other jurisdictions. It also provides a hypothetical illustration for the benefit of practitioners. Finally, Part VI concludes by arguing that, with *Lessary*, the Hawaii Supreme Court has made an important contribution to double jeopardy law.

II. The Facts of *State v. Lessary*

On April 4, 1991, James Easter Lessary drove to his wife's office, grabbed her by the hair and head, and threw her against a wall.[7] When a co-worker tried to stop him, he took an open pair of scissors and pointed it at his wife and the co-worker.[8] Then he dragged his wife out of the office and over to his jeep.[9] When his wife refused to

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[6] 75 Haw. 446, 865 P.2d 150 (1994).

[7] *Id.* at 448-49, 865 P.2d at 152.

[8] *Id.* at 449, 856 P.2d at 152.

[9] *Id.*

enter the jeep, he pointed the scissors at her again and said that he would stab her if she did not enter.[10] When they were both in the jeep, Lessary threw the scissors out the window and drove to a sugarcane field.[11] After talking with his wife for several hours, he surrendered.[12]

Lessary was charged with terroristic threatening,[13] kidnapping[14] (later amended to unlawful imprisonment),[15] and abuse of a family or household member.[16]

On April 29, 1991, he was arraigned in family court on the abuse charge and pled no contest.[17] The prosecutor stated that the abuse charge was based on the following facts: "[T]he defendant was reported to have gone to the victim's job site within the office and had thrown her against the wall . . . . The defendant then dragged [the victim] out of the office and into his vehicle."[18] The court found Lessary guilty of abuse and sentenced him to five days imprisonment and one year probation.[19]

The very next day, Lessary was arraigned in circuit court on the terroristic threatening and unlawful imprisonment charges.[20] He pled not guilty.[21] Later, he moved to dismiss the charges based on double

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] HAW. REV. STAT. § 707-716 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[14] *Id.* § 707-720.

[15] *Id.* § 707-721.

[16] *Id.* § 709-906.

[17] *Lessary*, 75 Haw. at 449, 865 P.2d at 152. The abuse charge was brought in family court rather than circuit court because family court has "exclusive original jurisdiction" over "any violation of section . . . 709-906 [abuse of a family or household member]." HAW. REV. STAT. § 571-14 (1985, Supp. 1992, Comp. 1993 & Supp. 1994). However, it should be noted that the family court may, in its discretion, waive jurisdiction over the offense charged. *Id.*

[18] *Lessary*, 75 Haw. at 450, 865 P.2d at 152.

[19] *Id.*

[20] *Id.* Circuit courts have general jurisdiction over "[c]riminal offenses cognizable under the laws of the State," except "as otherwise expressly provided by statute." HAW. REV. STAT. § 603-21.5 (1985, Supp. 1992, Comp. 1993 & Supp. 1994). The criminal jurisdiction of district courts is limited to "criminal offenses punishable by fine, or by imprisonment not exceeding one year," i.e., misdemeanors. *Id.* § 604-8. The terroristic threatening and unlawful imprisonment charges against Lessary were brought in circuit court because both crimes are felonies. *Id.* §§ 707-716(2), 707-721(2).

[21] *Lessary*, 75 Haw. at 450, 865 P.2d at 152.

jeopardy grounds.[22] The court granted his motion, holding that prosecution was barred because the charges were based on events occurring in the same episode as the abuse charge previously prosecuted in family court.[23] The State appealed to the Hawaii Supreme Court.[24]

III. History

The various arguments used in the double jeopardy debate are closely tied to the history and development of double jeopardy law. Therefore, it is necessary to examine that history first.

A. The Same Elements Test

For nearly sixty years, the "same elements" test[25] established in *Blockburger v. United States*[26] was the controlling interpretation of the Double Jeopardy Clause. In *Blockburger*, the U.S. Supreme Court ruled that "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[27] In other words, whether two crimes constitute the "same offense" is determined by examining the statutory elements of each crime. If each crime has at least one element that the other does not, the two crimes do not constitute the same offense.

Note that under this test, second prosecutions for lesser included offenses are barred.[28] Under the same elements test, two crimes constitute separate offenses if they *both* have an element not shared by the other. But if *only one* crime has an additional element, they constitute

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[22] *Id.*

[23] *Id.* at 450-51, 865 P.2d at 152-53. The trial court interpreted State v. Kipi, 72 Haw. 164, 811 P.2d 815 (1991), *cert. denied*, 502 U.S. 867 (1991), as adopting the "same transaction" or "same episode" test. On appeal, the Hawaii Supreme Court held this interpretation to be erroneous. *Lessary*, 75 Haw. at 451-52, 865 P.2d at 153; *see also infra* part IV.A.

[24] *Lessary*, 75 Haw. at 451, 865 P.2d at 153.

[25] The test has also been known, somewhat inaccurately, as the "same evidence" or "required evidence" test. *See* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 333-34 (1986) [hereinafter Thomas, *Successive Prosecutions*].

[26] 284 U.S. 299 (1932).

[27] *Id.* at 304.

[28] Brown v. Ohio, 432 U.S. 161, 166-68 (1977) (holding that a second prosecution was barred under the *Blockburger* test because joyriding is a lesser included offense of auto theft).

the same offense. In a lesser included offense situation, the greater offense would have at least one element that the lesser offense did not possess; however, the lesser offense would *not* have any element that the greater offense did not possess.[29] Therefore, a second prosecution for a lesser included offense is barred by the same elements test.

Also note that the order of the two prosecutions in a lesser included offense situation does not matter. If the *lesser* offense is prosecuted first, a second prosecution for the *greater* offense is also barred.[30]

B. The Same Transaction Test

The U.S. Supreme Court consistently applied the same elements test in double jeopardy cases throughout the years.[31] Justice Brennan, however, repeatedly advocated a test alternatively known as the "same transaction" or "same occurrence" or "same episode" test.[32]

Under this test, prosecutors are required "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[33] If the prosecutor fails to do so, a second prosecution is barred.[34] For example, if a defendant robbed six people at a poker game, he cannot be prosecuted for robbing each individual poker player in separate trials, one after another.[35] Since all six charges grow out of a single criminal episode, the charges must be joined in one prosecution.[36]

Despite Justice Brennan's efforts, the U.S. Supreme Court has never accepted the same transaction test. On the contrary, the Court has

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[29] *See id.* at 166.

[30] *Id.* at 168-69 ("[T]he sequence is immaterial. . . . Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

[31] *See* Grady v. Corbin, 495 U.S. 508, 536 (1990) (Scalia, J., dissenting) (citing Jones v. Thomas, 491 U.S. 376 (1989); United States v. Woodward, 469 U.S. 105 (1985); Ohio v. Johnson, 467 U.S. 493 (1984); Albernaz v. United States, 450 U.S. 333 (1981); Whalen v. United States, 445 U.S. 684 (1980); Simpson v. United States, 435 U.S. 6 (1978); Ianelli v. United States, 420 U.S. 770 (1975); Gore v. United States, 357 U.S. 386 (1958)).

[32] *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring); Jones v. Thomas, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting); Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, J., concurring).

[33] *Ashe*, 397 U.S. at 453-54.

[34] *Id.* at 460.

[35] *Id.* at 457-60.

[36] *Id.*

consistently rejected it in the strongest terms.[37] The Hawaii Supreme Court has also expressly rejected the same transaction test.[38]

C. *The Same Conduct Test*

Although the same elements test appeared to be the controlling interpretation of the Double Jeopardy Clause,[39] the U.S. Supreme Court delivered a number of tantalizing hints that it might be willing to extend double jeopardy protection further. In *Brown v. Ohio*,[40] the Court ruled that a second prosecution was barred under the same elements test because joyriding is a lesser included offense of auto theft.[41] However, in an important footnote, the Court stated that "[t]he Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."[42]

In *Harris v. Oklahoma*,[43] the Court again hinted that it might be willing to go beyond the same elements test. The Court held that a

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[37] Garrett v. United States, 471 U.S. 773, 790 (1985) ("We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."); *see also Ashe*, 397 U.S. at 448 (Harlan, J., concurring), 468 (Burger, C.J., dissenting).

[38] State v. Lessary, 75 Haw. 446, 458-59, 865 P.2d 150, 156 (1994). Although the Hawaii Supreme Court has rejected the same transaction test as an application of the Double Jeopardy Clause, the Hawaii Legislature has adopted the test as part of its compulsory joinder statute. HAW. REV. STAT. § 701-109(2) (1985, Supp. 1992, Comp. 1993 & Supp. 1994). Under the statute, "separate trials for multiple offenses . . . arising from the same episode" are barred. *Id.* There are, however, two exceptions. Joinder is not required if the offenses are not known to the prosecutor at the time the first trial commences or if the offenses are not within the jurisdiction of a single court. *Id.*

On a theoretical level, compulsory joinder is irrelevant to double jeopardy analysis. The Hawaii Supreme Court is not bound by the compulsory joinder statute when interpreting the protections afforded by the Hawaii Constitution. But on a practical level, the existence of the compulsory joinder statute means that most criminal charges will either be joined in a single indictment or dismissed based on the statute. Double jeopardy will only be at issue when the case falls under one of the exceptions to the statute. For instance, *Lessary* and State v. Kipi, 72 Haw. 164, 811 P.2d 815 (1991), *cert. denied*, 502 U.S. 867 (1991), were both cases in which the offenses were not within the jurisdiction of a single court. The first prosecutions took place in family court, the second prosecutions took place in circuit court. *Id.* at 170, 811 P.2d at 818; *Lessary*, 75 Haw. at 459 n.12, 865 P.2d at 156 n.12.

[39] *See supra* part III.A.

[40] 432 U.S. 161 (1977).

[41] *Id.* at 168.

[42] *Id.* at 166 n.6.

[43] 433 U.S. 682 (1977) (per curiam).

prosecution for robbery with a firearm was barred by a prior prosecution for felony murder.[44] The Court seemed to be referring to conduct rather than elements when it stated: "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence."[45]

In *Illinois v. Vitale*,[46] the Court held that a second prosecution for involuntary manslaughter was not barred by an earlier prosecution for failure to reduce speed because the two offenses each had an additional element.[47] However, the Court went on to say:

> [I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow . . . . In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*.[48]

All of these cases were based, in one way or another, on *In re Nielsen*,[49] a case which actually preceded *Blockburger* by more than forty years.[50] The case involved successive prosecutions for adultery and unlawful cohabitation.[51] *Nielsen* is a remarkably ambiguous and confusing decision.[52] Nevertheless, it can be interpreted as establishing the proposition that double jeopardy protection extends beyond the same elements test.[53] The Court expressly distinguished *Nielsen* from another case[54] which applied the same elements test.[55] The Court then went on

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[44] *Id.* at 682.

[45] *Id.* (quoting In re Nielsen, 131 U.S. 176, 188 (1889)).

[46] 447 U.S. 410 (1980).

[47] *Id.* at 418-19.

[48] *Id.* at 420 (citation omitted).

[49] 131 U.S. 176 (1889).

[50] *See* United States v. Dixon, 509 U.S. ____, 125 L. Ed. 2d 556, 602-05 (1993) (Souter, J., concurring in the judgment in part and dissenting in part).

[51] *Nielsen*, 131 U.S. at 177.

[52] For a lucid explanation of the case, see Thomas, *Successive Prosecutions*, *supra* note 25, at 342-45.

[53] *See id.*; *Nielsen*, 131 U.S. at 188-89; *Dixon*, 509 U.S. at ____, 125 L. Ed. 2d at 602-05 ("The recognition that a Blockburger rule is insufficient protection against successive prosecutions can be seen as long ago as In re Nielsen.").

[54] Morey v. Commonwealth, 108 Mass. 433 (1871).

[55] *Nielsen*, 131 U.S. at 188 ("We think, however, that that case [*Morey*] is distinguishable from the present."). *Morey* was, in fact, the basis for *Blockburger*. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

to hold that the second prosecution was barred because sexual intercourse is an essential ingredient of both cohabitation and adultery.[56] So, the Court apparently went beyond the same elements test and barred the second prosecution based on underlying conduct.[57]

In May 1990, the U.S. Supreme Court finally declared explicitly that the same elements test was not the only test it would apply in double jeopardy cases. In *Grady v. Corbin*,[58] the Court established the "same conduct" test.[59]

In *Grady*, the defendant, Thomas Corbin, drove his car across the centerline of a New York highway and struck two vehicles head-on.[60] Both occupants of the second vehicle were severely injured, and one eventually died.[61] The police served Corbin with two traffic tickets, one for driving while intoxicated and the other for failing to keep to the right of the median.[62] Corbin pled guilty to both charges in Town Justice Court and was sentenced to a $350 fine, a $10 surcharge, and a six-month revocation of his driver's license.[63] Two months later, Corbin was indicted for reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault, and driving while intoxicated.[64] The prosecutor submitted a bill of particulars describing the facts the prosecution would attempt to prove at trial.[65] The facts included: operating a motor vehicle while intoxicated, failing to keep to the right of the median, and driving at forty-five to fifty miles per hour in heavy rain.[66] The defendant moved to dismiss the indictment on double jeopardy grounds.[67] Eventually, after passing through the New York state courts, the case reached the U.S. Supreme Court.[68]

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[56] *Nielsen*, 131 U.S. at 189.

[57] *See Dixon*, 509 U.S. at ____, 125 L. Ed. 2d at 602-05.

[58] 495 U.S. 508 (1990).

[59] Professor Thomas also referred to this test as the "necessary element" test. Thomas, *Successive Prosecutions*, *supra* note 25, at 335.

[60] *Grady*, 495 U.S. at 513.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 512-13.

[64] *Id.* at 511.

[65] *Id.* at 513-14.

[66] *Id.* at 514.

[67] *Id.*

[68] *Id.* at 514-15. The Duchess County Court denied Corbin's motion to dismiss. Corbin sought a writ of prohibition. The Appellate Division denied the writ (without an opinion). The New York Court of Appeals reversed the conviction in Corbin v.

In an opinion written by Justice Brennan, the Supreme Court held that Corbin's second prosecution was barred by the Double Jeopardy Clause.[69] The second prosecution would have been permissible under the *Blockburger* test.[70] Since the charges in the first and second prosecutions had additional elements, the same elements test would not have barred the second prosecution.[71] However, the Court ruled that the *Blockburger* test alone did not provide adequate protection for defendants.[72]

The theoretical basis for departing from the *Blockburger* standard was the distinction between "multiple punishment" and "successive prosecution."[73] *Blockburger* was a multiple punishment case.[74] The defendant was charged with two separate statutory crimes but only a single proceeding was held.[75] The issue in such a case is largely a matter of statutory construction.[76] The Double Jeopardy Clause simply prevents the trial court from imposing greater punishment than the legislature intended (i.e., imposing sentences for two crimes when the legislature intended the crimes to be the "same offense").[77] For this reason, the *Blockburger* test focuses solely on the statutory elements of crimes.[78] Multiple punishment cases like *Blockburger* are different from successive

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Hillery, 543 N.E.2d 714 (1989), holding that the second prosecution was barred by the Double Jeopardy Clause. The U.S. Supreme Court granted certiorari in Grady v. Corbin, 493 U.S. 953 (1989). *Grady*, 495 U.S. at 514-15.

[69] *Id.* at 510-24. Strictly speaking, the Court only dealt with the homicide and assault charges in the second prosecution. The Court did not address the vehicular manslaughter and the second driving while intoxicated charge because the State conceded that those charges were barred. *Id.* at 522 n.13.

[70] *Id.* at 522 ("Respondent concedes that Blockburger does not bar prosecution of the reckless manslaughter, criminally negligent homicide, and third degree reckless assault offenses.").

[71] Driving while intoxicated would require that the driver be in a state of intoxication, which the homicide and assault charges would not. Crossing the median would require driving across the centerline of the highway, which the homicide and assault charges would not. The homicide charges would require the killing of a person, which driving while intoxicated and crossing the median would not. The assault charges would require bodily injury, which driving while intoxicated and crossing the median would not.

[72] *Id.* at 520.

[73] *Id.* at 516-18.

[74] Blockburger v. United States, 284 U.S. 299 (1932).

[75] *Id.* at 301-04.

[76] *Grady*, 495 U.S. at 517.

[77] *Id.* at 516-17.

[78] *Id.*

prosecution cases. In successive prosecution cases, the defendant is subjected to two (or more) separate proceedings. Such cases involve more than just statutory construction and the possibility of an enhanced sentence.[79] Successive prosecutions place an enormous burden on defendants; they subject defendants to "embarrassment, expense, and ordeal" and allow the State to unfairly rehearse trial strategies.[80] These independent concerns justify a stronger test for successive prosecution cases than for multiple punishment cases.[81] The *Grady* Court raised this argument and cited *Vitale*, *Brown*, *Nielsen*, and *Harris* in support.[82]

The Court established a two-tiered approach to double jeopardy analysis for successive prosecutions.[83] First, the second prosecution must survive the *Blockburger* same elements test.[84] Second:

> [T]he 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.[85]

Applying the "same conduct" test is quite different than applying the same elements test. It is not simply a matter of comparing the statutory elements of the two crimes. The same conduct test focuses on *proof of conduct*.[86] So, one must compare the facts that were actually proven in the first prosecution with the facts that will be proven in the second.[87] If the conduct proven in the first prosecution will be relied upon to prove any element in the second, the second prosecution is barred by the Double Jeopardy Clause.[88]

The facts in *Grady* provide a useful illustration. In the first prosecution, the State proved that Corbin drove while intoxicated and crossed the median of the highway.[89] In the second prosecution, as described

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[79] *Id.* at 518.

[80] *Id.* (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[81] *Id.* at 519.

[82] *Id.* at 515-16, 519-20.

[83] *Id.* at 521.

[84] *Id.*

[85] *Id.*

[86] *See* George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195, 200 (1991) [hereinafter Thomas, *A Modest Proposal*] ("The legal effect of [Grady] is that the state cannot use the facts that proved a previously-prosecuted offense to prove another offense.").

[87] *See id.*

[88] *Grady*, 495 U.S. at 521.

[89] *Id.* at 511-12.

in the bill of particulars, the State intended to prove that Corbin drove while intoxicated, crossed the median of the highway, and drove at forty-five to fifty miles per hour in heavy rain.[90] Driving while intoxicated and crossing the centerline constitute the conduct that was already proven in the first prosecution.[91] The State intended to prove those facts again in the second prosecution in order to establish the reckless or negligent mental state required for the homicide and assault charges.[92] Therefore, because the State was going to prove conduct already proven in the first prosecution in order to establish an essential element of the second prosecution, the Double Jeopardy Clause barred the second prosecution.[93]

It must be pointed out, however, that conduct *not* relied upon in the first prosecution *can* be used to prove elements in the second prosecution. In *Grady*, the State could have used the fact that Corbin drove forty-five to fifty miles per hour in heavy rain to prove the recklessness or negligence needed for the homicide and assault charges.[94] This conduct was not proven in the first prosecution; therefore, the State could have relied upon it in the second.[95] Double jeopardy would not have barred the second prosecution if the State had relied solely upon this conduct.[96]

Justice Scalia wrote a vehement dissent to Justice Brennan's opinion in *Grady*.[97] Justice Scalia criticized the majority on a number of grounds. First, he argued that the majority's interpretation was unsupported by the text of the Constitution; he noted that the Double Jeopardy Clause says "same offence" not "same conduct."[98] Next, he argued that the common law history of the double jeopardy concept did not support the majority's interpretation.[99] Justice Scalia also felt that the majority had misapplied *Vitale*, *Brown*, and *Harris*.[100] He argued that the com-

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[90] *Id.* at 513-14.

[91] *Id.* at 511-12.

[92] *Id.* at 523 (excerpt from the bill of particulars). The prosecution hoped to establish that "the defendant was aware of and consciously disregarded a substantial and unjustifiable risk of the likelihood of the result which occurred." *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 526-44 (Scalia, J., dissenting).

[98] *Id.* at 529.

[99] *Id.* at 530-35.

[100] *Id.* at 536-38.

ments in those cases suggesting a test beyond *Blockburger* were simply dicta and were not binding.[101] Finally, he argued that the same conduct test would impose the practical equivalent of the same transaction test.[102] He pointed out that the same transaction test had been consistently rejected by the Court throughout the years.[103] Toward the end of his dissent, Justice Scalia noted that "rejection of today's opinion is adequately supported by the modest desire to protect our criminal justice system from ridicule."[104]

There was a wide range of reaction to *Grady* among commentators. Some commentators unequivocally supported *Grady*.[105] Other commentators strongly opposed it as an unnecessary restriction on prosecutors.[106] Some commentators supported greater double jeopardy protection in theory but rejected the *Grady* test because it would be misinterpreted and inconsistently applied in practice.[107] Still other commentators gave *Grady* qualified support.[108] These commentators, including some of the more authoritative double jeopardy scholars, noted that the same conduct test was necessary in order to protect defendants.[109] However, they also stated that restrictions should or would be placed on *Grady* because it could lead to results that would be unacceptable to the public.[110]

D. Return to the Same Elements Test

Given the intensity of Justice Scalia's dissent, and the fact that *Grady* was a five to four decision,[111] it is not surprising that the issue was far

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[101] *Id.*

[102] *Id.* at 539.

[103] *Id.* (citing Garrett v. United States, 471 U.S. 773, 790 (1985)).

[104] *Id.* at 542.

[105] *See, e.g.*, Paul R. Robinson, Case Comment, *Grady v. Corbin: Solidifying the Analysis of Double Jeopardy*, 17 CRIM. & CIV. CONFINEMENT 395 (1991).

[106] *See, e.g.*, Diane M. Resch, Note, *"High Comedy but Inferior Justice": The Aftermath of Grady v. Corbin*, 75 MARQ. L. REV. 265 (1991).

[107] *See, e.g.*, Sara Barton, Case Comment, *Grady v. Corbin: An Unsuccessful Effort to Define "Same Offense,"* 25 GA. L. REV. 143 (1990).

[108] *See, e.g.*, Thomas, *A Modest Proposal*, *supra* note 86; Anne Bowen Poulin, *Double Jeopardy: Grady and Dowling Stir the Muddy Waters*, 43 RUTGERS L. REV. 889 (1991) [hereinafter Poulin, *Muddy Waters*]; James M. Herrick, Comment, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in Grady v. Corbin*, 79 KY. L.J. 847 (1990-91).

[109] Thomas, *A Modest Proposal*, *supra* note 86, at 195-96; Poulin, *Muddy Waters*, *supra* note 108, at 916-26; Herrick, *supra* note 108, at 866.

[110] Thomas, *A Modest Proposal*, *supra* note 86, at 220; Poulin, *Muddy Waters*, *supra* note 108, at 930; Herrick, *supra* note 108, at 866.

[111] The *Grady* majority consisted of the following justices: Brennan, White, Marshall,

from settled. In the end, the crucial factor was a change in the composition of the Court. Justices Brennan and Marshall retired and were replaced by Justices Souter and Thomas.

In June 1993, a little over three years after *Grady* was decided, the Court discarded the same conduct test in *United States v. Dixon*.[112] *Dixon* is an extremely fragmented decision addressing two distinct issues: (1) whether to overrule *Grady* and (2) whether criminal contempt should be subject to the Double Jeopardy Clause.[113] On the issue of overruling *Grady*, Justice Scalia assembled a five to four majority in favor of discarding the same conduct test.[114]

In his opinion, Justice Scalia cited his dissent in *Grady* for the historical arguments against the *Grady* test.[115] He criticized the distinction in *Grady* between multiple punishment and successive prosecution on the grounds that the *Blockburger* test alone defines the meaning of the term "same offense."[116] Justice Scalia also criticized the *Dixon* minority's reliance on *Nielsen*; he argued that *Nielsen* involved a lesser included offense and, therefore, was simply an application of the same elements test.[117] He also argued that the fact the Court had been forced to recognize an exception to the *Grady* test[118] only two years after *Grady* was decided indicated that *Grady* had been a mistake.[119] In addition,

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Blackmun, and Stevens. *Grady*, 495 U.S. at 508-24. The *Grady* minority consisted of the following justices; Rehnquist, O'Connor, Scalia, and Kennedy. *Id.* at 524-44.

[112] 509 U.S. ____, 125 L. Ed. 2d 556 (1993).

[113] Justices Scalia and Kennedy wanted to overrule *Grady* and felt that criminal contempt was subject to the Double Jeopardy Clause. *Id.* at ____, 125 L. Ed. 2d at 564-78. Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas wanted to overrule *Grady* but felt that criminal contempt was not subject to the Double Jeopardy Clause. *Id.* at ____, 125 L. Ed. 2d at 578-83. Justices White, Stevens, and Souter did not want to overrule *Grady* but felt that criminal contempt was subject to the Double Jeopardy Clause. *Id.* at ____, 125 L. Ed. 2d at 583-97, 598-611. Justice Blackmun did not want to overrule *Grady* and felt that criminal contempt was not subject to the Double Jeopardy Clause. *Id.* at ____, 125 L. Ed. 2d at 597-98.

[114] The following justices supported overruling *Grady*: Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. *Id.* at ____, 125 L. Ed. 2d at 564-83. The following justices opposed overruling *Grady*: White, Blackmun, Stevens, and Souter. *Id.* at ____, 125 L. Ed. 2d at 583-611.

[115] *Id.* at ____, 125 L. Ed. 2d at 572-73.

[116] *Id.* at ____, 125 L. Ed. 2d at 573.

[117] *Id.*

[118] United States v. Felix, 503 U.S. ____, 118 L. Ed. 2d 25 (1992) (holding conspiracy to be a per se exception to the *Grady* test).

[119] *Dixon*, 509 U.S. at ____, 125 L. Ed. 2d at 576-77.

he noted that lower courts had been having great difficulty in applying *Grady*.[120]

Dixon was essentially a victory for Justice Scalia. Once again, the same elements test became the sole test to be used in applying the Double Jeopardy Clause of the United States Constitution.

E. Evaluating the Three Double Jeopardy Tests

In order to evaluate the three double jeopardy tests (and therefore, the ruling in *Lessary*) the underlying purposes served by the Double Jeopardy Clause must be examined.

1. The competing interests underlying double jeopardy law

Scholars[121] and jurists[122] have identified two primary interests underlying the Double Jeopardy Clause: finality and proportionality.

Finality represents the defendant's interest in having his prosecution come to an end.[123] Repeated criminal prosecutions subject the defendant to "embarrassment, expense and ordeal, and compel[ ] him to live in a continuing state of anxiety and insecurity."[124] They also give the State an unfair advantage in that prosecutors can learn the strengths and weaknesses of their arguments in advance.[125] Finally, successive

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[120] *Id.* at ____, 125 L. Ed. 2d at 578 n.16 (citing Sharpton v. Turner, 964 F.2d 1284 (2d Cir. 1992), *cert. denied*, 506 U.S. ____, 113 S. Ct. 494 (1992); Ladner v. Smith, 941 F.2d 356 (5th Cir. 1991), *cert. denied*, 503 U.S. ____, 112 S. Ct. 1665 (1992); United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), *vacated and remanded*, 503 U.S. ____, 112 S. Ct. 1657 (1992); United States v. Prusan, 780 F. Supp. 1431 (S.D.N.Y. 1991), *rev'd*, 967 F.2d 57 (2d Cir. 1991), *and cert. denied sub nom.* Vives v. United States, 506 U.S. ____, 113 S. Ct. 497 (1992); State v. Woodfork, 478 N.W.2d 248 (Neb. 1991); Eatherton v. State, 810 P.2d 93 (Wyo. 1991)).

[121] *See, e.g.*, Thomas, *Successive Prosecutions*, *supra* note 25; Thomas, *A Modest Proposal*, *supra* note 86; George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827 (1988) [hereinafter Thomas, *An Elegant Theory*]; Poulin, *Muddy Waters*, *supra* note 108; Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95 (1992).

[122] See Justice Black's frequently cited opinion in Green v. United States, 355 U.S. 184 (1957), and Justice Blackmun's opinion in United States v. DiFrancesco, 449 U.S. 117 (1980).

[123] *See* Thomas, *An Elegant Theory*, *supra* note 121, at 836-40.

[124] *Green*, 355 U.S. at 187.

[125] *DiFrancesco*, 449 U.S. at 128.

prosecutions increase the possibility that innocent defendants will be found guilty.[126]

Proportionality represents society's interest in an outcome that is fair and just. Professor Thomas[127] refers to this interest as the "disparity problem."[128] The most extreme manifestation of the disparity problem would be when prosecution for a minor traffic offense bars a second prosecution for homicide.[129] In such a situation, a killer would go free after paying a small fine or losing his license.[130] The essence of the problem is the disparity between the defendant's culpability (for homicide) and his punishment (for a minor traffic offense).[131] Justice seems to demand a different outcome.

It should be noted that proportionality is implicit in the concept of justice itself. Plato wrote: "[T]o give back what is owed to each is just."[132] Cicero, one of the great lawyers of all time, wrote: "The punishment shall fit the offence."[133] Even more to the point, Cicero also wrote: "Care should be taken that the punishment should not be out of proportion to the offence."[134]

Unfortunately, it is not easy to satisfy both finality and proportionality.[135] Certainly, the two interest clash; advancing one interest may end up harming the other.

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[126] *Green*, 355 U.S. at 187-88 ("[R]epeated attempts to convict an individual . . . enhanc[e] the possibility that even though innocent he may be found guilty.").

[127] George C. Thomas III, Associate Professor, Rutgers School of Law—Newark. B.S. 1968, University of Tennessee; M.F.A. 1972, J.D. 1975, University of Iowa; LL.M. 1984, J.S.D. 1986, Washington University. There is some suggestion that the *Grady* test was based on Professor Thomas' work. *See* Thomas, *A Modest Proposal*, *supra* note 86, at 195 ("Brennan's opinion in *Grady v. Corbin* affirmed a position I had taken in previous articles, namely that the double jeopardy clause provides some form of protection against reprosecution for the same conduct."); Poulin, *Muddy Waters*, *supra* note 108, at 903-04 ("In fact, *Grady* appears to adopt precisely the '*Vitale* two-tiered test' advocated by Professor Thomas.").

[128] Thomas, *A Modest Proposal*, *supra* note 86, at 205-08.

[129] Thomas, *A Modest Proposal*, *supra* note 86, at 205-06.

[130] Note that these are the facts in Grady v. Corbin, 495 U.S. 508 (1990).

[131] Thomas, *A Modest Proposal*, *supra* note 86, at 206.

[132] PLATO, THE REPUBLIC, BOOK I, *reprinted in* GREAT DIALOGUES OF PLATO, at 129 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., Penguin Books 1984).

[133] CICERO, DE LEGIBIS, BOOK III, CHAPTER XX, *quoted in* A DICTIONARY OF LEGAL QUOTATIONS, at 152 (Simon James & Chantal Stebbings eds., 1987).

[134] CICERO, DE OFFICIIS, BOOK I, CHAPTER XXV, *quoted in* A DICTIONARY OF LEGAL QUOTATIONS, at 152 (Simon James & Chantal Stebbings eds., 1987).

[135] *See infra* part III.E.2.

2. How the three tests satisfy the competing interests

The same elements test satisfies proportionality. Since successive prosecutions are allowed if each crime has an additional element, prosecutors have more opportunities to prosecute serious offenses. However, the same elements test does not satisfy finality. The State could circumvent the same elements test by redefining the statutory elements in crimes.[136]

Justice Souter provided a hypothetical example in his partial dissent in *Dixon*.[137] Imagine that the defendant used a firearm to commit a robbery in a dwelling.[138] Imagine further that three different statutory offenses exist in that jurisdiction: simple robbery, robbery with a firearm, and robbery in a dwelling.[139] Under the same elements test, prosecution for simple robbery would bar subsequent prosecutions for both robbery with a firearm and robbery in a dwelling.[140] This would be true because simple robbery is a lesser included offense of the other two crimes.[141] But a prosecution for robbery with a firearm would not bar a subsequent prosecution for robbery in a dwelling, and vice versa.[142] Each crime has an additional element not possessed by the other.[143] Robbery with a firearm requires that the defendant be in possession of a firearm, and robbery in a dwelling requires that the robbery take place in a dwelling.[144] So, the defendant could be prosecuted twice for the very same conduct. State legislatures could help prosecutors avoid double jeopardy by redefining crimes until they are so specific that the same elements test never acts as a bar.[145] Therefore, the defendant could be prosecuted over and over again, and finality would not be served.

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[136] *See* United States v. Dixon, 509 U.S. ____, 125 L. Ed. 2d 556, 601 (1993) (Souter, J., concurring in the judgment in part and dissenting in part).

[137] *Id.* at ____, 125 L. Ed. 2d at 601-02.

[138] *Id.* at ____, 125 L. Ed. 2d at 601.

[139] *Id.*

[140] *Id.* at ____, 125 L. Ed. 2d at 601-02.

[141] *Id.* The sequence of the prosecutions does not matter. Even though the lesser included offense (simple robbery) is prosecuted before the greater offense (robbery with a firearm or robbery in a dwelling), the second prosecution is still barred by the same elements test. *See* Brown v. Ohio, 432 U.S. 161, 168-69 (1977); *supra* part III.A.

[142] *Dixon*, 509 U.S. at ____, 125 L. Ed. 2d at 602.

[143] *Id.*

[144] *Id.*

[145] *Id.*

The same transaction test, on the other hand, satisfies finality. Under this test, all charges based on a single episode must be joined in one prosecution.[146] Second prosecutions are barred.[147] The defendant is guaranteed that there will be only one prosecution for all crimes committed in the same transaction. However, the same transaction test does not satisfy proportionality. Second prosecutions are not allowed, even if the other crimes are extremely serious. The Hawaii Supreme Court provided a hypothetical example in *Lessary*.[148] Imagine a defendant who kidnaps his victim, rapes her, then murders her.[149] If he is prosecuted for kidnapping, and the State did not join the rape and murder charges with the kidnapping charge, he cannot subsequently be prosecuted for rape and murder.[150] Even though rape and murder are among the most serious offenses,[151] the defendant can only be prosecuted for kidnapping.

At first glance, the same conduct test seems to be a good compromise between the same elements test and the same transaction test. Under the same conduct test, a second prosecution is sometimes possible, at other times not possible. Whether a second prosecution will be allowed depends upon the proof offered by the State in both trials.[152]

In fact, the same conduct test is, for all practical purposes, the equivalent of the same transaction test. Members of both the U.S. Supreme Court and the Hawaii Supreme Court have stated so expressly. Justice Scalia wrote that the "practical effect" of *Grady* was a requirement that all charges stemming from a "single criminal act, occurrence, episode, or transaction" be joined in the same proceed-

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[146] Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring).

[147] *Id.* at 460.

[148] State v. Lessary, 75 Haw. 446, 458, 865 P.2d 150, 156 (1994).

[149] *Id.*

[150] *Id.*

[151] Both murder and rape (sexual assault) are felonies. First degree murder is punishable by life imprisonment without the possibility of parole. HAW. REV. STAT. §§ 706-656(1), 707-701(2) (1985, Supp. 1992, Comp. 1993 & Supp. 1994). Second degree murder is punishable by life imprisonment with the possibility of parole, *id.* §§ 706-656(2), 707-701.5(2), or life imprisonment without the possibility of parole if the murder was especially heinous, *id.* § 706-657. Sexual assault in the first degree is a Class A felony, punishable by an indeterminate term of twenty years imprisonment without the possibility of a suspended sentence or probation. *Id.* §§ 706-659, 707-730. Sexual assault in the second degree is a Class B felony, punishable by a maximum of ten years imprisonment. *Id.* §§ 706-660, 707-731.

[152] *See supra* part III.C.

ing.[153] In *State v. Kipi*,[154] the Hawaii Supreme Court acknowledged that the same conduct test is effectively the equivalent of the same transaction test.[155] The court stated: "As pointed out in Justice Scalia's dissenting opinion in *Grady*, what the new double jeopardy test in effect requires is that prosecutors observe a rule previously rejected by the Supreme Court 'that all charges arising out of a single occurrence must be joined in a single indictment.'"[156] The court then advised prosecutors to join all charges in circuit court, including contempt charges originating in family court.[157]

Another way to demonstrate that the same conduct test is the practical equivalent of the same transaction test is to apply the two tests to the same facts. If applying the same conduct test yields the same results as applying the same transaction test, the tests are practical equivalents.

In *Lessary*, the Hawaii Supreme Court described a kidnapping/rape/murder hypothetical.[158] The court stated that the same transaction test would bar a second prosecution for rape and murder if kidnapping had been prosecuted first.[159] The same conduct test also would bar a second prosecution. Under *Grady*, a second prosecution is barred if conduct proven in the first prosecution will be used to establish an essential element in the second prosecution.[160] Proof of the kidnapping could be used to prove motive for rape or murder.[161] Motive is not, in itself, an essential element of rape or murder.[162] However, motive is a circumstance from which a jury could infer intent.[163] Therefore, proof of the kidnapping would serve to establish an essential element

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[153] Grady v. Corbin, 495 U.S. 508, 539 (1990) (Scalia, J., dissenting).

[154] 72 Haw. 164, 811 P.2d 815 (1991) (holding that a criminal contempt conviction bars subsequent prosecution for burglary and terroristic threatening under the *Grady* test), *cert. denied*, 502 U.S. 867 (1991).

[155] *Id.* at 176, 811 P.2d at 821.

[156] *Id.* (quoting *Grady*, 495 U.S. at 527 (Scalia, J., dissenting)).

[157] *Id.*

[158] State v. Lessary, 75 Haw. 446, 458, 865 P.2d 150, 156 (1994).

[159] *Id.*

[160] Grady v. Corbin, 495 U.S. 508, 521 (1990).

[161] The motive for the rape would be the fact that the kidnapped victim was completely vulnerable. The motive for the murder would be to eliminate a witness to the kidnapping.

[162] *See* HAW. REV. STAT. §§ 707-730, 707-731, 707-701, 707-701.5 (1985, Supp. 1992, Comp. 1993 & Supp. 1994); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6(a) (2d ed. 1986).

[163] *See* LAFAVE & SCOTT, *supra* note 162, §§ 3.5(f), 3.6(b).

in the second prosecution. So, the second prosecution would be barred under the *Grady* same conduct test.

In Justice Scalia's dissent in *Grady*, he described a burglary/murder hypothetical.[164] The same transaction test would bar a second prosecution for murder after an initial prosecution for burglary.[165] As Justice Scalia pointed out, the same conduct test would also bar a second prosecution.[166] The State would use proof of the burglary to prove motive for murder.[167] Motive is not an essential element of murder,[168] but it would allow the jury to infer intent.[169] Intent *is* an essential element of murder.[170] Therefore, the second prosecution would be barred under the same conduct test.

Since, in both hypotheticals, application of the same conduct test and application of the same transaction test yield identical results, the two tests are practical equivalents. Thus, the same conduct test is subject to the same criticism as the same transaction test—it does not satisfy proportionality.

IV. ANALYSIS

Having examined the development of double jeopardy law, the competing interests underlying the Double Jeopardy Clause, and having evaluated the three double jeopardy tests, the foundation is set for examining the *Lessary* opinion itself.

A. Lessary as a Return to the Grady Standard

In *State v. Kipi*,[171] the Hawaii Supreme Court followed the interpretation of the Double Jeopardy Clause established by *Grady*. For three years, Hawai'i courts applied the same conduct test.[172] But when the

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[164] *Grady*, 495 U.S. at 539 ("Or suppose an initial prosecution for burglary and a subsequent prosecution for murder that occurred in the course of the same burglary.").

[165] *See* Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring).

[166] *Grady*, 495 U.S. at 539.

[167] *Id.* The motive would be to eliminate a witness to the burglary.

[168] *See* HAW. REV. STAT. §§ 707-701, 707-701.5 (1985, Supp. 1992, Comp. 1993 & Supp. 1994); LAFAVE & SCOTT, *supra* note 162, § 3.6(a).

[169] *See* LAFAVE & SCOTT, *supra* note 162, §§ 3.5(f), 3.6(b).

[170] HAW. REV. STAT. §§ 707-701, 707-701.5 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[171] 72 Haw. 164, 811 P.2d 815 (1991), *cert. denied*, 502 U.S. 867 (1991).

[172] State v. Lessary, 75 Haw. 446, 459, 865 P.2d 150, 156 (1994).

U.S. Supreme Court discarded the same conduct test in *Dixon*, the Hawaii Supreme Court was faced with a choice. The court could have followed the U.S. Supreme Court in returning to the same elements test or it could have established its own double jeopardy standard under the Hawaii Constitution.

The Hawaii Supreme Court has "final, unreviewable authority to interpret and enforce the Hawaii Constitution."[173] As long as the Hawaii Supreme Court affords defendants the minimum protections of the U.S. Constitution, the court is free to interpret the Hawaii Constitution so as to afford defendants greater protection.[174] The court will extend the protections of the Hawaii Constitution beyond the Federal Constitution "when logic and a sound regard for the purposes of those protections . . . so warrant[ ]."[175]

In *Lessary*, the court first noted that the trial court had misapplied *Kipi*.[176] Contrary to the trial court's holding, *Kipi* did not adopt the same transaction test.[177] *Kipi* was simply an application of *Grady*.[178] The court went on to reassert its power to interpret the Hawaii Constitution so as to afford defendants greater protection than under the U.S. Constitution.[179] The court then examined the history of double jeopardy law from *Blockburger*, through *Grady*, and on to *Dixon*.[180]

The court then focused on the finality interests underlying the Double Jeopardy Clause.[181] It discussed the "embarrassment, expense, and ordeal" that successive prosecutions impose on defendants.[182] In light of these concerns, the court concluded that the U.S. Supreme Court's interpretation in *Dixon* did not adequately protect defendants.[183] The court stated that it agreed with the majority in *Grady* and the minority in *Dixon*.[184] So, the court adopted the *Grady* test as the controlling

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[173] State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974).

[174] State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1849 (1993); State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967).

[175] *Kaluna*, 55 Haw. at 369, 520 P.2d at 58.

[176] *Lessary*, 75 Haw. at 451-52, 865 P.2d at 153.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 453-54, 865 P.2d at 154 (citing *Kaluna*, 55 Haw. at 369, 520 P.2d at 58).

[180] *Id.* at 454-57, 865 P.2d at 154-55.

[181] *Id.* at 455-56, 865 P.2d at 154-55.

[182] *Id.* at 455, 865 P.2d at 155 (quoting Grady v. Corbin, 495 U.S. 508, 518-19 (1990), which in turn quoted Green v. United States, 355 U.S. 184, 187 (1957)).

[183] *Id.* at 457, 865 P.2d at 155.

[184] *Id.*

interpretation of the Double Jeopardy Clause of the Hawaii Constitution.[185] The court held: "We believe that the application of the *Grady* rule is necessary to afford adequate double jeopardy protection, and, therefore, we adopt the 'same conduct' test under the Hawai'i Constitution."[186]

The court went on to address Lessary's argument that the court should adopt the same transaction test.[187] It discussed a hypothetical kidnapping/rape/murder case and noted that the same transaction test would bar a second prosecution for rape and murder after an initial prosecution for kidnapping.[188] The court then expressly rejected the same transaction test.[189]

Finally, the court applied the same conduct test to the facts of the case.[190] In the first prosecution (on the abuse charge), the State proved that Lessary threw his wife against a wall and dragged her to his car.[191] The act element of unlawful imprisonment is restraint of another person.[192] Since the State conceded that it would have to prove Lessary threw his wife against a wall and dragged her to his car in order to establish restraint, the court ruled that prosecution for unlawful imprisonment was barred by the Double Jeopardy Clause of the Hawaii Constitution.[193] On the other hand, the act element of terroristic threatening is threatening to cause bodily injury to another.[194] The State argued that it would prove that element by relying on conduct other than the conduct proven in the abuse prosecution.[195] The prosecutors intended to rely on Lessary's conduct in pointing the open

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[185] *Id.* at 459, 865 P.2d at 156.

[186] *Id.*

[187] *Id.* at 458, 865 P.2d at 155.

[188] *Id.* at 458, 865 P.2d at 156.

[189] *Id.* at 458-59, 865 P.2d at 156.

[190] *Id.* at 460-61, 865 P.2d at 156-57. The same elements test would already be satisfied. Abuse requires physical abuse of a family or household member, which unlawful imprisonment and terroristic threatening do not require. Unlawful imprisonment requires restraint of another person, which abuse and terroristic threatening do not require. Terroristic threatening requires threatening to cause bodily injury, which abuse and unlawful imprisonment do not require. *Id.* at 452 n.8, 865 P.2d at 153 n.8. *See also* HAW. REV. STAT. §§ 709-906, 707-721, 707-716 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[191] *Lessary*, 75 Haw. at 450, 865 P.2d at 152.

[192] HAW. REV. STAT. § 707-721 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[193] *Lessary*, 75 Haw. at 460 n.14, 865 P.2d at 156 n.14.

[194] HAW. REV. STAT. § 707-715 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[195] *Lessary*, 75 Haw. at 461, 865 P.2d at 157.

pair of scissors at his wife and her co-worker in the office, pointing the scissors at her a second time before entering the jeep, and telling her he would stab her if she refused to enter.[196] The court held that prosecution on the terroristic threatening charge was not barred.[197]

Therefore, on its face, *Lessary* is essentially a return to the *Grady* standard. The language of the opinion itself suggests that the court is simply re-establishing the *Grady* test under the Hawaii Constitution.

B. Problems With Lessary as a Return to the Grady Standard

If we take the Hawaii Supreme Court at its word and interpret *Lessary* as simply a return to the *Grady* test, a number of problems are created.

First, *Lessary* does not satisfy both of the competing interests underlying the Double Jeopardy Clause. As described in Part III, the same conduct test is the practical equivalent of the same transaction test.[198] The same transaction test fails to satisfy proportionality.[199] Therefore, the same conduct test also fails to satisfy proportionality.[200] So, *Lessary* does not satisfy one of the two interests underlying the Double Jeopardy Clause. Furthermore, the Hawaii Supreme Court's justification for extending rights beyond the Federal Constitution is to more fully serve the purposes of those rights.[201] But if the Hawaii Supreme Court's interpretation of the Double Jeopardy Clause serves only one of the two purposes, extension beyond the Federal Constitution seems less compelling.

There is a much more serious problem with *Lessary* than just its failure to satisfy proportionality. If it is indeed simply a return to the *Grady* test, the Hawaii Supreme Court's reasoning leads to serious contradictions. As described in Part III, the same conduct test is the practical equivalent of the same transaction test.[202] The Hawaii Supreme Court admitted as much in *Kipi*.[203] But in *Lessary*, the court expressly

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[196] *Id.*

[197] *Id.*

[198] *See supra* part III.E.2.

[199] *See supra* part III.E.2.

[200] *See supra* part III.E.2.

[201] State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974).

[202] *See supra* part III.E.2.

[203] State v. Kipi, 72 Haw. 164, 176, 811 P.2d 815, 821 (1991), *cert. denied*, 502 U.S. 867 (1991).

rejected the same transaction test.[204] The court examined a hypothetical kidnapping/rape/murder case and noted that the same transaction test would bar a second prosecution for rape and murder after an initial prosecution for kidnapping.[205] The court then rejected the same transaction test as unacceptable.[206] If the same transaction test and the same conduct test are practically the same, and the same transaction test is unacceptable, logically the Hawaii Supreme Court should have rejected the same conduct test as well. Instead, the court adopted it. In other words, the syllogism should have been:

(1) Same conduct test = same transaction test.
(2) Same transaction test is unacceptable.
(3) Therefore, the same conduct test is also unacceptable.

But in fact, the Hawaii Supreme Court decided:

(1) Same conduct test = same transaction test.
(2) Same transaction test is unacceptable.
(3) Therefore, the same conduct test is acceptable.

The conclusion in this syllogism does not flow from the major and minor premises. It appears to be a serious error in basic reasoning.

C. Lessary as a New Double Jeopardy Test

A number of serious problems exist if we interpret *Lessary* as simply a return to the *Grady* double jeopardy standard.[207] These problems suggest that there is more to *Lessary* than meets the eye. Rather than taking the Hawaii Supreme Court at its word and interpreting *Lessary* as a return to the *Grady* test, it would be worthwhile to dig below the surface of the decision and examine what *Lessary* actually accomplishes.

Upon closer examination, it is clear that the double jeopardy test established in *Lessary* is not the same as the test in *Grady*. The Hawaii Supreme Court made a subtle modification to the *Grady* test. The crucial evidence lies in footnote 13 of the *Lessary* decision.[208] There, the court notes that the State cannot rely upon conduct proven in the first prosecution in order to prove the actus reus element in the second prosecution.[209] But the court goes on to say that the State can use that

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[204] State v. Lessary, 75 Haw. 446, 458-59, 865 P.2d 150, 156 (1994).
[205] *Id.* at 458, 865 P.2d at 156.
[206] *Id.* at 458-59, 865 P.2d at 156.
[207] *See supra* part IV.B.
[208] *Lessary*, 75 Haw. at 459 n.13, 865 P.2d at 156 n.13.
[209] *Id.*

conduct to prove the mens rea element or any other element.[210] Quoting footnote 13 directly:

> Although the "same conduct" test bars the State from proving the conduct element of an offense using evidence of acts for which the defendant had already been prosecuted, it does not absolutely preclude the State from introducing evidence of those acts for other purposes. For example, the State may be allowed to introduce evidence of Lessary's acts of Abuse in order to prove Lessary's state of mind at the time of the alleged Terroristic Threatening.[211]

In contrast, the *Grady* test bars second prosecutions if the conduct is used to prove *any essential element*.[212] *Grady* states:

> [T]he 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.[213]

So, *Grady* applies to any essential element, while *Lessary* focuses on the act element only. With the *Lessary* decision, the Hawaii Supreme Court, in effect, modified the *Grady* test so as to read:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish [*the actus reus element*] of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[214]

Further evidence that the *Lessary* test focuses only on the act element (and therefore departs from the *Grady* test) can be found in the language of the decision.[215] The court refers only to the "conduct element" when applying the test to the facts of the case.[216] The court held that the unlawful imprisonment charge in the second prosecution was barred because "[t]he *conduct element* of Unlawful Imprisonment is restraining another person."[217] As for the terroristic threatening charge, the court noted that "[t]he State cannot use those acts [relied upon in the abuse

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[210] *Id.*

[211] *Id.*

[212] Grady v. Corbin, 495 U.S. 508, 521 (1990).

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

[214] *Compare with id.*

[215] *Lessary*, 75 Haw. at 460, 865 P.2d at 156-57.

[216] *Id.*

[217] *Id.* at 460 n.14, 865 P.2d at 156 n.14 (emphasis added).

prosecution] to prove the *conduct element* of Terroristic Threatening."[218] The court seems to be contrasting what it calls the "conduct element"[219] with the "state of mind" referred to in footnote 13.[220] Therefore, the test applied by the court focuses only on the actus reus element in the second prosecution and does not apply to any essential element.[221]

D. Significance of the New Lessary Test

The change in double jeopardy law effected by *Lessary* is very subtle, but tremendously important. The problems generated by interpreting *Lessary* as a return to the *Grady* standard simply disappear.

Interpreting *Lessary* as establishing a new test resolves the contradictions in Hawai'i law. In contrast to the *Grady* test, the *Lessary* test would not lead to results identical to the same transaction test.[222] In the kidnapping/rape/murder hypothetical,[223] the *Lessary* test would allow the State to use the kidnapping to prove the mens rea elements in rape and murder. As pointed out in Part III, the State would probably use the kidnapping to prove motive, which would lead to an inference establishing intent.[224] This would be permissible under *Lessary*. It is

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[218] *Id.* at 460, 865 P.2d at 157 (emphasis added).

[219] It is unfortunate that the Hawaii Supreme Court uses the term "conduct element." It would be less confusing if the court used the term "actus reus element" or "act element." Then the term "conduct" could be reserved for the actual physical activity of the defendant which the State seeks to prove at trial. Since the U.S. Supreme Court uses the term "conduct" in this manner, *see* Grady v. Corbin, 495 U.S. 508, 521 (1990), it would be preferable to continue to use the term in this manner for the sake of consistency. For example, in the first prosecution, Lessary's "conduct" was throwing his wife against a wall and dragging her to his car. That "conduct" was proven in order to satisfy the "actus reus element" of abuse (the physical abuse of a family member). In the second prosecution, the State attempted to use the very same "conduct" (Lessary throwing his wife against a wall and dragging her to his car) in order to satisfy the "actus reus element" of unlawful imprisonment (restraining another person). The State attempted to use different "conduct" (Lessary pointing a pair of scissors at his wife and her co-worker, pointing the scissors at her a second time, and telling her he would stab her if she did not enter his jeep) to satisfy the "actus reus element" of terroristic threatening (threatening to cause bodily injury). Although, for grammatical reasons, it is not always possible to use these terms in the manner just described, every effort has been made to do so in this casenote.

[220] *Lessary*, 75 Haw. at 459 n.13, 865 P.2d at 156 n.13.

[221] *Compare with Grady*, 495 U.S. at 521.

[222] *See supra* part III.E.2.

[223] *Lessary*, 75 Haw. at 458-59, 865 P.2d at 156.

[224] *See supra* part III.E.2.

true that the State could not use the kidnapping to prove the actus reus elements. However, the three crimes have very different act elements and it is unlikely that the State would use the same conduct to prove them. Kidnapping requires the restraint of a person,[225] rape requires sexual penetration,[226] and murder requires the killing of a person.[227] So, in contrast to the same transaction test and the *Grady* test, the *Lessary* test would allow the State to bring a second prosecution.

In Justice Scalia's burglary/murder hypothetical,[228] the *Lessary* test would allow the State to use the burglary to prove the mens rea element in murder. As pointed out in Part III, the State would probably use the burglary to prove motive, which would lead to an inference establishing intent.[229] This would be permissible under *Lessary*. True, the State could not use the burglary to prove the actus reus element. However, the two crimes have very different act elements and it is not likely that the State would use the same conduct to satisfy them. Burglary requires entry of a building[230] while murder requires the killing of a person.[231] So, in contrast to the same transaction test and the *Grady* test, the *Lessary* test would allow the State to bring a second prosecution.[232]

Since the *Lessary* version of the same conduct test does not lead to the same results as the same transaction test, they are not practical equivalents. In our problematic syllogism described in Part IV.B, the major premise is wrong.[233] The two tests are, in fact, not the same.

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[225] HAW. REV. STAT. § 707-720 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[226] *Id.* §§ 707-730, 707-731.

[227] *Id.* §§ 707-701, 707-701.5.

[228] Grady v. Corbin, 495 U.S. 508, 539 (1990) (Scalia, J., dissenting).

[229] *See supra* part III.E.2.

[230] HAW. REV. STAT. §§ 708-810, 708-811 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[231] *Id.* §§ 707-701, 707-701.5.

[232] In both the kidnapping/rape/murder hypothetical and the burglary/murder hypothetical, the State can use the conduct proven in the first prosecutions in order to infer intent. This does not mean that such an inference is the only way to prove intent. The State can rely upon other evidence as well. For example, if the defendant said, "I'm going to kill you," there would be no need to infer intent from the conduct proven in the first prosecution. Intent could be proven directly from the statement.

[233] *See supra* part IV.B. For the convenience of the reader, the problematic syllogism is reproduced here:

(1) Same conduct test = same transaction test.

(2) Same transaction test is unacceptable.

(3) Therefore, the same conduct test is acceptable.

Supra part IV.B.

The *Grady* version of the same conduct test may be the equivalent of the same transaction test, but the *Lessary* version is not. Therefore, the court could logically assert that the same transaction test is unacceptable while the *Lessary* version of the same conduct test is acceptable. The Hawaii Supreme Court is not guilty of violating basic logic.

The *Lessary* test satisfies both of the interests underlying the Double Jeopardy Clause. Proportionality is served in that the *Lessary* test allows prosecutors greater latitude than under *Grady*. Under *Grady*, the State cannot use conduct proven in the first prosecution in order to prove *any* element in the second prosecution.[234] But under *Lessary*, the State *can* use conduct proven in the first prosecution as long as it does not use that conduct to prove *the act element*.[235] So, prosecutions that would be barred under *Grady* are not barred under *Lessary*. For example, under *Grady*, second prosecutions in both Justice Scalia's burglary/murder hypothetical[236] and the Hawaii Supreme Court's kidnapping/rape/murder hypothetical[237] would be barred. But under *Lessary*, second prosecutions in both hypotheticals would be permissible.[238] This means that prosecutors would have more opportunities to bring second prosecutions and avoid the disparity problem.[239] Therefore, *Lessary* serves the interest of proportionality better than *Grady*.[240]

Finality is served in that the *Lessary* test still protects defendants from abuse by authorities. Although finality is sacrificed somewhat by allowing more second prosecutions, the *Lessary* test still prevents the legis-

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[234] Grady v. Corbin, 495 U.S. 508, 521 (1990).

[235] State v. Lessary, 75 Haw. 446, 459 n.13, 865 P.2d 150, 156 n.13 (1994).

[236] *Grady*, 495 U.S. at 539; *see also supra* part III.E.2.

[237] *Lessary*, 75 Haw. 458, 865 P.2d at 156; *see also supra* part III.E.2.

[238] *See supra* text accompanying notes 222-32.

[239] *See* Thomas, *A Modest Proposal*, *supra* note 86, at 205-08; *supra* part III.E.1.

[240] One could argue that increasing the opportunities to bring second prosecutions merely protects sloppy prosecutors. If prosecutors would simply join all the charges in a single proceeding, double jeopardy would never be an issue. It is only because prosecutors fail to do so that double jeopardy cases occur. In other words, prosecutors should not make mistakes in the first place. However, simply asserting that prosecutors should not make mistakes begs the question. The question is not whether prosecutors should or should not make mistakes—clearly they should not. Rather, the question is what should be done once these mistakes are made. Prosecutors, like all human beings, are imperfect. When the inevitable mistake is made, to what extent should the defendant suffer and to what extent should society suffer? The *Lessary* test strikes a balance between the interests of the defendant and the interests of society.

lature from circumventing[241] the Double Jeopardy Clause by redefining statutory elements. Justice Souter's hypothetical[242] (simple robbery/ robbery in a dwelling/robbery with a firearm) is a good example. If the defendant is prosecuted for robbery in a dwelling, the *Lessary* test would prevent a second prosecution for robbery with a firearm. The conduct proven in the first prosecution would be the defendant's act of robbery. Since the State would be using the same conduct to prove the actus reus element in the prosecution for robbery with a firearm, the second prosecution would be barred. Under *Lessary*, conduct is still the focus of the double jeopardy analysis. Like the *Grady* test, the *Lessary* test avoids the problems associated with the same elements test.[243]

The *Lessary* test satisfies both proportionality and finality. The *Lessary* test is everything that the *Grady* test aspired (and failed) to be. It is a good compromise that satisfies both of the interests underlying the Double Jeopardy Clause.

E. An Alternate Interpretation of Lessary

Admittedly, it is possible to interpret *Lessary* in a manner contrary to the interpretation described in this casenote. One could argue that the court never intended to create a new double jeopardy test. The court meant what it said when it claimed it was adopting the *Grady* test. Since the court never intended to create a new double jeopardy test, *Lessary* should not be construed as creating one.

The problem with this interpretation is that *Lessary* does not actually apply the *Grady* test.[244] *Grady* expressly refers to "an essential element" of the second prosecution.[245] *Lessary*, however, focuses specifically on the actus reus element.[246] Footnote 13 and the references to "conduct element" in the text of the decision stand as proof of this assertion.[247]

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[241] *See* United States v. Dixon, 509 U.S. ____, 125 L. Ed. 2d 556, 601 (1993) (Souter, J., concurring in the judgment in part and dissenting in part); *supra* part III.E.2.

[242] *Dixon*, 509 U.S. at ____, 125 L. Ed. 2d at 601-02; *see also supra* part III.E.2.

[243] *See supra* part III.E.2.

[244] *See supra* part IV.C.

[245] Grady v. Corbin, 495 U.S. 508, 521 (1990).

[246] *See* State v. Lessary, 75 Haw. 446, 459 n.13, 460 & n.14, 865 P.2d 150, 156 nn.13 & 14, 157 (1994); *supra* part IV.C.

[247] *Lessary*, 75 Haw. at 459 n.13, 460 & n.14, 865 P.2d at 156 nn.13 & 14, 157.

So, in order to interpret *Lessary* as attempting to adopt the *Grady* test, one would have to admit that the Hawaii Supreme Court misunderstood *Grady*. The court misinterpreted *Grady* as focusing on the actus reus element rather than applying to any essential element.

In the alternative, one could argue that the court correctly understood *Grady*. The only reason why *Lessary* appears to focus on the actus reus element is that the language of the decision was somewhat inaccurate. This would require arguing not only that footnote 13 is dicta, but also that it is incorrect dicta which should be disregarded. In *Lessary*, the prosecutors did not attempt to use the conduct proven in the first prosecution in order to prove the defendant's *mental state*; rather, they used the conduct to prove only the act element.[248] The use of conduct to prove mental state was not at issue; therefore, footnote 13 is non-binding dicta. Since allowing the use of conduct to prove mental state conflicts with *Grady*,[249] the dicta in footnote 13 would be incorrect. The problem with this argument is that it would constitute an admission that the court placed incorrect dicta in its decision.

This argument would also require disregarding the court's repeated references to "conduct element" in the decision.[250] One would have to argue that although the court wrote "conduct element," it actually meant "essential element." So, making this argument would require an admission that the court used embarrassingly imprecise language in its decision.

In short, interpreting *Lessary* as simply adopting the *Grady* test would require admitting that either (1) the Hawaii Supreme Court did not understand *Grady* or (2) the court mistakenly included incorrect dicta and used imprecise language in its decision. Obviously, interpreting *Lessary* as a return to the *Grady* test would not reflect well upon the judicial craftsmanship of the Hawaii Supreme Court.

In any case, even if the court actually intended to adopt the *Grady* test (and only the *Grady* test), there are independent reasons for interpreting *Lessary* as adopting a new test. As described in Part III, the *Grady* test does not satisfy one of the two interests underlying the Double Jeopardy Clause: proportionality.[251] More importantly, the *Grady* test leads to serious contradictions within Hawai'i law.[252] The

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[248] *Id.* at 460 & n.14, 865 P.2d at 156 n.14, 157.

[249] *See Grady*, 495 U.S. at 521.

[250] *See Lessary*, 75 Haw. at 460 & n.14, 865 P.2d at 156 n.14, 157.

[251] *See supra* part III.E.2.

[252] *See supra* part IV.B.

Grady test is the practical equivalent of the same transaction test, but the same transaction test has been expressly rejected by the court.[253] So, regardless of the court's intent when it decided *Lessary*, there are strong reasons for interpreting *Lessary* as a new double jeopardy test. Whether the *Lessary* test was created intentionally or not, it is an important innovation.

V. Impact

The *Lessary* decision will certainly have a significant impact on Hawai'i law. The decision could also have a tremendous impact on other jurisdictions.

A. Impact on Hawai'i

Lessary is an extremely important case for those practicing criminal law in Hawai'i. At the very least, *Lessary* clarifies Hawai'i law in relation to the U.S. Supreme Court's decision in *Dixon*. It is now clear that double jeopardy law in Hawai'i is not limited to the same elements test.[254]

It is unfortunate, however, that the Hawaii Supreme Court chose to cast *Lessary* as simply a return to the *Grady* standard.[255] *Lessary*, in fact, has modified the *Grady* approach in a subtle but significant way.[256] Because of the discrepancy between the words of the court and the true effect of the decision, there may be some confusion among practitioners regarding the correct understanding of the same conduct test. Such confusion will not be dispelled until the court explicitly acknowledges the innovation it made in *Lessary*.

There are a number of specific measures that the Hawaii Supreme Court can take in order to clarify the meaning of *Lessary*. In the next double jeopardy case before the court, the court should abandon the language suggesting that the *Grady* test is the appropriate interpretation of the Hawaii Constitution's Double Jeopardy Clause.[257] The court should no longer quote the *Grady* formulation of the same conduct test as authority:

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[253] *See supra* part IV.B.

[254] *See Lessary*, 75 Haw. at 456-57, 865 P.2d at 155.

[255] *See id.* at 457-59, 865 P.2d at 155-56.

[256] *See id.* at 459 n.13, 865 P.2d at 156 n.13; *supra* part IV.

[257] *See Lessary*, 75 Haw. at 457-59, 865 P.2d at 155-56.

> [T]he 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.[258]

Instead, the court should openly discuss the differences between the *Grady* test and the *Lessary* test.[259] Furthermore, the court should reformulate the same conduct test so as to reflect the changes made to the test by *Lessary*. One possible reformulation would be:

> The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish the actus reus element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[260]

If the court takes these measures, double jeopardy law in Hawai'i will be greatly clarified.

B. Impact on Other Jurisdictions

Lessary could have an impact on other jurisdictions if scholars and jurists notice the subtle difference between the *Lessary* test and the *Grady* test.[261] The *Lessary* test is a definite improvement over the *Grady* test.[262] In those jurisdictions that choose to provide greater double jeopardy protection than under *Dixon*, the *Lessary* test could be an attractive alternative to the *Grady* test.[263]

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[258] Grady v. Corbin, 495 U.S. 508, 521 (1990).

[259] *See Lessary*, 75 Haw. at 459 n.13, 865 P.2d at 156 n.13; *supra* part IV.

[260] *Compare with Grady*, 495 U.S. at 521.

[261] *See Lessary*, 75 Haw. at 459 n.13, 865 P.2d at 156 n.13; *supra* part IV.

[262] *See supra* part IV.

[263] Since *Dixon*, the supreme courts of six other states have expressly considered whether to extend double jeopardy protection beyond the same elements test based on their state constitutions. Four of these courts have refused to do so, following *Dixon* instead. State v. Kurzawa, 509 N.W.2d 712 (Wis. 1994), *cert. denied*, ___U.S. ___, 114 S.Ct. 2712 (1994); People v. Allen, 868 P.2d 379 (Colo. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 129 (1994); State v. Keffer, 860 P.2d 1118 (Wyo. 1994); State v. Brooks, 629 A.2d 1347 (N.H. 1993).

The Michigan Supreme Court has reaffirmed its adoption of the same transaction test. People v. Harding, 506 N.W.2d 482 (Mich. 1993). The court originally adopted the same transaction test 20 years ago in People v. White, 212 N.W.2d 222 (Mich. 1973).

The Kentucky Supreme Court has adopted a double jeopardy test which is strikingly similar to the *Lessary* test. The court originally established this test in Ingram v.

It should also be noted that *Dixon* is not a particularly secure decision. *Dixon* was supported by only a five to four margin.[264] It is no more secure than *Grady* was three years ago.[265] Depending upon the changes that take place in the composition of the U.S. Supreme Court, *Dixon* could be overturned.[266] In that event, the *Lessary* test might be preferable to the *Grady* test as a replacement.

C. A Practical Illustration of the Lessary Test

The impact of *Lessary* largely depends upon whether practicing attorneys are able to understand the principles in the decision and apply these principles to the particular facts of a case. As an aid to

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Commonwealth, 801 S.W.2d 321 (Ky. 1990), but the court further developed it in Eldred v. Commonwealth, No. 91-SC-678-MR, 1994 WL 587834 (Ky. Oct. 27, 1994). The test has two parts. The first part is the familiar *Blockburger* same elements test. *Id.* at *12. The second part "prohibits multiple prosecutions where the offense(s) arose from a single act or impulse with no compound consequences." *Id.*

The Kentucky test is apparently related to the *Grady* same conduct test. In *Ingram*, the court cited *Grady* as an authority. *Ingram*, 801 S.W.2d at 323. However, the Kentucky test is actually somewhat narrower than the *Grady* test. In *Eldred*, the court noted that it had not specifically adopted *Grady* and that "the 'single act or impulse' test of Ingram would appear to be narrower than the same conduct test." *Eldred*, No. 91-SC-678-MR, 1994 WL 587834, at *12 n.9. The Kentucky test is narrower than the *Grady* test because the concept of "compound consequences" limits the second prong of the test. An example of compound consequences would be a defendant firing a machine gun into a crowd and killing a number of people. *Id.* at *12. Even though this would be a single act, multiple prosecutions for murder would be allowed. *Id.*

The Kentucky Supreme Court has done essentially the same thing as the Hawaii Supreme Court in *Lessary*. Both courts have adopted new double jeopardy tests that are related to, but distinct from, the *Grady* test. Both of the new tests are narrower than the *Grady* test. The Kentucky test is highly significant because it indicates that the Hawaii Supreme Court's approach in *Lessary* is not an aberration. At least one other state supreme court has developed its own double jeopardy test.

[264] *See supra* note 114.

[265] *See supra* note 111.

[266] The composition of the Court has already changed since *Dixon* was decided. Justice White retired and was replaced by Justice Ginsburg. Justice Blackmun retired and was replaced by Justice Breyer. Since both Justice White and Justice Blackmun were members of the *Dixon* minority, these particular changes probably will not affect double jeopardy law. *See supra* note 114. However, future changes might have an effect.

practitioners, this section illustrates how the various double jeopardy tests would be applied to the facts in a hypothetical case.[267]

The basic facts of the case are as follows: John and Jane Doe separate after a stormy marriage. Jane takes their children and moves in with her mother. She fears John because he has a violent temper and a drinking problem; however, she fails to obtain a temporary restraining order. One night, John arrives at his mother-in-law's home. He is in a foul mood and is determined to take out his frustrations on his estranged wife. He bangs on the door and tells Jane he wants to see her. Jane's mother tells him to go away. Instead, he goes around to the back of the house, finds an unlatched window, and pushes it open. He climbs through the window and rampages through the house. "Jane! Where are you?!" He finds her in her bedroom. Using his fists, he strikes her repeatedly upon the head and upper body. After

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[267] These facts were chosen with an eye toward selecting facts which are likely to be encountered in actual double jeopardy cases.

Most double jeopardy cases will probably involve an initial prosecution in family court and a subsequent prosecution in circuit court. The reason for this is that such cases are among the few that will be able to survive Hawai'i's compulsory joinder statute. HAW. REV. STAT. § 701-109(2) (1985, Supp. 1992, Comp. 1993 & Supp. 1994). Family court/circuit court cases fall under the exception to the statute for offense not within the jurisdiction of a single court. *Id.*; *see also supra* note 38.

The combination of charges in this case also seems likely to occur in practice. The defendant in this case is charged with abuse of a family member, assault, and burglary. At the very least, such a combination is plausible, especially in domestic violence situations.

Another possible type of double jeopardy case would involve an initial prosecution in district court for a minor traffic offense followed by a criminal prosecution in circuit court. *Grady*, in fact, involved traffic offenses. Grady v. Corbin, 495 U.S. 508, 511-14 (1990). However, due to recent changes in Hawai'i law, it is not entirely clear whether traffic offenses still trigger double jeopardy protection. Effective July 1, 1994, traffic offenses were decriminalized. HAW. REV. STAT. ch. 291D (1985, Supp. 1992, Comp. 1993 & Supp. 1994). "Traffic infractions shall not be classified as criminal offenses." *Id.* § 291D-3(a). Since double jeopardy only applies to criminal prosecutions, it is arguable that traffic offenses do not trigger double jeopardy protection. However, the decriminalization statute also includes an express exception: "Traffic infractions that involve an accident resulting in personal injury or property damage or are committed in the same course of conduct as a criminal offense for which the offender is arrested or charged shall not be adjudicated pursuant to this chapter, but shall be adjudicated by the appropriate district or circuit court . . . ." *Id.* § 291D-3(b). In other words, these particular types of traffic offenses have not been decriminalized. Since traffic offenses falling under this exception are exactly the type of cases that would involve successive prosecutions, it appears as though double jeopardy still applies to traffic cases.

several minutes, she loses consciousness. Shortly thereafter, the police arrive (Jane's mother called them). John is arrested and charged with abuse of a family or household member,[268] assault in the first degree,[269] and burglary in the second degree.[270] A few days later, he is arraigned in family court on the abuse charge. The prosecutor tells the court that the defendant "struck his wife's head and body with his fists several times." He is convicted and sentenced to thirty days in prison. The next day, John is arraigned in circuit court on the assault and burglary charges. The prosecutor submits a bill of particulars stating, among other things, that the prosecution will prove "the defendant broke into the house" and "beat the victim upon her head and upper body until she lost consciousness." John moves to dismiss on double jeopardy grounds.

The first step in double jeopardy analysis is application of the *Blockburger* same elements test.[271] The statutory elements of the crimes are compared. Each crime must have an element that the other does not; otherwise, the two crimes constitute the same offense and a second prosecution is barred.[272] Under the *Blockburger* test, abuse and assault are different offenses. Abuse requires that the victim be a family or household member, assault does not.[273] First degree assault requires serious bodily injury, abuse does not.[274] Similarly, abuse and burglary are different offenses under the *Blockburger* test. Abuse requires physical abuse, burglary does not.[275] Burglary requires entering a building,

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[268] HAW. REV. STAT. § 707-906 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[269] *Id.* § 707-710.

[270] *Id.* § 708-811.

[271] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[272] *Id.*

[273] HAW. REV. STAT. §§ 707-906, 707-710 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[274] *Id.* Serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 707-700. Abuse, on the other hand, requires "physical abuse." *Id.* § 707-906. Physical abuse can be distinguished from serious bodily injury. A slap in the face would probably be considered physical abuse but would not be considered serious bodily injury. Physical abuse seems to apply to any physical harm inflicted upon the victim. Serious bodily injury, however, seems to refer only to a particularly high degree of harm. In other words, assault has an element not possessed by abuse: the requirement of an additional degree of harm that would make the injury "serious."

[275] *Id.* §§ 707-906, 708-811.

abuse does not.[276] Therefore, the same elements test does not bar a second prosecution on either the assault charge or the burglary charge.

Under *Lessary*, the next step is to examine conduct.[277] The State cannot use conduct proven in the first prosecution in order to satisfy the actus reus element of the second prosecution.[278] A second prosecution on the assault charge would be barred under *Lessary*. The conduct proven in the first prosecution is John's act of beating his wife. The actus reus element of assault is "caus[ing] serious bodily injury to another person."[279] Obviously, the prosecutor is using John's act of beating his wife in order to prove that John caused serious bodily injury to her. So, *Lessary* would bar prosecution on the assault charge.

However, *Lessary* would not bar prosecution on the burglary charge. As previously mentioned, the conduct proven in the first prosecution is John's act of beating his wife. The actus reus element of second degree burglary is "enter[ing] a building."[280] The prosecutor clearly is not using John's act of beating his wife to prove that he entered a building. Indeed, the fact that he beat his wife is irrelevant to entering a building. To prove the actus reus element of burglary, the prosecutor must rely upon John's act of breaking into the house. Since this conduct was not proven in the first prosecution, it can be used in the second. Therefore, *Lessary* would not bar prosecution on the burglary charge.

Under *Lessary*, the prosecutor could use John's act of beating his wife to prove the *intent* element of burglary. Although the State cannot use conduct underlying the first prosecution to prove the actus reus element in the second, the State can use such conduct to prove the mens rea element.[281] The mens rea element of burglary is "intent to commit therein a crime against a person or against property rights."[282] Assault is a crime against the person.[283] So, in other words, in this case the intent element of burglary is actually specific intent to commit assault.[284] In summary, the prosecutor could use John's act of beating

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[276] *Id.*

[277] State v. Lessary, 75 Haw. 446, 460 & n.14, 865 P.2d 150, 156 n.14, 157 (1994).

[278] *Id.*

[279] HAW. REV. STAT. § 707-710 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[280] *Id.* § 708-811.

[281] *Lessary*, 75 Haw. at 459 n.13, 865 P.2d at 156 n.13.

[282] HAW. REV. STAT. § 708-811 (1985, Supp. 1992, Comp. 1993 & Supp. 1994).

[283] *Id.* § 707-710.

[284] *See id.* §§ 707-710, 708-811. Specific intent to commit *assault* is required instead of specific intent to commit *abuse* because abuse is not a crime against the person; rather, it is a crime against the family and incompetents. *Id.* § 709-906.

his wife to prove that John had the specific intent to commit assault, which in turn constitutes the intent element of burglary.[285]

Applying the *Grady* test to these facts would lead to a very different result. Under *Grady*, the conduct underlying the first prosecution cannot be used to prove any essential element of the second.[286] The intent element of burglary would be an essential element. So, the prosecutor could not use John's act of beating his wife to prove the intent element of burglary. Unlike the *Lessary* test, the *Grady* test would bar a second prosecution for burglary as well as assault.

The same transaction test would lead to the same result as the *Grady* test.[287] Under the same transaction test, all charges must be joined in one prosecution if they are based on the same transaction or occurrence.[288] The assault and burglary charges stem from the same transaction as the abuse charge. Since the assault and burglary charges were not joined with the abuse charge, both of them would be barred.

VI. Conclusion

The Hawaii Supreme Court has made an important contribution to the law of double jeopardy. The court has developed a new double jeopardy test: the State cannot use conduct relied upon in the first prosecution in order to prove the actus reus element of the second prosecution.

The *Lessary* test represents a significant improvement over the *Grady* test. Although it prevents the use of conduct to prove the act element in the second prosecution, it permits the use of that conduct to prove mental state or any other element. In allowing prosecutors more opportunities to bring a second prosecution, it serves the interest of proportionality better than the *Grady* test. But since the test is still essentially based on conduct, it provides greater protection for defendants than the *Blockburger* test alone. Because it satisfies both propor-

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[285] Note that a very fine line is being drawn here. *Lessary* bars the use of John's conduct to prove the actual assault charge, but *Lessary* permits the use of John's conduct to prove intent to commit assault. The key concept is that, in this case, the intent element of *burglary* consists of the intent to commit *assault*. Keep in mind that intent to commit assault is not being used to prove assault, rather it is being used to satisfy the intent element of burglary.

[286] Grady v. Corbin, 495 U.S. 508, 521 (1990).

[287] *See supra* part III.E.2 (arguing that the two tests are practical equivalents).

[288] Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring).

tionality and finality, the *Lessary* test satisfies the interests underlying the Double Jeopardy Clause better than any other test developed so far.

The *Lessary* test has great potential. Whether that potential is realized depends upon the reaction of scholars and jurists. If scholars welcome the *Lessary* test and courts adopt it, *Lessary* could bring some balance and consistency to double jeopardy law. Double jeopardy analysis would no longer be the "Sargasso Sea" that so concerned Chief Justice Rehnquist.

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State v. Furutani: Hawai'i's Protection of a Defendant's Right to a Fair Trial — Verdict Impeachment Made Easy

TABLE OF CONTENTS

I. INTRODUCTION

The Sixth Amendment to the United States Constitution[1] and article I, section 14 of the Hawaii Constitution,[2] as well as principles of due

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[1] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.

[2] Article I, § 14 of the Hawaii Constitution (1978) provides in relevant part that "[in] all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed. . . ." CONST. art. I, § 14.

process under both the state and federal constitutions,[3] guarantee to the criminally accused a fair trial by an impartial jury. Unfortunately, these words provide little guidance with regard to what exactly constitutes a fair trial or an impartial jury and to what lengths the state is required to go to ensure that a litigant has received a fair trial. Moreover, because historically courts and legislatures have zealously protected the secrecy of jury deliberations, it is difficult for a litigant to challenge a verdict by a jury she or he believes was unfair.[4]

Federal Rule of Evidence 606(b) reflects a long-established policy of protecting the secrecy of jury deliberations.[5] Federal Rule of Evidence 606(b) prohibits a juror from testifying as to any statements made during jury deliberations.[6] By contrast, Hawaii Rule of Evidence 606(b) does allow testimony regarding statements made during jury deliberations.[7] Furthermore, Hawai'i courts have shown an increasing willingness to invade the jury room and investigate verdicts to ensure that a defendant has received a fair trial.[8]

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[3] Duncan v. Louisiana, 391 U.S. 145, 149 (1968)(holding that the Sixth Amendment to the United States Constitution guarantees "trial, by an impartial jury. . ." in federal criminal prosecutions, because "trial by jury in criminal cases is fundamental to the American scheme of justice. . . ." The due process clause of the Fourteenth Amendment guarantees the same right to defendants in state criminal prosecutions.); State v. Altergott, 57 Haw. 492, 495, 559 P.2d 728, 731-32 (1977)(stating that "the right of trial by an impartial jury is guaranteed to a criminal defendant by the state constitution and by the Sixth Amendment of the federal constitution as applicable to the States through the Fourteenth Amendment, as well by principles of due process under both the state and federal constitutions."

[4] Susan Crump, *Jury Misconduct, Jury Interviews And The Federal Rules Of Evidence: Is The Broad Exclusionary Principal Of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 510 (1988).

[5] *Id.* at 509.

[6] FED. R. EVID. 606(b).

[7] Hawaii Rule of Evidence 606(b) provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may the juror's affidavit or evidence of any statement by the juror indicating an effect of this kind be received." HAW. R. EVID. 606(b).

[8] *See* State v. Sugiyama, 71 Haw. 389, 791 P.2d 1266 (1990)(finding juror competent to testify about another juror's statements regarding failure of defendant to testify); Stratis v. Pacific Ins. Co., Ltd., 7 Haw. App. 1, 739 P.2d 251 (1987)(finding juror competent to testify regarding unauthorized personal inspection of fire site); State v. Larue, 68 Haw. 575, 722 P.2d 1039 (1986)(finding juror competent to testify about statement during deliberations regarding her personal experience with child abuse).

Inevitably, jurors will bring their own biases into the jury room.[9] However, through voir dire an attorney is able to attempt to eliminate "biased" jurors either by exercising a challenge for cause or a peremptory challenge.[10] For this procedure to work effectively, the juror must answer questions during voir dire truthfully.[11] Moreover, if a juror is found to have lied during voir dire, the defendant may be entitled to a new trial because the verdict was not rendered by a fair and impartial jury.[12]

The Hawaii Supreme Court, in *State v. Furutani*,[13] held that the defendant was deprived of a fair trial because during deliberations the

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[9] Beck v. Alabama, 447 U.S. 625, 642 (1980)("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them."); Toth v. Quarles, 350 U.S. 11, 18 (1955)("Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits.")

[10] Pruett v. Thigpen, 665 F.Supp. 1254, 1263 (N.D. Miss. 1986)("The principal way in which this right to trial by indifferent jurors is secured is through the system of challenges exercised during voir dire."); Holland v. Illinois, 493 U.S. 474, 484 (1990)("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.")(citations omitted).

[11] State v. Hatcher, 835 S.W.2d 340 (Mo.App. 1992).

> The right of a defendant to a fair and impartial jury is one of the fundamental principles of the American legal system. In order to meaningfully exercise this right, a defendant interrogates prospective jury members in order to reach his own conclusions as to who should sit on that jury. It is the duty of each prospective juror to answer the questions propounded to him fully, fairly and truthfully in order that his qualifications be assessed and that the challenges, peremptory or for cause, be utilized intelligently.

Id. at 342; United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980)("Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answer on voir dire, the result is deprivation of the defendant's right to a fair trial.")(footnote omitted).

[12] McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). In *McDonough*, the Court set forth the following standard for determining when juror responses at voir dire necessitate a new trial:

> to obtain a new trial. . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556.; Lopez v. State, 527 N.E.2d 1119, 1130 (Ind. 1988)("proof that a juror was biased against the defendant or lied on voir dire [to the defendant's prejudice] entitles the defendant to a new trial.")

[13] 76 Haw. 172, 873 P.2d 51 (1994).

jurors discussed the defendant's failure to testify and present evidence even though the jurors had given no indication on voir dire that they could not follow the court's instruction not to hold against the defendant his failure to testify or present evidence.[14] Consequently, the court affirmed the trial court's granting of the defendant's motion for new trial.[15]

In so ruling, the Hawaii Supreme Court moves against the national trend toward a more restrictive approach in the law governing impeachment of jury verdicts.[16] In contrast to other federal and state courts, Hawai'i courts have adopted a more liberal approach with regard to inquiries into jury verdicts and the impeachment of those verdicts.[17] For better or worse, Hawai'i has chosen to place a higher value on the defendant's right to a fair trial than on public policy concerns about protecting individual jurors and the jury system.

This article examines the propriety of Hawai'i's choice by examining the Hawaii Supreme Court's recent holding in *State v. Furutani*.[18] First, this article discusses the historical background and policy reasons for the rule prohibiting juror testimony to impeach a verdict. Then, it examines Hawai'i's variant of Federal Rule of Evidence 606(b).[19] Next, it discusses the facts and decision in *Furutani* and analyzes the court's reasoning. Finally, it comments on the possible impact of the *Furutani* decision.

II. Background

A. History of the inadmissibility of a juror's testimony to impeach a verdict

The principle of prohibiting the use of juror testimony to impeach a verdict was first set forth in the English case *Vaise v. Delaval*.[20] In *Vaise*, Lord Mansfield, who authored the opinion, stated:

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[14] *Id.*

[15] *Id.* at 180, 873 P.2d at 59.

[16] James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 St. John's L. Rev. 389, 437-38 (1991)(noting trend toward more restrictive approach evidenced by courts expanding the scope of Federal Rule 606(b) and limiting the application of its exceptions).

[17] *See supra* note 8.

[18] 76 Haw. 172, 873 P.2d 51.

[19] Fed. R. Evid. 606(b).

[20] Peter N. Thompson, *Challenge To The Decisionmaking Process—Federal Rule Of Evidence 606(b) And The Constitutional Right To A Fair Trial*, 38 Sw. L.J. 1187, 1196-97 (1985)(citing Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)).

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor, but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.[21]

Vaise became the basis for American courts limiting post-trial juror testimony.[22]

There are several policy reasons for barring juror testimony. Such a restriction protects the privacy and confidentiality of jury deliberations, which ensures free exchange of ideas in the jury room.[23] The restriction discourages harassing, intimidating, or tampering with jurors.[24] Also, it ensures the finality of the jury decision.[25] In *McDonald v. Pless*,[26] the United States Supreme Court warned of the negative effects of allowing verdicts to be set aside based on the testimony of participating jurors:

> [j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference. . . .
>
> For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.'[27]

Despite the adoption of Federal Rule of Evidence 606(b) in 1975, it is still unclear when a juror is competent to testify to impeach his or her verdict.[28] Specifically, once misconduct or impropriety is estab-

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[21] *Id.*

[22] *Id.*

[23] *Id.*; Diehm, *supra* note 16, at 394.

[24] *Id.*

[25] *Id.*

[26] 238 U.S. 264 (1915).

[27] *Id.* at 267-68 (quoting Cluggage v. Swan, 4 Binn. 155, 5 Am. Dec. 400; Straker v. Graham, 4 Mees. & W. 721, 7 Dowl. P.C. 223, 1 Horn & H. 449, 8 L.J. Exch. N.S. 86).

[28] *See* Thompson, *supra* note 20, at 1206-08 (noting that Federal Rule of Evidence 606(b) has generated litigation in the federal courts regarding its application and interpretation).

lished, the extent to which jurors may testify about the impact the misconduct or impropriety had on the verdict is uncertain.[29] Apparently, courts are still struggling with the competing concerns of needing to protect the individual juror and jury system on the one hand and ensuring that the verdict accurately reflects the decision of a fair and impartial jury on the other.[30] This struggle is clearly demonstrated by the United States Supreme Court's consideration of the issue in its 1987 decision *Tanner v. United States*[31], and the subsequent debate that the decision sparked.[32] With the *Tanner* decision, the United States Supreme Court effectively adopted the position that the jury system must be protected at all costs, even at the expense of possibly denying a defendant a fair trial.[33]

B. Federal Rule of Evidence and Hawaii Rule of Evidence 606(b)

In 1981, Hawai'i adopted the Federal Rules of Evidence with some notable exceptions. Among these is the difference between Federal Rule of Evidence 606(b) and Hawaii Rule of Evidence 606(b). Federal Rule of Evidence 606(b) states:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. . .[n]or may a juror's affidavit or evidence of any statement by the juror. . .be received for these purposes.[34]

The version which Hawai'i adopted excludes the words "as to any matter or statement occurring during the course of the jury's deliber-

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[29] *Id.* at 1208-1209 n.180.

[30] Diehm, *supra* note 16, at 416.

[31] 483 U.S. 107 (1987). In a five to four opinion, the court held that the District Court had not erred in refusing to hold an evidentiary hearing at which jurors would testify on juror alcohol and drug use during the trial.

[32] *See* Mark Cammack, *The Jurisprudence Of Jury Trials: The No Impeachment Rule And The Conditions For Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57 (1993); Crump, *supra* note 4, at 509; *Racist Juror Misconduct During Deliberations in Developments In The Law—Race And The Criminal Process*, 101 HARV. L. REV. 1472, 1595(1988); Diehm, *supra* note 16; Margaret Carolyn Kelsey, *Trial Control of the Jury*, 76 GEO. L.J. 971 (1988); Leslie Y. Kim, *Influences on the Jury*, 80 GEO. L.J. 1396 (1992).

[33] *Tanner*, 483 U.S. at 127.

[34] FED. R. EVID. 606(b).

ation.''[35] Thus, in Hawai'i, jurors are allowed to testify to objective actions which occur in the jury room and are only precluded from testifying as to the *effect* of these statements.[36]

Consequently, Hawai'i does not follow the position advocated by Congress and most federal and state courts of restricting post-trial scrutiny of jury verdicts.[37] Instead, the Hawai'i version of Federal Rule 606(b) seeks to strike a proper balance between the competing interests of fair trial and juror secrecy by excluding testimony relating to the internal deliberative process but allowing testimony about objective misconduct and irregularities.[38] Hawai'i case law reveals a remarkable willingness on the part of the Hawai'i courts to put aside concerns regarding protection of the jury system in favor of ensuring that each

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[35] HAW. R. EVID. 606(b). When Hawai'i was debating the adoption of the Federal Rules, the drafters were confronted with choices between the original federal proposal and the version which was eventually adopted by Congress. The commentary to the rule reflects the Hawai'i drafters conclusion that objective forms of juror misconduct should not be insulated from subsequent scrutiny. First, the commentary includes the Advisory Committee of the Judicial Conference's Note to the original federal proposal upon which subsection (b) is modeled:

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. . . . The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion.

Id. (alteration in original). Second, the commentary indicates that the original version was consistent with prior Hawai'i case law. For example, under the Hawai'i version jurors would be competent to testify to the consumption of alcoholic beverages by deliberating jurors, a matter which under some circumstances may be cause for setting aside a verdict. HAW. R. EVID., Title 33, Chapter 626, 1994 Special Pamphlet, Commentary at 71. (citing Kealoha v. Tanaka, 45 Haw. 457, 370 P.2d 468 (1962). In *Kealoha*, a deliberating jury repaired to the Halekulani Hotel, consumed alcoholic beverages, and thereafter returned a hasty verdict. Although the *Kealoha* holding did not relate to juror competency, the case is relevant because the jurors would not be competent to testify about their drinking activities under the federal rule but would qualify to testify under the Hawai'i rule. Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 454 (1981).

[36] Objective juror misconduct may also be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington. FED. R. EVID. 606(b).

[37] Diehm, *supra* note 16, at 437-38.

[38] HAW. R. EVID., Title 33, Chapter 626, 1994 Special Pamphlet, Commentary at 71.

particular verdict has been rendered by a fair and impartial jury.[39] However, Hawaii Rule of Evidence 606(b) makes no attempt to specify substantive grounds for setting aside verdicts when there is juror misconduct.[40]

III. Facts and Decision

In *State v. Furutani*,[41] the defendant, Henry H. Furutani, had been the Kauai County Treasurer for approximately six years until he abruptly departed, without explanation, on October 13, 1989.[42] The Treasury Division, which Furutani ran during that period, was responsible for collecting all money due to the county of Kauai (including property taxes, motor vehicle and license registration fees), depositing that money into the appropriate County bank account, and paying the County's bills.[43] When Furutani disappeared after having failed to present the Treasury Division auditors with a complete reconciliation of the Division's bank statements and checkbooks, the County retained a private C.P.A. to do the reconciliation.[44] The reconciliation uncovered a $1.3 million shortfall.[45] "This is believed to be the largest theft ever committed by a public official" against the state or a county in Hawai'i.[46] Ultimately, the money was never recovered, but there was speculation that Furutani used it to pay gambling debts in football pools in both Hawai'i and Las Vegas.[47] Moreover, in a statement to the court's parole officer, Furutani admitted to having a gambling problem.[48]

On June 25, 1990, the Fifth Circuit Court Grand Jury returned an indictment against Furutani charging him with two counts of theft in

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[39] *See supra* note 8.

[40] Haw. R. Evid., Title 33, Chapter 626, 1994 Special Pamphlet, Commentary at 71.

[41] 76 Haw. 172, 873 P.2d 51 (1994).

[42] Jan TenBruggencate, *Furutani: I'm guilty*, Honolulu Advertiser, Sept. 20, 1994, at A3.

[43] Appellant's Opening Brief at 3-4, State v. Furutani, 76 Haw. 172, 873 P.2d 51 (No. 91-0059)(1994).

[44] *Id.*

[45] *Id.*

[46] Jan TenBruggencate, *Record Theft Nets Furutani 10 Years*, Honolulu Advertiser, Dec. 14, 1994, at A3 (quoting Deputy State Attorney General Lawrence Goya).

[47] TenBruggencate, *supra* note 42.

[48] TenBruggencate, *supra* note 46.

the first degree, two counts of ownership or operation of a business by certain persons prohibited, one count of theft in the second degree, one count of forgery in the second degree, and three counts of failure to report income.[49] On April 15, 1991, the grand jury added an additional count of theft in the first degree.[50] The two cases were consolidated on May 13, 1991.[51]

The trial began on May 13, 1991, with jury selection.[52] During voir dire, Furutani's attorney remarked to the jury that one of the rules in criminal law is that a defendant is not required to testify and consequently, a juror cannot infer anything from the fact that the defendant chooses not to testify or present evidence.[53] Furutani's attorney asked, "Do you all feel that you can bring that into the courtroom, that kind of feeling as a member of the jury?"[54] A videotaped record of the proceedings failed to reflect any discernible response to these statements or question from any member of the jury panel.[55]

A jury of twelve, plus three alternates, was selected after the exercise of three peremptory challenges each by the prosecution and defense counsel.[56] At trial, Furutani exercised his Constitutional right not to testify and presented no evidence for his case.[57] Before the jury retired to the jury room to render its decision, the circuit court instructed the jury, by agreement of the parties, that "[Furutani] does not have any burden or duty to call any witnesses or produce any evidence, and you must not draw any inference unfavorable to [Furutani] because he did not testify in this case, or give any consideration to this fact in your deliberation."[58]

Furutani was found guilty of all charges except one count of theft in the second degree.[59] Several hours after the verdicts were returned, a complaining juror contacted the circuit court and defense counsel to announce that she had changed her mind about the verdict.[60] Besides

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[49] Appellant's Opening Brief at 3, *Furutani* (No. 91-0059).
[50] *Id.*
[51] *Id.*
[52] State v. Furutani, 76 Haw. 172, 176, 873 P.2d 51, 55 (1994).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 176-77, 873 P.2d at 55-56.
[59] *Id.* at 177, 873 P.2d at 56.
[60] *Id.*

claiming that she had been pressured to vote by other jurors who wanted to go home for the weekend, she stated that she had voted to convict on certain counts because another juror had opined during deliberations that if the signatures were not Furutani's, Furutani would have taken the stand and said so.[61]

The prosecution retained a private investigator to contact the foreperson of the jury and conduct a phone interview regarding the juror's statement.[62] Having learned that one or more jurors may have improperly considered Furutani's failure to testify or present evidence in his own behalf, the circuit court conducted an evidentiary hearing to determine whether any statements to that effect were made.[63] All twelve jurors were called to testify and were examined by both the prosecutor and defense counsel.[64] The record reflected that eight of the twelve jurors recalled that general comments were made in the course of deliberations regarding Furutani's failure to testify in his own behalf.[65]

The foreperson testified that "everybody had it in their mind because after we got through everybody said, yeah[,] we thought about it. . . ."[66] The complaining juror testified that "one of the exact statements was. . .'He [Furutani] didn't go up there and say that he wasn't guilty so he's guilty.'"[67] Another juror recalled that a member of the panel wondered aloud, "'[W]hy didn't he testify and. . . try to prove himself innocent?'"[68] An additional juror remembered the sentiment being expressed that, because Furutani did not testify in his own behalf, he was hiding something.[69] Moreover, nine jurors recalled comments from one or more of their fellows that defense counsel should have presented affirmative evidence of Furutani's innocence.[70] "One juror remembered the following statement: '[H]ow come he didn't have anybody to testify for him if he was innocent[?]'"[71]

In response to this testimony, Furutani filed a written motion for new trial, which the circuit court granted, concluding as a matter of

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 178, 873 P.2d at 57.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

law "that the possible misconduct at voir dire and the misconduct during deliberations deprived [Furutani] of a trial by twelve fair and impartial jurors."[72] The state appealed this decision.[73]

The ultimate issue on appeal was whether the circuit court committed an abuse of discretion when it concluded that "possible" jury misconduct at voir dire, in combination with jury misconduct during deliberations, deprived Furutani of a trial by twelve fair and impartial jurors.[74] The Hawaii Supreme Court held that the circuit court did not abuse its discretion in ordering a new trial when it concluded that "possible" jury misconduct at voir dire and juror misconduct during deliberations, deprived Furutani of a trial by twelve fair and impartial jurors.[75]

IV. Analysis

The Hawaii Supreme Court's analysis in *Furutani* reveals an overriding concern for a defendant's right to a fair and impartial trial. The Hawaii Supreme Court began its analysis by setting forth the standard for determining whether juror misconduct dictates the granting of a new trial in a criminal case.

In Hawai'i, the defendant bears the initial burden of making a prima facie showing of a deprivation that "could substantially prejudice [his or her] right to a fair trial. . ." by an impartial jury.[76] If the trial court determines that such a prima facie showing has been made, "[t]he trial judge is then duty bound to further investigate the totality of circumstances surrounding the [alleged deprivation] to determine its impact on jury impartiality."[77] Moreover, a rebuttable presumption of

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[72] *Id.*

[73] *Id.*

[74] *Id.* at 180, 873 P.2d at 59.

[75] *Id.* On September 19, 1994, to avoid a second trial, Furutani entered guilty pleas to three charges: first-degree theft, a racketeering count that prohibits diverting stolen money into a business, and second-degree forgery. TenBruggencate, *supra* note 42; On December 13, 1994, Judge Clifford Nakea sentenced him to ten years on each of the first two counts and five years for forgery. Also, Furutani is required to pay the $1.3 million back. Furutani starts his sentence on January 2, 1995. TenBruggencate, *supra* note 46.

[76] *Furutani*, 76 Haw. at 181, 873 P.2d at 60 (quoting State v. Williamson, 72 Haw. 97, 102, 807 P.2d 593, 596 (1991)); *cf.* Lopez v. State, 527 N.E.2d 1119, 1130 (Ind. 1988)("A defendant seeking a hearing on juror misconduct must first present some specific, substantial evidence showing a juror was possibly biased.").

[77] *Williamson*, 72 Haw. at 102, 807 P.2d at 596.

prejudice is raised, and the burden shifts to the prosecution to prove beyond a reasonable doubt that the alleged deprivation was harmless.[78] In *Furutani*, the Hawaii Supreme Court supported its holding to affirm the circuit court's decision to grant a new trial on two grounds: (1) juror nondisclosure during voir dire and (2) juror misconduct during deliberations.[79]

A. Juror nondisclosure during voir dire

After listing factors that various jurisdictions require for a defendant to establish a prima facie case for improper juror nondisclosure,[80] the Hawaii Supreme Court adopted the standard set forth by the Colorado Supreme Court in *People v. Dunoyair*[81]:

> Under some circumstances a juror's nondisclosure of information during jury selection may be grounds for a new trial. Where, for example, a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary. In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter.[82]

The court also indicated that it agreed with the Colorado Supreme Court that proof of a juror's "inadvertent" nondisclosure of information "of only peripheral significance" fails to meet the defendant's prima facie burden of demonstrating presumptive prejudice.[83]

Unfortunately, the *Dunoyair* court offered no specific definition of "inadvertent." However, an examination of the circumstances surrounding the defendant's nondisclosure provides some guidance. In *Dunoyair*, the defendant argued that he was denied a fair trial because during voir dire a juror had failed to disclose his acquaintance with one of the prosecution witnesses.[84] During voir dire, the jurors had been presented with a list of prosecution witnesses and asked whether

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[78] *Id.*

[79] *Furutani*, 76 Haw. at 181, 185, 873 P.2d at 60, 64.

[80] *Id.* at 181, 873 P.2d at 60.

[81] 660 P.2d 890 (Colo. 1983).

[82] *Furutani*, 76 Haw. at 181-82, 873 P.2d at 60-61 (quoting *Dunoyair*, 660 P.2d at 895).

[83] *Id.*

[84] *Dunoyair*, 660 P.2d at 895.

they knew any of the witnesses.[85] Although one juror had not recognized a witness' name from the list, during trial, he realized that he was acquainted with one of the witnesses.[86] In characterizing the nondisclosure to be "inadvertent," the Colorado Supreme Court focused on the fact that the juror did not intentionally or deliberately try to conceal the information on voir dire.[87] Rather, the juror's failure to disclose appeared to have been an honest mistake.[88] In addition, the Colorado Supreme Court indicated that a juror's failure to disclose through forgetfulness may be considered "inadvertent."[89] Furthermore, in the absence of evidence that the juror's acquaintance with the witness affected in any manner his ability to decide the case in accordance with the evidence and the law, the Colorado Supreme Court found that the circumstances surrounding the nondisclosure did not merit a new trial.[90] Consequently, according to *Dunoyair*, absent a showing of actual bias or prejudice, only proof of a deliberate concealment gives rise to a presumption that the juror was likely incapable of rendering a fair and impartial verdict.[91]

After announcing its adoption of the *Dunoyair* rule, the Hawaii Supreme Court applied it to and distinguished it from its prior decisions in *State v. Larue*[92] and *State v. Sugiyama*.[93] In *Larue*, the Hawaii Supreme Court held that a juror's failure to reveal during voir dire her personal experience with child abuse violated the defendant's right to an impartial jury, because the juror made statements during deliberations about this experience to buttress the reliability of the child's testimony.[94] Reversing the defendant's conviction, the court ruled that:

> Had [the] foreperson revealed the experience, and her recollection thereof, during the voir dire, there can be no question that she would have been subject to a challenge for cause, because it is clear that, given the central

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[85] *Id.* at 893.

[86] *Id.*

[87] *Id.* at 895.

[88] *Id.*

[89] *Id.* at 895 (citing Moynahan v. State, 334 A.2d 242 (1974)). In *Moynahan*, the court found that the juror's failure to disclose, through forgetfulness, a prior attorney-client relationship with the prosecutor ten years prior to trial did not justify a new trial. *Id.*

[90] *Dunoyair* 660 P.2d at 895-96.

[91] *Id.* at 896.

[92] 68 Haw. 575, 722 P.2d 1039 (1986).

[93] 71 Haw. 389, 791 P.2d 1266 (1991).

[94] 68 Haw. 575, 722 P.2d 1039.

> issue of reliability of the children's statements in this case, a person with such an experience and recollection thereof cannot, no matter how hard they try, really be an impartial juror.[95]

In *Furutani*, the Hawaii Supreme Court acknowledged that in *Larue* the foreperson's failure to reveal the experience and her recollection of it during voir dire was "innocent" and "inadvertent" rather than a "deliberate misrepresentation" as required by the *Dunoyair* rule.[96] Therefore, in a footnote, the *Furutani* court strained to reconcile *Larue* with its decision to adopt the *Dunoyair* rule.[97] The court pointed out that in *Larue* the record established "that the foreperson both consciously relied on her personal childhood experience as a sex assault victim and, based on that experience, communicated her assessment of the credibility of the children's testimony to her fellow jurors."[98] Therefore, the court reasoned that the *Larue* juror's failure to disclose her bias amounted to a "knowing concealment" as required by the *Dunoyair* rule.[99]

Under the more expansive definition of "knowing concealment" which the *Furutani* court has adopted, any subsequent claim of juror bias may call into question the validity of the verdict. Consequently, in stretching to accommodate prior case law, the *Furutani* court has succeeded in undermining the very purpose of the rule: to limit juror testimony regarding bias to instances when the juror intentionally lied during voir dire.

The court did not have to expand the definition of "knowing concealment" to avoid overruling *Larue*. Instead, the Court could have focused on the significance of the nondisclosure rather than the intent of the juror. Unlike the juror's nondisclosure in *Dunoyair*, the juror's nondisclosure in *Larue* was anything but of "peripheral significance," given the "centrality" of the reliability of the children's testimony.[100] Consequently, regardless of whether the juror's failure to reveal her experience and recollection during voir dire was innocent or inadvertent, her action of bringing it up during deliberations called into

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[95] *Id.* at 578, 722 P.2d at 1042.

[96] *Furutani*, 76 Haw. at 182, 873 P.2d at 61 n.13 (quoting *Larue*, 68 Haw. at 578, 722 P.2d at 1042).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 182, 873 P.2d at 61.

question whether the decision rendered by either her or the jury could have been unbiased.[101]

Furthermore, the *Furutani* court was incorrect in stating that the *Larue* court established that the juror had *relied* upon her experience when determining the credibility of the child.[102] If this were true, it would mean that the court had elicited testimony regarding the effect of the juror's improper action, which is barred by Hawaii Rule of Evidence 606(b). Instead, the *Larue* court granted the defendant a new trial because it was "impossible to say that beyond a reasonable doubt, the seven jurors who heard the remark" made by one juror regarding her experience when she was young "were not influenced thereby in reaching their verdict."[103]

In *Sugiyama*,[104] the Hawaii Supreme Court held that the trial court abused its discretion in refusing to grant a new trial when, during voir dire, a juror gave an untruthful answer.[105] The juror in *Sugiyama* was specifically asked: "Will you hold it against the defendant if he doesn't testify?" The juror answered "No."[106] The court held:

> [I]n this case had the juror in question responded truthfully to the voir dire inquiry he would have been excused for cause because he could not be an impartial juror. A criminal defendant is entitled to twelve impartial jurors. [The defendant] in this case, because of the false answer, did not have a trial before twelve impartial jurors. The trial court abused its discretion in refusing to grant a new trial.[107]

In examining *Sugiyama*, the *Furutani* court correctly noted that the facts in *Sugiyama* are different than those in *Furutani* in one key respect.[108] None of the jurors in *Furutani* actually uttered an untruthful statement during voir dire because Furutani's counsel failed to obtain any articulated answers to his questions regarding the defendant's right to remain silent and to refrain from presenting exculpatory evidence.[109] Consequently, the *Furutani* court focused on the fact that the jurors

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[101] *See Larue*, 68 Haw. at 578, 722 P.2d at 1042.
[102] *Furutani*, 76 Haw. at 182, 873 P.2d at 61 n.13.
[103] *Larue*, 68 Haw. at 578, 722 P.2d at 1042.
[104] *Sugiyama*, 71 Haw. 389, 791 P.2d 1266 (1991).
[105] *Id.*
[106] *Id.* at 389, 791 P.2d at 1267.
[107] *Id.*
[108] *Furutani*, 76 Haw. at 184, 873 P.2d at 63.
[109] *Id.*

had the opportunity to reveal their bias.[110] Interestingly, the *Furutani* court adopted the converse of the *Dunoyair* rule as also being true. The court stated: "'[I]nsofar as a 'juror's. . . knowing concealment [can] itself [be] evidence that the juror was likely incapable of rendering a fair and impartial verdict,' . . . direct evidence of incapability of rendering a fair and impartial verdict may legitimately give rise to an inference of prior knowing concealment.'"[111] Therefore, the court found that the testimony of the jurors' statements during deliberations constituted substantial evidence on the basis of which the circuit court could infer that one or more jurors had, during voir dire, knowingly concealed a bias against defendants who failed to testify or present evidence of their innocence.[112]

The adoption of the converse of the *Dunoyair* rule is both illogical and problematic. Although it may be a logical and permissible inference that when a juror intentionally conceals information during voir dire, he or she is unable to render a fair and impartial verdict, it does not logically follow that the inability to render a fair trial means that the juror intentionally concealed the bias. The Sixth Circuit case *United States v. Patrick*[113] is helpful in illustrating the problems of adopting the converse of the *Dunoyair* rule.

In *Patrick*, the venire panel was read a list of witness names and instructed to notify the court if they knew anyone on the list.[114] Also, the venire panel was questioned as to whether they had any relatives or close friends in the law enforcement community.[115] One juror failed to recognize a witness from the list but did recognize him after he testified.[116] In addition, the same juror failed to disclose that his brother was a deputy jailer and that he was a friend of a deceased former sheriff.[117] The juror did not disclose this information because he was unaware of a jailer's involvement with law enforcement, and he thought his friendship with the former sheriff was mooted by the latter's death.[118]

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[110] *Id.*
[111] *Id.* (alteration in original).
[112] *Id.* at 185, 873 P.2d at 64.
[113] 965 F.2d 1390 (6th Cir. 1991).
[114] *Id.* at 1399.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

After the trial, the defendant made a motion for new trial based on juror misconduct during voir dire.[119] The district court denied the motion and the circuit court affirmed.[120] The circuit court stated that because, the juror "did not deliberately conceal information, bias may not be inferred. For the defendants to receive a new trial, actual bias must be shown. The record discloses no sign of Cunnignham's (the juror's) actual bias."[121]

This holding is consistent with the *Dunoyair* rule: the defendant is required to show actual bias absent a showing of intentional concealment. However, under Hawai'i's adaptation, the court probably would grant the motion for new trial. Under the Hawai'i adaptation, the juror's failure to answer appropriately leads to the inference of knowing concealment, which gives rise to the presumption of actual prejudice, which requires a new trial. The adoption of a test which allows the court to infer from statements of jurors made during deliberations that they knowingly concealed a bias opens the jury room door too far, because it enables attorneys after trial to use inconsistencies between answers given during voir dire and statements made during deliberations to impeach a verdict. Under the rule set forth in *Furutani*, any inconsistency automatically gives rise to an inference of knowing concealment and may require a new trial.

The *Dunoyair* rule relieves the defendant of the burden of proving actual prejudice to establish an unfair trial, but the defendant still has a burden of establishing knowing concealment.[122] The Hawaii Supreme Court's adaptation of the *Dunoyair* rule is problematic, because it relieves the defendant of the burden of establishing actual prejudice without requiring the replacement burden of establishing knowing concealment. The defendant does not have to prove either actual prejudice or knowing concealment but only has to prove that the juror did not reveal something on voir dire. If the defendant proves that the juror failed to reveal something, this may in and of itself legitimately give rise to an inference of prior knowing concealment.

Furthermore, the *Furutani* court was willing to overlook the attorney's mistake during voir dire of failing to illicit or make a record of the jury panel's responses to his questions.[123] However, the court indicated

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Dunoyair*, 660 P.2d at 895-96.

[123] *Furutani*, 76 Haw. at 183, 873 P.2d at 62 n.15.

in a footnote that perhaps it would not be so forgiving in the future.[124] The court stated:

> [T]rial counsel would be well advised to request, as a threshold matter, that any venire member who holds a belief, bias, or prejudice, which is contrary to the proposition posed by a question, so indicate orally. As an adjunct to this practice, trial counsel should make a record that silence on the panel's part will be deemed to signify that no panel member holds a belief, bias, or prejudice that would require a response. In this way, trial counsel can obtain a 'commitment' by silence.[125]

The strong language used here indicates more than a mere recommendation by the Hawaii Supreme Court. Instead, this dicta indicates that the court is not willing to step in the next time to correct mistakes made by an attorney during voir dire. If the attorney fails to indicate on the record that a juror's failure to respond will be taken as a "no," the court will be inclined to find that silence does not commit the juror to any response.[126] Moreover, the court will not entertain motions for new trials based on juror misconduct during voir dire absent a commitment by the juror as to a belief, bias, or prejudice.[127]

B. Juror misconduct during deliberations

Regarding the alleged juror misconduct during deliberations, the Hawaii Supreme Court stated that it agreed with the Texas Court of Criminal Appeals in that a mere verbalization of or "casual reference" to the fact that a criminal defendant has not testified in his or her defense is not substantially prejudicial to the defendant: "To constitute reversible error, such reference must amount to a discussion by the jurors or be used as a circumstance against the accused."[128] However, as the court noted, it is difficult to ascertain if there has been prejudice because jurors are barred by Hawaii Rule of Evidence 606(b) from testifying about the effect of statements made in the jury room.[129] Having recognized this difficulty, the court held that once the defendant has made a prima facie showing that improper juror comments during

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 185, 873 P.2d at 64 (quoting Carrillo v. State, 566 S.W.2d 902, 914 (Tex. Crim. App. 1978), *reh'g en banc denied*, 566 S.W.2d 902 (1978)).

[129] *Id.* at 185, 873 P.2d at 64.

deliberations have been "used as a circumstance against" him or her, "there is a presumption of prejudice and the verdict will be set aside unless it is clearly shown that the juror's [comments] could not have affected the verdict."[130] Thus, the burden is on the prosecution to make a "clear showing" beyond a reasonable doubt that the comment could not have affected the verdict.[131]

This burden shifting demonstrates yet another way Hawai'i is willing to bend over backward to ensure that the defendant is afforded a fair and impartial trial. Before granting a new trial, other jurisdictions appear to require the defendant to show more than just evidence of substantial juror misconduct; generally, there must be a showing of substantial or actual prejudice.[132] Consequently, it is easier in Hawai'i to get a new trial because prejudice is inferred from substantial evidence of misconduct rather than a showing of prejudice. Because the court had determined that the comments of one or more jurors during deliberations regarding Furutani's failure to testify or otherwise present evidence of his innocence constituted substantial evidence of misconduct, the prima facie case here was made.[133] Furthermore, a new trial was required as a matter of law because the prosecution had not made a "clear showing" beyond a reasonable doubt that the jurors' comments could not have affected the verdict.[134]

IV. IMPACT

It was unnecessary for the Hawaii Supreme Court to base its ruling in *State v. Furutani* on two grounds. The court could have easily rested

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[130] *Id.* at 185-86, 873 P.2d at 64-65.

[131] *Id.* at 186, 873 P.2d at 65.

[132] *See* United States v. Easter, 981 F.2d 1549, 1553 (10th Cir. 1992)("A new trial based on juror misconduct is appropriate only where there is either a showing of actual bias or circumstances 'compel an imputation of inherent bias to the juror as a matter of law.'"); Tiggs v. State, 700 S.W.2d 65, 66-67 (Ark. Ct. App. 1985)(finding that any error or prejudice which may have occurred as a result of the jury's consideration of the defendant's failure to testify was rectified when, upon receiving an inquiry as to why the defendant was not called to testify, the trial court reread the instruction providing that the defendant had an absolute constitutional right not to testify and that his failure to testify should not be considered in arriving at a verdict); State v. Mitchell, 672 P.2d 1, 6-7 (Kan. 1983)(dismissing motion for new trial because defendant failed to show that he had been prejudiced by the jurors' consideration of his silence, much less "substantially prejudiced" as required by Kansas law).

[133] *Furutani*, 76 Haw. at 186-87, 873 P.2d at 65-66.

[134] *Id.*

its decision only on juror misconduct during deliberations, but instead, it chose to also base its ruling on juror nondisclosure during voir dire. Consequently, the holding has broader implications.

The purpose of Hawaii Rule of Evidence 606(b) is to promote "freedom of deliberation, stability and finality of verdicts and protection of jurors against annoyance and embarrassment." [135] With its holding in *Furutani*, however, the Hawaii Supreme Court takes a big step toward completely undermining this rule.

The court's decision to expand the scope of what constitutes "knowing concealment" by a juror during voir dire makes impeachment of verdicts using juror testimony much easier. This is especially true in a jurisdiction such as Hawai'i, which allows jurors to testify about statements made during deliberations. Juror testimony regarding bias is no longer limited to instances when the juror intentionally lied during voir dire. Now, any bias revealed after the verdict has been reached may conceivably become the basis for impeachment.

Consequently, the *Furutani* decision may have the unfortunate impact of encouraging juror harassment or intimidation.[136] After *Furutani*,

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[135] HAW. R. of EVID., Title 33, Chapter 626, 1994 Special Pamphlet, Commentary at 71.

[136] *See* Note, *Public Disclosures Of Jury Deliberations*, 96 HARV. L. REV. 886 (1983):

> [s]oliciting from jurors the inside story of their deliberations seems more widespread today than ever before. Postverdict requests by litigants to interview jurors are granted in a small but growing number of cases . . .Although the judiciary has not uniformly considered post-verdict questioning of jurors a 'problem,' a sizable number of courts disapprove the practice unless it is conducted under judicial auspices. . .Trial judges have long tried to insulate jurors from 'harassment,' 'molestation,' 'ransacking,' and 'intimidation' by prying counsel and others.

Id. at 887-89.; Miller v. United States, 403 F.2d 77, 82 (2d. Cir. 1968) (enjoining defendant, defense counsel, and private investigator from making further inquiry when private investigator conducted lengthy wide-ranging interviews with jurors, made unannounced visits to jurors' houses, and returned a second time to three jurors' houses who initially refused to be interviewed); United States v. Crosby, 294 F.2d 928, 950 (2d. Cir. 1961), *cert. denied*, Mittleman v. United States, 368 U.S. 984 (1962):

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

Id.; Grenz v. Werre, 129 N.W.2d 681, 693 (N.D. 1964)(holding that affidavits of all jurors, identical in form, and contrary to their verdict could not be used to impeach

attorneys have an incentive to track down jurors and question them about every aspect of the deliberations in hope of finding some "inadvertent" error. Indeed, in *Furutani*, the court acknowledges the potential for juror harassment.[137] Anticipating possible juror harassment, the court inserts a footnote with regard to the Hawai'i Rules of Professional Conduct to dissuade attorneys from independently tracking down jurors.[138] According to the court, the Hawai'i Rules of Professional Conduct require that all post-trial communications between attorneys and jurors, relating to the subject matter of the trial, must be in the presence of all parties to the proceeding or their legal representatives.[139] Consequently, a juror can either be simultaneously contacted by all parties on an informal basis or questioned on the record in open court.[140] The problem with relying upon professional rules of conduct to prevent juror harassment is that the rules do not distinguish the point at which well-intended but persistent interrogation, designed to improve a losing litigant's position, should give way to considerations of jury harassment, verdict finality, and judicial integrity.[141] Furthermore, neither the court nor the rules identify procedures by which the court should prevent, consider, or redress violations.[142]

The Hawaii Supreme Court's reliance upon the rules of professional conduct to prevent juror harassment is unsettling, because it only gives the practicing attorney a sketchy outline rather than a workable standard. In Hawai'i, it is easy to impeach a verdict because juror's statements made during deliberations can be used. Consequently, instead of relying upon a somewhat amorphous standard to prevent juror harassment, the court should set out specific rules to govern post-verdict juror contact. Other jurisdictions have adopted local rules granting the trial court authority to supervise the investigation of jury misconduct.[143]

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verdict or as ground for new trial); Virgin Islands v. Gereau, 523 F.2d 140, 146-47 (3d. Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) (finding jurors may have been coerced into providing false testimony); *But cf.* Thompson, *supra* note 20, at 1223-25 (1985)(expressing view that although concerns about harassment and intimidation of jurors have been consistently expressed by the courts and commentators, they do not justify retention of the unique concept of incompetency of juror testimony).

[137] *Furutani*, 76 Haw. at 177, 873 P.2d at 56 n.8.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *See* Crump, *supra* note 4, at 530.

[142] *Id.*

[143] *Id.* at 526-28. In Texas, 'after a verdict is rendered but before the jury is

Also, the court's recommendations with regard to voir dire may have the negative result of lengthening the voir dire process. Attorneys may no longer want to risk posing questions to the panel collectively. Instead, attorneys may feel the need to painstakingly question each individual juror. Therefore, the voir dire process may become much more involved and time consuming for the court. This would be an extremely undesirable result.[144]

In addition, with its holding in *Furutani*, Hawai'i demonstrates an unusually liberal stance with regard to the granting of new trials in cases of juror nondisclosure during voir dire. Other states have shown much more reluctance to overturn verdicts with regard to juror nondisclosure during voir dire.[145] The Hawaii Supreme Court's willingness

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discharged from further duty, an attorney may obtain leave of the Judge before whom the action was tried to converse with members of the jury.' *Id.* at n.17 (citing U.S. DIST. CT. E.D. TEX. R. 10(b)); In the Eastern District of North Carolina, 'no attorney or party litigant shall. . .ask questions of or make comments to a member of that jury or members of the family of such a juror that are calculated merely to harass or embarrass such a juror or a member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.' *Id.* at n.19 (citing U.S. DIST. CT. E.D.N.C. 6.03); In the Middle District of North Carolina, no communication with jurors is permitted 'which may reasonably have the effect of influencing' the juror. *Id.* at n.19 (citing U.S. DIST. CT. M.D.N.C. R. 112(b)(1)()). Some courts require the moving attorney to show good cause before being allowed to interview jurors. *Id.* at n.138. (citing U.S. DIST. CT. KAN. R. 23A; U.S. DIST. CT. E.D. MO. R. 16(D); U.S. DIST. CT. N.J. R. 19(B); U.S. DIST. CT. S.D. OHIO R. 5.6); *See also* Note, *Public Disclosures Of Jury Deliberations*, 96 HARV. L. REV. 886, 901 & nn.93-96 (1983)("In at least twenty-six federal district,. . .the court's prerogative to supervise the interview process is codified in the local court rules. Nearly half of these rules require the party requesting the interview to show 'good cause.'").

[144] Currently, Chief Justice Ronald T.Y. Moon is committed to clearing the existing backlog and increasing efficiency in the courts. He is making every effort to adjudicate Hawai'i's growing caseload in a timely manner and has even contracted with the National Center for State Courts to develop a comprehensive delay reduction project. July 1, 1993-June 30, 1994, JUDICIARY ANN. REP. Message from the Chief Justice December 14, 1994. Consequently, any policy which would serve to lengthen the trial process directly contradicts the Chief Justice's goals.

[145] United States v. Brooks, 677 F.2d 907, 912 (D.C.Cir. 1982)(Generally, the failure of a juror to disclose facts that might lead to his being challenged will be the basis for grant of a new trial only if the nondisclosure is deliberate.); United States v. Vargas, 606 F.2d 341, 344 (1st Cir. 1979) (A party who seeks a new trial because of nondisclosure by a juror during voir dire must show actual bias.); United States v. Eury, 268 F.2d 517, 522 (2d Cir. 1959)(Juror's lie was not so obvious a disqualification or so inherently prejudicial to require a new trial.); United States v. Patrick, 965 F.2d

to invade the jury room and its unusually liberal stance towards impeachment threatens the stability and public acceptance of jury verdicts.

IV. Conclusion

The Hawai'i legislature and courts have clearly shown that the defendant's right to a fair and impartial trial is of primary concern. All other concerns, such as the protection of the individual jurors and jury system, are secondary. Hawai'i's allowance of objective testimony with regard to statements made during deliberations coupled with its unusual interpretation and adoption of the *Dunoyair* rule has started Hawai'i down a dangerous road. Perhaps the Hawaii Supreme Court should listen to the warnings of the Second Circuit:

> [I]t would be impracticable to impose the [requirement] of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test.[146]

For, with *Furutani*, the Hawaii Supreme Court requires the impossible: a jury of perfection.

Kimberly Ayn Eckhart*

1390, 1399 (6th Cir. 1992)(Because juror did not deliberately conceal information, bias could not be inferred, and new trial was unnecessary absent showing of actual bias.); United States v. Moss, 591 F.2d 428 (8th Cir. 1979)(Juror's inadvertent nondisclosure of acquaintance with defense counsel, who previously represented adversary of juror's wife in prior litigation, found not to be a basis for new trial); United States v. Nickell, 883 F.2d 824, 825-26 (9th Cir. 1989)(Juror's misleading responses to questioning on voir dire did not merit granting of a new trial.); United States v. Easter, 981 F.2d 1549, 1553 (10th Cir. 1992)(Defendant not entitled to new trial because he does not allege that juror deliberately concealed or had any motive to conceal previous contact with defendant.).

[146] Jorgensen v. York Ice Machinery Corporation, 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

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State v. Lindsey: "Petty" Offenses and the Right to Jury Trial under the Hawai'i Constitution

I. Introduction

In 1994, the Hawaii Supreme Court redefined the right to a jury trial in "petty" criminal cases. First, in *State v. Nakata*,[1] the court reversed its previous position and held that first-time offenders accused of driving under the influence of intoxicating liquor (DUI) are not entitled to jury trial. Then, in *State v. Lindsey*,[2] the court held that individuals accused of prostitution offenses are not entitled to a jury trial. But the *Lindsey* holding went one step further: it established a "bright line" rule, under which offenses punishable by less than thirty days imprisonment are presumptively "petty," and persons accused of such offenses do not have a constitutional right to a jury trial.[3]

This note analyzes the *Lindsey* decision and its likely effects. Part II provides a brief sketch of Hawai'i's prostitution statute and its development. Part III provides a historical overview of the right to a jury trial under federal and Hawai'i law. Part IV examines the supreme court's analysis in *Lindsey*. Part V reviews the impact *Lindsey* will have on other "petty" offenses and the judicial system as a whole. Finally, Part VI summarizes the author's conclusions.

II. The History of Hawai'i's Prostitution Law

Prostitution was included as a criminal offense in Hawai'i in 1869[4] and was incorporated into the Hawaii Penal Code in 1972 at section

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[1] 76 Haw. 360, 878 P.2d 699 (1994).
[2] 77 Haw. 162, 883 P.2d 83 (1994).
[3] *Id.* at 165, 883 P.2d at 86.
[4] 1915 Revised Laws of Hawaii, § 4155 (1869).

712-1200.[5] The 1972 version of the statute classified prostitution as a petty misdemeanor but did not enumerate specific penalties for the offense of prostitution.[6] In 1981, the statute was amended to provide guidelines for the imposition of fines and terms of imprisonment.[7] The legislature made minor changes to the statute in 1986[8] and 1990[9] but did not make significant changes to the statutory penalties until 1993, when the legislature made payment of a $500 fine mandatory for first and subsequent convictions and made a 30-day prison term mandatory for subsequent convictions.[10] With the 1993 amendments, the penalties for prostitution were as follows:

> (4) A person convicted of committing the offense of prostitution shall be sentenced as follows:
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> (a) For the first offense, when the court has not deferred further proceedings pursuant to chapter 853, a mandatory fine of $500 and the person may be sentenced to a term of imprisonment

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[5] Act 9, January 1, 1973, 6th Leg., 1972 Reg. Sess., 1972 Haw. Sess. Laws 125.

[6] *Id.*

[7] Act 110, June 8, 1981, 11th Leg., 1981 Reg. Sess., 1981 Haw. Sess. Laws 219. The statute was amended to include the following penalty provisions:

> (a) For the first offense, a fine of $500 and the person may be sentenced to a term of imprisonment of not more than thirty days; provided, in the event the convicted person defaults in payment of the $500 fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1)(f), Hawaii Revised Statutes
>
> (b) For any subsequent offense, a fine of $500 and a term of imprisonment of thirty days, without possibility of suspension of sentence or probation.

Id. Before the 1981 amendments, courts were authorized to sentence individuals convicted of prostitution to both fines and imprisonment under section 701-107 of Hawaii Revised Statutes. However, the legislature noted that fines imposed under the prostitution statute averaged only $100 and that less than six percent of all prostitution convictions were punished by imprisonment. CONF. COMM. REP. NO. 70, 10th Leg., 1979 Reg. Sess., *reprinted in* 1981 HAW. HOUSE J. 908.

[8] Act 314, §§ 73, 74, June 6, 1986, 12th Leg., 1986 Reg. Sess., 1986 Haw. Sess. Laws 627. The amendments changed the language of subsection (2) from "sexual intercourse" to "sexual penetration," and amended the referral in subsection (4) from "section 706-605 (1)(f)" to "section 706-605 (1)." *Id.*

[9] Act 204, §1, June 19, 1990, 16th Leg., 1990 Reg. Sess., 1990 Haw. Sess. Laws 442. The amendment added subsection (5) to the statute: "This section shall not apply to any member of a police department, a sheriff, or a law enforcement officer acting in the course and scope of duties." *Id.*

[10] Act 130, § 6, May 21, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 183.

> of not more than 30 days; provided, in the event the convicted person defaults in payment of the $500 fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1).
>
> (b) For any subsequent offense, a fine of $500 and a term of imprisonment of thirty days, without possibility of deferral of further proceedings pursuant to chapter 853 and without possibility of suspension of sentence or probation. . . .[11]

The 1993 amendments applied retroactively to all pending cases.[12]

III. The Constitutional Right to Jury Trial

A. The Federal Standard

The Sixth Amendment to the United States Constitution guarantees the right to jury trial in criminal cases.[13] This fundamental right has been applied to the states through the Fourteenth Amendment's due process clause.[14] Nevertheless, the Supreme Court has long recognized that the right to jury trial is not absolute. Beginning with *Callan v. Wilson*,[15] the Court has distinguished so called "petty" offenses from more serious crimes, and has held that the right to jury trial does not extend to "petty" criminal offenses.[16]

In determining whether an offense was "petty," the Supreme Court's early cases focused on the nature of the offense and treatment of the offense under common law.[17] As the case law developed, however, the

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[11] Haw. Rev. Stat. § 712-1200 (1985 and 1992 Supp.).

[12] Act 130, § 6, May 21, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 183.

[13] U.S. Const. amend. VI. The amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *Id. See also* U.S. Const. art. III, § 2 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury").

[14] Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968).

[15] 127 U.S. 540 (1888).

[16] *Id.* at 555. The offense involved in *Callan* was conspiracy. The Court found that conspiracy was indictable at common law, and thus was not a petty or minor offense. *Id.* at 555-56.

[17] *See id.*, 127 U.S. 540 (1888); Schick v. United States, 195 U.S. 65 (1904); District of Columbia v. Colts, 282 U.S. 63 (1930); District of Columbia v. Clawans, 300 U.S. 617 (1937). *See also* Jerald J. Director, Annotation, *Distinction Between "Petty" and "Serious" Offenses for Purposes of Federal Constitutional Right to Trial by Jury — Supreme Court Cases*, 26 L.Ed.2d 916 (1971).

Court sought more objective indicia of seriousness.[18] In *Duncan v. Louisiana*,[19] the Court identified the maximum authorized penalty as a major factor in determining the seriousness of an offense. The *Duncan* Court acknowledged the need for a definite boundary separating petty and serious offenses,[20] but it declined to set one.[21] The Court finally provided a "bright-line" test for determining whether an offense is petty or serious in *Baldwin v. New York*.[22] The *Baldwin* Court identified the maximum authorized penalty as the most relevant factor in determining the seriousness of an offense,[23] and held that offenses carrying prison terms of six months or more cannot be classified as petty,[24] because a sentence exceeding six months is sufficiently severe by itself to require jury trial.[25]

The Court went a step further in the case of *Blanton v. City of North Las Vegas*.[26] In *Blanton*, the Court held that offenses are *presumptively* petty when the maximum authorized prison term is six months or less.[27] To overcome this presumption, a defendant must show that any additional statutory penalties,[28] when combined with the maximum prison term, are so severe that they clearly demonstrate a legislative intent to classify the offense as serious.[29]

The facts of *Blanton* indicate that this presumption may be difficult to overcome. *Blanton* involved two defendants charged with driving

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[18] Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1988) (citing Frank v. United States, 395 U.S. 147, 148 (1969)).

[19] *Duncan*, 391 U.S. 145 (1968). The defendant in *Duncan* was charged with simple battery, an offense punishable by a maximum prison term of two years. The Court held that the offense was serious, and that the defendant was entitled to a jury trial. *Duncan* is probably better known, however, for establishing that the Sixth Amendment right to jury trial is applicable to the states through the Fourteenth Amendment's due process clause. *Id.* at 149-50.

[20] *Id.* at 160.

[21] *Id.* at 161-62.

[22] 399 U.S. 66, 69 (1970).

[23] *Id.* at 68.

[24] *Id.* at 69.

[25] *Id.* at 69 n.6.

[26] 489 U.S. 538 (1989).

[27] *Id.* at 543.

[28] *Id.* at 543 (citing Note, *The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated*, 73 MINN. L. REV. 122, 149-50 (1988)). The Court declared that only penalties resulting from state action should be considered — thus, factors such as the effect of license suspension on employment, or an increase in automobile insurance rates are not included in the analysis. *Id.*

[29] *Id.*

under the influence of alcohol (DUI) in Nevada.[30] Under Nevada law, the maximum prison sentence for first-offense DUI was six months,[31] thus falling within the presumption. The Court examined the additional statutory penalties, which included payment of a fine, ranging from $200 to $1,000, suspension of driving privileges for ninety days, and attendance at an alcohol rehabilitation course.[32] The Court found that these penalties, viewed together with the maximum prison term, were not severe enough to overcome the presumption that DUI (as defined by Nevada law) was a "petty" offense.[33] Accordingly, the Court held that persons accused under Nevada's DUI statute were not entitled to trial by jury.[34]

The Court reaffirmed the *Blanton* presumption in *United States v. Nachtigal*.[35] In *Nachtigal*, Jerry Nachtigal was arrested and charged under the federal DUI statute,[36] which authorized a six-month maximum term of imprisonment and a $5,000 fine, as well as numerous discretionary penalties involving community service, rehabilitation, and probation.[37] The Magistrate Judge applied the *Blanton* test and denied Nachtigal's request for a jury trial.[38] The district court reversed the Magistrate's ruling because, according to the district court, the holding in *Blanton* was contrary to Ninth Circuit precedent.[39] The Ninth Circuit Court of Appeals affirmed, holding that *Blanton* was "inapposite."[40] The United States Supreme Court disagreed. The Court declared that the case was "quite obviously" controlled by *Blanton* and noted that the circumstances and potential penalties in *Nachtigal* called for a routine

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[30] *Id.* at 540.

[31] *Id.* at 539 (citing NEV. REV. STAT. § 484.379(1) (1987)). The Nevada statute also authorized a minimum prison term of two days for first offenders, and provided as an alternative to imprisonment a penalty of forty-eight hours of community service dressed in clothing that identifies the individual as a DUI offender. *Id.*

[32] *Id.* at 539-40 (citing NEV. REV. STAT. § 484.379(1) (1987)).

[33] *Id.* at 544.

[34] *Id.*

[35] 113 S.Ct. 1072 (1993)(per curiam).

[36] 36 C.F.R. §§ 4.23(a)(1) and (a)(2)(1992).

[37] *Nachtigal*, 113 S.Ct. at 1072.

[38] *Id.* at 1072-73.

[39] *Id.* at 1073. The district court was referring to United States v. Craner, 652 F.2d 23, 25 (9th Cir. 1981), in which the Ninth Circuit held that penalties set by agencies other than the U.S. Congress do not constitute a legislative determination of the seriousness of an offense. The district court reasoned that since *Blanton* did not expressly overrule *Craner*, *Craner* was still good law. *Nachtigal*, 113 S.Ct. at 1073.

[40] *Nachtigal*, 113 S.Ct. at 1073.

application of the *Blanton* rule.[41] Accordingly, the Court held that the federal DUI was a petty offense and that Nachtigal was not entitled to jury trial.[42]

After *Nachtigal*, the federal standard appears to firmly established: offenses punishable by imprisonment for six months or less are presumptively petty, and therefore a jury trial is not constitutionally required.[43] Although this presumption is not conclusive, it appears that a defendant trying to overcome the presumption must demonstrate that any additional statutory penalties are quite severe.[44]

B. The Hawai'i Standard

The Hawaii Constitution also guarantees the right to jury trial: Article I, section 14 provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed."[45] Like the federal courts, however, Hawai'i courts have held that the right to jury trial is not absolute.[46]

Although the Hawaii Supreme Court had, during the territorial period, examined the right to jury trial granted under the U.S. Constitution,[47] it did not examine the corresponding right under the *state* constitution until *State v. Shak*,[48] in 1970. In *Shak*, the court held that a defendant charged with traffic violations did not have a constitutional right to a jury trial under the Hawaii Constitution.[49] According

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[41] *Id.* at 1074.

[42] *Id.*

[43] Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989).

[44] The Supreme Court itself acknowledges that it is a "rare situation where a legislature packs an offense it deems serious with onerous penalties that nonetheless do not puncture the 6-month incarceration line." *Id.* (internal quotations and citations omitted).

[45] HAW. CONST. art. I, § 14.

[46] *See generally*, State v. Nakata, 76 Haw. 360, 878 P.2d 699 (1994); State v. Wilson, 75 Haw. 68, 856 P.2d 1240 (1993); State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982).

[47] *See* Ex Parte Higashi, 17 Haw. 428, 439 (1906)(citing Callan v. Wilson, 127 U.S. 540 (1888)). *Higashi* held that the Sixth Amendment right to jury trial does not extend to petty offenses, violations of municipal ordinances, or offenses which were tried summarily at common law. *Id. See also* Territory v. Taketa, 27 Haw. 844 (1924).

[48] 51 Haw. 612, 466 P.2d 422 (1970).

[49] *Id.* at 614, 466 P.2d at 424 (1970). The defendant, Clarence Shak, was charged with violating four sections of the Honolulu Traffic Code. None of the violations, either individually or combined, was punishable by imprisonment. *Id.*

to the court, the "determinative question in ascertaining whether there is a constitutional right to a jury trial in a given case is whether the offense charged is a 'petty' one or a 'serious' one."[50]

In *Shak*, the court supplied a two-step analysis, based on the federal constitutional standard, to determine whether an offense was serious or petty.[51] First, if the offense is "by its nature serious," then the defendant has the right to a jury trial.[52] If, however, the offense is not serious by its nature, then the second prong of the test requires review of the potential penalty.[53] In applying the test to the offenses with which Shak was charged, the court focused on the second prong — the potential penalty. Because the violations involved were not punishable by any term of imprisonment, the court concluded that the charges were petty.[54] The court noted that, under federal case law, offenses punishable by six months imprisonment or less are constitutionally petty.[55] However, the court did not expressly adopt the six-month standard as Hawai'i's constitutional requirement. *Shak* therefore established that there is no constitutional right to a jury trial for petty offenses under the Hawaii Constitution. *Shak* also provided a test for determining whether an offense was petty, but it declined to set a bright line rule along the federal model.

Twelve years later, the Hawaii Supreme Court revisited the right to jury trial in *State v. Kasprzycki*.[56] In *Kasprzycki*, the defendant was charged with harassment, which was at the time punishable by a fine of not more than $500 or a term of imprisonment not exceeding 30 days.[57] The court noted that Hawai'i's harassment statute[58] characterized the offense as a "petty misdemeanor"[59] and that the potential penalties would be petty under the federal constitutional standard.[60] Applying the rule set forth in *Shak*, the court held that Kasprzycki was not entitled to a jury trial.[61] Once again, the court declined to adopt a six-

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[50] *Id.*
[51] *Id.*
[52] *Id.* (citing Callan v. Wilson, 127 U.S. 540 (1888)).
[53] *Id.* (citing District of Columbia v. Colts, 282 U.S. 63 (1930)).
[54] *Id.* at 616, 466 P.2d at 425.
[55] *Id.* at 615, 466 P.2d at 424.
[56] 64 Haw. 374, 641 P.2d 978 (1982)(per curiam).
[57] *Id.* at 375, 641 P.2d at 979.
[58] HAW. REV. STAT. § 711-1106(2)(1985 & 1992 Supp.).
[59] 64 Haw. at 375, 641 P.2d at 979.
[60] *Id.*
[61] *Id.*

month prison term as the fixed dividing line between a serious and petty offense under the Hawaii Constitution.[62]

Following *Kasprzycki*, the next four cases in which the Hawaii Supreme Court addressed a criminal defendant's right to jury trial all involved the offense of driving under the influence of intoxicating liquor (DUI). The first such case was *State v. O'Brien*,[63] in which the defendant was charged with second-offense DUI. In *O'Brien*, the court held that DUI was a constitutionally serious offense and that defendants charged with DUI were entitled to jury trials.[64]

O'Brien is significant for two reasons. First, the court interpreted Hawai'i's constitutional right to jury trial as providing more protection than the corresponding right under the federal constitution.[65] Second, the court provided more specific guidance for determining whether an offense is "by its nature serious."[66] The court examined case law from other jurisdictions, and incorporated the following tests: (1) whether the offense was "indictable at common law" or tried without a jury;[67] (2) the gravity of the offense, including its effect on the public;[68] (3) whether the offense "reflects moral delinquency,"[69] or carries a social stigma.[70] After assessing the above factors, the court concluded that DUI was a constitutionally serious offense.[71]

The court noted that, under the federal constitutional standard, the potential penalties under Hawai'i's DUI statute would not trigger the right to jury trial.[72] At the time of O'Brien's conviction, Hawai'i's DUI statute provided the following penalties:[73]

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[62] *Id.*

[63] 68 Haw. 38, 704 P.2d 883 (1985).

[64] *Id.* at 42, 704 P.2d at 886.

[65] *Id.* at 44, 704 P.2d at 887.

[66] *Id.* at 40, 704 P.2d 885.

[67] *Id.* at 42, 704 P.2d at 886 (citing District of Columbia v. Clawans, 300 U.S. 617, 624-25 (1937)).

[68] *Id.* (citing Callan v. Wilson, 127 U.S. 540, 556 (1888)). In assessing the gravity of the offense, the court particularly emphasized the importance of the legislative pronouncements, including commentary and statutory enactments. *Id.* at 42-43, 704 P.2d at 886-87.

[69] *Id.* at 42, 704 P.2d at 886 (citing Schick v. United States, 195 U.S. 65, 69 (1904).

[70] *Id.* (citing Baker v. City of Fairbanks, 471 P.2d 386, 389 (Alaska 1970)).

[71] *Id.* at 42, 704 P.2d at 886.

[72] *Id.* at 44, 704 P.2d at 887.

[73] *Id.* at 40, 704 P.2d at 885.

(1) For a first offense, or any offense not preceded within a five-year period by a conviction under this section:
   (A) A fourteen-hour minimum alcohol abuse rehabilitation program including education and counseling, or other comparable program deemed appropriate by the court; and
   (B) Ninety day prompt suspension of license with absolute prohibition from operating a motor vehicle during suspension of license; and
   (C) Any one or more of the following:
      (i) Seventy-two hours of community service work; or
      (ii) Not less than forty-eight hours of imprisonment; or
      (iii) A fine of not less than $150 but not more than $1,000.

(2) For an offense which occurs within five years of a prior conviction under this section:
   (A) Prompt suspension of license for a period of one year; and
   (B) Any of the following:
      (i) Not less than ten days of community service work; or
      (ii) Not less than forty-eight consecutive hours of imprisonment; or
      (iii) A fine of not less than $500 but not more than $1,000 . . . .[74]

Thus, the penalties included a mix of fines, community service, rehabilitation, and less than six months imprisonment.[75] The court held that this "mix of punishments" reflected the societal and legislative belief that DUI was a serious offense in Hawai'i.[76]

Despite its holding in *O'Brien*, the court added the following qualification, as dicta:

> Were we faced with a situation where a first DUI offense was punishable, for example, by imprisonment for no more than five days, a second conviction by imprisonment for no more than ten days and a third, by imprisonment for no longer than one month, we would perhaps be

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[74] Act 117, May 25, 1983, 12th Leg., 1983 Reg. Sess., 1983 Haw. Sess. Laws 208 (codified as amended at HAW. REV. STAT. § 291-4 (1985 and 1992 Supp.)).

[75] *O'Brien* at 44 n.5, 704 P.2d at 887 n.5. Under the DUI statute, a first- or second-time offender could be sentenced to a minimum of forty-eight hours imprisonment — but the statute did not provide a maximum term of imprisonment for first or second-time offenders. The court assumed that the maximum was one hundred-eighty days (six months), because the statute did provide a one hundred-eighty day maximum term of imprisonment for persons convicted three or more times. *Id.*

[76] *Id.* "On an individual level, . . . these punishments can involve a disruption of daily life, interruption of livelihood and disaffection from other members of the community which cannot be viewed as minor." *Id.*

persuaded by State's position that DUI is not a serious offense . . . .[77]

Armed with the preceding guidance, the Hawaii Legislature amended the DUI statute in 1990. The amendments provided a thirty-day maximum term of imprisonment for first-time DUI offenders and a sixty day term for second-time offenders.[78] The amendments also provided for installation of an ignition interlock system[79] for first-time offenders.[80] The Hawaii Supreme Court addressed the effect of these amendments on the right to jury trial in *State v. Jordan*.[81]

In *Jordan*, four defendants appealed their DUI convictions to the circuit court. In light of the 1990 amendments to the DUI statute, the circuit court reserved to the Hawaii Supreme Court three questions of law: (1) whether the 1990 amendments should apply retroactively; (2) whether the change in penalties eliminated the right to jury trial for the offense of DUI; and (3) whether the deprivation of jury trial for defendants charged with DUI violates the equal protection clauses of the Hawaii or United States Constitutions.[82]

The Hawaii Supreme Court found nothing in the amended statute or the legislative history to indicate that the legislature intended the penalty provisions in the 1990 amendments to apply retroactively.[83] Nevertheless, the court analyzed the new penalty provisions, and concluded that the amendments did not eliminate the right to jury trial recognized in *O'Brien*.[84] The court noted that the only downgrading of the penalties was a "clarification" of the maximum sentences for first and second offenders.[85] The court also pointed out that an additional penalty[86] was added, and that the legislative history indicates that the legislature continues to regard DUI as a very serious crime.[87] Because

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[77] *Id.* at 44, 704 P.2d at 887.

[78] Act 188, June 19, 1990, 15th Leg., 1990 Reg. Sess., 1990 Sess. Laws 399.

[79] *Id.* An ignition interlock system is a "mechanical device certified by the director of transportation which, when affixed to the ignition system of a motor vehicle, prevents the vehicle from being started without first testing a deep-lung breath sample which indicates that the blood alcohol concentration of the vehicle's operator is less than .10." *Id.*

[80] *Id.*

[81] 72 Haw. 597, 825 P.2d 1065 (1992).

[82] *Id.* at 598, 825 P.2d at 1066-67.

[83] *Id.* at 599-600, 825 P.2d at 1067.

[84] *Id.* at 601, 825 P.2d at 1068.

[85] *Id.*

[86] *Id.* The additional penalty was the ignition interlock system. *See supra* note 79.

[87] 72 Haw. at 601, 825 P.2d at 1068.

it concluded that the 1990 amendments to the DUI statute did not eliminate the right to jury trial for DUI offenders, the court found it unnecessary to reach the equal protection issue.[88]

Following the *Jordan* decision, the legislature again amended the DUI statute.[89] In *State v. Wilson*,[90] the Hawaii Supreme Court addressed the new amendments and retreated somewhat from its position in *Jordan*.

The defendant in *Wilson* was not charged with DUI, but with the related offense of driving after his license had been suspended for DUI.[91] The court refined the *O'Brien* test to determine whether the offense of driving after DUI license suspension was constitutionally petty or serious.[92] The first prong of the test examined the treatment of the offense at common law; the second prong examined the gravity of the offense; and the third examined the authorized penalties.[93] Applying the *O'Brien* test, the court held that Wilson was not entitled to a jury trial.[94]

The supreme court noted first that the offense of driving after DUI license suspension was not indictable at common law.[95] Next, the court examined the gravity of the offense and concluded that, although driving after DUI license suspension was serious enough to warrant mandatory penalties, mandatory penalties alone do not indicate that the legislature considers an offense constitutionally serious.[96] Finally, the court examined the potential penalties for the offense.[97]

When Wilson was charged, the penalties for driving after DUI license suspension included a mandatory term of imprisonment from three to thirty days, a mandatory fine from $250 to $1,000, and a mandatory

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[88] *Id.* at 598, 825 P.2d at 1067.

[89] Act 128, May 21, 1993, 17 Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 179.

[90] 75 Haw. 68, 856 P.2d 1240 (1993).

[91] *Id.* at 69-70, 856 P.2d at 1242.

[92] *Id.* at 74-78, 856 P.2d at 1244-46.

[93] *Id.* at 74, 856 P.2d at 1244.

[94] *Id.* at 79, 856 P.2d at 1246.

[95] *Id.* at 74, 856 P.2d at 1244.

[96] *Id.* at 75-76, 856 P.2d at 1244. The court noted that:

> [a]lthough we do not condone the actions of DUI-license suspension violators who refuse to abide by their punishment, we cannot say that their continued driving is, in and of itself, as serious and tragic a problem as those who drive or continue to drive while under the influence of intoxicating liquor.

Id.

[97] *Id.* at 76-78, 856 P.2d at 1245-46.

license suspension for an additional year.[98] The court noted that it had addressed a similar "mix of penalties" in *O'Brien* and *Jordan*,[99] and had determined in those cases that the offense involved was constitutionally serious.[100] The court acknowledged, however, that *O'Brien* and *Jordan* were seriously undermined by the 1993 amendments to the DUI statute, wherein the legislature unequivocally declared that first-offense DUI is constitutionally petty.[101] The court therefore concluded that, because the mix of penalties for first-offense DUI are constitutionally petty, a similar mix of penalties for driving after DUI license suspension must also be considered petty.[102] Accordingly, the court held that Wilson was not entitled to a jury trial.[103]

In the *Wilson* decision, the Hawaii Supreme Court suggested that it had decided *O'Brien* and *Jordan* incorrectly.[104] Nevertheless, the court did not expressly overrule *O'Brien* or *Jordan* until it heard *State v. Nakata*[105] the following year.

In *Nakata*, the court held that first-offense DUI was constitutionally petty, and thus did not trigger the right to jury trial.[106] *Nakata* involved four defendants charged with first-offense DUI, each of whom requested a jury trial.[107] While their trials were pending, however, the state legislature amended the DUI statute, with the intent to eliminate the right to jury trial for first-offense DUI.[108] Pursuant to these amendments, the state moved to remand the defendants' cases to district

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[98] *Id.* at 70, 856 P.2d at 1242 (citing HAW. REV. STAT. § 291-4.5 (1985 and 1992 Supp.)).

[99] *Id.* at 76, 856 P.2d at 1245.

[100] *Id.* at 76-77, 856 P.2d at 1245.

[101] *Id.* at 77, 856 P.2d at 1245.

[102] *Id.* at 78, 856 P.2d at 1245.

[103] *Id.* at 79, 856 P.2d at 1246.

[104] *Id.* at 77, 856 P.2d at 1245. The court made the following statement about the legislative response to *Jordan* (upon which *O'Brien* was based): After reviewing our opinion in *Jordan*, the legislature, in 1993, decisively spoke and deemed our view of its perception of the seriousness of first time DUI offenses to be in error. *Id.*

[105] 76 Haw. 360, 878 P.2d 699 (1994).

[106] *Id.* at 367, 878 P.2d at 706.

[107] *Id.* at 363, 878 P.2d at 702.

[108] Act 128, May 21, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 179. The 1993 amendments reduced the maximum jail sentence for first-offense DUI from thirty days to five days, repealed the requirement for an ignition interlock system, and provided for retroactive application to all pending first-offense DUI cases. *See supra* notes 98-101 and accompanying text.

court for trial without a jury.[109] The trial court consolidated the cases, and reserved two questions of law to the Hawaii Supreme Court.[110]

The two reserved questions asked (1) whether the 1993 amendments to the DUI statutory penalties eliminated the right to jury trial for defendants charged with first-offense DUI,[111] and (2) whether the amendments could be applied retroactively to pending cases.[112]

In *Nakata*, the court first analyzed the 1993 amendments with respect to the right to jury trial under the federal constitutional standard.[113] The court noted that, under federal case law, first-offense DUI in Hawai'i is presumptively petty, because the five-day maximum term of incarceration authorized by Hawai'i's DUI statute (after the 1993 amendments) is well below the six-month federal threshold.[114] The court also pointed out that the additional mix of penalties for first-offense DUI was insufficient to overcome the presumption that first-offense DUI is constitutionally petty.[115] Accordingly, the court concluded that there was no right to jury trial for first-offense DUI under the United States Constitution.[116]

The court then examined the DUI statute under the state constitutional standard. Although the court restated the *Wilson* three prong-test, the court's analysis focused on two factors: the revised penalty structure and the legislative pronouncements accompanying the 1993 amendments.[117] The court concluded that first-time DUI offenders were not entitled to jury trial under the Hawaii Constitution because the 1993 amendments reduced the maximum jail sentence for first-offense

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[109] *Nakata*, 76 Haw. at 362, 878 P.2d at 701.

[110] *Id.*

[111] *Id.*

[112] *Id.* The court answered the second question in the affirmative. The court held that retroactive application did not violate the ex-post facto clause because the amendments reduce, rather than increase, the possible punishment. *Id.* at 375, 878 P.2d at 714. The court likewise rejected appellants' due process arguments, *Id.* at 376-78, 878 P.2d at 715-17, and equal protection arguments, *Id.* at 378-79, 878 P.2d at 717-18.

[113] *Id.* at 366, 878 P.2d at 705 (citing Blanton v. City of North Las Vegas, 489 U.S., 538, 541 (1989), and United States v. Nachtigal, 113 S.Ct. 1072, 1073 (1993)). *Blanton* and *Nachtigal* are discussed, *supra*, notes 26-44 and accompanying text.

[114] *Id.* at 366, 878 P.2d at 705 (referring to the threshold set in *Blanton*, 489 U.S. at 541).

[115] *Id.* at 366-67, 878 P.2d at 705-06. The court compared the penalties authorized by Hawai'i's DUI statute to those authorized by the federal DUI statute, which were ruled constitutionally petty in *Nachtigal*. *Id.*

[116] *Id.* at 367, 878 P.2d at 706.

[117] *Id.* at 368-69, 878 P.2d at 707-08.

DUI from thirty days to five days,[118] and because the legislature unambiguously declared that it considered first-offense DUI to be constitutionally petty.[119]

IV. State v. Lindsey

Three months after the *Nakata* decision, the Hawaii Supreme Court further restricted the right to jury trial for petty offenses. The case was *State v. Lindsey*;[120] the subject, prostitution.

A. The Facts of the Case

Decarla Lindsey was arrested on three separate occasions in 1991, each time charged with the offense of prostitution.[121] In April 1992, Lindsey was arraigned and requested a jury trial on each charge.[122] The district court granted her request and committed all three cases to circuit court for jury trials.[123] In May 1992, the prosecution moved to remand the cases to district court for non-jury trials.[124] The circuit court held that there was no right to jury trial for the offense of prostitution and remanded the cases to district court.[125] On remand, the district court found Lindsey guilty of all three charges, and she appealed.[126]

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[118] *Id.* at 368, 878 P.2d at 707. The court pointed out that the "Legislature appears to have specifically considered the comment from *O'Brien* regarding a maximum imprisonment term of five days for a first-offense DUI when it promulgated [the 1993 amendments]." *Id.*

[119] *Id.* at 369, 878 P.2d at 708. Specifically, the court noted the following:

> [The purpose of the amendments] is to reduce the penalties for first time offenders so that there can be no question that, as to first time offenders, the offense is a "petty offense" in the constitutional sense, to which no right to jury trial attaches. The Legislature finds that [repeat DUI offenders] represent a serious social problem. . . . First time offenders, however, represent less of a threat to society, as most will respond to corrective action.

Id. (citing Act 128, May 21, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 179).

[120] 77 Haw. 162, 883 P.2d 83 (1994).

[121] *Id.* at 163, 883 P.2d at 84.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

B. Analysis of the Lindsey Decision

The Hawaii Supreme Court began its analysis of Lindsey's right to jury trial with the federal constitutional standard. As it had previously, however, the court expressly declined to adopt the federal six-month standard for determining whether an offense is petty or serious.[127] Instead, the court set a "bright line" rule of its own:

> [W]e now adopt a rule that if the maximum authorized term of imprisonment for a particular offense does not exceed thirty days, it is presumptively a petty offense to which the right to jury trial does not attach. The presumption can be overcome only in extraordinary cases when consideration of the other *Nakata* factors[128] . . . unequivocally demonstrates that society demands that persons charged with the offense at issue be afforded the right to a jury trial.[129]

Because the maximum term of imprisonment authorized by Hawaii's prostitution statute is thirty days,[130] the court declared that there is a presumption that the right to jury trial under the Hawaii Constitution does not attach to any prostitution offense.[131]

The court then examined the other *Nakata* factors. First, the court examined the penalties other than imprisonment authorized by the prostitution statute. The court noted that the only other authorized penalty in the statute was a $500 fine, which by itself is insufficient to overcome the presumption.[132] Next, the court noted that prostitution was not an offense indictable at common law and therefore a person accused of prostitution had no right to jury trial under common law.[133] Finally, the court examined the gravity of the offense, with particular emphasis on the legislative history.[134] Based on the legislative history, the court concluded that prostitution is not a constitutionally serious offense:

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[127] *Id.* at 164, 883 P.2d at 85.

[128] The *Nakata* factors are discussed *infra* at notes 155-66 and accompanying text.

[129] *Lindsey*, 77 Haw. at 165, 883 P.2d at 86.

[130] HAW. REV. STAT. § 712-1200 (1985 and 1992 Supp.).

[131] *Lindsey*, 77 Haw. at 165-66, 883 P.2d at 87-88.

[132] *Id.* at 166, 883 P.2d at 87.

[133] *Id.* (citing Bailey v. United States, 98 F.2d 306 (D.C. Cir. 1938)).

[134] *Id.* The court stated that "'the legislature's perception of an offense, as reflected by its statements in legislative history, often provides a strong indication of society's view of the gravity of an offense.'" *Id.* (citing *Nakata*, 76 Haw. 360, 366, 878 P.2d 699, 706 (1994)).

> [W]e cannot conclude that the legislative history unequivocally demonstrates that society deems prostitution so grave an offense that it demands that individuals charged with prostitution be afforded the right to a trial by jury [because]: (1) when the Hawaii Penal Code was adopted the legislature was somewhat reluctant to continue to criminalize prostitution and reduced the offense to a petty misdemeanor . . . (2) the legislature was concerned primarily not with prostitution itself but with the secondary effects of prostitution . . . and (3) the legislature clearly feels that prostitution itself is less serious than other related offenses.[135]

The court concluded that consideration of the *Nakata* factors failed to overcome the presumption that prostitution is a petty offense.[136] Accordingly, the court held that Lindsey was not entitled to a jury trial.[137]

Lindsey's "bright line" rule for determining whether an offense is petty or serious essentially has two parts. First, any offense punishable by no more than thirty days incarceration is presumed petty, and persons accused of such an offense are therefore not entitled to jury trial.[138] Second, in order to overcome the presumption, the reviewing court must find that the "other *Nakata* factors"—the additional mix of statutory penalties, the treatment of the offense at common law, and the gravity of the offense—demonstrate that the legislature considers the offense constitutionally serious.[139]

Lindsey's test emphasizes the maximum authorized term of imprisonment as the most important factor in the analysis. This approach is consistent with previous federal[140] and Hawai'i[141] case law regarding the right to jury trial.[142] The reason that the Hawaii Supreme Court

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[135] *Id.* at 166-67, 883 P.2d at 87-88 (citations omitted).

[136] *Id.* at 167, 883 P.2d at 88.

[137] *Id.*

[138] *Id.* at 165, 883 P.2d at 86.

[139] *Id.*

[140] *Blanton*, 489 U.S. at 542 ("Primary emphasis . . . must be placed on the maximum authorized period of incarceration [in analyzing the seriousness of an offense]").

[141] *Nakata*, 76 Haw. at 368, 878 P.2d at 707. The court in *Nakata* reviewed *Wilson* and *O'Brien* and concluded that "it is apparent that [the Hawaii Supreme Court] placed primary emphasis on the imprisonment aspect [of the analysis]." *Id.*

[142] *See Blanton*, 489 U.S. at 542 (citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975)); *Lindsey*, 77 Haw. at 164, 883 P.2d at 85. The U.S. Supreme Court and the Hawaii Supreme Court have both pointed out that, while other penalties may significantly infringe on personal liberty, incarceration is an "intrinsically different" form of punishment and is the most powerful indication of the seriousness of an offense. *Id.*

drew its "bright line" at thirty days, however, is not at all clear.

The Hawaii Supreme Court's previous cases did not set a clear thirty-day standard, let alone a presumption, in regard to the right to jury trial under the Hawaii Constitution. In *State v. Shak*, the offense at issue was not punishable by imprisonment at all, and the court purported to follow the federal six-month standard and previous Hawai'i precedent.[143] In *State v. Kasprzycki*, the offense at issue was punishable by a maximum term of thirty days imprisonment;[144] however, the court noted—but did not adopt or reject—the federal standard.[145] Instead, the court relied on the legislature's classification of the offense as a "petty misdemeanor."[146]

The DUI cases likewise failed to set a clear thirty-day standard. In *O'Brien*[147] and *Jordan*,[148] the court found that the offense of DUI was constitutionally serious. The court did so despite the fact that, in *O'Brien*, the penalty provisions specified a minimum, but no maximum, prison term for first- and second-offense DUI,[149] and that, in *Jordan*, the maximum prison term for first-offense DUI was thirty days.[150] In *Wilson*, the court classified a DUI-related offense as petty because the *legislature* had recently amended the DUI statutes and specifically classified first-offense DUI as petty.[151] Finally, in *Nakata*, the court held that first-offense DUI, punishable by a maximum five-day term of imprisonment, is constitutionally petty.[152] Significantly, although *Nakata* was decided only three months before *Lindsey*,[153] the court in *Nakata* did not adopt *any* presumption regarding the classification of offenses.

Other than its discussion of previous case law, the court did not explain its reasons for drawing the "bright line" at thirty days. One possible explanation, however, is that the court viewed *Lindsey* as a means of reducing the backlog of criminal cases pending in Hawai'i's

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[143] State v. Shak, 51 Haw. 612, 616, 466 P.2d 422, 425 (1970).

[144] State v. Kasprzycki, 64 Haw. 374, 375, 641 P.2d 978, 979 (1982)(per curiam).

[145] *Id.*

[146] *Id.*

[147] 68 Haw. at 44, 704 P.2d at 887.

[148] 72 Haw. at 601, 825 P.2d at 1068.

[149] 68 Haw. at 43-44, 704 P.2d at 887.

[150] 72 Haw. at 599, 825 P.2d at 1067.

[151] 75 Haw. at 77-78, 856 P.2d at 1245.

[152] 76 Haw. at 371, 878 P.2d at 710.

[153] *Nakata* was decided on August 2, 1994. *Lindsey* was decided on November 2, 1994.

court system.[154] Although there is not a backlog of jury trial prostitution cases,[155] there is a backlog of criminal cases in general,[156] and *Lindsey* appears to be applicable to any criminal offense punishable by thirty days or less imprisonment.

Whatever the court's reasons may have been, the effect is clear: *Lindsey*'s thirty-day presumption creates a much clearer standard for identification of "petty" offenses, and if *Lindsey* is any indication, the presumption is all but conclusive. The court itself indicates that:

> [t]he presumption can be overcome only in *extraordinary cases* when consideration of the *Nakata* factors,[157] i.e. any possible additional statutory 'mix of penalties,' the treatment of the offense at common law, and the gravity of the offense, *unequivocally demonstrates* that society demands that persons charged with the offense at issue be afforded the right to a jury trial.[158]

Nevertheless, the court did perform a perfunctory analysis of the *Nakata* factors with respect to Hawai'i's prostitution statute.

The court had very little to say about the first of the other *Nakata* factors, the additional "mix" of statutory penalties. Aside from thirty days imprisonment, the only other penalty authorized by Hawai'i's prostitution statute is a fine of up to $500.[159] The court noted that such a fine "is insufficient in and of itself to trigger the right to jury trial."[160] Although that statement is consistent with Hawai'i prece-

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[154] July 1, 1993 to June 30, 1994 JUDICIARY - STATE OF HAWAI'I ANN. REP. 52, at Table 7. Chief Justice Ronald Moon seems especially concerned about reducing the docket backlog, and increasing the court's overall efficiency. *Nakata*, for example, will be instrumental in reducing the tremendous backlog of DUI jury trial cases. The backlog had reached 3,375 cases by the time the trial court heard *Nakata*. 76 Haw. at 363, 878 P.2d at 702. The court system faced a similar problem with domestic violence cases, prompting the assignment of four full-time judges and two per diem judges to exclusively handle domestic violence cases. In addition, the Chief Justice has proposed a new case management system, and has contracted with the National Center for State Courts to develop a "delay reduction program." July 1, 1993 to June 30, 1994 JUDICIARY - STATE OF HAWAI'I ANN. REP., Message from the Chief Justice.

[155] July 1, 1993 to June 30, 1994 JUDICIARY - STATE OF HAWAI'I ANN. REP. 52, Table 7.

[156] *Id.*

[157] State v. Lindsey, 77 Haw. 162, 165, 883 P.2d 83, 86 (1994). *See also Nakata*, 76 Haw. 360, 367, 878 P.2d 699, 706 (1994).

[158] *Lindsey*, 77 Haw. at 165, 883 P.2d at 86 (emphasis added).

[159] HAW. REV. STAT. § 712-1200 (1985 and 1992 Supp.).

[160] *Lindsey*, 77 Haw. at 166, 883 P.2d at 87.

dent,[161] the court's analysis is not clear: does *Lindsey* require a review of any additional penalty *by itself*, or does it require a review of the *combined effect* of the maximum prison term and any additional penalty?

The supreme court also devoted little attention to the second *Nakata* factor, treatment of the offense at common law. The entire analysis consisted of a cite to *United States v. Bailey*,:[162] "the act of prostitution, unattended by circumstances making it a public nuisance, was not an offense indictable at common law, so as to entitle a person accused thereof to a trial by jury.'"[163] *Bailey* appears to be the only authority which discusses the treatment of prostitution at common law,[164] however, and it does support the courts' conclusion.

The court devoted most of its analysis to the third *Nakata* factor, the gravity of the offense. The court focused particularly on the legislative history of Hawai'i's prostitution statute and noted that some of the legislative history indicates that prostitution is considered a serious offense in Hawai'i.[165] For example, the House Standing Committee, when reviewing amendments to the prostitution statute in 1993, reported the following:

> [T]here are others, many of them youngsters, who may be charged as prostitutes and who have engaged in the activity because of drug problems, extreme poverty or other mitigating circumstances.
>
> For these individuals, unlike the hardened professional, as well as for certain customers of prostitutes, a conviction under the present law for engaging in prostitution is a devastating and humiliating stigma which will last forever.[166]

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[161] *See* State v. Simeona, 10 Haw.App. 220, 245-46, 864 P.2d 1109, 1121 (1993). Simeona was charged with violating a Department of Transportation regulation, punishable by a fine of up to $10,000 but no imprisonment. The Hawaii Intermediate Court of Appeals (ICA) noted that the state constitution guarantees the right to jury trial in civil suits where the amount in controversy exceeds $5,000. Thus, the ICA upheld Simoena's right to jury trial, because, according to the court, "defendants in criminal cases should have no less of a constitutional right to jury trial than parties in civil cases." *Id.*

[162] *Lindsey*, 77 Haw. at 166, 883 P.2d at 87 (citing Bailey v. United States, 98 F.2d 306 (1938).

[163] *Id.*

[164] For a discussion of criminal offenses tried by jury at common law, *see* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); *See also* Note, *The Petty Offense Exception and the Right to Jury Trial*, 48 FORDHAM L. REV. 205 (1979).

[165] *Lindsey*, 77 Haw. at 166-67, 883 P.2d at 87-88.

[166] H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in* 1993 HAW. HOUSE J. 1468.

Despite this apparent indication of seriousness, the court concluded that the legislative history does not demonstrate that prostitution is serious in the constitutional sense. The court's conclusion was based on three factors. First, the court noted that the legislature had been somewhat reluctant to continue to criminalize prostitution when it adopted the Hawaii Penal Code in 1972.[167] In addition, the court pointed out that the legislature was primarily concerned with the secondary effects of prostitution, and not with prostitution itself.[168] Finally, the court inferred from the legislative history that the legislature believes prostitution to be less serious than related offenses.[169]

This analysis of the legislative history is persuasive when examined under the extremely high standard[170] the court has created for demonstrating the seriousness of an offense. The commentary to Hawai'i's prostitution statute does in fact indicate that the legislature was reluctant to continue to criminalize the offense when it adopted the Hawaii Penal Code in 1972.[171] Nevertheless, the legislature did include prostitution as a criminal offense but classified it as a "petty misdemeanor." The 1981 amendments added specific penalty provisions which, although mandatory, dramatically reduced the maximum possible prison term from one year to thirty days.[172] In addition, the 1993 amendments provided for deferred pleas for first-time offenders, and, significantly, eliminated deferred pleas for "the more serious offenses of promoting prostitution in the first, second, and third degree . . . ."[173] Although

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[167] *Lindsey*, 77 Haw. at 167, 883 P.2d at 88 (citing commentary to HAW. REV. STAT. § 712-1200 (1985 and 1992 Supp.).

[168] *Id.* (citing CONF. COMM. REP. No. 15, 11th Leg., 1981 Reg. Sess., *reprinted in* 1981 HAW. SENATE J. 907).

[169] *Id.* (citing H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in* 1993 HAW. HOUSE J. 1468, and comments of Representative Say, 1981 HAW. HOUSE J. 765).

[170] In order to overcome the presumption that an offense is "petty," *Lindsey* requires that the legislative history "unequivocally demonstrates that society deems prostitution so grave an offense that it demands that individuals charged with prostitution be afforded the right to a trial by jury." *Lindsey*, 77 Haw. at 166, 883 P.2d at 87.

[171] HAW. REV. STAT. § 712-1200 (1985 and 1992 Supp.)(official commentary). The commentary notes that the legislature finds the usual arguments for criminalizing prostitution—prevention of disease, protection of young girls from exploitation, and the "related sinister activities"—unconvincing. *Id.* It also acknowledges that legalization, combined with efforts to confine prostitution activity to certain areas, exhibits "foresight and practicality." *Id.*

[172] *See supra* note 7.

[173] H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in*

there are some indications to the contrary,[174] the court correctly concluded that the legislative history of Hawai'i's prostitution statute fails to "unequivocally demonstrate" that prostitution is a constitutionally serious offense.[175]

In examining the gravity of the offense, the court did not address the significant amount of prostitution-related legislation proposed during the 1994 legislative session.[176] Although none of the proposed bills was enacted into law,[177] the legislature's comments shed some additional light on their view regarding the gravity of the offense.[178] This legislative activity also suggests that society (at least in Hawaii) does not demand that individuals charged with prostitution be afforded the right to jury trial. In fact, because the legislature and the public appear to be primarily concerned about the *economic* consequences of prostitution,[179] particularly its effect on the Waikiki tourist industry and the states

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1993 HAW. HOUSE J. 1468. The fact that first-time offenders are eligible for deferred pleas, does not, as the court suggests in a footnote, indicate that prostitution is a "petty" offense. *See Lindsey*, 77 Haw. at 165 n.8, 883 P.2d at 88 n.8. There are numerous other offenses, constitutionally serious offenses, for which deferred pleas are accepted. The 1993 amendments do, however, support the court's assertion that the legislature believes prostitution to be less serious than prostitution-related offenses. *Id.*

[174] *See supra* note 166.

[175] *Lindsey*, 77 Haw. at 166, 883 P.2d 87.

[176] *See* S. 556, 17th Leg., Reg. Sess. (1994)(recommending changes to the penalty provisions); S. 3203, 17th Leg., Reg. Sess. (1994)(creation of a prostitution detention facility); S. 2294, 17th Leg., Reg. Sess. (1994)(recommending the addition of night court judges to hear prostitution and domestic violence cases); H.R. 2308, 17th Leg., Reg. Sess. (1994)(creating a separate offense for prostitution committed in the Waikiki area).

[177] H.R. 2308, 17th Leg., Reg. Sess., Veto Message, March 27, 1994. Governor John Waihee eventually vetoed House Bill 2308, noting that it only addressed prostitution in Waikiki, and would likely cause a backlog of cases and further overcrowd state prisons. *Id.*

[178] S. STAND. COMM. REP. No. 2039, 17th Leg., 1994 Reg. Sess. (not yet reprinted in HAW. SENATE J.) The committee report to Senate Bill 556 specifically states that the legislative intent is to preclude jury trials for prostitution cases. *Id.*

[179] *See* S. STAND. COMM. REP. No. 2039, 17th Leg., 1994 Reg. Sess. (not yet reprinted in HAW. SENATE J.)(describing prostitution in Waikiki as a "major problem" which will "reduce the attractiveness of Waikiki and our state as a major tourist destination"); H.R. 2308, 17th Leg., Reg. Sess. (1994)("more stringent measures are necessary to preserve Waikiki as a prime attraction and to protect the health, safety, and welfare of residents and visitors to Waikiki"). Two private associations, the Waikiki Improvement Association and the Retail Merchants of Hawaii, supported House Bill 2308. H.R. STAND. COMM. REP. No. 2907, 17th Leg., 1994 Reg. Sess. (not yet *reprinted in* HAW. HOUSE J.).

judicial and prison resources, they would most likely demand that accused prostitutes *not* be tried by jury.

The court also declined to address the public health concerns associated with prostitution. Although at least two public officials[180] suggested that they would propose legislation in 1995 requiring prostitutes to be tested for AIDS, neither official provided information about the link between prostitution and AIDS in Hawai'i.[181]

V. IMPACT

The holding in *Lindsey* does something that the Hawaii Supreme Court had long refused to do: it sets a "bright line" rule for determining whether an offense is petty or serious, and consequently determines whether and when an accused is entitled to trial by jury. Lindsey's "bright line" reaches beyond prostitution and will immediately affect numerous offenses currently classified as "petty misdemeanors" in the Hawaii Penal Code.[182]

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[180] The first, former Mayor Frank Fasi, proposed submitting a bill making it a felony for a prostitute who knows that he or she has AIDS to engage in prostitution. David Waite, *Mayor Targets Hookers*, HONOLULU ADVERTISER, June 23, 1994, at A2. The second, Honolulu City Councilman John Henry Felix, plans to introduce a bill that would require persons arrested for prostitution, including both prostitutes and customers, to be tested for sexually transmitted diseases. City and County of Honolulu Press Release, dated December 9, 1994.

[181] The Hawaii State Department of Health does not currently keep statistics regarding the number of prostitutes with AIDS. A spokesman for the department indicated that, although heterosexual prostitution is a major cause of the spread of AIDS in Africa and South East Asia, over 90% of *Hawaii*'s AIDS cases are caused by male-to-male sexual activity and intravenous drug use. Telephone interview with David Shelmer, epidemiologist with the State Department of Health, AIDS Surveillance Program (December 21, 1994).

[182] *See* HAW. REV. STAT. § 706-663 (1985 and 1992 Supp.)(providing that persons convicted of "petty misdemeanors" may be sentenced to not more than thirty days imprisonment). In addition to prostitution, the following Penal Code offenses are currently classified as "petty misdemeanors": HAW. REV. STAT. §§ 707-712 (third degree assault); 708-814 (second degree criminal trespass); 708-815 (simple trespass); 708-823 (fourth degree criminal property damage); 708-827 (second degree criminal tampering); 708-828 (criminal use of noxious substance); 708-829 (criminal loitering); 708-833 (fourth degree theft); 708-833.5 (shoplifting); 708-837.5 (failure to return leased/rented property); 709-900 (illegal marrying); 710-1011 (refusing to aid a peace officer); 710-1012 (refusing to aid a fire control officer); 710-1062 (false swearing); 711-1101 (disorderly conduct); 711-1105 (obstructing); 711-1106 (harassment); 711-1106.5 (harassment by stalking, depending on circumstances); 711-1111 (violation of privacy); 712-1211 (dispensing indecent material); 712-1217 (open lewdness); 712-1249 (third degree promoting a detrimental drug).

Perhaps even more significantly, the court was careful to point out that offenses punishable by more than thirty days, but less than six months, are not automatically granted the right to jury trial.[183] For those offenses, no presumption applies, and all of the *Nakata* factors must be examined together to determine whether the right to jury trial applies.[184] The court therefore left open the possibility of further reducing the number of offenses to which the right to jury trial attaches, over and above those offenses which fall within *Lindsey*'s presumption.

Although *Lindsey*'s presumptive standard may become a powerful tool in reducing the backlog of criminal cases, Lindsey's standard is unnecessarily inflexible. The legislature can now preempt any meaningful judicial review by setting up appropriate maximum penalties and creating a legislative record that specifically demonstrates its intent to classify a particular offense as "petty." This is particularly important now, because the Hawaii Penal Code is currently being revised. The legislature might reclassify crimes or reduce the potential penalties, not because an offense really is "petty," but to reduce the burden on limited state prison and court system resources. That appears to be precisely what happened with the revisions to the DUI statute in response to *O'Brien* and *Jordan*, and it seems likely to affect other offenses as well. For example, the Penal Code revision committee is considering a reduction in criminal penalties for domestic violence, probably not because anyone believes that domestic violence is "petty," but because doing so will enable domestic violence cases to get through the judicial system faster (because there will be no right to jury trial).[185]

VI. Conclusion

Lindsey has more narrowly defined an individual's right to jury trial. Both federal and Hawai'i courts had long recognized that the constitutional right to jury trial did not apply to "petty" offenses. Before *Lindsey*, however, the Hawaii Supreme Court had resisted the adoption of a presumptive standard along the federal model, which presumes that an offense is petty when its maximum possible prison sentence is six months or less.

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[183] State v. Lindsey, 77 Haw. 162, 165 n.5, 883 P.2d 83, 86 n.5 (1994).

[184] *Id.*

[185] Note, however, that the backlog of domestic violence cases has been reduced after four full-time and two per diem judges were assigned exclusively to domestic violence cases. July 1, 1993 to June 30, 1994 Judiciary - State of Hawai'i Ann. Rep., Message from the Chief Justice.

The *Lindsey* test essentially calls for a two part analysis. First, a court must examine the potential penalty for the offense at issue; if the maximum authorized prison sentence is thirty days or less, the offense is presumptively petty. Second, the court must analyze the other *Nakata* factors, namely any additional statutory penalties; the treatment of the offense at common law; and the gravity of the offense, with an emphasis on the legislative pronouncements. If *Lindsey* is any indication, however, the presumption will indeed be difficult to overcome, as the court itself acknowledges.

The reason that the court chose to create a "bright line" standard, and chose to draw the line at thirty days, is not entirely clear. It may have been prompted by the Hawaii Supreme Court's, and particularly Chief Justice Moon's, desire to increase the efficiency of our state court system. Whatever the reasons, *Lindsey* will likely have an immediate impact on numerous offenses classified as "petty misdemeanors" in the Hawaii Penal Code, and possibly other offenses with penalties falling between the Hawaii and federal standards.

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Reyes v. Kuboyama: Vendor Liability for the Sale of Intoxicating Liquor to Minors under a Common Law Negligence Theory

I. INTRODUCTION

In 1993, there were seventeen minors killed in alcohol related motor vehicle crashes in Hawai'i.[1] Nationally, young people under the age of twenty-one are more than twice as likely to be involved in fatal alcohol related crashes as would be expected considering the number of licensed drivers in this age group.[2] Dennis M. Saki, Chairman of the Hawaii Committee for the Minimum Drinking Age, reasons that minors under the age of twenty-one may lack the maturity to make responsible decisions about consumption of alcohol and driving.[3] Although statutes enacted in almost every state have raised the minimum drinking age to twenty-one, sales of liquor to minors continue despite the imposition of civil fines.[4]

Reyes v. Kuboyama[5] is the first appellate opinion from Hawai'i addressing the liability of a retail package liquor business for the unlawful sale of liquor to a minor.[6] In *Reyes*, the Hawaii Supreme Court held

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[1] Fatal Traffic Accidents, Hawaii Department of Transportation and Motor Vehicle Safety, 60 (1994).

[2] MOTHERS AGAINST DRUNK DRIVING NEWSLETTER, Hawai'i Chapter, June 6, 1986, at 1.

[3] *Id.* at 2.

[4] A newsletter from Dennis M. Saki, Chairman of the Hawaii Committee for the Minimum Drinking Age, indicates that Iowa, Minnesota, Georgia and Massachusetts all had increased fatalities in the 19 and 20 year old group after raising the drinking age to 21, and Montana showed a 400% increase in the first year after enacting legislation raising the drinking age to 21. MOTHERS AGAINST DRUNK DRIVING NEWSLETTER, December 6, 1990, at 4.

[5] Reyes v. Kuboyama, 76 Haw. 137, 870 P.2d 1281 (1994).

[6] *Reyes* at 141, 870 P.2d at 1285.

that Hawai'i's liquor control statute imposes a duty to innocent third parties upon a liquor licensee to refrain from selling alcohol to a minor, and that duty may be breached even if the intoxicated minor who causes an injury is not the minor who actually purchased the liquor.[7]

This casenote addresses the imposition of liability against a liquor vendor for the unlawful sale of liquor to a minor. In Part II, a factual summary of the *Reyes* case will be presented. In Part III, the background and evolution of liquor vendor liability in Hawai'i will be examined. Comparisons will be drawn with states implementing statutory tort remedies for the unlawful sale of liquor. In Part IV, the *Reyes* decision will be analyzed in light of prior Hawai'i decisions and appellate opinions from other jurisdictions. The elements necessary to establish liquor vendor liability will be discussed as possible defenses to liability. This casenote concludes with a discussion of the impact of the *Reyes* holding on future litigants and suggests the direction that the Hawaii Supreme Court might take in future decisions in this area.

II. Facts

On the evening of November 17, 1989, Yukiko Kuboyama, who owns and operates Kapa'a Liquors and Wine Company in Kapa'a, Kaua'i, sold at least two cases of cold beer to Jose Igaya and Howard Kamoku, Jr., both of whom were nineteen years old at the time.[8] Kuboyama did not ask either boy for identification which would have verified that he was at least twenty-one years old.[9] The boys had been driven to Kuboyama's store by Corey Medeiros, who was eighteen years old.[10] Corey Medeiros stayed in the car while the boys bought the beer.[11] After buying beer from Kuboyama, Medeiros drove the

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[7] *Reyes* at 138, 870 P.2d at 1283.

[8] *Id.*

[9] *Id. Haw. Rev. Stat.* § 281-78 (1985) provided:

(a) At no time under any circumstances shall any liquor:

. . .

(2) Be sold or furnished by an licensee to:

(A) Any minor.

The definitions section of chapter 281, Haw. Rev. Stat. Section 281-1 defines a "minor" as "any person below the age of twenty-one years." *Haw. Rev. Stat.* (1985).

Id.

[10] *Reyes* at 138, 870 P.2d at 1283.

[11] *Id.*

boys to another store where they purchased more beer.[12] The boys then proceeded to Howard Kamoku's home for a party.[13]

The beer was consumed at the party at Howard Kamoku's home.[14] Attending the party were Corey Medeiros, Jose Igaya, Howard Kamoku, Howard's brother Jason Kamoku, and Jason Kamoku's friend, Tiffany Nicole Delos Reyes.[15] The party lasted until the early morning hours of November 18, 1989, although "it was unclear as to how long Tiffany attended the party."[16] While there was no evidence that Tiffany consumed any alcohol at the party, she was there when the party ended.[17]

As the party was breaking up, it was agreed that Corey Medeiros would drive several of the people attending the party home, including Tiffany, despite evidence that Medeiros was inebriated at the end of the party.[18] Shortly after leaving Howard Kamoku's home, Medeiros lost control of his vehicle and crashed off the road, resulting in "serious and permanent" injuries to Tiffany.[19]

Tiffany's mother Jocelyn Delos Reyes, acting individually and on behalf of Tiffany, brought suit in the Fifth Circuit Court against Corey Medeiros on January 24, 1990.[20] On September 7, 1990, storeowner Kuboyama was cited by the Liquor Control Commission of the County of Kauai for violating *Hawaii Revised Statutes* section 281-78(a)(2)(A)[21] and fined $1,200.00.[22] On November 1, 1990, Reyes amended her complaint to add Kuboyama as a defendant.[23] Kuboyama subsequently filed a motion for summary judgment.[24] That motion was granted on the grounds that minors were not part of the class that was protected by *Hawaii Revised Statutes* section 281-78(a)(2)(A), and therefore, Kuboyama did not owe a tort duty to Tiffany.[25] Reyes appealed, and the

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 138. Most of the witnesses indicated that Tiffany was there "off and on." *Id.*

[17] *Id.* at 138, 870 P.2d at 1283.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See supra* note 9.

[22] *Id.* at 138, 870 P.2d at 1283.

[23] *Id.* at 139-40, 870 P.2d at 1283.

[24] *Id.*

[25] *Id.* at 140, 870 P.2d at 1284.

Hawaii Supreme Court vacated the lower court's ruling, holding that Kuboyama owed a duty to Tiffany not to sell liquor to a minor in violation of the statute and that duty applies even if the resulting harm is caused by a minor other than the minor to whom the liquor was originally sold.[26]

III. History

At common law, it was not a tort to either sell or give intoxicating liquor to an ordinary able-bodied person.[27] One furnishing liquor owed no duty to those persons injured by the intoxication of the person furnished with liquor.[28] The rationale advanced for the old common law rule was that the consumption of the liquor and not its sale was the proximate cause of the plaintiffs' injuries.[29] In the 1950s, however, some courts began to recognize a common law duty on the part of a liquor vendor to refrain from furnishing liquor to a visibly intoxicated patron.[30] The common law duty usually arises from a liquor control statute making it unlawful to sell liquor to visibly intoxicated customers or to minors.[31] Following such decisions, some states enacted "Dram Shop Acts[32]", to reduce liability for commercial alcoholic beverage

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[26] *Id.* at 139, 870 P.2d at 1282.

[27] 45 Am. Jur. 2d, *Intoxicating Liquor*, § 553 (1985).

[28] *Id.*

[29] Fleckner v. Dionne, 210 P.2d 530 (Ca. App. 1949). In his dissenting opinion, Justice Dooling indicated that the distinction was based on highly legalistic reasoning and that the plaintiffs' claim was well within fundamental common law negligence principles. *Id.*

[30] *See, e.g.*, Manning v. Yokas, 132 A.2d 198, 199 (Pa. 1957); McKinney v. Foster, 137 A.2d 502 (Pa. 1958); Schlein v. Goldberg, 146 A.2d 648 (Pa. 1958). While *Manning* and *McKinney* were grounded on an 1854 Civil Damage Law, *Schlein* rested entirely on common law principles. The seminal case of Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959), held that the sale of liquor to a visibly intoxicated patron or to a minor constituted a forseeable unreasonable risk of harm to others. The court stated that it would be error to rule that such negligence was not, as a matter of law, the proximate cause of the plaintiff's injuries. *Id.* at 10.

[31] *See, e.g.*, Chausse v. Southland Corp., 400 So.2d 1199 (La. 1981) (holding Louisiana's liquor control statute was intended to protect the public from the consequences of the drinking of alcohol by minors and imposes a duty on liquor vendors). *See also*, Hart v. Ivey, 420 S.E.2d 174 (N.C. 1989) (holding North Carolina liquor control statute was not a public safety statute designed to protect the driving public, but, nevertheless, recognizing a cause of action under common law principles of negligence).

[32] A dram shop is a drinking establishment where liquors are sold to be drunk on the premises. Examples include a bar or saloon. Black's Law Dictionary 444 (5th ed. 1979).

vendors.[33] Other states had to enact legislation to create a cause of action against liquor vendors.[34] Only seven states adhere to the old common law rule of nonliability of tavern owners.[35]

A. Common Law Dram Shop Action in Hawaii.

The Hawaii Supreme Court created a common law dram shop action[36] against commercial vendors of liquor in *Ono v. Applegate*.[37] The

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[33] *See, e.g.*, *Or. Rev. Stat.* § 30.950 (1987). Following Campbell v. Carter, 566 P.2d 893, 896 (Or. 1977), (recognizing common-law negligence against commercial establishment for serving alcohol to customer who was visibly intoxicated) and Davis v. Billy's Con-Teena, 587 P.2d 75, 76 (Or. 1978), (holding liquor establishments negligent per se for failing to require proof of age where there is a doubt that customer to whom liquor is sold is over twenty-one), in 1979, the Oregon Restaurant and Beverage Association and various commercial alcoholic beverage servers sought legislation to limit the liability of liquor licenses and permittees to third parties. Sager v. McClenden, 672 P.2d 697 (Or. 1983).

[34] *See, e.g.*, North Dakota's Civil Damage Act, N.D. CENT. CODE § 5-01-06 (1980), enacted to create liability in a class of cases where there was no liability under the common law. Iszler v. Jorda, 80 N.W.2d 665, 667-68 (N.D. 1957) *cited with approval in* Ross v. Scott, 386 N.W.2d 18, 22 (N.D. 1986).

[35] Sorenson v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108, 119-20 (1984). The seven states are Arkansas, Delaware, Georgia, Maryland, Montana, Nebraska and Nevada. *Id.* Connecticut recently abrogated its old common law rule of nonliability. *See*, Ely v. Murphy, 540 A.2d 54 (Conn. 1988).

[36] Dram shop acts impose civil liability on liquor vendors who furnish liquor and cause the intoxication of a person who subsequently commits a tort. Generally, to establish a cause of action under a dram shop act, the plaintiff must prove the following elements:

> (1) That an intoxicating liquor was involved;
> (2) That the defendant transferred the liquor;
> (3) That the [intoxicated party] consumed the liquor;
> (4) That the [intoxicated party] became intoxicated, or that the drink contributed to an existing state of intoxication;
> (5) That the [intoxicated party] caused an actionable injury to the plaintiff;
> (6) That the intoxication had a causal connection to the plaintiff's injury; and
> (7) That the furnishing of liquor was unlawful.

Mary M. French, et al., *Project, Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1059 (1985).

[37] Ono v. Applegate, 62 Haw. 131, 136, 612 P.2d 533, 535 (1980). In creating a common law dram shop cause of action, the Ono Court relied heavily on Vesely v. Sager, 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (creating common law dram shop cause of action in absence of legislative enactment creating civil liability for sale of liquor to visibly intoxicated patron), despite the fact that the California legislature specifically reversed the Court's activity in the area of supplier liability to third persons in 1978. *Ono*, 62 Haw. at 135 n.4, 612 P.2d at 534 n.4.

Ono court noted that other jursidictions employing a similar analysis allowed recovery against taverns for injuries received by a third person as a result of a customer's intoxication in the absence or inapplicability of dram shop legislation.[38] The court ruled that if a tavern or dram shop violated Hawaii Revised Statutes section 281-78(a)(2)(B)[39] by serving liquor to a person who it knew or reasonably should have known was under the influence of intoxicating liquor, then the dram shop had, at the same time, breached a duty to any subsequently injured third party.[40]

Ono was injured when the car he occupied was involved in a head-on collision with a car driven by Samantha Scritchfield.[41] Scritchfield consumed liquor at her apartment and at a bar named the Sand Trap prior to the accident.[42] Ono sued Scritchfield's estate[43] and Applegate, doing business as the Sand Trap, alleging that the Sand Trap violated *Hawaii Revised Statutes* section 281-78(a)(2)(B) by furnishing liquor to an intoxicated motorist, Scritchfield.[44]

The Hawaii Supreme Court held that Hawai'i's liquor control statute imposed a duty on a tavern keeper not to serve liquor to a person under the influence of alcohol.[45] The Court found accidents involving drunk drivers were foreseeable intervening acts which would not necessarily relieve the tavern owner of liability.[46] Before a violation of

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[38] *Ono* 62 Haw. at 134 n.2, 612 P.2d at 535 n.2. The *Ono* court cited 21 jurisdictions which possessed some form of dram shop legislation generally allowing certain classes of persons to sue a tavern which supplies liquor to the customer who then proceeds to injure a third person. *Id.*

[39] HAW. REV. STAT. § 281-78(a)(2)(B)(1976) states in relevant part:

"Section 281-78 Prohibitions. (a) At no time under any circumstances shall any liquor:

(1) Be consumed on any public highway or any public sidewalk;

(2) Be sold or furnished by any licensee to:

(A) Any minor.

(B) Any person at the time under the influence of liquor . . .

Violation of this section is punishable by the revocation or suspension of the tavern's license." HAW. REV. STAT. § 281-91 (1976).

[40] *Ono*, 62 Haw. at 139, 612 P.2d at 540.

[41] *Id.* at 134, 612 P.2d at 536.

[42] *Id.*

[43] James Tagawa and Masaichi Ono sustained serious bodily injury due to the accident. Thomas Tagawa, Samantha Scritchfield, and Jose Montez, a passenger in the Scritchfield vehicle, were killed in the collision. *Ono* at 132, 612 P.2d at 535.

[44] *Id.*

[45] *Id.* at 135, 612 P.2d at 540.

[46] *Id.* at 138-39, 612 P.2d at 540-41.

Hawaii Revised Statutes section 281-78(a)(2)(B)(1976) could be found, the plaintiff had to show notice or knowledge on the part of the dram shop that the patron who caused the harm was under the influence of liquor at the time alcohol was served to the patron.[47] Finally, the Court ruled that the Sand Trap's violation of the liquor control statute could be submitted to the jury as evidence of negligence.[48]

B. First Party Claims Barred.

In two cases following *Ono*, the Hawaii Supreme Court refused to allow a tavern's inebriated patrons to recover against the tavern under a common law dram shop action. In *Bertelmann v. Taas Associates*[49], the Court held that a common law dram shop action is unavailable to the inebriated patron.[50] *Bertelmann* arose out of a one-car accident involving the decedent[51], who had been drinking at the Sheraton Waikoloa Hotel.[52] Bertelmann, as administrator of the decedent's estate, and the decedent's survivors[53] filed suit against hotel owner Taas Associates claiming that the Sheraton hotel employees had served liquor to the decedent when they should have known he was under the influence of liquor.[54] The plaintiffs alleged that the decedent's fatal injuries were caused by the acts of the Sheraton employees in continuing to serve

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[47] *Ono*, 62 Haw. at 138, 612 P.2d at 540.

[48] *Ono*, 62 Haw. at 138, 612 P.2d at 540 (citing RESTATEMENT (SECOND) OF TORTS § 285 (1977) which provides that a standard of conduct to avoid liability for negligence may be adopted from legislation even though the legislative enactment contains no express provision that its violation shall result in tort liability). *Id.* The Hawaii Supreme Court has previously held that violation of a statutory duty is only evidence that the violating defendant is negligent and the defendant is not, as in other jurisdictions, held to be negligent per se or rebuttably presumed to be negligent. Michel v. Valdastri, Ltd., 59 Haw. 53, 55, 575 P.2d 1299, 1301 (1978).

[49] 69 Haw. 95, 96, 735 P.2d 930, 934 (1987).

[50] *Id.* at 96, 735 P.2d at 934.

[51] On March 25, 1985, Solomon Boyd Keliikoa was injured when the car he was driving crashed on Queen Kaahumanu Highway in North Kona. No other persons or vehicles were involved. He died on May 16, 1985, as a result of the injuries sustained in the accident. Eric Kaleo Haili Bertelmann was appointed as administrator of the estate of Keliikoa. *Id.*

[52] *Id.*

[53] The plaintiffs bringing suit as survivors were: Mary Kapua Bertelmann Keliikoa, as guardian ad litem for Saulnette Kapua Palenapa, a minor; Eric Kaleo Haili Bertelmann; and, Saul Cleghorn Keliikoa. *Id.*

[54] *Id.* at 97, 735 P.2d at 934.

the decedent despite the fact that he was visibly and clearly intoxicated.[55] The trial court dismissed Bertelmann's complaint for failure to state a claim and the plaintiffs appealed.[56]

In ruling against Bertelmann, the Hawaii Supreme Court claimed that it was following the majority of jurisdictions which have rejected recovery by inebriated dram shop patrons.[57] The Court reasoned that allowing the inebriated customer to recover would be to allow him to benefit from the voluntary and wrongful act of procuring liquor in violation of the liquor control statute.[58] Holding that liquor customers are not within the class of persons for whose benefit *Hawaii Revised Statutes* §§ 281-78(a)(2)(B) and 281-78(b)(1) were enacted, the Court ruled that in the absence of harm to a third party, merely serving liquor to an already intoxicated customer and allowing the customer to leave the premises does not in itself, constitute actionable negligence.[59] The Court noted that jurisdictions allowing the intoxicated consumer to recover against the dram shop also allow the affirmative defenses of contributory negligence and assumption of risk.[60] In those jurisdictions, the causal connection between the defendants' unlawful failure to stop providing alcohol to an inebriated consumer and the consumer's later harm is a jury question.[61] Claiming to restrict the

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[55] *Id.*

[56] *Id.*

[57] *Id.* at 100, 735 P.2d at 935. The Court reasoned that drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis. *Id.* (citing Wright v. Moffit, 437 A.2d 554 (Del. 1981)). The *Bertelmann* court cited only four cases in support of its conclusion that a majority of jurisdictions reject recovery by the intoxicated patron. *Bertelmann*, 69 Haw. at 100-01, 735 P.2d at 935. Yet, the Court noted that three other jurisdictions had interpreted their dram shop statutes to allow a suit by an injured liquor consumer against the parties who furnished the liquor. *Id.* at 101, 735 P.2d at 935.

[58] *Id.* (citing Allen v. County of Westchester, 109 A.2d 475 (NY 1985)).

[59] *Id.* at 101, 735 P.2d at 935 (citing Miller v. City of Portland, 288 Or. 271, 604 P.2d 1261 (1980)). The Bertelmann Court noted that *Miller* involved the sale of liquor to a minor, but specifically stated that it was not deciding whether the sale of liquor to a minor in violation of Haw. Rev. Stat. Section 281-78(a)(2)(A) who subsequently becomes drunk and sustains injury precludes the minor (or the estate and survivors) from suing the commercial liquor supplier. *Bertelmann* at 101, 735 P.2d at 935. Citing two cases from other jurisdictions, the Bertelmann court concluded that the majority of jurisdictions make no distinction between minors and adults who hurt themselves after becoming intoxicated. *Id.* at 101 n.3, 735 P.2d at 935 n.3.

[60] *Id.* at 102, 735 P.2d at 935.

[61] *Id.* at 101-02, 735 P.2d at 935 (citing Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959)).

applicability of *Ono*, the Court concluded that the Sheraton hotel's statutory violation could not create a cause of action in favor of the plaintiffs.[62]

In *Feliciano v. Waikiki Deep Water, Inc.*[63], the Hawaii Supreme Court further restricted the common law dram shop duty by holding that aggressive sales of liquor do not constitute sufficient affirmative acts that would create liability to a customer on the part of the tavern.[64] Albert Feliciano, a nineteen year old boy from Waianae, became a quadriplegic after he was involved in a one-car accident.[65] Prior to the accident he had been drinking at the Kiku Hut in Waikiki.[66] Feliciano claimed that he had never driven to Honolulu and had never been to Waikiki prior to the night of the accident.[67] Apparently, he had led a very sheltered life and had never been in a hostess bar before.[68] He alleged that alcoholic drinks automatically arrived at his table, and he consumed at least four drinks before leaving the bar.[69] Feliciano filed suit alleging that defendant Kiku Hut coerced him to consume alcoholic beverages and that its coercion was the proximate cause of his injuries.[70] Summary judgment was granted in favor of the defendant, and Feliciano appealed.[71]

The Hawaii Supreme Court ruled that a tavern[72] does not have to consider the qualities[73] of an intoxicated customer in determining

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[62] *Id.* at 101, 735 P.2d at 935 (citing Miller v. City of Portland, 604 P.2d 1261 (Or. 1980)). The *Bertlemann* Court also held that decedent's survivors could not recover under Hawai'i's wrongful death statute, because the survivors can only recover if the tortious harm the decedent suffered would have entitled the decedant to maintain an action against the defendant. 69 Haw. at 101, 735 P.2d at 935. Moreover, the survivors' claims for loss of consortium failed, because they are derivative of the estate's claim, which is barred. *Id.*

[63] 69 Haw. 605, 752 P.2d 1076 (1988).

[64] *Id.* at 608, 752 P.2d at 1078. The court in *Bertelmann*, had recognized that a tavern owes a duty to avoid affirmative acts which increase the peril to an intoxicated customer. *Bertelmann* at 101, 735 P.2d at 935. The *Feliciano* court held that aggressive sales of drinks at a bar do not constitute sufficient affirmative acts as to create liability to the consumer on the part of the tavern. *Feliciano*, 69 Haw. 608, 752 P.2d at 1078.

[65] 69 Haw. at 606, 752 P.2d at 1077.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 606-07, 752 P.2d at 1077.

[71] *Id.* at 607, 752 P.2d at 1077.

[72] *Id.* Although the Court seems to limit its holding to tavern owners, it has been

whether affirmative acts will increase the danger to the customer.[74] The Court reasoned that it would place too great of a burden on tavern owners to determine the relative amount of sophistication of their customers.[75] The Court held that aggressive sales of liquor are not sufficient affirmative acts to attach liability to the bar for injuries sustained by its intoxicated customers.[76]

C. First Party Liability for Sale of Liquor to Minors.

The Hawaii Supreme Court next considered a common law dram shop action arising out of violation of the liquor control statute prohibiting sales of liquor to minors in *Winters v. Silver Fox Bar*.[77] Daniel Ferris, an eighteen year old boy, was served liquor at the Silver Fox Bar in violation of *Hawaii Revised Statutes* section 281-78(a)(2)(A).[78]

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previously argued that liquor store owners owe the same duty of care as tavern owners under the liquor control statute. *See*, Bradford K. Bliss, Susan D. Sugimoto, *Note*, *Ono v. Applegate*: *Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149, 159 (1981).

[73] *Feliciano*, 69 Haw. at 607, 752 P.2d at 1077. Felciano argued that he was unsophisticated, and because the conduct of the Kiku Hut employees was aggressive, intimidating and manipulative in serving and coercing him to drink, there were sufficient affirmative acts on the part of Kiku Hut that increased his peril. The Court concluded that it would place an intolerable burden upon bar personnel to consider the individual characteristics, such as the patron's level of sophistication or relative liquor tolerance, of the intoxicated customer in placing a duty upon taverns to avoid affirmative acts that increase the danger to the customer. *Id.* at 608, 752 P.2d at 1078.

[74] *Id.* at 608, 752 P.2d at 1078.

[75] *Id.*

[76] *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 378 (5th ed. 1984)(duty exists if intoxicated person is ejected into the danger of a railroad yard); Thrasher v. Legget, 373 So.2d 494 (La. 1979)(no responsibility for harm caused by plaintiff's inebriated condition and not by affirmative acts of the tavern); Parvi v. City of Kingston, 41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161 (1977)(city had duty to plaintiff hit by a car who had been transported, while intoxicated, to spot outside the city limits near a busy thruway).

[77] 71 Haw. 524, 797 P.2d 51 (1990).

[78] *Id.* The Court also noted that by purchasing liquor, Ferris violated HAW. REV. STAT. § 281-101.5(1985), which provides in pertinent part:

> (b) No minor shall purchase liquor and no minor shall have liquor in the minor's possession or custody in any motor vehicle on a public highway[.]
>
> (d) Any person under age eighteen who violates this section shall be subject to the jurisdictions of the family court. . . . Any person age eighteen to twenty-one who violates subsection (b) . . . . shall be guilty of a petty misdemeanor.

Winters at 526, 797 P.2d at 52.

Ferris was killed when he lost control of his car after leaving the bar.[79] His mother, Mary Winters, brought a wrongful death suit against the Silver Fox Bar in federal court alleging dram shop liability.[80] The defendant moved to dismiss, and the federal court certified the question to the Hawaii Supreme Court.[81]

The Hawaii Supreme Court held that a minor who sustains injury due to his or her own voluntary intoxication is not within the class of persons protected by *Hawaii Revised Statutes* section 281-78(a)(2)(A) and is precluded from suing the liquor supplier.[82] The Court concluded that allowing minors to be included within the protected class would be inconsistent with the legislative intent of treating eighteen, nineteen, and twenty year olds as adults in other respects.[83] The Court stated that the primary legislative purpose in raising the drinking age from eighteen to twenty-one was to protect the state's federal highway funding and not to expand tort liability.[84] Any expansion of the protected class to include eighteen, nineteen and twenty year olds would have to come through legislative enactment and not judicial remediation of the common law.[85] Relying on *Feliciano*[86], the *Winters* court stated that a minor's (below the age of twenty-one) inexperience, immaturity and unsophistication regarding the consumption and effects of alcohol was insufficient to place them within the class of persons protected by the statute.[87]

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[79] *Id.* The Court does not state in its opinion whether there was evidence Ferris was intoxicated when he crashed on Nimitz Highway in Honolulu on October 25, 1987. Because the Court refused to extend the protection of the liquor control statute to a purchasing minor, the issue of whether the Silver Fox Bar's conduct in serving Ferris alcohol was the proximate cause of the crash was never reached. *Id.*

[80] Jurisdiction was based on diversity of citizenship. *Id.*

[81] The certified question read: Whether the sale of liquor to a minor (in violation of HAW. REV. STAT. § 281-78(a)(2)(A) [1985 & Supp. 1989)]) who subsequently becomes drunk and sustains injury precludes the minor (or the estate and survivors) from suing the commercial liquor supplier. *Id.* at 525, 797 P.2d at 51.

[82] *Id.* at 524, 797 P.2d at 51.

[83] *Id.* at 531-32, 797 P.2d at 55.

[84] *Id.* at 534, 797 P.2d at 55.

[85] *Id.* at 535, 797 P.2d at 56.

[86] *See supra*, notes 71-75, and accompanying text.

[87] *Winters*, 71 Haw. at 531, 797 P.2d at 55. The Court also followed *Bertelmann*, concluding that actions by the survivor's under the wrongful death statute and for loss of consortium were barred if the estate could not pursue its action. *Id.* at 535-36, 797 P.2d at 56.

D. *Employer-Social Host Liability.*

Courts have been reluctant to impose liability on social hosts (gratuitous non-commercial furnishers of liquor) because a social host has no pecuniary motives in furnishing liquor to a guest.[88] The Hawaii Supreme Court has judicially rejected social host liability even when the social host is an employer.[89] Employers, however, may still be held liable under theories of respondeat superior, ratification and negligent failure to control employee's actions.[90] The Hawaii Supreme Court has recently set forth the elements necessary to state a cause of action against employers arising out of torts committed by intoxicated employees under the theories of respondeat superior and negligent failure to control an employee's actions.[91]

IV. Analysis

A. *Duty Under Liquor Control Statute.*

As previously stated, a common law dram shop action was created by the Hawaii Supreme Court in *Ono*.[92] The plaintiff in *Reyes* contended that Tiffany was an innocent third party and within the class of persons

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[88] John R. Erickson, et al., *Comment, Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 Wake Forest L. Rev. 1013, 1017 (1983). For a thorough discussion of social host and employer liability, *see*, Darcie S. Yoshinaga, *Casenote, Johnston v. KFC National Management Co.: Employer Social-Host Liability for Torts of Intoxicated Employees*, 14 U. Haw. L. Rev. 801 (1992).

[89] Johnston v. KFC National Management Co., 71 Haw. 229, 238, 788 P.2d 159, 165 (1990).

[90] An employer may not be held liable as a social host as a matter of law. Johnston v. KFC National Management Co., 71 Haw. 229, 238, 788 P.2d 159, 165 (1990).

[91] *See*, Wong-Leong v. Hawaiian Independent Refinery, Inc., 76 Haw. 433, 879 P.2d 538 (1994). To recover under respondeat superior, the plaintiff must establish a negligent act on the part of the employee, that is, breach of a duty that is the legal cause of the plaintiff's injury. The plaintiff must also show that the negligent act was within the employee's scope of employment. *Wong-Leong*, *Id.* at 438, 879 P.2d at 541. Employers may also be held liable to third parties for negligent failure to control an employee. An employer owes a duty to control the employee where the employer has actual notice (pursuant to traditions or practices that they themselves have instituted or condoned involving the consumption of liquor) of the necessity and opportunity for exercising such reasonable control over its employees. Liability will be imposed if the failure to exercise that control creates a foreseeable risk that an inebriated employee will injure a third party in a motor vehicle accident. *Id.* at 445-46, 879 P.2d at 546.

[92] 62 Haw. 131, 612 P.2d 533 (1980).

protected by *Hawaii Revised Statutes* section 281-72(a)(2)(A).[93] Tiffany presented three grounds upon which the Court should recognize a duty to innocent third parties on the part of licensee-violators of the liquor control statute: (1) the legislature intended to protect the general public, including third parties injured by intoxicated minors, when it raised the minimum drinking age from eighteen to twenty-one years in 1986; (2) the Hawaii Supreme Court had already recognized a similar duty to innocent third parties under *Hawaii Revised Statutes* section 281-78(a)(2)(B) in *Ono*, and that duty should be extended to include section 281-78(a)(2)(A); and, (3) courts in other jurisdictions have already recognized such a duty.[94]

In reviewing the legislative intent, the Court concluded that, contrary to *Winters*, raising the minimum drinking age to twenty-one was not necessarily motivated only by the federal mandate, as it might also have been enacted to protect the general public from the dangers of drunk driving by minors.[95] With regard to the applicability of the *Ono* holding to *Hawaii Revised Statutes* section 281-78(a)(2)(A), the Court noted that section 281-78(a)(2)(B) has been held to protect any innocent third persons from drunk driving accidents.[96] Citing *Winters*, the Court held that a tavern has a duty to refrain from selling liquor to minors pursuant to *Hawaii Revised Statutes* section 281-78(a)(2)(A), and may be held liable for injuries to innocent third parties who are injured as a proximate result of the intoxication of the minor to whom liquor was sold or furnished.[97]

Finally, in looking to other jurisdictions, the Court noted that at least twenty other states had already recognized a tort duty on the part of tavern owners to refrain from providing liquor to minors.[98] Finding that the *Ono* court was persuaded by "the clear trend demonstrated"

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[93] *Reyes*, 76 Haw. at 141, 870 P.2d at 1285.

[94] *Id.* at 141, 870 P.2d at 1284.

[95] *Id.*

[96] *Id.* at 142, 870 P.2d at 1285.

[97] The Reyes Court accepted Tiffany's argument that if *Winters* precludes the offending minor from being included in the protected class of persons under the statute, the general public, or all innocent third parties must be in the class protected by the statute. *Id.*

[98] *Id.* at 142-43, 797 P.2d at 58. As previously stated, seven states have rejected dram shop liability. Furthermore, in the absence of either a dram shop act or a statutory enactment making the sale of liquor to minors unlawful which was intended to protect the general public, there is no common law cause of action arising from the sale of liquor to minors.

by cases from twenty-one jurisdictions acknowledging a dram shop action, the *Reyes* court claimed it was persuaded by the cited cases from twenty other jurisdictions which demonstrated "a clear national trend toward recognition" of a duty not to furnish minors with liquor under liquor control statutes.[99] Defendant Kuboyama argued that the trend of *Bertelmann*, *Feliciano*, *Winters* and *Johnston*, demonstrated the Court's reluctance to extend the duty found in *Ono*.[100] The Court concluded that those dram shop actions involved plaintiffs who were not within the protected class because their injuries "were essentially self-inflicted."[101] It distinguished *Johnston* by noting that the liquor in that case was furnished by a social host rather than a commercial seller of liquor.[102]

B. Application to Package Store Retailers.

Kuboyama argued that the difference in environment between a package store and a tavern should preclude recognition of a duty under *Hawaii Revised Statutes* section 281-78(a)(2)(A) akin to the *Ono* duty under section 281-78(a)(2)(B).[103] Kuboyama's argument was that a tavern operator is able to monitor the consumption of liquor on his or her premises, making it reasonable to impose a tort duty on the part of the operator not to serve alcohol to a person under the influence of liquor.[104] A package store operator, on the other hand, has no comparable way of determining whether a patron is a minor, and, therefore, the operator would be held strictly liable for injuries arising out of violation of the statute.[105]

The Hawaii Supreme Court rejected Kuboyama's argument, finding that a package store operator is responsible for monitoring its patrons' and its own conduct in furnishing liquor.[106] The Court reasoned that the statute provides the package store operator with a good faith

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[99] *Winters* at 143, 797 P.2d at 58.
[100] *Id.* at 144, 797 P.2d at 58.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 144, 797 P.2d at 58.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 145, 797 P.2d at 58.

defense.[107] Kuboyama, therefore, on remand can litigate the issue of whether her sale of liquor to Jose Igaya and Howard Kamoku, Jr., was made upon a good faith belief that she believed that they were over the age of twenty-one.[108]

C. Duty Extended to Foreseeably Intoxicated Minors.

Having recognized that a package store operator had a duty to innocent third parties not to sell liquor to a minor in violation of the liquor control statute, the Court had to decide whether the package store operator should be held liable for injuries caused by a minor other than the minor to whom the liquor was sold.[109] In addressing this issue, the Court noted that other jurisdictions have held that the duty encompasses situations involving the transfer of liquor among a group of minors.[110] Where an innocent third party is injured by a minor other than the specific minor to whom the liquor was sold, the liquor vendor will be held liable if the transfer of liquor was reasonably foreseeable.[111]

The Hawaii Supreme Court explicitly adopted the reasoning of the New Jersey Superior Court in *Thompson v. Victor's Liquor Stores, Inc.*[112] In *Thompson*, a minor (James Mullins) purchased a pint of whiskey and two six-packs of beer from a package store and shared it with two other minors, one of whom was the plaintiff (Ronald Thompson).[113] Mullins shared the liquor with Thompson, who subsequently was

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[107] *Id.* HAW. REV. STAT. § 281-78(a)(2)(1985) provides that

> a licensee who sells liquor to a minor is not in violation of the statute if "the licensee was misled by the appearance of the minor and the attending circumstances into honestly believing that such minor was of legal age and the licensee acted in good faith, and it shall be incumbant upon the licensee to prove that the licensee acted in good faith."

[108] Kuboyama's good faith defense may be hampered by the fact that she failed to ask Igaya and Kamoku for identification. *Reyes*, 76 Haw. at 145, 797 P.2d at 58.

[109] *Id.*

[110] *Id.* (citing Thompson v. Victor's Liquor Stores, Inc., 523 A.2d 269, 270 (N.J. 1987).

[111] *Id.* "Reasonable foreseeability" in this context means whether the liquor vendor knew or should have known that the liquor furnished to the minor would be shared with other minors. *Id.* at 146, 797 P.2d at 59.

[112] 523 A.2d 269 (N.J. Super. 1987).

[113] *Id.* at 270. The *Reyes* court noted that Thompson probably did not have a claim under Hawai'i law based on *Winters*, but that the forseeability issue was instructive for deciding *Reyes*. 76 Haw. at 145, 797 P.2d at 58.

injured when the automobile he was driving struck a brick wall.[114]

The New Jersey Superior Court viewed potential responsibility as a continuum resting on the issue of foreseeability that begins with the sale of liquor to a minor and does not necessarily end at that point in time.[115] Factors to be considered in determining foreseeability that the liquor would be shared with other minors (extending the seller's responsibility) included the quantity of alcohol purchased, the time of day, statements made at the time of purchase, and circumstances surrounding the purchase.[116] In fact, the New Jersey Court opined that if the store owner could see other young people sitting in the car with Mullins and that the beverages were immediately consumed by one of the occupants, it would be reasonable for a jury to determine that it was foreseeable that the alcoholic beverages would be shared with friends.[117] At some point, however, the actions of the third party can become sufficiently divorced from the initial sale of liquor to a minor that legal responsibility should no longer be assessed.[118] In *Thompson*, the Court held that a jury could find that the seller should have anticipated that twelve cold cans of beer and a pint of whiskey were intended for immediate consumption by a group of young persons, and not just for the purchaser.[119]

The Hawaii Supreme Court, relying on *Thompson*, ruled that the determination of the defendant's negligence, where the injury is caused by a minor other than the minor to whom liquor was sold, is a question of fact to be analyzed in terms of reasonable forseeability.[120] A plaintiff will not be precluded from bringing his or her claim on the basis that the minor who caused the injury was not the minor to whom the liquor was sold.[121] The issue of reasonable forseeability is to be determined by the trier of fact, and the plaintiff must produce sufficient evidence to show that it was reasonably foreseeable to the package store operator that the liquor would be shared among other minors, who would become intoxicated and drive a vehicle.[122]

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[114] *Thompson*, 523 A.2d at 270.
[115] *Id.* at 271.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] 76 Haw. at 146, 797 P.2d at 59.
[121] *Id.*
[122] *Id.* at 146-47, 797 P. 2d at 59.

V. IMPACT

The *Reyes* decision clarifies the duty owed by tavern owners and package store operators to members of the general public.[123] It allows plaintiffs to bring tort actions against businesses who sell or furnish liquor to minors for injuries proximately caused by the intoxication of minors, even though the minor who caused the injury was not the minor to whom liquor was directly sold.[124] Plaintiffs may use the violation of liquor control statutes as evidence of negligence on the part of the dram shop or package store.[125] Furthermore, once a violation has been shown, whether the sharing of the liquor with other minors was reasonably foreseeable is an issue to be determined by the fact-finder.[126] In *Reyes*, the fact that the minors purchased two cold cases of beer was sufficient evidence to present to a jury on the issue of reasonable foreseeability.[127]

While courts in the future might attempt to limit *Reyes* to its facts, the decision seems to foreshadow the future direction of the Hawaii Supreme Court in the area of liquor liability. *Reyes*, for instance, did not address whether social hosts could be held liable for furnishing liquor to minors.[128] Nor did it indicate how the Court may rule in a case involving an employer social-host who serves liquor to a minor.[129]

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[123] By holding that HAW. REV. STAT. § 281-78(b)(1)(A)(1985) created a duty on the part of liquor vendors to refrain from furnishing liquor to minors, the Court implicitly does not require the plaintiff to prove that the vendor knew or should have known that the minor was intoxicated at the time the liquor was furnished to him. *Reyes*, 76 Haw. at 144-145, 797 P.2d at 58.

[124] *Id.*

[125] *Id.* at 142, 797 P.2d at 58.

[126] *Id.* at 146-47, 797 P.2d at 59.

[127] *Id.*

[128] In *Huston v. Konieczny*, 556 N.E.2d 505 (Ohio 1990), the Ohio Supreme Court held that parents may incur liability where they authorize the use of their home for a teenage party and should have known that their children would furnish alcohol to underage guests. Such a duty could be premised upon negligent entrustment of a dangerous instrumentality and failure to exercise reasonable control over a child when the parent knows or should know that injury to another is a foreseeable consequence. *Id.* at 508.

[129] *Wong-Leong* also failed to address whether an employer can be held liable for furnishing liquor to a minor. Although some factual situations might fit into the respondeat superior or negligent control theories, certainly there are other instances where the employer will only furnish the liquor to the minor, without the requisite amount of control to bring the situation under the rationale of *Wong-Leong*. *Wong-Leong*, 76 Haw. at 446, 879 P.2d at 546.

In a case involving a particularly young minor, like Tiffany Reyes, the Hawaii Supreme Court might have difficulty immunizing the social host or employer who supplied liquor to the minor in violation of the liquor control statute.[130] On the other hand, if the minor is over the age of eighteen, the Court probably would follow *Johnston* and not hold the social host and employer liable. The Court could reason that the forseeability of harm to others is substantially less when liquor is provided to an eighteen year old as opposed to a fifteen year old based upon the minor's familiarity with alcohol and its effects on coordination and judgment.[131]

The *Reyes* court, however, shied away from overruling the *Winters* decision, in which claims were brought by the minor to whom liquor was furnished. Justice Levinson's concurring opinion gives insight that the Court may, in the future, reconsider its prior rulings in *Bertelmann*, *Feliciano*, and *Winters*.[132] Specifically, the lack of voluntariness in the consumption of liquor, especially by unsophisticated minors, may move the Court to make exceptions to the rule that the intoxicated party may not recover for his or her own injuries.[133] The Court might reason that a minor's consent in consuming liquor can be overcome by either peer pressure or particularly aggressive sales of liquor. While this analysis was rejected in *Feliciano*, a more progressive Court could carve out an exception where the minor is under the age of eighteen.

In light of the dangers of drunk driving and the need to hold liquor establishments liable beyond civil fines, the Court may use the reason-

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[130] There is no indication in *Reyes* as to whether a social host could be held liable for furnishing liquor to a minor. While the Hawaii Supreme Court has rejected social host liability, the furnishing of liquor to a minor by a social host may fall into one of the exceptions arising out of the social host's ability to control the minor. *See*, *Wong-Leong*, 76 Haw. at 446, 879 P.2d at 546 and *supra* note 129 and accompanying text.

[131] In *Winters*, the Court refused to differentiate the relative level of sophistication of an 18 year old and a 21 year old. *See supra* note 82 and accompanying text.

[132] *Reyes v. Kuboyama*, 76 Haw. at 147, 797 P.2d at 59.

[133] *Id.* In fact, the Court's insistence that Tiffany Delos Reyes be an innocent third party in order to be included in the class of persons protected by the liquor control statute may be misfounded. Most courts view the intoxication of the parties involved in the accident only as comparative negligence, and not a complete bar to recovery. *See*, Matthews v. Konieczny, 527 A.2d 508, 512 n.5 (1987)(emphasizing that the national trend is to recognize the intoxication of the parties as possible comparative negligence). After all, if Tiffany Delos Reyes were intoxicated, how is that a proximate cause of the harm she suffered? Any contributory negligence on her part would arise from assuming the risk of accepting a ride from the operator of a car whom she knew or had reason to know was intoxicated.

able foreseeability test to replace the hard and fast rule of non-liability for intoxicated patrons.[134] Certainly, *Reyes* and *Wong-Leong*[135] represent a reversal of the trend that restricted liability against liquor establishments and employers. This Court can be expected to continue to rule in favor of finding liability as long as the reasonable foreseeability test is met. That is, as long as the provider of liquor knew or should have known that the person to whom liquor was served was likely to operate a motor vehicle and injure himself or a third party as a proximate result of the vendor serving him liquor, then liability should attach to the vendor's conduct.

At some point, however, the policy of compensating victims of alcohol related motor vehicle collisions must give way in the face of runaway litigation, rising insurance premiums and the economic viability of the liquor serving industry.[136] Hawaii's economy depends heavily on money spent by tourists while vacationing in Hawai'i. The profitability of restaurants and liquor establishments could be severely impacted by increased insurance premiums resulting from more liberal interpretation of the dram shop common law cause of action. These businesses employ a substantial number of workers in Hawai'i. Increasing the cost of doing business through higher insurance premiums may force some taverns and restaurants out of business or cause them to reduce their payrolls by laying off workers.

If the Hawaii Supreme Court were to go so far as reversing *Johnston*, the impact on homeowner's insurance, which is already expensive and difficult to obtain in Hawai'i, may outweigh the benefit of deterring the furnishing of alcohol by social hosts to intoxicated friends. While such a cost might be justifiable where liquor has been furnished to a minor, to hold a social host liable for provision of liquor to an adult, probably would impose too great a cost on the general public.

Even the *Wong-Leong* decision might impose a substantial cost on employers through increased litigation and higher insurance premiums.

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[134] *Reyes*, 76 Haw. at 147, 797 P.2d at 59. It is apparent that sales of liquor to minors continue despite the imposition of civil fines. *See supra* note 4 and accompanying text.

[135] *See supra* note 91 and accompanying text.

[136] In fact, following the *Ono* decision, representatives of the restaurant and liquor industry lobbied unsuccessfully for dram shop legislation that would have limited the liability of a restaurant or tavern owner. *See*, Bradford F.K. Bliss, Susan D. Sugimoto, Note, *Ono v. Applegate: Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149, 162 (1981).

This cost, however, might be necessary to deter employers from engaging in conduct hazardous to the general public. Providing liquor to employees or condoning its consumption on company premises seems to create an unreasonable risk of harm. By requiring that the employer either actually provide the liquor or condone its consumption on company presmises as a practice, the Court clearly placed limits on the potential liability of the employer. Such a clear standard allows employers to avoid liability by eliminating such institutional practices. Because an employer can reduce its potential exposure by curtailing its conduct, the cost of allowing recovery can be properly weighed by the employer's insurer in light of the company's actual practices.

VI. Conclusion

Minors between the ages of eighteen and twenty-one have a high rate of alcohol related automobile accidents and consequential fatalities. *Reyes* recognized the need to make package stores and dram shops liable for the furnishing of liquor to minors. The Court refused to limit liability to tortious acts committed by the minor to whom the liquor was sold, as it is foreseeable in certain circumstances that the liquor will be shared with other minors, who may cause automobile accidents due to their intoxication.

Reyes represents a good balance between the need to deter the unlawful sale of liquor to minors and avoiding the unreasonable imposition of liability on liquor vendors. A liquor vendor can reduce its potential exposure by exercising greater care when selling liquor to younger persons. Not only should a vendor always require proper proof of age when selling liquor to a young person, the vendor should be particularly wary when the sale involves either a large quantity of liquor likely to be immediately consumed or the purchaser appears to be accompanied by minors. A single young adult purchasing a large amount of cold beer or hard liquor also creates a situation which may result in liability for the vendor. *Reyes* stands for the proposition that the liquor store operator should exercise extraordinary care when faced with such a situation.

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An Analysis of the Standing and Jurisdiction Prerequisites for Direct Appeal of Agency Actions to the Circuit Court Under the Hawaii Administrative Procedure Act After *Bush v. Hawaiian Homes Commission* and *Pele Defense Fund v. Puna Geothermal Venture*

I. INTRODUCTION

In 1961, the Hawaii State Legislature adopted the Hawaii Administrative Procedure Act[1] (HAPA) in order "to prescribe uniform standards for the conduct of rulemaking and the handling of adjudicatory proceedings."[2] HAPA was modeled after the Uniform Law Commissioner's Model State Administrative Procedure Act of 1961.[3] HAPA authorized state agencies to adopt rules and procedures that would provide a framework through which agencies would administer legislative mandates.[4] HAPA mandates procedures that agencies must follow

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[1] Hawaii Administrative Procedure Act, Act No. 103, 1961 Haw. Sess. Laws 85.

[2] HOUSE STAND. COMM. REP. No. 8, 1st Leg., 1961 Reg. Sess., *reprinted in* 1961 Haw. House J. 653, 655.

[3] MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 15 U.L.A. 147 (1990). The District of Columbia and twenty eight states adopted some form of the 1961 Model Act. The 1961 act was superceded by the 1981 act of the same name. 15 U.L.A. 7 (1990).

[4] Administrative rules supplement the statutory law. Rules must be consistent with the legislative mandate. *See* State v. Kimball, 54 Haw. 83, 503 P.2d 176 (1972).

in adopting, amending, or repealing rules.[5] HAPA also sets forth procedural requirements that an agency must follow when a person affected by one of its rules wishes to challenge a rule or its application before the agency.[6] Furthermore, HAPA establishes procedural prerequisites for judicial review in cases where a person adversely affected by an agency decision seeks to directly appeal the agency decision in the courts.[7]

One of the most litigated issues under HAPA has been when and under what circumstances a party dissatified with an agency's action or inaction may use HAPA to invoke the jurisdiction of the circuit court to directly appeal the agency's decision.[8] The reason for such

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[5] HAW. REV. STAT. § 91-3 (1985). HAPA clarifies in the definitions that 'rule' means:

> [E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

HAW. REV. STAT. § 91-1(4) (1985); *See* Doe v. Chang, 58 Haw. 94, 564 P.2d 1271 (1977) (holding that an agency instruction manual covering welfare fraud investigations dealt with internal management of the agency); Vega v. National Union Fire Insurance Co., 67 Haw. 148, 682 P.2d 73 (1984) (holding that an agency requirement that a claimant must submit to a medical exam is a 'rule' for the purposes of HAPA).

[6] *See* HAW. REV STAT. §§ 91-8 (1985), 91-9 (1985), 91-10 (1985), 91-11 (1985), 91-12 (1985), 91-14 (1985). These procedures govern declaratory rulings and contested case hearings.

[7] HAW. REV. STAT. § 91-14 (1985).

[8] Judicial review of contested cases is governed by HAW. REV. STAT. § 91-14 (1985). The two core requirements for judicial review are standing and subject matter jurisdiction. *See* Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 881 P.2d 1210 (1994). Standing refers to a particular party's right to bring suit. Maryland Waste Coalition v. Maryland Department of Education, 84 Md.App. 544, 581 (1990). Subject matter jurisdiction refers to the power of the court to adjudicate the case. *Id.* Standing is related to subject matter jurisdiction because if a party does not have a right to bring a claim, the court does not have the power to adjudicate it.

Standing and/or subject matter jurisdiction requirements under HAPA have been decisive issues in the following cases that have come before Hawai'i appellate courts: Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969); East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 479 P.2d 796 (1971); City and County of Honolulu v. Public Utilities Comm'n, 53 Haw. 431, 495 P.2d 1180 (1972); Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 522 P.2d 1255 (1974); Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974); Application

extensive litigation is that the right to appeal an agency decision is a statutory right; for the circuit court to have jurisdiction to hear an appeal, the appealing party must be able to identify statutory or constitutional authority that gives the court the power to hear an appeal.[9] Because the Hawaii Constitution does not expressly grant the right to appeal agency decisions,[10] the interpretation of statutory authority exclusively determines whether persons affected by agency actions are able to directly appeal to the circuit court.[11] The Hawaii

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of Hawaiian Electric Co., Inc., 56 Haw. 260, 535 P.2d 1102 (1975); Abramson v. Board of Regents, 56 Haw. 680, 548 P.2d 253 (1976); Life of the Land v. Land Use Comm'n, 58 Haw. 292, 568 P.2d 1189 (1977); Life of the Land v. Land Use Comm'n, 61 Haw. 3, 594 P.2d 1079 (1979); Jordan v. Hamada, 62 Haw. 444, 616 P.2d 1368 (1980); Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981); Jordan v. Hamada, 64 Haw. 451, 643 P.2d 73 (1982); *In Re* Eric G., 65 Haw. 219, 649 P.2d 1140 (1982); Nakamine v. Board of Trustees, 65 Haw. 251, 649 P.2d 1162 (1982); Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982); Punohu v. Sunn, 66 Haw. 485, 666 P.2d 1133 (1983); State v. Alvey, 67 Haw. 49, 678 P.2d 5 (1984); Kona Old Hawaiian Trails v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987); Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw. 361, 773 p.2d 250 (1989); Ariyoshi v. Hawaii Public Employment Relations Board, 5 Haw.App. 533, 704 P.2d 917 (1985); Simpson v. Dept. of Land and Natural Resources, 8 Haw.App. 16, 791 P.2d 1267 (1990); Pele Defense Fund v. Puna Geothermal Venture, 8 Haw. App. 203, 797 P.2d 69 (1990).

[9] Gustetter v. City and County of Honolulu Motor Vehicle Dealers' & Salesmen's Licensing Board, 44 Haw. 484, 489, 354 P.2d 956, 959 (1960); Munhall v. Inland Wetlands Comm'n, 602 A.2d 566, 568 (Conn. 1992); Berquist v. Campbell, 316 N.W.2d 596, 599 (Neb. 1982); RCJ Corp. v. Arizona Department of Revenue, 812 P.2d 1146, 1148 (Ariz. 1991); Bickham v. Dept. of Mental Health, 592 So.2d 96, 97-98 (Miss. 1991).

"*Where a right of redetermination or review in a circuit court is allowed by statute*, any person adversely affected by the decision, order or action of a governmental official or body other than a court, may appeal from such decision, order or action by filing a notice of appeal in the circuit court having jurisdiction of the matter." Haw. R. Civ. P. 72(a) (emphasis added).

[10] In contrast, the Louisiana Constitution includes the right to appeal agency actions in the absence of statutory authority. Griffin v. City of Baton Rouge, 444 So.2d 186, 187 (La. App. 1983). The Louisiana Constitution states: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." LA. CONST. art. I, § 22.

[11] *In Re* Eric G., 65 Haw. 219, 649 P.2d 1140 (1982). There is no common law right to appeal agency decisions in Hawai'i. "Hawaii cases decided before the enactment of the Hawaii Administrative Procedures Act followed the 19th century

Supreme Court has ruled that the right to appeal an adverse administrative decision is limited by HAPA,[12] at least in cases where there is no specific authority to appeal in another statutory provision.[13] HAPA only grants circuit court jurisdiction to issue declaratory judgments on the validity of agency rules[14] and to hear direct appeals from contested cases.[15]

Access to some form of judicial review of agency actions is crucial when an agency's actions are arguably outside its statutory or constitutional authority.[16] A direct appeal to the circuit court is the most immediate form of judicial review, but a direct appeal is not the only form of review of agency actions.[17] The supreme court has stressed

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common law standard of nonreviewability." *Id.* at 222, 649 P.2d at 1142.

The Hawaii Intermediate Court of Appeals has stated, "[I]n this jurisdiction there is a policy favoring judicial review of administrative decisions." Ariyoshi v. Hawaii Public Employment Relations Board, 5 Haw.App. 533, 538, 704 P.2d 917, 923 (1985). Thus, "statutes governing appeals are liberally construed to uphold the right of appeal." Credit Associates of Maui v. Montilliano, 51 Haw. 325, 329, 460 P.2d 762, 765 (1969) (citations omitted).

[12] *In Re Eric g.*, 65 Haw. at 222, 649 P.2d at 1142 (citations omitted).

[13] For example, a state statute provides that any person seeking issuance of a trademark registration who is aggrieved by an action of the director of commerce and consumer affairs may appeal to the circuit court. HAW. REV. STAT. § 482-9 (1985).

[14] HAW. REV. STAT. § 91-7 (1985).

[15] Mortensen v. Board of Trustees of the Employees' Retirement System, 52 Haw. 212, 217, 473 P.2d 866, 870 (1970).

[16] KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM 363 (1982). Professor Warren states: ". . .the power of judicial review extends awesome authority to the courts because it allows them to declare legislative and administrative actions unconstitutional, thereby making those acts null and void." *Id.* Judicial review enables the courts "to have the last word on what constitutional and statutory provisions really mean and to have the final say over whether government officials, at any level of government, are acting in a way which is inconsistent with constitutional or statutory requirements." *Id.*

> In explaining the role and importance of judicial review Bernard Schwartz asserts: Judicial Review is the balance wheel of administrative law. It enables practical effect to be given to the ultra vires theory upon which administrative power is based. . . The responsibility of enforcing the limits of statutory grants of authority is a judicial function; when an agency oversteps its legal bounds, the courts will intervene. Without judicial review, statutory limits would be naught but empty words.

BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 8.1 (1984).

[17] *See* Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 136-37, 870 P.2d 1272, 1280-81 (1994). One of the stated purposes of HAPA was "to provide for judicial review of agency decisions and orders on the record, except where the right of trial

that although the right to a direct appeal is limitted by HAPA, HAPA does not foreclose other avenues of review such as trials de novo[18] and declaratory judgements on the validity of agency rules.[19]

Bush v. Hawaiian Homes Commission[20] and *Pele Defense Fund v. Puna Geothermal*[21] are the two most recent Hawaii Supreme Court rulings on the standing and subject matter jurisdiction requirements for a direct appeal of agency actions to the circuit court. Neither decision represents a drastic departure from established caselaw. Both decisions clarify the standing and subject matter jurisdiction requirements for a direct appeal with greater specificity than before.

In *Bush*, the Hawaii Supreme Court upheld a circuit court ruling dismissing the case on jurisdictional grounds, stating that unless an agency rule or state statute *mandates* a hearing prior to an agency's decision, the circuit court does not have subject matter jurisdiction for purposes of judicial review.[22] The only exception to the requirement is

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de novo, including the right of trial by jury, is provided by law." HOUSE STAND.COMM.REP. No. 8, 1st Leg., 1961 Reg. Sess., *reprinted in* 1961 Haw. House J. 653, 655.

[18] HAW. REV. STAT. § 91-14(a) (1985). "An alternative [to a direct appeal to the circuit court]. . . is available. 'Nothing in this section [91-14] shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right to trial by jury, *provided by law*.'" *Bush*, 76 Haw. at 136-7, 870 P.2d at 1280-81 (citing *id.*) (emphasis in original).

[19] HAW. REV. STAT. § 91-7 (1985). The statute permits any person to initiate a judicial proceeding to review agency rules:

> (a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) herein by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question. (b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rule-making procedures.

Id.

Judicial review through a direct appeal is usually preferable to a declaratory judgment because declaratory judgments only pertain to agencies rules — rather than their application. *See* Puana v. Sunn, 69 Haw. 187, 189, 737 P.2d 867, 869 (1987). The Hawaii Supreme Court has declared: "Although H.R.S. § 91-7 does not give the circuit court jurisdiction to hear a challenge to the application of a rule, it clearly does provide for attacks on a rule's validity." *Id.*

[20] 76 Haw. 128, 870 P.2d 1272 (1994).

[21] 77 Haw. 64, 881 P.2d 1210 (1994).

[22] *Bush*, 76 Haw. at 134, 870 P.2d at 1278.

a showing that an agency has violated consititutional due process requirements.[23]

In *Puna Geothermal*, the Hawaii Supreme Court partially upheld a circuit court ruling finding jurisdiction for judicial review.[24] The supreme court reaffirmed prior decisions relaxing the standing requirements facing litigants when environmental issues are the subject of the dispute.[25] The court also ruled that although neither statute nor agency rules required the agency hearing that took place prior to the appeal, constitutional due process did require that a hearing take place, satisfying one of the jurisdictional prerequisites for a direct appeal.[26]

The purpose of this article is to identify the requirements a claimant must meet under the Hawaii Supreme Court's recent analysis in *Bush* and *Puna Geothermal* in order to invoke the jurisdiction of the circuit court under HAPA to appeal an administrative decision. Section II will familiarize the reader with the facts of the *Bush* case. Section III will review the facts in *Puna Geothermal*. Section IV will summarize the Hawaii Supreme Court's interpretations of HAPA as it identifies the legal prerequisites for judicial review. Section V will provide analysis of the court's reasoning in *Bush* and *Puna Geothermal*. Section VI will summarize the impact of the Hawaii Supreme Court's interpretation of HAPA's jurisdiction requirements on future claimants seeking to overturn agency rulings.

II. Facts in Bush v. Hawaiian Homes Commission

The state administrative agency in the *Bush* case was the Hawaiian Homes Commission. The 1920 Hawaiian Homes Commission Act (HHCA)[27] created the Hawaiian Homes Commission (HHC) and empowered it to "make such regulations . . . as are necessary to the efficient execution . . ."[28] of the functions of the HHC and the purposes of the HHCA. The underlying goal of the HHCA was to "enable native Hawaiians to return to their lands in order to fully support self-

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[23] *Id.* at 136, 870 P.2d at 1280.

[24] *Puna Geothermal*, 77 Haw. at 72, 881 P.2d at 1217.

[25] *Id.* at 67, 881 P.2d at 1213.

[26] *Id.* at 68, 881 P.2d at 1214.

[27] Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 202, 42 Stat. 108, (1921) (hereinafter HHCA).

[28] HHCA, § 222.

sufficiency."[29] Under the HHCA, tracts of land deemed "Hawaiian Home Lands" were set aside for long-term tenancy by native Hawaiians.[30] The HHC was entrusted with the responsibility of implementing

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[29] HHCA, § 101. The five principal purposes of the HHCA that are identified in the Act are:

> (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act. (2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term-tenancy to beneficiaries of this Act and their successors. (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity. (4) Providing adequate amounts of water and supporting infrastructure so that homestead lands will always be usable and accessible; and (5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self sufficiency and promote community-based development, the traditions, culture, and quality of life of native Hawaiians shall forever be self-sustaining.

HHCA, § 101 b(1)-(5).

[30] HHCA, § 207. The HHC was authorized to lease to native Hawaiians "the right to the use and occupancy of a tract" in the Hawaiian home lands. *Id.*

> The specific conditions of the leases established in the original act were:
> (1) The lessee shall be a native Hawaiian. (2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; (3) The lessee shall occupy and commence to use or cultivate the tract as his home or farm within one year after the lease is made; (4) The lessee shall thereafter, for at least such part of each year as the commission shall by regulation prescribe, so occupy and use or cultivate the tract on his own behalf; (5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any other person, except a native Hawaiian, and then only on the approval of the commission, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance to such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon. . . .

HHCA, § 208.

The legislative history indicates why such conditions were imposed. The House Report for the original Hawaiian Homes Commission Act included testimony from the hearings from Senator Wise of the Territorial Legislature:

> Q: Do [the native Hawaiians] want to homestead these lands and care for them?
> A: Yes. . . The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the big

the policies of long-term tenancy and self-sufficiency.[31] The HHC has taken steps towards this end[32] by leasing land to native Hawaiians "for use as a home and to cultivate as a farm"[33] at minimal cost to native Hawaiians.[34]

Under the authority of the HHCA[35] and in accord with the provisions of HAPA, the HHC promulgated Title 10 of the Hawaii Administrative Rules, entitled "Department of Hawaiian Home Lands."[36] The purpose of the rules was to establish the parameters of the Department's and the Commission's powers.[37] One of the rules relevant in the *Bush* case states that "contracts covering lease lands" must be approved in writing by the HHC.[38]

> reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way to rehabilitate them.

H.R. REP. No. 839, 66th Cong., 2nd Sess., 4 (1920).

[31] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[32] Through October 1994, the Department of Hawaiian Home Lands had granted 6,068 homestead leases. More than 16,000 people or families remained on the waiting lists for homestead lands. Mark Matsunaga, *Hawaiian Home Lands Trust Restored*, HONOLULU ADVERTISER, Oct. 29, 1994, at A2.

[33] *Bush*, 76 Haw. at 132, 870 P.2d at 1276. The present form of the HHCA requires that:

> (4) The lessee shall thereafter, for at least such part of the year as the department shall prescribe by rules, so occupy and use or cultivate the tract on the person's own behalf. (5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or so agree to transfer, or otherwise hold, the person's interest in the tract. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the person's interest in the tract or improvements thereon.

HHCA, §§ 208(4), 208(5).

[34] The "$1 per year for 99 years" provisions of the original HHCA are still valid. HHCA, §208(2).

[35] HHCA, §222.

[36] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[37] *Id.*

[38] *Id*; HAW. ADMIN. R. 10-3-35.

Beginning in 1980, non-Hawaiian farmers on Moloka'i individually entered into contractual agreements called third party agreements, or TPAs, with native Hawaiian lessees for use of their homestead lands.[39] The non-Hawaiian farmers contracted for use of enough acreage to facilitate large scale agribusiness.[40] One non-Hawaiian farmer contracted for use of enough farmland[41] that he became the largest single farm operator on the island,[42] with operations expanded to encompass more than 1,000 acres.[43] The agreements which enabled these large scale farming practices on Hawaiian Home Lands were not approved by the HHC.[44]

A number of native Hawaiian farmers on Moloka'i objected to the TPAs, arguing that the large scale agribusiness practices interfered with the small scale practices of native Hawaiians who were farming their homestead lots.[45] Specifically, they claimed that large scale farmers were flooding the market with the same crops as the homesteaders and that the large scale farmers left fruit to rot in the fields, a practice that created breeding grounds for infestations of fruit flies that destroyed the homesteaders' crops.[46]

Leiff Koa Bush and Martin D.L. Kahae, native Hawaiian homesteaders on Moloka'i, claimed to be harmed by the large scale agribusiness practices that followed the formation of the third party agreements.[47] Bush and Kahae objected to the legality of the contractual agreements, arguing that they violated the HHCA's requirement that lessees "occupy and use or cultivate the tract on their own behalf"[48]

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[39] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[40] *Id.*

[41] Larry Jefts contracted to farm on thirteen different leaseholds. *Id.* at 132, 870 P.2d at 1276.

[42] Edwin Tanji, *Moloka'i Farmers in Protest*, HONOLULU ADVERTISER, Oct. 4, 1991, at A1.

[43] Edwin Tanji, *Third Parties Can Pay to Farm Hawaiian Lands, Commission Rules*, HONOLULU ADVERTISER, May 20, 1992, at A5. This figure includes land from sources other than Hawaiian Home Lands, including the farmer's own land. "Close to 495 acres" were Hawaiian Home Lands. *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[44] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[45] Edwin Tanji, *Moloka'i Farmers in Protest*, HONOLULU ADVERTISER, Oct. 4, 1991, at A4.

[46] *Id.*

[47] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[48] Appellant's Opening Brief at 16, Bush. v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994) (No. 16840). The legislative history of the HHCA gives

and the HHCA's prohibition on subletting the person's interest in the tract.[49] Instead of initiating legal actions against the large scale non-Hawaiian farmers, Bush and Kahae chose to contest the legality of the underlying contractual agreements before the HHC in December 1987.[50] The HHC concluded that the TPAs, when properly executed, did not violate provisions of the HHCA[51] and would provide economic benefits to the Hawaiian homesteaders.[52]

Four years later, the Commission directed the Department of Hawaiian Home Lands to notify native Hawaiian lessees that TPAs required prior written permission from the HHC under administrative rule section 10-3-35.[53] The HHC invited native Hawaiians interested in contracting away the rights to farm on their homesteads to submit written requests that would be considered at a public meeting in

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some indication of why sections 208(4) and 208(5) were included in the Act. *See* H.R. Rep. No. 839, 66th Cong., 2d Sess. (1920). The House Committee report noted the failure of the Hawaiian Land Act of 1895, the first attempt to place the Hawaiians back on the land through homesteading, stating:

> Under the homestead laws somewhat more than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws.

Id. at 6.

The committee concluded that:"(1) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible. . ." and that "The native Hawaiian must personally occupy these lands and may not in any manner alienate them except to another native Hawaiian and then only with the approval of the commission." *Id.* at 7.

[49] Appellant's Opening Brief at 17.

[50] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[51] *Id.* Hoaliku Drake, chair of the HHC, stated that the TPAs were not violations of the HHCA because they were technically not leases, but only contracts that did not interfere with a lessee's potential use of the land. Edwin Tanji, *Moloka'i Farmers in Protest*, HONOLULU ADVERTISER, Oct. 4, 1991, at A1.

[52] *Bush*, 76 Haw. at 132, 870 P.2d at 1276.

[53] *Id.* Letters were dated December 3, 1991. The Commission stated that this was required under HAW. ADMIN. R. 10-3-35, the rule entitled "Contracts Covering Lease Lands." *Id.*

Honolulu on April 28, 1992.[54] Twenty-three homestead lessees submitted requests.[55]

Bush and Kahae, still interested in challenging the validity of the TPAs, petitioned the HHC in accordance with DHHL rules[56] for a contested case hearing to challenge the validity of the pending TPAs.[57] In addition, counsel for Bush and Kahae appeared at the April 28 meeting and orally requested a contested case hearing.[58] The Commission instead voted to defer action on the TPAs until its next meeting on May 19, 1992 on Kauai.[59] Bush and Kahae requested that consideration of the TPAs be postponed beyond the May 19 meeting because their attorney would not be able to attend.[60] The Commission denied the request and later approved all 23 of the TPA requests at the May meeting on Kauai.[61]

Bush and Kahae appealed both decisions to the Second Circuit Court, attempting to invoke jurisdiction under Hawaii Revised Statutes section 91-14(a).[62] Upon motion by the HHC, the circuit court dismissed for lack of subject matter jurisdiction without resolving the

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[54] *Id.*

[55] *Id.* at 133, 870 P.2d at 1277.

[56] HAW. ADMIN. R. 10-5-31.

[57] *Bush*, 76 Haw. at 133, 870 P.2d at 1277.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* Moloka'i homestead leaders sent a letter to the HHC on May 1 urging the commission to meet on Moloka'i before deciding the issue to "allow all parties involved in the issue to present their mana'o (thoughts)." Edwin Tanji, *Moloka'i Homesteaders Want Hearing There*, HONOLULU ADVERTISER, May 19, 1992, at A2. U.S. Senator Daniel Inouye also wrote to the commission that he was "deeply troubled with third party use of Hawaiian homelands. In light of the controversy surrounding third party leases on Moloka'i, as they relate to agricultural production and competition, I believe it only fair that the issue be raised and disposed of on Moloka'i." Nevertheless, the HHC approved the TPA requests at the meeting on Kauai. Edwin Tanji, *Third Parties Can Pay to Farm Hawaiian Lands, Commission Rules*, HONOLULU ADVERTISER, May 20, 1992, at A5.

[62] *Bush*, 76 Haw. at 133, 870 P.2d at 1277. Section 91-14(a) states that:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, trial de novo, including the right of trial by jury, provided by law.

HAW. REV. STAT. § 91-14(a) (1985).

substantive issue of whether the TPAs violated the HHCA.[63] Bush and Kahae appealed the dismissal, but the Hawaii Supreme Court affirmed.[64]

III. Facts in *Pele Defense Fund v. Puna Geothermal Venture*

In 1985, the State of Hawai'i exchanged 27,785 acres of Puna lands[65] designated as a geothermal resource subzone for 25,907 acres of Kahauale'a lands[66] owned by the estate of James Campbell.[67] The Campbell Estate leased the acquired property to True Energy Geothermal Corporation for a geothermal development project.[68] Pele Defense Fund sued to prevent geothermal development on the grounds

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[63] *Bush*, 76 Haw. at 133, 870 P.2d at 1277.

[64] *Id.* at 137, 870 P.2d at 1281.

[65] The Puna lands were ceded lands. The Hawaii Supreme Court explained the history and significance of the ceded lands in Pele Defense Fund v. Paty:

> Hawaii's ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1898. Upon annexation in 1898, the Republic of Hawaii ceded these lands to the United States. In 1959, when Hawai'i was admitted into the Union, the ceded lands were transferred to the newly created state, subject to the trust provisions set forth in § 5(f) of the Admission Act. Section 5(f) provides: The lands granted to the State of Hawai'i by subsection (b) of this section. . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust (1) for the support of public schools and other public educational institutions, (2) for the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, (3) for the development of farm and home ownership on as wide a basis as possible, (4) for the making of public improvements, and (5) for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the consitution and laws of said State shall provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Pele Defense Fund v. Paty, 73 Haw. 578, 585-6, 837 P.2d 1247, 1254 (1992) (citations omitted).

[66] The stated purpose of the exchange was to create a nature reserve on the Kahauale'a land and allow Campbell Estate to explore and develop geothermal energy resources on the Puna lands. Pele Defense Fund protested that most of the Kahauale'a land was covered with lava. Stu Glauberman, *Pele Worshipers Lose at Top Court — File Suit Again*, Honolulu Advertiser, Apr. 26, 1988, at A3.

[67] *Paty*, 73 Haw. 578, 587, 837 P.2d 1247, 1255 (1992). Honolulu Star-Bulletin, Feb. 24, 1991, at A33.

[68] Honolulu Advertiser, Feb. 23, 1993, at A5.

that the drilling of geothermal wells would interfere with traditional Hawaiian worship practices.[69] Pele Defense Fund lost the case for failure to prove that geothermal development would significantly interfere with Hawaiian worship practices.[70] Pele Defense Fund subsequently brought suit in a number of legal actions to oppose the project, employing a variety of other legal theories.[71]

Puna Geothermal applied to the state Department of Health (DOH) for two "Authority to Construct" permits for (1) a well field containing fourteen geothermal exploratory and developmental wells, and (2) a power plant.[72] By statute and DOH rules, the DOH has discretionary authority to hold public hearings prior to granting such permits.[73] The DOH elected to hold two "public informational hearings" prior to granting the permits.[74] At the hearings, several individuals testified in opposition to the permits and requested contested case hearings.[75] One person[76] testified that PGV activities on the site caused her family distress and discomfort.[77] She claimed that bulldozers parked less than 20 feet from her property awakened her daily in early morning hours and produced exhaust fumes that blew into her kitchen and bedroom.[78] She also claimed that the project brought helicopter noise, property

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[69] Stu Glauberman, *Pele Worshipers Lose at Top Court — File Suit Again*, HONOLULU ADVERTISER, Apr. 26, 1988, at A3. Pele is an akua, or goddess. In a full page advertisement run in Honolulu newspapers, Pele Defense Fund explained:

> Like Native Americans, our religion is in Nature. To Hawaiians, our gods and goddesses are alive and with us. On the Big Island, the Goddess Pele appears to us daily in all her forms. She is the volcano, the lava, the steam, the heat. Her family is present in the fern, certain shrubs, certain native trees. She is the land itself.

Id.

[70] Stu Glauberman, *Pele Worshipers Lose at Top Court — File Suit Again*, HONOLULU ADVERTISER, Apr. 26, 1988, at A3.

[71] Hugh Clark, *New Geothermal Suit Filed*, HONOLULU ADVERTISER, Sep. 12, 1990, at A7. The Hawaii County Planning Commission issued a geothermal resource permit to Puna Geothermal with 51 conditions. Pele Defense Fund attacked several of the conditions and raised other procedural objections. *See* Pele Defense Fund v. Puna Geothermal Venture, 9 Haw. App. 143, 827 P.2d 1149 (1992); Pele Defense Fund v. Puna Geothermal Venture, 8 Haw. App. 203, 797 P.2d 69 (1990).

[72] *Puna Geothermal*, 77 Haw. at 66, 881 P.2d at 1212.

[73] *Id.*

[74] *Id.* (citing HAW. REV. STAT. § 342-6(c) (1985) and HAW. ADMIN. R. 11-60-45(a)).

[75] *Id.*

[76] Aurora Martinovich. *Id.* at 70, 881 P.2d at 1216 n. 14.

[77] *Id.*

[78] *Id.*

destruction, and increased traffic in the area.[79] Finally, she testified that leaks from a prior geothermal project made her physically ill and she feared that such illness might recur if the project continued.[80]

The DOH referred the contested case hearing requests to the state Attorney General's office for a determination of whether the DOH was required by statute or administrative rule to grant the requests.[81] The Attorney General's office concluded that the DOH was not required to grant the contested case hearing requests.[82] The DOH thereafter denied the requests and granted the two permits to Puna Geothermal.[83]

Pele Defense Fund, the Kapoho Community Association, and four persons[84] residing in the vicinity of the proposed geothermal site appealed to the Third Circuit Court, naming Puna Geothermal and DOH as appellees.[85] Puna Geothermal moved to dismiss for lack of subject matter jurisdiction, arguing that the public hearings that the appellants testified at were discretionary and were therefore not contested case hearings.[86] The circuit court denied the motion on the grounds that "in environmental issues . . . the technical requirements should not operate to bar an appeal."[87] The Hawaii Supreme Court affirmed the result with respect to three individuals and remanded the case back to the circuit court, adding significant analysis that was not included in the circuit court ruling.[88]

IV. History of Section 91-14 and Contested Cases

The Hawaii Administrative Procedure Act identifies the circumstances in which the circuit court has jurisdiction to hear an appeal of an agency ruling.[89] The Act provides that:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Robert Petricci, Jennifer Perry, Steve Phillips, and Aurora Martinovich. *Id.* at 66, 881 P.2d at 1212 n. 1.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 67, 881 P.2d at 1213.

[88] *Id.* at 72, 881 P.2d at 1218.

[89] Haw. Rev. Stat. § 91-14(a) (1985).

> relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.[90]

Hawai'i appellate courts have dissected this language into six prerequisites for judicial review in any given case. Although Hawai'i courts have not explicitly stated that there are six requirements, each of the following have been found decisive at some point in the evolution of the court's interpretation of section 91-14(a): (1) "Aggrieved Person": The person bringing the claim must show that his or her interests were injured or were likely to be injured;[91] (2) "Final Decision or Order": The agency decision must be final so as to leave the claimant with no other recourse but the courts; (3) "Hearing": An agency hearing must have taken place;[92] (4) "Required by Law": The hearing must have been required by agency rule, statute, or a constitutional provision;[93] (5) "Adversary Participation": The aggrieved person must have been involved at some point in the administrative proceeding that culminated in the unfavorable decision;[94] (6) "Rules Followed": The aggrieved person must have followed agency rules relating to contested case proceedings.[95]

A. Fulfillment of the "Aggrieved Persons" Requirement

HAPA does not expressly define what is meant by the words "person aggrieved" in section 91-14(a),[96] but the Hawaii Supreme Court has

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[90] *Id.* The Model State Administrative Procedure Act similarly states:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. 14 U.L.A. 147, 300-301 (1990).

[91] *Puna Geothermal*, 77 Haw. at 69-70, 881 P.2d at 1215-16. This is also referred to as the "Injury in Fact" requirement.

[92] *Id.* at 67, 881 P.2d at 1213.

[93] *Bush*, 76 Haw. at 134-35, 870 P.2d at 1278-79. The requirements of HAPA differ from the requirements of the federal Administrative Procedure Act. Section 702 of the federal Act provides: "A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988).

[94] *Puna Geothermal*, 77 Haw. at 69, 881 P.2d at 1215 (citations omitted).

[95] *Id.* at 67-68, 881 P.2d at 1213-14; Simpson v. Department of Land and Natural Resources, 8 Haw. App. 16, 24, 791 P.2d 1267, 1273 (1990).

[96] However, HAPA does define "persons" as including "individuals, partnerships,

articulated a working definition over the course of several cases. In *Application of Hawaiian Electric*,[97] the court ruled that persons suffering adverse economic impacts from an agency ruling—such as increased utility rates—are sufficiently "injured" so as to have standing to appeal under section 91-14(a).[98]

Since *Hawaiian Electric*, the court has liberalized standing requirements so that harm no longer needs to be economic. For example, in *East Diamond Head Association v. Zoning Board of Appeals*,[99] the court established the requirement that one be "specially, personally, and adversely affected"[100] such that there is "injury[101] or damage to one's personal or property rights as distinguished from the role of being only a champion of causes."[102] The court found that neighboring landowners challenging a zoning variance that would have allowed a movie production on adjacent property had standing as aggrieved persons[103] because they would be "affected the most" by the variance.[104]

In *Kona Old Hawaiian Trails v. Lyman*[105] the Hawaii Supreme Court ruled that loss of access routes to the ocean and the rights to traverse

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corporations, associations, or public or private organizations of any character other than agencies." HAW. REV. STAT. § 91-1(2) (1985). HAPA further defines "Agency" to mean "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 brances." HAW. REV. STAT. § 91-1(1) (1985).

[97] Application of Hawaiian Electric Co., 56 Haw. 260, 535 P.2d 1102 (1975).

[98] *Id.* at 265, 535 P.2d at 1106.

[99] 52 Haw. 518, 479 P.2d 796 (1971).

[100] 52 Haw. at 522, 479 P.2d at 798. The person must allege a "personal stake in the outcome" to have standing. Jordan v. Hamada, 64 Haw. 451, 457, 643 P.2d 73, 75 (1982).

[101] Injury can be anticipated. *Jordan*, 64 Haw. at 459, 643 P.2d at 76.

[102] *East Diamond Head*, 52 Haw. at 522, 479 P.2d at 798 (citing Hattem v. Silver, 19 Misc.2d 1091, 1092, 190 N.Y.S.2d 752, 753 (Sup. Ct. 1959)). The harm must be individualized such that the persons appealing seek to do more than 'vindicate their own value preferences through the judicial process'. *Puna Geothermal*, 77 Haw. at 70, 881 P.2d at 1216 (citing Sierra Club v. Morton, 405 U.S. 727, 740 (1972)).

[103] Persons have standing as aggrieved persons when the agency action is a zoning change on an adjacent parcel of land. Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969).

[104] *East Diamond Head*, 52 Haw. at 522 479 P.2d at 798. The court noted the probability of increased noise, traffic, congestion, telephone crews, and electric crews. Although the variance would have only granted temporary permission to film, the court also noted the possibility that the company might leave undesirable fixtures behind, thereby detracting from the aesthetics of the area. *Id.* at 521, 479 P.2d at 798.

[105] 69 Haw. 81, 734 P.2d 161 (1987).

ancient trails across public beaches were sufficient injuries to confer standing.[106]

The Hawaii Supreme Court went even further to liberalize standing requirements in the 1979 case of *Life of the Land v. Land Use Commission*.[107] The court declared that harm to aesthetic and environmental interests is adequate injury to qualify for "aggrieved person" status where such interests are "personal" and "special."[108] When such interests are shared by several members of the community, any member may enforce the rights of the public; the person does not need to allege injury "different in kind" from that suffered by the public.[109]

Only twice when appeals have been brought under the jurisdictional authority of HAPA[110] have Hawai'i appellate courts determined that a person lacked standing for failure to meet the aggrieved person requirement. In *Jordan v. Hamada*[111] the court ruled that a retired government employee did not have standing to challenge a union service fee that he was never required to pay.[112] In the 1990 case *Pele Defense Fund v. Puna Geothermal*,[113] the Hawaii Intermediate Court of Appeals

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[106] *Id.* at 90, 734 P.2d at 167.

[107] Life of the Land v. Land Use Comm'n, 61 Haw. 3, 594 P.2d 1075 (1979). Two years later, in another case by the same name, the supreme court proclaimed that "standing requirements should not be barriers to justice." Life of the Land v. Land Use Comm'n, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981).

[108] *Life of the Land*, 61 Haw. at 8, 594 P.2d at 1082. The environmental interests cited included the loss of surrounding agricultural land, loss of beach access, and loss of hiking and horseback riding areas. *Id.*

The supreme court has also ruled that restrictions of scenic views, the loss of sense of open space, and increased population density are sufficient to give a person standing as an aggrieved person. Dalton v. City and County of Honolulu, 51 Haw. 400, 403, 462 P.2d 199, 202 (1969).

Environmental interests were cited with approval again in Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982). The court found that residents living adjacent to a site for proposed construction of multi-family housing units had standing to challenge the issuance of a permit. *Id.* at 515, 654 P.2d at 880.

[109] Akau v. Olohana Corp., 65 Haw. 383, 388-9, 652 P.2d 1130, 1134 (1982).

[110] For a significant non-HAPA standing case, see Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989).

[111] 64 Haw. 451, 643 P.2d 73 (1982).

[112] *Id.* at 460, 643 P.2d at 77. The fee was implemented after the appellant retired. The appellant never paid any money to the union. The court noted that although the fee was supposed to be applied retroactively to encompass the period of time that the retiree was still employed, the union only had legal authority to extract the fee from employees on the paroll, and, consequently, the retiree would not be affected by the new fee. *Id.*

[113] 8 Haw. App. 203, 797 P.2d 69 (1990).

ruled that a citizen group challenging the adequacy an agency's efforts to give notice prior to continued development of a geothermal project did not have standing to challenge the agency's action because it failed to show that one of its members was personally harmed by the alleged inadequacy.[114]

B. Fulfillment of the "Final Decison and Order" Requirement

The phrase "final decision and order" is not defined in HAPA.[115] The Hawaii Supreme Court adopted a definition of "final order" in *Gealon v. Kèala*:[116] "'Final order' means an order ending the proceedings, leaving nothing further to be accomplished. Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for futher action."[117] Hawai'i courts have ruled that remands within an agency[118] and deferrals "pending entry

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[114] *Id.* at 211, 797 P.2d at 73. The agency rule required the agency to mail notice to property owners within three hundred feet of the project's boundaries and make a reasonable attempt to notify residents within one thousand feet. The appellants argued that one thousand feet was facially inadequate because the operation had the 'potential to affect property and human health over large areas of Puna.' *Id.* The ICA concluded: "Appellants have no standing to raise the issue or Rule 12-5(c)'s invalidity since they have not shown that they have been injured by its alleged inadequacy." *Id.*

[115] HAPA does not include a definition of "final decision and order" in the definitions section but does require that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law." HAW. REV. STAT. § 91-12 (1985).

[116] Gealon v. Keala, 60 Haw. 513, 591 P.2d 621 (1979).

[117] *Id*, (citing Downing v. Board of Zoning Appeals, 274 N.E.2d 542, 544 (Ind.App. 1971)). In note 8 of the *Gealon* decision the court cited the United States Supreme Court decision in Port of Boston Marine Terminal Association v. Rederiaktiebolaget: "The relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether the rights or obligations have been determined or legal consequences will flow from the agency action." 400 U.S. 62, 71 (1970).

[118] Inouye v. Board of Trustees of the Employees' Retirement System, 4 Haw. App. 526, 669 P.2d 638 (1983). In a proceeding regarding disability benefits, the Board accepted a hearing officer's recommendation that an employee be declared incapacitated but remanded the action to the hearing officer to determine whether the incapacity was the result of a work-related accident. The Board appealed the First Circuit Court's order that the Board pay total disability benefits. The Hawaii Supreme Court ruled that the circuit court's order was premature. *Id.*

of a subsequent final decision" cannot be appealed because the agency has not rendered a final decision.[119] However, a denial of a petition for intervention[120] and a denial of a petition for reconsideration[121] have both been deemed "final decisions and orders" for purposes of judicial review because they have left claimants without any recourse but the courts.

C. Fulfillment of the Hearing Requirement

In *City and County of Honolulu v. Public Utilities Commission*[122] the court ruled that the "person aggrieved" and "contested case" elements of section 91-14(a) were separate and distinct, reasoning that if the legislature had intended to give any person aggrieved by a final decision and order the right to judicial review, it would have not included the "clear and unambiguous" requirement that the person must have been involved in the contested case.[123]

HAPA explicitly defines "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."[124]

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[119] Williams v. Kleenco, 2 Haw. App. 219, 629 P.2d 125, 126 (1981). In *Williams*, an employer appealed a ruling by the director of the Labor and Industrial Relations Appeals Board that an employee claim was not barred by the statute of limitations. Appeal was brought before the director had determined the amount of compensation. *Id.* In a similar case, the Hawaii Supreme Court ruled that an appeal was premature when an employer appealed a Labor and Industrial Relations Appeals "recommended decision" in favor of the employee in a wrongful discharge dispute. The recommened decision did not include the amount the employee would be paid because the hearing officer needed more evidence to fix an amount. The court ruled that there was no final decision and order. Hawaii Laborers' Training Center v. Agsalud, 65 Haw. 257, 258-9, 650 P.2d 574, 575-6 (1982).

[120] *In the Matter of* Hawaii Government Employees' Association, Local 152, 63 Haw. 85, 88, 621 P.2d 361, 364 (1980). Interlocutory appeals satisfy the final decision and order requirement. *Id.*

[121] McPherson v. Zoning Board of Appeals, 67 Haw. 603, 607, 699 P.2d 26, 29 (1985).

[122] 53 Haw. 431, 495 P.2d 1180 (1972).

[123] *Id.* at 433, P.2d at 1182. *See also Life of the Land*, 61 Haw. at 6, 594 P.2d at 1081 (1979); Kaapu v. Aloha Tower Development Corporation, 74 Haw. 365, 382-83, 846 P.2d 882, 889 (1993).

[124] HAW. REV. STAT. § 91-1(5) (1985). The Model Act defines a "contested case" as: "a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 147, 148 (1990).

HAPA clarifies that "'Agency hearing' refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14."[125] The Hawaii Supreme Court has since interpreted the contested case requirement as defined in the statute to be a dual requirement that a hearing take place *and* that the hearing be required by law.[126]

That a hearing must actually take place was clarified in *Kona Old Hawaiian Trails v. Lyman*.[127] In *Kona Old*, the Hawaii County charter

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[125] HAW. REV. STAT. § 91-1(6) (1985). The Model Act does not include definitions for "hearing" or "agency hearing." In *Puna Geothermal*, the Hawaii Supreme Court characterized the definitions of "contested case" and "agency hearing" in HAPA as a "classic example of circular definition." 77 Haw. at 68, 881 P.2d at 1214 n. 7.

[126] *Bush*, 76 Haw. at 137, 870 P.2d at 1281.

[127] 69 Haw. 81, 734 P.2d 161 (1987). Prior to *Kona Old* it would have been plausible to argue that the wording of chapter 91 does not require that a hearing take place. The definition of contested case is "a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HAW. REV. STAT. § 91-1(5) (1985). One reading of the definition is that there only needs to be a legally required *opportunity* for a claimant to testify at an agency hearing and that a *proceeding* can be a contested case as long as a claimant had a legal right to be heard, regardless of whether the hearing actually took place. Under this interpretation, the phrase "required by law" is read to modifiy the words "opportunity for" instead of the word "hearing." In support of this interpretation, one would argue that any other interpretation render the words "opportunity for" meaningless. If the hearing must actually take place the definition should read "after an agency hearing" instead of "after an opportunity for agency hearing." Three jurisdictions omitted the words "opportunity for" from their administrative procedure acts. MO. ANN. STAT. § 536.010 (Vernon 1981). WIS. STAT. § 227.01(2) (1975). D.C. CODE ANN. § 1-1502(8) (1981).

The difficulty in interpreting that a hearing does not need to actually take place is that HAPA defines "agency hearing" as a hearing "held . . . immediately prior to judicial review of a contested case as provided in section 91-14." HAW. REV. STAT. § 91-1(6) (1985). A first impression reading of this definition suggests that the hearing is a prerequisite for judicial review under chapter 91. An alternate interpretation is that "agency hearing" is defined to emphasize the timing element of when jurisdiction for judicial review takes place.

The legislative history indicates that the definition of agency hearing was added:

> [T]o make it clear that, in the area of contested cases, a person would be required to exhaust his administrative remedies, and that the formality required under section 9 would apply at the stage within the agency immediately prior to the stage when judicial review becomes available as provided in section 14.

HOUSE STAND. COMM. REP. NO. 8, 1st Leg., 1961 Reg. Sess., *reprinted in* 1961 Haw. House J. 653, 656.

This alternate reading would be consistent with the use of the words "opportunity

required the agency to conduct a hearing according to HAPA, but the party bringing the appeal failed to request a hearing from the agency.[128] In a footnote, the court declared that "an agency hearing is a necessary prologue" to judicial review under section 91-14 and concluded that because a hearing did not take place, there was no final decision or order in a contested case as required by Hawaii Revised Statutes section 91-14(a).[129] The failure to take advantage of the legally mandated hearing prevented the exercise of the court's jurisdiction despite the fact that the agency would have been required to grant a hearing if one had been requested.[130]

The hearing that takes place does not have to be an individualized hearing; on numerous occassions the Hawaii Supreme Court has ruled

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for" in the definition of a contested case and would cease to give the definitions a circular effect. *See supra* note 125. This reading would also ensure circuit court jurisdiction in cases when an agency fails to recognize a legally mandated opportunity for an agency hearing or when a hearing is unnecessary to adjudicate the rights of the parties.

The District of Columbia Court of Appeals addressed a similar statutory provision in District of Columbia v. Douglass, 452 A.2d 329 (1982). In *Douglass*, the court ruled that a controversy can still be a contested case even if there are no disputed adjudicative facts requiring a hearing. *Id.* at 331. The District of Columbia Administrative Procedure Act (DCAPA) defines a contested case as "a proceeding before the mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined *after a hearing* before the Mayor or before an agency . . . " D.C. CODE ANN. § 1-1502(8) (1981) (emphasis added). However, the court found another provision in DCAPA persuasive, a provision that is not included in HAPA or the Model Act, which states that "any contested case may be disposed of by stipulation, agreed settlement, consent order, or default." *Douglass*, 452 A.2d at 331 (citing D.C. CODE ANN. § 1-1509(a) (1981)).

Other jurisdictions have resolved the matter in favor of the interpretation that a hearing must actually take place. The Michigan Administrative Procedure Act, for example, defines a contested case as "a proceeding. . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MICH. COMP. LAWS § 24.203 (1979). The Michigan Court of Appeals has ruled that this language requires that a hearing actually take place. Blue Cross and Blue Shield of Michigan v. Commissioner of Insurance, 400 N.W.2d 638, 641 (Mich. App. 1985).

The Hawaii Supreme Court reaffirmed its interpretation that a hearing must take place in *Puna Geothermal*, 77 Haw. at 67, 881 P.2d at 1213.

[128] *Kona Old*, 69 Haw. at 92, 734 P.2d at 168.

[129] *Id.* at 91-92, 734 P.2d at 168 n. 10.

[130] *See id.*

that public hearings may satisfy the contested case requirement.[131]

D. Fulfillment of the "Required By Law" Requirement

The Hawaii Supreme Court has ruled that it is not sufficient that a hearing take place;[132] HAPA requires that the hearing be one in which "the legal rights, duties, or privileges of specific parties are required by law to be determined."[133] This means that discretionary hearings cannot be contested cases.[134]

HAPA does not define what is meant by the phrase "required by law," but the Hawaii Supreme Court ruled in *Aguiar v. Hawaiian Housing Authority*[135] that the phrase encompasses both statutory and constitutional requirements.[136] Hawai'i courts have since recognized in *Kona Old Hawaiian Trails Group v. Lyman*[137] that a county charter requiring a hearing may satisfy the "required by law" requirement[138] and in *Miller v. Department of Transportation*[139] that an administrative regulation mandating a hearing may satisfy the requirement.[140]

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[131] *See, e.g.*, East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 524, 479 P.2d 796, 800 (1971); *Application of* Hawaiian Electric, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975).

[132] *Bush*, 76 Haw. at 134, 870 P.2d at 1278.

[133] HAW. REV. STAT. § 91-1(5) (1985). *See* Abramson v. Board of Regents, 56 Haw. 680, 695, 548 P.2d 253, 263 (1976); Miller v. Dept. of Transportation, 3 Haw. App. 91, 93, 641 P.2d 991, 992 (1982).

[134] *Puna Geothermal*, 77 Haw. at 68, 881 P.2d at 1214; *Bush*, 76 Haw. at 134-35, 870 P.2d at 1278-79.

The Connecticut Supreme Court reached the same conclusion in Herman v. Division of Special Revenue, 477 A.2d 119, 122 (Conn. 1984). The Connecticut statute defines a contested case as "a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties, or privileges of a party are required by statute to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . ." *Id* (citing CONN. GEN. STAT. § 4-166(2) (1988)).

[135] 55 Haw. 478, 522 P.2d 1255 (1974). *See also* Tai v. Chang, 58 Haw. 386, 388, 570 P.2d 563, 564 (1977); Lono v. Ariyoshi, 63 Haw. 138, 146, 621 P.2d 976, 981 (1981).

[136] *Aguiar*, 55 Haw. at 496, 522 P.2d at 1267.

[137] *Kona Old Hawaiian Trails v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987).

[138] *Id.* at 91, 734 P.2d at 167.

[139] 3 Haw. App. 91, 641 P.2d 991 (1982).

[140] *Id.* at 93, 641 P.2d at 992. *Miller* was cited with approval in Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994).

Whether a statute, charter, or administrative rule requires a hearing in a given context is a comparatively straightforward determination that only requires interpretation of the statute, charter, or rule. Whether there is a constitutional due process right to a hearing is a more complex inquiry. The Hawaii Supreme Court adopted a two-step analysis in *Aguiar*: "(1) is the particular interest which the claimant seeks to protect by a hearing 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,'[141] what specific procedures are required to protect it."[142] The court determined that a benefit that a claimant was entitled to receive by statute—in this case low rent public housing—was a constitutionally protected property interest.[143] The second inquiry turned on whether the particular interest was "substantial enough" to require agency hearings.[144]

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[141] Property interests protected by procedural due process extend well beyong actual ownership of real estate, chattels, or money. Board of Regents v. Roth, 408 U.S. 564, 571-2 (1972).

[142] *Aguiar*, 55 Haw. at 495, 522 P.2d at 1266. Property interests are not the only interests protected by procedural due process; deprivation of liberty is protected as well.

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

Roth, 408 U.S. at 569-70 (footnote omitted).

[143] *Aguiar*, 55 Haw. at 496, 522 P.2d at 1267. In order to have a legally protectable property interest a person "must have more than an abstract need or desire for it. . . He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577.

In *Aguiar*, the Hawaii Supreme Court adopted an approach that was growing in popularity in a number of jurisdictions. The traditional notion of a property right made a distinction between a right and a privilege. Early cases had held that entitlements were privileges and and were not subject to due process protection. *See* Bailey v. Richardson, 182 F.2d 46 (1950), *aff'd*, 341 U.S. 918 (1951). When *Aguiar* was decided, recent United States Supreme Court cases had discarded the right-property distinction and had held that entitlements were constitutionally protected. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). The United States Supreme Court "fully and finally" rejected the right-property distinction in *Roth*, 408 U.S. at 571.

In Mortensen v. Board of Trustees, the Hawaii Supreme Court reasoned that the widespread economic effects and importance to the recipients were compelling reasons to accord property status to entitlements. 52 Haw. 212, 473 P.2d 866 (1970).

[144] *Aguiar*, 55 Haw. at 495, 522 P.2d at 1267.

In *Aguiar*, the court determined that a reduction in benefits could "jeopardize the economic survival" of the recipients and was thus significant enough to require agency hearings.[145] The Hawaii Supreme Court has also ruled that continued employment is a property interest substantial enough to require an agency hearing.[146] In *Sandy Beach Defense Fund v. City and County of Honolulu*,[147] the supreme court recognized that the interests in *Aguiar* and *Silver* were both "basic needs. . . to which plaintiffs had a legitimate claim of entitlement."[148]

The first caveat under this analysis is to avoid confusing the standard for what is substantial enough to qualify as a property interest worthy of due process protection with the standard for qualifying as an "aggrieved person." Recall that a property right only has to be "specially, personally, and adversely *affected*"[149] for one to qualify as an aggrieved person.[150] In *Sandy Beach*, the Hawaii Supreme Court ruled that harm to aesthetic and environmental interests did not rise to the level of property within the meaning of the due process clause,[151] despite the fact that the court has held such interests sufficient to give a person standing under the "aggrieved person" analysis.[152]

The second caveat is that even if the interests rise to the level of "property" one also needs to show that the interest is substantial enough to require a full agency hearing.[153] Procedural due process is

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[145] *Aguiar*, 55 Haw. at 497, 522 P.2d at 1268.

[146] Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972).

[147] Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw. 361 773 P.2d 260 (1989).

[148] *Id.* at 377, 773 P.2d at 260.

[149] East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 522, 479 P.2d 796, 798 (1971) (emphasis added).

[150] *See supra* notes 99-109 and accompanying text.

[151] *Sandy Beach Defense Fund*, 70 Haw. at 377, 773 P.2d at 261. In note 10, the court acknowledged that: "The California Supreme Court has recognized that land use decisions which substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property within the context of procedural due process." *Id* (citing Horn v. County of Ventura, 596 P.2d 1134, 1139 (1979); Scott v. City of Indian Wells, 492 P.2d 1137 (1972)).

Hawai'i Courts have not come to such a conclusion, but the Hawaii Intermediate Court of Appeals conceded that "[I]t is at least arguable that [appellants'] use of their property might be so severely curtailed by [neighboring] applicants' . . . activities as to constitute a deprivation of property." Medeiros v. Hawaii County Planning Comm'n, 8 Haw.App. 183, 194, 797 P.2d 59, 65 (1990).

[152] *See supra* notes 107-108 and accompanying text.

[153] *Aguiar*, 55 Haw. 478, 495, 522 P.2d 1255, 1267 (1974). In *Application of* Kauai

not a fixed concept requiring specific procedure in every situation.[154] The basic elements of procedural due process only require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before deprivation of the property interest.[155] Property may be protected by due process, but it does not necessarily follow that the person affected has a right to appear in a court of law, present witnesses, or perform cross examination.[156] A contested case hearing is not essential to the guarantees of due process.[157] The opportunity to speak at a publicized public hearing and present a position in writing may be all the protection a claimant may be entitled to under procedural due process protection.[158]

E. Fulfillment of the "Adversary Participation" Requirement

City and County of Honolulu v. Public Utilities Commission[159] established that the aggrived person must be involved as a party or participant in

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Electric, 60 Haw. 166, 182, 590 P.2d 524, 536 (1978), the Hawaii Supreme Court cited the United States Supreme Court's definition of 'full hearing' in the New England Divisions Case: "[o]ne in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken . . ." Akron v. U.S., 261 U.S. 184, 200 (1923). *Kauai Electric* also adopted the Second Circuit's determination that: "A hearing may be a full one, although evidence introduced does not enable the tribunal to dispose of issues completely or permanently, and although the tribunal is convinced, when entering the order . . . that, upon further investigation, some changes will have to be made." *Id* (citing McManus v. Civil Aeronautics Board, 310 F.2d 762 (2d Cir. 1962)).

[154] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[155] Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Barry v. Barchi, 443 U.S. 55, 66 (1979).

[156] The Hawaii Supreme Court has ruled that the determination of specific procedures required to satisfy due process involves balancing the following factors: the private interest which will be affected, the risk of erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards, and the governmental interest, including the burden that additional procedural safeguards would entail. *Sandy Beach Defense Fund*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). *See also Mathews*, 424 U.S. at 335; Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974).

[157] *Medeiros*, 8 Haw. App. 183, 195, 797 P.2d 59, 65 (1990).

[158] Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw. 361, 378-79, 773 P.2d 250, 261-62 (1989). This is significant because if a person deprived of a property interest chooses to not participate in a given public hearing, due process protection may not require an additional individualized hearing for the deprived person to testify. *See Medeiros*, 8 Haw. App. at 195-96, 797 P.2d at 65-66.

[159] 53 Haw. 431, 495 P.2d 1180, (1972).

the agency hearing[160] in order to have standing to appeal.[161] Intervention as a party is the most direct form of involvement and is clearly always considered valid participation,[162] but other forms of adversary participation short of formal intervention have also been recognized.[163] In East Diamond Head, presentation of testimony at a public hearing was considered adequate participation when formal intervention was denied.[164] Presentation of written testimony that was "received for the record" was sufficient in *Mahuiki v. Planning Commission*[165] after the commission suggested that persons state their objections in such a manner.[166] Filing of an amicus brief after formal intervention was denied met the participation requirement in *Ariyoshi v. Hawaii Public Employment Relations Board.*[167]

F. Fulfillment of the "Rules Followed" Requirement

The Hawaii Intermediate Court of Appeals recently declared a new jurisdiction requirement in *Simpson v. Department of Land and Natural Resources.*[168] The court ruled that if an aggrieved party has failed to follow agency procedures regarding contested case proceedings, the

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[160] *Id.* at 433, 495 P.2d at 1182. The Hawaii Supreme Court's decisions in *Bush* and *Pele Defense Fund* stressed that participation in a hearing is not sufficient to give rise to appeal rights if the hearing is not required by law. *See supra* notes 178-82 and accompanying text. This contradicts Simpson v. Department of Land and Natural Resources, 8 Haw. App. 16, 791 P.2d 1267 (1990), a Hawaii Intermediate Court of Appeals case that the supreme court cited in *Puna Geothermal* for a different purpose—but did not expressly overrule in regards to the 'required by law' requirement. *See infra* notes 168-71. In *Simpson*, the ICA had declared that a public hearing conducted pursuant to public notice was a contested case and that participation in a public hearing was sufficient to give rise to appeal rights. 8 Haw. App. 16, 23, 791 P.2d 1267, 1272 (1990). This is certainly not valid law after *Bush* and *Pele Defense Fund. See supra* notes 179-82.

[161] *Public Utilities Comm'n*, 53 Haw. at 433, 495 P.2d at 1182; Mahuiki v. Planning Comm'n, 65 Haw. 506, 514, 654 P.2d 874, 880 (1982).

[162] *Application of* Hawaiian Electric, 56 Haw. 260, 263, 535 P.2d 1102, 1104 (1975).

[163] Jordan v. Hamada, 62 Haw. 444, 449, 616 P.2d 1368, 1372 (1980).

[164] East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 523-4, 479 P.2d 796, 799 (1971).

[165] *Mahuiki*, 65 Haw. at 515-516, 654 P.2d at 880.

[166] *Id.* at 516, 654 P.2d at 880.

[167] Ariyoshi v. Hawaii Public Employment Relations Board, 5 Haw. App. 533, 541, 704 P.2d 917, 924 (1985).

[168] 8 Haw. App. 16, 791 P.2d 1267 (1990).

circuit court does not have jurisdiction to hear the appeal.[169] In *Simpson*, the court remanded the case back to the agency for a contested case hearing in accord with DLNR rules.[170] The Hawaii Supreme Court cited the *Simpson* rule with approval in *Puna Geothermal*, but criticized its application in that particular case.[171] The court's rationale for approving the *Simpson* rule was to establish an adequate formal record for a judicial review that would inform the circuit court of the agency's basis for its final decision and order.[172]

V. ANALYSIS

A. Bush v. Hawaiian Homes Commission

In *Bush*, the Hawaii Supreme Court began its analysis by noting that under HAPA a party has standing to invoke the circuit court's

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[169] *Id.* at 24-25, 791 P.2d at 1273. In *Simpson*, the appellant failed to follow an Department of Land and Natural Resources regulation that specifically required a party seeking a contested hearing to request one before the Board of Land and Natural Resources. Simpson had participated in a public hearing and otherwise met all of the criteria to appeal. *Id.*

[170] *Id.* at 26, 791 P.2d at 1274. Simpson filed his appeal on October 21, 1988. On December 12, 1988 the DNLR filed a motion to dismiss because Simpson had never requested a contested case hearing. On January 23, 1989 Simpson sent a letter to the Board requesting a contested case hearing. In a letter dated January 31 the Board denied the request on the ground that it was untimely. Simpson had never been informed that he was required to request a hearing until after the DNLR had filed the motion to dismiss. On January 31 the circuit court dismissed the case. In the interests of justice the ICA remanded the case back to the agency for a contested case hearing. The ICA ruled that [t]he DNLR or the Board should have informed Simpson of his right to request a 'contested case hearing' and the time within which such request must be made. Simpson should also have been 'fully impressed' of the consequence that he would not have recourse to judicial review of an adverse decision without a 'contested case hearing.' *Id.* at 26, 791 P.2d at 1274.

[171] *Puna Geothermal*, 77 Haw. 64, 69, 881 P.2d 1210, 1215 (1994) n.10. In note 10, the supreme court stated:

> Although the ICA found that the circuit court lacked jurisdiction because Simpson did not participate in a contested case, it nonetheless reversed the dismissal of Simpson's claim and 'remanded with direction to remand the matter to the DNLR for a contested case hearing.' Lacking jurisdiction, the circuit court could do nothing but dismiss the appeal. Requiring a remand to the DNLR with instructions to provide a contested case hearing directly contradicts the proper finding of a lack of jurisdiction in Simpson.

Id. at 69, 881 P.2d at 1215 (citations omitted).

[172] *Id.*

jurisdiction upon a showing that the party is aggrieved by a final decision and order in a contested case.[173] Bush and Kahae claimed to qualify as aggrieved parties because HHC approval of the TPAs enabled the large scale farming that brought infestations of damaging fruit flies and lower market prices.[174] Since a farmer's crops are certainly a property interest with tangible value, a claim that such property was damaged or destroyed as a result of the agency decision easily affords the farmer "aggrieved person" status.[175] Accordingly, the court conceded that Bush and Kahae were "specially, personally, and adversely" affected by the administrative action.[176]

The court then noted the additional standing requirements that the person must have participated in a contested case before an administrative agency prior to judicial review.[177] The court did not find it necessary to address the participation requirement independently because it concluded that "the jurisdictional prerequisite of a contested case hearing did not occur."[178] The court cited the HAPA definitions of "contested case" and "agency hearing"[179] and interpreted the definitions to mean that "if an agency hearing is 'required by law' it is a contested case for the purposes of judicial review."[180] If there is no rule, statute, or constitutional provision requiring a hearing, there is no contested case.[181] The remainder of the opinion explained why, in the court's view, the HHC was not required to hold hearings prior to deciding the TPA issue. Since the hearing that took place was not required by law, there was no contested case for purposes of judicial review.[182]

The court's analysis of whether a hearing was required was broken down into two inquiries. The first was whether the HHCA or DHHL rules required the HHC to hold a hearing prior to approving the

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[173] *Bush*, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994).

[174] *See supra* note 47.

[175] *See supra* notes 96-109 and accompanying text.

[176] *Bush*, 76 Haw. at 134, 870 P.2d at 1278.

[177] *Id.*

[178] *Id.* If the April 28 meeting had been deemed a contested case hearing, oral testimony in opposition to the TPAs would have been sufficient participation to confer standing. *See supra* note 131 and accompanying text.

[179] *See supra* note 127.

[180] *Bush*, 76 Haw. at 134, 870 P.2d at 1278. This is consistent with prior caselaw. *See supra* notes 132-58 and accompanying text.

[181] *Bush*, 76 Haw. at 134-5, 870 P.2d at 1278-9. *See supra* notes 133-34.

[182] *Id.* at 136, 870 P.2d at 1280.

TPAs.[183] The second was whether there was a constitutional right to such a hearing.[184]

The court did not find any provisions in the HHCA that required a hearing prior to approval of third party agreements.[185] However, the court did scrutinize two DHHL rules[186] that identify when the HHC is directed to grant contested case hearing requests. The rules do not identify specific scenarios when the HHC is automatically required to grant hearings; rather, the rules require hearings only if the HHC determines that 1) hearings are required by chapter 91, 2) there is reason to believe that a law or rule of the commission has been violated, 3) a hearing would be in the best interests of one or more of the beneficiaries of the HHCA, and 4) a proceeding would be in the best interests of the DHHL.[187] The rules also declare that it is the policy of the HHC not to initiate proceedings when the matters complained of involve a private controversy redressable in the courts and where the public interest is not involved.[188] The court ruled that because DHHL rules grant the HHC the discretion to decide whether to hold hearings, the right to a hearing is a "conditional right" subject to HHC findings, not an "absolute right," and is therefore not "required by law" for purposes of judicial review.[189]

Given this rule, the issue of whether the HHC abused its discretion in denying the contested case hearing requests became irrelevant. The court did not even mention the issue.[190]

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[183] *Id.* at 134, 870 P.2d at 1278.

[184] *Id.* at 135, 870 P.2d at 1279.

[185] *Id.* at 134, 870 P.2d at 1278. Bush and Kahae did not cite any specific provisions in the briefs. Instead, counsel argued that due process mandated a hearing prior to the TPA issue. Appellant's Opening Brief at 19-26, Bush. v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994) (No. 16840).

[186] HAW ADMIN. R. 10-5-31 and HAW. ADMIN. R. 10-5-32.

[187] HAW. ADMIN. R. 10-5-32.

[188] HAW. ADMIN. R. 10-5-31.

[189] *Bush*, 76 Haw. at 135, 870 P.2d at 1279. "[t]he absolute right to such a hearing is not provided by these . . . rules . . . the Commission is granted wide administrative discretion. . . consequently, there is no regulatory mandate for a hearing." *Id.*

In a similar ruling based on a similar statute, the Minnesota Supreme Court declared that a rule providing for discretionary hearings does not entitle a party to a hearing as a matter of right. Consequently, there there is no contested case and there can be no judicial review. Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 666 (Minn. 1984).

[190] In the due process constitutional analysis in the briefs, counsel for Bush and

Turning from the DHHL rules, the court addressed whether constitutional due process mandated a hearing prior to the approval of the TPAs.[191] Bush and Kahae argued that they had a constitutional right to a contested case hearing because they sought to protect substantial property interests.[192] The court did not address the issue of whether the HHC was required to grant contested case hearings to Bush and Kahae regarding the property interests *they* sought to protect; instead, the court focused on whether the subject matter of the hearings, the TPA agreements, were property interests such that the hearing that actually took place was a contested case.[193] If the HHC was constitutionally required to grant a hearing to *anyone* for resolution of the TPA requests, the hearing would be "required by law" and would satisfy the contested case requirement for purposes of judicial review.

This is a counter-intuitive twist. The due process inquiry determines whether "the particular interest which the *claimant* seeks to protect" is property within the meaning of the due process clause.[194] Usually, the claimant is the same person who brings the appeal. In *Bush*, the "claimant" was not the person bringing the appeal, but was instead

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Kahae urged the court to note that the DHHL was not a typical state agency, but that the HHC and the DHHL "serve as trustees, in a fiduciary capacity, charged with faithfully administering the HHCA in the best interests of the beneficiaries." Appellant's Opening Brief at 23, Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994) (No. 16840). The appellants argued that this unique relationship imposes a much higher standard on actions conducted by the HHC since the fundamental obligation of a trustee is "to act as an ordinary prudent person would in dealing with his own property." *Id* (citing Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 340, 640 P.2d 1161, 1169 (1982)).

[191] *Bush*, 76 Haw. at 135, 870 P.2d at 1279.

[192] Appellant's Opening Brief at 20, Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994) (No. 16840). Three property interests were argued in the briefs. First, appellants argued that they had a substantial property interest in the *quiet enjoyment* of their leaseholds (emphasis added). *Id.* Second, appellants argued that they had a property interest in preventing third party non-Hawaiian farmers from diminishing the value of their leaseholds. *Id.* at 21. Finally, appellants argued that they had a protected entitlement interest as beneficiaries under the HHCA. *Id.* at 23.

[193] *Bush*, 76 Haw. at 136, 870 P.2d at 1280. "The dispositive issue. . . is whether the homestead lessees' interest in entering into TPAs, not Appellants' right to maintain the agrarian lifestyle on their leaseholds, constitutes a 'property' interest such that the incumbent hearing was a 'contested case' pursuant to HRS § 91-14(a)." *Id* (citing *Aguiar*, 55 Haw. 478, 522 P.2d 1255 (1974)).

[194] *Id* (citing *Aguiar*, 55 Haw. 478, 495, 522 P.2d 1255, 1266 (1974) (emphasis added)).

the claimant in the proceeding before the HHC.[195] The definition of contested case only mandates that a hearing be required by law; it does not mandate that the *appealing party* be entitled to such a hearing.[196] As long as the HHC was required to grant a hearing to *someone*, the hearing could be a contested case for purposes of judicial review.[197]

The court noted that the subject matter of the hearings that took place at the April 28 and May 19 HHC meetings was the petitions for approval of the TPAs.[198] The court ruled that the TPAs were not property interests under the relevant sections of the HHCA and the HAR[199] and that the interests in the TPAs were not "substantial enough" to require agency hearings prior to HHC approval.[200]

Because the prerequisite element of participation in a hearing required by law did not take place, the supreme court ruled that the circuit court lacked jurisdiction to hear the appeal.[201] The court stressed that this did not leave Bush and Kahae without a remedy;[202] section 91-14 does not foreclose "other means of review, redress, relief, or trial de novo, including the right of trial by jury, *provided by law*."[203]

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[195] *See Bush*, 76 Haw. at 136, 870 P.2d at 1280.

[196] A contested case is one in which the rights of "specific parties" are required to be determined after an opportunity for agency hearing. HAW. REV. STAT. § 91-1(5) 1985.

[197] *See Bush*, 76 Haw. at 136, 870 P.2d at 1280. The Wisconsin Supreme Court reached the same conclusion in Daly v. Natural Resources Board, 208 N.W.2d 839, *cert. denied*, 414 U.S. 1137 (1973). However, the Wisconsin statutory definition of contested case as it existed at the time was clearer than the Hawai'i provision: "'Contested case' means a proceeding before an agency in which, after hearing required by law, the legal rights, duties, or privileges of *any party to such proceeding* are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding." WIS. STAT. § 227.01(2) (1975) (emphasis added).

[198] *Bush*, 76 Haw. at 136, 870 P.2d at 1280.

[199] *Bush*, 76 Haw. at 136, 870 P.2d at 1280. "The TPAs cannot be considered 'property' interests because a sublease, transfer, or contract covering leased lands does not constitute a property interest pursuant to the relevant sections of the HHCA and the HAR." *Id.*

[200] *Id.* This seems to be an extraneous holding since the court concluded that the TPAs were not a property interest. *See supra* notes 141-42.

[201] *Bush*, 76 Haw. at 136, 870 P.2d at 1280.

[202] *Id.* at 136-7, 870 P.2d at 1280-1. The court acknowledged that to disallow an appeal with no alternative "would seem unjust inasmuch as the Commission would therefore hold what appears to be unfettered discretion to grant or deny a contested case hearing, thereby controlling appellate review." *Id.*

[203] *Id.* at 136, 870 P.2d at 1280 (emphasis in opinion).

B. Pele Defense Fund v. Puna Geothermal

In *Puna Geothermal*, the Hawaii Supreme Court first noted the trial judge's reasoning in denying the motion to dismiss:

> [I]f this was a regular agency appeal. . . the Court would basically agree with PGV's position in terms of a contested case[,]. . . [b]ut the Court was greatly influenced by the [Mahuiki] case and another case where there was a directive by the [appellate] courts that in environmental issues, that the technical requirements should not bar an appeal.
>
> And I appreciate that there is no Hawaii case that says that where an (sic) environmental issues where there are no mandated public hearings, that you can still have a contested case. I appreciate all the contested cases that have been cited. . . [a]ll have a statutory requirement for public hearing.
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> But the Court was influenced by the admonition that in environmental issues that the technical requirements should not be a bar.[204]

The circuit court ruling appears to be premised on the understanding that prior caselaw authorizes the circuit court to relax jurisdiction requirements in cases involving environmental issues.[205]

The supreme court upheld the decision on different grounds, clarifying that a court does not have the power to hear an appeal if it lacks subject matter jurisdiction.[206] The supreme court first made the distinction between standing requirements and subject matter jurisdiction: standing is concerned with whether the parties have the right to bring suit; subject matter jurisdiction is concerned with whether the court has the power to hear a case.[207] The circuit court does not have the power to ignore technical jurisdiction requirements, since any judgment rendered without subject matter jurisdiction is invalid.[208] However, the circuit court does have the power, following the precedent established

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[204] Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 66-67, 881 P.2d 1210, 1212-13 (1994).

[205] The circuit judge had concluded that a hearing was not mandated, and based the decision on the apparent authority in prior caselaw to excuse the "technical requirements" for jurisdiction. The *Mahuiki* case, however, did not excuse the "technical requirements" of the court's jurisdiction in environmental cases; it only criticized "restrictive standing requirements." *Mahuiki*, 65 Haw. at 512, 654 P.2d at 878.

[206] *Puna Geothermal*, 77 Haw. at 67, 881 P.2d at 1213 (citing *Bush*, 76 Haw. at 133, 870 P.2d at 1277).

[207] *Id* (citing Maryland Waste Coalition v. Maryland Department of Education, 84 Md. App. 544, 581 (1990)).

[208] *Id* (citing *Bush*, 76 Haw. at 133, 870 P.2d at 1277).

by Hawai'i appellate courts, to permit less restrictive standing requirements provided that all other jurisdictional prerequisites[209] have been met.[210]

The court began its legal analysis of the other jurisdictional requirements by inquiring whether an agency hearing that was "required by law" and held "to determine the rights, duties, or privileges of specific parties in the proceeding" had taken place.[211] Although the circuit court had concluded that such a hearing had not taken place,[212] the supreme court disagreed.

Although the parties did not dispute that the DOH hearings were not required by statute or agency rule,[213] the court indicated that the hearing might actually have been required by statute.[214] Yet instead of basing its holding on statutory provisions, the supreme court held that the DOH public information hearings were required by constitutional due process protections.[215]

Puna was similar to *Bush* in that the property interest that the court subjected to due process scrutiny was PGV's interest in obtaining its permit, not the residents' property interests in maintaining the quiet enjoyment of their neighborhood.[216] PGV agreed that it had a property interest in the proposed use of its project site, an interest substantial

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[209] *See supra* notes 92-96 and accompanying text.

[210] *Puna Geothermal*, 77 Haw. at 67, 881 P.2d at 1213. The court confirmed that "[t]he circuit court was correct in identifying our concern about the barriers facing litigants in matters affecting the environment." *Id.*

[211] *Id.* The court added the phrase ". . .that determined the rights duties, or privileges of specific parties" because *Puna Geothermal* faced the same counter-intuitive scenario as *Bush*: a hearing took place but the law did not require that the agency give a hearing *to the appellants*. If the law required the agency to provide a hearing to another party in the proceeding to determine the legal rights or privileges of that other party, the hearing could still be a contested case for purposes of judicial review. *See supra* note 197.

[212] *Puna Geothermal*, 77 Haw. at 68, 881 P.2d at 1214. The circuit court concluded that the public informational hearings that took place were discretionary, and therefore could not be contested cases for purposes of judicial review. *Id.*

[213] *Id.*

[214] *Id.* n.8. The court noted that Hawaii Revised Statutes section 342-6(c) guarantees that "the director shall not deny an application for the issuance . . . of a permit without affording the applicant a hearing in accordance with chapter 91." *Id* (citing HAW. REV. STAT. § 342-6(c) (1985)) (ellipses in original).

[215] *Id.* "Nonetheless, we need not rely on the statute because a hearing is mandated by constitutional due process." *Id.*

[216] *Id.* at 68, 881 P.2d at 1214. *See supra* note 193.

enough to require agency hearings to protect it.[217] Since PGV's objectives in the hearings were to have the "legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents of Puna," the hearings were contested cases.[218]

Having established that the DOH hearings were required by law, the court turned to the *Simpson* requirement that a party seeking appeal must follow agency rules regarding contested case hearings.[219] The court noted that some of the appellees had followed DOH rules[220] in applying for contested case hearings.[221] The court recognized that the purpose of the *Simpson* rule was "'to establish an adequate formal record for judicial review'"[222] and noted that the record for the appellees who followed DOH rules was neither sparse nor inadequate for review.[223] Consequently, the court concluded that the *Simpson* criteria had been met and the circuit court properly exercised subject matter jurisdiction.[224]

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[217] *Puna Geothermal*, 77 Haw. at 68, 881 P.2d at 1214.

[218] *Id.* The court added that "as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." *Id.* The court did not identify which "constitutionally protected rights" it was referring to. Those other rights could be property rights if issuance of a permit threatened another's property. Alternately, the court could be alluding to the constitutional rights to a clean and healthful environment in the Hawaii Constitution: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of air pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art IX, § 9.

[219] *Puna Geothermal*, 77 Haw. at 68-9, 881 P.2d at 1214. *See supra* notes 168-72 and accompanying text.

[220] *See* DOH Rules of Practice and Procedure, Part C, "Hearings on Contested Cases" (1962).

[221] *Puna Geothermal*, 77 Haw. at 68, 881 P.2d at 1214. The court did not specify which appellants had submitted applications. *Id.*

[222] *Id.* at 69, 881 P.2d at 1215.

[223] *See supra* notes 170-72 and accompanying text. The court did not indicate whether these were the same appellees that submitted contested case hearing requests. *See Puna Geothermal*, 77 Haw. at 68-69, 881 P.2d at 1214-15.

[224] *Puna Geothermal*, 77 Haw. at 69, 881 P.2d at 1215. The court did not explain why it applied the *Simpson* rule to the facts of this case. The court ruled that the public information hearings were contested cases because constitutional due process

This left the court to address the "aggrieved person" and "participation" standing issues.[225] The court affirmed earlier precedent that relaxed the standing requirements in cases involving environmental issues.[226] The court also reaffirmed precedent liberalizing the standing requirements so that a member of the public has standing to enforce the rights of the public even though the individual's injury is not different in kind from the public's generally.[227]

The court ruled that four appellees[228] had demonstrated that they were harmed or likely to be harmed by the PGV project so as to have standing as aggrieved persons.[229] The potential harm claimed included "diminished property values, deterioration of air quality, odor nuisance, and possible physical injury . . ."[230]

Finally, the court addressed the issue of adversary participation. The court cited its own well-established precedent that participation short

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required hearings. The court did not rule that the aggrieved parties were entitled to separate contested case hearings; the aggrieved parties merely participated in hearings that were deemed contested cases because they involved PGV's property interest of obtaining a permit. The court did not explain why it would require aggrieved persons to request contested case hearings when the proceeding that they were participating in was already a contested case. *See id.*

In *Simpson*, Simpson was legally entitled to a contested case hearing, but he failed to request one. His failure to request a hearing is what made the record sparse and made judicial review impractical. If he had requested a hearing, and a hearing had taken place, the record would have been substantial enough for the circuit court to resolve a direct appeal. *See id.*

In *Puna Geothermal*, a hearing did take place. There was a formal record for judicial review. PGV had a constitutional due process right to a hearing. The Puna residents "piggybacked" onto the hearing that DOH was required to give to PGV. The hearing was a contested case, whether the residents requested it or not. There is no reason to require the residents to request contested case hearings when the proceeding that they have participated in is deemed a contested case.

[225] *Id.* at 69, 881 P.2d at 1215. The court did not need to address the issue of whether there was a final decision or order in the contested case. *Id.*

[226] *Id.* at 67, 881 P.2d at 1213.

[227] *Id.* at 70, 881 P.2d at 1216 (citing Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989) (citing Akau v. Olohana Corp., 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982))).

[228] Martinovich, Perry, Petricci, and Phillips. *Puna Geothermal*, 77 Haw. at 70, 881 P.2d at 1216.

[229] *Id.* Pele Defense Fund did not meet the aggrieved person requirement because it was unable to show that one of its members suffered actual or indiviualized harm. *Id.* n.16.

[230] *Id.*

of intervention can be adequate to preserve rights to appeal.[231] The question for the court turned to whether the four appellees who had already satisfied the aggrieved person requirement adequately participated as adversaries in the agency proceeding.[232] All four aggrieved persons had testified at the hearings. Three of the four submitted applications for contested case hearings.[233] The fourth, along with the Kapoho Community Association, failed to submit applications.[234] The court merged the "participation" and "rules followed" requirements and ruled that an application for a contested case hearing in accordance with DOH rules was required to meet the adversary participation requirement.[235] Though the three appellees who submitted applications for contested case hearings did not intervene in the proceedings, they did "everything possible" in accordance with DOH rules to establish and preserve a right to appeal; the court concluded that this satisfied the requirements to invoke the jurisdiction of the circuit court under Hawaii Revised Statutes section 91-14(a).[236]

The supreme court affirmed the circuit court denial of PGV's motion to dismiss with respect to the three appellees who met the aggrieved person, participation, and rules followed requirements and reversed with respect to the other appellees.[237]

VI. Impact

Bush and *Puna Geothermal* do not fundamentally alter the Hawaii Supreme Court's construction of HAPA, but they do leave significant questions unanswered regarding the forms of judicial review that are available when a direct appeal under HAPA is not authorized.

Through the evolution of the court's interpretation of HAPA and its six requirements, the court has articulated four fundamental messages regarding judicial review of agency actions and HAPA. First,

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[231] *Puna Geothermal*, 77 Haw. at 71, 881 P.2d at 1217 (citing *Jordan*, 62 Haw. at 449, 616 P.2d at 1371; *Life of the Land*, 61 Haw. at 10, 594 P.2d at 1083). *See supra* notes 159-67 and accompanying text.

[232] *Id.*

[233] *Id.* at 70, 881 P.2d at 1216 n. 15. The three that submitted applications were Martinovich, Petricci, and Phillips. *Id.* Pele Defense Fund also submitted an application, but did not show that any of its members were aggrieved persons. *Id.*

[234] *Id.*

[235] *Id.* at 71, 881 P.2d at 1217.

[236] *Id.*

[237] *Id.* at 72, 881 P.2d at 1218.

the court has announced that it favors the policy of assuring some form of judicial review of agency actions.[238] Second, the court has liberally construed the aggrieved person standing requirement to guarantee access to the courts for those suffering environmental harms.[239] Third, the court has shown a concern for the adequacy of the record in direct appeals to the circuit court.[240] Finally, the court has stressed that even when the prerequisites for a direct appeal under HAPA have not been met, other avenues for judicial review are available.[241]

A synthesis of these messages suggests that the court does not intend to curtail the availability of judicial review, but it will require that judicial review take place in an appropriate form to insure that the reviewing court has an adequate record to work from. Since agencies often adjudicate matters informally without required hearings, in many cases a record must be created in a full trial de novo to insure that the circuit court has adequate information to evaluate an agency's decision.[242] The court's concluding remarks in *Bush* acknowledged that a denial of the right of direct appeal may equate to a denial of justice if other alternatives for judical review are unavailable.[243] The court stressed that HAPA does not restrict the right to judicial review through alternative means "provided by law."[244] The supreme court has not indicated in its HAPA opinions which alternative means *are* provided by law; it has not indicated which common law, constitutional, or statutory provisions create an original cause of action that would function as a means of judicial review.

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[238] *See supra* note 11.

[239] *See supra* notes 107-109 and accompanying text.

[240] *See supra* notes 222-23 and accompanying text.

[241] *See supra* note 203.

[242] In the alternative, the court may be inviting the use of common law writs as a mechanism for review. Iowa did not include the phrase "this section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law" from the Model Act in its administrative procedure act. *See* Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 835 (Iowa 1979). The Iowa Supreme Court ruled that the absence of this phrase precluded the otherwise available common law provisions such as "[c]ertiorari, declaratory judgment, injunction, and other common law writs . . ." *Id. See also In the Matter of* Ultraflex Enterprises' Appeal, 494 N.W.2d 89 (Minn. Ct. App. 1992); Waters v. Putnam, 289 Minn. 165 (1971) (holding that the availability of a right to appeal under the state administrative procedure act precluded the right to use writs of certiorari and mandamus).

[243] *See Bush*, 76 Haw. at 137, 870 P.2d at 1281.

[244] *Id* (citing HAW. REV. STAT. § 91-14(a) (1985)).

The court's broad stance in support of some form of judicial review, coupled with the acknowledgement that injustice may result in the absence of alternatives to direct appeals, must be interpreted to mean that the court will be receptive to legal theories supporting original causes of action. Just how far the court will go to insure substantive justice remains to be seen. The *Bush* opinion stands out as an invitation to pursue other avenues of review.

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