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DEDICATION

This issue of the University of Hawaii Law Review is dedicated to the memory of our classmate, Eileen Diane Eisenhower, who became the victim of cancer and died in August 1979. Eileen contributed greatly to the class of 1980 and the University of Hawaii Law School with her enthusiasm for legal scholarship and her warm, friendly personality. Her untimely death has reminded us to treasure highly the precious gift of life.

JUDICIAL INDEPENDENCE: THE HAWAII EXPERIENCE

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During the past twenty years, Hawaii, like many other states, has experienced a tremendous growth in the use of the judicial process. A 1976-77 review found that the caseload for Hawaii's circuit courts proper[1] and district courts had increased over the past decade by forty-four percent[2] and in excess of one hundred percent,[3] respectively. During the five year

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This perspective of judicial independence reflects the author's personal experience in each branch of government. Immediately prior to appointmentas chief justice, he served as elected Lieutenant Governor of Hawaii, and before that he was the Chief Clerk of the Territorial Senate for the 1955 and 1957 sessions.

The author wishes to acknowledge the valuable researching and drafting assistance of Melody MacKenzie, supreme court administrative law clerk, and to thank Catherine Chang, former supreme court law clerk, for her part in the preparation of this article.

[1] There are four judicial circuits in the Hawaii judicial system corresponding to the four counties. The term "circuit courts proper" refers to the four circuit courts exclusive of the land court and tax appeals court, which are statewide courts of specialized jurisdiction, and the family and district courts, which are within the same territorial jurisdiction but have different subject matter jurisdiction. *See* notes 172-74 *infra*.

[2] [1976-1977] HAWAII JUDICIARY ANN. REP. 19.

[3] This figure was derived by comparing the combined caseloads for all district courts for the appropriate years. *Id.* at 38, 44, 50, 55.

period from 1973-74 to 1978-79, the number of matters[4] filed with the supreme court more than doubled.[5] Projections for the year 2000 indicate that the filings for all circuit, family, and district courts will be more than 1.5 million,[6] over twice the number recorded in 1977-78.[7]

The reasons for such expanding caseloads are many and complex: Population growth,[8] an increased willingness on the part of our citizenry to involve the courts in resolving private disputes,[9] the expansion of criminal defendants' rights,[10] technological changes that have created whole new fields of law,[11] a rising awareness of the need to protect human and civil rights,[12] the creation of new administrative agencies,[13] and the passage of numerous laws requiring interpretation by the courts.[14] An additional fac-

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[4] The term "matters" includes both primary cases and supplemental proceedings filed with the court.

[5] The number of matters filed in 1973-74 was 419 while the number of matters filed in 1978-79 was 963. [1973-1974] HAWAII JUDICIARY ANN. REP. 5; HAWAII SUP. CT., REPORT OF CASELOAD ACTIVITY, FISCAL 1978-1979 (1979).

[6] [1976-1977] HAWAII JUDICIARY ANN. REP. 5 projects 1,557,358 filings in 2000.

[7] The number of filings in 1977-78 was 749,886. [1977-1978] HAWAII JUDICIARY ANN. REP. 24.

[8] For instance, estimates for 1978 indicated a population of 896,700 for Hawaii. The total population has risen from 154,000 in 1900 and 423,000 in 1940. DEP'T OF PLANNING AND ECON. DEV., THE STATE OF HAWAII DATA BOOK—1978, at 9 (1978). It is estimated that Hawaii's population will increase to 942,000 by 1980 and exceed 1 million by 1985. *Id.* at 23.

[9] Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 904 (1971) [hereinafter cited as Hufstedler]; Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, (Magazine), at 17.

[10] *See, e.g.*, Carvalho v. Olim, 55 Hawaii 336, 519 P.2d 892 (1974) (guilty plea must be made voluntarily and with full understanding of consequences); State v. Alameida, 54 Hawaii 443, 509 P.2d 549 (1973) (right to speedy trial); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971) (Hawaii Constitution provides independent basis for informing arrested person of constitutional rights); Wong v. Among, 52 Hawaii 420, 477 P.2d 630 (1970) (double jeopardy protection).

[11] *See, e.g.*, Universal City Studios, Inc. v. Sony Corp., 48 U.S.L.W. 1053 (D.Cal. Oct. 2, 1979) (use of television recording machines in the home); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973), *aff'd*, 420 U.S. 376 (1975) (reproduction of copyrighted materials); State v. Stachler, 58 Hawaii 412, 570 P.2d 1323 (1977) (validity of helicopter surveillance); 17 U.S.C. § 108 (1976) (reproduction by libraries and archives); Hufstedler, *supra* note 9, at 904-05. *See also* Markey, *Needed: A Judicial Welcome for Technology—Star Wars or Stare Decisis?*, 79 F.R.D. 209 (1978).

[12] *See, e.g.*, HAWAII CONST. art. I, § 3 (sexual equality), § 6 (the right to privacy), § 11 (grand jury counsel), art. XI, § 9 (environmental rights), art. XII, § 5 (Office of Hawaiian Affairs). The above constitutional provisions were adopted in 1978.

[13] *See, e.g.*, Act 246, 1974 Hawaii Sess. Laws 707 (creating environmental quality commission); Act 163, 1972 Hawaii Sess. Laws 539 (creating ethics commission); Act 171, 1970 Hawaii Sess Laws 307 (creating public employment relations board); Act 226, 1967 Hawaii Sess. Laws 331 (creating criminal injuries compensation board).

[14] *See, e.g.*, Hawaii State Teachers Ass'n v. Hawaii Pub. Employment Relations Bd., 60 Hawaii 364, 590 P.2d 993 (1979) (interpreting provisions of the public employees collective bargaining law); State v. Ortez, 60 Hawaii 107, 588 P.2d 898 (1978) (applying law providing for sentence resetting); Life of the Land, Inc. v. Ariyoshi, 59 Hawaii 156, 577 P.2d 1116 (1978) (interpreting requirements for environmental impact statements); American Insur-

tor is the growth of our legal community. In the last five years, the number of attorneys licensed to practice in Hawaii has increased by more than one-third and is expected to grow by two hundred each successive year.[15]

As new rights are identified and old rights are expanded—whether economic, environmental, or individual—and as the community prevails upon the legislative branch to legitimize and the executive branch to regulate and enforce them, society will turn more frequently to the courts to interpret and define the extent of these rights. This is in keeping with the judiciary's traditional role of resolving disputes and dispensing justice evenhandedly, efficiently, and speedily.

It is the duty of the judicial administrator to design a system which remains conducive to evenhanded, efficient, and speedy adjudication. This becomes an increasingly difficult task as society and its laws become more complex. In making administrative decisions, those who value justice must protect and balance numerous corollary principles.[16] Among them are maintaining the high quality of the judicial process, improving the efficiency of the judicial system, maintaining public confidence in and respect for the courts, providing citizens greater yet equal access to the courts, and preserving the independence of the judiciary. These postulates are interrelated, but at times they may conflict. For instance, greater access to the courts could result in clogged dockets and decreased efficiency; methods used to improve the efficiency of the courts could threaten the quality of the adjudicative process.

Although all of the values mentioned above are important, my primary purpose in the following article is to discuss the significance of judicial independence and the growth of this principle in Hawaii. In doing so, I will present an overview of the many structural and administrative changes that have taken place within Hawaii's courts. I shall first touch upon the theoretical basis for the principle of judicial independence, examine its development during the early periods of our history, and comment on court unification and its impact on judicial independence. Finally, I will present some thoughts about the future of judicial administration and the problems the judiciary will face in maintaining its independence while dealing with its increasing responsibilities to the

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ance Company v. Takahashi, 59 Hawaii 59, 575 P.2d 881 (1978) (interpreting provisions of uninsured motorists statute).

[15] [1977-78] HAWAII JUDICIARY ANN. REP. 24. Simply put, more attorneys means more court cases filed.

[16] *See* Shetreet, *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*, 13 U. BRIT. COLUM. L. REV. 52 (1979) [hereinafter cited as Shetreet]. Shetreet offers an excellent discussion of these values and the relative weight society attaches to each. *See also* Task Force III Report, *What Is the Proper Role of the Judiciary in Hawaiian Society as a Whole and in Relation to the Legislative and Executive Branches of Government?*, in FINAL TASK FORCE REPORTS, CITIZEN'S CONFERENCE ON THE ADMINISTRATION OF JUSTICE (1972).

public.

I. The Role of Courts and the Principle of Judicial Independence

Society entrusts to the courts the task of resolving disputes. Behind this simple statement is the recognition that this primary duty involves several functions.[17] First, a court must apply the established law of the jurisdiction. Second, to the extent that the law of the jurisdiction is unclear, a court must interpret statutes or develop common law. Third, where a possible conflict exists between the law of the jurisdiction and the state or Federal Constitution, a court must determine the constitutionality of executive or legislative actions.

Thus, in resolving disputes, courts interpret and develop law and act as a check on the other branches of government. In order to effectively perform these functions the judiciary must be free from external pressures and influences. Only an independent judiciary can resolve disputes impartially and render decisions which will be accepted by rival parties, particularly if one of those parties is another branch of government.

There are two separate but necessary elements of judicial autonomy: institutional independence and independence of individual judges.[18] The first element requires the executive and legislative branches of government to recognize the judiciary as a co-equal, honor its decisions, provide it with adequate financial support, and defer to its judgment on internal operations and matters peculiarly within its knowledge. The second element protects the freedom of individual judges in the decisionmaking process. Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.

The principle of judicial independence in the American system has its theoretical foundation in the separation of powers doctrine, which holds that government power should be limited and therefore should be divided.[19] In its theoretical form, the doctrine states that the functions of

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[17] Nowak, *Courts and the American System of Government*, in National Center for State Courts, State Courts: A Blueprint for the Future 139, 145 (1978) [hereinafter cited as Nowak].

[18] Shetreet, *supra* note 16, at 57-62.

[19] The essence of the doctrine was described by Montesquieu, whose writings were well known throughout Western Europe and the American colonies in the late eighteenth century:

> When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of

government can be divided into three categories, legislative, executive, and judicial, and that each of these functions or powers should be lodged in separate branch. Consequently, the same person should not occupy positions concurrently in more than one branch; nor should one branch of government duplicate functions performed by another branch.

Although strict adherence to the doctrine allowed no overlapping of the executive, legislative, and juducial functions, the Drafters of the Federal Constitution made no clear distinction among those functions.[20] Instead, the Constitution established a system of checks and balances to prevent the accumulation of power in a single branch of government and to ensure the political independence of each.[21] This blending and overlapping of functions takes several forms. For instance, the power of appointment is an executive power but can only be exercised with advice and consent of the Senate;[22] Congress makes laws but those laws are subject to executive veto, and the veto is subject to legislative override;[23] the judiciary can neither enact nor execute laws but can declare legislative and executive acts unconstitutional.[24]

Hawaii's governmental structure predictably reflects the federal prototype. Remarkably, the state judicial branch has surpassed the federal model by obtaining a larger measure of institutional independence. Yet, it was not always so.

II. HISTORICAL DEVELOPMENT

The theoretical underpinnings of the United States Constitution present a striking contrast to the earliest governments of Hawaii. Prior to

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the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.

I B. DE MONTESQUIEU, SPIRIT OF THE LAWS 152 (Nugent ed. 1823). *See also* Ervin, *Separation of Powers: Judicial Independence*, 35 LAW AND CONTEMP. PROB. 108 (1970); Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211 (1973).

[20] One criticism of the United States Constitution was that it failed to follow the pure separation of powers doctrine. James Madison answered this by arguing that separation of powers did not require an absolute division of functions and that unless the three branches of government "be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the [separation of powers] maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST No. 48, at 146 (Fairfield ed. 1966) (J. Madison).

[21] Nowak, *supra* note 17, at 144.

[22] U.S. CONST. art. II, § 2. *Accord*, HAWAII CONST. art. V, § 6, art. VI, § 3.

[23] U.S. CONST. art. I, § 7. *Accord*, HAWAII CONST. art. III, §§ 16-17.

[24] *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); State v. Shigematsu, 52 Hawaii 604, 483 P.2d 997 (1971); State v. Abellano, 50 Hawaii 384, 441 P.2d 333 (1968).

unification of the islands by Kamehameha I[25] and promulgation of Hawaii's first constitution by Kamehameha III in 1840,[26] all legislative, executive, and judicial functions were vested in the highest chiefs:

> [A]ll functions of government . . . were united in the same persons and were exercised with almost absolute power by each functionary over all under him, subject only to his superiors, each function being exercised not consciously as different in kind from the others but merely as a portion of the general power possessed by a lord over his own. There was no distinct judiciary and scarcely any conception of distinct judicial power, and yet judicial forms were to some extent observed.[27]

Although there were no written laws, a substantial body of customary laws existed relating to water rights, fishing rights, land tenure, and taxation.[28] The government and social system were closely interwoven with religion so that the largest body of law consisted of the *kapus* or prohibitions, which have been characterized as highly oppressive.[29]

In the reign of Kamehameha I, the land-owing chiefs continued to exercise both judicial and executive powers.[30] Kamehameha, however, introduced an innovation to the traditional government scheme. Since he could be present on only one island at a time, he appointed governors to act as his representatives on the other islands.[31] Although no separate judiciary existed, the various levels of government acted as different levels of a judicial system:[32] Kamehameha himself was the court of last resort; the governors appointed by Kamehameha presided over island courts; at the lowest level, tax officers adjudicated land and tax matters, and the chiefs decided all other disputes.[33]

During the two hundred years after Western contact and through four radically different forms of government,[34] the separation of powers theory and its American refinement in the checks and balances concept slowly evolved to become the foundation of our present governmental structure.

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[25] Kamehameha I had gained control of the islands of Hawaii, Maui, Molokai, Lanai, and Oahu by 1794. Kaumualii, chief of Kauai and its dependency, Niihau, acknowledged Kamehameha as King in 1810. I R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778-1854, at 44-51 (1938) [hereinafter cited as I R. KUYKENDALL].

[26] *See* note 35 *infra* and accompanying text.

[27] Frear, *The Evolution of the Hawaiian Judiciary*, HAWAIIAN HISTORICAL SOCIETY PAPERS No. 7, at 1-2 (1894) [hereinafter cited as Frear].

[28] I R. KUYKENDALL, *supra* note 25, at 10.

[29] *Id.* at 8; Frear, *supra* note 27, at 5-6.

[30] I R. KUYKENDALL, *supra* note 25, at 52.

[31] *Id.* at 53.

[32] Frear, *supra* note 27, at 6-7.

[33] *Id.* at 7.

[34] Hawaii has been a constitutional monarchy (1840-1893), republic (1893-1898), territory (1900-1959), and a State (1959 to present). After the overthrow of the monarchy in 1893, a provisional government was established until the Constitution of the Republic was promulgated in 1894.

The evolution of these two concepts shaped the development of our judicial system and resulted in a judiciary that is a truly separate and independent branch of government.

A. *The Constitutional Monarchy (1840-1893)*

Hawaii's modern judicial history begins with Kamehameha III's proclamation of the Constitution of 1840.[35] Although the legislative, executive, and judicial functions were distinguished in this Constitution, they were not clearly delineated; the same persons could exercise more than one type of power.[36] Thus, the rudimentary elements of the separation of powers principle were recognized, although not fully developed, in the Constitution of 1840.

That Constitution provided for legal redress of injury and punishment of crimes by trials according to law.[37] A Supreme Court, consisting of the King, the *Kuhina Nui* (Premier), and four other chiefs elected by the lower House of the Legislature, was established with final and appellate jurisdiction.[38]

The King appointed tax officers, who were both assessors and collectors.[39] They were also judges in all cases arising under the tax law, "in all cases where land agents or landlords were charged with oppressing the lower classes and also in cases of difficulty between land agents and tenants."[40] The tax officers were directly subject to the various island governors appointed by the King, and from their judicial decisions an appeal could be made to the appropriate governor; further appeal could be made to the Supreme Court.[41]

In addition, the governors appointed two or more district judges for each island, whose terms were for an indefinite period, subject to impeachment.[42] These judges had jurisdiction over all cases except those within the authority of the tax officers.[43]

Although the Constitution did not mention governors' or island courts, these tribunals, presided over by the governors, existed prior to the 1840

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[35] For a general discussion of events surrounding adoption of the Constitution, see Kuykendall, CONSTITUTIONS OF THE HAWAIIAN KINGDOM 7-9 (Hawaiian Historical Society Papers No. 21, 1940) [hereinater cited as Kuykendall—*Constitutions*]; I R. KUYKENDALL, *supra* note 25, at 153-68.

[36] HAWAII CONST. of 1840, *reprinted in* THE FUNDAMENTAL LAWS OF HAWAII 1-9 (L.A. Thurston ed. 1904) [hereinafter cited as Thurston]; Kuykendall—*Constitutions*, *supra* note 35, at 9-14.

[37] HAWAII CONST. of 1840, §§ III, IV, *reprinted in* Thurston, *supra* note 36, at 2.

[38] *Id.* § "Of the Supreme Judges", Thurston at 8.

[39] *Id.* § "Respecting the Tax Officers", Thurston at 7.

[40] *Id.*, Thurston at 7-8.

[41] *Id.*, Thurston at 8.

[42] *Id.* § "Of the Judges", Thurston at 8.

[43] *Id.*

Constitution and continued to exist by custom and practice.[44] They occupied a position intermediate between the Supreme Court and district judges.[45]

Between 1845 and 1847, while the Constitution of 1840 remained in force, the Legislature (House of Nobles and House of Representatives) passed three organic acts that completely reorganized the government and integrated the judiciary.[46] These acts are generally recognized as milestones in the movement toward the separation of legislative, executive, and judicial functions.[47] The Judiciary Act of 1847 gave judges independence from the Executive and provided that the King should not control judicial decisions,[48] "but this was understood to mean, not that judicial and executive, to say nothing of legislative functions, should not be exercised by the same person, but that the functions themselves when exercised by the same person should be kept separate and distinct."[49]

The Act established a Superior Court of law and equity with appellate and original jurisdiction.[50] The Supreme Court continued to exist in name only and most of its work was assigned to the Superior Court.[51] The legislation also created four circuit courts of record, one for each major island group.[52] These courts were presided over by a Superior Court judge and two circuit judges appointed by the governor of each island.[53] The district courts remained substantially unchanged; there were twenty-four district courts, each with one or more judges.[54]

The judiciary changed once more when a new Constitution was adopted in 1852[55] creating a three-tiered court structure that would not change

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[44] Kuykendall—*Constitutions, supra* note 35, at 13.

[45] *Id.*

[46] An Act to Organize the Judiciary Department (1847), II STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, at 3-65 (Honolulu 1847) (government press) [hereinafter cited as II STATUTE LAWS]; An Act to Organize the Executive Department (1846), I STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, at 19-272 (Honolulu 1846); An Act to Organize the Executive Ministry (1845), *id.* at 9-17.

[47] Kuykendall—*Constitutions, supra* note 35, at 14; Frear, *supra* note 27, at 17. *See also* I R. KUYKENDALL, *supra* note 25, at ch. XIV.

[48] II STATUTE LAWS, *supra* note 46, at 3-4.

[49] Frear, *supra* note 27, at 17.

[50] II STATUTE LAWS, *supra* note 46, at 29.

[51] I R. KUYKENDALL, *supra* note 25, at 263.

[52] II STATUTE LAWS, *supra* note 46, at 26.

[53] *Id.* at 27.

[54] *Id.* at 10.

[55] For discussion of the historical setting from which the new Constitution emerged, see Kuykendall—*Constitutions, supra* note 35, at 14-17. A Commission consisting of Dr. G. P. Judd, Judge John Ii, and Judge William Lee drafted the new Constitution, which was extensively debated in the Legislature. R. C. Wyllie, Minister of Foreign Affairs from 1845-1865, was very critical of the document since he believed the monarch's prerogatives should be preserved and looked to the British Constitution as a model. As Historian Kuykendall noted, *id.* at 16, Judge Lee was responsible for the draft constitution, and it reflected his American and democratic point of view. Minister Wyllie, in later years, claimed that

for more than one hundred years.[56] The powerful Superior Court was renamed the Supreme Court, and the former Supreme Court, having been stripped of most of its powers in 1847, was abolished.[57]

The Constitution of 1852 established a foundation upon which to build the separation of powers principle by providing: "The Supreme power of the Kingdom, in its exercise, is divided into the Executive, Legislative and Judicial; these are to be preserved distinct; the two last powers cannot be united in any one individual or body."[58] The judicial power of the kingdom was vested in the Supreme Court and such inferior courts as created by the Legislature.[59] The Supreme Court consisted of a Chief Justice and two Associate Justices appointed by the King with the advice of the Privy Council,[60] to hold office during good behavior, subject to impeachment.[61] The Chief Justice was made Chancellor of the kingdom with equity jurisdiction, subject to appeal to the Supreme Court.[62] The compensation of Justices could not be reduced during their term of office,[63] and any judge of a court of record could be removed for mental or physical inability by a two-thirds vote of both Houses of the Legislature.[64]

The circuit courts, which had long existed by practice and were formally established as courts of record by the Act of 1847, obtained constitutional status.[65] From one to three circuit judges for each court was to be appointed by the King, with the advice of the Privy Council,[66] to hold office during good behavior, subject to impeachment.[67] The 1852 Constitution also incorporated the existing mechanism for appointment of district court judges by the island governors,[68] however, appointments required the advice of the Supreme Court.[69] District judges no longer served indefinite terms but instead took office for two years, subject to

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Kamehameha III signed the Constitution with reluctance saying that "if it [should] work badly for me and my people, remember what I gave, I will take away." *Id.* at 17. Later, Kamehameha V followed this course of action. *See* note 72 *infra.*

[56] *See* Judd, *The Judiciary of Hawaii*, in THRUM'S HAWAIIAN ANNUAL OF 1898, at 36 [hereinafter cited as Judd]; Kuykendall—*Constitutions, supra* note 35, at 20; notes 164-74 *infra* and accompanying text. *Compare* HAWAII CONST. art. V, §§ 1, 2, 3 (1959 & 1968, amended and renumbered art. VI, §§ 1, 2, 3, 1978), *with* HAWAII CONST. of 1852, art. 81, 89, *reprinted in* Thurston, *supra* note 36, at 165-66.

[57] Frear, *supra* note 27, at 20-21.

[58] HAWAII CONST. of 1852, art. 23, *reprinted in* Thurston, *supra* note 36, at 157.

[59] *Id.* art. 81, Thurston at 165.

[60] *Id.* art. 89, Thurston at 166.

[61] *Id.* art. 82, Thurston at 165.

[62] *Id.* art. 86, Thurston at 165-66.

[63] *Id.* art. 82, Thurston at 165.

[64] *Id.*

[65] *Id.* art. 83, Thurston at 165.

[66] *Id.* art. 89, Thurston at 166.

[67] *Id.* art. 83, Thurston at 165.

[68] *Id.* art. 90, Thurston at 166.

[69] *Id.*

removal for cause by the circuit courts of their respective islands.[70]

Kamehameha V, who became King in 1863, refused to take an oath to maintain the Constitution of 1852, which had severely limited the prerogatives of the Crown.[71] After failing to gain a new charter by calling a Constitutional Convention,[72] Kamehameha V abrogated the 1852 document and promulgated the Constitution of 1864.[73]

That Constitution omitted the provisions relating to circuit and district courts, thereby allowing the Legislature to regulate both matters by statute.[74] The King gained the exclusive prerogative to appoint Supreme Court Justices and circuit court judges, with the advice of the Privy Council no longer required.[75] A new provision regarding removal of judges of courts of record conferred potential veto power in the monarch by requiring not only a two-thirds vote of the Legislature but also "good cause shown to the satisfaction of the King."[76]

The crucial division of powers language lost some of its force in the Constitution of 1864. The general statement that executive, legislative, and judicial powers should be preserved distinct was retained, but the specific prohibition against uniting legislative and judicial powers in any one individual or body was changed to the more limited requirement that a judge of a court of record could not serve as a legislator.[77]

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[70] *Id.* art. 91, Thurston at 166.

[71] The background to the promulgation of a new Constitution in 1864 is discussed extensively in Kuykendall—*Constitutions, supra* note 35, at 21-37. Kamehameha IV, who succeeded Kamehameha III in 1855, found many of the provisions of the Constitution of 1852 unacceptable limitations on his exercise of the royal prerogatives, and his reign "show[ed] an almost continuous history of efforts to get the constitution amended in accordance with [the views of the King and his advisors]." *Id.* at 21. These efforts were unsuccessful.

[73] Kamehameha V's opposition to the Constitution resulted in the calling of a Constitutional Convention to enact a new Constitution. When the Convention became deadlocked over the issue of universal suffrage, which the King opposed, he dissolved the Convention and abrogated the Constitution of 1852 saying:

> As we do not agree it is useless to prolong the session, and as at the time His Majesty Kamehameha III gave the Constitution of the year 1852, he reserved to himself the power of taking it away if it was not for the interest of his Government and people, and as it is clear that that King left the revision of the Constitution to my predecessor and myself therefore as I sit in His seat, on the part of the Sovereignty of the Hawaiian Islands I make known today that the Constitution of 1852 is abrogated. I will give you a Constitution . . . .

Id. at 36.

[73] For a week after Kamehameha V's abrogation of the Constitution of 1852, Hawaii had no written constitution. Kamehameha V signed a new Constitution drawn by him, the Cabinet, and A. G. M. Robertson, Associate Justice of the Supreme Court. The Constitution of 1864 thus reasserted the monarch's prerogatives as evidenced by the provisions on appointment and removal of judges and, more importantly, property qualifications for voters and representatives serving in the Legislative Assembly. *Id.* at 36-40.

[74] HAWAII CONST. of 1864, art. 64, *reprinted in* Thurston, *supra* note 36, at 177.

[75] *Id.* art. 71, Thurston at 178.

[76] *Id.* art. 65, Thurston at 177.

[77] *Id.* art. 20, Thurston at 171. Attempts were made in 1870 and in subsequent years to

The struggle over the King's prerogatives again led to a new Constitution in 1887. Kalakaua, who had been elected to the throne in 1874,[78] reluctantly signed a document which significantly reduced his powers and placed executive control in the Cabinet.[79] The Constitution of 1887 made no change of any significance to the judicial article,[80] but the specific prohibition in the separation of powers section was altered. For the first time it restricted the concentration of executive and legislative powers in a single person. The language adopted included all judges and was more detailed:

> [N]o Executive or Judicial officer, or any contractor, or employee of the Government, or any person in the receipt of salary or emolument from the Government, shall be eligible to election to the Legislature of the Hawaiian Kingdom, or to hold the position of an elective member of the same. And no member of the Legislature shall, during the time for which he is elected be appointed to any civil office under the Government, except that of a member of the Cabinet.[81]

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amend this provision by deleting the words "of a Court of Record" in order to prevent district judges from sitting in the legislature. The amendment consistently failed. Kuykendall—*Constitutions, supra* note 35, at 41.

[78] Kamehameha V left no successor and William Lunalilo was elected to the throne by the Legislative Assembly in 1873. Lunalilo proposed several amendments to the 1864 Constitution, among which was one that eliminated property qualifications for voters. Before the amendments could be finally acted upon by the Legislative Assembly, Lunalilo died. Kalakaua was elected King and also supported the amendment abolishing voter property qualifications. This amendment was subsequently adopted. Kuykendall—*Constitutions, supra* note 35, at 41-43.

[79] *Id.* at 44-46, gives an account of the events leading to the 1887 Constitution. Kalakaua yielded to pressures to appoint a new Cabinet whose first task would be to provide a new Constitution. His disinclination to endorse the Constitution was well explained by its purpose.

> [The main objectives of the Constitution were] to take from the King the extensive and uncontrolled powers exercised by him under the Constitution of 1864 and reduce him to the status of a ceremonial figure somewhat like the sovereign of Great Britain; to place the executive power, as a practical matter, in the hands of a Cabinet appointed by the King but responsible to the legislature; to change the character of the legislature by making the Nobles as well as the Representatives elective; to re-define the qualifications of Nobles, Representatives, and electors.

Id. at 46.

[80] *See* King v. Testa, 7 Hawaii 201 (1888) (interpreting the constitutional provision relating to the composition of the Supreme Court). Article 65 of the Constitutions of 1864 and 1887 provided that the Supreme Court should consist of a Chief Justice and not less than two Associate Justices. The Legislature of 1886 enacted a law enlarging the Supreme Court from three to five Justices, and two additional Associate Justices were appointed. The Legislature of 1887 repealed the Act of 1886 and the Attorney General claimed that vacated the new offices. The Court held that under the Constitution a Supreme Court Justice held office during good behavior subject only to impeachment; therefore, the Legislature could not deprive a Justice of his office by repealing the act under which he was appointed.

[81] HAWAII CONST. of 1887, art. 20, *reprinted in* Thurston, *supra* note 36, at 183.

During the monarchy period the Constitution changed four times in as many decades. Each change brought variations in the basic separation of powers approach to governance. While the turn of the century marked the end of the Monarchy, it would not erase the progress made toward establishing the judiciary as an independent institution.

B. The Republic (1893-1898)

After the overthrow of the Monarchy in 1893,[82] the Republic of Hawaii continued the basic three-tier court structure created by earlier Governments. The Constitution of the Republic established a Supreme Court consisting of a Chief Justice and two Associate Justices[83] appointed by the President of the island government with the approval of the Senate.[84] The Justices were given lifetime tenure subject to impeachment,[85] and their salaries could not be diminished during their term of office.[86]

The circuit courts formed the next highest level and circuit judges were appointed for six-year terms by the President subject to Senate ratification.[87] These judges had jurisdiction at chambers in equity, probate, and admiralty.[88] At general term, they also had jurisdiction in all felony prosecutions and civil cases where the amount in controversy exceeded three hundred dollars.[89]

At the lowest level, there were twenty-nine judicial districts with one or more magistrates for each district appointed by the President and Cabinet.[90] The magistrates held office for two years, sitting without a jury,[91] and their jurisdiction extended to all misdemeanor charges and civil cases involving less than three hundred dollars.[92]

The Constitution of the Republic contained a general provision recognizing the three functions of government, but specific language carrying the separation of powers principle into effect was absent.[93] In fact, the

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[82] For a brief history of the overthrow of the Monarchy see Kuykendall—*Constitutions, supra* note 35, at 54-56; *see generally*, III R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874-1893 (1953) [hereinafter cited as III R. KUYKENDALL]. Revolution was the final step in the continuous struggle over the Constitution of 1887 and its curtailment of the monarch's prerogatives.

[83] HAWAII CONST. of 1894, art. 83, § 1, *reprinted in* Thurston, *supra* note 35, at 233.

[84] *Id.* art 26, § 1, Thurston at 209.

[85] *Id.* art 83, § 2, Thurston at 233.

[86] *Id.*

[87] *Id.* art. 26, § 1, Thurston at 209; CIVIL LAWS OF THE HAWAIIAN ISLANDS § 1141 (1897) (compiled from the Civil Code of 1859 and Session Laws of 1860-1896; published by authority) [hereinafter cited as CIVIL LAWS].

[88] CIVIL LAWS, *supra* note 87, at § 1145.

[89] *Id.* § 1134; Judd, *supra* note 56, at 96.

[90] CIVIL LAWS, *supra* note 87, at §§ 897, 1114-16.

[91] *Id.* at §§ 1118-19.

[92] *Id.* § 1119; Judd, *supra* note 56, at 96.

[93] HAWAII CONST. of 1894, art. 20, *reprinted in* Thurston, *supra* note 35, at 207.

section included the caveat that the judicial, legislative, and executive powers would remain distinct "except as herein provided."[94]

Although in many ways the Republic was a radical break from the monarchy period,[95] the judicial system changed little. This period was one of transition between kingdom and territory,[96] and, like other departments of government, the judiciary's role was to maintain the balance of power until that transition could be completed.

C. *The Territory (1898-1959)*

Annexation to the United States came in 1898.[97] The Joint Resolution of Annexation created a five-person Commission to draft and recommend an organic act to govern the new territory.[98] The Commissioners found the judicial system of Hawaii so enlightened and excellent by the standards of the time that they urged its retention.[99] Thus, in 1900, when Congress formally established Hawaii as an organized territory by adopting the Organic Act,[100] it confirmed the existing judicial structure.[101]

The Organic Act served as Hawaii's constitution, and, while the Act did not contain a separation of powers clause, the new government generally reflected the political model of the sovereign. Yet, even though the judicial system remained independent from the other branches of Territorial Government, it suffered a long and difficult period of benign neglect and, sometimes, outright usurpation of judicial power.[102]

The Organic Act continued the basic court structure established in 1852, but it drastically changed the selection method, tenure, and compensation of the judiciary. The President of the United States, with Senate approval, appointed supreme and circuit court judges.[103] Tenure was reduced in the case of supreme court judges from life to four years[104] and

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[94] *Id.*

[95] For general background on the effects of the revolution in Hawaii and the response throughout the United States, see III R. KUYKENDALL, *supra* note 82, at 605-50.

[96] The express purpose of those supporting the Revolution of 1893 was union with the United States. *See* Proclamation of 1893, *reprinted in* Thurston, *supra* note 36, at 197-98.

[97] The formal transfer of sovereignty under the Joint Resolution of Annexation of July 7, 1898 took place August 12, 1898; the Organic Act, creating the Territory of Hawaii, took effect June 14, 1900. *See* notes 98, 100 *infra*.

[98] Joint Resolution of Annexation of July 7, 1898, § 1, 30 Stat. 750.

[99] Tavares, Address to the Citizen's Conference on the Administration of Justice 47 (Jan. 17, 1967).

[100] Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (organic act) (repealed in part by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4 (admission act)).

[101] *Id.* § 81.

[102] *See* note 108 *infra* and accompanying text.

[103] Act of Apr. 30, 1900, ch. 339, § 82, 31 Stat. 141 (repealed by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4, *reprinted in* 48 U.S.C. ch. 3, at 11744 (1970)).

[104] *Id.* § 80 (amended 1905, 1921, 1956, 1958).

in the case of circuit court judges from six to four years.[105] Judicial compensation was cut in half.[106]

In effect, judges served at the pleasure of the President, if they served at all. Vacancies on the bench were allowed to continue for long periods. In one decade, two vacancies on the supreme court prevented the court from sitting for a total of eighteen months.[107] During World War II, Hawaii's courts were closed under martial law.[108] All of these factors seriously compromised the independence of the territorial judiciary.

Further, although many individuals serving on the bench were competent jurists, prestige and power were sometimes the impetus for accepting judgeships.[109] For instance, one source points out that it was common knowledge in Honolulu that the probate calendar was most desired because of the judge's ability to appoint the administrators of lucrative estates.[110]

Half a century after annexation, Hawaii's judiciary had relinquished its exemplary status. In his 1957 report to Territorial Chief Justice Philip Rice, the former Director of the Administrative Office of the United States Courts, Henry P. Chandler,[111] commented on the deficiencies:

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[105] *Id.* The original six-year terms for circuit judges were eventually restored, but supreme court justices never enjoyed lifetime tenure again. In 1956, Congress increased their tenure to seven years. Act of May 9, 1956, Pub. L. No. 84-508, 70 Stat. 130.

[106] *See* Act of Apr. 30, 1900, ch. 339, § 92, 31 Stat. 141 (repealed by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4); Anthony, *The Judiciary Under the Constitution of the State of Hawaii*, 43 JUD. 13, 14 (1959).

[107] Associate Justice Samuel Kemp was appointed chief justice on June 20, 1941. His replacement on the court, Louis LeBaron, did not qualify until April 2, 1942. During the intervening period, no cases were submitted to or decided by the court. On July 11, 1949, Associate Justice Albert Christy died and his successor did not qualify until April 18, 1950. *See* Menash v. Sutton, 38 Hawaii 449 (1950), in which Chief Justice Kemp concluded that constitutional and statutory provisions allowing a circuit judge to sit in the absence of a justice did not apply where the absence was due to death and that the court could not hear or decide cases without full membership. Associate Justice LeBaron dissented in part. *Id.* at 464.

[108] The Governor placed the territory under martial law on the afternoon of December 7, 1941. Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the* Yamashita *Case*, 59 HARV. L. REV. 833, 834 & n.7 (1946). Limited modifications occurred in 1942 and 1943, *id.* at 835-36, and the following year, the President terminated martial law and restored the privilege of the writ of habeas corpus effective October 24, 1944. Proclamation No. 2627, 9 Fed. Reg. 12831 (1944). *See generally* Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27 (1947).

[109] H. CHANDLER, ADMINISTRATION OF TERRITORIAL COURTS 3 (1957) [hereinafter cited as CHANDLER].

[110] *Id.*

[111] Henry P. Chandler was retained by Chief Justice Phillip Rice to survey the administration of justice in Hawaii and make recommendations for improvement. The report and proposed legislation implementing the recommendation was distributed to the territorial legislature. Chandler also appeared before the judiciary committee of both houses of the legislature to explain his recommended legislation. See note 121 *infra* and accompanying text.

> From what I have been able to learn about the courts of the Territory of Hawaii, there is one conclusion that stands out: they are disjointed to an extreme degree. There is no such thing as a unified judicial system. Responsible direction is lacking not only for the separate courts as parts of a whole, but even for the one circuit court that presently has more than one judge. . . .[112]

Chandler had identified serious flaws. The chief justice, although possessing some administrative powers, exercised no control over the overall administration of the judiciary.[113] The statutory provisions empowering the supreme court to promulgate rules of practice in criminal and civil cases[114] contained no explicit authority to administer the lower courts, and the supreme court had not undertaken to do so.[115] The several courts each submitted separate budgets to the legislature instead of presenting a coordinated plan for the entire judiciary.[116] Chandler assailed the practice in one circuit[117] of letting the judges divide the calendar among themselves.[118] He also criticized the lack of uniform court hours, vacation times, and courtroom procedure, and the absence of a regular system for presenting and deciding motions.[119]

Chandler did have some words of praise for the administration of the district courts:

> As the courts which come closest to the people, they are very important to the good order and contentment of the population of the Islands. It is greatly to the credit of Hawaii that it provides for the compensation of the district judges or magistrates by salary, not by fees, thus putting them in an impartial position.[120]

Notwithstanding the imperfections of a system in which tenure was insecure, compensation inadequate, and judicial administration deficient, the territorial courts continued to perform their functions in a competent and efficient manner.

The findings and recommendations in the 1957 Chandler report formed the basis for legislative reform of the courts.[121] Some major improvements already had been proposed by the Constitutional Convention of 1950,[122] which was called in anticipation of statehood. However, it was

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[112] CHANDLER, *supra* note 109, at 1.

[113] *Id.* at 1-2.

[114] *See* notes 256-59 *infra* and accompanying text.

[115] CHANDLER, *supra* note 109, at 1.

[116] *Id.* at 2.

[117] *Id.* at 2-3 (referring to the circuit court of the first circuit).

[118] *Id.* at 3-5.

[119] *Id.* at 5-7.

[120] *Id.* at 23.

[121] Act 259, 1959 Hawaii Sess. Laws 229 (codified at HAWAII REV. STAT. §§ 601-1 to -4 (1976)).

[122] *See* text accompanying notes 126-30 *infra*.

not until Hawaii entered the Union nine years later that the convention's judicial article became effective.[123]

D. Statehood and the Judicial Article

The 1950 constitutional convention delegates constructed the framework for a strong and independent judiciary. The judicial article, like the constitution as a whole, was simple and set forth a full grant of essential powers,[124] leaving detailed provisions, such as the jurisdiction of the courts, number of circuit courts, and amounts of judicial salaries, to legislative action.

The judicial power of the State was vested in one supreme court, circuit courts, and such inferior courts as established by the legislature.[125] The supreme court was given the power to promulgate rules of practice and procedure for all courts,[126] and the chief justice was made the administrative head of the courts[127] with the authority to appoint an administrative director, subject to the approval of the supreme court.[128] The chief justice also was given the power to assign circuit judges to temporary service on the supreme court[129] or in another circuit.[130]

After extensive and heated floor debate,[131] convention delegates accepted a judicial selection method that provided for the appointment of supreme court justices and circuit court judges by the Governor, with the

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[123] The constitution proposed by the Constitutional Convention of Hawaii of 1950 was ratified on November 7, 1950, but it did not take effect until Hawaii was admitted as a State. The constitutional convention and the resulting document were not ends in themselves but part of a greater effort to achieve statehood:

> The 1950 Constitution gave the Congress of the United States a preview of Hawaii the state. It showed and was meant to demonstrate how thoroughly the people of the Islands were imbued with American political and cultural traditions. The proposed constitution closely followed both the federal constitution, which it specifically adopted, and the requirements set forth in the statehood enabling legislation then pending before the Congress.

N. MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII 84 (1971).

[124] As Meller points out, the articles on the legislative, executive, and judiciary followed the traditional American pattern:

> The document was commendably short, some 14,000 words, and represented the victory of those who held for sketching the structure of government, positing its powers in general language, and leaving out everything specific that was not essential by way of overcoming negative legal interpretations or protecting the rights of the people.

Id. at 85.

[125] HAWAII CONST. art. V, § 1 (1959, amended and renumbered art. VI, § 1, 1978).

[126] *Id.* § 6 (1959, renumbered art. VI, § 7, 1978).

[127] *Id.* § 5 (1959, amended and renumbered Art. VI, § 6, 1978).

[128] *Id.*

[129] *Id.* § 2 (1959, amended 1968, 1978, renumbered art. VI, § 2, 1978).

[130] *Id.* § 5 (1959, amended and renumbered art. VI, § 6, 1978).

[131] II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 386-415 (1961).

advice and consent of the senate.[132] Tenure was set at seven years for supreme court justices and six years for circuit judges.[133] Retirement became mandatory at the age of seventy.[134] Compensation was to be determined by the legislature but could not be reduced during a judge's term of office, unless by a law generally applicable to all salaried officers of the State.[135]

Judges could not hold another position for profit under the State or United States,[136] were required to have ten years tenure in the Hawaii bar,[137] and were compelled to leave the bench upon becoming a candidate for elective office.[138] They were subject to removal upon a two-thirds vote of each legislative house sitting in joint session[139] or could be retired for incapacity by the Governor after inquiry and recommendation by a board.[140]

When the next constitutional convention convened in 1968, very few amendments to the judicial article were proposed: Terms of supreme court justices and circuit court judges were changed to ten years;[141] retired supreme court justices became eligible for temporary service on the supreme court;[142] and legislative removal of judges was abolished while the procedure on retirement for incapacity was extended to include removal for misconduct.[143] All of these amendments were subsequently ratified by the electorate.[144]

The Constitutional Convention of 1978 proposed, and the voters approved, major revisions to the judicial article.[145] Among them were the creation of an intermediate appellate court,[146] the establishment of new judicial selection and retention procedures,[147] and the transfer to the su-

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[132] HAWAII CONST. art. V, § 3, para. 1 (1959, amended and renumbered art. VI, § 3, para. 1, 1978). District court judges, however, were not mentioned in the constitution, and were appointed by the chief justice, HAWAII REV. STAT. § 604-2 (1976) *as amended by* Act 16, 1979 Hawaii Sess. Laws 28. *Cf.* note 385 *infra* and accompanying text (chief justice limited to appointment from list of eligible candidates under new system).

[133] HAWAII CONST. art. V, § 3, para. 3 (1959, amended 1968 & 1978, renumbered art. VI, § 3, para. 5, 1978).

[134] *Id.*

[135] *Id.*

[136] *Id.* para. 2 (1959, amended and renumbered art. VI, § 3, para. 4, 1978).

[137] *Id.*

[138] *Id.*

[139] *Id.* para. 3 (1959, repealed 1968). See text accompanying notes 414-15 *infra*.

[140] *Id.* § 4 (1959, amended 1968 & 1978, renumbered art. VI, § 5, 1978).

[141] *Id.* § 3, para. 3 (1968, amended and renumbered art. VI, § 3, para. 5, 1978). See text accompanying notes 390-93 *infra*.

[142] *Id.* § 2 (1968, amended and renumbered art. VI, § 2, 1978). See note 221 *infra*.

[143] *Id.* § 4 (1968, amended and renumbered art. VI, § 5, 1978).

[144] OFFICE OF LIEUTENANT GOVERNOR, STATE OF HAWAII, RESULT OF VOTES CAST GENERAL ELECTION TUESDAY, NOVEMBER 5, 1968 (1968).

[145] *See* Kahalekai v. Doi, 60 Hawaii 324, 590 P.2d 543 (1979).

[146] HAWAII CONST. art. VI, § 1.

[147] *Id.* §§ 3-4.

preme court of the power to discipline, remove, or retire from office all state judges.[148] These and other recent amendments to the judicial article and their effect upon judicial independence are discussed in subsequent sections which examine court structure[149] and various aspects of the independence of individual judges.[150]

Hawaii has been a State for less than half the time it was a territory. During this brief and dynamic period, the judiciary has recaptured its independence and its reputation for having an enlightened system, measured against prevailing standards throughout the nation. Despite such accolades, history has shown us that improvement is essential.

III. Institutional Independence of the Judiciary

The American constitutional system dictates that the judiciary form a separate branch of government. Our state constitution incorporates this familiar concept,[151] which is not a passive notion. In order to function as an independent and respected entity, the judiciary must direct attention to its own problems. This includes "administering [its] affairs effectively, establishing and improving the skill and morale of . . . judicial and auxiliary personnel, developing the popular and legislative support required to secure adequate resources, and planning to meet future demands."[152]

Hawaii's first judicial article adopted many of the features advocated by Arthur T. Vanderbilt, former Chief Justice of the New Jersey Supreme Court and one of the early proponents of court unification.[153] The unification movement was directed primarily at increasing the efficiency of courts, but it was no coincidence that its founders also viewed judicial independence as a prime motive for simplifying the structure and centralizing the administration of courts.[154] Unification and independence are

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[148] *Id.* § 5.

[149] See text accompanying notes 175-93 *infra*.

[150] See text accompanying notes 381-89 *infra;* text accompanying notes 403-04 *infra;* text accompanying notes 424-37 *infra*.

[151] The Hawaii Constitution does not contain a specific separation of powers clause. The doctrine, however, is implicit in articles separating the legislative, executive, and judicial branches. *See* Hawaii Const. art. III, § 1 (vesting legislative power in a legislature), art. V, § 1 (vesting executive power in a Governor), art. VI, § 1 (vesting judicial power in one supreme court, one intermediate appellate court, circuit courts, district courts, and such other courts as the legislature may establish).

[152] ABA Comm. on Judicial Administration, Standards Relating to Court Organization, Standard 1.00, Commentary at 1 (1974) [hereinafter cited as ABA—Court Organization].

[153] Stand. Comm. Rep. No. 37, Hawaii Const. Conv., *reprinted in* I Proceedings of the Constitutional Convention of Hawaii of 1950, at 174 (1961). *See generally* A. Vanderbilt, Improving the Administration of Justice (1957) [hereinafter cited as Vanderbilt].

[154] *See* A. Vanderbilt, The Doctrine of Separation of Powers and Its Present Day Significance (1953). This is best exemplified by the stand Pound, Vanderbilt, and others took with regard to the judicial rulemaking power. *See* notes 233-41 *infra* and accompanying

complementary ideas.

The concept of unification was introduced to the American legal community by Dean Roscoe Pound in his now famous address before the American Bar Association in 1906.[155] His speech analyzed popular dissatisfaction with the administration of civil justice in America and identified the "archaic" nature of American judicial organization and procedure as one of the major causes of dissatisfaction.[156] He pointed to three areas in which the state court systems were deficient: First, in their multiplicity of courts; second, in preserving concurrent jurisdictions; and third, in wasting judicial power.[157] Pound recommended that American lawyers carefully study the English Judicature Act of 1873, which he viewed as a model of unification.[158] That Act established a two-tier judicial system that consolidated five appellate courts into one court of final appeals and similarly combined eight courts of first instance into a single trial court.[159]

Pound's original model has undergone extensive revision,[160] and, although modern theory generally holds that unification is desirable, the precise definition of a unified court system remains somewhat elusive. A recent study conducted by the National Institute of Law Enforcement and Criminal Justice[161] identified the essential elements of a unified system: Consolidation and simplification of court structure, centralized administration, centralized rulemaking, and state financing and centralized budgeting. In ranking the states according to these factors, Hawaii's court system was the most unified.[162] The following sections examine these fac-

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text. *See also* Winberry v. Salisberry, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950); Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 JUD. 25 (1940) [hereinafter cited as Pound, *Principles*]; Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952) [hereinafter cited as Pound, *Rules of Court*]; Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926) [hereinafter cited as Pound, *Rule-Making*]; Wigmore, *All Legislative Rules for Judiciary Procedures Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) [hereinafter cited as Wigmore].

[155] Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 ABA Rep. 395 (1906), *reprinted in* NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, RESOURCE MATERIALS 3 (1976) [hereinafter cited as Pound, *Causes*].

[156] *Id.* at 5. The other causes cited by Pound were (1) causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of the Anglo-American system, and (3) causes lying in the environment of judicial administration. *Id.*

[157] *Id.* at 17.

[158] *Id.* at 17-18.

[159] *Id.* at 17.

[160] *See* Ashman & Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1, 1-9 (1974); Berkson, *The Emerging Ideal of Court Unification*, 60 JUD. 372 (1977) [hereinafter cited as Berkson]; Gazell, *Lower Court Unification in the American States*, 1974 ARIZ. ST. L.J. 653; Pound, *Principles*, *supra* note 154.

[161] Berkson, *Unified Court Systems: A Ranking of the States*, 3 JUST. SYS. J. 264 (1978) [hereinafter cited as Berkson, *Unified Court Systems*] (quoting National Institute of Law Enforcement and Criminal Justice, U.S. Justice Department (Grant No. N 76-NI-99-0124)).

[162] *Id.* at 275.

tors and the role each plays in maintaining the judiciary as an independent branch of government.

A. *Consolidation and Simplification of Court Structure*

At the core of a unified court system is a simplified structure in which the jurisdiction of all courts at each level is the same and in which each stratum represents a simple jurisdictional division, such as the division between courts of original and appellate jurisdiction.[163] This structure promotes the perception of the judiciary as a single entity rather than a loose assemblage of parts. It permits a central authority to administer the entire system, provides great flexibility in assigning personnel resources, facilitates the prescription of uniform rules and standardized forms for all courts at the same level in the system, and leads to more accurate budgeting and planning. In this sense, by providing the foundation for a unified body, a simplified court structure contributes to judicial independence.

Pound originally had suggested that there be only one appellate court and one trial court of general jurisdiction,[164] but in 1940 he revised his model.[165] The top of the hierarchy, as in his original model, would be a single and final court of appeals. Next there was to be a court of general jurisdiction dealing with all cases "above the grade of small causes and petty offenses and violations of municipal ordinances."[166] Finally, minor trial courts would handle small actions. In 1970, passage of the District Court Reorganization Act[167] brought Hawaii's courts into harmony with Pound's revised model. The Act consolidated twenty-seven separate district courts, established a single district court for each county,[168] converted district courts into courts of record,[169] and provided for direct appeal from their decisions to the supreme court.[170] As a result of this reorganization, the state's judicial structure became one of the most simplified in the country, comprised of one supreme court, hearing all appeals,[171] and one trial court[172] with two components, the circuit[173] and

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[163] ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.11(a)-(b), at 3.

[164] *See* text accompanying notes 158-59 *supra*.

[165] Pound, *Principles*, *supra* note 154, at 226-29.

[166] *Id.* at 226.

[167] Act 188, 1970 Hawaii Sess. Laws 443.

[168] *Id.* § 8 (amending HAWAII REV. STAT. § 604-1 (1968)).

[169] *Id.* § 22 (amending HAWAII REV. STAT. § 604-17 (1968)).

[170] *Id.* § 3 (amending HAWAII REV. STAT. § 641-1 (1968)).

[171] The Hawaii Supreme Court, until recently, *see* text accompanying notes 183-93 *infra*, was the sole and final appellate court in the State, although appeals from certain administrative agencies were heard in circuit court and were, in turn, appealable to the supreme court. *See generally* HAWAII REV. STAT. ch. 602 (1976 & Supp. 1978) (amended 1979).

[172] In addition to a trial court of general jurisdiction, Hawaii has two specialized courts; one for tax appeals, the other for property matters. The land court is a statewide court of

district[174] courts.

Although neither of Roscoe Pound's models included an intermediate court of appeals, reformers[175] within the past two decades have recommended the addition "where the volume of appeals is such that the state's highest court cannot satisfactorily perform [the functions of reviewing trial court proceedings and formulating and developing the law]."[176] Until recently, the Hawaii constitution did not provide for an intermediate appellate court.

By the time the 1978 constitutional convention convened, it had become apparent that the supreme court could not keep abreast of the number of appeals filed each year. The court's backlog of cases, at that time numbering 670,[177] seemed likely to grow. Despite internal measures taken to increase efficiency,[178] the burgeoning caseload severely threatened the effective administration of justice. Litigants sometimes waited years for a final decision on appeal,[179] and the court's ability to adequately perform its "law-stating" function was jeopardized.[180] Thus, the primary function of the intermediate appellate court, as envisioned by

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record with exclusive jurisdiction over all matters involving legal title to fee simple land and easements and administration of the land registration system. *See, e.g.*, City & County of Honolulu v. A.S. Clarke, Inc., 60 Hawaii 40, 587 P.2d 294 (1978); HAWAII REV. STAT. § 501-1 (1976). The tax appeal court is also a statewide court of record with original jurisdiction to hear all disputes between the assessor and taxpayer. HAWAII REV. STAT. ch. 232 (1976). The chief justice assigns judges of the first circuit court to hear cases in both the tax appeal court and the land court. *Id.* §§ 232-8, 501-2.

[173] All jury trials are held in the four circuit courts proper which have exclusive jurisdiction in all felony cases, civil cases involving more than $5,000, and probate proceedings. Criminal misdemeanors and traffic cases are transferred from district to circuit court when a jury trial is requested. Circuit courts exercise concurrent jurisdiction with the district courts in civil actions involving amounts between $1,000 and $5,000. *See* HAWAII CONST. art. I, § 13; HAWAII REV. STAT. ch. 603 (1976 & Supp. 1979); *id.* § 604-5(b). The family courts, which are a specialized division of the circuit courts, deal with the family unit; their jurisdiction includes marital actions, adoptions and paternity actions, criminal cases involving abuse of a spouse or children, and juvenile cases. HAWAII REV. STAT. ch. 571 (1976 & Supp. 1979).

[174] The district courts are courts of limited jurisdiction where nonjury trials are conducted in both civil and criminal cases. They have exclusive jurisdiction in civil actions where the amount contested is not more than $1,000. *See* note 173 *supra*. District courts have jurisdiction in all criminal misdemeanors and conduct preliminary hearings in felony cases. Additionally, district courts have jurisdiction in all traffic cases and in cases filed for violations of county ordinances. HAWAII REV. STAT. ch. 604 (1976 & Supp. 1979). A small claims division of the district court has exclusive jurisdiction over actions where the amount contested is below $600 and litigants present their own cases and in landlord-tenant cases; no appeal is allowed from a small claims court judgment. *Id.* § 633-27.

[175] *See* Berkson, *supra* note 160, at 375 for a listing of organizations supporting the intermediate appellate court concept.

[176] ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.13, at 32.

[177] HAWAII SUP. CT., REPORT OF CASELOAD ACTIVITY, FISCAL 1977-1978 (1978).

[178] *See* Richardson, *Remarks on Alternatives To Remedy Appellate Court Congestion in Hawaii*, XIV HAWAII B.J. 55, 59-60 (1978).

[179] *Id.* at 58.

[180] *Id.* at 55.

its advocates, was to review those more routine cases involving trial court error,[181] thereby allowing the supreme court to concentrate on cases raising important legal, constitutional, and public policy questions.

The new constitutional language mandated an intermediate court, but the resolution of crucial questions regarding organization and jurisdiction was left to the legislative branch.[182] In 1979, the legislature adopted the framework for an appellate court system[183] which is similar to only one other jurisdiction.[184] When it becomes operational,[185] the three-judge intermediate appellate court will exercise concurrent jurisdiction with the supreme court.[186] All appeals will be filed with the clerk of the supreme court, and one filing fee will be paid regardless of whether the case is heard by one or both courts.[187]

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[181] *Id.* at 62-65. *See also* STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 3-4, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19 _).

[182] HAWAII CONST. art. VI, § 1 provides:

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. Such courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for the disposition of cases in accordance with their rules.

[183] Act 111, 1979 Hawaii Sess. Laws 261 (codified at HAWAII REV. STAT. ch. 602, pt. II (Supp. 1979)). The conference committee report accompanying Act 111 indicates that the committee was very cognizant of the concerns that prompted the constitutional amendment and described the relationship between the two courts in the following manner:

> (a) require the Intermediate Appellate Court to handle the "more routine appellate cases;"
> (b) allow such court, together with the Supreme Court, to hear "all types of cases;"
> (c) allow the Supreme Court a "by-pass" in the hearing of "special types of appeals;"
> (d) afford the desired result of minimizing "double appeals;" and
> (e) preserve the "vital law-shaping function of the Supreme Court."

CONF. COMM. REP. No. 73, 10th Hawaii Leg., 1st Sess. 4, *reprinted in* HOUSE JOURNAL 1121, 1122 (1979) (reprinted as "Conf. Com. Rep. No. 70 [*sic*] on H.B. No. 92"); SENATE JOURNAL 989, 990 (1979) (both versions quoting STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 3, 4, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19_)).

[184] In 1977, an intermediate appellate court was established in Iowa. Under the Iowa system, the court of appeals only hears cases which are referred to it by the Iowa Supreme Court. IOWA CODE ANN., §§ 684.31 to .55 (West Supp. 1979).

[185] Implementing legislation was signed into law on May 25, 1979. However, the new judicial selection process, discussed in text accompanying notes 383-84 *infra*, delayed the selection and appointment of these judges. The Governor announced his choices for the new appellate court bench in mid-February 1980. Honolulu Advertiser, Feb. 16, 1980, at A-3, col. 1. The state senate confirmed the gubernatorial appointees, two circuit court judges and one practicing attorney, late in February. Letter from Seichi Hirai to Hon. George R. Ariyoshi (Feb. 27, 1980). Conceivably, the chief justice could have assigned circuit court judges to sit on the court temporarily, but, as explained in text accompanying notes 222-24 *infra*, the circuit courts are also short of judicial manpower.

[186] Act 111, § 3, 1979 Hawaii Sess. Laws 262 (codified at HAWAII REV. STAT. § 602-57 (Supp. 1979)).

[187] *Id.* § 5 (codified at HAWAII REV. STAT. § 607-5.5 (Supp. 1979)).

The chief justice or his designee will review each appeal and, within twenty days after the last document in the case is filed, assign it either to the supreme court or the intermediate court of appeals.[188] In making a case assignment, the judge will consider certain criteria indicating the importance of the issues raised. These criteria will include whether the case presents a question of first impression or a novel legal issue, requires constitutional interpretation, questions the validity of a state statute, county ordinance, or agency regulation, raises inconsistencies in supreme court or intermediate court decisions, or involves a sentence of life imprisonment without possibility of parole.[189]

The supreme court will have discretionary power to reassign a case from the intermediate to the supreme court if the case concerns an issue of imperative or fundamental importance.[190] Also, a party may petition the intermediate court to have a case reassigned to the supreme court.[191] However, even if the party's petition is successful, the supreme court may still reject the reassignment.[192] Finally, after a decision by the intermediate court, parties may apply for a writ of certiorari to the supreme court on grounds which must include either grave errors of law or fact or obvious inconsistencies between the intermediate court's ruling and prior federal or state appellate decisions.[193]

While the creation of an intermediate appellate court signals a major change in a judicial system, it need not detract from a simple court structure. The number of court levels in a particular jurisdiction is not as important as the method by which cases are handled.[194] Under the appellate procedures designed by the Hawaii Legislature, the supreme and intermediate courts have identical appellate jurisdiction[195] but will decide different types of cases and serve different functions.[196] Hence, these two courts may be viewed as two divisions of a unified appellate system which continue to adhere to the basic principles of a simplified court structure.[197]

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[188] *Id.* § 2 (codified at HAWAII REV. STAT. § 602-5(8) (Supp. 1979)).

[189] *Id.* (codified at HAWAII REV. STAT. § 602-6 (Supp. 1979)).

[190] *Id.* (codified at HAWAII REV. STAT. § 602-5(9) (Supp. 1979)).

[191] *Id.* § 3. (codified at HAWAII REV. STAT. § 602-58 (Supp. 1979)).

[192] *Id.*

[193] *Id.* (codified at HAWAII REV. STAT. § 602-59 (Supp. 1979)).

[194] *See* Berkson, *supra* note 161, at 266. After reviewing the literature on court unification, the author concluded that "the presence or absence of intermediate courts of appeals is not necessarily an indicator of whether a state system is unified." *Id. See also id.* at 278 & n.17.

[195] *See* note 183 *supra* and text accompanying note 186 *supra.*

[196] *See* text accompanying notes 177-81, 188-93 *supra.*

[197] *See* note 163 *supra* and accompanying text; ABA—COURT ORGANIZATION, *supra* note 152, Commentary at 33-8.

B. Centralized Administration

Once courts are established, jurisdiction conferred, and funding provided, their day-to-day operations should be managed and controlled from within the judicial branch. Executive or legislative control over the administration of courts would violate the principle of judicial independence.

Administration under a single authority directly affects the level of judicial independence. Fragmentation, with each court acting as an autonomous unit, inevitably leads to inefficiency and internal conflicts.[198] Centralized administration protects individual judges from outside pressures and allows the judiciary to act as a cohesive body. It provides greater flexibility in allocating personnel resources and results in more uniform delivery of judicial services. Further, centralized administration fixes the responsibility for judicial operations in one person or office which facilitates dealing with the coordinate branches of government.

The advocates of a unified court system attempted to apply basic business principles to the administration of the judicial system.[199] They recognized that if the courts were to be managed efficiently, administrative authority must vest in a single agency or individual.[200] The chief justice of the supreme court was the obvious person to whom the responsibility should be given.[201] However, it was apparent that a chief justice already had extensive judicial duties and to adequately discharge the contemplated administrative duties, assistance would be needed. The answer was found in the professional court administrator whose main function would be to supply the chief justice with the information needed to make intelligent administrative decisions and then to assist in effectuating them.[202]

The concept of a strong, centralized administration was familiar to the framers of Hawaii's first state constitution, and, although the idea departs from the structure of the territorial judiciary,[203] it nevertheless comports with the traditional framework of Hawaiian government.[204] Thus, the first

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[198] *See* text accompanying notes 110-18 *supra*.

[199] VANDERBILT, *supra* note 153, at 49-82; note 201 *infra*; *see* Pound, *Principles*, *supra* note 154.

[200] VANDERBILT, *supra* note 153, at 68; Pound, *Principles*, *supra* note 154, at 229.

[201] Vanderbilt wrote:

> A judicial system is a large statewide business and has all the problems that are present in the operation of any large business enterprise. Like a business it cannot function efficiently without proper administrative control. Just as every business has a president in whom the final administrative authority rests to carry out the policies of its board of directors, so every judicial system must have a single administrative head who has the power and responsibility for making the judicial establishment function efficiently. The administrative power should most naturally and logically be vested in the chief justice.

A. VANDERBILT, CASES ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1252-53 (1952).

[202] *Id.* at 1253-55.

[203] For discussion of the territorial period, see text accompanying notes 102-19 *supra*.

[204] For discussion of the period from Kamehameha I through the Republic of Hawaii, see

state constitution contained a provision,[205] which remains unchanged,[206] designating the chief justice as administrative head of the courts,[207] with the power to appoint an administrative director, subject to approval of the supreme court.[208] Additionally, specific administrative duties of both the chief justice and administrative director have been set by statute.[209]

Under our present scheme, the chief justice receives advice from a judicial council on policy matters pertaining to court administration.[210] The task of implementing policy decisions devolves upon the administrative director, who is also responsible for supervising nonjudicial personnel and the support systems for all of the courts.[211] Throughout the year, administrators of the various courts[212] meet on a regular basis with the administrative director to review operations and procedures. This coordination, supplemented by policy and procedure manuals developed for the courts, has allowed the judiciary to maintain a high degree of operational uniformity.[213]

One of the great advantages of a centralized administration is the abil-

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text accompanying notes 30-96 *supra*.

[205] HAWAII CONST. art. V, § 5 (1959, amended and renumbered art. VI, § 6, 1978).

[206] *See id.* art. VI, § 6. The 1978 amendments were stylistic rather than substantive.

[207] *Id.* art. V, § 5 (1959, amended and renumbered art. VI, § 6, 1978).

[208] *Id.*

[209] *See* HAWAII REV. STAT. § 601-2 (1976 & Supp. 1979) for duties and powers of the chief justice. *Id.* § 601-3 lists the following responsibilities of the administrative director:

(1) Examine the administrative methods of the courts and make recommendations to the chief justice for their improvement;
(2) Examine the state of the dockets of the courts, secure information as to their needs of assistance, if any, prepare statistical data and reports of the business of the courts and advise the chief justice to the end that proper action may be taken;
(3) Examine the estimates of the courts for appropriations and present to the chief justice his recommendations concerning them;
(4) Examine the statistical systems of the courts and make recommendations to the chief justice for a uniform system of judicial statistics;
(5) Collect, analyze, and report to the chief justice statistical and other data concerning the business of the courts;
(6) Assist the chief justice in the preparation of the budget, the six-year program and financial plan, the variance report and any other reports requested by the legislature;
(7) Carry out all duties and responsibilities that are specified in title 7 on public officers and employees as it pertains to employees of the judiciary; and
(8) Attend to such other matters as may be assigned by the chief justice.

[210] HAWAII REV. STAT. § 601-4 (1976); *see* R. HAWAII SUP. CT. 18. The council is an advisory body composed of attorneys, judges, and lay persons who serve on a voluntary basis with the chief justice serving as its presiding officer.

[211] *See* note 209 *supra*. For a more complete description of the administrative director's office, see [1977-78] HAWAII JUDICIARY ANN. REP. 54-60. The administrative director is aided by a deputy specifically responsible for the support functions of the district courts and for the judiciary's legislative initiative. *Id.* at 3, 13; *see* HAWAII REV. STAT. § 601-3 (Supp. 1979).

[212] These administrators include, for example, chief clerks of the various courts and the family court director.

[213] *See also* note 450 *infra* on the development of the Hawaii Benchbook for trial judges.

ity to allocate judicial personnel resources. By constitutional provision,[214] the chief justice may assign judges from one circuit to another for temporary service and, by statute,[215] may assign circuit judges to specific calendars.[216] Similarly, he has the authority to transfer district judges temporarily from one district to another.[217]

The ability to transfer judges laterally is complemented by the power to make temporary vertical assignments. Until recently this power extended only to assigning circuit judges to sit on the supreme court.[218] A 1978 amendment to the judicial article[219] now permits the chief justice to assign district court judges to circuit court, circuit court judges to both the new intermediate court and the supreme court, and intermediate appellate judges to the supreme court.[220] Additionally, since 1968, retired justices of the supreme court have been eligible for temporary service on the supreme court.[221]

The need for such a flexible mechanism in the assignment of judges is illustrated by recent vacancies on the supreme court and in the circuit courts.[222] Several district court judges have been assigned on a full-time basis to the circuit courts[223] and calendar assignments within circuits have been changed in order to deal with the shortage of judicial personnel. These shifts have naturally created vacancies in the district courts, which in turn have been filled by per diem judges appointed by the chief justice.[224]

If the ability to assign judicial personnel is vitally important to the ad-

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[214] HAWAII CONST. art. VI, § 6; *accord*, HAWAII REV. STAT. §§ 601-2(b)(1), 603-41 (1976).

[215] HAWAII REV. STAT. § 601-2(b)(2) (1976).

[216] The chief justice may not, however, assign circuit court judges to individual cases. *Id.*

[217] HAWAII REV. STAT. § 604-3 (1976).

[218] HAWAII CONST. art. V, § 2 (1968, amended and renumbered art. VI, § 2, 1978).

[219] *Id.* art. VI, § 2.

[220] The period of a temporary appointment depends, of course, upon the circumstances that prompt it (for example, illness, resignation, or the removal process), but the onus is initially on the judicial selection commission to ensure timely permanent replacements since appointment deadlines are tied to commission action. *See id.* § 3.

[221] *Id.* art. V, § 2 (1968, amended and renumbered art. VI, § 2, 1978). By statute, a retired justice not actively engaged in the practice of law is eligible for service. HAWAII REV. STAT. § 602-10 (Supp. 1979).

[222] Justice Kobayashi retired on December 29, 1978 and Justice Kidwell retired on February 28, 1979. Family Court Judge Herman F. Lum and Honolulu Attorney Edward H. Nakamura recently assumed those positions. *See* letter from Seichi Hirai to Hon. George R. Ariyoshi (Jan. 24, 1980) (acknowledging senate confirmation of gubernatorial appointees). When this article was drafted, five vacancies existed in the first circuit court and one in the fifth circuit. These positions have since been filled, but the elevation of one circuit court judge to the supreme court and two circuit judges to the intermediate court of appeals, *see* note 185 *supra*, has left three vacancies in the first circuit court.

[223] During the recent period when vacancies occurred in two circuits, *see* note 222 *supra*, district court judges were assigned temporarily to fill these positions.

[224] The chief justice may appoint per diem judges who receive compensation for the days on which actual service is rendered. HAWAII REV. STAT. § 604-1 (1976 & Supp. 1979).

ministration of an efficient court system, supervision of nonjudicial personnel may be no less significant. In 1974, legislation was passed that increased the judiciary's authority over personnel matters, although employees remained under the state civil service system.[225] Three years later, a major step in the development of an independent and unified judiciary came with new legislation giving the judiciary equal status with the executive branch and the several counties in personnel matters and recognizing the judiciary's civil service system as a separate part of the overall state system.[226] Hence, under the present statute, the judiciary develops its own position classification plan, adopts personnel rules and regulations, and recruits, examines, and trains all employees.

There has been a clear and consistent trend toward centralization of administrative powers in the chief justice as evidenced by new constitutional and statutory provisions dealing with temporary judicial assignments and the separate status of the personnel system. At the same time, centralization has been tempered by internal and external operative forces. Within the judiciary itself, effective administration calls for a proper balance between central control and local autonomy. Therefore, administrative judges, court directors, and individual jurists must be accorded great deference in directing the operations of the courts for which they are responsible. Externally, the legislature acts as a potential limiting force since powers conferred by statute, if abused, may be rescinded.[227] Legislative control of the judicial budget also can be a power-

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[225] Act 159, 1974 Hawaii Sess. Laws 298. The legislation (1) provided for representation from the judiciary at meetings of the state and county civil service commissioners and directors, (2) required the director of personnel services to consult with the chief justice in the development of a position classification plan, the formulation of personnel rules and regulations and administration of the personnel system insofar as they affected judiciary personnel, and (3) gave the chief justice final authority in any disputes arising between the chief justice and director of personnel services relating to the judiciary's requests for action. 1974 produced other legislative reforms which strengthened the judiciary's independence. *See* text accompanying notes 351, 360-61 *infra*.

[226] Act 159, 1977 Hawaii Sess. Laws 318. The "findings" section of the Act stated:

> The Constitution of the State of Hawaii provides for three separate and coequal branches of government, the executive branch, the judicial branch, and the legislative branch.
>
> The legislature finds that this concept has been partially implemented, but that the statutes relating to personnel administration are not completely consistent with these constitutional principles.
>
> This remains particularly so with respect to those statutes which appear to permit the executive branch to exercise various administrative controls over the personnel of the judiciary. The purpose of this Act is to conform the personnel laws of the state of Hawaii to the concept that the judiciary is a separate branch of government.

Id. § 1.

[227] *See, e.g.*, notes 225-26 *supra*, notes 351-53 *infra* and accompanying text. Quite apart from legislation designed to correct abuses of power, it should be noted that the legislature recently considered transferring the probation department from the judiciary to the executive branch. S.B. 170, 10th Leg., 1st Sess. (1979). The proposal was premised on the theory that the functions of probation are not judicial, but rather correctional and rehabilitative,

ful check.[228]

In the judicial selection process, the chief justice's authority extends solely to appointment of district judges and only from among candidates successfully screened by the judicial selection commission.[229] While the fear associated with vesting power in one person or one branch of government may be genuine, each branch must be given sufficient authority to carry out its designated functions. The broad framework within which this authority operates in the Hawaii judiciary has been constructed in such a manner as to curtail its excessive or arbitrary use.[230]

C. *The Rulemaking Power*

The rulemaking power is an important element in maintaining the independence of the judiciary[231] and it is in this area that the greatest potential exists for conflict between the judicial and legislative branches of government.[232] The crucial issues in the controversy over rulemaking are

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and therefore appropriately within the Hawaii State Department of Social Services and Housing. Notwithstanding the merits of that view, it may be seriously contended that the presentence investigation division of the probation department, as presently constituted, performs a peculiarly judicial function and that its transfer to the administrative branch would raise constitutional questions either under the separation of powers doctrine or with regard to the sentencing rights of defendants. The latter issue is beyond the scope of this article.

[228] *See* notes 365-71 *infra* and accompanying text. However, use of the legislature's control over the judicial budget to influence administrative or judicial decisions is clearly improper under the separation of powers theory. C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 158 (1975) [hereinafter cited as BAAR].

[229] *See* text accompanying note 385 *infra*.

[230] *See* text accompanying notes 19-24, 151 *supra* on the separation of powers theory and doctrine of checks and balances.

[231] The rulemaking power gives the judiciary the ability to promulgate rules and regulations for operation of the courts. These rules usually fall into two categories: administrative rules for internal operations and rules for practice and procedure before the courts. C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 3 (1978) [hereinafter cited as GRAU]. As Grau notes, rules do not fall neatly into these two categories since an administrative rule can have procedural effects.

[232] The most notable controversy occurred as a result of the New Jersey Supreme Court's decision in Winberry v. Salisberry, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950). The New Jersey court construed the phrase "subject to law", which appeared in the state constitution as a limitation on the court's rulemaking power, and upheld a court rule requiring appeals to be filed within a certain time limit even though that conflicted with a statutory provision. The court interpreted the constitutional language as a reference to substantive law and concluded that the rulemaking power of the supreme court with regard to pleading was not subject to overriding legislation. *See* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisberry, 65 HARV. L. REV. 234 (1951); Pound, *Rules of Court, supra* note 154. *See also* Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. L. REV. 16 (1978) [hereinafter cited as Giannelli]; Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975) [hereinafter cited as

the source and extent of the power and its proper allocation between the judiciary and legislature.

Early advocates of judicial rulemaking argued that the authority resides in the judiciary, not the legislature.[233] Dean John H. Wigmore, in a famous editorial, went so far as to declare that all legislative rules for judicial procedure are constitutionally void.[234] These proponents of judicial rulemaking based their arguments on historical precedent[235] and policy considerations.[236] Roscoe Pound asserted that the common law courts of England had exercised inherent powers to prescribe procedural rules and that the King's Court at Westminster had exerted rulemaking power for centuries before the early American States drafted their constitutions.[237] Pound concluded that "if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function."[238]

Pound and Wigmore also advanced persuasive policy arguments.[239] They observed that courts, not legislatures, are familiar with procedural problems and have the expertise to devise solutions; legislatures are intolerably slow to act and are isolated from the judicial process; legislatures are subject to outside pressures which may not result in the best procedural reforms; legislatures often amend rules on a piecemeal basis, and such amendments are sometimes inconsistent or defective; and courts, not legislatures, are held responsible by the public for the efficient administration of justice.[240]

Although Wigmore contended that the judiciary had inherent rulemaking power,[241] in most jurisdictions the legislature exercised ultimate control over the entire procedural area. Thus, the reform movement initially focused on legislation authorizing state supreme courts to prescribe rules of practice and procedure. The next step was to encourage constitutional grants of rulemaking power to the judiciary whenever the opportunity arose.

Today, the predominant source of judicial rulemaking authority is constitutional.[242] In thirteen states,[243] however, the function is delegated to

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Kay]; text accompanying notes 281-329 *infra*.

[233] Wigmore, *supra* note 154; Pound, *Rules of Court*, *supra* note 154.

[234] Wigmore, *supra* note 154.

[235] Pound, *Rule-Making*, *supra* note 154, at 601.

[236] Wigmore, *supra* note 154, at 278.

[237] Pound, *Rule-Making*, *supra* note 154, at 601.

[238] *Id.*

[239] *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 4 (1958) [hereinafter cited as Levin & Amsterdam]; Kay, *supra* note 232, at 27-28.

[240] Pound, *Rules of Court*, *supra* note 154, at 44-45; Pound, *Rule-Making*, *supra* note 154, at 602; Wigmore, *supra* note 154, at 278-79.

[241] Wigmore, *supra* note 154.

[242] GRAU, *supra* note 231, at 18.

[243] *Id.* These states are Arkansas, Delaware, Idaho, Indiana, Iowa, Kansas, Massachusetts,

the courts solely by statute. This is also the case in the federal system. The United States Supreme Court has no constitutional authority to prescribe rules; ultimate rulemaking authority resides in Congress.[244] In a series of enabling statutes,[245] Congress has delegated the authority to prescribe rules of "practice and procedure" to the Supreme Court.[246] A third source of rulemaking power is the "inherent power" of a court to perform those actions which are indispensible to the exercise of judicial power.[247]

There is great variation among the states in the allocation of the rulemaking power between the judiciary and legislature. In some states, court rules are effective unless disapproved by the legislature;[248] in other jurisdictions, court rules do not become effective unless approved by the legislature;[249] in ten states, court rules may be repealed by the legislature;[250] and in thirteen more, the legislature may amend court rules.[251] In all of these approaches, judicial expertise is utilized in prescribing rules, but the legislature retains ultimate control over practice and procedure in

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Mississippi, New Mexico, Oklahoma, Rhode Island, Tennessee, and Wyoming.

[244] *See, e.g.*, Sibbach v. Wilson, 312 U.S. 1 (1941); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 1001-1008 (1969) (history of procedure in the federal courts).

[245] *See* 18 U.S.C. § 3771 (1976) (criminal); 28 U.S.C. § 2072 (1976) (civil and admiralty); 28 U.S.C.A. § 2075 (1959 & Supp. 1979) (bankruptcy).

[246] *See, e.g.*, 28 U.S.C.A. § 2075 (1959 & Supp. 1979) which states:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the bankruptcy laws].
>
> Such rules shall not abridge, enlarge, or modify any substantive right.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice . . . .

[247] *See, e.g.*, State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974), *discussed in* Kay, *supra* note 232; Goldberg v. Judges of the Eighth Dist. Ct., _ Nev. _, 572 P.2d 521 (1977); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978), *discussed in* 1977 B.Y.U. L. REV. 493.

Although statutory provisions give the Hawaii Supreme Court authority to act with regard to matters relating to the practice of law, HAWAII REV. STAT. ch. 605 (1976 & Supp. 1979), the supreme court has recognized the inherent power concept in a number of areas. *See, e.g.*, Reliable Collection Agency, Ltd. v. Cole, 59 Hawaii 503, 584 P.2d 107 (1978) (unauthorized practice of law); *In re* Ellis, 55 Hawaii 458, 522 P.2d 460, *cert. denied*, 419 U.S. 1109 (1974) (unauthorized practice); *In re* Bar Ass'n of Hawaii, 55 Hawaii 121, 516 P.2d 1267 (1973) (professional corporations); *In re* Ellis, 53 Hawaii 23, 487 P.2d 286 (1971), *cert. denied*, 405 U.S. 1075 (1972) (unauthorized practice); *In re* Integration of the Bar, 50 Hawaii 107, 432 P.2d 887 (1967) (matters affecting practice of law and the bar); *In re* Trask, 46 Hawaii 404, 380 P.2d 751 (1963) (attorney discipline); *In re* Bouslog-Sawyer, 41 Hawaii 403 (1956) (discipline). *See also* notes 255, 333-35 *infra* and accompanying text.

[248] *See, e.g.*, MONT. CONST. art. VII, § 2(3); OHIO CONST. art. IV, § 5(b), *discussed in* Giannelli, *supra* note 232. *See generally* GRAU, *supra* note 231, at 18-21.

[249] Specifically, these jurisdictions are Georgia and Tennessee. GRAU, *supra* note 231, at 18-19.

[250]. These states are Florida, Maryland, Minnesota, Missouri, New York, North Carolina, Oregon, Texas, Vermont, Wisconsin. *Id.*

[251] These states are Alabama, Alaska, Indiana, Iowa, Maryland, Minnesota, Missouri, New York, North Carolina, Oregon, South Dakota, Vermont, Wisconsin. *Id.*

the courts.

In every state, the legislature has the concurrent power to enact statutes dealing with court procedure and thus may act in areas untouched by court rule.[252] However, in half of the states, procedural rules adopted by the court supersede conflicting statutes, giving the judicial branch final authority over procedure.[253]

In Hawaii, the supreme court's rulemaking power is derived primarily from the constitution,[254] although an inherent power to make procedural rules was recognized even before the constitutional grant.[255] Prior to statehood, the supreme court also had statutory power[256] to prescribe general rules of practice in criminal[257] and civil courts,[258] and these rules had the force and effect of law, superseding any conflicting statute.[259]

The language of the 1959 constitution, which survives unchanged, granted the supreme court extensive rulemaking authority by providing: "The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures and appeals, which shall have the force and effect of law."[260] Although the constitutional history is not explicit, it appears that the legislature may regulate procedure by statutes which are effective unless in conflict with a court rule.[261]

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[252] *Id.*

[253] *Id.*

[254] HAWAII CONST. art. VI, § 7.

[255] Cardozo v. Sociedade Portugueza de Santo Antonio Beneficente de Hawaii, 19 Hawaii 319 (1909). *See also* note 247 *supra*.

[256] REV. LAWS HAWAII ch. 214 (1955) (current version at HAWAII REV. STAT. ch. 602 (1976 & Supp. 1979)).

[257] REV. LAWS HAWAII § 214-18 (1955) (corresponded with HAWAII REV. STAT. § 602-31 (1968) (repealed 1972)).

[258] REV. LAWS HAWAII § 214-14 (1955) (current version at HAWAII REV. STAT. § 602-11 (Supp. 1979)).

[259] REV. LAWS HAWAII §§ 214-17, -21 (1955) (corresponded with HAWAII REV. STAT. §§ 602-24, -34 (1968) (repealed 1972)).

[260] HAWAII CONST. art. V, § 6 (1959, renumbered art. VI, § 7, 1978).

[261] *See* 67-6 OP. HAWAII ATT'Y GEN (1967) in which it is concluded that the legislature has concurrent power with the supreme court in the realm of procedure. But several Hawaii cases have indicated that rules of court take precedence over conflicting statutes. Asato v. Furtado, 52 Hawaii 284, 294 n.6, 474 P.2d 288, 295 (1970); Kudlich v. Ciciarelli, 48 Hawaii 290, 300, 401 P.2d 449, 455 (1965); State v. Hawaiian Dredging Co., 48 Hawaii 152, 159, 397 P.2d 593, 599 (1964). These cases were decided under HAWAII REV. STAT. § 602-24, -34 (1968) (repealed 1972), which provided that civil and criminal rules of practice and procedure had the force and effect of law and superseded any conflicting statutes. None of these cases, however, cites the statutory provisions as authority for concluding that a court rule takes precedence over a conflicting statute. They seem to rely, rather, on the constitutional grant of rulemaking power to the court. This principle that a court rule takes precedence over a conflicting statute follows from the constitutional provision since rulemaking power with regard to practice and procedure is explicitly lodged in the supreme court, while such power is not granted to the legislature. Judicial supremacy in the regulation of practice and procedure also can be upheld on an inherent powers theory. *See* note 247 *supra* and accom-

Even after the adoption of the 1959 constitution, the statutory grant of rulemaking power enacted during the territorial period remained on our law books. In 1970, a committee on coordination of rules and statutes was formed[262] to prepare revisions to the statutes and rules relating to civil procedure[263] in order to eliminate inconsistencies and transfer procedural matters to the rules. The committee's deliberations resulted in legislation[264] deleting the old provisions granting the court rulemaking power[265] and adopting the constitutional language with the proviso that court rules could not "abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations."[266] This statute remains in effect today.

1. Administrative Rules.—In many jurisdictions, administrative rules have been promulgated for the internal operations of the courts.[267] These rules cover such matters as establishing the position and defining the duties of the administrative director of the courts,[268] setting out the duties of chief judges,[269] and providing for assignment of judges.[270]

No constitutional or statutory provision expressly authorizes the Hawaii Supreme Court to prescribe rules for the administration of the

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panying text.

[262] The committee was appointed and functioned pursuant to appropriations made for the office of administrative director of the courts. Act 68, 1971 Hawaii Sess. Laws 64; Act 175, 1970 Hawaii Sess. Laws 326; Act 154, 1969 Hawaii Sess. Laws 210.

[263] The committee's work related solely to civil procedure. However, in working on the statutes dealing with the court's rulemaking power, the committee found the provisions relating to rulemaking in criminal courts unnecessary and recommended their deletion. I REPORT OF COMMITTEE ON COORDINATION OF RULES AND STATUTES § 602-21 (1971) [hereinafter cited as REPORT COORDINATING COMMITTEE].

[264] The committee submitted a report covering all volumes of the Hawaii Revised Statutes showing deletions and insertions with notes explaining the changes as well as draft bills to enact the revisions. These materials were reviewed by joint interim committee. H. SPEC. COMM. REP. No. 9, 6th Hawaii Leg., 1st Sess., *reprinted in* HOUSE JOURNAL 1115 (1972); S. SPEC. COMM. REP. No. 7, 6th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 697 (1972). At the 1972 session, 17 bills based on the committee's work were enacted, followed by 12 more in 1973.

[265] *See* notes 256-59 *supra* and accompanying text.

[266] HAWAII REV. STAT. § 602-21 (1976) (renumbered § 602-11, 1979) provides:

> **Rules.** The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.
>
> Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

[267] Alaska, Michigan, New Jersey, Ohio, Pennsylvania, and Wisconsin make extensive use of administrative rules. GRAU, *supra* note 231, at 31.

[268] *See, e.g.*, ALASKA R. CT., AD. R. 1; WIS. R. PRAC. & P., JUD. AD. R. 1-7, 10, 13.

[269] *E.g.*, N.J. R. GENERAL APP. 1.33-4; WIS. R. PRAC. & P., JUD. AD. R. 19-21.

[270] *E.g.*, ALASKA R. CT., AD. R. 33; PA. R. CT., JUD. AD. R. 701; WIS. R. PRAC. & P., JUD. AD. R. 23-24.

courts.[271] Such a statutory provision did exist prior to 1972[272] but was deleted as part of the effort to coordinate statutes and court rules.[273] The coordination committee believed that the enactment was unnecessary due to the court's extensive rulemaking power,[274] and the constitutional history of the rulemaking provision confirms that belief.[275]

In practice, the supreme court has rarely exercised its rulemaking power in the administrative area.[276] This is due primarily to the administrative role given to the chief justice by the constitution.[277] Since the chief justice also has extensive authority to assign judicial personnel,[278] and because the administrative director has assumed a major role in management of nonjudicial personnel,[279] the court has found it unnecessary to promulgate standards in many of the areas that could be the subject of administrative rules. This does not diminish the unquestionable authority of the court to establish such rules.[280]

2. *Rules of Practice and Procedure.*—In other jurisdictions the rulemaking controversy may revolve around the source and allocation of the rulemaking power.[281] In Hawaii, the source of judicial rulemaking authority is the constitution, and its language is explicit. Hawaii Supreme Court decisions consistently have held that where a statute and rule conflict in matters of procedure, the rule takes precedence.[282]

Court rules, under a statutory limitation, may not alter the substantive rights of a litigant.[283] However, this limitation also may be implied from the constitutional grant since it relates solely to "process, practice, procedure and appeals."[284] Thus, the major issue which must be resolved in any use of the rulemaking power in Hawaii is whether a particular matter

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[271] *Cf.* HAWAII REV. STAT. § 601-2(b) (1976 & Supp. 1979) (identifies the administrative powers of the chief justice, "subject to such rules as may be adopted by the supreme court").

[272] *Id.* § 602-16 (1968) (repealed 1972).

[273] *See* text accompanying notes 262-64 *supra.*

[274] REPORT COORDINATING COMMITTEE, *supra* note 263, at § 602-16.

[275] The judiciary committee report comments on the rulemaking provision:

> [This section] deposits full rule-making power in the supreme court. Under this section, the court may by the promulgation of rules of court abolish archaic procedures relating to practice, procedure, process, appeals *and general administration of the business of the courts.* It has flexibility in that amendments to rules can be made from time to time by the court without resort to the slower legislative process.

STAND. COMM. REP. No. 37, Hawaii Const. Conv., *reprinted in* I PROCEEDING OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 175 (1961) (emphasis added).

[276] *But see* R. HAWAII SUP. CT. 1(b), 1(c), 1(d), 12.

[277] *See* text accompanying notes 205-07 *supra.*

[278] *See* notes 214-21 *supra* and accompanying text.

[279] *See* notes 211, 225-26 *supra* and accompanying text.

[280] *See* sources cited in notes 274-75 *supra.*

[281] *See* text accompanying notes 248-51 *supra*; authorities cited in note 232 *supra.*

[282] *See* cases cited in note 261 *supra.*

[283] *See* note 266 *supra* and accompanying text.

[284] *See* note 260 *supra.*

is procedural and therefore subject to judicial control or whether it is substantive and therefore subject to legislative control.

As numerous scholars have pointed out,[285] there is no clear line between substance and procedure. Substantive rules are said to be those "which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals" while procedural rules "merely . . . prescribe machinery and methods to be employed in enforcing these positive provisions."[286] In an attempt to abandon the substance-procedure dichotomy, one authority has defined the legislature's domain as the enactment of laws that are "declarations of public policy" and the judiciary's realm as the promulgation of rules that "promote the prompt, inexpensive administration of justice."[287] Another authority focuses on whether a particular rule involves "something more than the orderly dispatch of judicial business."[288] If it does, the matter is within the purview of the legislature. A more recent formulation differentiates between rules that only regulate the manner in which judicial decisions are made and those which "go further and affect people's conduct outside the litigation context."[289] These different analyses highlight the difficulty, perhaps the futility, in trying to draw a neat line between substance and procedure. The problem is aggravated because the meaning of these two terms may shift according to the context in which they are used.[290]

The procedure versus substance enigma is nowhere better illustrated than in the area of evidence rules and the manner in which such rules are adopted. Many authorities have concluded that, although the rules of evidence are primarily procedural, some rules do affect substantive rights.[291] There does not seem to be a clear consensus on the issue among the jurisdictions that have adopted rules of evidence. In some jurisdictions, the legislature has enacted rules of evidence;[292] in others, the courts, pursu-

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[285] Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482 (1940); Levin & Amsterdam, *supra* note 239, at 14-15; Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601, 604 (1940) [hereinafter cited as Riedl].

[286] Riedl, *supra* note 285, at 605 n.31 (quoting W.F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRTION 8 (19_)).

[287] *Id.*

[288] Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 629-30 (1957).

[289] Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 194-95 (1979) [hereinafter cited as Martin].

[290] Giannelli, note 232 *supra* at 34-35; Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467 (1957) [hereinafter cited as Morgan].

[291] *See, e.g.*, Giannelli, *supra* note 232, at 46-55; Levin & Amsterdam, *supra* note 239, at 20-24; Martin, *supra* note 289, at 183-200; Riedl, *supra* note 285. *But see* Grinell, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 24 JUD. 41, 49 (1940); Morgan, *supra* note 290, at 467.

[292] *See, e.g.*, CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1979); FLA. STAT. ANN. chs.

ant to statutory grants of procedural rulemaking power, have established evidence rules.[293] In four states whose constitutions contain rulemaking provisions similar to Hawaii's, the courts have adopted such rules.[294]

In 1972, the United States Supreme Court prescribed the Federal Rules of Evidence and transmitted them to Congress. The Supreme Court obviously believed that the rules were procedural,[295] since the Court's rulemaking power extends only to "practice and procedure".[296] Under the enabling acts, Congress had ninety days in which to disapprove the rules; however, before the ninety days tolled, Congress enacted legislation deferring the effective date of the rules.[297] Subsequently, Congress revised the Court's proposed rules, particularly those relating to privilege, and codified them.[298]

The legislative history of the federal rules[299] indicates that Members of the House of Representatives believed that rules of evidence were substantive in nature and not within the scope of the enabling acts authorizing the Supreme Court to adopt procedural rules.[300] However, the act codifying rules of evidence also gave the Supreme Court amendatory power.[301] Court amendments become effective absent congressional intervention, except that rules of privilege require affirmative congressional approval. This would suggest that Congress viewed rules of evidence (other than privileges) as procedural, rather than substantive.

The evidence rules controversy has not been limited to the federal level. In Ohio, the debate has produced a constitutional crisis with the Ohio Supreme Court twice promulgating and the Ohio General Assembly twice disapproving the proposed Ohio Rules of Evidence.[302] In *Ammer-*

90, 92 (West 1979); KAN. STAT. §§ 60-401 to -471 (1976 & Supp. 1979); NEB. REV. STAT. ch. 27 (1975 & Supp. 1978); NEV. REV. STAT. tit. 4 (1980); OKLA. STAT. ANN. tit. 12, ch. 40 (West Supp. 1979-80).

[293] Arkansas, North Dakota, and Wisconsin statutes authorize their respective supreme courts to make rules but omit explicit reference to rules of evidence. *See* ARK. STAT. ANN. §§ 22-242, -245 (Supp. 1979); N.D. CENT. CODE §§ 27-02-08, -09 (1974); WIS. STAT. ANN. § 751.12 (West Supp. 1979). The enabling statutes of Maine, Minnesota, and Wyoming expressly mention evidence rules. ME. REV. STAT. tit. 4, § 9-A (1979); MINN. STAT. ANN. § 480.0591 (West Supp. 1980); WYO. STAT. ANN. §§ 5-2-114, -115 (1977).

[294] ARIZ. CONST. art 6, § 5; MICH. CONST. art. VI, § 5; MONT. CONST. art. VII, § 2; S.D. CONST. art. V, § 12.

[295] *See* Reporter's Note, 409 U.S. 1132 (1972). *But see id.* at 1132, 1133 (Douglas, J., dissenting).

[296] *See* notes 245-46 *supra* and accompanying text.

[297] Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

[298] The Federal Rules of Evidence were signed into law on January 2, 1975, and became effective July 1, 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. § 2071 (1976)). The rules have been amended three times.

[299] H.R. REP. No. 650, 93d Cong., 1st Sess. 2 (1973) (on H.R. 5463), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075.

[300] *Id.* at 7076.

[301] Pub. L. No. 93-595, § 2, 88 Stat. 1926 (1974) (codified at 28 U.S.C. § 2076 (1976)).

[302] *See* Giannelli, *supra* note 232.

man v. Hubbard Broadcasting, Inc.,[303] the New Mexico Supreme Court struck down a statutory news reporter privilege and held that the court had inherent and *exclusive* power to prescribe rules of practice and procedure, including rules of evidence.[304] The New Mexico tribunal based its holding on the court's constitutional power of "superintending control over all inferior courts."[305]

In New Jersey, where the pertinent constitutional provision[306] resembles Hawaii's,[307] the adoption of evidence rules represented a cooperative effort by all three branches of government in order to "avoid a constitutional confrontation on the matter and to find a practical course by which the administration of justice could be served."[308] Some rules were passed by the legislature and others were adopted by the court, but in either case they were subject to disapproval by the other branches.[309] The New Jersey Supreme Court, in a subsequent case,[310] explained the rationale for such an arrangement:

> Thus we did not pursue to a deadlock the question whether "evidence" was "procedural" and therefore . . . the sole province of the Supreme Court. Nor were we deterred by the spectre of the criticism that, if "evidence" is "substantive," it was unseemly or worse for the Court to participate in the "wholesale" promulgation of substantive law. The single question was whether it made sense thus to provide for the administration of justice, and the answer being clear, we went ahead.[311]

Hawaii's evidence rules are found both in statutes[312] and court rules,[313] but most of the relevant legal principles have been developed through case law.[314] In 1977, the state legislature filed a bill which would have

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[303] 89 N.M. 307, 551 P.2d 1354 (1976).

[304] *Id.* at 312, 551 P.2d at 1359.

[305] *Id.* at 310, 551 P.2d at 1357.

[306] The New Jersey provision reads: "The Supreme Court shall make rules governing the administration of all courts in the State and subject to law the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N.J. CONST. art. VI, § 2.

[307] *Compare id. with* HAWAII CONST. art. VI, § 7, *quoted in* text accompanying note 260 *supra*.

[308] Rybeck v. Rybeck, 141 N.J. Super. 481, 510, 358 A.2d 828, 843 (1976).

[309] N.J. STAT. ANN. § 2A:84A-1 to -46 (West 1976).

[310] Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973), upheld the validity of a rule authorizing prejudgment interest in tort actions which had been challenged on the basis that the rule was a matter of substantive law and thus beyond the court's rulemaking power. Chief Justice Weintraub, in his plurality opinion, reviewed the process by which the New Jersey Rules of Evidence were adopted.

[311] *Id.* at 368, 307 A.2d at 580.

[312] HAWAII REV. STAT. ch. 621 (1976 & Supp. 1979).

[313] *E.g.*, HAWAII R. CIV. P. 43-44; HAWAII R. PENAL P. 26-28.

[314] *See, e.g.*, Graham v. Washington Univ., 58 Hawaii 370, 569 P.2d 896 (1977) (extrinsic evidence may be considered by court in determining intent if there is controversy as to

established an evidence code based on the Federal Rules of Evidence.[315] In written testimony on the bill,[316] the administrative director of the courts recognized that evidence rules have both substantive and procedural aspects[317] and suggested that the judicial council[318] form a committee to study the federal rules and make recommendations for adoption. Subsequently, the house judiciary committee deferred consideration of the bill, and the judicial council established an evidence rules committee.[319] Following a year of intensive study, the committee submitted a final draft of the rules to the legislature[320] and supreme court in 1979. The legislature formed an interim committee to study the rules, and new draft legislation was submitted in the 1980 legislative session that is expected to pass.[321]

An issue addressed by the proposed legislation is the proper method of adopting the rules.[322] Given the supremacy of judicial rulemaking in procedural matters,[323] a cooperative effort is advisable. While the legislature could act unilaterally, rules adopted in such a manner would be subject to revision, amendment, or nullification either by the court's promulgation of new rules[324] or by case law interpreting the legislative rules.[325] This would raise the spectre of uncertainty and confusion in the law and un-

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meaning of language in a written instrument); State v. Olivera, 57 Hawaii 339, 555 P.2d 1199 (1976) (chain of custody showing not required for fingerprint records where there is direct testimony of their unchanged condition and there is no evidence indicating tampering); Apo v. Dillingham, 57 Hawaii 64, 549 P.2d 740 (1976) (declaration of deceased person is admissible to show relationships within a family of which declarant was a member and to show declarant's membership in the family); Gum v. Nakamura, 57 Hawaii 39, 549 P.2d 471 (1976) (parol evidence admissible to show intent where provision in agreement is reasonably susceptible to construction); State v. Pokini, 57 Hawaii 17, 548 P.2d 1397 (1976) (evidence of other crimes allegedly committed by defendant which are collateral to the issue at trial are ordinarily inadmissible); *In re* Pioneer Mill Co., 53 Hawaii 496, 497 P.2d 549 (1972) (a reviewing court may take judicial notice of a fact whether or not trial court did so).

[315] *See* H.B. 22, 9th Hawaii Leg., 1st Sess. (1977).

[316] Letter to Hon. Richard Garcia from Lester E. Cingcade at 2 (February 22, 1977).

[317] *Id.* at 3.

[318] *See* note 210 *infra* and accompanying text.

[319] The judiciary originally had requested a legislative appropriation to aid the committee's work. The legislature did not act on the request but the committee was established with Judge Masato Doi as its chairperson and Professor Addison Bowman of the University of Hawaii School of Law as its recorder.

[320] These rules were introduced as H.B. 1009, 10th Hawaii Leg., 1st Sess. (1979).

[321] S.B. 1827-80, S.D. 1, 10th Hawaii Leg., 2d Sess. (1980).

[322] *See* note 326 *infra*. Although the administrative director originally had suggested that the evidence rules committee address this topic, the committee's role was purely that of recommending rules to both bodies.

[323] *See* notes 282-84 *supra* and accompanying text.

[324] *See* note 261 *supra* and cases cited therein which indicate that rules of court take precedence over conflicting statutes.

[325] *See, e.g.*, State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971) (statute allowing introduction of evidence of a prior conviction upon witness' denial unconstitutional as applied to criminal defendant).

necessarily enhance the possibility of conflict between the judiciary and legislature. The proposed legislation contains a mutually agreeable adoptive method, reflecting the concerns of both branches, designed to preserve the intent of the constitution's rulemaking provision and to avoid dispute over the efficacy of legislative action.[326]

Ample precedent for this pragmatic approach is found in the work of the committee on coordination of rules and statutes[327] as well as in other joint endeavors of the judiciary and legislature toward reforming the substantive law.[328] These highly successful efforts attest to the cooperative nature of the relationship between the Hawaii judiciary and the legislature. Undoubtedly, in adopting evidence rules, Hawaii will "find a practical course by which the administration of justice will be served"[329] while giving due recognition to the proper functions of the legislature and judiciary in this complex area.

D. State Financing and Central Budgeting

If courts are to operate in an independent manner, they must be assured of adequate financial resources. Moreover, the method by which funding is obtained should minimize the possibilities for conflict between the judiciary and other branches of government.

The legislature and executive jointly control the governmental budget process. The legislature raises and appropriates public monies; the executive allocates funds, and most expenditures support activities in the executive branch. The executive also has the power to veto appropriations. The judiciary does not have a decisionmaking role in this process and is required to compete with other institutions for scarce financial resources. Ideally, however, the financing procedure should recognize that the judiciary is distinct from other public entities because it is an independent branch of government.

1. The Source of Funding.—A major issue in seeking sufficient court financing is the source of funding. In many states, trial courts are financed by local governmental units such as counties, usually with tax

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[326] As of this writing (March 1980) the relevant section of the pending legislation reads as follows: "If any other provision of law, including any rule promulgated by the supreme court, is inconsistent with this chapter, this chapter shall govern unless this chapter or such inconsistent provision of law specifically provides otherwise." S.B. 1827-80, S.D. 1, 10th Hawaii Leg., 2d Sess. § 16 (1980).

[327] *See* notes 262-64 *supra* and accompanying text.

[328] For example, the Hawaii Penal Code was drafted by a special committee of the judicial council. After revision by the legislature, it was adopted in 1972. Act 9, 1972 Hawaii Sess. Laws 59. The initial work on the Hawaii Probate Code was also undertaken by a special committee of the judicial council. It was first presented to the legislature in 1972, and a revised version was adopted in 1976. Act 200, 1976 Hawaii Sess. Laws 372.

[329] Rybeck v. Rybeck, 141 N.J. Super. 481, 510, 358 A.2d 828, 843 (1976).

revenues.[330] This practice has been characterized as "perhaps the greatest barrier to the functional independence of the judicial system."[331] Local control of judicial financing exacerbates conflicts over the allocation of limited funds.[332] For example, the refusal to fund essential court operations has precipitated lawsuits in which local governments have been required to pay for such services.[333] These lawsuits are based on the "inherent powers" doctrine.[334] Inherent powers consist of "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective."[335]

While some advocates of inherent powers lawsuits view them as powerful tools in securing adequate judicial financing,[336] the need for such liti-

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[330] For a listing of such states see BAAR, *supra* note 228, at 10, Table 1-2, Category 1.

[331] Nowak, *supra* note 17, at 149.

[332] As Nowak points out:

> Assigning financial responsibility to local government units has an inherent tendency to lead to conflict between the local financing authority and the court system. Local officials are responsible to voters within a small location and they need not have any deep concern for the theory of independent powers at the state level. In view of increasing problems of limited resources to support governmental services, members of the local population will almost surely resent allocating their tax dollars to funding the state judicial system. Local finances most commonly are raised through a tax on real property with, perhaps, some small supplementation from personal property taxes or sales taxes. Property taxes weigh heavily upon persons of moderate incomes, who find it increasingly difficult to meet expenses in an inflationary economy.

Id. at 150.

[333] *See, e.g.*, O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 287 N.E.2d 608 (1972) (under inherent powers, judge has authority to protect his court from impairment resulting from inadequate supplies and thus could purchase equipment even without specific authorization; Massachusetts Supreme Judicial Court would promulgate rule requiring judge to first obtain approval from chief justice); Judges for the Third Cir. v. County of Wayne, 383 Mich. 10, 172 N.W.2d 436 (1969), *modified on rehearing*, 386 Mich. 1, 190 N.W.2d 228 (1971) (judiciary has inherent power to determine requirements for supporting personnel and to compel county officials to provide necessary funds; burden of proof is on the court to show necessity but nonavailability of county funds is not a sufficient defense); Commonwealth v. Tate, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971) (judiciary has inherent power to determine amounts and to compel monetary payments from city of sums that are reasonable and necessary to carry out its mandated responsibilities; court bears burden of proving reasonable necessity, but judicial finding of reasonableness supersedes prior city determination that funding was not necessary); *In re* Salary of Juvenile Director, 87 Wash. 2d 232, 552 P.2d 163 (1976) (under its inherent power, court may increase salaries of court personnel, but power should only be exercised upon showing of clear, cogent, and convincing proof that salary increase is reasonably necessary). For an excellent discussion of such lawsuits, see BAAR, *supra* note 228, at 143-49. *See* Carrigan, *Inherent Powers and Finance*, 7 TRIAL 22 (Nov./Dec. 1971) [hereinafter cited as Carrigan]; Hazard, McNamara & Sentilles, *Court Finance and Unitary Budgeting*, 81 YALE L. REV. 1286 (1972) [hereinafter cited as Hazard, McNamara & Sentilles].

[334] See note 247 *supra* for cases discussing inherent powers of the courts to prescribe procedural rules.

[335] Carrigan, *supra* note 333, at 22.

[336] *See, e.g., id.*; Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L.

gation indicates a breakdown in the financing system and poses a serious threat to judicial independence.[337] The threat exists no matter how the issue is resolved. A ruling for local officials would signify the demise of co-equal status. Yet, the opposite result may be regarded by the other branches of government as so institutionally self-serving as to erode respect for court decisions.

In spite of the problems attributed to local funding of courts,[338] there does not seem to be a significant movement to abandon this method.[339] However, many authorities believe that the independent role of the judiciary is best protected through total funding by the state.[340]

Hawaii followed the common pattern of court funding to the extent that individual counties financed the district courts until 1965.[341] In that year, the State assumed responsibility for administration of these courts and integrated them into the larger judicial network.[342] Hawaii was one of the first and remains one of only five states in which the judicial system is entirely financed from state revenues.[343]

2. *The Budgetary Process.* —The source of judicial funding is closely related to the determination of who requests the money, who reviews such requests, and who ultimately decides the amounts the judiciary receives. Each of these steps in the funding process highlights the judiciary's relations with the executive and legislature. Ideally, the judiciary's position as an equal branch of government should be appreciated at every stage.

There are four traditional models of court budget preparation: External preparation, in which the budget is prepared by an executive agency based upon data obtained from the judiciary; separate submission, in which all courts or courts of different jurisdictions submit separate budgets either directly to the legislature or to an executive officer for review; central review, in which all courts submit requests to a central office or

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REV. 975 (1979); 54 JUD. 138 (1970).

[337] BAAR, *supra* note 228, at 147-49, advances the following hypotheses about the impact of inherent power law suits: (1) There may be a breakdown in the working relationship between the judiciary and other branches of government on administrative and financial matters if the court goes outside the normal political process and files suit, (2) public support for the judiciary may weaken as a result of these suits, (3) success at the local rather than state level in winning these suits may be greater, and (4) the bargaining position of the judicial branch in negotiations with officials of other branches may increase.

[338] *See* note 332 *supra*.

[339] BAAR, *supra* note 228, at 115; Baar, *The Limited Trend Toward State Court Financing*, 58 JUD. 322 (1975).

[340] *See, e.g.*, ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.50, at 97-98; BAAR, *supra* note 228, at 121; Hazard, McNamara & Sentilles, *supra* note 333, at 1293.

[341] *See, e.g.*, REV. LAWS HAWAII § 220-2 (1955) (current version at HAWAII REV. STAT. § 608-2 (1976)).

[342] Act 97, 1965 Hawaii Sess. Laws 116.

[343] Alabama, Connecticut, South Dakota, and West Virginia are other states which provide total state financing. BAAR, *supra* note 228, at 5-7.

the state's high court for review and unified presentation to the executive or legislative branches; and central preparation, in which a state court administrator develops a single budget that is presented to the executive or legislature.[344] Hawaii has utilized various models.

During the territorial period, our courts submitted separate budgets to the legislature.[345] After 1959, and as a result of the Chandler report,[346] the administrative director's office prepared one budget for all state-funded courts. The document did not include the county-funded district courts until their integration into the state system in 1965.[347]

Since then, Hawaii has followed the central preparation model. Central budget preparation combined with statewide funding is often described as a unitary budget system.[348] Such a system is, in effect, a complement to central administration of the state's courts. "It locates in one central authority the ultimate responsibility for planning, channeling, and auditing all judicial expenditures within a state."[349] It also promotes planning within the judicial system and allows a more equitable distribution of judicial services.

Although Hawaii was a leader among the states in adopting a unitary budget system, until recently the judiciary submitted its request to the State Department of Budget and Finance, which actively reviewed and deleted items before sending the proposal to the legislature as part of the executive budget.[350] Judiciary spokesmen could then go to the legislature to justify restoration of any items cut by the executive. In 1974, legislation passed authorizing the judiciary to submit its budget directly to the legislature and in 1978 that procedure was constitutionally mandated.[351] Consequently, Hawaii is one of the few states to fully recognize and respond to the problem involved with executive review of the judicial budget.[352] Such review threatens the independence of the judiciary and

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[344] *Id.* at 11-12. *See also* Berkson, *supra* note 160, at 380-81.

[345] *See* text accompanying note 115 *supra*.

[346] *See* note 121 *supra* and accompanying text.

[347] *See* notes 341-42 *supra* and accompanying text.

[348] BAAR, *supra* note 228, at 15.

[349] Hazard, McNamara & Sentilles, *supra* note 333, at 1293-94.

[350] *See, e.g.*, HAWAII REV. STAT. §§ 37-62, 40-1, 601-1 to -3 (1968) (amended 1974).

[351] HAWAII CONST. art. VII, § 8; Act 159, 1974 Hawaii Sess. Laws 298 (codified at HAWAII REV. STAT. § 601-2(c) (1976)). 1974 was a significant year for court reform legislation. *See* text accompanying note 225 *supra* & notes 360-61 *infra*.

[352] The findings section of the 1974 reform legislation declared:

> The legislature finds that, although the Constitution incorporates the principle of separation of powers and the principle that no one branch of government shall dominate another branch, the Hawaii Revised Statutes are not completely consistent with these constitutional principles. This is particularly the case with respect to those statutes which appear to permit the executive branch to exercise various administrative controls over the judiciary and its courts and the legislature and its agencies. Such statutes are in conflict with the constitutional status of the judicial branch and the legislative branch as separate and co-equal branches of government.

Act 159, 1974 Hawaii Sess. Laws 298. Baar called this legislation "the most far-reaching

violates the separation of powers doctrine because "it constitutes a limitation on the functioning of an independent branch of government rather than the review of budget requests of agencies properly within the executive control."[353]

Judicial independence also may be threatened after the legislature passes the judicial budget and sends it to the executive. The Governor may exercise the veto power.[354] As a general rule, a chief executive should veto a judicial budget only when appropriated funds are totally out of proportion to the judiciary's reasonable needs and when the allocation would seriously damage the state's financial position.[355]

In almost all states the Governor has an "item veto,"[356] and a few states allow a "reduction veto."[357] Use of the item veto power with regard to court budgeting could significantly restrain the functions of the judiciary.[358] By triggering the veto and override mechanism, a Governor can exercise extraordinary political control over the judicial budget.[359] A reduction veto presents similar dangers. The difficulty with both vetoes is that the judiciary must either develop an independent political and popular constituency to affect an override or submit to executive control. In

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attempt to disentangle a court system from administrative supervision of the executive branch." BAAR, *supra* note 228, at 29 n.(b).

[353] Nowak, *supra* note 17, at 146-47.

[354] Hawaii's Governor may return any disapproved bill to the legislature; if the legislature is not in session the Governor must give 10 days' notice of intention to disapprove and the legislature may reconvene to consider the veto. HAWAII CONST. art. III, § 16. *See also* Schwab v. Ariyoshi, 58 Hawaii 25, 564 P.2d 135 (1977) (item veto provision does not require the legislature to enact a separate bill on salary increases for each branch to facilitate exercise of Governor's general veto power).

[355] Nowak, *supra* note 17, at 146.

[356] BAAR, *supra* note 228, at 48, reports that as of 1970, the Governors of 43 states had item veto powers. At that time, Hawaii's Governor had the power to strike out or reduce specific items in all appropriation bills, *see* notes 360-61 *infra* and accompanying text.

[357] At least two states, Pennsylvania and West Virginia, confer this power on their respective Governors. *Id.* at 51.

[358] BAAR, *supra* note 228. On the basis of questionnaires sent to state budget officers and state court administrators, Baar concluded that the item veto is rarely used on judicial appropriations. However, he cites three instances in which the item veto has been used recently. In 1969, the Governor of Texas deleted $91,000 from the judicial budget approved by the legislature on the grounds that no justification had been provided for the money. In Connecticut, the Governor reduced appropriations for all budgeted agencies, including the judiciary, by five percent for fiscal years 1971 and 1972. In 1971, the Governor of California struck $350,741 from state judicial appropriations which were scheduled to be used for an increase in judicial salaries mandated by a statute providing automatic increases in salaries in accordance with a cost of living index. For a discussion of the background and resolution of this controversy, see *id.* at 53.

[359] Baar notes that the rare use of the item veto nevertheless illustrates that it has been used without regard for the differences between courts and executive agencies and without regard for limitations on the appropriate exercise of executive power. He concludes that "it remains the most substantial grant of legal authority that State officials possess over court budgets." *Id.* at 53-54.

the former situation, the judiciary will become involved in politics to such a great extent that judicial independence may be compromised. In the latter instance, the separation of powers doctrine is clearly violated.

Until 1974, our state constitution gave the Governor power to strike out or reduce any specific item in any appropriation bill.[360] Recognizing possible executive dominance, the legislature proposed, and the voters passed, an amendment excluding the judicial and legislative budgets from such vetoes.[361]

Executive control over allocation of appropriated funds is another sphere in which the independence of the judiciary could be threatened. The Governor could either withhold funds or try to regulate judicial spending by timing the release of appropriations.[362] This potential danger has been eliminated in Hawaii through legislation that gives the judiciary complete authority over the expenditure of funds and requires appropriated amounts to be made available to the judiciary.[363]

Although separation of powers problems in the context of financing a statewide judiciary usually arise in relation to the executive,[364] conceivably the legislature could decline to fund the judiciary to a level necessary to ensure adequate judicial services.[365] Clearly, the legislature must play a significant role in determining judicial funding. It is primarily responsible for overseeing state finances through the enactment of revenue producing measures and the appropriation of monies, and the legislature would be derelict in its duty if it did not carefully scrutinize the judiciary's budget.[366]

Securing adequate financial support for the judicial branch has not been a problem during Hawaii's statehood years.[367] Several factors contribute to the judiciary's recent success in obtaining funds. First, by ex-

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[360] HAWAII CONST. art. III, § 17 (1959, amended 1974, renumbered § 16, 1978).

[361] This was effectuated by a constitutional amendment proposed by the legislature and adopted by the voters in 1974. *See* S.B. 1943-74, 1974 Hawaii Sess. Laws 735. For a discussion of other legislative reforms significantly affecting the judiciary, see text accompanying notes 225, 351 *supra*.

[362] *See* BAAR, *supra* note 228, at 95-114.

[363] Act 159, 1974 Hawaii Sess. Laws 298 (codified at HAWAII REV. STAT. § 40-1(c) (1976)).

[364] *See* notes 358-59 *supra* and text accompanying notes 350-55 *supra*.

[365] Nowak, *supra* note 17, at 148-49, suggests that if the legislature fails to fund the judiciary at a level that allows the courts to perform their basic functions, a basis for an inherent powers lawsuit may exist. As a practical matter, however, such suits usually have been directed at county-level budget authorities. *See* Hazard, McNamara & Sentilles, *supra* note 333, at 1288.

[366] 1978 amendments to the state constitution were designed to ensure such scrutiny. *See* HAWAII CONST. art. VII, §§ 5, 6, 7, 8, 9 (budget estimates and expenditure ceiling).

[367] For instance, the judiciary budget for fiscal year 1977 was $13,629,774 or 1.68% of the state general fund; the budget for fiscal year 1978 was $14,528,579 or 1.64% of the state general fund; and for fiscal year 1979, the budget was increased to $16,756,878. *See* Act 197, 1975 Hawaii Sess. Laws 679; Act 233, 1976 Hawaii Sess. Laws 748; Act 11, 1977 Hawaii Sess. Laws 757; Act 208, 1979 Hawaii Sess. Laws 430.

empting the judicial budget from executive controls,[368] the legislature has acknowledged that the courts' requirements must be viewed as those of a coordinate branch of government rather than another agency. Second, the judiciary's centralized budgeting process[369] results in submission of a single document reflecting the needs of the entire system. Additionally, in presenting the budget, the judiciary provides extensive information[370] on its program and operational needs which increases the credibility of the budget request. Finally, the long history of cooperation between the judiciary and legislature[371] may be reflected in a greater willingness to accept the judiciary proposal as an accurate assessment of the courts' needs.

IV. INDEPENDENCE OF INDIVIDUAL JUDGES

Although the independence of the judiciary as an institution is vital to maintaining the integrity of the judicial process, we must not forget that it is judges who decide cases and make law. In making their decisions, individual judges must be subject to no other authority than the law itself.[372] Further, judges must have personal independence, which means that judicial terms of office, tenure, and compensation must be secure. The method of choosing judges also relates to judicial independence; a selection process must result not only in qualified and unbiased judges, it also must remove them from political pressure. Finally, if the need arises to discipline a judge, the separation of powers doctrine and its corollary requirement of individual judicial independence suggest that the disciplinary mechanism be lodged within the judiciary.

Each of these issues—judicial selection and tenure, compensation, and discipline—has been studied at great length in the literature discussing the judicial process.[373] It is not my intent to repeat that dialogue except

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[368] *See* text accompanying notes 351-53 *supra*. Although the chief justice submits the judiciary's budget request directly to the legislature, cooperation between the executive and judicial branches is implied by the constitutional requirement that aggregate general fund proposed budget figures for both branches not exceed the expenditure ceiling. HAWAII CONST. art. VII, § 8.

[369] *See* text accompanying notes 348-49 *supra*.

[370] The budget and fiscal office prepares the biennial multi-year program and financial plan and budget, which is a six-year projection of operational and capital improvement needs. Two other documents outline current operational and construction needs for the biennium, which is the legislative budgeting period in Hawaii. *See* HAWAII CONST. art. VII, § 8. The budget office prepares supplemental requests for the legislature's consideration in even-numbered years. The administrative director and budget and fiscal officer each testify at budgetary hearings.

[371] *See* notes 264, 328 *supra* and accompanying text.

[372] Independence of individual judges may be divided into two elements: substantive independence and personal independence. "Substantive independence means that in the making of judicial decisions and the exercise of other official duties individual judges are subject to no other authority than the law." Shetreet, *supra* note 16, at 57.

[373] *See, e.g.*, ABA—COURT ORGANIZATION, *supra* note 152, at 39-65; ABA JOINT COMM. ON

as it relates to the independence of the individual judge and recent changes in our state constitution.

A. Selection and Tenure

The quality of justice in our society relates closely to the competency, fairness, and effectiveness of our judges. Although the characteristics of a good judge are not easily measured, a judge should have sound legal training and experience, intellectual skill, personal integrity, and an ability to understand and relate to people.[374] The search for the most competent judges is essentially a search for the best method of judicial selection.

The goal of a judicial selection system is not merely to find good judges. An effective mechanism also removes judges from political pressure in order to ensure judicial independence. The process should also encourage public confidence in the judiciary; that is, the public must be assured

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PROFESSIONAL RESPONSIBILITY, STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT (Tent. Draft 1977) [hereinafter cited as ABA—JUDICIAL DISCIPLINE]; AMERICAN JUDICATURE SOCIETY, JUDICIAL RETIREMENT AND DISABILITY COMMISSIONS PROCEDURES (G. Winters & R. Lowe eds. 1969); A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS (1974); W. BRAITHWAITE, WHO JUDGES THE JUDGES? (1971) [hereinafter cited as BRAITHWAITE]; R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND BAR (1969); Cannon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & SOC'Y REV. 579 (1972); Frankel, *Who Judges the Judges*, 11 TRIAL 55 (Jan./Feb. 1975); McConnell, *Judicial Salaries and Retirement Plans 1972*, 56 JUD. 140 (1972); Comment, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1977); Note, *Judicial Discipline in California: A Critical Re-evaluation*, 10 LOY. L.A.L. REV. 192 (1976); Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976); Comment, *Judicial Discipine, Removal and Retirement*, 1976 WIS. L. REV. 563; 54 JUD. 182 (1970).

[374] Arthur Vanderbilt, in a series of lectures at Boston University, made these comments about the attributes of a good judge:

> The requirement of integrity of character is primary; in order for judges to be independent and impartial they must be courageous and able to withstand external influences whether in the form of bribes, pressure of friend or family, antipathies of class or religion. The importance of the ethics of a judge cannot be overemphasized. Judges require that true humility of character that is found in an awareness of one's own limitations and deficiencies and finds expression in a willingness to hear the other side of the question. Wisdom, that deepening of the intellect which is more than mere intelligence, including comprehension of the effects of their decisions, is fundamental if a judge is to be able to resolve all the ramifications of the various kinds of litigation coming before him. Knowledge in the fullest sense of learning and education, legal and general, and professional experience, are the handmaidens of such wisdom. Social relations embrace personal conduct, the maturity which comes with experience of people, the ability to get along with other men, to understand their actions and to decide in accordance with such understanding, and to evoke the respect of other men by attitudes of courtesy and cooperation. A judge does not function in the isolation of an ivory tower; he must deal with the disputes of actual people and he must know and understand them.

II SELECTED WRITINGS OF ARTHUR T. VANDERBILT 113-14 (F. Klein & J.S. Lee eds. 1967).

that its judges are competent and that their decisions are made on an impartial basis.

From its early days, Hawaii has had an appointive judiciary. The Constitutions of 1852, 1864, 1887, and the Constitution of the Republic all provided for an appointive judiciary.[375] When Hawaii became a territory, judges of the supreme court and circuit courts were appointed by the President and confirmed by the Senate.[376] After statehood, and until recently, supreme court justices and circuit court judges were appointed by the Governor with the advice and consent of the senate.[377] District court judges, by statute, were appointed by the chief justice.[378]

The method of selecting judges was a controversial issue at the 1950 and 1968 constitutional conventions.[379] At both conventions, the judiciary committee divided on whether to retain the appointive system or adopt a selection commission plan in which a nonpartisan nominating committee would review candidates and arrive at a list of names from which the appointing authority would be required to choose.[380] At the 1978 constitutional convention, a selection commission plan was proposed again, and a rather unusual blend of both the commission plan and our traditional appointive system finally was adopted and subsequently ratified.

The convention's judiciary committee was concerned primarily with the potential for political influence and abuse under the appointive system.[381] The committee recognized that such influence could not be eliminated completely but determined that a nonpartisan commission would minimize the risk because a greater number of people, including attorneys and lay persons, would be involved. From this, the committee inferred that judicial nominees would be chosen on the basis of qualifications rather than political affiliation or personal friendship.[382]

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[375] HAWAII CONST. or 1887, art. 71, *reprinted in* Thurston, *supra* note 36, at 192; notes 60, 75, 84 *supra* and accompanying text.

[376] *See* note 103 *supra* and accompanying text.

[377] *See* notes 131-32 *supra* and accompanying text.

[378] *See* note 132 *supra*.

[379] *See* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 343-69 (1972); note 131 *supra* and accompanying text.

[380] *See* MIN. REP. No. 2, 2d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 333-36 (1973); STAND. COMM. REP. No. 37, Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 175 (1961).

[381] STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 7-8, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19 _).

[382] The committee listed the following reasons in support of a commission system:

1. It removes the selection of judges from the political consideration of one person and places it in the hands of a nonpartisan board of citizens;

2. The choice of nominees is made without consideration or influence of partisan politics;

3. It forms an independent panel of commissioners whose sole and exclusive function is to seek out, encourage and screen all candidates for judicial appointment;

4. It includes both lawyer and laypersons' views in the selection of judges; and

The constitution now provides that vacancies in the supreme court, intermediate appellate court, and circuit court are to be filled by gubernatorial appointment from a list of not less than six nominees submitted by the judicial selection commission.[383] Senate confirmation is still required.[384] In the district court and district family court, appointments are to be made by the chief justice, again from a list submitted by the judicial selection commission, but senate confirmation is not required.[385]

Until passage of the constitutional amendment, Hawaii's judges had to seek reappointment by their respective appointing authorities. The amendment places the power of retention with the newly created judicial selection commission.[386] Six months prior to the end of a judge's term, the judge must indicate whether reappointment is desired. If it is, the commission reviews past performance to decide whether the judge should be retained for another term.[387] A judge determined by the commission to be qualified will remain on the bench without going through the entire appointment process.[388] The convention history indicates that the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action.[389]

Selection and retention procedures affect the length of time a judge will serve on the bench. Thus, the process is intimately tied to tenure. Provisions relating to tenure should be guided by two principles: they should be adequate enough to attract highly qualified persons to the bench and to retain them in judicial service, and they should be designed to ensure judicial independence.

With the exception of the territorial period,[390] Hawaii's judges have generally served for long judicial terms.[391] For example, supreme court justices, intermediate appellate judges, and circuit judges presently serve for ten years,[392] while district court judges serve for six years.[393] Hence, Hawaii's judges serve for longer periods than the Governor or legislators, and longer judicial tenure is seen as a safeguard to individual independence.

Lengthy terms are desirable for several reasons. First, the longer the

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5. It permits many more qualified candidates who might otherwise be overlooked by one person to be considered.

Id. at 8.

[383] HAWAII CONST. art. VI, § 3, para. 1-3.

[384] *Id.* para. 1.

[385] *Id.* para. 3.

[386] *Id.* para. 6.

[387] *Id.*

[388] *Id.*

[389] STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 14, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19 _).

[390] *See* notes 104-05 *supra* and accompanying text.

[391] *See, e.g.*, notes 61, 85 *supra* and accompanying text.

[392] HAWAII CONST. art. VI, § 3, para. 6.

[393] HAWAII REV. STAT. § 604-2 (Supp. 1979).

term, the more likely it will be that a qualified candidate will accept a judgeship. Attorneys in private practice—even those in government service—are reluctant to give up lucrative, permanent positions unless they are assured of a long-term commitment. Second, substantial tenure serves to insulate the judiciary from control by the executive, legislature, or outside political forces. A judge who must be reelected or reappointed after a short term may find it difficult to make impartial decisions on controversial cases. In addition to "job security and independence from the appointing authority," the 1978 constitutional convention's judiciary committee suggested that longer terms "would allow a new judge enough time to learn and mature into his[or her] role as an arbiter of the law."[394]

Compulsory retirement is another aspect of tenure addressed by the constitution. Hawaii, like many states, requires a judge to relinquish his position upon reaching the age of seventy.[395] The American Bar Association endorses mandatory retirement because it "makes possible the orderly termination of service of people who, on the average, have reached an age when their physical and mental powers do not permit them to carry a full workload."[396] To a limited extent, our constitution and statutes allow the chief justice to recall retired judges to active service.[397]

B. Judicial Compensation

Judicial salaries should be sufficient to attract competent and qualified individuals to the bench. This is especially true since judges are prohibited by our constitution from practicing law[398] and are required by ethics canons to forego any form of financial activity that would lead to even an appearance of conflict or inability to decide a case in a fair and impartial manner.[399]

In any discussion of judicial salaries, the central concern must be how to assure adequate compensation and at the same time insulate judicial salaries from political control. However, it should be recognized that the legislature, as the body responsible for overseeing the state's finances, must play a major role in setting judicial salaries.

Hawaii's early constitutions contained provisions safeguarding judicial salaries against encroachment by the other branches of government. The

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[394] STAND. COMM. REP. No. 52, 3d Hawaii Const. Conv. 14, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19 _). Another reason for longer judicial terms in Hawaii is to provide for adequate accrual toward retirement pensions after one term on the bench, especially for those judges with no prior government service. *See* STAND. COMM. REP. No. 40, 2d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 196, 200 (1973).

[395] HAWAII CONST. art. VI, § 3, para. 7.

[396] ABA—COURT ORGANIZATION, *supra* note 152, at 64.

[397] *See* note 221 *supra* and accompanying text.

[398] HAWAII CONST. art. VI, § 3, para. 5.

[399] R. HAWAII SUP. CT. 19, Exhibit B, Code of Judicial Conduct, Canons 5C, 5F.

Constitution of 1852 provided that the compensation of Justices of the Supreme Court could not be reduced during their terms of office, and the Constitution of the Republic contained a similar provision.[400] The first state constitution prohibited the reduction of supreme court justices' and circuit court judges' salaries unless the decrease applied to all salaried officers of the State.[401] The 1968 constitution not only continued this prohibition but also set a minimum amount below which judicial salaries could not fall.[402]

The 1978 amendment to the constitution retained the old prohibition against reduction of judicial salaries and extended its applicability to all full-time state judges.[403] The minimum salary figure was replaced by a general mechanism for periodic salary review by a commission, although the commission's recommendations are not binding upon the legislature.[404]

C. *Judicial Discipline, Removal, and Retirement*

The process used for disciplining, removing, or retiring a judge is a most important element in promoting the independence and impartiality of the judiciary. While judicial independence is of prime importance, judges also must be accountable for improper conduct. Society looks to the judiciary and the individuals administering justice to settle disputes and define and enforce laws in an impartial and rational manner. Honesty and integrity are expected in all actions of a judge, whether in fulfilling duties on the bench or in private life. When a judge's conduct fails to meet these standards, society's confidence in the decisions of the courts and in the judicial system as a whole is undermined.

Additionally, a disciplinary and retirement mechanism must assure a judge of freedom in the decisionmaking process. A judge must be able to

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[400] *See* notes 63, 86 *supra*.

[401] *See* note 135 *supra*.

[402] HAWAII CONST. art. V, § 3, para. 3 (1968, amended and renumbered art. VI, § 3, para. 7, 1978) (minimum annual salary for chief justice, associate justices, and circuit judges $28,000, $27,000, and $25,000, respectively).

[403] *Id.* art. VI, § 3, para. 7.

[404] *Id. See also* ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.23, at 58. The commentary to the standard notes:

> The task of periodically reviewing judicial compensation levels should be performed in a systematic way by people who have qualifications to do so. Review of judicial compensation by the legislature alone involves the risk of indifference, and frequently involves also the complication of relating increases in judicial salaries to increases in the legislators' own compensation. Review of judicial compensation by the judiciary itself is self-serving and entails unseemly advocacy of personal interest. A more satisfactory method of performing the task is the creation of an independent agency having this specific responsibility. The suggested agency is similar to ones that have been constituted to review and recommend salary structures in the executive branch of government.

Id. at 63.

interpret the law independently and honestly and know that disciplinary measures will not be imposed for writing an unpopular opinion or because an attorney disagrees with a ruling.

In the past, the sole disciplinary mechanism in most jurisdictions[405] involved legislative removal of an incompetent or dishonest judge.[406] These sanctions were reserved only for the most severe forms of judicial misconduct or disability and have been criticized as cumbersome and inefficient.[407] During the last twenty years, in recognition of the general ineffectiveness of traditional mechanisms, forty-eight states and the District of Columbia have adopted new procedures for disciplining and removing judges.[408] At least thirty-eight states have established judicial discipline commissions[409] modeled after the California commission on judicial performance.[410]

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[405] As of 1971, 46 state constitutions as well as the Federal Constitution contained impeachment provisions, 28 states had address procedures, and a few others had resolution provisions. BRAITHWAITE, *supra* note 373, at 12. See note 406 *infra* for a description of these legislative mechanisms. In addition, Braithwaite identifies seven states with recall procedures. *Id.* Recall is analogous to initiative and referendum; if a certain percentage of the voters sign a petition to recall a judge, a special election is held to determine whether the judge should be retained.

[406] The traditional legislative mechanisms are impeachment, address, and resolution. In a typical impeachment proceeding, the lower house of a bicameral legislature acts as a grand jury, drafting charges against the official to be removed, and the upper house acts as the judge and jury. Address is a formal request from the legislature to the governor seeking the removal of a judge. Resolution, very much like address, requires a resolution and vote by two-thirds of the legislature for the removal of a judge to be effected.

[407] Comment, *The Procedures of Judicial Discipline*, *supra* note 373, at 196-97; Comment, *Toward a Disciplined Approach to Judicial Discipline*, 73 Nw. U.L. REV. 503, at 508-10 (1978). For instance, by 1960 California's three methods were so cumbersome that the State had rarely used them; it impeached only two judges (in 1862 and 1929), used recall only once (in 1929), and introduced only one concurrent resolution to remove a judge (in 1936). BRAITHWAITE, *supra* note 393, at 81-83. Note, *supra* note 373, at 193-99.

> Evidence on the effectiveness and extent of use of the traditional procedures is scant. In 1936 it was reported that during the period 1900-25 two judges were removed by impeachment—one in Montana and one in Texas—and three by address, all in Virginia. In 1952 it was reported that during the period 1928-48 there were only three impeachments of judges, and all three judges were acquitted. A 1960 article states:
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> > Replies to inquiries in 1960 disclose that in forty of forty-five states, as far back as can be recalled or determined, legislative attempts to invoke impeachment procedures have been made in only seventeen states in a total of fifty instances. The results were nineteen removals and three resignations. In one case the result was unknown.
>
> The present research, though not exhaustive, found only five states that have used impeachment within the last fifteen years, and no instance of the use of address or recall within the last three decades.

BRAITHWAITE, *supra* note 373, at 12-13 (citations omitted).

[408] I. TESITOR, JUDICIAL CONDUCT ORGANIZATIONS (American Judicature Society 1978).

[409] *Id.* at 2.

[410] The California commission, originally created by a 1960 constitutional amendment, has nine members: two judges of courts of appeals, two judges of superior courts, and one judge of a municipal court, each appointed by the supreme court; two members of the state

Hawaii has participated in the national trend toward more effective disciplinary and disability retirement methods. Our early constitutions provided for legislative removal of judges.[411] During the territorial period, supreme and circuit court judges could be removed by the President,[412] while district magistrates were subject to removal by the supreme court when "necessary for the public good."[413] When Hawaii first became a State, the only mechanism for dealing with misconduct of a circuit or supreme court judge was removal from office upon concurrence of two-thirds of the membership of each legislative house.[414] No proceeding was ever brought under this provision, and, indeed, the legislature did not promulgate rules or procedures for the implementation of the mechanism.[415] The constitution contained a separate provision dealing with retirement for disability.[416]

In 1968, the constitution was amended to merge the disciplinary mechanism with the retirement for disability provision,[417] requiring the Governor to appoint a board to inquire into removal or retirement of a circuit or supreme court judge after a commission certified probable cause.[418]

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bar appointed by its governing body; and two lay persons appointed by the Governor with the advice and consent of the senate. The commission employs a full-time secretary and is empowered to receive and investigate complaints from any source and to hold confidential adversary hearings. Prior to 1976, the commission itself had no powers. However, it could make public recommendations to the supreme court for retirement of a disabled judge where the disability seriously interfered with the performance of the judge's duties and was or was likely to become permanent, or it could recommend censure or removal for action that constituted "wilful misconduct in office, wilful and persistent failure to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." CAL. CONST. art. VI, § 18 (1879, amended 1976). In 1976, the constitution was amended to authorize the commission to privately admonish a judge found to have engaged in an improper action or a dereliction of duty. In addition, the grounds upon which a judge could be disciplined were enlarged to include an "inability" to perform judicial duties. In the past, only a "wilful and persistent failure" of performance could lead to discipline.

[411] *See, e.g.*, notes 61, 76, 85 *supra* and accompanying texts. The following cases concerned removal of district court judges: *In re* Helekunihi, 10 Hawaii 285 (1896); *In re* Kaaa, 8 Hawaii 298 (1891); *In re* Mahelona, 8 Hawaii 296 (1891); *In re* Kalai, 7 Hawaii 257 (1888); *In re* Kahulu, 5 Hawaii 283 (1885); *In re* Kakina, 5 Hawaii 669 (1878).

[412] Act of Apr. 30, 1900, § 80, 31 Stat. 141 (repealed 1959). Section 80 was superseded by the Hawaii Constitution, adopted on August 21, 1959, which provided for appointment and removal by the Governor. The constitutional provision was amended in 1968 and 1978.

[413] REV. LAWS HAWAII § 2296 (1915) (amended various years and codified at *id.* § 2273 (1925); *id.* § 3761 (1935); *id.* § 9672 (1945); *id.* § 26-12 (1955)) (current version at HAWAII REV. STAT. § 604-2 (Supp. 1979)); *see In re* Soares, 27 Hawaii 509 (1923).

[414] HAWAII CONST. art. V, § 3, para. 3 (1959, amended 1968, 1978, renumbered art. VI, § 3, para. 6, 1978).

[415] *See* STAND. COMM. REP. NO. 40, 2d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 196, 201 (1973).

[416] HAWAII CONST. art. V, § 4 (1959, amended 1968, 1978, renumbered art. VI, § 5, 1978).

[417] *Id.* (1968, amended and renumbered art. VI, § 5, 1978).

[418] *Id.*

The following year a commission was formed,[419] but since then only two complaints have required investigation.[420] In both instances, the commission found no probable cause to recommend removal.[421]

In 1977, the supreme court adopted the Code of Judicial Conduct, modeled after the ABA Code of Judicial Conduct.[422] No formal disciplinary mechanism existed, however, to handle those instances where a judge's conduct might call for reprimand or censure but not for the severe sanction of removal.[423]

The 1978 constitutional amendment to the judicial article lodged the disciplinary mechanism within the judiciary by vesting in the supreme court full power to reprimand, discipline, suspend, retire, or remove from office any justice or judge.[424] It significantly enlarged disciplinary powers, giving the supreme court ultimate authority over all state judges[425] and expanding the range of disciplinary measures which could be imposed.

Pursuant to the amendment, the supreme court has promulgated rule 26[426] creating a seven-member commission, composed of three attorneys and four lay persons, to receive, screen, and conduct preliminary investigations of all complaints regarding judges.[427] Upon the commission's request, the supreme court will appoint special counsel to carry the investi-

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[419] Pursuant to the constitutional amendment, a plan for judicial removal and disability retirement was enacted by the legislature in 1969 which provided for a commission consisting of five members appointed by the Governor, from a panel nominated by the judicial council and confirmed by the senate. The commission was empowered to receive and investigate complaints, subpoena witnesses, administer oaths and take testimony relative to complaints. If a majority of the commissioners determined that there was probable cause to believe that a judge appears "so incapacitated as substantially to prevent him from performing his judicial duties or has acted in a manner that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute" the commission would certify its findings to the Governor, who in turn would appoint a board of judicial removal consisting of the chief justice or an associate justice designated as chairperson and two other members. HAWAII REV. STAT. § 610-3(a) (1976). The board after conducting a full hearing would submit its findings and recommendations to the Governor who was required to remove or retire the judge within thirty days if the board recommended such action. *Id.* § 610-13. Although not explicitly repealed, this provision may have been impliedly repealed by passage of the 1978 constitutional amendment on judicial discipline, *see* note 424 *infra*.

[420] COMM. FOR JUDICIAL QUALIFICATION ANN. REP. (1977).

[421] *Id.*

[422] R. HAWAII SUP. CT. 19, Exhibit B.

[423] Although the court lacked explicit constitutional authority to discipline judges, such discipline could have been imposed under the inherent powers concept. *See* ABA—JUDICIAL DISCIPLINE, *supra* note 373, Standard 1.1 & Commentary, at 3-4.

[424] HAWAII CONST. art. VI, § 5.

[425] Formerly, the constitutional provision covered only supreme and circuit court judges while district court judges could be removed by the supreme court whenever the court deemed it necessary for the public good. HAWAII REV. STAT. § 604-2 (1976) (amended 1979).

[426] R. HAWAII SUP. CT. 26 (amended Nov. 6, 1979, effective Jan. 2, 1980).

[427] *Id.* .1(a), .2(a).

gation forward and, if necessary, file formal proceedings.[428] Such proceedings include a complaint and answer[429] and a hearing before the commission, at which the judge may be represented by counsel, confront the complainant, cross-examine witnesses, compel attendance of witnesses and documents, and present evidence.[430] Prior to instituting formal proceedings, the commission may close the case or recommend disciplinary action to the supreme court.[431] At any time after the judge files an answer to a complaint, the commission may dismiss the matter upon a determination of insufficient cause.[432] After the formal hearing, the commission will make a report and recommendation to the supreme court for review and action.[433] All disciplinary and disability procedures are confidential until and unless the supreme court imposes public discipline or the judge requests the matter be made public.[434]

Appointment of special counsel is a unique feature of rule 26. This provision removes the commission from involvement in any but preliminary investigations and helps to maintain the commission's impartiality at later stages in the procedure. It also ensures that the case will be presented to the commission by an attorney who will have knowledge of applicable evidentiary and procedural rules.

Under the rule, various types of conduct are subject to disciplinary actions, including a felony conviction, willful misconduct in office, willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute, conduct prejudicial to the administration of justice or that brings the judicial office into disrepute, and conduct that violates the Code of Judicial Conduct.[435] Additionally, the rule lists the sanctions which the commission may recommend[436] and sets out procedures for cases involving mental or physical disability and involuntary retirement.[437]

It is clear that an independent judiciary requires that the mechanism for dealing with incompetent or disabled judges function within the judiciary. In implementing such a procedure, rule 26 attempts to protect the independence of the individual judge in the decisionmaking process while also assuring public accountability in judicial conduct.

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[428] *Id.* .7.

[429] *Id.* .9(a)-.9(b).

[430] *Id.* .9(c).

[431] *Id.* .6(h)-.6(i).

[432] *Id.* .9(c).

[433] *Id.* .9(f).

[434] *Id.* .4.

[435] *Id.* .5(a).

[436] *Id.* .9(f).

[437] *Id.* .13-.14.

V. Conclusion

Roscoe Pound's classic 1906 address called attention to basic defects in the structure and procedures of the existing legal system.[438] The courts that had served the small, agrarian society of the nineteenth century no longer sufficed in the newly industrialized, urban culture of America. Pound's speech inspired the legal community to examine and seek solutions to those problems he identified, and, in the nearly three-quarters of a century since, our courts have experienced radical alterations.

Through constitutional amendment and legislation, through administrative practices and exercise of the rulemaking power, the independence of the Hawaii judiciary has been strengthened. At the same time, enlightened constitutional provisions have secured the independence of individual judges in their roles as dispute resolvers and law interpreters. Many of these advancements evolved as a direct result of Pound's original exhortation.

This tradition of reform has brought the Hawaii judiciary national recognition as a model for unified court systems.[439] Yet, just as the legal system of Pound's day had become archaic in an industrial-revolutionized society, today's legal system soon may be obsolete in our scientifically revolutionized society. The most realistic approach to change is a flexible one. The painstaking restructuring of the Hawaii judiciary over the last twenty years has given us a broader perspective and provided us with a firm basis from which to meet an uncertain future.

Our unified court system, with a centralized administration, possesses the necessary versatility to implement changes in response to shifting values and expectations. The potential use of the court's rulemaking power is also of great significance. In the past, the rulemaking power has been utilized to adopt uniform criminal and civil rules of procedure to speed the adjudicative process. Delay continues to be a major problem which may necessitate reexamination and revision of our procedures.[440] In response to a constitutional mandate,[441] the supreme court has already promulgated rules setting time limits for appellate case disposition.[442]

In addition, alternative methods of dispute resolution, such as establishing neighborhood justice centers[443] and expanding the use of small

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[438] Pound, *Causes*, *supra* note 155.

[439] Berkson, *supra* note 160.

[440] *See* ABA, Report of the Pound Conference Follow-up Task Force (1979), *reprinted in* 74 F.R.D. 159, 171, 191-92 (1977); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288-90 (1978) [hereinafter cited as Erickson]; 91 Harv. L. Rev. 1925 (1978).

[441] Hawaii Const. art. VI, § 1.

[442] R. Hawaii Sup. Ct. 33 (amended Nov. 6, 1979, effective Jan. 2, 1980); R. Hawaii Inter. Ct. App. 21 (adopted Nov. 6, 1979, effective Jan. 2, 1980).

[443] *See, e.g.*, Office of State Courts Administrator, Citizens Dispute Settlement Program Development in Florida, A Report to the Conference of Chief Justices (1978);

claims courts,[444] arbitration,[445] and administrative hearings[446] are being advanced as mechanisms to decrease court congestion and provide more expeditious relief to litigants. The impact of these and other contemplated reforms has not been determined. However, any proposal, once adopted, must not be sanctified but must be the subject of constant reevaluation. Even the most far-reaching changes are useless unless continually assessed.

The Hawaii courts have begun the deliberate process of evaluating present goals and looking at the future administration of justice. With the establishment of the office of court planner in 1976,[447] the judiciary initiated a formal master planning procedure to aid in meeting the community's demands for services. The completed statewide plan will address fundamental questions about the judiciary's function in a society where values and expectations may be more transitory and ephemeral than permanent.

To ensure a successful design, the judiciary must be able to exchange information with other court systems. Recently, the states have formed a network which expands the planning assets of each member. The nucleus of this web is the National Center for State Courts[448] which collects data from the various jurisdictions and acts as a catalyst in setting guidelines for fair and expeditious judicial administration. The proper utilization of this resource will contribute greatly to our own mobility in preparing for

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Bell, *Crises in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 7 (1978) [hereinafter cited as Bell]; Erickson, *supra* note 440, at 281-82; Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 12 (1976) [hereinafter cited as Kaufman].

[444] *See, e.g.*, Act 172, 1979 Hawaii Sess. Laws 349 (expanding small claims court jurisdiction); Erickson, *supra* note 440, at 282-83; Kaufman, *supra* note 443, at 13-14; King, *Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court*, XII HAWAII B.J. 2 (1976); Muir, *The Hawaii Small Claims Court: An Empirical Study*, XII HAWAII B.J. 18 (1976) (assessing the effectiveness of Hawaii's small claims court).

[445] *See, e.g.*, Bell, *supra* note 443, at 7; Erickson, *supra* note 440, at 283-84; Rosenburg, *Devising Procedures that Are Civil To Promote Justice that Is Civilized*, 69 MICH. L. REV. 797 (1971), in NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, RESOURCE MATERIALS 83-89 (1976); Schulman, *Compulsory Arbitration in Pennsylvania*, *id.* at 91-93 (reprinted from H. CHADBOURN, A. LEVIN & P. SHUCHMAN, CASES AND MATERIALS ON CIVIL PROCEDURE 1006 (2d ed. 1974).

[446] *See, e.g.*, Erickson, *supra* note 440, at 285-86.

[447] Office of the Administrative Director of the Courts, State of Hawaii, A Progress Report to the Chief Justice on a Plan for the Judiciary: A Summary Report, Attachment 2, at 1 (1977).

[448] The National Center for State Courts is a nonprofit organization established in 1971 and committed to improving the administration of justice at the state and local levels. It serves as an ongoing resource institution, aiding in the perfection of procedure and substance in state courts, through research and problem studies and education and training of judicial officers and administrators. The center is financed by contributions from all fifty states as well as funds solicited from the private sector. Headquartered in Williamsburg, Virginia, with five regional offices located throughout the United States, the center possesses a staff with backgrounds in 18 separate academic disciplines and 38 court-related specialties. 60 JUD. 39, 41 (1976). *See generally* NATIONAL CENTER STATE CTS. ANN. REP. (1978).

tomorrow. Suggested solutions to our problems may be tested against alternatives employed elsewhere[449] and the experience of other states may be considered in forming our own objectives.

In looking to the future, the judiciary's relationship with the executive and legislature will continue to be of primary importance. Our tripartite form of government contemplates not only independence and separateness of each branch, but also coordination among the branches deriving from a common purpose. Like the society in which these government institutions function, the relationship among them will remain fluid and dynamic. The ingenuity of our constitutional structure is that it precludes any one branch of government from dominating the other. While each can significantly affect the other, each can also limit the effect. In this interdependent setting, cooperation among the branches takes on added significance. It is, in part, the long and productive tradition of cooperation among Hawaii's governmental branches that has gained for the judiciary a full measure of independence and promises to safeguard it hereafter.

The future can never be wholly predictable. Our best efforts to anticipate concerns and needs may fail to disclose circumstances of profound consequence. Nevertheless, the Hawaii judiciary, with a solid foundation of independence, will continue to fulfill its constitutional directive by consciously shaping the form and substance of justice itself.

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[449] In 1977, the center conducted a study of the Hawaii appellate system and recommended the establishment of an intermediate appellate court. NATIONAL CENTER FOR STATE COURTS, THE HAWAII APPELLATE REPORT (1977). As discussed earlier, see text accompanying notes 183-93 *supra*, such a court was subsequently proposed by the 1978 Constitutional Convention, ratified, and implemented by Act 111, 1979 Hawaii Sess. Laws 259. In 1978, the center assisted the Hawaii judiciary in drafting the Hawaii Benchbook for trial judges which was published in May 1979. On a national level, the center is currently evaluating guidelines for sentencing and small claims courts' procedures and focusing on facilitating the planning process at individual state levels. NATIONAL CENTER STATE CTS. ANN. REP. at 12-14 (1978).

UNRAVELING *ROBINSON V. ARIYOSHI:* CAN COURTS "TAKE" PROPERTY?

Williamson B. C. Chang*

*"We are not final because we are infallible, but we are infallible only because we are final."***

The most critical question currently affecting Hawaii's state judicial system is its relationship with the federal district courts of Hawaii. Decisions of the Hawaii Supreme Court have been set aside by federal district courts on three occasions in the 1970's.[1] This pattern of nullification is of obvious importance to the independence and sovereignty of the state judiciary.[2] In particular, if the United States district court decision in *Robinson v. Ariyoshi*[3] is sustained on appeal, then the state supreme

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** Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[1] Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (State ownership of beach land below the vegetation); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed,* Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978) (State "ownership" of surplus waters); Patterson v. Burns, 327 F. Supp. 745 (D. Hawaii 1971) (constitutionality of state statute).

[2] For a thorough discussion of the importance of an independent judiciary, see Richardson, *Judicial Independence: The Hawaii Experience,* 2 U. HAWAII L. REV. 1 (1979).

[3] 441 F. Supp. 559 (D. Hawaii), *appeal docketed,* Civ. No. 78-2264 (9th Cir., filed Nov. 28,

court will have been deprived of the ability to perform its principal responsibility; that is, to resolve questions of state law with finality. The logic of *Robinson v. Ariyoshi* allows district court review and invalidation of a state judicial decision that modifies or overrules prior state law in a manner judged "unexpected" by the federal court. The ramifications of this type of collateral attack are so great as to completely reorder our system of federalism.

First, the United States Supreme Court would no longer perform its role, clearly set forth by statute,[4] as the exclusive appellate court for state judgments. Under the district court's logic in *Robinson*, a reordering of the parties[5] and an allegation that a judicial decision "took" private property[6] suffices to create federal question jurisdiction, allowing a federal district court to negate a state trial court judgment or appellate decision.[7] Moreover, since the court in *Robinson* failed to articulate clear rules as to what is an "unexpected" state ruling,[8] federal intervention may be based on the subjective judgment of the district court that a state court went too far.

Second, state court decisions would be deprived of the preeminent requirement of finality. If the *Robinson* type of collateral attack is allowed, there will be two methods of reviewing state court decisions: appeal and writ to the United States Supreme Court[9] or collateral attack in the federal district courts. Under certiorari or appeal to the Supreme Court there is a statutory time bar that renders the state supreme court judg-

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1978). As of January 1980, the judgment in Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978), had not been entered, but the government is likely to appeal that case as well. For a description of the issues involved in *Sotomura*, see Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979).

[4] 28 U.S.C. § 1257 (1976).

[5] In the original state court action, the plaintiff was the McBryde Sugar Company, the owner of the *ilis kupono* of Eleele and Kuiloa, situated in the southeastern portion of the Hanapepe Valley. The defendants were (1) the territory, now the State of Hawaii, the owner of the *ahupua'a* of Hanapepe, located in the southwestern portion of the valley, (2) the partnership of Gay & Robinson and its individual partners, owners of the *ilis kupono* of Manuahi and Koula, located in the northwestern and northeastern portions of the valley, and (3) the small owners, owners of all other lands in the valley.

In the federal district court action, the plaintiffs were the Robinson family, and the defendants included (1) State officials, (2) McBryde and Olokele Sugar Companies, and (3) the small owners. On appeal to the Ninth Circuit, the Robinsons, Olokele, McBryde, and the small farmers all argued as appellees. In other words, they supported affirmance of the district court opinion.

[6] 441 F. Supp. at 562, 580.

[7] *Id.* at 586.

[8] *Id.* at 583: "*McBryde I* therefore came as a shocking, violent deviation from the solidly established case law—totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions." The court referred to the original decision and the supreme court's opinion on rehearing as *McBryde I* and *McBryde II*, respectively. *See* text accompanying notes 19 to 31 *infra*.

[9] 28 U.S.C. § 1257 (1976), *quoted in* note 96 *infra*.

ment final.[10] Collateral review in a federal district court would not, however, be subject to a uniform time limit.[11] Aggrieved parties could conceivably attack the state judgment years later.[12] Without finality, the value of a state court judgment is substantially impaired.

Third, under the reasoning in *Robinson*, state courts would no longer be the final arbiters of state law, thus undermining a fundamental premise of federalism.[13] The principle that state courts are free to modify and overrule themselves must be as acceptable as the unquestioned ability of the United States Supreme Court to overrule and modify federal law.[14] Yet, the impact of the *Robinson* decision contravenes this pillar of federalism by empowering lower federal courts to rule invalid those decisions which are deemed radical modifications of precedent. Questions of state law therefore remain issues of state law only so long as they do not change. Once a state court has effected profound change through decisional law, it has created federal question jurisdiction. The integrity of the state ruling and the traditionally inherent power of the court to shape state law are at the mercy of the local federal district courts.

In light of these considerations, *Robinson v. Ariyoshi* must be viewed as more than a case concerning water rights, *ilis kuponos, ahupua'as*,[15] and

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[10] *Id.* § 2101 sets time limits for appeal or application for a writ of certiorari from various types of decisions. Subsection (c) requires that an application for a writ of certiorari in a civil suit like *McBryde* be taken within ninety days, although a Supreme Court Justice may extend the period for sixty days for good cause.

[11] *Robinson* involved a claim under 42 U.S.C. § 1983 (1976). Because section 1983 does not contain a statute of limitations, federal courts apply the state statute that would be applicable in the most closely analogous state action. Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977); Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977); Meyer v. Frank, 550 F.2d 726, 728 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977). Hence, the limitations statute applied is often different even though the nature of the section 1983 action is the same. *Compare* Wooten v. Sanders, 572 F.2d 500 (5th Cir. 1978) (two-year Georgia statute of limitations for analogous tort action), *with* Proctor v. Flex, 567 F.2d 635 (5th Cir. 1978) (one-year Louisiana statute of limitations for analogous tort action).

[12] Sotomura v. County of Hawaii, 402 F. Supp. 95, 103-05 (D. Hawaii 1975) (six-year statute of limitations appropriate to *Robinson*-type claim by analogy to state statute of limitations governing compensation on account of deprivation of land after registration).

[13] Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

[14] "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930).

[15] The terms *ilis kuponos* and *ahupua'a* were explained in Territory v. Bishop Trust Co., 41 Hawaii 358, 361-62 (1956):

> The unit of land was the *ahupuaa* [*sic*], usually running from the mountains to the sea. Within the *ahupuaa* were a number of subdivisions, each of which was called an *ili* [or *ili* of the *ahupua'a*]. This division was for the convenience of the chief, administered by a *konohiki* or agent appointed by the chief. (It is only in the later statutes that the chiefs or landlords are referred to as *konohikis*.) It had no existence separate from that of the *ahupuaa*, except the so-called *ili ku* [*ili kupono*] or independent *ili*, although the independent *ili* paid tribute to the king.

Hawaiian history. The decision changes the fulcrum in the delicate equilibrium between state and federal courts and, if upheld on appeal, will subordinate all state judicial systems within the Ninth Circuit to the federal district courts that reside in their respective states.

Perhaps an appropriate metaphor of the conflict between the federal courts over Hawaii water rights is that of a traffic accident. The "collision" in this case was between the decision of the Supreme Court of Hawaii in *McBryde Sugar Co. v. Robinson*[16] and the injunction issued by the federal district court in *Robinson*, voiding the *McBryde* decision. The analogy is helpful not only to emphasize the force of the collision between the state and federal courts,[17] but also to show that issues are framed depending upon the forum from which one views the case.

One phenomenon common to both vehicular and judicial collisions is that persons with different perspectives will give divergent explanations of what has happened. Yet, these conflicting descriptions each interpret the same event. Similarly, as one views the questions posed in *Robinson*, one eventually concludes that some characterizations of the issues are merely different legal labels to describe the same event.

Second, in viewing this judicial collision there is a temptation to judge fault in an either-or sense. One is prone to say, "If driver *A* were right, then driver *B* must be wrong." In our case the danger is in constructing a theorem that if the *McBryde* decision were "wrong," then *Robinson* is "right," and if *Robinson* were "wrong," then *McBryde* is "right." This absolutist approach has focused commentary solely on the substantive water law issues;[18] that is, the divergent interpretations of water rights as manifested in *McBryde* and *Robinson*. Commentators reason that if the *McBryde* court constructed a new doctrine on a false foundation of misread Hawaiian water rights cases, then the *Robinson* court's interpretation of water law must be correct. Ergo, federal intervention was proper because it achieved the "right" result.

However, the first and most critical question to be asked about this "collision" is whether the second vehicle, namely, the *Robinson* decision, had a right to be in the intersection in the first place. If it did not, then the analytical care with which the district court approached the first vehicle, the merits of the *McBryde* decision, loses its impact. In other words, the central issue is whether the federal court had proper jurisdiction. If there was no power to intervene and nullify, then the Hawaii Supreme Court's decision in *McBryde* must be final regardless of its consistency

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[16] 54 Hawaii 174, 504 P.2d 1330 (1973), *cert. denied*, 417 U.S. 976, *cert. denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

[17] Moreover, as in most accidents, the accusations of fault were quite vigorous. *See* 441 F. Supp. at 566.

[18] *See* Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori & Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141 (Hawaii Institute for Management and Analysis in Government 1977).

with prior water rights law.

This article therefore does not attempt to discuss the different interpretations of Hawaiian water rights as expressed in *McBryde* and *Robinson*. Rather, it addresses the threshold issue of the jurisdictional power of federal courts and attempts an investigation of the circumstances under which district courts may rightfully "collide" with state tribunals. Before proceeding, a brief description of the two "vehicles" is in order.

McBryde is the Hawaii Supreme Court decision culminating some twenty years of litigation regarding the extent to which various parties have rights to the water in the Hanapepe River. The parties involved were the State of Hawaii[19] and the various landowners whose property adjoined the river and streams.[20] The supreme court affirmed the trial court's determination of appurtenant water rights, defined as the right to take the amount of water historically needed to grow taro.[21] But the court set down two rulings that surprised the parties.

First, the court held that all the surplus water in the State, including normal and storm and freshet surpluses, is the property of the State.[22] In large part, the suit originally had been instituted to determine the rights of the various parties to the surplus waters in the stream. Absent the explicit urging of any of the parties, the supreme court held that the State owned all the surplus waters.

The second ruling was that water rights acquired by virtue of ownership of lands adjoining a stream could not be transferred to other parcels.[23] The basis of this ruling was, in part, that section 577 of the Revised Laws of Hawaii (1925)[24] codified the doctrine of riparianism as it existed in Massachusetts in 1850. This ruling was particularly devastating to the sugar plantations since the large agricultural users have continuously transported water to other watersheds. Such irrigation systems had been the foundation for the growth of the sugar industry.[25]

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[19] The State was involved in litigation because it was the owner of the *ahupua'a* of Hanapepe.

[20] *See* note 5 *supra*.

[21] 54 Hawaii at 189, 504 P.2d at 1319-40.

[22] *Id.* at 200, 504 P.2d at 1345.

[23] *Id.* at 191, 198, 504 P.2d at 1341, 1344.

[24] The statute remains substantially unchanged and is currently codified at HAWAII REV. STAT. § 7-1 (1976) which provides as follows:

> **Building materials, water, etc.; landlords' titles subject to tenants' use.** 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 water-courses, which individuals have made for their own use.

[25] *See* Brief for Amicus Curiae, Hawaiian Sugar Planters' Ass'n at 8-12, Robinson v.

All parties except the State sought a rehearing before the Hawaii Supreme Court.[26] The court granted a rehearing but denied petitioners' request to argue the constitutionality of the earlier decision.[27] The supreme court affirmed its prior decision[28] with two justices dissenting.[29] Petitioners then sought review in the United States Supreme Court on the bases of appeal and certiorari. The Court denied review.[30]

Prior to the Court's denial, petitioners instituted attack on the *McBryde* decision in the United States District Court for the District of Hawaii,[31] seeking a declaratory judgment that the *McBryde* decision was unconstitutional. The district court assumed jurisdiction[32] and on October 26, 1977, issued its opinion, *Robinson v. Ariyoshi*. The court held that the Hawaii Supreme Court decision in *McBryde* was an unconstitutional "taking" of private property and therefore void.[33] State officials were enjoined from attempting to enforce the *McBryde* ruling,[34] and the case was partially remanded to the state trial court.[35]

Several institutional interests are directly affected by the water law issues in *Robinson*. The sugar industry, while applauding the federal decision, is not yet out of the canefield. Still to follow is the decision of the Ninth Circuit and potential review in the United States Supreme Court. Until there is a final resolution, the business of buying and selling water rights[36] will be paralyzed by the uncertainty of the appellate process.

Ariyoshi, No. 78-2264 (9th Cir., filed Nov. 28, 1978). The sugar growers assert that most modern plantations are "absolutely dependent" on the presently extensive irrigation systems. *Id.* at 14-15.

[26] The parties seeking a rehearing were Olokele Sugar Company, McBryde Sugar Company, Gay & Robinson, and the nonappellant small owners.

[27] The Hawaii Supreme Court limited reargument to the following points: (1) The relevance of section 7-1 of the Hawaii Revised Statutes (1968) to the water rights of the parties and (2) the legal theories which support a conclusion that appurtenant water rights can be used on other parcels. McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 261, 517 P.2d 26, 27 (1973), *cert. denied*, 417 U.S. 976 (1974). See note 24 *supra* and accompanying text for an explanation of the statute involved.

[28] McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976 (1974).

[29] *Id.* at 261, 262, 517 P.2d at 27 (Marumoto, J., and Levinson, J., dissenting).

[30] 417 U.S. 962 (1974).

[31] The Supreme Court dismissed the appeal for want of jurisdiction and denied certiorari on June 17, 1974. *Id.* Petitioners filed their complaint in the federal district court more than four months prior to the Supreme Court dismissal. Civ. No. 74-32 (D. Hawaii, filed Feb. 2, 1974). The fact that the Court dismissed the *McBryde* appeal is another intriguing aspect of the *Robinson* litigation inasmuch as dimissal for want of a substantial federal question is considered an adjudication on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[32] The district court asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2283 (1976) and 42 U.S.C. § 1983 (1976). 441 F. Supp. at 562.

[33] 441 F. Supp. at 585-86.

[34] *Id.* at 586.

[35] *Id.*

[36] *See id.* at 577:

> Since the earliest recognition of private property in Hawaii, rights to surface waters

Moreover, various county and state agencies such as the board of water supply, the department of health, and the department of land and natural resources await clarification of the water rights situation in order to implement plans to regulate and preserve Hawaii's diminishing water supply.[37] Furthermore, environmentalists and downstream owners, intrigued by the implications of the riparian doctrine adopted by the Hawaii Supreme Court, are waiting for possible vindication of that decision in order to use it as the legal basis for preserving the natural state of stream waters.[38]

It is against this background of concern over the status of water rights and the incipient judicial conflict over ultimate power to resolve the controversy that this article attempts to unravel the complexities in *Robinson v. Ariyoshi*. While there probably will be no final resolution until the United States Supreme Court once again acts on this case, it is definitely of value to the various interests involved to dissect *Robinson* and to predict how it may be decided.

I. JUSTICE STEWART AND THE LAYMEN'S VIEW OF A "TAKING"

The crucial question in *Robinson* is not whether the Hawaii Supreme Court was correct in its interpretation of Hawaiian water rights, but whether the federal court had the power to judge the propriety of the state court's interpretation of these rights. In other words, did the federal district court properly assert jurisdiction?

Jurisdiction in *Robinson* was based *inter alia*[39] on both 28 U.S.C. § 1331 (1976), federal question jurisdiction, and 28 U.S.C. § 1343 (1976), which confers jurisdiction to redress rights arising under the Constitution or federal statutes in violation of the Civil Rights Act of 1871, 42 U.S.C. §

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have been bought, sold, leased and otherwise dealt with as other private property. The government has bought and paid for privately owned surface water and all branches of the Hawaiian government have consistently dealt with surface water however owned or acquired by the government in all respects and in the same manner as private persons.

[37] As of November 1979, the Hawaii State Board of Land and Natural Resources has adopted Regulation 9, Control of Groundwater Use, for regulation of groundwater under chapter 177 of the Hawaii Revised Statutes (1976); the board has proposed designation of the Pearl Harbor Basin for regulation under the statute. The State Department of Land and Natural Resources, as part of its functional plan for water resources development mandated by chapter 226 of the Hawaii Revised Statutes (Supp. 1979), has proposed regulating the development and use of all ground and surface waters by a permit system. *See* HAWAII DEP'T OF LAND AND NATURAL RESOURCES, STATE WATER RESOURCES DEVELOPMENT PLAN 133-65 (Draft, July 1979).

[38] In Reppun v. Board of Water Supply, Civ. No. 50121 (1st Cir. Ct. Hawaii, Oct. 15, 1979) plaintiffs asserted that the upstream diversion of water by the defendant Honolulu Board of Water Supply illegally deprived them of water. In particular, plaintiffs asserted that under the *McBryde* decision, as owners of riparian land bordering a stream, they have the statutory right to "running water." Trial Brief for Plaintiff at 9.

[39] See note 32 *supra*.

1983 (1976). In essence, both sections require the existence of a federal question. Although the records were in both cases different, *Robinson* was based on essentially the same "factual" situation as *McBryde*,[40] a situation primarily involving nonfederal, state property law issues concerning water rights. The question therefore arises as to what constituted the new issue upon which federal question jurisdiction was asserted. The *Robinson* court purports to answer this question through its analysis of two constitutional provisions.

First, the court said that the Hawaii Supreme Court's decision in *McBryde* and the state court's conduct in reaching that decision were a deprivation of procedural due process, a right derived from the fourteenth amendment.[41] Petitioners had alleged a multitude of due process violations in the form of procedural irregularities.[42] The *Robinson* court found that the failure of the state court to grant petitioners an opportunity on rehearing to argue the constitutional questions was itself sufficient basis for reversal.[43] This will be referred to as the procedural due process claim.

The taking argument was the second federal question that the court grasped. The fifth amendment,[44] as applied to state action by the fourteenth amendment, prohibits a taking by the state without just compensation.[45] In the view of the federal court, a taking occurred when the Hawaii court, through its decision in *McBryde,* diminished the water rights of petitioners.[46] This will be termed the substantive due process claim.

The approach taken by the court in *Robinson* was not a very tradi-

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[40] Both *Robinson* and *McBryde* were actions ultimately seeking a clarification of the ownership of water rights of the various parties. The evidentiary records presented before the Hawaii Supreme Court and the federal district court were, of course, different. The conduct of the Hawaii Supreme Court in its issuance and the content of its *McBryde* decision were the focus of the federal court action. Nevertheless, the facts regarding the conduct of the litigants in their use and reliance on water rights over time were the same before both tribunals.

[41] 441 F. Supp. at 580.

[42] Petitioners alleged that the *McBryde* decision deprived them of due process by: (1) Overruling earlier decisions that the normal surplus of water of a stream belongs to the *konohiki* (owner of the land on which it arises) and he is free to transfer it out of the watershed; and (2) deciding issues that were neither raised nor tried in lower court, thus depriving the parties of an opportunity to present evidence. *Id.* at 580-83.

[43] *Id.* at 580.

[44] U.S. CONST. amend. V provides, in pertinent part: "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."

[45] Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

[46] As the district court noted in *Robinson:*

> It may be that the court did not conceive of its action as a taking—it said the plaintiffs never *had had* any such water rights, ergo, no taking! Just that simple!
>
> . . . For over a century neither the State nor its predecessors in title ever attempted to take water rights without either purchase or condemnation, but *McBryde I took the plaintiffs' water rights for the State* . . . .

441 F. Supp. at 585 (emphasis added at "took the plaintiffs' water rights for the State").

tional application of the fifth amendment. One normally associates a taking with the executive branch of government through use of the power of eminent domain. It is obviously a taking when the State confiscates private property to build a highway. But, has a taking occurred when a state supreme court decides that a piece of property belongs to neither claimants *X* nor *Y* and declares that the property belongs to a third party, *Z*? The *Robinson* court found no logical distinction between confiscation of property to build a highway and the elimination of the party's water rights in *McBryde*.[47] The court's logic was simple. The petitioners had water rights prior to the *McBryde* decision; they did not have these rights after the *McBryde* decision. Ergo, the decision took these rights away. Moreover, it was the "State" which took these rights by acting through a state entity, the judiciary.

One might label this the "laymen's view of a taking." The term "lay" as used by Professor Bruce A. Ackerman[48] is not unflattering, but rather describes an eminently sensible conclusion based primarily on simplicity and clarity. The laymen's view requires no deep legal scholarship to reach its conclusion. The concept is based on the fundamental legal principle of securing private property from governmental interference.[49] The laymen's perspective reflects such a prominent societal value that one assumes it must be expressed somewhere in the Constitution. It is so because it must be so. It could not be otherwise in a legal system based on private property. As Professor Laurence H. Tribe has put it:

> Most people know a taking when they see one, or at least they think they do. Before the taking, an object or a piece of land belonged to X, who could use it in a large number of ways and who enjoyed legal protection in preventing others from doing things to it without X's permission. After the taking, X's relationship to the object or the land was fundamentally transformed; he could no longer use it at all, and other people could invoke legal arguments and mechanisms to keep him away from it exactly as he had been able to invoke such arguments and mechanisms before the taking had occurred. As Professor Bruce Ackerman has shown in a thoughtful analysis of the taking problem, much of the constitutional law of takings is built upon this ordinary, lay view of what a "taking" is all about.[50]

The court in *Robinson* appears to share this lay view of a taking, that it must be a taking because government cannot be allowed to condemn without compensation merely by clothing its actions in the sanctity of the judiciary.[51] The court quoted Justice Stewart's concurring opinion in

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[47] *Id.* at 583-86.

[48] *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-167 (1977).

[49] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 456 (1978).

[50] *Id.* at 459-60 (footnote omitted).

[51] 441 F. Supp. at 585 (quoting Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)). See text accompanying note 61.

Hughes v. Washington[52] in applying the protections of fourteenth amendment due process to the judiciary.[53] Both opinions reason by implication: The fifth amendment applies to the States by incorporation through the fourteenth amendment;[54] since the fourteenth amendment applies to the actions of courts in other contexts,[55] the fifth amendment also must apply to the courts by virtue of the fourteenth amendment.

Although *Hughes* was decided on different grounds,[56] the concurring opinion of Justice Stewart discussed an alternative issue very similar to the question before the court in *Robinson*.[57] The Supreme Court of Washington had decided in 1946 that title to gradual shoreline accretions vested in the owner of the adjoining land.[58] Twenty years later, the Washington court reversed itself and held that the same constitutional provision, properly construed, terminated the rights of such landowners.[59] For the lay observer this judicial about-face was clearly a taking. Property that had existed under the first decision was taken away by the second. Justice Stewart posed the problem in this manner: "Does a prospective change in state property law constitute a compensable taking . . . ?"[60] His affirmative answer demonstrates the force of the argument that it is so because it must be so:

> [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. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court . . . .[61]

Justice Stewart also concluded that the fifth amendment applies to state courts. "Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than

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[52] 389 U.S. 290, 294 (1967) (Stewart, J., concurring).

[53] 441 F. Supp. at 585 (quoting 389 U.S. at 298 (1967)).

[54] Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

[55] *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (due process clause); Shelley v. Kraemer, 334 U.S. 1 (1948) (equal protection clause).

[56] The majority opinion in Hughes v. Washington, 389 U.S. 290 (1967), decided that federal, not state, law was controlling on the question of ownership of future accretions to lands conveyed by the United States to a private owner prior to statehood. The state court had held that state law controlled. The State's constitution, the state court concluded, denied the landowner any future rights to accretion. Thus, the majority did not consider the question of whether an overruling judgment of a state court could "take" property vested by an earlier decision. Justice Stewart, on the other hand, argued that if the state constitution had unambiguously denied the landowner the right to future accretion, then the question of change in state law would raise the taking issue.

[57] *See* 389 U.S. at 294-98 (Stewart, J., concurring); note 56 *supra*.

[58] Ghione v. State, 26 Wash. 2d 635, 175 P.2d 955 (1946).

[59] Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd*, 389 U.S. 290 (1967).

[60] 389 U.S. at 295-96 (Stewart, J., concurring).

[61] *Id.* at 296-97 (citations omitted).

through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."[62]

Fundamental to the lay view of Justice Stewart and the court in *Robinson* is the fear that a State can avoid the obligation to compensate so long as its highest court simply rules that the object seized is not property or that it has always belonged to another. Property could disappear in the sense that a judicial panel "finds" the "true" rule that the claimant's property never existed in the first place. Such evanescent rights would not be compensated under the fifth amendment.

Thus, the primary basis for the court's decision in *Robinson* was the lay view that when one's property vanishes at the hands of a governmental agency, even if that entity be the state judiciary, a taking has occurred and compensation must be paid. The following section will discuss a secondary proposition implicit in the *Robinson* opinion that there are constitutional due process limitations on the ability of courts to overrule prior doctrines upon which persons have relied.[63]

II. Retroactive Overruling and Due Process

The Hawaii Supreme Court's decision in *McBryde* is complicated by all of the constitutional problems associated with retroactive overruling. Retroactive overruling is endemic to the judicial process and is obviously required in any legal system that seeks to avoid being forever locked into ancient doctrines. Moreover, for many years retroactive decisions were thought to be the only possible, logical kind.[64] Retroactive overruling was a necessary element of traditional Blackstonian thinking. When judges overruled an earlier decision, they were not deemed to have "pronounce[d] a new law, but to [have] maintain[ed] and expound[ed] the old one."[65]

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[62] *Id.* at 298. The *Robinson* court quoted most of this rationale. 441 F. Supp. at 585.

[63] 441 F. Supp. at 585 (citing Muhlker v. New York & Harlem R.R., 197 U.S. 544 (1905)).

[64] The controversy surrounding the constitutionality of prospective overruling was resolved in Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932), where the Supreme Court, in an opinion by Justice Cardozo, stated that courts were free to choose between retroactive and prospective overruling.

[65] Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 2 (1960) [hereinafter cited as Levy] (quoting 1 W. Blackstone, Commentaries * 69).

> The judge merely *finds* the preexisting law; he then merely *declares* what he finds. A prior judicial decision is not the law itself but only evidence of what the law is. Thus a later judicial decision which seems to change the law has not really changed it at all but has only discovered the "true" rule which was always the law. It follows that any judicial "change" in the law must necessarily be retroactive. It could not be otherwise, for the judge is deemed merely to be articulating what the law has always been—as though the law were, in Holmes' irony-tipped phrase, a "brooding omnipresence" and not some decision to be made by some specific court. The parties acted yesterday but the law at which the court arrives today is the law which nonetheless covered yesterday's conduct.

Id. at 2 (footnote omitted) (original emphasis).

This view of retroactive overruling consistently has drawn criticism when it resulted in the overturning of prior doctrines in property law.[66] Hardships obviously occur when a party who has relied on previously sanctioned property rights has those rights extinguished under a new decision. In Blackstonian terms, however, it would be argued that this party never had a property right in the first place. Thus, to return to the fifth amendment, there was no taking.

Due to the harshness of this view, an exception to the general rule of retroactivity has been urged in cases dealing with property rights.[67] It was asserted that the exception was necessary to assure stability in property law.[68] Realists urged the application of prospective overruling to avoid the dilemma.[69]

Prospective overruling, however, is simply not possible in a case like *McBryde* where the court is ruling upon the question of ownership. Questions of ownership and determinations of title are retroactive concepts inextricably rooted in a Blackstonian view. The judge, in his search to determine title, is "deemed merely to be articulating what the law has always been."[70]

Retroactive overruling is, therefore, the only type of overruling which is consistent with the determinations of title and ownership. When such overruling does occur, for example, when the court decides that *X* and not *Y* has always been the owner of the property, it is easy to see why a claim can be made that Y's property has been taken. If the beneficiary of the decision is the State, as in *Robinson*, it is also easy to see how the overruling can be viewed as a violation of the fifth amendment if no compensation is paid. Answers to these dilemmas lie in an examination of the constitutional limits on retroactive overruling.

The first important case that requires analysis is *Muhlker v. New York & Harlem Railroad.*[71] *Muhlker* is often resurrected in discussions concerning the constitutionality of retroactive overruling.[72] The court in *Robinson* relied on it,[73] and the sugar companies frequently cited it in their post-*McBryde* arguments.[74]

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[66] *See, e.g.*, Kamau v. County of Hawaii, 41 Hawaii 527, 551 (1957) (stare decisis can be applied more flexibly in cases which do not involve "property" rights); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 442 (1974) (arguing that property rights should be handled on a prospective overruling basis).

[67] *See* Note, *supra* note 66, at 442.

[68] *See generally id.*

[69] *Id.* at 442-43, 447-48.

[70] Levy, *supra* note 65, at 2.

[71] 197 U.S. 544 (1905).

[72] *E.g.*, Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1939) [hereinafter cited as Stimson].

[73] 441 F. Supp. at 585.

[74] *See* Answering Brief for Selwyn A. Robinson at 45, Answering Brief for Olokele Sugar Co. at 46, Answering Brief for McBryde Sugar Co. at 32-33, Robinson v. Ariyoshi, Civ. No.

The facts in *Muhlker* are similar to those in *McBryde*. In 1888, when Muhlker purchased his land in New York City, New York law held that the erection of an elevated railroad was not a public purpose or street use within the meaning of an 1813 statute. The statute had been interpreted by cases to mean that the owner of real estate could bring a damage suit against the builder of an elevated railroad constructed in front of his property. The New York & Harlem Railroad built an elevated railroad in front of Muhlker's property. The New York Court of Appeals reversed its prior decisions and held that an elevated railroad was a public use within the meaning of the statute. Thus, Muhlker could not sue. The United States Supreme Court, however, reversed and held that the retroactive overruling by the New York Court of Appeals deprived Muhlker of his property without due process of law. Writing for the Court, Justice McKenna said:

> When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.[75]

Although not a careful analysis of the contract clause or the fourteenth amendment, Justice McKenna's reasoning, as an expression of the lay view, seemed eminently sensible. How could Muhlker's easements to light and air which had existed under prior law be summarily obliterated by a simple declaration of the New York Court of Appeals? If the New York Legislature or the executive branch had attempted to do this, the contract clause or the fifth amendment easily could have been invoked by Muhlker to protect his rights. Thus, the question was whether the courts could accomplish by declaration what the legislature was prohibited from doing. Under the lay view, they certainly could not. Under this view the *Muhlker* decision, regardless of whether it was based on the contract clause or the due process clause, must be right. It must be so.

The continued validity of *Muhlker* squarely conflicts with the argument made here that courts cannot "take" property through their decisional processes. Although *Muhlker* never has been explicitly overruled, it has been undermined by the judicially expressed views stated in later cases;[76] namely, that there are no property rights in the decisions of

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78-2264 (9th Cir., filed Nov. 28, 1978).

[75] 197 U.S. at 570.

[76] *See, e.g.*, cases cited in note 79 *infra*.

courts and that changes in law are not a deprivation of due process.

Ten years prior to *Muhlker*, the United States Supreme Court had taken a different position in *Central Land Co. v. Laidley*.[77] The facts in *Laidley* parallel those of *Muhlker* and *McBryde*. A West Virginia court reconstrued a statute to hold that a deed, which had been valid under an earlier statutory interpretation, was invalid and that a later deed conveyed title. Answering the claim that the new construction was an unconstitutional deprivation of property without due process, the Court stated: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States."[78] Thus, *Laidley* and *Muhlker* were at odds with each other. However, in subsequent cases the Court followed *Laidley*.[79] In fact, *Muhlker* was treated as based on the contract clause.[80] Moreover, the significance of *Muhlker* was reduced when the Court stated that the contract clause applied only to actions by the legislature.[81]

In his 1939 article, Dean Edward S. Stimson pointed out that another weakness of *Muhlker* was its reliance upon *Gelpcke v. City of Dubuque*.[82] In *Gelpcke*, a state statute authorized the issuance of municipal bonds in exchange for stock of railroad companies in order to encourage development. In several decisions the Iowa Supreme Court had upheld the constitutionality of the law. After the City of Dubuque issued bonds pursuant to the statute, the Iowa court reversed its previous decisions and invalidated the statute. The holders of the bonds sued in federal court under diversity jurisdiction to recover the money due on the interest coupons. The federal district court applied the latest Iowa decision and denied recovery. The United States Supreme Court reversed, holding that the last Iowa decision should be ignored and that the earlier decisions upholding validity should be followed.

The facts in *Gelpcke* and *Muhlker* are similar, but the procedural difference is significant. *Muhlker* was based on a direct appeal from the state supreme court decision, while petitioners in *Gelpcke* had filed suit in federal court under diversity jurisdiction subsequent to the state court decision. *Gelpcke*, however, belonged to the era of *Swift v. Tyson*[83] when

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[77] 159 U.S. 103 (1895).

[78] *Id.* at 112.

[79] Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Dunbar v. City of New York, 251 U.S. 516 (1920); Patterson v. Colorado, 205 U.S. 454 (1907).

[80] Tidal Oil Co. v. Flanagan, 263 U.S. 444, 452-53 (1924). *See* Stimson, *supra* note 72, at 51 (making the argument).

[81] Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924).

[82] 68 U.S. (1 Wall.) 175 (1864). For a discussion of this case see Stimson, *supra* note 72, at 48-49.

[83] 41 U.S. 1 (1842).

the rule of *Erie Railroad v. Tompkins*[84] was not applicable and federal courts could refuse to apply the later decisions of a state court which overruled earlier precedents upon which parties had relied. Hence, *Gelpcke* and therefore the underlying rationale of *Muhlker* are tainted by the prevailing view of the proper law to be applied in diversity actions at the time they were decided. *Gelpcke* and its progeny were completely discredited by the Court's 1938 decision in *Erie* which commanded the federal courts to apply substantive state law as determined by the state supreme court. Thus, one way of viewing *Muhlker* is that it was tenuously based on *Gelpcke*,[85] since *Gelpcke* perished after *Erie*, so did this tenuous justification for *Muhlker*.

A. Brinkerhoff-Faris *and the Substantive-Procedural Due Process Distinction*

In 1930 the Supreme Court decided *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[86] and clarified the confused situation arising after *Muhlker*. In *Brinkerhoff-Faris*, the bank claimed that the formula for assessing bank property taxes at one hundred percent of value was discriminatory because other property was assessed only at seventy-five percent of value. Six years before the action was filed, the Missouri Supreme Court had decided that the relevant statute did not give the state tax commission authority to make an adjustment and held that a suit in equity was the proper means to address unfair taxation.[87] When Brinkerhoff-Faris brought its tax refund suit in a court of equity, the Missouri court reversed its earlier decision, ruling that equity was an improper forum and the only remedy was by a claim to the tax commission. Under the new interpretation, the application to the tax commission could only be made before the tax books had been delivered to the commission. Brinkerhoff-

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[84] 304 U.S. 64 (1938). The *Gelpcke* doctrine allowed the federal district court to ignore a new interpretation by a state supreme court which "took" a person's rights. *Muhlker* was based, at least in part, on Supreme Court approval of this practice by federal district courts which had diversity jurisdiction of cases which were really "appeals" from the state supreme court. The *Erie* doctrine in 1938 eliminated the ability of the federal district court to ignore the last supreme court decision on the subject. The federal district court was thereafter compelled to apply the state supreme court decision, even though it ostensibly took property. Thus, since *Muhlker* was based on *Gelpcke* and the ability of the federal district court to choose between the earlier "nontaking" supreme court decision and the later "taking" supreme court decision, the force and effect of *Muhlker* was swept away with the advent of *Erie*.

[85] "In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque* and *Louisiana v. Pilsbury* . . . . That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this court a good while to explain." Muhlker v. New York & Harlem R.R., 197 U.S. 544, 573 (1905) (Holmes, J., dissenting) (citations omitted).

[86] 281 U.S. 673 (1930).

[87] State v. State Tax Comm'n, 295 Mo. 298, 243 S.W. 887 (1922).

Faris had delivered its tax book before it filed suit. The state decision overruling prior law therefore completely denied Brinkerhoff-Faris a remedy.

Although the United States Supreme Court reversed the Missouri Supreme Court, the Court made an important distinction between the case before it and the *Muhlker* and *Laidley* decisions. Justice Brandeis, writing for the Court, distinguished *Brinkerhoff-Faris* on the ground that it was a denial of procedural due process, as opposed to a denial of substantive due process or the kind of taking involved in *Muhlker*. "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support."[88]

Under Justice Brandeis' distinction, courts in their arbitral capacity could not commit takings in a substantive due process sense, but courts could deny due process in a fourteenth amendment, procedural due process sense. Unfortunately, the district court in *Robinson* construed *Brinkerhoff-Faris* as holding that the judiciary as well as the legislature can commit takings under the fifth amendment.[89] It is a mistake to assume that *Brinkerhoff-Faris'* use of due process includes the fifth amendment's taking provision.[90]

One commentator has asserted that Justice Brandeis' procedural-substantive due process distinction is not justified.[91] Upon deeper analysis, this rather unassuming distinction presents a brilliant means of resolving problems of federalism and separation of powers. It also constitutes a framework for conceptual clarification of the confusion surrounding the question of whether courts can take property.

B. No Substantive Due Process Claim in Robinson

The first key implication from a proper reading of *Brinkerhoff-Faris* is that there is no substantive due process claim in *Robinson*. In other words, courts in their arbitral capacity just do not "take." Thus, there is no basis for federal question jurisdiction. As Justice Brandeis stated in *Brinkerhoff-Faris:* "Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review . . . ."[92]

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[88] 281 U.S. at 681.

[89] 441 F. Supp. at 580. The error probably arose from the confusion engendered by the fact that fifth amendment substantive due process is made applicable to the states through the 14th amendment due process clause.

[90] *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

[91] Stimson, *supra* note 72, at 54.

[92] 281 U.S. at 681 (footnote omitted). The *Laclede* case refers to State v. State Tax

In terms of balancing the power between federal and state courts, denying the federal courts jurisdiction in an action based on the theory of a taking by a state supreme court decision serves the important purpose of preserving state court sovereignty. One can easily imagine the problems that would arise if federal courts could assume jurisdiction anytime a so-called taking by a state court allegedly occurred.

First, how would the federal court determine whether a taking has occurred? Justice Stewart in *Hughes v. Washington*[93] suggested a test of "unexpectedness."[94] Since federal courts have jurisdiction to determine jurisdiction, it would be left to the federal courts to fashion this law of unexpectedness and to determine when collateral attacks on state court decisions are permissible. If every "unexpected" state court decision were subject not only to United States Supreme Court review, but also to attack by a federal district court on the basis of surprise, uncertainty as to the finality of state supreme court decisions would persist well after their rendition. Even if the district court dismissed a complaint, the plaintiff would have the opportunity to appeal that dismissal to a circuit court of appeals and to get a second chance at review by the Supreme Court.

Second, the use of federal question jurisdiction based on an unexpected state decision does great violence to the principle of federalism set forth in *Rooker v. Fidelity Trust Co.*,[95] that the federal district courts are not to act as appellate courts of the states. The attempt to act in such an appellate capacity would clearly undermine the principle expressed in 28 U.S.C. § 1257 (1976)[96] that the United States Supreme Court has exclusive jurisdiction to review decisions of state courts. Furthermore, it would run counter to the unmistakable intent of Congress to refrain from giving

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Comm'n, 295 Mo. 298, 243 S.W. 887 (1922), *discussed in* text accompanying note 87 *supra*, where the State brought an action on behalf of Laclede Land & Improvement Co.

[93] 389 U.S. 290 (1967).

[94] *Id.* at 296 (Stewart, J., concurring).

[95] 263 U.S. 413, 416 (1923).

[96] 28 U.S.C. § 1257 (1976):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

the lower federal courts power to review state court decisions.[97]

Third, granting federal courts such jurisdiction would empower them to control the rate of change in state law and in effect to decide questions of state law. If federal courts can void state supreme court decisions, as the court did in *Robinson,* then they possess a powerful tool to mold state law simply by determining what that law may not be.

Fourth, *Robinson*-type intervention would increase the case load of federal courts thereby aggravating the concern shown by Congress and the Supreme Court to reduce the federal court workload.[98] Litigation would increase in two ways: First, since every state supreme court decision which overrules prior decisions or departs from a previously expected result could, in effect, be appealed to federal district courts, the federal district courts would assume the appellate workload of the state courts; second, since the direct path of state court appeals to the Supreme Court would no longer represent a final determination in view of federal district court review, litigants would perceive the state court system as useless and tend to seek federal jurisdiction in cases where the state courts have concurrent jurisdiction.

Although there is no indication that Justice Brandeis developed the procedural-substantive due process distinction with an eye for these state-federal problems, the dichotomy serves the very important function of preserving state sovereignty in our federalist system. The intervention based on procedural due process which Justice Brandeis sanctioned in *Brinkerhoff-Faris* avoids these institutional problems since it does not allow the court to judge the substance of the state court decision but only requires an adjudication of the fairness of the proceedings. The logical remedy in such a situation would be to remand the case to the state court for it to hold a proper hearing. Thus, there would be no "voiding" of the state supreme court decision as in *Robinson.* The state court would only be ordered to provide an adequate opportunity to be heard.

C. When Courts Legislate

Underlying this distinction between procedural and substantive due process is a rather simple view of the intentions of the Framers of the Constitution that the fifth amendment was meant to apply only to the executive and legislative branches and not to the judicial branch of government. Viewed in this light, the fifth amendment fits in with other constitutional provisions that prohibit the executive and legislative branches of government from diminishing vested property rights without compen-

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[97] *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity,* 64 CALIF. L. REV. 943, 945-48 & 947 n.22 (1976).

[98] *See* authorities cited in *id.* at 943 n.1.

sation. For example, the contract clause of the Constitution,[99] which prohibits states from passing laws that impair contracts, has been held applicable only to the actions of legislatures and not courts.[100] Similarly, the ex post facto clause[101] of the Constitution prohibits Congress and the State legislatures from passing statutes that retroactively alter criminal laws, but it also has been held inapplicable to decisions by courts.[102]

Placed in a framework where the contract clause prohibits legislatures from destroying existing contract rights and the ex post facto clause prevents legislatures from retroactively applying criminal laws, the fifth amendment protects existing property rights from legislative destruction. All these provisions were intended by the Framers of the Constitution and the Bill of Rights to be the substantive limits on the power of the legislature and not the judiciary.[103]

Since Blackstonian jurisprudence was clearly the dominant legal philosophy at the time the Constitution was framed, it is understandable that the original Framers applied these provisions only against the actions of the legislature and not the judiciary. The "government" which needed limiting was the legislature, not the judiciary. It was the legislature that "made" laws. To the Blackstonian mind, the judiciary did not make law but rather "found" the true law. Thus, a judge was not a lawmaker and did not act directly against the individual. In a Blackstonian sense, only legislatures could deprive persons of property, and courts would not be subject to the limitations of the fifth amendment.

Obviously, the concept that courts never make laws has changed.[104] Courts have the power to rewrite statutes,[105] reopen schools,[106] control

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[99] U.S. CONST. art. I, § 10: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . "

[100] Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).

[101] U.S. CONST. art. I, § 9, para. 3.

[102] Ross v. Oregon, 227 U.S. 150 (1913) (courts not prohibited from giving retroactive effect to overruling decisions).

[103] It should be noted that the fifth amendment "takings" provision is only a limitation on the actions of the Federal Government and not state governments. From the time of the Constitution until 1868 when the 14th amendment was passed, the courts used the contract clause to prohibit state legislatures from depriving individuals of property rights. Property was thus defined and protected on the basis of contract rights. In 1897, the Supreme Court held that the fifth amendment applied to the states through the 14th amendment due process clause, and thus there was no longer a need for reliance on the contract clause. *See generally* Stimson, *supra* note 72, at 31 n.4.

Since the contract clause clearly has no applicability to the actions of courts, the protection of property from retroactive laws prior to 1868 extended to cover only legislative and not judicial action. There is no indication that the nature of the fifth amendment changed after 1868 such that the protection of property from retroactive laws was extended to judicial action.

[104] *See* Levy, *supra* note 65, at 2.

[105] *See, e.g.*, State v. Huelsman, 60 Hawaii 71, 588 P.2d 394 (1978) (extended-term sentencing).

[106] *See* Griffin v. County School Bd., 377 U.S. 218, 233 (1964).

prison admissions,[107] redistribute tax revenues,[108] design legislative reapportionment schemes,[109] and order bussing of public school children.[110] Not much is left of the old adage: the legislature makes the laws and the courts interpret them. Some ask whether courts should be allowed to legislate so freely.[111] But the question does not concern the wisdom of such action since all might agree that too much legislating would be bad practice. The real question is whether the limits of judicial legislation are to be self-imposed by the state courts or enforced by some outside institution such as a federal district court. Existing appellate jurisprudence is somewhat schizophrenic;[112] while adhering to Blackstonian principles in applying property concepts, everyone recognizes that courts can reach results indistinguishable from legislative actions.

When a court goes too far in legislating, as the court is accused of having done in *McBryde*, adherents of the lay view find it logical to restrict the courts with the same constitutional limitations that apply to legislative actions. The court in *Robinson* similarly expressed this view:

> It [the *McBryde* decision] was strictly a "public-policy" decision with no prior underlying "legal" justification therefor. The majority wanted to see streams running down to the sea on an all-year-around basis. Knowing that this was squarely contrary to the accepted state of water rights law of Hawaii, the court first declared that the rule of stare decisis did not apply to water rights law. In this case stare decisis interfered with the court's policy![113]

Thus, another of the underlying rationales of the *Robinson* opinion is the belief that when courts act in a legislative, policymaking mode they, too, should be subject to the same substantive limits placed on legislatures. The problem with this approach is that it would essentially undermine the sovereignty and mediation function of state judicial systems.

First, judges always, in a crude sense, have "made" law. This is no modern phenomenon. The fact that we are now willing to admit that courts legislate is a rather recent development. Moreover, it is an intellectually more honest view of the tasks courts have been required to perform. Creation and interpretation of law cannot be clearly separated. Although courts do not create law by writing statutes, they certainly create law by filling statutory gaps and giving content to constitutional lan-

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[107] *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. State, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

[108] *See* Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (requiring transfer of public funds to improve prison conditions).

[109] Reynolds v. Sims, 377 U.S. 533, 586 (1964).

[110] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

[111] *See, e.g.*, Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[112] Levy, *supra* note 65, at 3.

[113] 441 F. Supp. at 566-67.

guage. In each case, the real lawmaker is the one with the final authority to say what the law is.

> There may be justification in a clerical tradition for unwillingness to recognize the responsibility of the law interpreter in himself giving the law its direction. In the theological tradition, the church doctors or the rabbinical judges regarded themselves as construing the word of God. The word of God must remain untouched, but nonetheless the interpreters had to find a way of giving to it their own human application for their own times. God said in the Old Testament: an eye for an eye. And that fiat could not be altered. But the judicial sages regarded such intentional maiming as inhumane. Thus an eye for an eye remains an eye for an eye; but it means, said the sages, due reparation. We lawyers, however, are not operating in a theological tradition—at least not professedly so—and once appellate judges face honestly their ineluctable lawcreating function, this critical pivot of our legal system will no longer be "among the most neglected questions of legal scholarship."[114]

The advancing realism of courts has provided the basis for innovative techniques such as prospective overruling. The fact that we are now willing to describe the legal process in an honest fashion should not be used to place the courts under the same constraints as the legislature, constraints which would seriously impair the ability of the courts to serve their intended functions.

Second, equating courts with legislatures would skew the judicial process by requiring, in effect, prospective overruling in cases dealing with contracts, property, and criminal law where dispute resolution is only meaningful in a retroactive context. Propsective overruling would clearly contradict retroactive concepts in the law such as ownership.

Third, although the intent of the court in *Robinson* may have been only to intervene in cases of the most egregious policymaking, the problem lies in agreeing upon the criteria to be employed to determine which decisions are truly "policy" decisions. What criteria would a federal judge use? It seems inevitable that the thrust of the inquiry would consider the motivations and subjective views of the state court judges. For example, the federal court would be put in the position of inquiring whether the court in *McBryde* intended to act in a legislative sense. Such an inquiry would be impossible if not inherently misleading.

Fourth, courts often legitimately act in a policymaking sense. In attempting to construe statutes in a manner consistent with the intent of the draftsmen, courts must discern the policy to be effectuated. When dealing with common law issues where there is no statutory language to guide them, the courts often make law by arranging it to serve broadly stated public policies. It was in this type of situation that the court in *McBryde* acted. The court perceived the law of water rights to be unset-

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[114] Levy, *supra* note 65, at 5-6 (footnotes omitted).

tled.[115] It seized the policies evidenced by a long-ignored statute to serve as a guide.[116] Arguably, the court made law only in the sense that all courts that operate in voids or areas of uncertainty make law. Intervention by a federal court based upon a fear that a state court is acting in a legislative mode would create the same four federal-state institutional problems mentioned earlier in Part IIB.[117]

Thus, for a number of reasons based on practical considerations as well as legal theory, there can be no substantive due process claim arising out of a state supreme court decision which changes law. There is no property, in a fifth amendment sense, in the decisions of a court. Hence, there is no property to be taken by a court which chooses to overrule a prior decision. Furthermore, in a jurisprudential sense, courts which determine ownership, cannot "take" property. Moreover, the Framers of the Constitution, as part of the scheme to limit the legislature, could not have intended the fifth amendment to apply to the decisions and judgments of courts. Lastly, while the Supreme Court in *Muhlker* implied that the fifth amendment could, in certain situations, apply to courts, that decision has not been followed and has been superseded by the procedural-substantive due process distinction of *Brinkerhoff-Faris*.

III. Procedural Due Process

Brinkerhoff-Faris clearly implies that a procedural due process question may exist upon which to base federal jurisdiction. Petitioners in *Robinson* understandably raised a number of due process claims, specifically as follows: (1) That they were not granted the right to argue the constitutionality of the taking on rehearing before the Hawaii Supreme Court, (2) that the Hawaii Supreme Court improperly failed to give res judicata or stare decisis effect to previous cases, (3) that the Hawaii Supreme Court resolved the case in a manner not urged by any of the parties, and (4) that the Hawaii Supreme Court ruled on issues not properly brought before it. Although detailed analysis of these claims is beyond the scope of this article, a few brief comments are appropriate.

As to issue (1), that failure to allow argument on the constitutional taking issue was a denial of due process, the first question is whether there was a right to a rehearing in the first place.[118] If not, it is difficult to

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[115] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 181-87, 504 P.2d 1330, 1335-39 (1973), *cert. denied*, 417 U.S. 976, *cert. denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

[116] *Id.* at 185-87, 191-93, 504 P.2d at 1338-39, 1341-42.

[117] See text accompanying notes 94-98 *supra*.

[118] Arguably, there is no right to rehearing under the Hawaii Supreme Court Rules, which provide:

> **Rehearing.** (a) Time and Form. A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is

construct a constitutional right to argue all issues once a rehearing was granted. Since rehearing is discretionary,[119] not a matter of right, the court must also have discretionary power to limit the issues considered on rehearing. Whether the court abused its discretion by denying argument on the alleged constitutional issue, thereby violating due process, is inevitably a question controlled by the substantive due process issue.

In any event, if it is true that courts cannot take property, refusing to allow argument on that ground was harmless error. The court in *McBryde* apparently decided that the constitutional claims were not substantial. If it is true that courts cannot take, then the Hawaii Supreme Court was essentially correct in its judgment that the issue was inappropriate on rehearing.

As to point (2), that the supreme court failed to give res judicata or stare decisis effect to previous cases, the question of the court's right to overrule is, in effect, merely a restatement of the original taking issue. Whether res judicata must be applied is a question of state law to be determined by the highest court of the State.[120] Thus, the Hawaii Supreme Court's implicit or explicit rejection of prior state law in applying res judicata in *McBryde* is clearly within the court's power to fashion the res judicata law of the State.

Suppose that this new application of law or failure to apply res judicata is a radical departure from previous Hawaii law. Does that raise a constitutional question? It cannot create a fifth amendment claim if one agrees with the analysis that courts cannot take. Does it nevertheless constitute a procedural due process violation? Arguably not, since the remedy would not be procedural. In other words, if the federal court were to intervene on the basis that the state supreme court's failure to apply res judicata was a denial of procedural due process, it would be forcing the state court to modify its substantive law of res judicata;[121] that is, to confine the holding in *McBryde*. to prior decisional law. The remedy would dictate

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granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) Argument; Reply; Allowance. No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

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[119] Since there is no contrary statutory requirement, the supreme court is free to deny petitions for rehearing, as it frequently does. *See, e.g.*, American Ins. Co. v. Takahashi, 59 Hawaii 102, 577 P.2d 780 (1978) (rehearing denied).

[120] Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939) (res judicata effect of state judgment is governed by state law). *See* Comment, *Res Judicata in the Federal District Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

[121] *See* text accompanying notes 141-53, *infra*.

the substantive outcome in the case and therefore would not be procedural. Such a claim would not be based on the procedural due process, opportunity-to-be-heard type of violation found in *Brinkerhoff-Faris,* but rather upon a substantive due process violation derived from the notion that courts can take, a notion discussed and rejected in the preceding section.

Issues (3) and (4) raise the problem of surprise occurring in the appellate process. Petitioners complained that the result reached was unexpected and that the decision was based on issues not raised. If the court's decision is not based on the legal issues presented, then the court's language must be dicta[122] and therefore not binding on the parties before the court. Thus, to the degree that the statements in *McBryde* are not based on any facts implicitly or explicitly brought before the court, they are harmless to the parties and, moreover, not particularly unusual in the appellate process. For example, if the factual issue of transporting water outside of the watershed were not part of a question of law essential to the judgment in *McBryde,* then the court's statements prohibiting transfer must be dicta. In essence, the court would be indicating how it would rule in the future if a party brought a transfer-of-water case before it.

Similarly, any part of the *McBryde* decision that was decided in a manner not urged by the parties and for which there was no *factual* basis must be dicta. If, however, there was some factual basis, the situation is not very different from many cases where courts arrive at a decision based on judicially noticed facts.[123] For example, if *X* and *Y* bring a declaratory judgment action to determine which of the two of them owns Iolani Palace,[124] is the state court prevented by any substantive doctrines from declaring that the State of Hawaii is the owner? Would such a decision be void? Is not the question of whether anyone other than *X* or *Y* owns Iolani Palace implicitly raised by their action, or is the court required to choose between *X* and *Y*?

In any event, a defect based on procedural due process is more easily

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[122] *See* R. CASAD, RES JUDICATA 8 (1976):

> Declarations of law or of the meaning of laws made by the court have no binding force as precedent for later cases unless the declaration was made in resolving a question of law that was necessary to the decision of the case before the court. Only such declarations are "holdings" having stare decisis effect. Other statements of law contained in the court's opinion are dicta which may or [may] not be followed in later cases . . . .

[123] For a general discussion of judicial notice, see 10 MOORE'S FEDERAL PRACTICE § 200.01, at II-1 (2d ed. 1979) [hereinafter cited as MOORE'S]. It is well established that an appellate court can take judicial notice of facts even though the trial court did not do so. *In re* Pioneer Mill Co., 53 Hawaii 496, 497 n.1, 497 P.2d 549, 551 n.1 (1972); 10 MOORE'S, *supra,* at II-3. Indeed, the Hawaii Supreme Court has expressly taken judicial notice of land ownership in a case which rejected the State's claim to title. State v. Midkiff, 49 Hawaii 456, 460, 421 P.2d 550, 554 (1966) (judicial notice that Victoria Kamamalu inherited vast land from her mother who died in 1839).

[124] Iolani Palace, now an historical landmark in Honolulu, was once the residence of Hawaii's monarchs.

remedied than one based on substantive due process. Even if a federal court were to find a denial of procedural due process, as in *Brinkerhoff-Faris,* the proper relief would be to remand the case to the state court to be redetermined under fair and adequate procedures. Thus, even assuming procedural due process violations were committed in *McBryde,* the federal district court could not substitute its own judgment on the substantive legal issues.

IV. Even Assuming that Courts Can "Take"— The Court in *Robinson* Should Have Refused Jurisdiction

Suppose that all of the previous discussion is incorrect and that state courts can "take" through their decisions. What then is the proper response of a federal district court? In this section it is argued that even if courts can take, the court in *Robinson* was *compelled* to refuse jurisdiction. First, it is contended that the doctrine expressed in *Rooker v. Fidelity Trust Co.,*[125] that the lower federal courts have no power to review state court decisions, deprives the federal court of jurisdiction. Second, it is contended that res judicata barred the federal court from deciding the *Robinson* case. Lastly, the question of whether a claim under 42 U.S.C.§ 1983 (1976) constitutes an exception to these two rules is examined and answered in the negative.

A. *The* Rooker *Doctrine—Lack of Jurisdiction*

One of the critical issues in *Robinson* is whether the facts of that case fall within the rule set forth in *Rooker v. Fidelty Trust Co.,* that the lower federal courts have no jurisdiction to act as appellate courts of the states.[126] As in *Robinson,* the plaintiff in *Rooker* was the losing party in a

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[125] 263 U.S. 413 (1923).

[126] Most recently, the district court applied *Rooker* principles to another Hawaii case. Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979). The continuing vitality of the *Rooker* doctrine is also manifest in circuit court rulings. *See, e.g.,* Williams v. Washington, 554 F.2d 369, 370, 371 (9th Cir. 1977) (section 1983 claimed barred by Younger v. Harris, 401 U.S. 37 (1971); *Rooker* mentioned); Smiley v. South Dakota, 551 F.2d 774, 775 (8th Cir. 1977) (*Rooker* grounds; section 1983 claim noted); Adkins v. Underwood, 520 F.2d 890, 893 (7th Cir.), *cert. denied,* 423 U.S. 1017 (1975) (section 1983 claim barred; *Rooker* argued); Jack's Fruit Co. v. Growers Marketing Serv., 488 F.2d 493, 494 (5th Cir. 1973) (procedural due process claim barred by *Rooker);* Tang v. Appellate Div., 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied,* 416 U.S. 906 (1974) (section 1983 claim barred by *Rooker*); Hutcherson v. Lehtin, 485 F.2d 567, 568-69 (9th Cir. 1973) (section 1983 claim barred by *Rooker;* res judicata noted); Roy v. Jones, 484 F.2d 96, 99 n.11 (3d Cir. 1973) (section 1983 action barred; *Rooker* noted); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481, 484 (9th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974) (section 1983 claim barred by *Rooker*); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973) (procedural due process claim barred by *Rooker*); Duke v. Texas, 477 F.2d 244, 253

state court proceeding. After an adverse decision in state court, he turned around and sued in federal district court to set aside the state court judgment. The district court dismissed for lack of jurisdiction. The Supreme Court affirmed saying:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character . . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.[127]

The Court reasoned that the lower federal courts have no power to act as appellate courts in light of the fact that Congress has never granted them that capacity.[128] Section 25 of the First Judiciary Act[129] vested appellate review of state courts solely in the Supreme Court. *Rooker* was only a logical derivation of the exclusiveness of Supreme Court review under 28 U.S.C. § 1257 (1976).[130] As Professor David P. Currie argues, the general federal question grants of jurisdiction embodied in 28 U.S.C. §§ 1331 and 1343 (1976) should not be construed to undermine section 1257's exclusive grant of review to the Supreme Court, for granting federal district courts jurisdiction to review state court decisions would subvert section 1257's requirement that an appeal to the Supreme Court be timely filed.[131] Moreover, federal district court review would undermine section 1257's requirement that review be from the highest court of the State.[132] *Robinson*-type intervention, where a new trial is held, also would be contrary to the Supreme Court's requirement that review of state decisions be limited to the facts on the state court record.[133] Professor Currie states:

> I suspect that the Supreme Court was chosen to review state court judgments because only it had sufficient dignity to make federal review of state courts

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(5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) (section 1983 claim barred on *Younger* and *Rooker* grounds); Community Action Group v. City of Columbus, 473 F.2d 966, 973 (5th Cir. 1973) (constitutional claim barred under *Rooker*); Bricker v. Crane, 468 F.2d 1228, 1231-32 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (section 1983 claim barred by res judicata and *Rooker*); Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970) (freedom of religion claim barred by *Rooker*); Brown v. Chastain, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (due process and equal protection claim barred by *Rooker*).

[127] 263 U.S. at 416.

[128] *Id.*

[129] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85.

[130] *See* 263 U.S. at 416. The 1923 *Rooker* decision invoked section 237 of the amended Judicial Code, *see* Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726. The current codification was based on that section of the Judicial Code. 28 U.S.C. § 1257 (1976).

[131] *See* 263 U.S. at 416; Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 322-23 (1978) [hereinafter cited as Currie].

[132] *See* Currie, *supra* note 131, at 323.

[133] *Id.* at 323-24.

> reasonably palatable; that the highest-state-court requirement was designed to preclude federal interference unless and until state courts had a full opportunity to avoid that clash; and that the time limits on Supreme Court review were meant to protect parties prevailing in state courts from stale challenges to their judgments. If any of these surmises is accurate, *Rooker* is right.[134]

Petitioners in *Robinson,* of course, did not characterize their action as an appeal or review of a state court judgment, but the form of the pleadings should not be allowed to prevail over what clearly was an appeal.[135] As the Court said in *Rooker,* a litigant "cannot be permitted to do indirectly what he no longer can do directly."[136]

Although disguised as an original action, with State officials as the "new" defendants and a "new" claim that the state court "took" their property, the *Robinson* action was clearly an attempt to avoid the effects of the *McBryde* state court determination. In essence, both sides are "appealing" to a different court. The ultimate issue in *McBryde* and *Robinson* was really the same — ownership of water rights.[137] The *Rooker* doctrine was therefore circumvented merely by naming those State officials who must enforce a state court decree as the new defendants and then claiming the federal suit was a new and original action.[138] It is illogical to suppose that the policies inherent in *Rooker* might be so easily undermined.

The *Rooker* doctrine is merely another manner of expressing the idea that courts cannot take and that state decisions which overrule prior law do not create a substantive due process federal question.[139] The difference between the *Rooker* doctrine and res judicata is that *Rooker* is jurisdictional and therefore need not be raised by the parties. The court can dismiss the action sua sponte.[140] Thus, the court in *Robinson* should have followed *Rooker* and dismissed on its own motion.

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[134] *Id.* at 323 (footnote omitted).

[135] *Id.*

[136] 263 U.S. at 416.

[137] *See* text accompanying notes 19-35, 40 *supra.*

[138] Currie, *supra* note 131, at 333-34.

[139] Since *Rooker* invalidates (as lacking jurisdiction) direct or indirect "disguised" appeals of state court decisions, it thus also invalidates the federal question used to gain jurisdiction. Two different ways of looking at this are: (1) *Rooker* held that a federal question cannot be conjured in order to gain appellate jurisdiction of state cases; and (2) if a case is an "indirect appeal" of a state decision, then the question used to gain jurisdiction is not "federal." Thus, if one can determine that the federal action is an attempt to appeal a state action; that is, to avoid the direct consequences of a state decision, then the federal court must dismiss for lack of jurisdiction. Ergo, the question presented to the court — such as the claim that the court "took" property — cannot be, by definition, a substantial federal question.

[140] Currie, *supra* note 131, at 324.

B. *Res Judicata*

In his recent article, Professor Currie also reminds the reader of the often ignored use of res judicata to preclude relitigation of an action in federal court subsequent to a state court determination.[141] When the first action is brought in state court and the second in federal court, the federal court is compelled to apply res judicata if the substantive res judicata law of the state so requires.[142] Although discussing this point,[143] the court in *Robinson* did not mention a critically relevant federal statute, which states:

> [J]udicial proceedings [of any court of any . . . State, Territory, or Possession] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[144]

Thus, the court would have to act as if it were a Hawaii trial court and apply res judicata if the law of Hawaii, as developed by the Hawaii Supreme Court, would so require.[145]

Three initial objections might be raised against applying res judicata in *Robinson*. First, it might be argued that the federal proceeding involved a different action. Second, it might be asserted that res judicata does not apply if the parties to the second, federal action are different from those in the original, state action. Lastly, it may be argued that res judicata should not apply to actions based on a section 1983 claim.[146] The first two

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[141] *See id.* at 325-50. The purpose of res judicata is to "bring an adjudication to a final conclusion with a reasonable promptness and within reasonable limits of cost." F. JAMES & G. HAZARD, CIVIL PROCEDURE 530 (2d ed. 1977). The thrust of res judicata is a search for some point of finality in litigation: "To litigate the same matter twice or more would impose costs on the parties and the burdened and subsidized judicial system. Indeed, if a judgment were not conclusive as to what it actually determined, 'the adjudicative process would fail to serve its social function' of resolving disputes." Currie, *supra* note 131, at 325 (footnote omitted).

[142] Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939).

[143] 441 F. Supp. at 583-84 & n.35.

[144] 28 U.S.C. § 1738 (1976).

[145] The Hawaii Supreme Court has held that res judicata "precludes a second suit based on the same cause of action involved in a prior suit between the same parties or their privies." Henderson v. Pence, 50 Hawaii 162, 163, 434 P.2d 309, 310 (1967). *See* Yuen v. London Guarantee & Accident Co., 40 Hawaii 213, 223 (1953); text accompanying notes 120-21 *supra*.

[146] 42 U.S.C. § 1983 (1976):

> **Civil action for deprivation of rights**
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> Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

arguments will be discussed in this subsection and the last in the following subsection.

The first argument against applying res judicata in *Robinson* is that the claim in the federal proceeding, namely, that the *McBryde* decision unconstitutionaly took property, was truly different from the issue raised in *McBryde*, a suit seeking a declaration of ownership interests. Assuming that courts can take, one then must consider the legal defintion of a claim in order to determine whether these are the same claims for res judicata purposes. A claim includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose.[147] Arguably, the *McBryde* and *Robinson* actions are the same in that both arise out of the same factual situation.[148]

In *McBryde*, the action was a declaration of ownership rights. In *Robinson*, the allegedly new action sought a determination of whether the state adjudication of ownership rights in *McBryde* was correct. In essence, both cases concerned the same "ultimate practical question"[149] of who owns the water rights. A different view could only be based on the untenable argument that an appeal from a trial court is a different claim from the claim brought before the trial court.

Secondly, it might be argued that because there are different parties in *McBryde* and *Robinson* res judicata should not apply.[150] In *McBryde* the suit was between McBryde Sugar Company and Gay & Robinson. In *Robinson*, McBryde Sugar Company, Gay & Robinson, and others sued State officials to enjoin the consequences of the *McBryde* decision. If *McBryde* and *Robinson* do involve the same claim or ultimate practical question, then to allow avoidance of res judicata by rearranging the parties and adding defendants who are responsible for carrying out the original decision would represent the triumph of form over substance. Petitioners should not be allowed to escape the well-settled rule that the binding effect of a judgment is defined by the law of the rendering jurisdiction.[151] Assuming that *Robinson* involves new parties, the *McBryde* decision still governs the situation under the doctrine of collateral estoppel.[152]

If res judicata could be subverted so easily, then civil litigants who lose at trial could eschew the appellate process by refiling their case in an-

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[147] RESTATEMENT (SECOND) OF JUDGMENTS § 71(1) (Tent. Draft No. 1 (1973)).

[148] *See* note 40 *supra*.

[149] Currie, *supra* note 131, at 341.

[150] *Id.* at 331-34.

[151] 28 U.S.C. § 1738 (1976); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 94, 95 (1971).

[152] *See, e.g.*, Parklane Hosiery, Inc. v. Shore, 99 S. Ct. 645 (1979) (collateral estoppel proper even when it denies defendant a jury trial in a civil matter); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942).

other trial court and adding sheriffs or others responsible for enforcement as new defendants.[153] Such evasion of the statutorily protected doctrine of res judicata should not be tolerated by the federal courts.

C. *The Section 1983 Exception*

The last argument against applying res judicata in *Robinson* is a claim that 42 U.S.C. § 1983 (1976) should constitute an exception to both the *Rooker* doctrine and res judicata. Petitioners in *Robinson* sought federal jurisdiction based on claims arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). That section essentially provides private parties legal or equitable redress for deprivations of federal constitutional or statutory civil rights by persons acting under color of state law.

In effect, petitioners claimed that threatened enforcement of the *McBryde* decision would constitute a taking in violation of the fifth amendment. Since the justices of the Hawaii Supreme Court were not named as defendants in the complaint, they were not technically the "person", within the section 1983 context, who had allegedly deprived petitioners of their rights. Since the State had not attempted to enforce the *McBryde* decision, there was no way to know whether the State's action would constitute a taking. It was really the action of the Hawaii Supreme Court in *McBryde* that provided the only logical basis for the complaint. Absent the *McBryde* decision there would have been no reason to seek a declaratory judgment on the taking issue and to seek an injunction against future, albeit undefined, state enforcement. Thus, although the supreme court was not named as a defendant, only its conduct could form the basis for a section 1983 claim.

Therefore, the same objections to the assertion of federal question jurisdiction apply to jurisdiction under section 1983. If there is no fifth amendment claim based on the decision, there is no section 1983 claim. If the State were threatening to act in a manner that constitutes a taking of petitioners' rights without just compensation, then petitioners may have had a legitimate 1983 claim. However, there was no indication that the State was about to act in a confiscatory manner.

Petitioners and the court in *Robinson* assumed that the mere declaration of ownership in the State by virtue of the *McBryde* decision constituted a confiscatory act. This is not necessarily true. The term "ownership," without clarification, is meaningless in water rights.[154] Ownership

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[153] For example, in a suit *X* v. *Y*, *X* loses a money judgment decision to *Y*. *X* brings suit against the sheriffs charged with executing the judgment in another trial court. The suit is called *X* v. Sheriffs. Is this a new action or just an appeal of the original decision? Should res judicata be denied by the second trial court simply because new parties have been added? Obviously not!

[154] *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957) [hereinafter cited as Trelease] (discussion of various meanings associated with State

of water by the State, as evidenced in most other jurisdictions asserting ownership, simply means that the State has the power to control and regulate the waters if it chooses to do so at all.[155] Hence, the issue of confiscation was not ripe.[156] Life on the Hanapepe River goes on as before. If the State chose to control and regulate the water in such a manner as to completely prevent petitioners from using the water, such conduct might constitute a confiscatory act for which fifth amendment protection could be invoked. At that point a suit to determine whether a taking has occurred would be more appropriate. Until then, the injunction in *Robinson* is a suit to enjoin undefined state action.

Moreover, the power of the State to control and regulate the waters does not depend on the declaration in *McBryde* that the State is the owner of the water. Rather, the power to control and regulate is derived from the inherent police power of the State.[157] Thus, the State was not given anything under *McBryde*, nor was anything taken from petitioners. There is a possibility of a taking under future regulation, but the issue was not ripe in *Robinson*.

Without the threat of tangible governmental action which may constitute a taking, there was no controversy and no section 1983 action over the so-called ownership issue. The *Robinson* suit is simply an action to prevent unspecified government control and regulation of water. Once it is agreed that the State inherently has the power to regulate waters in a manner that does not constitute a taking, there is no controversy left. The *Robinson* action is then reduced to an action similar to an overly broad suit against a state to enjoin any and all control or regulation of land through zoning. Such an injunction can only be sought against particularized state conduct.[158]

"ownership" of water: *res nullius, res communes, publici juris,* and *res publicae*); text accompanying notes 175-76 *infra*.

[155] *See id.* at 640-45.

[156] In other words, the taking issue may have been purely hypothetical and thus not a case or controversy under article III of the Constitution. *See* ILWU Local 37 v. Boyd, 347 U.S. 222 (1954); United Pub. Workers v. Mitchell, 330 U.S. 75, 89-91 (1947).

[157] *See, e.g.*, HAWAII CONST. art. IX, § 1, art. XI, §§ 1, 7. Prior to ratification of constitutional amendments in 1978, similar police powers were explicitly recognized in the constitution. *See id.* art. VIII, § 1 (1968, renumbered art. IX, § 1, 1978); *id.* art. X, § 1 (1968, amended and renumbered art. XI, § 1, 1978).

[158] Plaintiffs arguably did not prove the real or threatened harm necessary to support the injunction. *Cf.* Massachusetts State Grange v. Benton, 272 U.S. 525, 527 (1926) ("[N]o injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."). Plaintiff's suit in *Robinson* was based on the assumption that the *McBryde* decision granted fee-simple-like *res publicae* ownership to the State and that the State planned to confiscate waters presently used by the sugar companies and sell it back to them. Reading *McBryde* in the context of water rights law in general does not sustain the assumption of *res publicae* ownership. *See* Trelease, *supra* note 154. Upon viewing the future plans of the State in terms of water management, the perceived threat of "sale" also was not reasonable. *See* STATE WATER COMM'N, HAWAII'S WATER RESOURCES, DIRECTIONS FOR

Assuming, however, that a valid section 1983 claim existed, it is necessary to consider whether the statutory action provides an exception to res judicata. A number of commentators have suggested that, because of the strong federal policy underlying section 1983, prior state court determinations should not be res judicata as to later federal court proceedings.[159] The Supreme Court has not ruled on this issue. The majority of lower federal courts have held that res judicata applies.[160] In other words, in the view of these courts, section 1983 does not create an exception to the statutory requirement that federal courts give full faith and credit to state court judgments.[161]

The court in *Robinson* viewed the res judicata issue in slightly different terms. According to the court, petitioners' action should not be barred by res judicata because *it was not raised and could not have been raised* by parties in the *McBryde* proceeding.[162] There is disagreement within and among the circuits as to whether section 1983 claims which were not raised in the state proceedings are barred in the federal proceedings.[163]

THE FUTURE, A REPORT TO THE GOVERNOR (1979) (discussing and proposing a permit system to manage the *use* of water resources but not the *sale* of water to raise state revenues). Thus the perceived harm in *Robinson* was based on two unfounded assumptions.

[159] *See* Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); McCormack, *Federalism and § 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. II), 60 VA. L. REV. 250 (1974); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). For a contrary view and an excellent analysis, see Currie, *supra* note 131.

[160] Ten circuits have applied res judicata to subsequent section 1983 actions. *See* Davis v. Towe, 526 F.2d 588 (4th Cir. 1975) (mem.); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); Metros v. United States Dist. Ct., 441 F.2d 313 (10th Cir. 1971); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955), *cert. denied*, 351 U.S. 955 (1956). These cases are cited in Currie, *supra* note 131, at 332 n.106.

[161] *See* text accompanying note 144 *supra*. For further discussion, see Currie, *supra* note 131, at 327-32.

[162] 441 F. Supp. at 584 n.35: "[P]laintiffs claimed wrong in this federal action was not within any of the issues raised and tried. . . . No party including the State could have anticipated what the Supreme Court did, sua sponte . . . . The Supreme Court refused to allow plaintiffs to argue the constitutional issues raised by this federal action."

[163] Circuit courts have differed as to the res judicata effect to be accorded a state court judgment in federal court when the constitutional claim is asserted in federal court but was not raised in state court. *Compare* Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (res judicata is a bar), *with* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (res judicata is not a bar).

The confusion among courts as to the general applicability of res judicata to section 1983 claims was noted by the Sixth Circuit in Getty v. Reed, 547 F.2d 971 (6th Cir. 1977):

> If what we have said thus far suggests that the District Judge who held he had "no jurisdiction" to try this case simply missed the signs on a well marked trial [*sic*], we

Although the Ninth Circuit held in *Scoggin v. Schrunk*[164] that res judicata bars the unasserted federal claim, dicta from a recent case indicates that the Ninth Circuit's view may be changing where there is a clearly enunciated federal interest to be protected.[165]

In any event, petitioners in *Robinson* argued[166] that their case presented an even more sympathetic factual situation than *Scoggin*.[167] The section 1983 action could not have been brought in *McBryde* because it was allegedly created by the decision itself. Thus, we are back on the same circular path. If the constitutionality of the state decision creates a claim and if section 1983 creates an exception to res judicata, then every state court decision potentially can be relitigated in federal court under section 1983 with no possibility of res judicata applying. The federal courts would become the appellate courts of the states through the use of section 1983.

The fallacy which creates this circularity of reasoning is the misconception that a decision creates a new claim. The correctness of a decision (and the constitutionality of a decision is only one aspect of its correctness) is not a new claim but only an aspect of the original claim, which is

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hasten to acknowledge that no such thing is true. One commentator, Theis, has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in § 1983 cases and added that as a result "the decisions of the lower courts teem with inconsistencies." Theis appended the following footnote to illustrate his point:

> *Compare Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), *with Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1974) [*sic*]; *Roy v. Jones*, 484 F.2d 96 (3d Cir. 1973), *with Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), *with Mack v. Florida State Bd. of Dentistry*, 430 F. 2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971) (White, J., dissenting from denial of writ); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970), *with Mulligan v. Schlacter* [Schlachter], 389 F.2d 231 (6th Cir. 1968); *Blankner v. City of Chicago*, 504 F.2d 1037 (7th Cir. 1974), *with Hampton v. City of Chicago*, 484 F.2d 602, 606 n.4 (7th Cir. 1973); *Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), cert. denied*, 415 U.S. 916 (1974), *with Ney v. California*, 439 F.2d 1285 (9th Cir. 1971).

Id. at 975 (parallel citations omitted). Obviously, if there are differences within single circuits, there are differences between the circuits. *Getty* considered federal jurisdiction over section 1983 claims within the narrow context of the three-judge-court statute, 28 U.S.C. § 2281 (1970) (repealed 1976), *see* 547 F.2d at 972, and found that res judicata was no bar to the procedural due process claims.

[164] 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (res judicata bars a claimed due process violation in federal court on grounds of failure to notify homeowners of delinquent installment payments and the resultant sale of property even though the federal constitutional claim was not asserted in state court where the purchaser sought to nullify the conveyance on the basis of unjust enrichment and lack of notice).

[165] Red Fox v. Red Fox, 564 F.2d 361, 365 (9th Cir. 1977) (unique historical relationship between American Indians and the Federal Government).

[166] *See* Answering Brief for McBryde Sugar Co., at 53-59, Robinson v. Ariyoshi, Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978).

[167] The district court found *Scoggin* inapposite. 441 F. Supp. at 584 n.35. See note 164 *supra* for a brief description of *Scoggin*.

properly reviewed only on appeal. If one accepts the view that a decision creates an action (that courts can take) and that an action based on section 1983 is not subject to res judicata because it could not have been raised previously, then the policies expressed under the *Rooker* doctrine are substantially undermined, and the exclusiveness of review by the United States Supreme Court is negated.

The *Rooker* principle[168] should not be subject to a section 1983 exception for the same reasons that res judicata should prevail. Without a clear indication from Congress, section 1983 should not be read to undercut section 1257 and that section's clear grant of exclusive review of state court decisions to the Supreme Court. Analogies between section 1983 and habeas corpus fail because Congress intended through habeas corpus to give federal district courts the power to collaterally attack state judgments.[169]

It cannot be denied, however, that there may be a section 1983 action arising out of the procedural manner in which courts act. If a litigant were denied an opportunity to be heard, this could constitute a proper claim. However, it must be noted that the proper remedy is to compel the forum to adequately consider the argument. The proper remedy is not to invalidate the substantive aspects of the decision. The distinction between fifth and fourteenth amendment considerations remains critical. Courts can act to deprive persons of fourteenth amendment procedural due process but not fifth amendment substantive due process. The validity of section 1983 claims based on procedural due process would depend on the same considerations discussed in the preceding Part III. Thus, even if it is assumed that a section 1983 action exists in *Robinson*, it is certainly not so clear as the court implied[170] that the *Rooker* doctrine or res judicata do not defeat federal district court jurisdiction.

V. CONCLUSION

If there is a lesson to be learned from examining *Robinson v. Ariyoshi*, it is that courts cannot take. It is not that they cannot take property because they cannot act in a manner which has the same results or ramifications of a governmental taking. Rather, they do not take because the implications of the contrary proposition contradict the essential functions of the judiciary. Simply put, courts do not take because that would destroy their ability to resolve disputes. Courts do not take; they declare. If

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[168] See note 126 *supra* and accompanying text.

[169] *See* Currie, *supra* note 131, at 323 n.50. *Cf.* Note, *Federal Relief Against Threatened State Prosecutions: The Implications of* Younger, Lake Carriers *and* Roe, 48 N.Y.U. L. REV. 965 (1973) (availability of federal habeas relief precludes prosecution under a statute held by a local federal court to be unconstitutional).

[170] The court did not discuss *Rooker*. It disposed of the res judicata defense at 441 F. Supp. at 583-84.

courts were said to take, they could not effectively declare.

The ramifications of the *Robinson* theory of intervention are enormous not only for the state courts but for federal courts as well. If a decision can create an independent federal claim, then federal trial courts could enjoin United States circuit court decisions involving "unexpected" results.[171] The implications of *Robinson*-type intervention are that there would be no judicial hierarchy and no finality in appellate systems.

When it comes to writing an epitaph for *Robinson v. Ariyoshi* as it concerns Hawaii water rights, one might fittingly pirate the title: "Much Ado About Nothing." Since the claim was based on the unjustified assumption that "ownership" in *McBryde* was used in the *res publicae* sense, the *Robinson* litigation seems to have been a waste of resources.[172]

Rather than seeking an injunction in the *Robinson* action, the petitioners more sensibly should have waited for the taking issue to ripen.[173] This ripening might occur if (1) the State were to adopt and implement a water regulatory scheme that was overly restrictive with respect to the petitioners' rights to use; or (2) pending a clarification by the court, the State took interim action to prevent actual use of water by the petitioners or to charge them for its use.[174] Any of these possibilities would at least provide the federal district court with a concrete state action to review. Instead, the court prematurely judged the meaning of *McBryde*, thereby provoking the very kind of situation that jurisprudential considerations of ripeness are designed to forestall.

It will not become clear what the Hawaii Supreme Court really meant until that court speaks again. Nevertheless, one can attempt to examine *McBryde* in the same light that one looks at landmark decisions which leave certain questions unanswered. Toward this end, a few closing observations are offered.

The primary holding of the court in *McBryde* was that the State is the owner of all water not subject to appurtenant or riparian rights. What does this mean? Twenty years ago, Professor Frank J. Trelease wrote an

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[171] Moreover, the important consideration of finality in the judicial system would be destroyed. For example, the *Robinson* court took jurisdiction based on the concept that the *McBryde* decision took the property rights of the petitioners. If courts can take, could the State sue in state court to enjoin the federal officials responsible for enforcing *Robinson* on the same theory that the *Robinson* decision took their property rights as created by the *McBryde* decision? Since state trial courts can entertain federal constitutional issues, particularly section 1983 actions, the state court could conceivably assume jurisdiction, void the *Robinson* decision, and enjoin the federal officials from enjoining *McBryde*. Then, suppose that subsequent to this state court's decision a federal trial court similarly assumes jurisdiction to enjoin the state trial court's decision enjoining *Robinson*. The result would be an absurdity.

[172] *See* notes 176-79 *infra* and accompanying text.

[173] See notes 154-58 *supra* and accompanying text.

[174] None of these events would necessarily constitute a taking. The point made here is merely that, in contrast to the situation in *Robinson*, these occurrences would enhance the ripeness of any claim that might be brought for adjudication.

article equating the concept of ownership of water with that of *tu-tu*.[175] *Tu-tu* is the label that a tribe of south-sea islanders gave to one's status after contacting one's mother-in-law. If an islander encountered his mother-in-law, he was subject to a dangerous force or infection that could ruin his whole community. Professor Trelease drew the analogy between *tu-tu* and ownership of water in the following manner:

> Civilized Americans, of course, know that there is no such thing as tu-tu. As the prevalence of mother-in-law jokes testifies, people encounter their mothers-in-law often and nothing like this happens. Therefore, tu-tu does not exist in fact, it has no reference to reality. While it might be argued that tu-tu has reality to the islanders, it can be demonstrated that even they can get along very well without the concept. They say "If a man encounters his mother-in-law, he becomes tu-tu. When a man is tu-tu, he must be purified." But all reference to tu-tu may be eliminated and the same result reached by simply saying "If a man encounters his mother-in-law he must be purified."
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> . . . .
>
> An examination of the legal concept of ownership shows that it falls into this pattern. "I bought this watch, therefore I have ownership of it. I have ownership of this watch, therefore I may recover it from one who takes it from me." Just as we eliminated tu-tu, we can eliminate the middle concept entirely: "I bought this watch, therefore I may recover it from one who takes it from me." The author suggests that we may substitute "tu-tu" for "ownership," or, if we prefer, "green cheese," and the logic is unimpaired.[176]

Since ownership is essentially *tu-tu*, one can give it nearly any meaning one chooses. Thus, State ownership in *McBryde* may be given a nonconfiscatory interpretation. Ownership may mean *publici juris*, belonging to the State in the sense that the State is the representatives of the public to enforce the public interest.

Most fears derived from the *McBryde* decision impute the *res publicae*[177] meaning to ownership; that is, ownership in a corporeal sense, in the manner that the State owns Iolani Palace. However, it is unusual to view water rights in this way. For example, Wyoming attempted to use *res publicae* in its constitution, and it was subsequently interpreted by the courts to mean a trust or regulatory sense.[178] In the *McBryde* decision itself, the court attempted to avoid the *res publicae* definition and to employ a public trust sense of the term.[179] Moreover, there is nothing partic-

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[175] Trelease, *supra* note 154, at 638 (citing Ross, *Tu-tu*, 70 HARV. L. REV. 812 (1957)).

[176] *Id.*

[177] *Id.* at 640 (defining *res publicae*).

[178] Willey v. Decker, 11 Wyo. 496, 73 P. 210 (1903); Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).

[179] 54 Hawaii at 186, 504 P.2d at 1338:

> We believe that the right to water is one of the most important usufruct [*sic*] of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the

ularly desirable about ownership of water in a *res publicae* sense. The purpose of State ownership would be to facilitate control and regulation. The State can achieve those ends through the use of its police power[180] and does not have to rely on judicial declaration. If one interprets ownership as giving the owner the power of control and not a proprietary meaning, then the *McBryde* decision has not given the State anything new. Hence, it is difficult to conceive of water having been taken from the petitioners.

Even if the court in *McBryde* had intended ownership in the *res publicae* sense, the court may not have meant to deny the parties the right to continued use of water. One need only look to the recent Hawaii Supreme Court decision in *United Congregational & Evangelical Churches v. Heirs of Kamamalu*[181] for an example of the majority's extraordinary willingness to protect the property interests of a party whose claim of land title was nonetheless rejected. In that case, plaintiff churches brought an action to quiet title. The court ruled that the State held title to the land at issue, but the special facts of longstanding use of the parcels by the plaintiff under a good faith claim of right created an equitable right to continued use of the land for religious purposes.[182] The equitable

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land grants. [footnote omitted]

[180] *See* note 157 *supra* and accompanying text.

[181] 59 Hawaii 334, 582 P.2d 208 (1978).

[182] *Id.* at 343, 582 P.2d at 214. In *United Congregational*, a bare majority of the Hawaii Supreme Court (even then, only two of the majority votes were held by Supreme Court Justices, since Circuit Judge Shintaku replaced Justice Menor who was disqualified) appears to have created a new interest in real property, an interest characterized as "an equitable right akin to a prescriptive easement." *Id.* at 338, 582 P.2d at 211. The suit arose as an action by United Churches to quiet title to two parcels of land in Holualoa and Kahalu'u *ahupua'a* on the Island of Hawaii. Only the defendant-intervenor State of Hawaii disputed title to the land and appealed from a trial court judgment for the United Churches.

The lands involved as part of the *ahupua'a*, were *maheled* to Victoria Kamamalu in 1848. Title was conveyed in 1852 but with boundaries of the parcels not defined. The Holualoa and Kahalu'u lots were separately surveyed in 1854, subsequently recorded in the Land Book of the Department of Public Instruction as a "School lot" and "School and Church lot", respectively, and granted to the Board of Education by Royal Patent in 1882. Actual school uses continued only between 1880 and 1888. The trial court found that the United Churches had used the lots continuously for over a hundred years exclusively for church purposes, except for the brief period of school use. The trial court ruled in favor of the United Churches based on a two-step theory: (1) Any government title to the lots was lost by operation of a reverter statute which returned the lots to Kamamalu, the original grantor, when school uses ended in 1888; and (2) the United Churches acquired title from Kamamalu by adverse possession.

The majority's rejection of this theory reflected its interpretation of the operation of the reverter statute and its view that private school and church uses were inextricable in 19th century Hawaii. The 1854 survey presumptively evidenced a grant to the Government in fee simple absolute for school and church purposes. An 1859 statute and a successor 1864 statute diminished the Government's interest to fee simple determinable by providing for reverter to the "original grantor" if the school and church uses ceased, but the reverter provision was repealed in 1896. The majority found that the reverter provision was never

principles dictating *United Churches* may provide a basis for longtime agricultural users of water to seek analogous results. *McBryde* never ad-

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triggered. While the school uses ended in 1888, the church uses continued after the repeal of the reverter provision, and the court ruled that reverter required discontinuance of *both* school and church purposes. Continuance of the church uses meant that government title ripened to fee simple absolute with repeal of the reverter statute in 1896.

The majority noted that adverse possession cannot run against the sovereign, *id.* at 341-42, 582 P.2d at 213 (citing State v. Zimring, 52 Hawaii 477, 479 P.2d 205 (1970)), but said that "the doctrine of a presumed lost grant, arising out of adverse, exclusive, and uninterrupted possession for a substantial number of years, may be applied against the sovereign." *Id.* (citing United States v. Fullard-Leo, 331 U.S. 256 (1947); *In re* Kioloku, 25 Hawaii 357 (1920)). Nevertheless, the court was constrained by the facts to agree with the trial court that any presumption of a lost grant of *title* had been rebutted. The presumption was rebutted by (1) the explicit Royal Patent grants of 1882, (2) a 1911 church application requesting grant of the Kahalu'u lot, and (3) statements by church officers that title was in the government.

The majority concluded, however, that the circumstances did not rebut a presumption of a lost grant of lesser rights, noting that in the law of prescriptive easements a lost grant of easements may be presumed. *Id.* (citing Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692, 706 (1944)). The 1944 decision on which the majority relied had elaborated on acquiring title to an easement by prescription based on the theory of lost grant:

> Title to an easement such as claimed by the defendant upon and over the kuleana may be acquired in two ways: 1. By grant. 2. By prescription . . . . By prescription, is by use and occupation for the period prescribed by law adverse to the true owner of the fee. Such use and occupation are substituted for the grant. In other words, they give rise to the presumption that a grant existed, since lost or destroyed by time or accident.
>
> To give rise to the presumption of a grant, the use and occupation of the easement must be long, continued, uninterrupted and peaceable . . . . The longer the period the stronger the presumption.

Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692, 706 (1944) (citations omitted).

The court analogized to presumed lost grants of easements and invoked principles of equity to allow continued use by the churches.

> In furtherance of basic considerations of justice and equity, and by analogy with the law regarding presumed lost grants of easements, we hold that the United Churches possess equitable rights in the lots for religious and educational purposes, until such uses are abandoned. The State, as holder of the title, is free to use and develop the lots so long as the State does not interfere substantially with religious and educational uses by the churches.

59 Hawaii at 344, 582 P.2d at 214. The evidence cited as establishing longstanding occupation by the churches under a good faith claim of right was: (1) Continuous use since mid-19th century; (2) a 1912 petition to incorporate, approved by the territory which listed the lots as property held; (3) a 1939 warranty deed from the churches' parent organization to the county granting a portion of the Kahalu'u parcel for road widening; (4) a 1948 letter from the Commissioner of Public Lands to a third party saying the Holualoa lot belonged to the churches' parent organization; (5) testimony by a pastor that tax maps in the early 1960's showed the lots under the name of the parent organization; and (6) testimony by the pastor that "the people" had told him, "We owned the lots since the early 1880's." *Id.* at 342-43, 582 P.2d at 213.

The two dissenting votes were cast by Justices Kidwell and Kobayashi (both since retired) who were sympathetic to the equities involved but found no legal grounds to uphold a claim by the United Churches. They objected that an equitable right akin to a prescriptive easement is a nonentity in property law whose substantive meaning and legal impact were left undefined by the majority. The dissent reasoned that the circumstances which the majority

dressed the possible rights to continued use or to compensation, so those matters remain unanswered questions. It is clear from *United Churches*, at least, that the court is not hostile to private property rights, notwithstanding the view of the court in *Robinson*.

The second important ruling in the *McBryde* opinion, that water rights are held only as appurtenant to land and that water cannot be transported beyond those lands,[183] is more difficult to evaluate. If it is true, as petitioners assert in *Robinson*, that the question of severability and transportability of water was not before the court in *McBryde*, then the court's ruling on these matters was dicta and arguably does not affect the parties before the court; neither does the ruling create positive law. In other words, *McBryde* did not make the transport of water illegal. In a proper case, the court might say that certain landowners, perhaps those adjacent to streams, have a common law right to prevent transportation of water by others out of the watershed. Thus, the transportation of water might be prevented by those who have standing to assert that right.[184] Resolution of this issue is not apparent from the decision.

Uncertainty in the aftermath of any major case is not unusual.[185] The problems of creating a system of water law through judicial interpretation and reinterpretation are obvious. It may take years of litigation to place another water case before the supreme court. The nature of the judicial process limits courts to resolving one narrow issue at a time. The *McBryde* decision evidences the problems engendered when a court speaks too broadly. All of these factors point to the desirability of a legislative solution, a comprehensive water law for adjudicating rights. But water legislation would not address the broader significance of this litigation.

This article has focused upon *Robinson* and the validity of its assertion of jurisdiction. Jurisdiction was based on an eminently logical lay view of a taking, a view which conflicts with the larger constitutional framework by distorting fifth amendment values beyond their functional limits. The search for every available legal doctrine to protect individuals from a government which may act in an arbitrary or capricious manner under vague notions of the public interest should be encouraged. But in its attempt to protect the individual, the court in *Robinson*, perhaps unknowingly, tread upon some of the delicate checks and balances between federal and state courts created by the Constitution.

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found sufficient to rebut the presumption of a lost grant of title should equally rebut a presumption of a lost grant of the equitable right.

[183] 54 Hawaii at 191, 504 P.2d at 1341.

[184] See note 38 *supra*.

[185] Landmark decisions often leave unanswered questions. The long history of litigation seeking to clarify and define the limits of Brown v. Board of Educ., 347 U.S. 483 (1954) is but one example. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. New Kent County School Bd., 391 U.S. 430 (1968).

Ours is a system of federalism. One needs to be reminded how grudgingly the States gave power to the Federal Government. They did not readily acquiesce in Supreme Court review of state decisions.[186] Moreover, the States and Congress have never given the lower federal courts the general appellate power to review state decisions.[187] At this time in our history, with the concerns articulated by some regarding state court inadequacy[188] and with the increasing intervention of federal courts into state actions,[189] it is easy to forget that state and federal systems were born equal, with the Supreme Court as the highest court of review for both systems.[190] Although the principle may become blurred by the apparent power of federal courts, the state courts are still paramount and sovereign on matters of state law. Even the Supreme Court is bound to respect this tenet.[191]

If state courts are indeed sovereign on issues of state law, then state supreme court decisions on those matters are final, subject only to review by the High Court. They are not, to quote Justice Jackson, "final because . . . [they] are infallible, but . . . infallible only because . . . [they] are final."[192] It is not the scope of this article to determine whether *McBryde* was correctly decided, but to urge that the decision was final after the Supreme Court denied review.

Although interpretation of *McBryde* is difficult, the decision is nevertheless a valid expression of state judicial sovereignty in the substantive area of water law. Whether the decision is judged a consistent interpretation of prior law, it is the principle of state judicial sovereignty that assures *McBryde* of its claim to legitimacy.

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[186] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 445 (2d ed. 1973).

[187] *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 945 (1976).

[188] Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[189] *See generally Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1147-53 (1977).

[190] C. WRIGHT, FEDERAL COURTS 535 (3d ed. 1976).

[191] Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. [citations omitted]

See Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944).

[192] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

HAWAII'S EQUAL RIGHTS AMENDMENT: ITS IMPACT ON ATHLETIC OPPORTUNITIES AND COMPETITION FOR WOMEN

Sherry Broder*
Beverly Wee**

American sports have long been characterized by discrimination against women. Every dimension of athletic activity reflects the general societal attitude that women are best suited to be spectators or cheerleaders who applaud the performance of their male counterparts.[1] The exclusion of women from serious athletic competition and the justifications for partial or complete sex segregation in athletics have largely been based on myths.[2] Over the years there have been a number of outstanding women athletes[3] whose achievements boldly contradict the underlying assump-

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[1] Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753, 759 (S.D. Ohio 1978); Jewett, *The Equal Rights Amendment and Athletics*, 1 HARV. WOMEN'S L.J. 53, 58 (1978) [hereinafter cited as Jewett] (quoting Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 423 (1975)); Comment, *Equality in Athletics: The Cheerleaders v. The Athlete*, 19 S.D.L. REV. 428 (1974); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1267-69 (1979).

[2] Two myths have been used to exclude women. First, athletic prowess has been viewed as inconsistent with the idealized image of a woman as one who is kept on a pedestal and admired for her ladylike, polite, and fragile manners. This ideal has faded in recent years as women have successfully entered many previously all-male fields. The second myth is more persistent—that the physical and biological characteristics of the female body result in inferior athletic performance and increased susceptibility to injuries. Although differences do exist between the sexes in average athletic performance, it is not yet known how many of these differences can be attributed to socialization and training and how many to actual physical factors. *See generally* B. BROWN, A. FREEMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 304-08 (1977) [hereinafter cited as BROWN].

[3] A few examples are Althea Gibson, Sonja Henie, Billie Jean King, and Wilma Rudolph. P. HOLLANDER, 100 GREATEST WOMEN IN SPORTS 24-25, 109-10, 113-15, 126-28 (1976) [hereinafter cited as HOLLANDER]. Babe Didrikson Zaharias was chosen in 1950 by American

tions of sex discrimination in sports. The Olympic games evidence that in several events females are consistently closing the gap in comparative performance.[4]

The contemporary women's movement has begun to change sports.

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sportswriters as the "Woman Athlete of the Half Century" and had an unmatched career. Ms. Zaharias was a basketball star, an Olympic competitor (winning a silver medal and two gold ones, breaking her own world records in both javelin and the 80-meter hurdles), and a national and international champion in amateur and professional golf. She also excelled in every other sport she tried. W. JOHNSON & N. WILLIAMSON, WHATTA-GAL, THE BABE DIDRIKSON STORY 1-22 (1977). Federal District Judge Carl B. Rubin recently observed: "Babe Didrikson could have made anybody's team." Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753, 758 (S.D. Ohio 1978). The court rejected the presumption that females are athletically inferior to males because of their gender. *Id.*

[4] The times of women athletes at the last three summer Olympics compare favorably with those of men in several events. For example:

TABLE 1

400-meter Freestyle

	Women		Men		
year	min.	sec.	min.	sec.	[time difference]
1968	4	31.80	4	09.00	[22.80]
1972	4	19.04	4	00.27	[18.77]
1976	4	09.89	3	51.93	[17.96]

100-meter Freestyle

	Women		Men		
year	min.	sec.	min.	sec.	[time difference]
1968	1	00.00	0	52.20	[07.80]
1972	0	58.59	0	51.22	[07.37]
1976	0	55.65	0	49.99	[05.66]

100-meter Backstroke

	Women		Men		
year	min.	sec.	min.	sec.	[time difference]
1968	1	06.20	0	58.70	[07.50]
1972	1	05.78	0	56.58	[09.20]
1976	1	01.83	0	55.49	[06.34]

800-meter Run

	Women		Men		
year	min.	sec.	min.	sec.	[time difference]
1968	2	00.90	1	44.30	[16.60]
1972	1	58.60	1	45.90	[12.70]
1976	1	54.94	1	43.50	[11.44]

INFORMATION PLEASE ALMANAC 1980, 847-54 (34th ed. 1979).

More and more women are successfully engaging in athletic activity[6] despite societal restrictions perpetuating the fiction of an inferior sex,[8] insufficient funding and coaching of women's sports,[7] and limited competitive opportunities.[8] Equality of athletic opportunity for both sexes nonetheless remains a controversial issue.[9] The proposed equal rights amendment (ERA) to the Constitution[10] could provide significant impetus for remedying the sex discrimination that exists in the athletic world.[11]

One response to the revitalized women's movement was reactivation of the federal ERA, which had languished in Congress since the first resolution was introduced in 1923.[12] Legislation was introduced every year thereafter[13] until 1972 when the ERA finally was passed by Congress and

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[6] 44 Fed. Reg. 71, 413, 71,419 (1979) (participation by women in sports is increasing despite inadequate funding and facilities). Prior to 1971, girls at Rogers High School in Rhode Island were primarily cheerleaders. By 1979, after formerly all-male teams were opened to competition, 43% of all positions on the various varsity teams were occupied by women. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (D.R.I. 1979), *application to vacate stay entered by First Circuit denied*, 47 U.S.L.W. 3760 (May 21, 1979) (No. A-995).

[8] *See* notes 1-2 *supra*.

[7] 44 Fed. Reg. 71,413, 71,419 (1979). *See* notes 114-18 *infra*.

[8] *See Hearings on S. 2518 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. 76 (1973) (statement of Ms. Billie Jean King on the Women's Educational Equity Act of 1973); Gilbert & Williamson, *Sport is Unfair to Women* (pt. I), SPORTS ILLUSTRATED, May 28, 1973, at 92.

[9] There has been litigation in this area under the 14th amendment to the United States Constitution, under state equal rights amendments, and under Title IX of the Education Amendments of 1972, which has led commentators to treat the equality issue as a significant area of concern. *See* notes 121-210 *infra* and accompanying text.

[10] The House adopted the original language of the resolution after lengthy debate on proposed amendments. H.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35782-815 (1971). H.J. Res. 208 was debated and passed by the Senate on March 22, 1972. 92d Cong., 2d Sess., 118 CONG. REC. 9517-98 (1972). The language of the proposed amendment is straightforward:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

86 Stat. 1523 (1972). Throughout this article, the term ERA used in the federal context refers to the proposed equal rights amendment quoted above.

[11] *See* text accompanying notes 211-64 *infra*.

[12] Senator Charles Griffin and Representative Daniel Anthony (Republicans, Kan.) introduced the first proposal which read: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction." S.J. Res. 21, 68th Cong., 1st Sess., 65 CONG. REC. 150 (1923). The National Woman's Party spearheaded the drive for enactment of the resolution. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 129 (1975) [hereinafter cited as BABCOCK]. For a history of early attempts to pass an equal rights amendment, see *id.* at 129-33.

[13] Resolutions were locked in committee until 1946 when one proposal was voted on by the full Senate and defeated, 38 to 35. S.J. Res. 61, 79th Cong., 2d Sess., 92 CONG. REC. 9405

proposed to the States.[14] Thirty-five states have ratified the amendment,[15] three short of the required thirty-eight.[16] Four states have attempted to rescind their ratification.[17] As of this date, the fate of the national amendment is still in doubt.

Hawaii was first to ratify the national ERA, doing so just one hour after

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(1946). In 1950 and 1953 the amendment passed the Senate, but the House failed to act in both these years, and the proposal was never submitted to the States for consideration. BABCOCK, *supra* note 12, at 131. In these two years, Senator Carl Hayden (Democrat, Ariz.) introduced a rider to the amendment. The Hayden rider read: "The provisions of this article shall not be construed to impair any rights, benefits or exemptions now or hereafter conferred by law upon persons of the female sex." 81st Cong., 2d Sess., 96 CONG. REC. 870 (1950). The rider may be seen as a reflection of the historically prevalent view that women need different rights from those accorded men. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908). Such a protective attitude has been candidly acknowledged as an attempt to keep women in an inherently unequal and subordinate class. *See id.* at 421-23.

[14] The House of Representatives, by a vote of 354 to 24, passed the amendment on October 12, 1971. H.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35815 (1971). The Senate approved the proposed ERA on March 22, 1972, by a vote of 84 to 8. H.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972).

Senator Sam J. Ervin, Jr. (Democrat, N.C.) was a member of the Judiciary Committee and the major opponent of the ERA in the Senate. He testified extensively against the bill, quoting passages from the Bible suggesting that God created men and women with physiological and functional differences between them that the Constitution should not purport to erase. *Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 2 (1970) (statement of Sen. Sam J. Ervin, Jr.). For a partial listing of organizations which took a position on the ERA at the time Congress passed the proposed amendment, *see* BABCOCK, *supra* note 12, at 132-33.

[15] The following states ratified the ERA in the following order: 1972, Hawaii, New Hampshire, Delaware, Iowa, Idaho, Kansas, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, California; 1973, Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, Washington; 1974, Maine, Montana, Ohio; 1975, North Dakota; 1977, Indiana. 56 CONG. DIG. 167 (1977).

[16] Ratification by three-fourths of the state legislatures is required before an amendment becomes part of the Constitution. UNITED STATES CONST. art. V. The initial deadline for ERA ratification was March 22, 1979, or seven years from the time the amendment was adopted. On October 6, 1978, the United States Senate, by a vote of 60 to 36, passed a joint resolution which extended the ERA ratification deadline to June 30, 1982. H.J. Res. 638, 95th Cong., 2d Sess., 124 CONG. REC. 17283 (1978).

[17] Nebraska, Tennessee, and Idaho, three of the 35 ratifying states, voted to rescind ratification in 1973, 1974, and 1977, respectively. Comment, *ERA: The Effect of Extending the Time for Ratification on Attempts To Rescind Prior Ratifications*, 28 EMORY L. J. 71, 72 n.4 (1979). The Lieutenant Governor of Kentucky vetoed the legislature's rescission resolution in the Governor's absence in 1978. *Id.* The constitutionality of rescission actions as well as the validity of the extension for ratification, *see* note 16 *supra*, is currently being debated with most authorities concluding that rescission is ineffective. *See id.* at 107-08. *But see* sources cited in *id.* at 82 n.71. In the past, New Jersey and Ohio attempted to withdraw ratification of the 14th amendment. New York ratified and then withdrew its approval of the 15th amendment. In both cases, Congress accepted only the affirmative action to ratify by pronouncing the amendments valid. *Id.* at 78-84. *See also* S. FREEDMAN & P. NAUGHTON, ERA: MAY A STATE CHANGE ITS VOTE? (1978).

the United States Senate voted for its adoption.[18] In that same year, Hawaii's voters also added an ERA to their state constitution, with the support of 86.6% of the votes.[19] Article 1, section 3 of the Hawaii Constitution provides: "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."[20] Thus, regardless of the outcome of the national amendment, equality of rights is constitutionally mandated in Hawaii.

Adoption of the Hawaii ERA precipitated changes of various magnitude in the statutory law[21] and in the state constitution.[22] Few attorneys,

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[18] S. Con. Res. 39, 6th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 294 (1972).

[19] Certified results tallied 207,123 in favor of the state ERA; 31,930, against. OFFICE OF LIEUTENANT GOVERNOR, STATE OF HAWAII RESULTS OF VOTES CAST IN THE GENERAL ELECTION TUESDAY, NOVEMBER 7, 1972, at 75 (1972).

[20] HAWAII CONST. art. I, § 21 (1972, renumbered § 3, 1978).

[21] Act 230, 1979 Hawaii Sess. Laws 755 (minors' consent valid for medical care with regard to family planning services and treatment of venereal disease); Act 225, *id.* at 751 (neutralizing the language of rape law); Act 204, *id.* at 426 (mandating appointment of county committees on the status of women); Act 168, *id.* at 345 (ex parte restraining orders for domestic violence authorized); Act 143, *id.* 321 (rubella premarital screening); Act 6, *id.* at 8 (requirement of prompt complaint for prosecution of sexual offenses against minor or incompetent victim deleted).

Act 150, 1978 Hawaii Sess. Laws 281 (authorizing state department of education pilot project to create maximum 200 half-time, job-sharing positions for tenured classroom teachers); Act 77, *id.* at 100 (spousal liabilities).

Act 191, 1977 Hawaii Sess. Laws 413 (neutralizing the language of collective bargaining statute by referring to "firefighters" and "police officers" instead of "firemen" and "policemen", respectively); Act 109, *id.* at 191 (requiring *closed* court hearing to determine the relevancy of sexual conduct of a rape victim for purposes of impeaching the prosecutrix); Act 41, *id.* at 51 (authorizing the state department of education to enter into agreements for the use of public school buildings, facilities, and grounds for the operation of child care programs after school hours); Act 31, *id.* at 38 (permitting either party to use surname used prior to marriage or during any prior marriage instead of limiting such name changes to female parties to divorce).

Act 200, 1976 Hawaii Sess. Laws 372 (modified version of the Uniform Probate Code containing some provisions to equalize the probate law treatment of men and women); Act 46, *id.* at 57 (prohibiting sex discrimination in all educational and recreational programs or activities receiving state or county financial support or using state or county facilities).

Act 173, 1975 Hawaii Sess. Laws 380 (authorizing a sculpture of Queen Liliuokalani for permanent display at the State capitol); Act 114, *id.* at 207 (both parties to a marriage may adopt the married surname, whether that of the wife, the husband, or a combination of both); Act 109, *id.* at 190 (amending the Fair Credit Extension Act and the Fair Employment Practice Law to prohibit discrimination in credit transactions and real property transactions, respectively, on account of marital status); Act 83, *id.* at 154 (requiring court hearing out of the presence of the jury, but not the general public, to determine the relevancy of sexual conduct of a rape victim for purposes of impeaching the witness); Act 68, *id.* at 127 (extending workers' compensation coverage to certain domestic workers); Act 66, *id.* at 115 (modified version of the Uniform Parentage Act recognizing the paternal rights of a willing father of a child born out of wedlock); Act 41, *id.* at 70 (neutralizing the language of workers' compensation law by inserting "workers'" for "workmen's").

Act 136, 1974 Hawaii Sess. Laws 241 (extending employee-beneficiary public health bene-

however, have used the amendment as a basis for challenging sex discrim-

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fit provisions to spouses rather than only to widows or wives); Act 118, *id.* at 212 (amending public employee retirement system provisions so that widowers are treated the same as widows).

Acts 190, 188, 1973 Hawaii Sess. Laws 324, 322 (giving police additional authority to enforce family court restraining orders protecting one spouse from abuse by the other); Act 189, *id.* at 323 (establishing spouse abuse as a misdemeanor offense); Act 177, *id.* at 284 (amending the civil service law to prohibit discrimination on account of sex and to give veteran's preference to the spouse or surviving spouse of a disabled or deceased veteran, respectively, rather than only to the veteran's wife); Act 159, *id.* at 253 (repealing the pregnancy disqualification for extended unemployment benefits from the period between four months before expected delivery until two months after childbirth); Act 75, *id.* at 99 (repealing the pregnancy disqualification for basic unemployment benefits from the period between four months before expected delivery until two months after childbirth); Act 61, *id.* at 72 (defining "disability" to include pregnancy and providing temporary disability insurance benefits for disability resulting from pregnancy); Act 53, *id.* at 64 (repealing the requirement that a worker who voluntarily left employment to become a homemaker must, in order to qualify for unemployment benefits, give evidence of economic or other need for returning to the labor market and show that arrangements had been made to care for the household); Act 52, *id.* at 63 (prohibiting licensed commercial employment agencies from referring any applicant to employment of an immoral character rather than only applicants who are women or minors).

Legislation which may be expected to have a greater indirect impact on women than on men, such as the minimum wage law, also should be noted. *See, e.g.*, Act 4, 1978 Hawaii Sess. Laws 4 (minimum wage set at $3.10 as of July 1, 1980; $3.35 as of July 1, 1981); Act 196, 1977 Hawaii Sess. Laws 425 (extending state income tax credit of 5% of employment-related expenses for the costs of care of dependents of the taxpayer); Act 89, *id.* at 154 (civil and criminal liability for nonpayment of wages).

Similarly, a law applicable to all court witnesses may have peculiar impact on rape victims called as prosecution witnesses. *See* Act 13, 1978 Hawaii Sess. Laws 19 (employer prohibited from firing or threatening employee witness). Additionally, various appropriations, too numerous to mention, have been enacted in response to the ERA.

Lawmakers also passed remedial legislation in anticipation of voter ratification of the state ERA in 1972. Act 192, 1972 Hawaii Sess. Laws 609 (minimum age for marriage with requisite consent made uniform for male and female minors); Acts 191, 189, *id.* at 609, 608 (relieving the husband of liability for the torts of his wife and giving an action for damages to either spouse on account of injury to the other); Act 190, *id.* at 608 (permitting either spouse, not being a licensed attorney, rather than only the husband to represent the other spouse in district court); Act 139, *id.* at 484 (entitling the spouse rather than only the wife of a veteran to receive free copies of certain court decrees); Act 64, *id.* at 274 (amending the Fair Employment Practices Act to prohibit discrimination on account of sex in apprenticeship agreements); Act 63, *id.* (amending the "equal pay for equal work" law so that it no longer relates the wage rates of female workers to the rates paid to the lowest male workers; prohibiting an employer from reducing the wage rate of any employee in order to comply with the equal pay requirement); Act 21, *id.* at 190 (makes uniform the provisions for termination of the guardianship of a minor ward upon the ward's marriage rather than limiting such termination of guardianship to female wards); Act 20, *id.* at 189 (providing an allowance to the surviving spouse from unadministered small estates rather than only to the widow); Act 19, *id.* at 188 (modifying the order of priority in appointment of administrators of decedents' estates so that the parents of a deceased child have equal priority rather than ranking the father ahead of the mother).

Legislative reform has not been comprehensive, but a recent study details provisions which require change in order to accomplish statutory compliance with the state ERA. LEG-

ination in Hawaii.[23] In the one Hawaii Supreme Court case in which the ERA was raised, *Holdman v. Olim*,[24] the court refrained from applying the provision in favor of a traditional equal protection analysis.

This article will examine the *Holdman* decision and will discuss how the constitutional and legal requirements of the state ERA should serve to redress sex discrimination in athletics. Within this framework, the article will grapple with the problematic nature of equalization of opportunity in school athletics and will attempt to resolve the following questions:

1. How should contact sports be treated?
2. Can separate-but-equal sex segregation satisfy the constitutional mandate of ERA?
3. What significance should be given to the current average physical differences between men and women?

In addition, this article will review litigation in other states and will discuss congressional legislation in order to point out the difficulties in combating sex discrimination in athletics without an ERA.

I. Standards of Review Under the ERA

In order to evaluate the effect of the state ERA on athletics, it is necessary to determine what standard of review a court is likely to apply under the amendment.[25] This determination should begin with an examination

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ISLATIVE REFERENCE BUREAU, STATE OF HAWAII, EQUALITY OF RIGHTS (1979).

[23] *Compare* HAWAII CONST. art. IX, § 1 (1959, amended and renumbered art. X, § 1, 1978) ("There shall be no *segregation* in public educational institutions because of race, religion or ancestry." (emphasis added)), *with id.* art. X, § 1 ("There shall be no *discrimination* in public educational institutions because of race, religion, *sex* or ancestry." (emphasis added)). The language of the entire constitution has been sex neutralized. *See* Kahalekai v. Doi, 60 Hawaii 324, 344 & n.16, 590 P.2d 543, 556 & n.16 (1979). For example, the Lieutenant Governor and chief justice are no longer referred to as "he". *Id.* art. V, §§ 2-3, art. VI, § 2. Coincidentally, the same year that such stylistic changes were made throughout the constitution, the voters elected a woman as Lieutenant Governor. The revision was completed by the proposed repeal of HAWAII CONST. art. XIV, § 13 (1959, renumbered 1968) ("Whenever any personal pronoun appears in this constitution, it shall be construed to mean either sex.") and *id.* art. I, § 12 (1959, repealed 1978) ("No person shall be disqualified to serve as a juror because of sex.").

[24] Hawaii's experience accords with the relative paucity of case law in other jurisdictions having constitutional provisions which prohibit sex discrimination, *see* note 44 *infra*. This may be attributed to the recency of the respective amendments which, for the most part, were adopted after the federal ERA was proposed. *E.g.*, ALASKA CONST. art. I, § 3 (three reported cases); MONT. CONST. art. 2, § 4 (one reported case); N.M. CONST. art. II, § 18 (two reported cases). *But see* UTAH CONST. art. IV, § 1 (one case since adoption in 1895); WYO. CONST. art. 1, § 3 (one case since adoption in 1889).

[25] 59 Hawaii 346, 581 P.2d 1164 (1978).

[26] The standard of review employed by a court is of great importance. If a court employs strict scrutiny, it will be very difficult for the state to offer sufficient justification for its classification: only in wartime circumstances has the United States Supreme Court found

of legislative history.

The legislative history of the state ERA incorporates the proposed federal ERA by reference.[26] The language of the state provision is almost identical to that of the federal proposal.[27] Moreover, the State passed its own amendment at the time Congress recommended the federal version to the nation.[28] The federal proposal logically served as the prototype for its state counterpart, and the legislative history surrounding the federal ERA[29] thus provides necessary insight into legislative intent required to interpret the state ERA.

Extensive hearings by both the Senate and House Judiciary Committees in 1970[30] preceded passage of the federal ERA. At that time, noted legal scholars clashed on the merits of the resolution.[31] In 1971, an article

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sufficient grounds to uphold racial classifications. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). *But cf.* Petrie v. Illinois High School Ass'n, 48 U.S.L.W. 2283 (Ill. App. Ct. Sept. 6, 1979) (applying strict scrutiny required for sex-based classifications under the state constitution and approving exclusion of males from all-female high school volleyball teams on grounds that promoting athletic competition for both sexes is a compelling state interest). When employing a rational relation test, the Court allows the legislature wide latitude in treating categories of persons differently. Consequently, the Court has nearly always found some legitimate justification for the classification under that test. *See, e.g.*, Dandridge v. Williams, 387 U.S. 471 (1970); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *See also* note 45 *infra*.

[26] H. STAND. COMM. REP. No. 394-72, 6th Hawaii Leg., 2d Sess., *reprinted in* HOUSE JOURNAL 814 (1972); S. STAND. COMM. REP. No. 76-72, 6th Hawaii Leg., 2d Sess., *reprinted in* SENATE JOURNAL 780 (1972).

> The language of the proposed constitutional amendment is similar to the proposal now under consideration in the United States Congress. Your Committee finds that the State of Hawaii should proceed to enunciate in the Bill of Rights of the State Constitution the basic proposition that every individual is entitled to equality under the law, without discrimination on account of sex, and that such equality is a right of every woman, man, girl, and boy in the State.

Id. The only floor speech was delivered by one of the three female representatives and also referred to the federal proposal. "I am proud that we, as members of the Sixth State Legislature, were the first in the Nation to ratify the Congressional amendment. Now let us offer to the people of our State this November the opportunity to ratify our State amendment to our Constitution." HOUSE JOURNAL 353 (Hawaii 1972) (remarks of Rep. Patricia F. Saiki) (Republican, 9th Dist.).

[27] *Compare* text accompanying note 20 *supra with* note 10 *supra*.

[28] The proposed state constitutional amendment passed third and final reading in the State house on March 29, 1972, HOUSE JOURNAL 354 (Hawaii 1972), exactly one week after Congress approved the proposed federal ERA. *See* note 14 *supra*.

[29] *See* note 14 *supra*, notes 30-43, 69, 72, 74-77, 211-12 *infra* and accompanying text.

[30] *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

[31] Professors Norman Dorsen (New York Univ.) and Thomas Emerson (Yale Univ.) and Professors Paul Freund (Harvard Univ.) and Philip Kurland (Univ. of Chicago) testified on opposite sides of the issue. *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. C.R.-C.L.L. REV. 215 (1971). They later expanded their testimony in a symposium on the ERA. *Id.* Recently, a legal scholar argued in favor of ERA ratification, abandoning his former "agnosticism" which he now ascribes to the inability to determine the precise effect of the ERA in "each case that might plausibly relate to or arise

appeared in the *Yale Law Journal (Yale)* which offered Congress a definitive explanation of the impact of the proposed federal ERA.[32] That article was cited extensively and offered as testimony in the congressional debates.[33] It is considered by many to be the major authoritative interpretation of the federal ERA because Congress relied heavily on the analysis it contained in adopting the amendment.[34] The article concluded that the constitutional guaranty of equality under the ERA would be virtually absolute.[35] The legal principle underlying this premise is that the law "must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex."[36]

The *Yale* article did identify two exceptions to the broad prohibition of classification by sex: (1) Laws dealing with physical characteristics unique to one sex, and (2) laws affecting the right to privacy.[37] Under the first exception, physical — not emotional, psychological, or social — factors found in one sex alone might be used as the basis for particular legislation.[38] Among the few examples that have been cited are laws dealing with wet nurses or sperm donors.[39] It is clear, however, that the unique physical characteristics exception would not allow broadly differentiated treatment on the basis of pregnancy,[40] which traditionally has restricted women's opportunities.[41] In addition, this exception would not permit classifications based on traits commonly, but not necessarily uniquely, found in one sex or the other.[42] The right to privacy would permit distinctions based solely on sex, where necessary, to preserve an individual's

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under it." Van Alstyne, *The Proposed Twenty-Seventh Amendment: A Brief, Supportive Comment*, 1979 WASH. U.L.Q. 189, 193.

[32] Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as YALE].

[33] *See, e.g.*, 118 CONG. REC. 9518-22, 9525, 9531-36, 9545, 9550, 9559, 9562-65 (1972); 117 CONG. REC. 35797-801, 35805-06 (1971).

[34] Even opponents of the ERA like Senator Sam J. Ervin, Jr., *see* note 14 *supra*, acknowledged that the *Yale* article was "one of the best guides to a general interpretation of the equal rights amendment." *Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women: Hearings on S. Rep. No. 92-689*, 92d Cong., 2d Sess. 35 (1972) (remarks of Sen. Sam J. Ervin, Jr.).

[35] YALE, *supra* note 32, at 909.

[36] S. REP. No. 92-689, 92d Cong., 2d Sess. 4, 12 (1972).

[37] YALE, *supra* note 32, at 893-900. For a more detailed discussion on the privacy exception to the ERA see Comment, *The Equal Rights Amendment and the Right of Privacy*, 23 EMORY L.J. 197 (1974).

[38] YALE, *supra* note 32, at 893.

[39] *Id.*

[40] *See* note 211 *infra*.

[41] The Supreme Court has not recognized classifications based on pregnancy as sex discrimination. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 429 U.S. 484 (1974).

[42] BROWN, *supra* note 2, at 15. Proponents of the ERA maintain that a regulation or statute excluding women from strenuous occupational or athletic opportunity on the theory of physiological inferiority to men could not withstand scrutiny under the ERA. *Id.* at 16.

right to personal privacy in matters relating to bodily functions. Thus, an individual's right to sleep, shower, or disrobe only in the presence of members of the same sex would be protected.[43]

Because the federal ERA has not yet been ratified, application of the theoretical principles debated in the federal legislative history can be found only through interpretations of analogous state provisions.[44] High courts of states with ERAs modeled after the federal proposal have adopted more stringent tests under their state ERAs than the standard employed by the United States Supreme Court in its analysis of gender-based discrimination under the equal protection clause of the fourteenth amendment.[45] Four states, Maryland, Massachusetts, Pennsylvania, and

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[43] YALE, *supra* note 32, at 900-01. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court recognized an independent constitutional right of privacy derived from a combination of various more specific rights embodied in the first, third, fourth, fifth, and ninth amendments. Although *Griswold* did not define the exact scope of the right of privacy, the *Yale* article argues that the right would have bearing on the ERA, permitting separation of sexes in public restrooms, segregation by sex in sleeping quarters of prisons or other public institutions, and appropriate segregation of living conditions in the armed forces. *Id.* at 901. The scope of the right to privacy in the area of equal rights is dependent on the community's current mores. *Id.* at 902.

[44] Seventeen states have adopted constitutional provisions prohibiting sex discrimination. *See* ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. 2, § 20; HAWAII CONST. art. I, § 3; ILL. CONST. art. 1, § 18; LA. CONST. art. 1, § 3; MD. CONST. art. 46; MASS. CONST. pt. 1, art. 1; MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. 2; N.M. CONST. art. II, § 18; PA. CONST. art. 1, § 28; TEX. CONST. art. 1, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. 1, § 3, art. 6, § 1.

Eleven of the 17 provisions contain language almost identical to the federal amendment: Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, Utah (preexisting provision), Washington, and Wyoming (preexisting provision). Virginia's ERA includes the language of the federal ERA but makes an exception for "mere separation of sexes." VA. CONST. art. I, § 11. *See* note 48 *infra*. Louisiana appears to have adopted the lowest standard of review employed in equal protection analysis as the language of its amendment. LA. CONST. art. I, § 3. *See* note 48 *infra*.

Alaska's provision parallels neither the federal ERA nor the equal protection clause: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin." ALASKA CONST. art. I, § 3. Montana's guaranty is to the same effect. MONT. CONST. art. II, § 4. Utah and Wyoming added equal rights provisions to their constitutions near the end of the last century, yet there is only one reported case in each jurisdiction. For discussion of the differing standards of review, see Note, *State Equal Rights Amendments: Legislative Reform and Judicial Activism*, 4 WOMEN'S RIGHTS L. REP. No. 4, at 227, 228-32 (1978). *See also* BROWN, *supra* note 2, at 9-32; Driscoll & Rouse, *Through a Glass Darkly: A Look at State Equal Rights Amendments*, XII SUFFOLK U.L. REV. 1282 (1978); Treadwell, *State Equal Rights Amendments: How Do They Look in Court?*, 1 WOMEN'S L.J. 67, 77-79 (1976); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CAL. L. REV. 1086 (1977).

[45] *See* text accompanying notes 46-47 *infra*. Until the early 1970's, the Supreme Court upheld sexually discriminatory laws so long as they were rationally related to government purposes, even though they reflected stereotyped perceptions of the relationship between men and women. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upheld state law including men for jury service unless they requested exemption but excluding women unless they volunteered); Goessart v. Cleary, 335 U.S. 464 (1948) (upheld prohibition against women bar-

Washington, have adopted the "absolute standard."[46] Illinois determined

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tenders unless barmaid was wife or daughter of male owner; disapproved in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976)); Radice v. New York, 264 U.S. 292 (1924) (upholding state statute prohibiting employment of women in restaurants in large cities between the hours of 10:00 p.m. and 6:00 a.m.); Muller v. Oregon, 208 U.S. 412 (1908) (upholding state limitation on women's working hours); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding state prohibition of law practice by women).

In Reed v. Reed, 404 U.S. 71 (1971), the Court finally invalidated a state statutory preference based on sex. The law challenged in *Reed* mandated that males be appointed in preference to equally qualified females as administrators of decedents' estates. *Id.* at 73. The Court purported to apply the traditional rational relation test. However, the Court noted that to prefer one sex over another as a matter of administrative convenience was the kind of arbitrary legislative choice forbidden by the equal protection clause. *Id.* at 76.

In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of four (Justices Douglas, Brennan, White, and Marshall) declared that classifications based on sex were suspect. *Id.* at 682. In support of this conclusion, Justice Brennan reasoned that the "sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. Three concurring Justices (Chief Justice Burger, Justices Blackmun and Powell) disapproved of the plurality's "premature and unnecessary" declaration of sex as a suspect class. *Id.* at 692. Instead, they found that the pending ratification of the ERA presented a compelling reason to postpone a decision on whether to treat sex as a suspect class under the equal protection clause. *Id.* at 691. *See* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV. 617, 641-42 (1974) (asserting that Justice Powell's concurring opinion urging postponement abdicates judicial responsibility). *Compare* Stanton v. Stanton, 421 U.S. 7, 13 (1975) (invalidating a Utah statute requiring parental support for males until age 21 and females until age 18 without deciding if sex is to be a suspect classification), *and* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating a social security provision granting benefits to a widow with dependent children, but not to a widower, without expressly invoking strict scrutiny), *with* Kahn v. Shevin, 416 U.S. 351 (1974) (special state tax exemption for female survivors upheld where discrimination is based on legislative policy of "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," *id.* at 355).

In Craig v. Boren, 429 U.S. 190 (1976), the Court for the first time articulated an intermediate standard of review applicable to gender-based laws in a case which invalidated, on equal protection grounds, an Oklahoma statute prohibiting sale of 3.2% beer to males under age 21 and to females under age 18. The government offered a variety of statistical surveys attempting to demonstrate a high correlation between gender and alcohol-related accidents. *See* note 58 *infra*. Although the Court regarded the statutory objective of ensuring traffic safety as important, it found the statistical evidence inadequate to prove that "sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* at 204. "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. In his concurring opinion, Justice Powell acknowledged that the decision may be viewed as a "middle-tier" approach to equal protection analysis, recognizing "that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* at 211 n.* (Powell, J., concurring). Stanford Law School Professor Gerald Gunther first articulated the Court's trend toward an intermediate standard of review. Gunther, *The Supreme Court, 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972), *cited in* 429 U.S. at 211 n.*

The United States Supreme Court has recently applied the intermediate standard of review in several cases. Caban v. Mohammed, 99 S. Ct. 1760 (1979) (*Craig* standard invoked to invalidate statute permitting unwed mothers, but not unwed fathers, to block adoption sim-

that sex is a suspect classification subject to strict scrutiny.[47]

Louisiana, Utah, and Virginia have utilized a standard less stringent than the federal test, employing instead a rational relation test.[48] The

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ply by withholding consent); Orr v. Orr, 440 U.S. 268 (1979) (applying *Craig* "substantial relation" test to invalidate statute requiring husbands, but not wives, to pay alimony). *Cf.* Califano v. Webster, 430 U.S. 313, 317-18 (1977) (per curiam) (quoting *Craig* standard but upholding social security provision establishing favorable formula for determining women's benefits based on benign intent to compensate for past discrimination).

In Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2281 (1979), seven members of the Court upheld a Massachusetts statute granting absolute preference to veterans in civil service promotions. Once the Court found the statute to be "neutral on its face," it applied the reasoning of Washington v. Davis, 426 U.S. 229 (1976), which requires a showing of an "intent to discriminate." *Id.* at 240. This analysis ignores the fact that sex-based discrimination under the veterans' preference statute is incurable since women are denied jobs on the basis of a status that the law prevented them from attaining. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 101 (Supp. 1979). Virtual exclusion from service has meant almost total exclusion from preference under the statutes. Until 1967, Congress restricted the number of women in the armed forces to two percent of the total force. Act of Aug. 10, 1956, ch. 1041, §§ 3209(b), 3215, 5410, 8208, 8215, 70A Stat. 1 (amended 1967) (current version at 10 U.S.C. §§ 3209(b), 3215, 8208, 8215 (1976)).

[46] *See, e.g.*, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (both parents equally responsible for child support); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979) (invalidating rule that boys may not play on girls' teams); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974) (alimony pendente lite available to either spouse); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (girls permitted to play interscholastic volleyball). *See generally* Comment, *supra* note 44, at 1098-99; Note, *supra* note 44.

[47] Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974) (invalidating statutory differences in age of marriage for men and women); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (invalidating statute extending juvenile status to female delinquents up to age 18 and males up to age 17). *But cf. In re* Estate of Karas, 61 Ill. 2d 40, 329 N.E.2d 234 (1975) (upholding statutory scheme allowing illegitimate children to inherit through mother's, but not through father's, intestate estate). *Cf.* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex is a suspect classification under state equal protection clause).

[48] *See, e.g.*, State v. Barton, 315 So. 2d 289 (La. 1975) (upholding statute under which husbands, but not wives, are liable for criminal spousal neglect); Smith v. Smith, 564 P.2d 307 (Utah 1977) (maternal preference upheld in child custody). Utah adopted its ERA provision prior to the current movement for sexual equality. UTAH CONST. art. IV, § 1 (1895). The Louisiana Constitution is unlike that of any other state in its treatment of sex discrimination. LA. CONST. art. 1, § 3 provides, in part: "No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 8 (1974). In contrast, Virginia's constitution states that sex, as well as race, color, and national origin is "to be free from any governmental discrimination." VA. CONST. art. I, § 11. The inclusion of gender with other suspect classes under federal equal protection analysis, *see, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (national origin), certainly suggested that the court might employ strict scrutiny in its analysis, but instead the state supreme court found the provision "no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States," prohibiting only "invidious, arbitrary discrimination upon the basis of sex," Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

other states have not yet established a clear standard of review: Texas courts, for example, have utilized the language of different tests within the same opinion;[49] Alaska and New Hampshire have no published opinions on their ERAs;[50] Colorado summarily declared that closest judicial scrutiny is required by its ERA;[51] and the Montana court announced its standard of review in an alternative ruling.[52] The courts in Connecticut, Hawaii, New Mexico, and Wyoming have reached decisions under the ERA without articulating a standard.[53]

II. THE HAWAII SUPREME COURT'S APPROACH: *Holdman v. Olim*

The one Hawaii case raising a state ERA claim, *Holdman v. Olim*,[54] involved a challenge to an Oahu state prison directive which read: VISITORS WILL BE PROPERLY DRESSED. WOMEN VISITORS ARE ASKED TO BE FULLY CLOTHED, INCLUDING UNDERGARMENTS. PROVOCATIVE ATTIRE IS DISCOURAGED.[55] Holdman was denied entrance to the prison after a search revealed that she was not wearing a brassiere. She challenged the directive as prohibited sex discrimination in violation of both federal and state equal protection clauses and the state ERA. The court found that under the equal protection clause of the Constitution the directive was substantially related to the achievement of the important governmental objective of prison security.[56]

Although the court indicated that it was adopting the *Craig v. Boren*[57] federal equal protection test of "substantial rationality," it is questionable whether, in fact, this test was applied. The *Craig* Court found that

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[49] *Compare* Mercer v. Board of Trustees, 538 S.W.2d 201 (Tex. Ct. App. 1976) (employing language of strict scrutiny and limiting permissible sex-related classifications to compelling interests and the two ERA exceptions), *with* Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975) (upholding sex-specific rape statute on rational basis and discussing unique physical characteristics common to strict ERA analysis).

[50] *See* Note, *supra* note 44, at 230.

[51] People v. Barger, 191 Colo. 152, 550 P.2d 1281 (1976) (upheld female protective statutory rape provision). *Barger* relied upon People v. Green, 183 Colo. 25, _, 514 P.2d 769, 770 (1973), which cited Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971), for the proposition that closest judicial scrutiny is the proper test. However, ambiguity arises since the Supreme Court utilized different standards in *Frontiero* and *Reed*. *See* note 45 *supra*.

[52] State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976) (rejected male defendant's challenge to sex-based rape statute alternatively for lack of standing or because the law provided a "reasonable basis for the inequality," *id.* at 156, 545 P.2d at 653).

[53] Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976); Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978); Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974); State v. Yazzie, 67 Wyo. 256, 218 P.2d 482 (1950).

[54] 59 Hawaii 346, 581 P.2d 1164 (1978).

[55] *Id.* at 348, 581 P.2d at 1166.

[56] *Id.* at 351, 581 P.2d at 1168.

[57] 429 U.S. 190 (1976). *See* note 45 *supra* & note 58 *infra*.

even the most focused and relevant of statistical surveys were unpersuasive[58] and "far too tenuous to satisfy . . . [the] requirement that the gender-based difference be substantially related to achievement of the statutory objective."[59] In *Holdman,* no statistics or evidence of any kind were offered. Yet, the court concluded that, even under the more stringent compelling state interest test, the regulation was justifiable.[60]

The court next turned to the equal protection clause of the Hawaii Constitution, article I, section 4,[61] and recognized that it was free to apply the strict scrutiny-compelling state interest test. Instead, the court declared that analysis of this provision would be reserved for future consideration because, even if sex-based classifications were suspect, the compelling state interest of maintaining control and order in the prison was overriding.[62]

The court last addressed the claim based on Hawaii's ERA. In disposing of that issue, the court concluded: "We do not decide what standard of review should be applied to an equal rights claim. Nevertheless, in the narrow focus of this case, we find that the equal rights challenge has not been sustained."[63] By deciding the case on other grounds, the court im-

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[58] In Craig v. Boren, 429 U.S. 190 (1976), *discussed in* note 45 *supra,* the State of Oklahoma introduced a variety of statistical surveys to justify a statute using sex classifications in setting legal drinking ages. One survey showed an analysis of statistics for 1973 which documented that arrests of males 18 to 20 years old for drunken driving exceeded female arrests for that same age group. A second survey showed that youths 17 to 21 years old were overrepresented among those killed or injured in traffic accidents, with males again exceeding females in this regard. A third survey revealed that young males were more inclined to drive and drink beer than their female counterparts. A fourth survey of nationwide FBI statistics exhibited a notable increase in arrests for driving under the influence of alcohol, with male arrests for all ages exceeding 90% of the total. Finally, statistical evidence in other jurisdictions corroborated the state's experience by indicating the pervasiveness of youthful males' participation in motor vehicle accidents following the imbibing of alcohol. *Id.* at 200-01.

[59] *Id.* at 204.

[60] The *Holdman* court emphasized the lack of an adequate record but it failed to recognize that the burden of justifying the discriminatory regulation should be placed on the State. *See* note 93 *infra.* No real evidence other than portions of the rules and regulations of the Hawaii State Department of Social Services and Housing were preserved on appeal. Thus, no evidence was presented that the directive did in fact serve its purported objective of maintaining prison security or that women without undergarments did threaten security. 59 Hawaii at 347-50, 581 P.2d at 1165-68.

[61] HAWAII CONST. art. I, § 4 (1968, amended and renumbered § 5, 1978).

[62] 59 Hawaii at 350, 581 P.2d at 1167.

[63] *Id.* at 354-55, 581 P.2d at 1170. Appellant also challenged the directive as violative of her right to privacy and void on grounds that it was not promulgated in accordance with the Hawaii Administrative Procedure Act, HAWAII REV. STAT. ch. 91 (1976) (amended 1978, 1979). The court, assuming without deciding that the directive was a "rule" within the meaning of the Act, *id.* at 355-56, 581 P.2d at 1170-71, held that it concerned only internal management of the agency and thus fell within the statutory exception to the requirement of publication. *Id.;* HAWAII REV. STAT. § 91-1(4) (1976). The court disposed of the privacy challenge in one sentence indicating that the directive would survive even strict scrutiny. 59 Hawaii at 352, 581 P.2d at 1169.

plicitly used a less than exacting standard of review. This case involved what the court saw as one of the exceptions to a strict ERA application: the exception for physical characteristics unique to one sex.[64]

By moving automatically to one of the two recognized exceptions under the federal ERA,[65] the court side-stepped a complete analysis of the relationship between the prison directive and an interpretation of the state ERA. The court did cite the *Yale* article[66] which suggests that, in future cases, Hawaii may adopt the absolute standard. However, the court incorrectly applied the *Yale* analysis[67] and consequently misinterpreted the intent of the federal and state ERA.

The challenged prison directive should have been found unconstitutional because it requires only females to conform with a particular dress code.[68] Under the federal ERA, it is clear that sex will be an impermissible factor for determining the legal rights of women and men.[69] Yet the Hawaii court refused to find that the directive was facially, or in its application, a violation of the provisions of the state constitution.[70] The court seemed to excuse its lack of analysis in *Holdman* because of the deficiencies in the record.[71] The *Yale* article maintained that the factual evidence should be presented by the party attempting to justify the regulation.[72] Nevertheless, the court found that the equal rights challenge had not been sustained.[73]

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[64] 59 Hawaii at 354, 581 P.2d at 1170. For a discussion of the intended narrow construction of the unique physical characteristics exception in the analogous federal ERA, see text accompanying notes 37-42 *supra*.

[65] *See* text accompanying note 74 *infra*. Assuming that the federal ERA is ratified, it is unlikely that the provision would be interpreted without regard for the two exceptions described in the *Yale* article. *See* text accompanying notes 32-34 *supra*. A court may, of course, recognize other exceptions or take a broader view of those recognized by the *Yale* authors and incorporated into the legislative history. *See* Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 175-76 [hereinafter cited as Ginsburg].

[66] 59 Hawaii at 353-54, 581 P.2d at 1169.

[67] *See* text accompanying notes 78-102 *infra*.

[68] *Id.* at 352, 581 P.2d at 1168. Although the record was incomplete, *see* note 60 *supra*, the court in *Holdman* deduced that the prison directive required women always to wear brassieres. The conclusion was correct; brassieres are mandatory attire for female visitors and attorneys. Interview with Rita A. Hoopii-Hall, Hawaii State Prison receptionist, in Honolulu (Sept. 10, 1979); interview with Anton S. Olim, Hawaii State Prison superintendent, in Honolulu (Sept. 16, 1977).

[69] S. REP. No. 92-689, 92d Cong., 2d Sess. 4-6, 11-12 (1972); YALE, *supra* note 32, at 889, 892.

[70] 59 Hawaii at 354, 581 P.2d at 1170.

[71] *Id.*

[72] The authors said: "In considering whether to sustain this rule, a court would weigh . . . factors on the basis of factual evidence presented by the party attempting to justify the regulation." YALE, *supra* note 32, at 895.

[73] If the court had placed the burden of justifying the directive on its defenders, there would have been no alternative but to hold that the link between the state's compelling interest and the regulation had not been established by the record.

In justifying its decision, the court quoted from a paragraph in the *Yale* article that allows an exception to the absolute mandate where physical characteristics unique to one sex are involved.[74] The article defined this exception as falling within the "subsidiary principle" of the federal ERA.[75] The court concluded its analysis at this point, however, the analysis in *Yale* continued:

> Application of this subsidiary principle raises questions which should be carefully scrutinized by the courts.
>
> Unless that principle is strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex.[76]

In order to prevent an overbroad application of the subsidiary principle, the *Yale* article identified six factors that a court should weigh to determine whether the exception is applicable.[77]

An unabridged ERA analysis in *Holdman* would first require the court to consider "the proportion of women who actually have the characteristic in question."[78] The characteristic creating problems of prison security apparently is provocative breasts.[79] Presumably, the most sophisticated attempt to determine the number of women possessing this characteristic would reflect highly subjective judgments.[80] In any case, the State should

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[74] The court relied on the statement that:

> So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence, such legislation does not, *without more,* violate the basic principle of the Equal Rights Amendment.

59 Hawaii at 353, 581 P.2d at 1169 (emphasis added at "without more") (quoting YALE, *supra* note 32, at 893).

[75] YALE, *supra* note 32, at 893.

[76] *Id.* at 894.

[77] Those factors are:

> First, the proportion of women who actually have the characteristic in question . . . .
>
> Second, the relationship between the characteristic and the problem . . . .
>
> Third, the proportion of the problem attributable to the unique physical characteristic of women . . . .
>
> Fourth, the proportion of the problem eliminated by the solution . . . .
>
> Fifth, the availability of less drastic alternatives . . . .
>
> Sixth, the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution.

Id. at 895-96. For a discussion of the same six factors applied to sex-segregated athletic activities, see text accompanying notes 217-24 *infra*.

[78] *Id.* at 895.

[79] *See* text accompanying note 88 *infra*.

[80] It is not the subjective aspect per se that presents a problem, for it is possible that cumulative responses could be transformed into an objective standard based, for example, on breast shape or brassiere size in conjunction with body weight and height. Indeed, the Court has upheld an analogous rule in the equal protection context. *See* Kelley v. Johnson,

have borne the burden of persuasion on this question.[81]

Second, the court should have discussed "the relationship between the characteristic and the problem."[82] In this case, the court should have required information regarding the number of women visitors who would actually cause a disruption of prison security if they entered without a brassiere. The court did not even speculate on the actual number.

Third, the court should have contemplated "the proportion of the problem attributable to the unique physical characteristic of women."[83] Here, the court should have acknowledged that breasts can be sexually arousing even when a woman wears a brassiere as well as the fact that modest outer wear can mitigate any provocative impact of an unharnessed woman. The court should then have inquired into the proportion of the security problems that are attributable to other factors, such as illegal possession of weapons and other contraband in the prison, overcrowding, insufficient space devoted to exercise and recreation areas, inadequate psychological and psychiatric services, and inadequate supervision of visiting areas.[84] The court completely ignored the literature documenting that homosexual assaults are prevalent in a prison setting.[85]

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425 U.S. 238, 248 (1976) (hair length requirement for police officers rationally related to promoting goals of esprit de corps and public perception of police officer as law enforcement authority). Although application of the ERA absolute standard in *Kelley* surely would dictate a contrary result, that is not the point. It must be emphasized that perceptions of female sexuality pervade the underlying subjective evaluation required by the *Holdman* facts; the sex-object stereotype of women is reinforced thereby. Hence, the ERA's implied mandate to diminish discriminatory effects of sexual stereotypes is ignored, and it is particularly for that reason that the ERA is anathema to the *Holdman* decision and lack of analysis.

[81] *See* note 72 *supra*.

[82] YALE, *supra* note 32, at 895.

[83] *Id.*

[84] Interview with Randolph L. Hatori, inmate at Hawaii State Prison, in Honolulu (Sept. 5, 1979). *See* Nacci, Teitelbaum & Prather, *Population Density and Inmate Misconduct Rates in the Federal Prison System*, 41 FED. PROB. No. 2, at 26 (1977); Comment, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?*, 27 AM. U.L. REV. 92 (1977).

[85] Gardner, *The Defense of Necessity and the Right To Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110 (1975); Jacobs & Steele, *Sexual Deprivation and Penal Policy*, 62 CORNELL L. REV. 289, 292 (1977); Schwartz, *Prisoners' Rights: Some Hopes and Realities*, in A PROGRAM FOR PRISON REFORM 47 (1972); 29 BAYLOR L. REV. 180, 181-82 (1977). The State might have asserted that deprivation of heterosexual relationships during confinement precipitates homosexual assaults and that such violence is aggravated by inmate contact with sexually provocative females. The court might then have met this argument with a command to adopt a less drastic alternative to sex discrimination; namely, to establish conjugal visiting privileges for eligible inmates. On March 4, 1974, the State House of Representatives approved a resolution requesting implementation of conjugal visits, H. Res. 98, H.D. 1, 7th Hawaii Leg., 2d Sess., *reprinted in* HOUSE JOURNAL 231 (1974), in part, because "such a program is a useful custodial tool in that it induces good institutional behavior." H. STAND. COMM. REP. No. 132-74, 7th Hawaii Leg., 2d Sess., *reprinted in* HOUSE JOURNAL 614 (1974). The committee report noted that the California State Department of Corrections had conducted a conjugal visiting program

The directive is discriminatory in that it does not require males to don special articles of clothing to reduce their potential sexual attractiveness.[86]

The fourth factor that should have been evaluated is "the proportion of the problem eliminated by the solution."[87] It was not clear that requiring women to wear brassieres had any effect on prison security. In defining the problem under the fourteenth amendment, the court conjectured that to some members of society "the omission of a brassiere as a conventional article of women's clothing . . . has been regarded as sexually provocative."[88] However, administrators of other penal institutions with security problems at least comparable to those at Hawaii State Prison have concluded that such dress restrictions are not necessary.[89]

Fifth, consideration should have been given to "the availability of less drastic alternatives."[90] The court in *Holdman* reasoned that if the prison

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without significant problems since 1968. *Id. See* San Quentin State Prison, Mail and Visiting Information 5-6 (1978) [hereinafter cited as San Quentin pamphlet]. Hawaii State Prison has not, however, established conjugal visits for inmates. *See* State of Hawaii Department of Social Services and Housing Rules and Regulations of the Corrections Division Inmate Handbook § .420-.002(3) (1977) ("Handshaking, embracing, and kissing by immediate members of the family and close friends may be permitted within the bounds of good taste.").

[86] Consider the analogous absurdity, for instance, of requiring men to wear athletic supporters or codpieces. The codpiece is, of course, obsolete. It was developed in the early Renaissance, *circa* 1420, and persisted as a fashion until around 1580. Men began wearing hosiery in two separate pieces. They were sewn together in the back, and the front was covered by a triangle of cloth, called the breye, which became the codpiece. By the 16th century, codpieces were heavily boned and padded. R. KEMPER, COSTUME 71, 81 (1977).

[87] YALE, *supra* note 32, at 895.

[88] The court explained that: "Dress standards are intimately related to sexual attitudes. We do not express individual views of propriety by recognizing that the omission of a brassiere as a conventional article of women's clothing has been controversial and has been regarded as sexually provocative by some members of society." 59 Hawaii at 350, 581 P.2d at 1167. In a later case, the Hawaii Supreme Court ostensibly reversed its analysis of the effect of the female breast and reached a holding that implicitly ignored the attitudes and reactions of those same unidentified members of society who are aroused by the mere absence of a brassiere. The court found that *public* exposure of naked female breasts on a public beach did not constitute lewd behavior. State v. Crenshaw, 61 Hawaii __, 597 P.2d 13 (1979).

[89] California's San Quentin Prison, for instance, does not have a blanket requirement that women wear brassieres as a prerequisite to admission. Author's personal experience (Mar. 28, 1977); San Quentin Pamphlet, *supra* note 85.

> No levis or other clothing which resembles blue denims may be worn by visitors of either sex. Visitors will be refused admission if they are wearing clothing which could be mistaken for levis, or if their clothing does not meet acceptable standards of decency.
>
> Visitors will not be admitted if they are dressed so as to appear to be a member of the opposite sex, or if they have any insignia and/or notations on their clothing or in exposed tatoos which are inflammatory in nature.
>
> Visitors whose clothing does not conform to these requirements may usually borrow a change of clothing from The House, so that they will then be able to visit.

Id. at 2.

[90] YALE, *supra* note 32, at 895. *See* note 85 *supra*.

directive required individualized decisions "only in the cases of women visitors whose physical attributes without brassieres would create a reasonable risk that their attire would be regarded as sexually provocative by male residents of the prison, it would have been more difficult to challenge on its face."[91] Because a discretionary standard would have created "intolerable difficulties in making subjective decisions at the prison door,"[92] the court concluded that those problems justified application of uniform dress standards to all women visitors.[93]

This reasoning is inconsistent with the *Yale* article's interpretation of the federal ERA in two respects. First, "[a]rguments that administrative efficiency or other countervailing interests justify limiting the Amendment contradict its basic premises."[94] Second, the challenged directive already required subjective decisionmaking. There was no objective standard by which one could measure the requirements of "properly dressed" and "provocative attire".[95] Thus, while men were admitted after a subjective review of their attire, women were admitted only after (1) an absolute requirement of certain attire, and (2) a subjective review.

The sixth factor that the Hawaii Supreme Court should have considered is "the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution."[96] Here the question would be the seriousness of the harm that would actually result if a woman were allowed into the prison without a brassiere. The court did not find a cause-and-effect relationship between female visitors wearing brassieres and prison security.[97] Because other high-security prisons do not

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[91] 59 Hawaii at 352, 581 P.2d at 1168.

[92] *Id.*

[93] *Id.* It does appear that, in addition to prison security, the Hawaii court considered administrative convenience a compelling state interest. This contradicts Reed v. Reed, 404 U.S. 71, 76 (1971), where the Court expressly found administrative convenience insufficient to justify a sex-based discrimination in equal protection analysis. *See* note 45 *supra*. In applying strict scrutiny, the party seeking to maintain the statutory distinction bears the burden of demonstrating that the state interest is compelling and that no less drastic alternatives exist. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The *Holdman* court noted that "[a] less drastic alternative means of attaining the legitimate purpose of the directive has not been suggested," *id.* at 354, 581 P.2d at 1170, but considered that a matron could make subjective decisions at the door for each female. *Id.* at 352, 581 P.2d at 1168. Thus, the court upheld the directive on a hypothetical analysis.

[94] YALE, *supra* note 32, at 890-91.

[95] *See* text accompanying note 55 *supra*.

[96] YALE, *supra* note 32, at 896.

[97] The *Holdman* court did not concern itself with causal relationships. The court's reasoning implies that once the objective of prison security was posited, no further analysis was necessary:

> Whether these attitudes were reflected in the prison population at the times relevant to this case could have been determined, if at all, only with great difficulty. The dress restrictions imposed upon women visitors by the directive derived their relation to prison security out of the assumption that these attitudes were present among the residents. *Whether or not this assumption was correct*, it is manifest that the directive was sub-

require brassieres, one may reasonably conclude that their administrators have determined that there is insufficient justification to warrant such a rule.[98]

If the State had been able to establish the relevant relationship between prison security and the appearance of a braless woman, then this should have been balanced against the costs of the solution; namely, the continuation of sexual stereotyping[99] and the application of double standards for men and women.[100] *Holdman* allows society to dictate a code of dress for women[101] by requiring the use of undergarments in the name of a totally unsubstantiated government interest.[102]

Under the court's analysis, it seems that any directive will pass muster once the objective of prison security is advanced. Moreover, the court purportedly relied on the rationale employed by the high courts of Washington and Massachusetts,[103] but those supreme court decisions found the physical characteristics exception insufficient justification for sex discrimination in the context of contact sports.[104]

Because the *Holdman* facts involved a prison setting, the controversy arguably presented a more difficult context for determination of a clear standard of review under the Hawaii ERA. The United States Supreme Court had already recognized that maintenance of prison control is an overriding governmental objective even when measured against other constitutional rights.[105] The court thus faced a previously established inter-

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stantially related to the achievement of the important governmental objective of prison security and met the test under the Fourteenth Amendment.

59 Hawaii at 351, 581 P.2d at 1167-68 (emphasis added).

[98] *See generally* note 89 *supra*.

[99] *See* note 80 *supra*.

[100] *See* text accompanying notes 85-86 *supra*.

[101] *See* notes 68, 93 *supra* and accompanying text.

[102] *See* notes 71, 73, 93, 97 *supra* and accompanying text.

[103] 59 Hawaii at 354, 581 P.2d at 1169 (citing Opinion of the Justices, _ Mass. _, 371 N.E.2d 426 (1977); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975)).

[104] For discussion of Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975), see text accompanying notes 227-30 *infra*. In Opinion of the Justices, _ Mass. _, 371 N.E.2d 426 (1977), a bill was pending before the Massachusetts House of Representatives which would have restricted women from competing with men in football and wrestling in the state's public schools. In considering the constitutionality of the proposed legislation under the state ERA, the court concluded that the "strict scrutiny-compelling State interest test is required in assessing any governmental classification based solely on sex." *Id.* at _, 371 N.E.2d at 428. The Massachusetts Supreme Judicial Court was influenced by the fact that the state ERA had been adopted at a time when state and federal equal protection analysis employed only two standards of review, strict scrutiny and mere rationality. *Id.* at _, 371 N.E.2d at 428. The court reasoned that the use of any lower standard than strict scrutiny would negate the purpose of the state ERA and that the bill violated the constitutional provision because the absolute prohibition did not meet the close scrutiny to which a statutory classification based solely on sex must be subjected. Prohibition of all females from voluntary participation in a particular sport under every possible circumstance served no compelling state interest.

[105] *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974), involving a prison regulation that

est, one which may have overshadowed the equal rights question.[106] The issues of equal rights in athletics provide a more flexible framework for the development of a sound ERA analysis.

III. Sex Discrimination in Athletic Opportunity and Competition

Physical education and competitive sports are an important part of the educational experience. Sports activity develops physical skill and fitness and, more importantly, character, citizenship, independence, self-esteem, competitive spirit, and camaraderie.[107] These values shape the character of a student's life as much as any substantive subject taught in the classroom. Thus, so long as women are denied equal athletic opportunities, they are denied equal educational opportunities.[108]

Discrimination in athletics restricts the availability of athletic scholarships for women,[109] which in turn limits the financial resources women

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prohibited face-to-face interviews between specific prisoners and media or other members of the public. The Court held that, in light of the other alternative means of communication, the state's legitimate interests in confining prisoners to deter crime, protect society, and maintain internal security of penal institutions outweighed the inmates' first amendment interests in free speech. The regulation withstood constitutional attack. In Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119 (1977), appellee prisoner labor union brought an action under 42 U.S.C. § 1983 (1970), claiming that its first amendment and equal protection rights were violated by regulations promulgated by the state's corrections department. The rules prohibited inmates from soliciting union members and barred contact with outside sources through organizational meetings and bulk mailings concerning union activities. The Court upheld the regulations since they were rationally related to prison security. 433 U.S. at 136. *But see* Lee v. Washington, 390 U.S. 333 (1968), where the Court summarily affirmed an order directing desegregation of Alabama prisons and declaring certain of the state's statutes unconstitutional to the extent that they required segregation of races. The decision noted, however, that the order did not preclude "allowance for the necessities of prison security and discipline." *Id.* at 334.

[106] It is difficult to determine what effect the limited record had on the opinion of the justices. It is clear that they were troubled by the deficiencies. *See* note 60 *supra*. Coupled with concern for prison security, the incomplete record may have increased reluctance to interfere in the prison setting. Nonetheless, if the court had recognized that the State had the burden of justifying the directive and if it had applied the six-factor test based on the proposed federal ERA, see note 77 and text accompanying notes 78-100 *supra*, Holdman would have prevailed because of the deficiencies in the record.

[107] Jewett, *supra* note 1, at 58-59.

[108] *See* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1241 (D. Kan. 1974).According to one court, "[d]iscrimination in high school interscholastic athletics constitutes discrimination in education." Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973). The court cited a report by a Presidential task force that "[d]iscrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." *Id.* (quoting A Matter of Simple Justice, The Report on the President's Task Force on Women's Rights & Responsibilities 7 (1970)). *See also* text accompanying note 206 *infra*.

[109] 44 Fed. Reg. 71,413, 71,419 (1979).

may utilize to secure advanced education and ultimately circumscribes opportunities in sports as well as other professional fields.[110] Women today still have fewer career options than men in positions that require physical ability or knowledge of athletics, such as professional sports, sports writing or reporting, coaching, teaching, athletic training and management, and sports entrepreneuring.[111] Lack of adequate training and competitive opportunities for women has meant that fewer women compete in professional circuits.[112] This same discrimination means that those opportunities which do exist are offered for lower pay.[113]

Discrimination against women is reflected in the disparity of athletic programs. In Hawaii, less money is spent on athletics for women than for men.[114] Interscholastic competition offers fewer and different sports for

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[110] *See, e.g.*, NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DIGEST OF EDUCATION STATISTICS 113-14 (1979):

TABLE 2

	Physical Education 1976-77:	Hospital & Health Care Administration 1976-77:
Bachelor's Degree:		
female	10,488	320
male	12,800	348
Master's Degree:		
female	1,892	355
male	2,824	999
Doctoral Degree:		
female	78	3
male	169	315

[111] *Cf.* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 420 (female athletes and kindred workers, including writers, artists, and entertainers constituted 41.9% of the total 105,000 workers employed in this category in 1977).

[112] *Compare* Darrin v. Gould, 85 Wash. 2d 859, 876 n.9, 540 P.2d 882, 892 n.9 (1975) (" 'no fewer than seven women's pro football teams are now on the gridiron' ") (quoting TIME, May 26, 1975, at 41), *with* INFORMATION PLEASE ALMANAC 1980, at 871 (34th ed. 1979) (listing 28 professional football teams in the National Football League).

[113] *See* note 118 *infra* and accompanying text. In 1971, Billie Jean King won over $100,000 in prize money as a result of her winnings in tennis, becoming the first woman athlete to earn that much in a single year. She achieved this distinction only after leading the fight for greater financial recognition of women athletes and demanding purses more comparable to those awarded men. HOLLANDER, *supra* note 3, at 115. Since then, a few other professional women athletes have been able to arrange more advantageous contracts for their skills. In 1973, figure skater Janet Lynn signed a $1,400,000 contract with Shipsteads & Johnson Ice Follies. *Id.* at 35.

[114] In 1979, the University of Hawaii (UH) men's athletic program budget was approximately $3,000,000; women's, approximately $330,000. Honolulu Advertiser, Dec. 5, 1979, at E-1, col. 3. That same year, the state general fund appropriation for UH men's athletics was

female high school students than for male students.[115] The University of Hawaii women play fewer games than the men and are less likely to have subvarsity squads or assistant coaches. Even the head coaches are employed part time or are required to coach more than one varsity sport.[116] Scholarships for women in athletics were nonexistent until very re-

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$220,956; the women's, $131,250. The men's expenditures were as high as $20,723 per player for basketball; the women's, $6,321 per player for volleyball. Ka Leo O Hawaii, May 7, 1979, at 2, col. 4-5. Despite these discrepancies in the funding of similar revenue-producing sports, the UH Manoa and UH Hilo volleyball teams accomplished what the men's teams never have achieved—national championships. In 1979, UH won the Association of Intercollegiate Athletics for Women national volleyball championships in both the university and college divisions. Honolulu Star-Bulletin & Advertiser, Dec. 9, 1979, at J-1, col. 1.

The wide disparity in financial support of women's and men's programs at UH mirrors the situation in colleges and universities across the country. 44 Fed. Reg. 71,413, 71,419 (1979). *See generally* Note, *Sex Discrimination and Intercollegiate Athletics*, *supra* note 1, at 420. Arguably, the impact of inadequate funding is more severe in Hawaii than in mainland athletic programs simply due to geography. Because Hawaii is an island state, accessibility to competition is limited. Athletic programs therefore must have larger budgets than those at comparable mainland institutions in order to achieve parity because the UH must either send their teams to the mainland or offer financial inducements to attract mainland teams to Hawaii. The lack of adequate competition may be a bigger problem for women than men. Although many of the men's programs at mainland schools have the funds to send their teams to Hawaii, the women's programs at these same schools lack financial resources and cannot afford to send their players to Hawaii. *See* Honolulu Advertiser, Dec. 5, 1979, at E-1, col. 4.

[115] Private and public high schools that offer interscholastic competition belong to member leagues of the Hawaii High School Athletic Association. The statewide high school program offers 21 sports; 19 for boys, 12 for girls. Girls do not compete in wrestling, football, baseball, or water polo. Twenty-one public high schools in Honolulu belong to the Oahu Interscholastic League (OIA) which offered a total of 19 sports for the school year 1978-79; 17 for boys, 13 for girls. It was estimated that 16 sports would be available the following school year; 14 for boys, 11 for girls. The girls' sports include swimming, tennis, track, volleyball, cross country, bowling, riflery, basketball, softball, soccer, and soft-tennis. Interview with William S. Smithe, OIA Director, in Honolulu (Sept. 1979).

The total number of girls involved in varsity sports in a recent year was 4,726, compared with 9,966 boys. There were 1,638 girls participating in junior varsity sports, compared with 7,142 boys. Thus, the ratio of boys to girls in varsity sports was approximately two to one and approximately four to one in junior varsity sports. Hawaii State Interscholastic Athletic Participation Survey (1978-79).

[116] Until 1977, the director of the University of Hawaii (UH) women's athletic program held a part-time position. The women's varsity coaching staff still has only part-time positions, including eight coaches and three to five assistants. In contrast, the men's athletic program has 12 full-time coaching positions; nine in football, three in basketball. Honolulu Advertiser, Dec. 5, 1979, at E-1, col. 4; interview with Masaji Saito, UH Assistant Athletic Director for Finance, in Honolulu (Sept. 27, 1979). The salary range for the football coaches is from $19,000 to $39,000. Assistant coaches for both men's and women's programs make $1,000 to $1,500 per period. Part-time coaches work on ⅓ time and are alloted a maximum salary of $3,000. There are three full-time athletic trainers, two for the men and one for the women, and the annual salary for those positions ranges from $10,000 to $19,000. *Id.* However, the women's trainer reportedly is not classified for this salary range. *See* note 118 *infra*.

cently.[117] In other areas, such as the quality of the coaching staff and the pay scale of the coaches, disparities persist.[118]

These imbalances may be cured through court challenges under the Hawaii ERA. Federal statutory reform[119] and litigation under the equal protection clause of the fourteenth amendment thus far have been largely ineffective.[120]

A. Title IX of the Education Amendments of 1972

The thrust of Title IX of the Education Amendments of 1972[121] is to

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[117] In 1979, University of Hawaii (UH) male athletes reportedly received $381,120 in scholarship funds; the women, $68,799. Ka Leo O Hawaii, May 7, 1979, at 2, col. 5. These funds augment the general fund appropriations described in note 114 *supra*. The scholarship figures compare poorly with the national average: UH women athletes received approximately 16% of the scholarship funds but comprise nearly 33% of all the athletes, *see id.* at col. 3; female athletes attending institutions that belong to the National Collegiate Athletic Association receive 22% of the scholarship funds and make up approximately 30% of eligible athletes. 44 Fed. Reg. 71,413, 71,419 (1979).

Fifty-six nominally athletic scholarships were awarded recently to women athletes at UH. Twelve of them were either administrative scholarships or internships. These were designed to alleviate understaffing in the women's athletic program. One of the coaching assistants in volleyball received a scholarship instead of pay. Interview with Cynthia J. Boerner, Academic Advisor and Administrative Assistant for UH women's athletics, in Honolulu (Oct. 1, 1979). On the other hand, 160 scholarships were awarded to male athletes for the same period; none were administrative scholarships or internships. Interview with Leon W. Schumaker, Academic Counselor for UH men's athletics, in Honolulu (Oct. 3, 1979).

UH women basketball players recently were told that they could play in the 1979-80 season only if they promised not to take scholarships for the next year. The rules of the Association of Interscholastic Athletics for Women provide to the contrary: If a student on scholarship is cut, she is to retain her scholarship for that school year, and, if she plays, she must be offered another one for the following year. Honolulu Star Bulletin & Advertiser, Nov. 18, 1979, at K-10, col. 1. The Department of Justice is reportedly joining a private lawsuit brought by three Alaska women basketball players who were told they must provide $250 to help pay for travel. The suit also attacks other aspects of sex discrimination in the Alaska athletic department. Honolulu Advertiser, Nov. 21, 1979, at C-1, col. 1.

[118] The men have two trainers. The women's program has only one. This single position has been classified at the same level as the men's assistant trainer, thus resulting in lower salary. Ka Leo O Hawaii, May 7, 1979, at 2, col. 4. The women's program has only student help for administrative and clerical positions and no full-time secretary. The men's program has four secretaries, one full time. Three full-time positions are allotted to the women's athletic program; a counselor-administrator, a secretary, and a women's sports information director. Presently these positions are frozen. Moreover, the women's basketball and volleyball teams have had to share facilities for practice sessions. The men's basketball team, on the other hand, enjoys exclusive use of the gymnasium. Interview with Donnis H. Thompson, UH Women's Athletic Director, in Honolulu (Mar. 13, 1978). This accords with nationwide discrepancies between male and female teams in terms of access to facilities. 44 Fed. Reg. 71,413, 71,419 (1979).

[119] *See* text accompanying notes 121-67 *infra*.

[120] *See* text accompanying notes 168-210 *infra*.

[121] Pub. L. 92-318, §§ 901, 86 Stat. 235, 373 (1972) (amended 1974, 1976) (codified at 20 U.S.C. §§ 1681-86 (1976)).

prohibit sex discrimination in educational institutions that receive federal funds. Congress passed Title IX three months after the Senate gave final approval to the proposed ERA.[122] The statute provides in part that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[123] In some respects the legislation surpasses the scope of the fourteenth amendment[124] even though it contains important exceptions.[125] Certain restrictions[126] and ambiguities[127] make predictive state-

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[122] Title IX was enacted June 23, 1972, *id.* The Senate passed the ERA on March 22, 1972. *See* note 14 *supra.*

[123] 20 U.S.C. § 1681(a) (1976).

[124] Title IX covers public and private preschools, elementary, secondary, vocational, and professional schools as well as institutions of higher education. 20 U.S.C. § 1681(c) (1976). In a recent decision, the Supreme Court enlarged the potential scope of Title IX by authorizing a private action by an individual who alleged that she was not admitted to medical school in violation of section 901 (that section is quoted in part in text accompanying note 123 *supra*). Cannon v. University of Chicago, 99 S. Ct. 1946 (1979). Despite the absence of express authority for private enforcement actions in Title IX, the Court reasoned that Congress had resolved the policy issue in favor of allowing case-by-case adjudication of admissions decisions. *Id.* at 1964. In the specific area of athletics, it should be noted that Title IX's exemption for interscholastic and intercollegiate contact sports, 45 C.F.R. § 86.41(b) (1979), does not reach the scope of the recent federal district court decision in Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978), *discussed in* text accompanying notes 205-09 *infra.* Kadzielski, *Postsecondary Athletics in an Era of Equality: An Appraisal of the Effect of Title IX*, [1978-1979] 5 J.C.&U.L. 123, 134. *See generally* Kaplin, *An Overview of Legal Principles and Issues Affecting Postsecondary Athletics*, [1977] 5 J.C.&U.L. 1. *See also* text accompanying notes 210-13 *infra.*

[125] *E.g.*, 20 U.S.C. § 1681(a)(3) (1976) (religion); *id.* § 1681(a)(4) (military schools); *id.* § 1681(a)(5) ("any public institution of undergraduate higher education . . . that traditionally . . . has had a policy of admitting only students of one sex"); *id.* § 1681(a)(6) (social fraternities and sororities, the Y.W.C.A., Y.M.C.A., Girl Scouts, Boy Scouts, and similar youth organizations); *id.* § 1681(a)(7) (boy or girl conferences); *id.* § 1681(a)(8) (father-son or mother-daughter activities); *id.* § 1681(a)(9) (beauty pageant scholarships).

[126] Any regulations proposed by HEW must receive presidential approval. 20 U.S.C. § 1682 (1976). All proposed regulations must be submitted to Congress which has 45 days in which to set them aside or they become effective. *Id.* § 1232(d), (f). Any fund termination must be reported to Congress, *id.* § 1682, and is subject to judicial review, *id.* § 1683.

[127] *See* 45 C.F.R. § 86.37 (1979). Section 86.37(c)(1) states: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." This section appears to require that scholarships be awarded proportionately to ensure that both sexes will have an equal opportunity for financial assistance. However, section 86.37(c)(2) continues: "Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41." This section on athletic scholarships appears to qualify the proportional scholarship distribution requirement of section 86.37(c)(1) by allowing a recipient institution to provide athletic scholarships for members of one sex so long as they are on single-sex teams. The sections do not explicitly preclude an institution from establishing the criteria to be

ments about Title IX's impact on school athletics imprecise.[128] Federal courts have struck down the Department of Health, Education, and Welfare (HEW) implementing regulation governing employment, thereby establishing that Title IX does not reach sex discrimination complaints by faculty and other staff.[129] Thus, Title IX is not directly available to remedy disparities in coaching salaries.[130]

In 1974, Congress passed the Javits amendment[131] requiring HEW to promulgate regulations implementing Title IX, including rules to govern intercollegiate athletic activities. HEW interprets Title IX to apply to any athletic program that "benefits" from federal funds regardless of whether the institution receives funds through another recipient or for another program.[132] The regulations prohibit recipients of federal funds

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used in granting financial aid. Each university will be able to retain control over its scholarship and distribution philosophy. *See* Note, *Sex Discrimination and Intercollegiate Athletics, supra* note 1, at 479; notes 153, 155 *infra*.

[128] For a compilation of early articles on the subject, see *Edmonds, Postsecondary Athletics and the Law: A Selected Bibliography*, [1977] 5 J.C.&U.L. 65.

[129] Islesboro School Comm. v. Califano, 449 F. Supp. 866 (S.D. Me. 1978), *aff'd*, 593 F.2d 424 (1st Cir. 1979); Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979).

[130] HEW has suspended enforcement of employment practices but will consider "the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes." 44 Fed. Reg. 71,413, 71,416 n.6.

[131] The full wording of the Javits amendment, section 844 of the 1974 Education Amendments is as follows:

> The Secretary [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*

Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (emphasis added). The Javits amendment replaced the Senate-approved Tower amendment in conference committee. CONF. REP. NO. 93-1026, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4206, 4271. The Tower amendment, which as originally proposed would have exempted all intercollegiate athletic programs, was adopted by voice vote of the Senate only after the author modified the proposal to exempt "an intercollegiate athletic activity to the extent that such activity does or *may* provide *gross* receipts *or* donations to the institution necessary to support that activity." Amend. No. 1343, 93d Cong., 2d Sess., 120 CONG. REC. 15322, 15323 (1974) (emphasis added).

[132] 45 C.F.R. §§ 86.2(h), .11, .41 (1979). The National Collegiate Athletic Association (NCAA) challenged the HEW regulations as exceeding the scope of Title IX by governing, *inter alia*, "collegiate athletic programs offered by educational institutions which do not directly receive federal financial assistance but which offer non-athletic educational programs that receive or 'benefit from' federal financial assistance." National Collegiate Athletic Ass'n v. Califano, 444 F. Supp. 425, 429 (D. Kan. 1978). The court held that the NCAA lacked standing and failed to allege sufficient injury to constitute a "case or controversy" required by the Constitution. *Id.* at 429-33. Commentators have disagreed on the validity of the HEW interpretation. *Compare* Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 37-79 (1977) [hereinafter cited as Cox] (courts should adopt HEW's interpretation), *and* Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 107-12 (1974) (HEW interpretation

from offering separately any educational program or activity on the basis of sex, including physical education classes.[133] Students in physical education programs still may be segregated by sex under the following circumstances: (1) Where the sport emphasizes bodily contact;[134] and (2) where the grouping in physical education programs is by ability as assessed by objective standards, without regard to sex.[135] Moreover, the regulations governing interscholastic, intercollegiate, club, or intramural sports allow for virtually identical exceptions: A recipient may offer sex-segregated teams where "selection for such teams is based upon competitive skill *or* the activity involved is a contact sport."[136] A proviso requires that, where no separate team is provided for the sex that in the past has had more limited opportunities, members of the excluded sex must be allowed to try out for the team.[137] Once again, contact sports are excluded.[138] These exceptions for contact sports exempt major intercollegiate competition, such as football and basketball,[139] from the general ban against sex discrimination and separate teams.

In drafting compliance regulations pursuant to the Javits amendment and in later policy statements, HEW relied upon the very language of the 1974 legislation[140] to carve out broad exceptions for revenue-producing sports, football and basketball in particular.[141] This effectively accom-

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consistent with analogous case law), *with* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L. J. 49, 75-76 (1976) (criticizing HEW interpretation). Difficulties may arise in determining whether an institution directly or indirectly receives federal monies. Note, *Sex Discrimination & Intercollegiate Athletics*, *supra* note 1, at 460. Few, if any, intercollegiate athletic programs receive direct federal financial assistance or directly benefit from such assistance. *See* 444 F. Supp. at 434 (NCAA, which represents some 700 colleges and universities, alleged in its complaint that none of its members' athletic programs receive direct federal financial assistance). Most athletic departments receive a substantial portion of their funding through student fees, state appropriations, gate receipts, and donations.

[133] 45 C.F.R. § 86.34 (1979).

[134] *Id.* § 86.34(c). This exempts "wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." *Id.*

[135] *Id.* § 86.34(b).

[136] *Id.* § 86.41(b) (emphasis added). The more stringent proposed HEW regulations were diluted in their final form. *See* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, *supra* note 1, at 1256-59. A comparison of the proposed and final policy interpretation of the regulations conforms with this pattern of attenuation. *See* notes 140-61 *infra* and accompanying text.

[137] 45 C.F.R. § 86. 41(b) (1979).

[138] *Id.* Thus under the federal regulations, the result achieved in Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975), where the court found the prohibition against women competing in interscholastic football to be a per se violation of the Washington ERA, would not be possible. For a discussion of *Darrin* see text accompanying notes 227-30 *infra*.

[139] For a thoughtful criticism of the contact sports exception see Cox, *supra* note 132, at 43-45.

[140] *See* note 131 *supra*.

[141] 44 Fed. Reg. 71,413, 71,415-16 (1979) (lack of substantial equivalence for football justified on basis of Javits amendment). *See* Cox, *supra* note 132, at 45 (Javits amendment

plished what logically was thought to have been avoided by the Javits amendment.[142] Moreover, adoption of compliance rules did not correspond with their enforcement. When HEW regulations became effective in July 1975,[143] institutions of higher education were given three years, or until July 21, 1978, to conform with the new provisions.[144] During the enforcement moratorium HEW received approximately one hundred complaints of sex discrimination in college athletic programs, including one complaint against the University of Hawaii.[145] The original grace period was effectively extended to nearly four and one-half years, until December 1979, by delay in adoption of a policy interpretation of the regulations.[146] Hence, HEW has not issued decisions on any of the complaints.

The final policy interpretation (PI) contains major changes from HEW's original version.[147] The proposed PI incorporated two important principles that have been eliminated: assessing compliance using an average per capita expenditure formula and ensuring the improved future status of women's athletic programs.

The expenditure formula addressed the requirement of equal opportunity for participants in athletic programs.[148] Institutions would have been able to demonstrate a presumption of compliance if they established that average per capita expenditures for male and female athletes were substantially equal for financially measurable benefits and opportunities.[149]

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should not be basis for excluding women from contact sports).

[142] *See* note 131 *supra*. In April 1978, an opinion of the HEW General Counsel advised that Title IX was applicable to revenue-producing sports. 43 Fed. Reg. 58,070, 58,075 (1978).

[143] 45 C.F.R. § 86.1 (1979).

[144] *Id.* § 86.41(d).

[145] Letter from Hawaii State Rep. Faith P. Evans (Republican, 24th Dist.) to Office of the Assistant Secretary for Education, HEW (July 24, 1978); Honolulu Advertiser, Dec. 5, 1979, at E-1, col. 3. *See* note 146 *infra*.

[146] By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

44 Fed. Reg. 71,413 (1979).

[147] *Compare id. with* 43 Fed. Reg. 58,070 (1978).

[148] 43 Fed. Reg. 58,070 (1978).

[149] The proposed PI required institutions to provide comparable benefits for male and female athletes where benefits and opportunities were not readily financially measurable.

An institution provided equal athletic opportunities in its existing program if:

A. Substantially equal average per capita funds are allocated to participating male and female athletes for:

1. Financial assistance awarded on the basis of athletic ability;
2. Recruitment; and
3. All other readily financially measurable benefits and opportunities;

Provided however, that differences in average per capita expenditures for such

HEW proposed to calculate "average per capita expenditures" by adding together all funds spent on benefits and opportunities, regardless of source.[150] "[G]ate receipts, student fees, earmarked donations, booster club funds" would all be included, and the total amount would be divided by the total number of athletes of each sex participating in the institution's intercollegiate athletics.[151] The Department revised this approach and now lists extensive compliance factors.[152] The more elusive term "equal opportunity" has been substituted for average per capita expenditure as the final standard.[153] Substantial discrepancies in expenditures favoring male football teams may be justified either on the basis of high-cost maintenance or, along with male basketball teams, on the ground that these crowd attractions require larger investments.[154] These exceptions,[155] coupled with the contact-sports exemption, are likely to maintain the status quo to such an extent that Congress may as well have exempted remunerative sports outright.

The significance of HEW's virtual grant of immunity from Title IX sanctions in connection with intercollegiate football and basketball cannot be overemphasized. It has both symbolic and practical importance: symbolic, as a reflection of the still tenuous national commitment to achieving equality between the sexes; practical, because the result withholds precisely those opportunities that provide the greatest incremental value in overcoming sex discrimination in all athletics. Integration of basketball and football would effect widespread and highly visible change because these are the biggest spectator sports. Relatively proportionate expenditures, even under the prevailing pattern of sex-segregated teams, at least would attack the most egregious current funding discrepancies. Yet, HEW's failure to endorse either action was not inadvertent.[156] So

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financially measurable benefits and opportunities will be considered consistent with Title IX if the institution can demonstrate that the differences result from nondiscriminatory factors such as the nature or level of competition of a particular sport.

B. Comparable benefits and opportunities which are not readily financially measurable, are provided for participating male and female athletes.

Id. at 58,072.

[150] *Id.* at 58,073.

[151] *Id.*

[152] 44 Fed. Reg. 71,413, 71,416-17 (1979).

[153] *Id.* at 71,414. For an explanation of the deletion see *id.* at 71,419-20. The simple per capita formula has been retained in considering the athletic scholarship factor, but calculations focus on the available financial aid, not the actual expenditures. *Id.* at 71,415.

[154] *Id.* at 71,415-16.

[155] The PI also justifies disproportionate amounts of available scholarship funds based on "reasonable professional decisions" designed to build a successful team and will protect the practice of recruiting out-of-State male athletes for the most remunerative sports. *Id.* at 71,415.

[156] In discussing the proposed PI, then HEW Director Joseph A. Califano, Jr. candidly remarked that the proposal "sought to strike a balance between the encouragement of greater participation in college athletics by women and the realistic understanding that men's sports receive more attention and require more money." N.Y. Times, Dec. 7, 1978, §

long as the sex-segregated status of basketball and football are protected, women's athletic abilities will continue to be viewed as inferior.

With respect to sports other than football and basketball, the changes from the proposed PI may make it more difficult for the Department to find noncompliance. The process of investigating all the compliance factors will be lengthy and time consuming. Without the per capita spending criterion, the weight to be given to disparities in expenditures between men and women athletics is unclear.

The second principle eliminated involved future responsibilities.[157] The proposed PI would have required institutions to adopt procedures and standards to expand women's athletic programs, for example, increasing the number of female participants and the offerings of sports at the club, intramural, and intercollegiate level.[158] In addition, publicity regarding athletic opportunities for women would have been required in conjunction with an effort to upgrade the competitive status "from local to State, State to regional, and from regional to national."[159] The final PI does not specifically mandate such programs.[160] Instead, the PI explains that institutions need only "accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available."[161]

The PI makes it clear that absolute equality will not be the Title IX standard. Rather, programs can be "equal *or* equal in effect."[162] Title IX does not affirmatively require equal spending or nondiscrimination in the treatment of separate teams. HEW regulations specifically provide that inequality of aggregate expenditures alone will not constitute noncompliance.[163] The standard is substantial equivalency rather than equality.

Finally, the PI does not guarantee a remedy for women athletes when there is a team only for males. A university *may* be required "to permit the excluded sex to try out for the team,"[164] at least in noncontact sports.

D, at 21, col. 1. After HEW issued the final PI, University of Hawaii Athletic Director Raymond R. Nagel indicated the importance of exemptions for the major intercollegiate sports: "We're talking about severe consequences. That's the bone, whether we will treat football and basketball the same." Honolulu Advertiser, Dec. 5, 1979, at E-1, col. 4. The 1979 budget for the men's football program at the University of Hawaii was slightly more than three times the budget for the entire women's sports program. *Id.* at col. 3.

[157] *See* 43 Fed. Reg. 58,070, 58,072 (1978).

[158] *Id.* at 58,074.

[159] *Id.*

[160] *See* 44 Fed. Reg. 71,413, 41,414 (1979).

[161] *Id.*

[162] *Id.* at 71,415 (emphasis added).

[163] HEW regulations require an institution to "provide equal athletic opportunity for members of both sexes," 45 C.F.R. § 86.41(c) (1979), but HEW has concluded that this equality of opportunity does not require either equality of "aggregate expenditures for members of each sex [or equality of] . . . expenditures for male and female teams." *Id. See* Comment, *supra* note 132 (discussing the weaknesses of Title IX).

[164] 44 Fed. Reg. 71,413, 71,418 (1979); *cf.* Gomes v. Rhode Island Interscholastic League,

Alternatively, a college may be required "to sponsor a separate team for the previously excluded sex."[165] Before HEW will order the latter remedial action in either contact or noncontact sports, there must be "a reasonable expectation of intercollegiate competition for that team."[166] This requirement may be seen as inconsistent with HEW's acknowledgment that historical emphasis on men's intercollegiate athletic programs has resulted in underparticipation by women and "contributed to existing differences in the number of sports and scope of competition offered men and women."[167] Indeed, the legislative goal of equal opportunity as it was understood in the early 1970's when Title IX was enacted has been so emasculated that the law today does not even mandate separate-but-equal athletic programs for men and women.

B. Fourteenth Amendment Litigation

During the past decade, courts have not been consistent in requiring full equality in athletic education and opportunity.[168] The cases presented under the fourteenth amendment have challenged different types of discrimination in athletics,[169] and the judicial response has lacked a uniform and developed approach to these new challenges.[170] The interests asserted by schools and athletic associations to justify the sex discrimination include tradition, cost control, the prevention of physiological and psychological damage to participants of both sexes, and the protection and development of girls' athletic programs.[171]

The early cases involved situations where there was boys' competition in individual sports but no comparable opportunity for girls. Courts generally held that where there was no team for women, mixed-gender competition must be allowed.[172] In a number of these cases, the courts

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469 F. Supp. 659 (D.R.I. 1979), *application to vacate the stay entered by the First Circuit denied*, 47 U.S.L.W. 3760 (May 21, 1979) (No. A-995) (Title IX regulations require that qualified male be given opportunity to play volleyball either by establishing a separate volleyball team for boys, by allowing him to compete on present girls' team, or by other practical means).

[165] 44 Fed. Reg. 71,413, 71,418 (1979).

[166] *Id.*

[167] *Id.* at 71,419.

[168] This corresponds with the uneven development of the Supreme Court's treatment of sex discrimination generally. Ginsburg, *supra* note 65, at 170-71. *See* note 45 *supra*.

[169] *E.g.*, some cases challenge the failure to provide women's teams, *see* notes 172-80 *infra* and accompanying text; others challenge restrictions on existing women's teams, *see* notes 186-96 *infra* and accompanying text.

[170] *E.g.*, rational relation test, *see* notes 173, 180 *infra* and accompanying text; substantial rationality standard, *see* notes 175-78 *infra* and accompanying text.

[171] *See, e.g.*, text accompanying notes 188-99 *infra* and notes 194, 201.

[172] Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (tennis, skiing, running, and cross country); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (tennis); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D.

reached this result by applying a rational relation test under the equal protection clause.[173] Schools were prohibited from enforcing rules that deny women the opportunity to compete with men in skiing, tennis, running, and golf.[174]

More recently, in *Hoover v. Meiklejohn*,[175] a female student successfully challenged the high school athletic association rule limiting soccer competition to males. The federal district court employed an intermediate standard of review under the equal protection clause, known as the substantial rationality test established by *Craig v. Boren*.[176] *Hoover* is significant because it involved a contact sport. The court did not order mixed competition but instead offered the association three alternatives: (1) The organization could decide to discontinue soccer as an interscholastic athletic activity;[177] (2) it could decide to offer separate teams but with substantial equality in funding, coaching, officiating, and opportunity to play; or (3) it could permit both sexes to compete on the same team.[178]

Carnes v. Tennessee Secondary School Athletic Association[179] illustrates both the significance accorded differentiations based on contact versus noncontact sports and the analytical difficulties inherent in the dichotomy. The federal district court temporarily enjoined enforcement of a rule that prohibited plaintiff, a high school senior, from participating in the existing baseball program on account of her sex. The court applied a rational relation test and assumed that the State could legitimately "discriminate between sexes" when contact sports are involved.[180] However, the court questioned the reasonableness of classifying baseball as a collision sport:

> Coach Kreis testified that the rules of baseball prohibit body checking and that base-runners are generally tagged with a glove. If the game is played properly,

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Kan. 1974) (track); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (golf); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) (golf).

[173] *See* cases cited note 172 *supra*. For further discussion, see Jewett, *supra* note 1.

[174] *See* note 172 *supra*.

[175] 430 F. Supp. 164 (D. Colo. 1977).

[176] *Id.* at 168-69. *See* Jewett, *supra* note 1, at 65 n.44. Also see the discussion of Craig v. Boren, 429 U.S. 190 (1976), *supra* note 45.

[177] 430 F. Supp. at 172. *See generally* Palmer v. Thompson, 403 U.S. 217 (1971) (where the city council of a Mississippi town decided not to operate public pools on a desegregated basis pursuant to a court order in Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963)).

[178] 430 F. Supp. at 172.

[179] 415 F. Supp. 569 (E.D. Tenn. 1976).

[180] *Id.* at 572. The court nevertheless cast doubt on the proposition that the bar was designed to reduce the risk of injury since the plaintiff had played other sports without incident and since the purported state interest did not consider the welfare of males by barring those boys who are prone to injuries. *Id.* at 571.

> collisions at the plate are infrequent. Occasionally, a player is spiked, and a batter is hit by a wild pitch. It is questionable, therefore, whether . . . [the athletic association] can reasonably classify baseball as a contact sport.[181]

The protective rationale underlying the contact sports exception takes on a different dimension of paternalism when sex-segregated noncontact sports are condoned. The former rationalization of protecting females from sports injuries as a result of superior male strength is replaced with the asserted need to protect females from domination as a result of superior male athletic skill. The female displacement argument obviously loses its force where no play opportunity exists for women,[182] but courts have been reluctant to order mixed competition in any sports program that already offers viable teams for each sex.[183] The court in *Hoover* commented that the equal protection clause when applied to sex classification mandates only "comparability, not absolute equality,"[184] and that separate-but-equal teams would satisfy the requirement of equality of opportunity.[185]

In *Bucha v. Illinois High School Association*,[186] a female high school student brought a class action challenging a rule that prohibited competition between members of the opposite sex and that placed restrictions on girls' swim contests but not boys'. The federal district court applied the rational relation test and found that the classification withstood constitutional attack. District Judge Austin noted that "at the pinnacle of all sporting contests, the Olympic games, the men's times in each event are consistently better than the women's."[187] The evidence showed that the times of two male swimmers sent to the state championship were better than those ever recorded by either of the named female plaintiffs.[188] Expert testimony presented physical and psychological differences between males and females, prompting the inference that unrestricted athletic

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[181] *Id.* at 571-72. The court refused to decide whether baseball is a contact sport as a matter of judicial notice and noted that Title IX regulations do not expressly include baseball in the definition of collision sports. *Id.* at 572 n.4.

In Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975), the court rejected medical testimony attempting to establish that the physical differences between girls and boys created a greater risk of injury to girls. The court reasoned that "should girls find Little League baseball too demanding, the program would seem self-regulating in that girls would withdraw." *Id.* at 350. The court further concluded that the physical differences did not constitute a convincing factual rationale for the sex-based classification. Uncontroverted evidence showed that during the ages 8-12 years, girls come close to matching boys in size and physical potential.

[182] *See* 415 F. Supp. at 571-72; text accompanying notes 201-04 *infra*.

[183] *See* text accompanying notes 186-96 *infra*.

[184] Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977).

[185] *Id.*

[186] 351 F. Supp. 69 (N.D. Ill. 1972).

[187] *Id.* at 74. *But cf.* note 4 *supra* and accompanying text (performance gap is narrowing).

[188] *Id.*

competition would lead to male domination of interscholastic sports and actually result in a decrease in female participation in such events.[189] In addition, the court emphasized the existence of a "bona fide athletic program for girls"[190] and concluded that all these justifications had rational bases in fact and were constitutionally sufficient reasons for prohibiting athletic interscholastic competition between boys and girls.[191]

In *Ritacco v. Norwin School District*,[192] the court reached an alternative holding[193] that separate-but-equal teams in athletics were justified by the physical and psychological differences between the sexes.[194] Plaintiff, a female high school student, challenged a regulation of the defendant athletic association requiring separate girls' and boys' teams in interscholastic noncontact sports. The federal district court applied a rational relation standard[195] and agreed with the analysis in *Bucha* that separate teams enhance participation in sports where opportunities for engaging in athletic events are equal.[196] The association's rule was justified because the school already had a separate girls' team.

Evidence accepted by the federal courts in *Ritacco*[197] and *Bucha*[198] was

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[189] *Id.* at 74-75.

[190] *Id.* at 75.

[191] *Id.*

[192] 361 F. Supp. 930 (W.D. Pa. 1973).

[193] The court first held that the case was moot because the named plaintiff already had graduated. For this reason the court also found the class action invalid. *Id.* at 930-31.

[194] *Id.* at 932. The court quoted a list of physiological differences from Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1233 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973):

> [M]en are taller than women, stronger than women by reason of a greater muscle mass; have larger hearts than women and a deeper breathing capacity, enabling them to utilize oxygen more efficiently than women, run faster, based upon the construction of the pelvic area, which, when women reach puberty, widens, causing the femur to bend outward, rendering the female incapable of running as efficiently as a male. These physiological differences may, on the average, prevent a great majority of women from competing on an equal level with the great majority of males.

But see Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979). "Women may . . . have an edge in sports that test balance, since their average lower center of gravity augments stability. They retain heat longer and enjoy greater buoyancy than men—both advantages in swimming. There is also evidence of higher endurance levels, and lower injury rates, for females." *Id.*, slip op. at 19 n.34 (citations omitted). Evidence also has shown that young males and females manifest few differences in size and physical ability. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975), *discussed in* note 181 *supra*.

[195] 361 F. Supp. at 932.

[196] *Id.* (citing Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972)). The court also noted that no girls participated in the sports program under a prior rule which did not preclude integrated teams. 361 F. Supp. at 931. In implementing Title IX, HEW officials have acknowledged the correlation between historic patterns of sex discrimination in intercollegiate athletic programs and present participation rates of women which are "far below those of men." 44 Fed. Reg. 71,413, 71,419 (1979).

[197] *See* notes 194, 196 *supra*.

[198] *See* text accompanying notes 187-89 *supra*.

similar to that advanced before the Indiana Supreme Court in *Haas v. South Bend Community School Corp.*[199] One member of the state supreme court was emphatic about the inconclusiveness of the offered proof:

> Such evidence cannot support a conclusion that the male sex is athletically superior. An objective observer could not determine which of two opposing armies is superior merely by examining the strongest and bravest soldier in each. For constitutional purposes, such an investigation would necessarily focus on the causes of any differential in the relative performances of male and female athletes.[200]

The *Haas* majority rejected the conclusion that the average differences between male and female athletes require special protection for women's athletic opportunities.[201] Although the court agreed that males generally possess superior athletic ability, that alone provided insufficient grounds to justify sex segregated teams "[u]ntil girls' programs comparable to those established for boys exist."[202] The implication of this analysis is that affirmative action may be necessary to alleviate the debilitating effects of past denials to equal athletic facilities, financial and social support, training, and competitive opportunities.[203] In the absence of a comparable female athletic program, the court found no justification under this analysis for prohibiting the woman athlete who can qualify from competing on otherwise all-male teams.[204]

The assumption that boys will always be athletically superior to girls was rejected in *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association.*[205] There the District Court of the United States for the Southern District of Ohio relied on the due process clause of the fourteenth amendment, striking down an athletic association rule that prohibited mixed-gender competition in interscholastic contact sports. The court found that the regulation deprived women of freedom of choice in matters of education, a liberty protected by the due process clause.[206] The court acknowledged two "palpably legitimate" justifications for the deprivation: (1) The state interest in prevent-

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[199] 259 Ind. 515, 289 N.E.2d 495 (1972).

[200] *Id.* at 528, 289 N.E.2d at 503 (DeBruler, J., concurring).

[201] *Id.* at 524, 289 N.E.2d at 500. The court reached this conclusion in response to the argument that sex segregation is necessary to protect the integrity of the girls' athletic program which otherwise would be dominated by boys.

[202] *Id. But cf.* Petrie v. Illinois High School Ass'n, 48 U.S.L.W. 2283 (Ill. App. Ct. Sept. 6, 1979) (exclusion of males from all-female volleyball team not violative of state ERA even though no program for males was offered).

[203] *Accord,* Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977), *quoted in* text accompanying note 254 *infra.*

[204] 259 Ind. at 526, 289 N.E.2d at 500-01.

[205] 443 F. Supp. 753, 758 (S.D. Ohio 1978). *See* note 3 *supra.*

[206] *Id.*

ing injury, and (2) the interest in maximizing female athletic opportunities.[207] The state interests, however, were premised on the conclusion that girls are uniformly physically inferior to boys. In the court's view the regulation was unconstitutional because the presumption might be rebutted if individualized determinations were made. The court held that a woman who so desires must be given the opportunity to demonstrate that the conclusive presumption created by the rule is invalid when applied to her.

Yellow Springs points out that a challenge under the due process clause of the fourteenth amendment may be an effective vehicle for mitigating sex discrimination.[208] The decision is a positive step toward equality, particularly because the court recognized that the state's interests in preventing physical injury and maximizing athletic opportunities for women are unacceptable even in the area of contact sports. Although the district court's ruling is encouraging, the continuing vitality of the rebuttable presumption theory of constitutional jurisprudence has been placed in doubt by a Supreme Court decision which the district court in *Yellow Springs* ignored.[209]

Even if courts embrace the *Yellow Springs* analysis, the process of desegregating sex-specific athletic programs will undoubtedly be slow and will fail to consider the cumulative effect of past sex discrimination. Similarly, the potential for statistical distortion coupled with the nonuniformity of judicial analysis makes the equal protection and due process litigation approach less than ideal.[210]

C. *Analysis Under the ERA*

Constitutional analysis changes significantly when sex-segregated athletics are scrutinized under ERA principles.[211] The fundamental precept

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[207] *Id.*

[208] The federal district court relied upon three Supreme Court decisions to sustain its analysis. *Id.* at 758 (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972)).

[209] *See* Weinberger v. Salfi, 422 U.S. 749, 767-75 (1975).

[210] *See* Ginsburg, *supra* note 65; note 266 *infra*.

[211] Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650, slip op. at 14 (Mass. Sup. Jud. Ct. July 3, 1979) (under state ERA sex is "a category in a constitutional tier at least as high as race"). In Darrin v. Gould, 85 Wash. 2d 859, 872, 540 P.2d 882, 890 (1975), the court incorporated the *Yale* analysis by reference and adopted a higher standard of review than strict scrutiny in construing the state ERA. *See* Comment, *Sexual Equality in High School Athletics: The Approach of* Darrin v. Gould, 12 GONZ. L. REV. 691 (1977). Even if traditional equal protection analysis were imported into judicial review under an ERA, rather than the *Yale* analysis, the logical result would be to view sex classifications as suspect and to acknowledge that discrimination with regard to pregnancy is sex discrimination. This itself would change the result of litigation. *Compare* Geduldig v. Aiello, 417 U.S. 484 (1974) (rational relation test applied to comprehensive disability insurance plan excluding normal pregnancy), *with* Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1973) (strict

of the ERA is that classification by sex is always overclassification. Accordingly, if a court follows the *Yale* article's analysis, "the issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor."[212]

Hawaii's ERA provides greater potential for preventing discrimination in athletics than either the fourteenth amendment or Title IX. It is unlikely that a system of sex segregation would be allowed under the ERA, even if the unique physical characteristic argument were advanced.[213] However, Hawaii courts would have to employ a more rigorous analysis than that utilized by the state supreme court in *Holdman v. Olim*[214] in order to prevent the use of this exception to evade the absolute mandate of the ERA.

In the context of sports, it is likely that a defendant may seek to justify rules totally or partially prohibiting competition between the sexes on the ground of differences in unique physical characteristics. In fact, the argument that women's physiology increases their risk of injury and decreases their athletic potential has been advanced both to exclude females from all-male teams and to prohibit males from participation on all-female teams.[215] The reasoning fails to comprehend the intended narrow scope of the exception being invoked.[216]

Assuming that a unique physical characteristic is proven to affect the risk of injury, particularly in contact sports, a faithful ERA analysis must conduct a six-part examination of the relationship between that lineament and the classification in general.[217] Dissection of exceptional claims to sex-segregated sports would begin with empirical evidence establishing the proportion of women who actually have a unique characteristic that

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scrutiny applied to unemployment insurance benefits excluding pregnancy-based claims). *Cf.* Darrin v. Gould, 85 Wash. 2d 859, 861, 540 P.2d 882, 891 (1975) (rejecting lower court's finding that a rule excluding females from football teams was based upon the nature of the game rather than a sex-based rule per se).

[212] YALE, *supra* note 32, at 892.

[213] For a discussion of this exception to the ERA absolute standard, see text accompanying notes 37-42, 74-98 *supra*.

[214] *See* discussion of Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978) in text accompanying notes 54-106 *supra*.

[215] *Compare* Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975), *and* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (rejecting arguments that female susceptibility to injury justified preclusion of women from all-male teams), *with* Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979) (rejecting argument that exclusion of males from all-female team is justified by injury-prone nature of females). The safety argument has also been used to exclude girls from sports programs in Hawaii. *See* note 270 *infra*.

[216] *See* text accompanying note 38 *supra*.

[217] *See* note 77 *supra*.

increases their risk of injury.[218] It is extremely difficult to determine how much of the differences in athletic performance and achievement can be attributed to physical potential and how much to socialization. Moreover, these physical differences are only average differences.[219] Notwithstanding problems of quantification, one must next determine the percentage of those women with the injury-provoking characteristic who would actually be injured. Further consideration would be given to the fact that even the most talented athletes can be injured during competition and practice. The inquiry therefore must explore the proportion of injuries that are due to other factors, such as lack of adequate training, illness, accidents, emotional or psychological problems, faulty equipment, and refusal to abide by game rules.

Having thus defined the magnitude of the problem sought to be remedied by the sex-based classification, attention would focus on the relative value of the proposed solution. A prohibition on integrated competition might reduce injuries caused by a biological disadvantage, but it would not eliminate all the other sources creating a risk of injury. If, for example, a large proportion of accidents occur in the sport which are not related to the unique physical characteristic claimed to underlie the exception, then the value of reducing accidents which are related to the characteristic is diminished in relative importance.

A search for alternatives to sex segregation is also mandated.[220] For example, if the female breast tissue is vulnerable to injury, protective equipment could be used.[221] Similarly, if it were proven that a distinct feature of female bone structure promoted injury, sex segregation should not be permitted if height and weight classifications for players of both sexes would serve substantially similar ends.[222] Another alternative might be to test individuals for actual susceptibility to injury.[223]

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[218] Allowing men to take risks with their own bodies while preventing women from taking similar risks merely because the characteristic creating the risk occurs more frequently among women than men would not satisfy the requirement for uniqueness. *See* note 42 *supra* and accompanying text.

[219] BROWN, *supra* note 2, at 304.

[220] Less drastic alternatives also would be explored under equal protection analysis if classifications by sex were considered suspect. For a discussion of alternatives to sex-segregated athletics in the equal protection context, see Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 871-81 (1978).

[221] Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571 (E.D. Tenn. 1976) (noting that plaintiff in equal protection challenge "would be willing to wear a chest protector specially designed for women" in order to play on male baseball team); Darrin v. Gould, 85 Wash. 2d 859, 876-77, 540 P.2d 882, 892 (1975), *quoted in* note 229 *infra;* Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535, 550 n.109 (1974).

[222] BROWN, *supra* note 2, at 305.

[223] *Id.* The assumption that women might be weaker and more injury prone did not withstand scrutiny under an ERA analysis in Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975). The court reasoned that:

The existence of certain characteristics to a greater degree in one sex does not justify

Finally, a cost-benefit analysis must be employed. One must balance the seriousness of the risk of injury and the likelihood of avoiding harm against the cost of denying women the opportunity to compete to the best of their abilities, the cost of perpetuating sex stereotyping, and the cost of preserving long-term male domination of athletics.

A similar analysis would apply to a unique physical characteristic that diminishes athletic ability. Open competition is an obvious less drastic alternative to sex classification under those circumstances. There is no defensible rationale for promoting sex-segregated teams based on a purportedly benign motive to protect biologically disadvantaged individuals from competing with advantaged individuals.[224]

1. How should contact sports be treated?—Where the issue of integrated contact sports has been litigated in states with ERAs nearly identical to Hawaii's constitutional provision,[225] the courts have adopted a *Yale*-type analysis.[226] The results uniformly reject the proposition that exclusionary rules are justified because (1) women do not have as great athletic potential as men, and (2) women are more prone to injury than men.

The Washington Supreme Court held in *Darrin v. Gould*[227] that a rule excluding women from a high school football team was a per se violation of the state ERA. Two women who had practiced with the all-male football team and who the coach considered qualified to play brought a class action on behalf of all high school girls qualified to play football to challenge the Washington Interscholastic Activities Association (WIAA) regulation. The WIAA argued that the prohibition against women on the team was necessitated by the nature of the game of football. The risk of injury to the "average girl" would be great because of her physiology. However, the court found that what may be true for the majority of girls may not be true for the plaintiffs or girls like them.[228] In addition, the court noted

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> classification by sex rather than by the particular characteristic . . . . If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications.

Id. at 52, 334 A.2d at 843 (citation omitted). *Accord,* Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571 (E.D. Tenn. 1976).

[224] Fortin v. Darlington Little League, Inc., 514 F.2d 344, 350 (1st Cir. 1975) (handicapped boys were allowed on all-male team); BROWN, *supra* note 2, at 304-06.

[225] Hawaii, Massachusetts, Pennsylvania, and Washington have ERAs containing language nearly identical to the proposed federal ERA. For a complete list of state ERAs see note 44 *supra.*

[226] Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). *See also* Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975) (summary judgment).

[227] 85 Wash. 2d 859, 540 P.2d 882 (1975). There was no dissenting vote.

[228] *Id.* at 875, 540 P.2d at 892. *Accord,* Commonwealth v. Pennsylvania Interscholastic

the lower court's finding that the risk of harm to women because of their particular body structure could be reduced without resort to segregation, thus showing that unique physical characteristics could not justify the classification in this case.[229]

Darrin is a benchmark decision because the traditional bastion of male athletics, football, was forced to open its doors to qualified women.[230] It suggests that the Hawaii ERA will not permit an exception for sex-segregated contact sports. Contact sports should not receive different treatment under ERA analysis even where unique physical characteristics are claimed to support the distinction. Men, as well as women, run the risk of physical injury in football games, but this risk to average males has not been used to deny them the chance to play. The bar is thus underinclusive because it does not address the problem of male injuries. Rules that limit female participation in contact sports for safety reasons are also underinclusive if the same females are allowed to participate in dangerous noncontact sports, such as downhill skiing or surfing.[231]

2. *Can separate-but-equal sex segregation satisfy the constitutional mandate of ERA?*—The athletic potential of females is related to the health and safety argument that pervades the justification for sex-segregated contact sports. But the assertion that women are inherently inadequate athletes is the pinion of a separate-but-equal approach to competition. Opponents of integrated teams argue that male domination of all athletic activities will result.[232] Segregationists are finding, however, that

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Athletic Ass'n, 18 Pa. Commw. Ct. 45, 52, 334 A.2d 839, 843 (1975). Carol Darrin was 16 years old, 5'6" and 170 pounds. Her sister Delores was 14 years old, 5'9" and 212 pounds. Both had undergone the necessary physical tests and training and proved competent to play on the team. 85 Wash. 2d at 861, 540 P.2d at 884.

[229] " '[T]he breasts could be adequately protected with proper equipment not currently available and serious injury to the procreative organs is not a very substantial risk.' " 85 Wash. 2d at 876-77, 540 P.2d at 892.

[230] *Darrin* is the first supreme court decision applying a state ERA to the specific issue, but it relied upon an earlier Pennsylvania lower court decision which had reached a similar result under that state's ERA. *Id.* at 877, 540 P.2d at 893. In Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975), the court ordered the athletic association to permit women to practice and compete with men. The complaint omitted football and wrestling, thereby affording the Pennsylvania court an opportunity to distinguish between integration of contact and noncontact sports. In fact, the court included both contact sports in its order: "[I]t is apparent that there can be no valid reason for excepting those two sports from our order in this case." *Id.* at 53, 334 A.2d at 843. The Massachusetts Supreme Judicial Court recently issued an advisory opinion which found no compelling state purpose to justify a proposed statute to prohibit mixed competition in football and wrestling. Opinion of the Justices, _ Mass. _, 371 N.E.2d 426 (1977). *See* note 104 *supra*.

[231] *See* Attorney Gen. v. Massachusetts Interscholastic Ass'n, No. S-1650, slip op. at 21 (Mass. Sup. Jud. Ct. July 3, 1979). *Cf.* Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571 (E.D. Tenn. 1976) (rule prohibiting girls from participation too narrowly drawn).

[232] Fasteau, *Giving Women a Sporting Chance*, Ms., July 1973, at 58. *See also* Comment, *supra* note 211.

courts question the validity of the assumption that females are physically inferior.[233] Moreover, they cannot meet the ERA demands for empirical evidence in those sports never offered to women, since there is no basis for comparative documentation of relative skills. For example, in *Darrin*, the WIAA contended that women's athletic programs would be disrupted if coeducational teams were allowed. Very few women would qualify for the teams since the average male is superior in athletic ability to the average female. The court dismissed this as "opinion testimony necessarily conjectural in character as to what might happen."[234] Specific evidence was not available because the existing football teams were exclusively male.[235]

In *Commonwealth v. Pennsylvania Interscholastic Athletic Association*,[236] the State through its attorney general challenged the constitutionality of the defendant organization's by-law providing that "[g]irls shall not compete or practice against boys in any athletic contest."[237] On motion for summary judgment, the commonwealth court concluded that the by-law was unconstitutional on its face. The athletic association argued that it was more advantageous for women to compete exclusively with members of their own sex due to the greater athletic abilities of men in the traditional sports. The court found that this argument lacked substance where there is no women's team and that even where separate teams exist the woman athlete who excels would be unconstitutionally denied the right to compete at a level reflecting her ability.[238]

The obvious corollary to removing prohibitions against participation by females on formerly all-male teams is that qualified males are entitled to earn positions on previously all-female teams. *Attorney General v. Massachusetts Interscholastic Athletic Association*[239] involved an association rule that completely prohibited male participation on girls' teams even when no comparable boys' teams existed.[240] The Massachusetts Supreme Judicial Court unanimously held that the bar violated the state ERA, even while the court assumed but did not decide the validity of separate-

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[233] Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650, slip op. at 19, 21 (Mass. Sup. Jud. Ct. July 3, 1979); notes 181, 194 *supra*.

[234] 85 Wash. 2d at 876-77, 540 P.2d at 892.

[235] *Accord*, Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979). The Massachusetts court found the medical data correlating injury to females with the presence of male athletes on the team to be replete with stereotypic assumptions. *Id.*, slip op. at 21. *See also* text accompanying notes 182, 201-04 *supra*.

[236] 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975). One of six judges dissented. *Id.* at 53, 334 A.2d at 843 (Bowman, J., dissenting).

[237] *Id.* at 48, 334 A.2d at 840 (quoting art. XIX, § 3B of the Pennsylvania Interscholastic Athletic Ass'n By-Laws).

[238] *Id.* at 52, 334 A.2d at 842.

[239] No. S-1650 (Mass. Sup. Jud. Ct. July 3, 1979).

[240] *Id.*, slip op. at 13, 25.

but-equal teams.[241] The association presented the benign or remedial explanation of protecting girls' sports from being overwhelmed by boys. The court found this anticipated peril speculative; even if the danger were solidly based in fact "it would not justify the categorical exclusion of males from any sport . . . in which, overall, they enjoy no or only a slight advantage over females."[242]

The requirement of individualized determinations without regard for sex is the essence of ERA doctrine. To replace that tenet with the anachronistic philosophy of segregation would transport contemporary jurisprudence to the nineteenth century.[243] Valid criticism of the separate-but-equal approach to athletics is analogous to the Court's rationale for prohibiting racially segregated public schools in *Brown v. Board of Education*.[244] The badge of inferiority associated with racial segregation made

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[241] *Id.* at 23-24, 26. *But see* Petrie v. Illinois High School Ass'n, 48 U.S.L.W. 2283 (Ill. App. Ct. Sept. 6, 1979).

[242] No. S-1650, slip op. at 22. See note 261 *infra*. The court mentioned that gymnastics, swimming, and riflery may be examples. *Id.*

[243] Twelve years after the Supreme Court announced the separate-but-equal doctrine in race relations, Plessy v. Ferguson, 163 U.S. 537 (1896), the Court upheld protective legislation for women, finding that "she is not upon an equality" with men. Muller v. Oregon, 208 U.S. 412, 422 (1908). The Court did not accord women the same status as racial minorities then and does not now. *See* note 45 *supra*.

[244] 347 U.S. 483 (1954). "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495. The Court relied on a number of social science studies to conclude that legally sanctioned segregation tended to retard the educational development of black children. *Id.* at 494 n.11. Although these studies have been the subject of subsequent debate, *see, e.g.*, Stell v. Savannah-Chattham County Bd. of Educ., 220 F. Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964) (reviewing sociological studies); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, 460 & n.19, 461 & n.20 (1975), the Court has continued to accept the view that in the area of race, segregated schools are inherently unequal. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 395 (1978), Justice Marshall in his separate opinion reiterated the principle:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. . . . [Justice Marshall listed statistics on health, employment, and income.]
>
> The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.
>
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

If a court were to accept a separate-but-equal argument in litigation involving athletic opportunities, the development and achievements of women athletes likewise may remain a "distant dream." *See* Jewett, *supra* note 1, at 58-59. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (employing race and sex discrimination analogy). For a discussion of the analogy between race and sex in general see Comment, Plessy *Revived: The Separate but Equal*

it impossible ever to have truly equal separate facilities. It has been asserted that separation of the sexes does not create a stigma of inferiority.[245] If this were so, the analysis in *Brown* might not apply. However, women's teams are generally considered inferior to men's teams.[246] Reaction to the concept of integrated contact sports is likely to be emotional[247] and based on the psycho-sexual impact of mixed competition.[248] Emotional responses should not be used to defeat positive steps towards equality.[249] Integration is needed to eliminate the very social prejudices which undercut women's opportunities. The psychological impact of integrated teams would reduce the stigma of women athletes as inferior.[250] In any case, advanced psychological reasons for integration need not be reached since the tangible aspects of women's athletics are far from equal to men's. Disparities are well documented in funding, facilities, training, scholarship awards, and the number of sports offered, both nationally[251] and in Hawaii.[252]

3. What significance should be given to the current average physical differences between men and women?—If a separate-but-equal approach to athletics is inimical to ERA principles, recognition of current average performance differences between the sexes requires thoughtful considera-

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Doctrine and Sex-Segregated Education, 12 HARV. C.R.-C.L.L. REV. 585, 594-98 (1977).

[245] Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977) (no "stigmatizing inferiority" in the separation of athletic teams by sex).

[246] The main argument for retaining segregated sports rests on the view that female athletes are inherently inferior. *See* text accompanying notes 234-38 *supra*. *See also* 44 Fed. Reg. 71,413, 71,419 (1979) (Title IX exception for all-male football recognizes its popularity with spectators).

[247] Survey, Commonweath v. Pennsylvania Interscholastic Athletic Association: *A Stride Toward Equality of the Sexes or a Misstep?*, 37 U. PITT. L. REV. 234, 247, 249 (1975). Some critics have expressed the fear that integrated competition will even encourage rape. "Sanctioned public display of males directing violence against females on the football field or wrestling mat may well provide the wrong type of encouragement for those persons in society already teetering on the brink of committing this crime." *Id.* at 247 n.78. Even assuming arguendo that mixed competition would incite potential rapists, by the same reasoning potential violators are now encouraged to commit homosexual assaults by the sanctioned public display of males directing violence against males in athletic activity.

[248] *Id.* at 247.

[249] The bugaboo of women's physical inferiority was raised to block employment opportunities. Yet, women today are performing well in tasks that were traditionally limited to men. One of the most dramatic examples is the expanding role of women in the military. Lichtenstein, *Oh, The Captain, She's a Lady*, N.Y. Times, Aug. 26, 1979 (Magazine), at 24, 26. In the area of employment practices, traditional systems of separate facilities or separate lines of progression for women have diminished. Most legal challenges today focus on disparate treatment, when protected group employees are denied employment advantages on account of a proscribed factor, and disparate impact, when a test device or requirement stands as a significant barrier to equal participation. Myer, *Development of a Plaintiff's Fair Employment Practices Case*, 5 LITIGATION No. 2, at 8 (1979).

[250] Note, *Sex Discrimination in Athletics*, 57 MINN. L. REV. 339, 369 (1972).

[251] 44 Fed. Reg. 71,413, 71,419 (1979).

[252] *See* notes 114-18 *supra*.

tion. It has been suggested that women's athletic opportunities cannot achieve equality unless affirmative action is taken to remedy past discrimination and that this requires special teams for women. For instance, the federal district court in *Hoover v. Meiklejohn*[253] reasoned: "Given the lack of athletic opportunity for females in past years, the encouragement of female involvement in sports is a legitimate objective and separation of teams may promote that purpose. It may also justify the sanction of some sports only for females, of which volleyball may be an example."[254] This approach contradicts the underlying principles of the ERA.[255] In the long run, this would be harmful to the cause of women's athletics because exceptional athletes play a vital role in expanding horizons for all athletes and in inspiring other women to compete to the best of their ability.[256]

Although proponents of the ERA make it clear that the goal of sexual equality is not in general promoted by affirmative action programs,[257] they believe that courts will have power to grant affirmative relief in particular cases. They reason that where damage resulted from discriminatory actions, the enforcing authorities may be compelled to take the same characteristic into account in order to undo the damage. "Women's athletic opportunities cannot be equal to those of men unless affirmative action is taken to alleviate the deleterious effects of the long denial of equal access to athletic facilities, financial and social support, training and competitive opportunities."[258]

The apparently schizophrenic demand for affirmative action within the context of ERA's mandate of absolute equality[259] may be reconciled by the use of remedial measures which do not require sex-segregated athletics per se but which do take into account the extent to which past and present discrimination is responsible for differences between men's and women's average athletic ability.[260] Indeed, this issue was addressed in the most recent decision construing the Massachusetts ERA:[261] "During a

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[253] 430 F. Supp. 164 (D. Colo. 1977) (equal protection, not ERA claim).

[254] *Id.* at 170 (citations omitted).

[255] Brown & Freedman, *Sex Averaging and the Equal Rights Amendment*, 2 WOMEN'S RIGHTS L. REP. No. 4, at 35 (1975) [hereinafter cited as Brown & Freedman]. *But see id.* at 45: "For perhaps an extended period of time, girls teams can be maintained simply to develop their skills."

[256] *Id.* at 45. The importance of role models should not be underestimated.

[257] *See* YALE, *supra* note 32, at 904.

[258] Brown & Freedman, *supra* note 255 at 45.

[259] *See* note 255 *supra* and accompanying text.

[260] Allocating an equal number of positions to male and female athletes may be an alternative to qualification for a team through competition. Comment, note 221 *supra*, at 562-63. International volleyball association rules, for example, provide for four men and two women players per team. HOLLANDER, *supra* note 3, at 142. *See also* notes 261-62 *infra*. For a discussion of several other alternatives, see Comment, note 1 *supra*, at 441-45.

[261] The Massachusetts Supreme Judicial Court observed that if all high school boys performed better than all their female counterparts, total separation might be justified. But the court cast doubt on the likelihood that such a situation would occur, *see* note 194 *supra*, and

period of experimentation and change, some unevenness in the competition may result, but that calls merely for a modicum of toleration and some imaginative willingness to try new combinations."[262] This transition-period affirmative action must be closely tailored to the particular setting.[263] Far from compromising the equality principle, it is an essential part of a program designed to realize that goal.[264]

IV. CONCLUSION

The long history of unsuccessful litigation under the fourteenth amendment[265] foretold the necessity for an ERA.[266] Hawaii boldly embraced the concept of equality for the nation and the Fiftieth State.[267] The *Holdman* decision did not fulfill the promise of this initial commitment.[268] The single truncated application of the ERA in Hawaii corresponds with the lack of judicial precedent established by other state courts,[269] suggesting that

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concluded that classification on the basis of sex without reference to skill differential was archaic and overbroad. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, No. S-1650, slip op. at 19-20 (Mass. Sup. Jud. Ct. July 3, 1979). The court did note, however, that "the legality of segregation in separate but equal teams" was not challenged. *Id.* at 23-24. The court discussed several less Draconian alternatives to segregation which administrators of educational programs might consider. *Id.* at 23-25 (use of height, weight, or skill standards for team selections; admission through handicapping techniques common to golf; selective pairing of teams).

[262] *Id.* at 24. The court's opinion disappointed a former Massachusetts volleyball tournament official and prompted her to suggest that school athletic directors consider a requirement that an equal number of boys and girls start each game. The Boston Globe, July 3, 1979, at 26, col. 2.

[263] In the equal protection context, the Supreme Court has recognized the care that must accompany ostensibly benign classifications based on sex.

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

Orr v. Orr, 440 U.S. 268, 283 (1979) (citation omitted).

[264] Brown & Freedman, *supra* note 255 at 45.

[265] *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

[266] Darrin v. Gould, 85 Wash. 2d 859, 871-72, 540 P.2d 882, 889-90 (1975): "The Federal Equal Rights Amendment . . . was intended to outlaw interpretations of the Equal Protection and Due Process Clauses that permitted exceptions to the prohibition against sex discrimination."

[267] *See* text accompanying notes 18-19 *supra*.

[268] *See* discussion of Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978) in text accompanying notes 54-106 *supra*.

[269] *See* note 23 *supra*.

many women have either not yet discovered the potency of the ERA or still find the social consequences of assertive behavior intolerable.

The sports paradigm is a fertile area to produce a positive statement of equal rights for both sexes under Hawaii's ERA. The current catalog of sex-specific disparities ranges from Pop Warner football[270] to University of Hawaii athletic programs.[271] The result of litigation in other jurisdictions with ERAs similar to Hawaii's constitutional provision has proven the ERA a more compelling weapon to combat discrimination than either the fourteenth amendment or federal legislation.

For instance, Title IX regulations exempt contact sports, such as football, from integrated competition even where no women's team exists,[272] but such exemptions have been found unacceptable under the mandate of the ERA.[273] Title IX may ultimately show its true force in the group of women who are now practicing and training alongside their male peers in previously protected strongholds of male superiority.[274] Some young women are already competing with men, not only in soccer and baseball,[275] but in professional basketball as well.[276] These examples remain the exception[277] to the federally sanctioned rule of sex-segregated contact sports which does not even require separate-but-equal status for certain revenue-producing sports.[278]

Litigation under the fourteenth amendment has resulted in inconsistent results depending on the standard of review employed, the state in-

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[270] In the fall of 1978, an 11-year-old girl was found ineligible to participate in a Pop Warner football game on the Island of Kauai because of her sex. As a result, the game was never played. Her team voted not to play without her. National Pop Warner rules do not bar females from participating; the Kauai Pop Warner league manager made a discretionary decision to exclude her for "safety" reasons. Honolulu Star-Bulletin, Dec. 2, 1978, § B, at 1, col. 2-5.

[271] *See* notes 114-18, 145 *supra* and accompanying text.

[272] *See* text accompanying notes 133-41, 164-66 *supra*.

[273] *See* text accompanying notes 227-35 *supra*.

[274] *See* 45 C.F.R. § 86.34(c) (1979) (integrated physical education classes required except for contact sports).

[275] One of these young women was described by her coach: "She's the quickest player I've ever had . . . . In the all-star game, she carried the ball 80 per-cent of the time—and scored two of her team's three touchdowns." Hammer, *My Daughter, the Football Star*, Honolulu Star-Bulletin & Advertiser, Aug. 5, 1979 (Parade Magazine), at 6, col. 1.

[276] Although Ann Meyers did not make the Indiana Pacers' 11-player roster in the fall of 1979, she was the first woman to sign a National Basketball Association contract. Honolulu Advertiser, Sept. 11, 1979, § D, at 4, col. 1. Her example is a sign of the revolution in professional sports, and she will surely not be the last woman to secure a contract for her basketball skills. For instance, 6'8" collegiate player Anne Donovan exhibits similar professional potential. *See* N.Y. Times, Apr. 8, 1979, § S, at 7, col. 3.

[277] *See* National Collegiate Athletic Ass'n v. Califano, 444 F. Supp. 425, 434 (1978) (NCAA's "representational capacity may be fairly said to extend to only the interests of its members in promoting intercollegiate athletic programs and activities for male student athletes.").

[278] *See* text accompanying notes 141-42, 154-56 *supra*.

terests advanced, or the amount and type of evidence introduced.[279] Progress under the fourteenth amendment thus remains precarious and should no longer be the major avenue for redress.

Recognition that Hawaii's ERA will not condone present federal law still requires interim solutions to facilitate a smooth transition toward achievement of the ultimate goal.[280] If the cost of implementing the state constitution is to devise practical means for achieving "equality of rights under the law",[281] Hawaii will have enhanced its stature as the first State to ratify the ERA.

The use of the ERA as a remedy for sex discrimination in athletics is an increasing reality.[282] Given success in future litigation, society's attitudes and prejudices about women may prove the real barrier to equal opportunity. However, as in other areas such as employment, opportunities once reserved for men are now available to women.[283] As new generations of women strive to compete in sports from which they have previously been excluded, the pressure to change these attitudes will intensify. The full effect of the ERA's mandate and its underlying spirit will be realized.

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[279] *See* text accompanying notes 168-210 *supra*.
[280] *See* notes 260-63 *supra* and accompanying text.
[281] *See* text accompanying note 20 *supra*.
[282] *See* text accompanying notes 211-64 *supra*.
[283] *See* note 249 *supra*.

THE PROSECUTOR'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE TO THE GRAND JURY: DID THE HAWAII SUPREME COURT RETREAT FROM FUNDAMENTAL FAIRNESS?

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Duff Zwald**

The year 1978 witnessed two developments in Hawaii law with important implications for the rights of persons accused in a grand jury proceeding by a prosecutor seeking a criminal indictment. First, the Hawaii Supreme Court, in *State v. Bell*[1] and its companion cases,[2] held that in addition to presenting inculpatory evidence to the grand jury the prosecutor is only required to present evidence which is "clearly exculpatory" in nature. The scope of discretion in presenting exculpatory evidence is an area of prosecutorial conduct that has received little scrutiny or judicial review.[3] The *Bell* holding severely limits the right of an accused to

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[1] 60 Hawaii 241, 589 P.2d 517 (1978).

[2] The *Bell* decision consolidated defendant Bell's appeal with those in two other cases, State v. Chang, Crim. No. 50789 (1st Cir. Ct. Hawaii Dec. 7, 1977), and State v. Hisaw, Crim. No. 49928 (1st Cir. Ct. Hawaii Feb. 9, 1977).

[3] The relative paucity of case law and the failure of many courts to address the constitutional implications of restricted evidentiary presentations by the prosecutor make it difficult to formulate conclusively a majority rule with regard to the presentation of exculpatory evidence to a grand jury. At trial, a prosecutor is required to disclose available exculpatory evidence to the defense, but many states do not require such broad disclosure to the grand jury. *See* M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 71 (1977) [hereinafter cited as FRANKEL & NAFTALIS].

At one extreme, there are several federal court decisions which maintain that very limited disclosure of exculpatory evidence is necessary in federal grand jury proceedings. *See, e.g.*, United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977) (exculpatory evidence must be presented only in the most flagrant cases such as known perjury before the grand jury); United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) (evidence that tends to negate guilt need not be presented to a grand jury); United States v. Ruyle, 524 F.2d 1133 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (the fact that evi-

have exculpatory evidence presented, and it falls far short of the ABA Standards on Criminal Justice, which provide that "[t]he prosecutor should disclose to the grand jury *any evidence* which he knows will tend to negate guilt."[4]

The second important event was the ratification of a state constitutional amendment calling for independent legal counsel for grand juries.[5] The amendment is intended to resolve conflicts heretofore inherent in the prosecutor's role in the grand jury process.[6] Implementation of this amendment is still pending, however, because legislation passed for that purpose was vetoed by the Governor in June 1979.[7]

This article critically examines the court's decision in *Bell* and its ultimate impact on grand jury proceedings in light of the recent amendment. Part I reviews the evidentiary situations at issue in *Bell* and the compan-

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dence tending to be favorable to the defense was not presented to the grand jury does not entitle the defendant to challenge the indictment).

Other cases fail to adopt discernible standards of disclosure and instead resolve the issue by placing it within the discretion of the prosecutor. *See, e.g.*, Eames v. Pitcher, 344 F. Supp. 207 (M.D. La. 1972) (evidence that might have brought a grand jury to an alternate conclusion need not be presented; the district attorney is only required to produce evidence which he thinks, in good faith, fairly apprises the grand jury of the facts necessary to show probable cause); People v. McPhail, 118 Colo. 478, 197 P.2d 315 (1948) (the district attorney is the sole determiner of which witnesses will be called before the grand jury; the accused has no right to call witnesses to exculpate himself).

California courts impose a duty upon the prosecutor to reveal any evidence tending to negate guilt. This was the result of statutory construction in Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975). In State v. Herrera, 26 CRIM. L. REP. (BNA) 2016 (N.M. Ct. App. Aug. 21, 1979), the New Mexico Court of Appeals similarly adopted the ABA standard on disclosure of exculpatory evidence to the grand jury. In recognizing the grand jury's duty to protect citizens from unfounded accusations, the court held that a prosecutor's knowing withholding of evidence tending to negate guilt is fundamentally unfair and violates due process.

Few states impose such a broad requirement. *See* Note, *Criminal Procedure—District Attorney Is Under an Implied Statutory Duty To Inform Grand Jury of Exculpatory Evidence*, 25 CATH. U.L. REV. 648 (1976).

Commentators generally view the expansive approach, whether it be by a materiality standard or by the ABA "tending to negate guilt" standard, as a positive reform, *see, e.g., id.* at 664, which presents its own problems. *See* FRANKEL & NAFTALIS, *supra* at 129-30; Note, *The Prosecutor's Duty To Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514, 1535-36 (1977).

[4] ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.6(b) (1971) [hereinafter cited as ABA STANDARDS] (emphasis added).

[5] HAWAII CONST. art. I, § 11 provides:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

Implementing legislation mandated by the constitution for this provision was vetoed by Governor George R. Ariyoshi. *See* text accompanying notes 73-84 *infra*.

[6] *See* note 61 *infra* and accompanying text.

[7] *See* notes 75-76 *infra* and accompanying text.

ion cases. Part II examines the Hawaii Supreme Court's application of the clearly exculpatory rule as the standard under which the prosecution must reveal to the grand jury evidence that is favorable to the accused. It is argued here that the case law upon which the Hawaii court ostensibly relied actually followed a "materiality" rule, a more liberal standard than the one announced in *Bell*. It is further contended that the *Bell* standard retreats from previously established legal principles and may only rarely result in the presentation of any exculpatory evidence. Part III suggests, however, that the constitutional amendment may substantially mitigate the harshest effects of *Bell* by enabling grand juries, with the assistance of independent counsel, to call for presentation of additional evidence. Finally, implementation uncertainties raised by the veto of the enabling legislation are examined in view of the constitutionally mandated scope of that legislation and the grounds asserted for the veto.

I. THE *Bell* TRILOGY OF CASES

The trial courts in each of the cases decided in *Bell* had dismissed the indictments because of the defendants' contention that the prosecution had refused to inform the grand jurors of exculpatory evidence, thus denying the defendants due process of law. All three cases were appealed by the prosecution, and the Hawaii Supreme Court reversed.[8] The court rejected the trial courts' determinations that the prosecution had improperly withheld from the grand jury evidence favorable to the accused. The evidentiary disputes in the respective cases of defendants Bell, Hisaw, and Chang are briefly discussed here in order to provide the necessary background for discussion on standards for prosecutorial disclosure found in Part II of this article.

In Bell's case, the prosecutor did not present the grand jury with the testimony of eyewitness Michael Nash, who would have said that defendant Bell was not the murderer of Calvin Silva. The Nash testimony directly contradicted the circumstantial evidence of another witness, Michael O'Connell. The supreme court relied heavily on its own conclusion that witness Nash was sufficiently under the influence of intoxicants to render his testimony not "clearly exculpatory."[9] The undisputed facts indicated that witness O'Connell never claimed to have seen Bell with a firearm. Further, no nexus was shown between the firearm recovered from Bell at the time of his arrest shortly after the incident and the murder weapon.[10] Witness Nash's testimony was unequivocal that Bell was not

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[8] A fourth case, State v. Wilson, Crim. No. 49576 (1st Cir. Ct. Hawaii Sept. 1, 1977), arising in the same context at the same time, was not appealed by the State because the grand jury, upon being fully informed of the exculpatory evidence, returned a no-bill.

[9] 60 Hawaii at 247-48, 589 P.2d at 521.

[10] *Id.* at 242-43, 589 P.2d at 519.

the person who shot Calvin Silva.[11] In discussing the conflict of testimony, the court stated that it would be "conjecture" to deduce that the inclusion of Nash's "testimony could have induced the grand jury not to return an indictment against Bell."[12]

In Hisaw's case, the defendant was indicted for manslaughter for the stabbing death of Scott Robert Ramo on the premises of a Wahiawa restaurant. Wynelle Adaniya, a state witness at the time of the preliminary hearing, testified that Ramo and two other men chased Hisaw into the restaurant and shoved him up against a wall. According to Adaniya the three men then accosted Hisaw who appeared to be frightened. Adaniya further testified that two men, one of whom was Ramo, pursued Hisaw in the restaurant and that Hisaw, holding a knife in his hand, told them, "Come and get me. I'm ready for you."[13] Another witness, Colin Walsh, testified at a deposition prior to the preliminary hearing that he, another male acquaintance, and the defendant Hisaw were unexpectedly attacked in a parking lot in Wahiawa. Walsh was not called as a witness at either the preliminary hearing or before the grand jury. Karen Martinez, the only witness at the grand jury hearing who claimed to have personally observed the stabbing, testified that three men backed Hisaw into the restaurant, and one of the men (Ramo) hit Hisaw two or three times. Hisaw, who had a "strap" in his right hand, then swung at Ramo who stated, "You stabbed me."[14] The prosecution not only failed to call Walsh and Adaniya to testify before the grand jury, but it also neglected to advise or instruct the grand jury on the right of self-defense.

The supreme court said that the evidence produced by Adaniya was not "clearly exculpatory" because she did not actually witness the stabbing. Walsh, the second witness, did not identify the men who attacked him; nor did he witness the stabbing.[15] Finally, because the evidence did not clearly support a contention of self-defense, the court ruled that there was no need for such an instruction to the grand jury.[16]

In defendant Chang's case the grand jury indicted Police Officer Chang for burglary in the first degree. The victim claimed that a person identified himself as a police officer, gained entrance to her residence, and then began to grab her. The victim later fled the house. The victim spotted Chang by chance and identified him as the person who had entered her home. But at a subsequent lineup, the victim identified a person of substantially different appearance from Chang.[17] The fact of misidentification at the lineup was not presented to the grand jury. The supreme court

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[11] *Id.* at 243, 589 P.2d at 519.
[12] *Id.* at 248, 589 P.2d at 521.
[13] *Id.*, 589 P.2d at 522.
[14] *Id.* at 249, 589 P.2d at 522.
[15] *Id.* at 250, 589 P.2d at 523.
[16] *Id.* at 252, 589 P.2d at 524.
[17] *Id.*

ruled that although the misidentification reflected upon the credibility of the witness it was not "clearly exculpatory."[18]

II. THE *Bell* STANDARD—"CLEARLY EXCULPATORY" EVIDENCE

A. *The Court Applied* Filis *Improperly*

The majority and concurring opinions in *Bell* failed to differentiate between cases in which the failure to produce exculpatory evidence occurs in light of evidence overwhelmingly demonstrating a prima facie case[19] and those cases in which the existence of a prima facie case may be a close issue because of conflicting eyewitness testimonies, conflicting circumstantial evidence, or eyewitness testimony conflicting with circumstantial evidence. In addition, the court displayed apparent confusion as to the actual legal standard applied by the trial courts in dismissing the indictments. Although the court identified the issue presented as "whether the prosecution is required to present to the grand jury evidence which tends to negate the guilt of the accused,"[20] the court later stated that it did not believe prosecutorial responsibilities required presentation of "any and all" exculpatory evidence.[21] Although the record indicates that the lower courts were urged to adopt the ABA standard calling for presentation of any evidence that tends to exculpate,[22] there is no indication from the opinion that in fact they did so. This confusion may have contributed to the court's reluctance to sustain the trial courts' actions and its failure to embrace the intermediate position taken by the New York court in *People v. Filis*.[23]

In *Filis* the victim's wife made what were arguably inconsistent statements to the police, but the prosecutor, who was also by statute legal advisor to the grand jury,[24] did not present this evidence to the grand jury which returned the indictment.[25] The Hawaii Supreme Court quoted with approval a portion of the *Filis* opinion: " 'He need only select those

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[18] *Id.* at 254-55, 589 P.2d at 524.

[19] To support a prima facie case, "[t]he evidence must enable a reasonable mind fairly to conclude guilt beyond a reasonable doubt, giving full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact." State v. Rocker, 52 Hawaii 336, 345-46, 475 P.2d 684, 690 (1970).

[20] 60 Hawaii at 242, 589 P.2d at 518.

[21] *Id.* at 243, 589 P.2d at 519: "We do not believe, however, that the fulfillment of these responsibilities [to determine probable cause and to protect citizens against unfounded criminal prosecutions] requires that the grand jury have before it *any and all* evidence which might tend to exculpate the defendant." (emphasis added).

[22] *See, e.g.*, Record at 7, State v. Hisaw, Crim. No. 49928 (1st Cir. Ct. Hawaii Feb. 9, 1977); Record at 2-3, State v. Chang, Crim. No. 50789 (1st Cir. Ct. Hawaii Dec. 7, 1977).

[23] 87 Misc. 2d 1067, 386 N.Y.S.2d 988 (Sup. Ct., Queens County 1976).

[24] *See* note 64 *infra*.

[25] 87 Misc. 2d at ___, 386 N.Y.S.2d at 989.

witnesses and those facts which most expeditiously establish a prima facie case. He is under no duty to present all of his evidence or engage in a dress rehearsal of his case.' "[26] But the Hawaii court took this apparent support for narrowly defining the prosecutor's responsibility out of context. It ignored an important caveat immediately following the *Filis* quote that greatly limited the prosecutor's discretion in determining what exculpatory evidence not to present.[27]

The New York court said that the grand jury's need to evaluate evidence logically indicates that the prosecutor should introduce specific evidence when it would be clearly material to the issues being explored.[28] The court phrased this materiality test as a question: "Is the exculpatory matter in this case so important as to materially influence the Grand Jury's investigation or would its introduction possibly cause the Grand Jury to change its findings?"[29] Therefore, the opinion relied upon by the Hawaii Supreme Court in *Bell* actually applied a materiality standard, which stakes out a middle ground between the ABA standard of any exculpatory evidence and the *Bell* standard of clearly exculpatory evidence.[30]

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[26] 60 Hawaii at ___, 589 P.2d at 525 (quoting People v. Filis, 87 Misc. 2d 1067, 1069, 386 N.Y.S.2d 988, 989 (Sup. Ct., Queens County 1976).

[27] 87 Misc. 2d at ___, 386 N.Y.S.2d at 989:

> Yet this discretion is not unlimited. Under the law the District Attorney is the legal adviser of the Grand Jury. (CPL, § 190.25[6].) As legal adviser he must "instruct the jury with respect to the significance, legal effect or evaluation of evidence." (CPL, § 190.30[6].) Obviously, a jury cannot evaluate evidence without being aware of the underlying facts comprising this evidence. Thus it follows that the statute must contemplate situations in which specific evidence must be presented to the Grand Jury. When would such situations arise? Logic would indicate that the District Attorney should introduce specific evidence in those situations where such evidence would be clearly material to the issues explored by that body. The Grand Jury is a fact-finding group and must have the necessary facts before it. Further, it would appear that in any case where there would be evidence so compelling as to legally cause the Grand Jury to consider an alternate action under section 190.60 of the Criminal Procedure Law, the District Attorney would be equally obligated to introduce such evidence.

[28] *Id.*

[29] *Id.* at ___, 386 N.Y.S.2d at 990. The court in *Filis* applied this test to find that the omitted inconsistent statements were not material:

> This raises the second and more fundamental question. *Is the exculpatory matter in this case so important as to materially influence the Grand Jury's investigation or would its introduction possibly cause the Grand Jury to change its findings?* The Court has reexamined the Grand Jury minutes and finds that the answer must be in the negative. Witnesses grow confused; their testimony is frequently contradictory. However, the mere fact that a witness gives conflicting testimony (in the absence of bad faith or deliberate perjury) does not restrict the Grand Jury's fact-finding role. Nor would it logically tend to change the Grand Jury's ultimate determination. As the District Attorney points out, the conflicting testimony of the witness is a matter that can be resolved only during trial when all the circumstances surrounding that testimony may be thoroughly explored by both sides.

Id. (emphasis added).

[30] Although the Hawaii court misread the *Filis* standard, there was ample authority upon

It is clear that the court in *Filis* was vitally concerned with returning to the grand jury its historical powers and allowing it, not the prosecutor, to be the factfinder.[31] But the Hawaii Supreme Court's concerns reflect a different view of the grand jury's function. The majority opinion in *Bell* noted several major factors mitigating any requirement of the prosecution to produce exculpatory evidence which does not rise to the clearly exculpatory standard. These factors included: (1) A concern that the grand jury should not be converted into an adversary body; (2) the difficulty which a prosecutor would face in determining, at an early stage in the proceedings, what evidence is or is not exculpatory; (3) the need to avoid confusion and delay in grand jury proceedings; (4) the possibility of overreaching by the prosecutor *vis-a-vis* defense witnesses; and (5) the resulting difficulty created for the defense in overcoming an enhanced "presumption of guilt" arising from a misplaced notion that the grand jurors actually heard both sides of the controversy.[32] The court's treatment of the countervailing interests is limited to a perfunctory restatement of the grand jury's responsibilities to protect "citizens against unfounded criminal prosecutions."[33]

B. Bell *Retreats From Prior Hawaii Principles*

The *Bell* decision runs counter to principles enunciated in prior case law governing the prosecutor's conduct before a grand jury. In *State v. Joao*[34] the Hawaii Supreme Court held that a prosecutor may not engage in conduct which, in effect, would vouch for the credibility of a particular witness. Joao's prosecutor had presented statements to the grand jury relating to the motivation of a witness to testify at the proceedings. The court reasoned that such conduct was "contrary to 'those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" '."[35]

The *Joao* case established a state constitutional right to a fair and impartial grand jury proceeding.[36] By implication, *Bell* holds that the willful nondisclosure of exculpatory evidence by the prosecution which falls below the vague and subjective standard of "clearly exculpatory" does not affect an individual's right to a fair and impartial grand jury proceeding.

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which the court might have relied in adopting the clearly exculpatory test. *See* cases cited in note 3 *supra*.

[31] *See* note 27 *supra*.

[32] 60 Hawaii at 243-45, 589 P.2d 519-20.

[33] *Id.* at 243, 589 P.2d at 519 (citing United States v. Calandra, 414 U.S. 338, 343 (1974)).

[34] 53 Hawaii 226, 491 P.2d 1089 (1971).

[35] *Id.* at 230, 491 P.2d at 1091 (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926))).

[36] 53 Hawaii at 228-30, 491 P.2d at 1090-92. HAWAII CONST. art. I, § 10 provides in pertinent part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . . "

These divergent principles are difficult to reconcile. The evil sought to be avoided by the court in *Joao* was the action of a prosecutor in determining and warranting the credibility of witnesses. The evil caused by *Bell* is the granting to the prosecutor the power to determine the lack of credibility and materiality of witnesses or evidence. It is difficult to imagine that the arguably prejudicial, yet objectively innocuous, conduct of the prosecutor in *Joao* affected fundamental fairness more than the deliberate exclusion of highly relevant evidence sanctioned by the court in the *Bell* trilogy. Any rule allowing a prosecutor to choose between conflicting witnesses presents the opportunity for abuse and invasion of the grand jury's prerogatives. Such a rule can only weaken efforts to reform the grand jury.

C. *The Strict* Bell *Standard in Practice*

The court in *Bell* offered only two examples of what it believed to be clearly exculpatory evidence.[37] The court stated:

> Clearly exculpatory evidence may be manifested, for example, by a witness whose testimony is not directly contradicted by any other witness and who maintains that the accused was nowhere near the scene of the crime when it occurred. Also, where it has become apparent to the prosecution, for example, that a sole eyewitness testifying as to the perpetration of the crime has perjured himself before the grand jury, that perjury must be revealed to the grand jury. The failure of the prosecutor to present such clearly exculpatory evidence to the grand jury would justify dismissal of the indictment.[38]

In light of the court's apparent strictness as to what constitutes clearly exculpatory evidence, one should expect the court's holding to result in prosecutorial production of such evidence only in very rare cases.

The real question after *Bell* is whether a situation would *ever* arise requiring the presentation of exculpatory evidence to the grand jury. If, in fact, the prosecutor believed the evidence to be clearly exculpatory, it is probable that he would not seek an indictment.[39] Prosecutors generally

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[37] Justice Kidwell, since retired, concurred in the result but criticized the majority for failing to define the clearly exculpatory standard. He offered a definition that comports with the strictness suggested by the majority through its examples. "[E]vidence should be considered clearly exculpatory within the meaning of the opinion only when the prosecution could not in good faith rely on other evidence." 60 Hawaii at 258, 589 P.2d at 527 (Kidwell, J., concurring).

[38] *Id.* at 245, 589 P.2d at 520.

[39] *Cf.* ABA STANDARDS, *supra* note 4, at § 3.6(c) ("A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law."); *id.* § 3.9(b), Commentary a ("The prosecutor ordinarily should prosecute if after full investigation he finds that a crime has been committed, he can identify the perpetrator, and he has evidence which will support a verdict of guilty.").

are interested in seeking only indictments on which they have a significant likelihood of securing convictions.[40] In a case where there existed both inculpatory and clearly exculpatory evidence, the prosecutor might choose to present the case to the grand jury if he believed only the inculpatory evidence or if he desired the grand jury to be held responsible for the prosecutorial decision so that he could avoid public scrutiny of his own judgment.[41]

D. *Deciding the* Bell *Trilogy Under* Filis

Viewed under the materiality standard of *Filis*, the dismissal of the indictment by the trial court in defendant Bell's case was improper. Although a conflict of evidence was present, the facts would lead a prosecutor to seek an indictment despite the exculpatory evidence, and presentation of the evidence would not lead a reasonable grand jury to change its findings.[42] In defendant Hisaw's case the exculpatory evidence was improperly excluded under the *Filis* standard, and the indictment was properly dismissed. Not only did the available evidence indicate that defendant Hisaw committed no crime, but it also clearly indicated that other persons might have committed indictable offenses against Hisaw. In defendant Chang's case, the motion to dismiss also was properly granted under *Filis* because the nondisclosed evidence indicated a serious question of misidentification and exposed the circumstances surrounding the identification that was made: both factors were so important as to materially influence the grand jury's investigation and could have caused the grand jury to change its findings.[43]

III. Constitutional Change—A Renovation of the Grand Jury and a Reprieve from *Bell*?

Hawaii's constitutional amendment requiring independent counsel for the grand jury in all felony cases[44] is an effort to strengthen the grand

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[40] *Id.*

[41] *Cf.* note 53 *infra* (quoting Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. Crim. L.C.&P.S. 157, 161 n.47 (1979) (attempted indictment of political candidates)).

[42] See *Filis* materiality test in note 29 *supra*. The factual dispute in *Bell* related to the ability of the "exculpatory" witness to perceive and record accurately the incident giving rise to the indictment. The indictment was improperly dismissed under the *Filis* standard because it cannot be said that this testimony, in light of other evidence presented and the need for a factfinder to evaluate the witness' demeanor, recollection, and credibility, *see* text accompanying notes 9-12 *supra*, would have caused the grand jury to change its findings.

[43] 87 misc. 2d at ___, 1386 N.Y.S.2d at 989. *See* note 29 *supra*.

[44] Hawaii Const. art. I, § 11, *quoted in* note 5 *supra*.

jury system, an institution subject to criticism in recent years.[45] England, which created the grand jury in 1166, abolished it in 1933.[46] About half the states of this Nation allow a prosecutor to charge a felony either by a grand jury indictment or by an information.[47] Whenever a suspect is arrested and charged with a felony in Hawaii not pursuant to grand jury indictment, the district court is required to schedule a preliminary hearing.[48] Following the preliminary hearing, the prosecutor is still required to proceed through the grand jury process as required by the Hawaii Constitution in all felony cases.[49] Hawaii's procedure necessarily results in a certain level of duplicated effort, but the two-step process serves sufficiently important and distinct purposes.[50]

Although the grand jury historically functioned as a bulwark of liberty because it interposed the judgment of an independent body composed of members of the community between the State and potential defendant, recent commentary indicates that such historical regard has been largely misplaced.[51] As discussed extensively elsewhere,[52] Hawaii's grand juries do not function independently of the prosecutor; they protect few if any persons from unfounded prosecutions. Recent activities in Hawaii have

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[45] *See* notes 51-55 *infra* and accompanying text.

[46] United States v. Cox, 342 F.2d 167, 187 (1965) (Wisdom, J., concurring specially); Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1963).

[47] *Id.*

[48] HAWAII R. PENAL P. 5(c).

[49] HAWAII CONST. art. I, § 10. A defendant may, of course, waive the indictment requirement. HAWAII R. PENAL P. 7(b).

[50] Any argument citing duplicated efforts in this procedure is overstated since criminal defendants arrested pursuant to grand jury indictment are not entitled to a preliminary hearing. Moreover, the issuance of a grand jury indictment after arrest but prior to the date set for preliminary hearing eliminates the scheduled preliminary hearing. For a further discussion of the duplicity of effort required by Hawaii's system, *see* NATIONAL CENTER FOR STATE COURTS, THE GRAND JURY SYSTEM OF HAWAII 20-25 (1976) [hereinafter cited as GRAND JURIES]. In California the two methods for initiating a felony prosecution are either by information or grand jury indictment. Until 1978, defendants accused by information were entitled to a preliminary hearing while the indictment procedure omitted this safeguard. In Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978), the California Supreme Court held that the denial of a postindictment preliminary hearing violated the equal protection guarantees of the California Constitution. The court reasoned that all defendants charged with felonies must be afforded a preliminary hearing since this proceeding provided a valuable opportunity for defense attorneys to engage in discovery procedures by examining prosecution witnesses. The court noted that the grand jury session could not provide a similar opportunity for discovery concerning the prosecution's case because a defendant and his attorney are not allowed to participate. It is apparent from this decision that the grand jury proceeding and the preliminary hearing serve separate and distinct functions that warrant any duplication of effort described in GRAND JURIES, *supra*. An argument can thus be made that preliminary hearings should be scheduled in all felony cases in Hawaii including those cases initiated pursuant to grand jury indictment.

[51] *See* FRANKEL & NAFTALIS, *supra* note 3; Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L.C.&P.S. 157, 158-60 (1974).

[52] *See* GRAND JURIES, *supra* note 50, at 27-28.

caused great public concern regarding the use of the secretive grand jury machinery for politically motivated prosecutions and investigations.[63]

The United States Supreme Court also has observed that the grand jury may not always serve its historical protective function.[64] Justice

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[63] *See, e.g.*, Hansen v. Ariyoshi, Civ. No. 77-00505 (D. Hawaii, filed Dec. 12, 1977); State v. Fasi, Crim. No. 50091 (1st Cir. Ct. Hawaii Mar. 21, 1977); Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L.C.&P.S. 157, 161 n.47 (1979):

> The situation which arose in Hawaii recently regarding alleged campaign violations illustrates the way in which the grand jury can become embroiled in political conflicts. Following the general election in 1972, the Honolulu prosecutor initiated prosecutions against candidates for office for failure to report properly campaign contributions or perjury in reporting campaign contributions. Honolulu Advertiser, Jan. 17, 1973, at A-7, col. 1. During the 1972 term of the grand jury, the prosecutor, an appointee of the successful incumbent Democratic candidate for mayor, presented evidence to the grand jury against the unsuccessful Republican candidate for mayor in the general election and against the unsuccessful Democratic candidate for mayor in the primary election. The grand jury did not return indictments against either candidate, Honolulu Advertiser, Jan. 17, 1973, at A-7, col. 1.
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> During the 1973 term of the grand jury, the prosecutor again presented evidence to the grand jury and an indictment was returned against the unsuccessful Democratic candidate, who subsequently sought to dismiss the indictment on the grounds of alleged misconduct by the prosecutor. Honolulu Advertiser, May 9, 1973, at A-1, col. 1; Honolulu Advertiser, March 20, 1973, at A-7, col. 2. An indictment was also returned against a state representative. Honolulu Star-Bulletin, March 12, 1973, at A-1, col. 5. The indictment was later dismissed due to insufficient evidence. Honolulu Star-Bulletin, March 12, 1973, at A-1, col. 5.
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> During the same period of time, the state attorney general initiated an investigation into the campaign contributions and reporting of the mayor. Following the investigation, evidence was then presented to the grand jury which had returned indictments against the unsuccessful mayoral candidates. Honolulu Star-Bulletin, Feb. 23, 1973, A-1, col. 1. While the first of the hearings was underway, an assistant attorney general and the prosecutor held "press conferences" with members of the news media who "buzzed" around the grand jury room. Honolulu Star-Bulletin, Feb. 23, 1973, A-1, col. 1.
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> The grand jury met four times to hear evidence concerning the mayor. However, before it completed its proceeding, the foreman of the grand jury held the first of his press conferences with a local newspaper. He discussed the proceedings, including the evidence presented and alleged threats to the individual jurors. Honolulu Star-Bulletin, March 5, 1973, at A-1, col. 1. The court subsequently dismissed the grand jury, but not before the attorney general had subpoened [*sic*] the mayor's books and records.
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> Undeterred by the dismissal of one grand jury, the attorney general made plans to present evidence to another grand jury. However, on the day on which the proceeding was to begin, the court ordered the attorney general to hold up the proceeding in order to consider the legality of the attorney general's actions in conducting the investigations. The attorney general filed information on the next day against several of the mayor's campaign workers for improprieties in reporting campaign contributions. At this writing the outcome of these investigations is still in doubt. *See* State v. Good Guys for Fasi, Crim. No. 5521 (Hawaii Sup. Ct., filed July 26, 1973). *See also* State v. Altiery, Crim. No. 45364 (Hawaii Circuit Ct., 1st Circuit, Jan. 30, 1973), where the court dismissed the case because of prosecutorial misconduct occurring before the grand jury.

[64] United States v. Dionisio, 410 U.S. 1, 17-18 (1973):

> The grand jury may not always serve its historic role as a protective bulwark standing

Douglas, a most candid, constant, and realistic critic of the grand jury, viewed it as a tool of the executive.[55]

The grand jury should ensure that citizens are brought to trial on just grounds, and it should protect citizens against unfounded accusations.[56] Insistence upon this protective function is based largely upon recognition of the serious consequences of an indictment not justified by the evidence possessed by the prosecutor. These consequences include the damage to the defendant's reputation caused by mere issuance of an indictment. The resulting stigma may persist even after dismissal of the indictment or acquittal at trial.[57] The victim of an unfounded indictment also incurs the financial expense of defending in the criminal prosecution.[58] These resulting harms, along with other debilitating effects such as emotional distress and disruption of personal life,[59] certainly constitute the major rationale for the ABA's adoption of a disciplinary standard prohibiting a prosecutor from seeking criminal indictments he knows are not supported by probable cause.[60]

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solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

[55] United States v. Mara, 410 U.S. 19, 23-24 (1973) (Douglas, J., dissenting).

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury:

> "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Id. (footnote omitted).

[56] *See* United States v. Dionisio, 410 U.S. 1, 17 n.15 (1973) (quoting *Ex parte* Bain, 121 U.S. 1, 11 (1886)). *See also* Wood v. Georgia, 370 U.S. 375, 390 (1962).

[57] *See* People v. Rosen, ___ Misc. ___, ___, 74 N.Y.S.2d 624, 627 (King's County Ct. 1947).

[58] *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (citing United States v. Rose, 215 F.2d 617, 628-29 (1954)).

[59] *See* LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, 1978, ARTICLE I: BILL OF RIGHTS 61 (1978); Sperlich & Jaspovice, *Grand Juries, Grand Jurors and the Constitution*, 1 HASTINGS CONST. L.Q. 63, 64-65 (1974).

[60] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1978) (adopted by the Hawaii Supreme Court 1972) provides: "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."

A. *The Grand Jury Amendment and Its Probable Effect*

Ratification of the constitutional amendment was a positive step toward reestablishing the effectiveness of the grand jury system. It is clear that the drafters of the amendment intended to resolve the inherent conflict in the prosecutor's dual role as seeker of an indictment and advisor to the grand jury panel.[61] Further, the drafters intended that the independent counsel should take the initiative to advise the grand jury on any matter appropriate to the case.[62]

This amendment is especially relevant to the holding in *Bell* because of the court's treatment of *People v. Ferrara*,[63] another New York case. *Ferrara* held that where evidence in the possession of the prosecution established an affirmative defense, the prosecution was required to instruct the grand jury on the importance of that evidence. The Hawaii Supreme Court distinguished *Ferrara* from *Bell* on the ground that the prosecutorial duties discussed arose under a New York statute which required the district attorney, as legal advisor, to instruct the grand jury where necessary or appropriate.[64] Hawaii's constitutional amendment, which was ratified after the relevant facts of *Bell* occurred, imposes on the independent legal counsel a similar duty to advise the grand jury.

Arguably, the de facto practice in much of Hawaii prior to the constitutional amendment was identical to the statutory requirement in New York. Statutory authority dictating the duties of county prosecutors on Hawaii, Kauai, and Maui includes, as part of those duties, the giving of advice to the grand jury.[65] One must assume that the prosecutors discharged this duty since the preamendment procedural rules provided that the prosecutor and the witness under examination were the only persons,

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[61] STAND. COMM. REP. No. 69, 3d Hawaii Const. Conv. 5, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at ___ (19__).

> The role of counsel will be to advise the grand jury and not the witness or the prosecutor. Until now the prosecutor has served as a legal advisor to the grand jury but there seems to be a conflict between presenting evidence to a grand jury in hope they will return an indictment and being their legal advisor. Independent legal counsel will be available to advise the grand jury on any appropriate manner [*sic*]. Your Committee believes that the parameters of the role of independent counsel will be determined by the grand jury but if his role is to be effective, counsel should advise the grand jury whether [*sic*] it is appropriate rather than when asked.

Id.

[62] *Id.*

[63] 82 Misc. 2d 270, 370 N.Y.S.2d 356 (Nassau County Ct. 1975).

[64] N.Y. CRIM. PROC. LAW § 190.25(6) (McKinney 1971) provides:

> The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

[65] HAWAII REV. STAT. § 62-71(3) (1976). *See* note 82 *infra*.

other than jurors, allowed to attend the proceeding.[66] In any event, in view of the constitutional amendment and the intent of its drafters,[67] the Hawaii court's rationale for distinguishing *Ferrara* no longer exists.

More significantly, however, the new constitutional mandate to establish the grand jury counsel should result in the divulging of exculpatory evidence which would not necessarily be produced by the prosecution under the clearly exculpatory standard of *Bell*. Under the new amendment, the prosecution would undoubtedly argue that the duty to actually present evidence rests entirely in its hands and that grand jury legal counsel should not be permitted to peruse the prosecutor's files in search of potentially exculpatory evidence. Nevertheless, grand jury counsel could direct the panel's attention to inconsistencies in the evidence and request the production of additional available evidence. Arguably, when such a request is made a prosecutor should not be permitted to engage in a subjective determination as to whether the evidence is clearly exculpatory, even under the *Bell* holding. Thus, a more extensive duty of disclosure should be required upon request by the grand jury or its counsel for additional evidence.[68] The amendment therefore may largely negate the effect of *Bell*.

In view of these practical effects of the amendment, the *Filis* materiality standard[69] for mandatory presentation may become more attractive to the Hawaii Supreme Court. The materiality standard, with its emphasis on the probable influence of particular evidence on the grand jury's investigation or deliberations, would allow the prosecutor, and possibly the grand jury counsel, to weigh the evidence in light of its potential effect on the actions of the grand jurors rather than against the other evidence available to or considered by the grand jury.

The materiality standard poses no problems with respect to the Hawaii Supreme Court's concerns about the potentially adverse effects that presentation of less than clearly exculpatory evidence might have on the functioning of the grand jury.[70] First, this standard should not transform the grand jury into an adversary body. Since the presentation of evidence still rests with the prosecutor, without any intervention by the defendant or defense counsel, a change in the standard should not foster miniature trials in grand jury proceedings. Second, use of the materiality standard, as compared with the clearly exculpatory standard, poses no greater difficulty for the prosecutor in making subjective determinations as to what evidence to present to the grand jury. Third, while the confusion and de-

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[66] HAWAII R. PENAL P. 6(d).

[67] *See* note 61 *supra*.

[68] Whatever division of responsibilities arises between grand jury counsel and prosecutor, the effect will surely improve the quality of evidence presented to the jurors and their comprehension of the legal issues involved. It is also likely that independent counsel will provide a check on prosecutorial abuse, either through direct action or mere presence.

[69] *See* notes 23-33 *supra* and accompanying text.

[70] *See* note 32 *supra* and accompanying text.

lay which might arise under the ABA standard[71] would be a justifiable concern, minimal delay arises from use of the *Filis* materiality standard; furthermore, any delays which might result would leave the grand jury more fully informed on the evidence in a particular case, thus increasing its effectiveness and independence. Fourth, with independent counsel present and with a more complete presentation of evidence, the opportunities for overzealous prosecutorial conduct during the presentation of potential defense witnesses would be minimized. A certain degree of trust must be placed in the prosecutor concerning his conduct before the grand jury, and existing sanctions should be an adequate deterrent. Finally, the concern that indictments returned by a more fully informed grand jury would carry a presumption of guilt more difficult to overcome at trial is simply misplaced. A grand jury indictment is merely an accusation, and any resulting presumption of guilt could be easily cured at trial by a proper jury instruction.

B. *Implementation Uncertainties*

The independent grand jury counsel provision could reestablish the impartial functioning of grand jury proceedings despite the Hawaii Supreme Court's decision in *Bell*. Certainly the interface between this new right and the *Bell* decision, which was antithetical to the standard of fairness and impartiality implied by *Joao*,[72] will increase legal challenges to the course of grand jury proceedings. However, the amendment's mandate has not yet been implemented, and this delay raises additional legal questions.

The amendment provides for independent counsel "to *advise* the members of the grand jury regarding matters brought before it."[73] The manner of appointment, including the "term and compensation for independent counsel shall be *as provided by law.*"[74] The 1979 State legislature passed enabling legislation to implement the amendment,[75] but it was vetoed by

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[71] *See* note 4 *supra* and accompanying text. *See also* United States v. Mandel, 415 F. Supp. 1033, 1041-42 (D. Md. 1976).

[72] *See* text accompanying notes 34-36 *supra*.

[73] HAWAII CONST. art. I, § 11 (emphasis added). The entire amendment is quoted in note 5 *supra*.

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

[75] H.B. 95, H.D. 2, S.D. 2, Conf. D. 1, 10th Hawaii Leg., 1st Sess. (1979) (vetoed June 8, 1979). In relevant part the vetoed bill provided:

> Sec. 612— **Grand jury counsel; appointment and removal.** The chief justice of the state supreme court shall appoint grand jury counsel for the four judicial circuits of the state, without regard to chapters 76, 77, and 89. Right to removal shall rest with the chief justice.
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> . . . .
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> Sec. 612— **Grand jury counsel; length of term; extension of term; limitation on reappointment.** (a) Grand jury counsel shall serve for a term of one year following

Governor George R. Ariyoshi. The rationale for the veto was as follows: The term "advise" was not defined in the legislation; "advise" as ordinarily used includes making recommendations; any such recommendations by counsel would be prejudicial and a denial of due process.[76]

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appointment.

(b) The term of a grand jury counsel may be extended when the matters for which the counsel was called to service cannot be completed before the end of the counsel's term. The extension shall be authorized by the chief justice where completion of such matters would be substantially extended or hindered by the assignment of another counsel.

(c) In no case shall the grand jury counsel be reappointed to serve consecutive terms.

(d) The term of the grand jury counsel whenever practicable shall be such that it will not be co-terminous with the term of the grand jury.

. . . .

Sec. 612— **Grand jury counsel; call to duty.** Grand jury counsels shall be subject to call by the appointing authority during their term of office. Such a call for service shall include an estimate of the number of hours or days, or other reasonable approximation of the time that the grand jury shall desire counsel's services. No later than twenty-four hours after a call to service, the grand jury counsel shall notify the appointing authority whether or not the call for service is accepted.

. . . .

Sec. 612— **Grand jury counsel; compensation.** The grand jury counsel shall be compensated on a daily basis at the same rate as per diem judges of the district court.

. . . .

Sec. 612— **Grand jury counsel; disqualification.** Grand jury counsel shall disqualify himself in any matter in which circumstances render substantial question upon his impartiality or which would jeopardize public confidence in the grand jury.

Sec. 612— **Grand jury counsel; duties.** The grand jury counsel shall serve as independent legal counsel to the grand jury. His function shall be to advise the grand jury, but he shall not engage directly in the questioning of the witnesses or the prosecution.

. . . .

Sec. 612— **Grand jury proceedings.** (a) Each grand jury proceeding conducted under the authority of the State shall be aided by a grand jury counsel.

(b) The deliberation of the grand jury shall be private; provided that the grand jury may call in the grand jury counsel for the purpose of making specific inquiries of him or may transmit written inquiries to him from the privacy of its deliberation.

(c) All inquiries made by the grand jury of the grand jury counsel and all exchanges between them shall be recorded verbatim and made a part of the record of the grand jury proceedings.

. . . .

Sec. 612— **Dismissal of indictment.** Any indictment which is based upon a grand jury proceeding in which a violation of section ____ or section ____ has occurred may be subject to dismissal without prejudice by an appropriate state court in the exercise of its discretion. Motion for such dismissal may be made by either party or the court.

Id. at 1-5.

[76] The veto message read in part:

The word "advise" is not defined, qualified or limited in the subject legislation, nor is there any provision that would confine grand jury counsel's duties to advise or assist the grand jury by providing the grand jury with information as to the law in such cases as may come before them.

. . . .

"Advise" is a broad term and as ordinarily used includes recommendations regarding a

The constitutional legitimacy of the veto is questionable on the stated grounds. The Hawaii Constitution specifically denies the Governor the right to veto proposed amendments.[77] One might argue that the constitution therefore precludes the veto of implementing legislation because the practical effect is to nullify the amendment. Alternatively, a veto based on grounds related to the mandated scope of the enabling legislation may be constitutionally permissible and indeed contemplated as part of the process which, in this instance, will establish the manner of appointment, term, and compensation *by law*. One need not resolve this issue in analyzing Governor Ariyoshi's veto since the veto was based on grounds unrelated to the only legislative provisions which required implementation by law; that is, manner of appointment, term, and compensation. If the prohibition against a gubernatorial veto of an amendment proposed by a constitutional convention has any meaning at all,[78] it must preclude the veto in this situation because the reasons therefor dealt only with the function of the independent counsel as an advisor to the grand jury, an

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decision or course of conduct.

> Due process requires that where the indictment mechanism is employed, it must be through an unprejudiced grand jury. Any advice or aid that would tend to induce action other than which the grand jurors in their uninfluenced judgment would deem warranted on the evidence fairly presented before them is deemed prejudicial and would result in tainted indictments.

Statement of Objections to H.B. 95, at 2-3 (June 8, 1979).

In 1980 the State legislature again considered the independent grand jury counsel requirement. As of this writing (March 1980), the proposed legislation tracks the vetoed bill in large part, but it limits the duties of counsel to advising the grand jury in matters of law.

> **Grand jury counsel; duties.** The grand jury counsel shall serve as independent legal counsel to the grand jury. His function shall be to advise the grand jury as to matters of law; he may be present during grand jury proceedings but he shall not engage directly in the questioning of the witnesses or the prosecution.

H.B. 2059-80, 10th Hawaii Leg., 2d Sess. § 8 (1980). *Compare id. with* H.B. 95, H.D. 2, S.D. 2, Conf. D. 1, 10th Hawaii Leg., 1st Sess. (1979) (vetoed June 8, 1979), *quoted in* note 75 *supra*.

[77] HAWAII CONST. art. XVII, § 4 reads: "No proposal for amendment of the constitution adopted in either manner provided by this article [by legislature or by constitutional convention] shall be subject to veto by the governor."

[78] A familiar principle of constitutional construction is to avoid construing language as mere surplusage. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In the case of article XVII, section 4 of the Hawaii Constitution, see note 77 *supra*, the prohibited veto of a convention-proposed amendment has little, if any, meaning unless it applies to implementing legislation. *See* notes 85-88 *infra* and accompanying text. The lieutenant governor, not the Governor, is the chief elections officer of the State, responsible for preparing the ballot and certifying the results of the ratification vote. *See* Kahalekai v. Doi, 60 Hawaii 324, 590 P.2d 543 (1979); HAWAII CONST. art. IV, § 3; HAWAII REV. STAT. §§ 26-1, 11-2, -111, -155 (1976 & Supp. 1979). The only other possible connection between a veto and a convention-proposed amendment might involve appropriations or other legislation to facilitate the mechanism for voter ratification established by the constitutional convention. *See* HAWAII CONST. art. XVII, § 2 ("The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.").

aspect of the amendment which did not require implementing legislation.

By his veto the Governor substituted his judgment for the reasoned decision of the delegates to the constitutional convention[79] and the electorate which ratified the provision. Further, there is an implied anomaly in the Governor's action because the reason for his veto, the potential for prejudicial proceedings,[80] is the precise danger sought to be remedied by the amendment.[81] Moreover, it is paradoxical that the Governor vetoed the legislation for fear of the prejudice it portended in view of the fact that existing statutes place no restrictions on the prosecutorial conduct before the grand jury.[82] Finally, as to the merits of the veto, which essentially implied that the state constitutional provision is unconstitutional under the federal due process guarantee,[83] it must be clear that judicial interpretation of the state constitutional provision could cure any defect.[84]

Despite the veto, it may be argued that a citizen's right to have independent counsel present at grand jury proceedings has vested. Conclusive authority dictating the effective date of a ratified constitutional amendment does not exist.[85] A background study conducted in preparation for the constitutional convention[86] suggests an effective date either on the date of voter ratification (November 7, 1978) or the date of the formal signing of the amendments (December 1978) by the convention dele-

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[79] *See* note 61 *supra*.

[80] *See* note 76 *supra*.

[81] *See* STAND. COMM. REP. No. 69, 3d Hawaii Const. Conv. (1978), *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at ___ (19_), *quoted in* note 61 *supra*. Delegates were concerned about the absence of impartiality in grand jury proceedings due to the prosecutor's control over those proceedings and his intent to secure indictments. The independent counsel provision was intended to ensure unbiased and impartial functioning of a grand jury on evidence fairly presented.

[82] In delineating the general duties of county prosecutors of Hawaii, Kauai, and Maui, the Hawaii statute provides in part that the prosecutor shall "attend before and give advice to the grand jury whenever cases are presented to them for their consideration." HAWAII REV. STAT. § 62-71(3) (1976). The word "advice" as used in this statute is not defined, qualified, or limited and thus would seemingly foster the same due process infringements envisioned by the Governor in his veto.

[83] *Compare* HAWAII CONST. art. I, § 11, *quoted at* note 5 *supra*, *with* H.B. 95, H.D. 2, S.D. 2, Conf. D. 1, 10th Hawaii Leg., 1st Sess. (1979) (vetoed June 8, 1979), *quoted* in part at note 75 *supra*. If the legislation violated due process for lack of a limiting definition of "advise", the constitutional provision would be vulnerable on the same grounds.

[84] *Cf.* State v. Huelsman, 60 Hawaii 71, 588 P.2d 394 (1978) (the court found that the statutory scheme for extended-term sentencing conferred unconstitutionally broad discretion on the sentencing judge in violation of the state due process clause and then construed the legislation to limit discretion, thereby curing the constitutional defect).

[85] The state constitution says that "amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the vote cast at the election, or at a special election by a majority constituting at least thirty percent of the total number of registered voters." HAWAII CONST. art. XVII, § 2.

[86] LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, 1978, ARTICLE XV: REVISION AND AMENDMENT (1978).

gates.[87] The remaining alternative is the date that implementing legislation becomes effective. If the Governor's exercise of veto power were unconstitutional, then it is logical to conclude that the legislation became effective at the same time as other bills which were neither signed into law nor vetoed.[88]

Whatever the precise date, once the right created by amendment has vested, all indictments subsequently secured without the presence of independent counsel would be defective, notwithstanding that the veto temporarily delayed the amendment's operational date. Even in the absence of the appropriate enabling legislation concerning appointment, compensation, and term, Hawaii courts must protect any vested right embodied in the Hawaii Constitution. The responsibility for implementation should now be shifted to the judicial branch[89] so that the right can be extended to persons subject to indictment in Hawaii. Notwithstanding a

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[87] *Id.* at 39-40 concludes in part:

Effective Date of Amendments and Revision.

Only a few states specify the effective date of amendments or revision. Alaska specifies 30 days after certification of the election, unless otherwise provided. Michigan specifies 45 days after the election; Missouri and New Jersey specify 30 days, while North Dakota specifies 10 days after the election. Hawaii does not specify any date, nor does the majority of states. The assumption is that the constitutional convention would set this date. Generally in practice, the effective date of constitutional amendments in Hawaii has been the date of ratification by the electorate.

The *Model State Constitution* calls for the date of effectiveness of approved constitutional revision to be 30 days after the date of the election, ". . . unless the revision itself otherwise provides."

Neither the 1950 nor the 1968 Hawaii Constitutional Convention enabling acts referred to an effective date for adopted amendments and/or revision.

[88] *See* HAWAII CONST. art. III, § 16. Once the amendment was ratified by Hawaii voters, the legislature and the Governor were arguably under a duty to produce enabling legislation. The voter instructions relating to the grand jury counsel proposal stated that the amendment, if adopted, would *require* that the legislature set term and compensation. *See* STAND. COMM. REP. No. 99, 3d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at ___ (19_). However, even if the grand jury amendment did not impose a duty on the legislature to pass enabling legislation, the constitution expressly prohibited the Governor from obstructing effectuation of the amendment by exercising his general veto power once the legislature had so acted. *See* text accompanying note 77 *supra*. The distinction between active and passive governmental actions pervades this analysis. In this context, legislative inaction would not likely give rise to a claim that a defendant's rights had been violated, but the Governor's veto was an affirmative act which deprives a defendant of his constitutional right.

[89] It should be noted that the amendment does not limit the form of implementation to legislation. The express language of the amendment says only that appointment, term, and compensation shall be provided by law. This contrasts with the 1978 right to privacy amendment, HAWAII CONST. art. I, § 6, which expressly mandated that "[t]he legislature shall take affirmative steps to implement this right." It is therefore altogether appropriate for the judiciary branch, either through decisional law or rules adopted by the supreme court to provide enabling law. Moreover, such action would not conflict with the vetoed legislation giving the chief justice the appointing authority for independent counsel. *See also* note 90 *infra*.

recent Hawaii circuit court case to the contrary,[90] all indictments returned by grand juries in Hawaii prior to implementation arguably are constitutionally suspect and thus subject to future dismissal.

IV. Conclusion

The clearly exculpatory standard adopted in *Bell*, which now governs prosecutorial disclosure of exculpatory evidence before the grand jury, will likely create significant confusion in its implementation. This potential for confusion arises from the Hawaii Supreme Court's failure in *Bell* to establish sufficient guidelines regarding what type of evidence would be clearly exculpatory under the given facts.[91] The particular fact situations in the three cases decided by *Bell* will generate considerable debate over the proper application of this standard. Strong arguments can be made in the cases of defendants Hisaw and Chang that the omitted evidence concerning the potential self-defense claim and the critical misidentification by the complaining witness, respectively, was clearly exculpatory as it related to the charges on which the indictments were based. Use of the *Filis* materiality standard would afford Hawaii courts a more discernible standard that probably would result in less confusion and greater disclosure of material evidence to the grand jury, thus promoting the effectiveness and protective function of this institution.

The ratification of the constitutional amendment requiring independent grand jury counsel should bring the functioning of Hawaii grand ju-

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[90] State v. Gorian, Crim. No. 53162 (1st Cir. Ct. Hawaii Aug. 8, 1979). The court denied a motion to dismiss the indictment which was secured without the presence of independent counsel. Counsel for defendants Gorian and Lauderdale argued that the purpose of the grand jury historically has been to protect the rights of the accused, and therefore it is the party under investigation who suffers an infringement of his constitutional rights when counsel to the grand jury is not provided. Record at 57-58. Defense counsel pointed out that amendments to the Hawaii Constitution are presumptively self-executing. Hawaii Const., art. XVI, § 16 ("The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."). She further argued that the Hawaii Supreme Court has the power to implement article I, § 11, the independent grand jury counsel provision because the chief justice has both the power to appoint attorneys licensed in Hawaii to serve as counsel to the grand jury on a rotating basis and the power to transfer funds within the judiciary's budget to cover expenses until enabling legislation is enacted. *Gorian*, Record at 61 (citing Hawaii Rev. Stat. §§ 601-2(a), -2(b)(5) (1976 & Supp. 1979); Act 208, pt. II, § 5, 1979 Hawaii Sess. Laws. 430, 431).

A sense of urgency attaches to the execution of a constitutional amendment which has as its purpose the protection of citizens' rights in relation to the criminal indictment process. The delay already experienced in awaiting the enabling legislation for article I, section 11 and the subsequent gubernatorial veto demonstrate how the intent of an amendment can be frustrated unless self-execution is promoted. *Cf.* 68-31 Op. Hawaii Att'y Gen. (1968) (Hawaii Const. art. I, § 11 (1968, amended and renumbered section 14, 1978) requiring the State to provide counsel for indigent criminal defendants effective upon ratification date, not upon certification of results).

[91] *See* note 37 *supra*.

ries under closer scrutiny and should subject those proceedings to more constitutional challenges. The impact of the amendment on prosecutorial disclosure under *Bell* will depend on the role taken by counsel in those proceedings.[92] Despite the holding in *Bell*, the participation of independent counsel hopefully will result in more informed and inquisitive grand juries asserting greater independence from the prosecutor and fulfilling more effectively their historic function to protect accused persons from unjustified indictments.

[92] Certainly, the duties of independent counsel will include instructing the grand jury on the law to be applied to each case and on its duties in acting on the evidence presented. Grand jury counsel could also make that body aware of possible defenses that exist under any given set of facts. This increase in legal instruction to grand jurors should make those individuals more attuned to what particular evidence in a case may be exculpatory. Thus, if the grand jury expressed a desire to hear certain witnesses, it could require the prosecutor to present such testimony even if the prosecutor considered such evidence to fall below the clearly exculpatory standard. Although a prosecutor might not be under an affirmative duty to present this testimony under *Bell*, a prosecutor is certainly under an obligation to respond faithfully to requests for evidence by the grand jury.

LAND USE: HEREIN OF VESTED RIGHTS, PLANS, AND THE RELATIONSHIP OF PLANNING AND CONTROLS

David L. Callies*

There can be little argument about the jurisdictional importance of Hawaii land use law. Land use management and control is almost synonymous with Hawaii.[1] But Hawaii is not yet a particularly litigious state in the field of land use controls, and what litigation there is that has made its way into the federal and state appellate courts of record here has been relatively sparse. Most of its well-known state and local land use control regulations[2] are only recently or not yet challenged. While it is possible to extrapolate theories and principles from sparse existing case law and apply them in those many areas in which Hawaii has so far no appellate court[3] cases, this is neither the province nor the purpose of a survey, which should be confined to reporting and interpreting what is. This sur-

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[1] *See* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971) [hereinafter cited as THE QUIET REVOLUTION]; F. BOSSELMAN, D. FEURER & C. SIEMON, URBAN LAW INSTITUTE, THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION (1976); D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION (1976) [hereinafter cited as MANDELKER]; P. MYERS, ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW (1975) [hereinafter cited as ZONING HAWAII].

[2] *See* THE QUIET REVOLUTION, *supra* note 1, at ch. 1; MANDELKER, *supra* note 1; ZONING HAWAII, *supra* note 1; Mandelker & Kolis, *Whither Hawaii: Land Use Management in an Island State*, 1 U. HAWAII L. REV. 48 (1979) [hereinafter cited as *Whither Hawaii*]. Most of these comment upon controls such as the Hawaii State Land Use Law, HAWAII REV. STAT. ch. 205 (1976 & Supp. 1979). There is little yet written upon controls such as Honolulu's charter provisions requiring all new land use changes to accord with local development plans. Charter of the City & County of Honolulu § 5-412(3). Development plans are presently in draft form.

[3] It is only in late 1978 that an intermediate appellate court was authorized by constitutional amendment, *see* HAWAII CONST. art. VI, § 2, and but a few months ago that judges for that court were confirmed by the state senate, *see* letter from Seichi Hirai to Hon. George R. Ariyoshi (Fed. 27, 1980). This survey is based only upon appellate — and, therefore, until the recently authorized system is functioning — Hawaii Supreme Court decisions.

vey therefore concentrates on a number of recent cases[4] which will critically influence certain specific areas of land use management and control in Hawaii: vested rights, the relationship of planning to zoning, the character of state zoning amendments, and water rights and coastal zone ownership.

I. VESTED RIGHTS

The point at which a developer is entitled to proceed with a development in the face of a newly enacted land use regulation which, if applied to the development, would hinder or prevent it is becoming a commonly litigated issue across the country.[5] While it is fair to say that most jurisdictions are satisfied with an expenditure of funds in reliance upon a preexisting zone classification to support a claim for these so-called vested rights,[6] some jurisdictions have disregarded altogether fairly large amounts so expended.[7] The law therefore appears to vary significantly with the jurisdiction.

There is a fair amount of recent case law in Hawaii on this critical subject.[8] The Hawaii Supreme Court has dealt with it directly on five occasions in the past ten years,[9] most recently in January of 1980.[10] The trend appeared to be in the direction of the strict California rule until quite

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[4] Kaiser-Aetna v. United States, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738); Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978); Life of the Land, Inc. v. City Council, No. 7240 (Hawaii Sup. Ct. Jan. 4, 1980); Life of the Land, Inc. v. Land Use Comm'n, 61 Hawaii _, 594 P.2d 1079 (1979); Life of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979); Kailua Community Council v. City & County of Honolulu, 60 Hawaii 428, 591 P.2d 602 (1979); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Akahane v. Fasi, 58 Hawaii 74, 565 P.2d 552 (1977); Save Hawaii Loa Ridge Ass'n v. Land Use Comm'n, 57 Hawaii 84, 549 P.2d 737 (1976); Hall v. City & County of Honolulu, 56 Hawaii 121, 530 P.2d 737 (1975); Town v. Land Use Comm'n, 55 Hawaii 538, 524 P.2d 84 (1974); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971); Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969).

[5] 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 56.02 (1975) [hereinafter cited as WILLIAMS]; 4 *id.* § 104.02; *see* Hagman, *The Taking Issue: The* HFH *et al. Round*, 28 LAND USE L. & ZONING DIG. NO. II, at 5 (1976); McCown-Hawkes & King, *Vested Rights to Develop Land: California's* Avco *Decision and Legislative Responses*, 6 ECOLOGY L. Q. 755 (1978).

[6] *See* 4 WILLIAMS, *supra* note 5, at § 111.02.

[7] *E.g.* Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 533 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

[8] *See* Devens, *Overview Remarks*, in VESTED RIGHTS, DEVELOPMENT RIGHTS 9 (Proceedings of June 22, 1979 Conference on Planning for Growth Management, Honolulu, Hawaii).

[9] Life of the Land, Inc. v. City Council, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980); Life of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971); Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969).

[10] Life of the Land, Inc. v. City Council, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980).

recently. Much will depend on the extent to which future decisions either hearken back to the first true vested rights decision in Hawaii[11] or proceed down a "softer" path trod by the majority, over a strong dissent, in a later pronouncement by the court.[12]

The two most recent — and critical — cases dealing with vested rights and equitable estoppel in Hawaii bear the same name, *Life of the Land, Inc. v. City Council.*[13] The litigation dealt respectively with attempts to preliminarily and permanently enjoin the construction of a multi-story condominium building. Because the majority and dissenting opinions in the first case divided on the extent of vested rights, and the court arguably departed from previous Hawaii cases on vested rights in the second case, the rulings place Hawaii at a crossroads in this area in many respects. In the first decision, both majority and dissent claimed *Denning v. County of Maui*[14] as their touchstone. Since *Denning* was the first case to deal directly with the subject in Hawaii and was the basis for both *Life of the Land* cases and the intervening case of *Allen v. City & County of Honolulu,*[15] we turn first to an analysis of *Denning.*

The facts of *Denning* are relatively straightforward. Denning purchased property near Kihei on Maui which was at the time (1968) classified in both the county master plan and the county zoning ordinance as "hotel district". Applicable regulations in the zoning ordinance limited buildings constructed in the hotel district to a height of twelve stories and a "floor area/lot area ratio" (FAR)[16] of 150%.[17] One year after purchasing the property, Denning sought from the county planning director informal "preliminary approval" of plans for an eight-story condominium project with an FAR of 144.1%. While agreeing that the proposed development accorded with existing zoning, the director also noted in his written reply that the county was then considering a proposed general plan which designated Denning's land "resort commercial". Zoning regulations applicable to the designation would reduce the maximum permitted height from twelve to six stories. The court in its factual summary interpreted these letters as "clearly" implying that the zoning regulations would control development although it is unclear whether by this the court meant that planning without implementing zoning was inapplicable or that Denning should then have been on notice that new regulations would likely apply

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[11] Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971).

[12] Life of the Land, Inc. v. City Council, 60 Hawaii 446, 451, 592 P.2d 26, 29 (1979) (Kidwell, J., dissenting).

[13] No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980); 60 Hawaii 446, 592 P.2d 26 (1979).

[14] 52 Hawaii 653, 485 P.2d 1048 (1971).

[15] 58 Hawaii 432, 571 P.2d 328 (1977).

[16] Floor/area ratio (FAR), as the court noted, is determined by dividing the square foot area of a lot into the square footage of floor space to be developed. Thus, if one knows the lot area and the required FAR, one can readily determine the amount of floor space permissible by multiplying the lot area by the FAR in the zoning ordinance.

[17] 52 Hawaii at 654, 485 P.2d at 1049.

soon. Nevertheless, the director stated in two separate communications that it would be "difficult to determine" what regulations would apply to Denning's land.[18]

A couple of months later, an interim ordinance reducing the height on Denning's land was indeed enacted, and Denning accordingly modified his plans and reduced the height of his condominium project to six stories. The following month the director once again gave preliminary approval to Denning's plans much in the same form as before. Denning made minor changes as required by the director over the next three months and continued to receive assurances that his plans conformed to the existing ordinances. Then the county council enacted an ordinance further reducing the height in the area, including Denning's land, to two stories and the FAR to 100%. The director told Denning that the new ordinance would apply to his land and, more importantly, to his contemplated condominium project.[19] (The court noted that the ordinance was "silent as to whether it affects development in progress to the extent of Denning's project."[20])

Informed that a building permit for his proposed project would be denied, Denning unsuccessfully sought permission to continue the development from the Maui County Board of Adjustment and Appeals, alleging that he had incurred approximately $38,000 in architectual, advertising, and legal fees. There was nothing to indicate any physical work had begun on the site itself. The board refused to act, and Denning appealed to the circuit court which remanded back to the board for a hearing and decision.[21]

The Hawaii Supreme Court first dealt summarily with that remand. Noting that after the ordinance change (reducing the height to two stories and the FAR to 100%) the board "was bound to enforce the terms" of that ordinance, the court held that the board was without jurisdiction to permit Denning to proceed under the old ordinance, and since no variance[22] had been sought it was without jurisdiction altogether. Therefore, the circuit court's remand was reversible error.[23] Nevertheless, the court set out what it considered to be the critical test for deciding vested rights cases, even though it was not called upon to do so by the posture of the case:

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[18] *Id.* at 655, 485 P.2d at 1049.

[19] *Id.* at 657, 485 P.2d at 1050.

[20] *Id.*

[21] *Id.*

[22] A variance is an exception from applicable land use regulations granted in cases of hardship uniquely caused to the applicant for relief. A variance is usually granted to provide relief to the landowner who has been unduly burdened. There are basically two types of variances: bulk variances and use variances. *See* Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 ANGLO-AMERICAN L.J. 292, 309 (1972) [hereinafter cited as Garner & Callies].

[23] 52 Hawaii at 658-59, 485 P.2d at 1051.

> [F]or Denning to be allowed the right to proceed in constructing the planned structure the facts must show that Denning had been given assurances of some form by appellants that Denning's proposed construction met zoning requirements. And that Denning had a right to rely on such assurances thereby equitably estopping appellants from enforcing the terms of [the ordinance].[24]

Citing a California case,[25] the court continued: "Mere good faith expectancy that a permit will issue does not create in a property owner a right to continue proposed construction."[26] This differed from the trial court's rule.[27] The key appears to be the matter of "right." What is the quality of the assurance? Is it merely an "expectancy" that a permit will issue? The court held that the passage of the *first* of the ordinances (*reducing* the height from twelve to six stories) could very well be critical. The court's reference to the purpose of the first ordinance as protecting the proposed general plan while zoning regulations were being formulated[28] and its reference to an article[29] discussing with approbation interim zoning measures[30] suggest that the court considered the first ordinance to be in the nature of an interim zoning regulation. Since Denning clearly had notice of the first ordinance according to the facts, he presumably would *not* be able to claim any vesting of rights (or damages?) between the notice and the eventual refusal to issue a building permit on the strength of the second ordinance further restricting his right to develop.

Six years later, the court again considered vested rights and development rights in *Allen v. City & County of Honolulu.*[31] It is here that the court made a distinction between vested rights and equitable estoppel. The court had before it one of three cases decided by the lower court in which money damages had been awarded to compensate developers for expenditures alleged to have been made in reliance upon then existing zoning regulations of the city and county. Allen had purchased a parcel

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[24] *Id.* (footnotes omitted).

[25] Russian Hill Impr. Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 423 P.2d 824, 828, 56 Cal. Rptr. 672, 676 (1967).

[26] 52 Hawaii at 659, 485 P.2d at 1051 (footnote omitted).

[27] The trial court had ruled: "If Denning expended substantial sums for the preparation of plans and documents in good faith reliance upon law prior to Ordinance No. 641 and which expenditures were incurred upon the reasonable probability of a building permit being issued then Denning must be allowed the right to proceed." *Id.* at 658, 485 P.2d at 1051.

[28] *Id.* at 659, 485 P.2d at 1051: "The function of this measure [the first ordinance] was undoubtedly to protect the design of the proposed General Plan 701 while the zoning regulations pertaining thereto were still in their incubative stage."

[29] *Id.* at n.8 (citing Note, *Stopgap Measures To Preserve the Status Quo Pending Comprehensive Zoning or Urban Redevelopment Legislation,* 14 W. RES. L. REV. 135 (1962)).

[30] Interim zoning is a temporary measure used to prevent development in an area that has not been zoned or an area that is undergoing a comprehensive study for rezoning. Interim measures can be useful in assuring orderly development but also can be misused by a government to delay zoning or rezoning an area. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 84 (1971).

[31] 58 Hawaii 432, 571 P.2d 328 (1977).

classified A-3 under the zoning code for the purpose of constructing an eleven-story condominium. The current zoning permitted buildings up to 350 feet high. There was evidence that Allen purchased the property only after inquiring about existing zoning and consulting an architect. Immediately following purchase, Allen retained the same architect and "commenced architectual, engineering and other work necessary to obtain a building permit from the city."[32] Six months later a rezoning amendment which had the effect of downzoning Allen's property was passed by the city council. Meanwhile, Allen had testified against the proposal at a public hearing two months before passage and four months after purchase of the property and had applied for a building permit which had been partially approved on the date the rezoning ordinance was passed. Allen did not wait for a denial, however, and promptly *withdrew his building permit application.*[33]

Allen thereafter sued the city for $77,000 in damages — allegedly the amount of nonrecoverable costs incurred up to the date the downzoning ordinance was passed. The trial court found there had been a substantial change in position resulting in some $68,000 of nonrecoverable costs[34] and found the city liable for that amount.[35]

But the supreme court held that Allen could not recover monetary damages from the city, whether or not he had a valid vested rights claim:

> In our opinion, to permit damages for development costs is not only unprecedented but would also be unsound policy. Were we to affirm the award of damages, the City would be unable to act, if each time it sought to rezone an area of land it feared judicially forced compensation. Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources.[36]

Further, the court held that if found to be equitably estopped from enforcing its ordinance, then the city should decide whether to condemn

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[32] *Id.* at 433, 571 P.2d at 328.

[33] *Id.* at 434, 571 P.2d at 329.

[34] *Id.*:

> Prior to the effective date of Ordinance 4145, the Plaintiffs in reliance on the A-3 zoning then in effect and on the reasonable probability that a building permit would be issued, substantially changed their position and incurred certain nonrecoverable costs for the development of their property in the amount of $67,950.26 for which they were and are liable.

[35] *Id.* at 434-35, 571 P.2d at 329:

> (1) Plaintiffs had the right to rely on the zoning requirements existing prior to the effective date of Ordinance 4145. (2) The City is liable for the costs incurred by the Plaintiffs in reliance on the then existing A-3 zoning and on the reasonable probability of the issuance of a building permit. (3) The mere introduction of Bill 46 on March 6, 1973 does not constitute notice to the Plaintiffs that the zoning would be changed.

[36] *Id.* at 438, 571 P.2d at 331.

the property rights or repeal its zoning restrictions:

> Prohibiting damages for development costs does not mean that a property owner must suffer an injury without compensation, for if the facts establish that the doctrine of equitable estoppel should apply to prevent the City from enforcing newly enacted prohibitive zoning, then the property owner is entitled to continue construction. Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City—not property owners.[37]

But it is the Hawaii Supreme Court's *dicta,* not its *holding* in *Allen,* which is important for predicting its future direction in vested rights cases. Citing with apparent approval recent cases from California[38] and Illinois,[39] a unanimous court seemed to favor applying an increasingly strict standard to property owners claiming vested rights or equitable estoppel as against a change in land use regulations applicable to their property. The court began by quoting with approval a distinction between vested rights and estoppel,[40] noting that courts reached the same results under either theory.[41] The court then noted the tough standards applied in California and Illinois and reiterated its language in *Denning* that "mere good faith expectancy" would not be enough.[42] So far, the court *appears* to be saying that Allen had no more than such an expectancy.

But it is on this point that the court concentrated on the issue of damages, noting that in two other cases decided the same day by the trial court[43] building permits had issued and construction had begun.[44] In each

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[37] *Id.* at 439, 571 P.2d at 331.

[38] Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied,* 429 U.S. 1083 (1977).

[39] First Nat'l Bank & Trust Co. v. City of Rockford, 47 Ill. App. 3d 131, 361 N.E.2d 832 (1977).

[40] 58 Hawaii at 435, 572 P.2d at 329 (quoting Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes,* 1971 URB. L. ANN. 63, 64-65):

> The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly, their elements are different. Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations. (Footnotes omitted.)

[41] 58 Hawaii at 435, 571 P.2d at 329.

[42] *Id.* at 436, 571 P.2d at 330.

[43] Hale Kona Kai Dev. Corp. v. Yuasa, Civ. No. 39391; Guerin v. Yuasa, Civ. No. 39390 (1st Cir. Ct. Hawaii July 24, 1973) (decided together).

of these declarative and injunctive relief had been sought, the trial court had held that the permits had been rightfully revoked, and damages had been awarded.[45]

In sum, it would appear from *Allen* (and especially in light of *Denning*) that the Hawaii Supreme Court was moving, if not directly toward strict standards making a showing of vested rights or equitable estoppel difficult in cases of downzoning, at least toward a theory of compensable regulations in which the law would stand but some measure of compensation might be due the landowner stopped *in medias res*. Nevertheless, *Allen* left many questions unanswered, not the least of which was: Is a developer who has expended sums in reliance on existing zoning, but who has *not* commenced construction, likely to be able to show any vested rights or claim equitable estoppel?

The first *Life of the Land, Inc. v. City Council*[46] case would seem to answer, yes. In this recent decision, a bare majority of the court held that where a developer, in good faith reliance upon existing law, has expended substantial sums for the preparation of plans and documents for the purpose of applying for a building permit, and it is further shown that he has been given assurance in some form by county officials charged with administering the law that his proposed construction meets zoning requirements, and that he had a right to rely on such assurances, the county will be *equitably estopped* from denying him a building permit by reason of a subsequently enacted prohibitory ordinance. The critical questions become: (1) What reliance is "good faith"; (2) what sums are "substantial"; (3) what constitutes "assurance" by officials; and (4) when does a developer have a right to rely on such assurances? While some answers are discernible from the majority opinion, they must be carefully considered not only in light of the strong dissents by two of the five justices sitting, but also in light of the retirement of one justice each from the majority and dissenting blocks.[47] Appointments to the State's highest court could change considerably the future lineup on these critical questions. Moreover, the case is tinged by the intense political and public controversy over construction of the Admiral Thomas condominium project overlooking one of Honolulu's treasured urban parks.[48] Finally, a unanimous supreme court (with two temporary justices assigned by reason of the aforementioned vacancies) has rejected Life of the Land's request for a permanent injunction.[49]

The salient facts are relatively uncomplicated and undisputed.[50] The

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[45] 58 Hawaii at 437, 571 P.2d at 330.

[46] *Id.*, 571 P.2d at 330-31. Neither decision was appealed.

[46] 60 Hawaii 446, 592 P.2d 26 (1979).

[47] Justice Kobayashi who voted with the majority has recently retired, as has Justice Kidwell.

[48] The Admiral Thomas condominium overlooks Thomas Square Park.

[49] Life of the Land, Inc. v. City Council, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980).

[50] *Id.*, slip op. at 1.

developers' property is located in a district which, at the time of application to build, was controlled by a building permit moratorium. The moratorium had been in effect for eighteen months when the developers applied to the city council for an exemption, which it may grant in its discretion under the terms of the moratorium ordinance.[51] Two months later, the council approved such an exemption for a 350-foot, 177-unit, 35-story condominium. Had it not been for the moratorium, the proposed building would have been a permitted use in the A-4, high density apartment zone.[52]

Approximately one month later, the city reduced the height limit to 299 feet and the number of units to 150 and added, among other conditions,[53] a 95-foot setback from Victoria Street.[54] The developers agreed. Two months later, plans embodying these changes appear to have been submitted.[55] But the following month, the Thomas Square Historic, Cultural and Scenic (HCS) District Ordinance became effective.[56] That ordinance prohibited a structure such as that proposed by the developer. Three months later, Life of the Land sued the city and the developer, and late in 1978 the trial court decided in favor of the defendants. It was only after that decision that the council "determined" that all conditions had been met by the developer, leaving the city's department of land utilization free to issue a building permit.[57]

The Hawaii Supreme Court upheld the trial court's refusal to grant a temporary injunction. In so doing it reaffirmed its language in *Denning*[58] and *Allen*[59] that a developer who spends money in good faith reliance on existing law may have a right to proceed — the local government being *equitably estopped* from enforcing an ordinance which does not permit such development. But the majority further expanded the scope of vested rights which, although defensible, *purports* to be derived from the two earlier cases. It is not altogether clear that a basis for such expansion can be found in or fairly implied from either prior case.

First, the court clearly extended equitable estoppel rights to expenditures for plans and documents — in this case an amount apparently ex-

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[51] 60 Hawaii at 448, 592 P.2d at 27.

[52] *Id.*, 592 P.2d at 28.

[53] The developers were mandated to enter negotiations with the Honolulu Academy of Arts for underground parking, to consider any urban design policy that might emerge for the Thomas Square area in designing the project, and to study the possibility of constructing two residential buildings rather than one. *Id.* at 455 n.4, 592 P.2d at 31 n.4 (Kidwell, J., dissenting).

[54] *Id.* at 454-55, 592 P.2d at 31 (Kidwell, J., dissenting).

[55] *Id.* at 449, 592 P.2d at 28. Whether plans in conformance with these changes were *in fact* submitted is not clear. Justice Kidwell, at least, regarded this as a factual issue to be considered later. *Id.* at 459, 465, 592 P.2d at 33, 37.

[56] *Id.* at 449, 592 P.2d at 28.

[57] *Id.*

[58] *See* text accompanying note 24 *supra*.

[59] *See* text accompanying note 37 *supra*.

ceeding half a million dollars.[60] Although the previous cases did in fact deal with such expenditures, there is at least a suggestion in *Allen* that neither the amount nor kind of spending would lead to the application of equitable estoppel.[61] Indeed, the court in *Allen expressly held* it was *not* deciding whether the city should be estopped from enforcing the ordinance in question, but only whether the damage remedy was proper.[62] Whether it is appropriate in Hawaii to extend equitable estoppel to money spent in planning and design prior to the issuance of a building permit, the point is that it is not nearly so clear the court had *already* done so in *Allen* and *Denning*, yet the court apparently thought it did so then. In any event, it does so now.[63]

Second, and more troublesome, the court assumed without discussion that the developers had acquired development rights by virtue of their acquisition of the property zoned A-4 prior to the passage of the moratorium.[64] While there may be jurisdictions that so hold, more discussion and explanation seems preferable if this is the direction Hawaii means to go. Following *Allen* the Hawaii legal community justifiably could have

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[60] 60 Hawaii at 450, 592 P.2d at 29. It is not terribly clear, of all the amounts discussed by the court, which it considered applicable to the issue in this case:

> In this case, the expenditures made by the developers were substantial. In reliance upon Section IV of Ordinance No. 4551, they proceeded to file an application for an exemption from the moratorium on July 11, 1977. The record is not clear exactly how much was spent by the developers in the preparation of plans and designs in support of their application, but it does show that up to September 21, 1977, when the city council gave its express approval to the proposed construction, they had already incurred expenditures in excess of $150,000 for planning and design. They first acquired development rights to the property on August 22, 1975, before the passage of Ordinance No. 4551. Following council approval, and between September 21, 1977 and November 10, 1977, they incurred expenditures of close to $95,000 for the project, of which the sum of approximately $85,000 was allocated for planning and design. Subsequent city council action on November 10, 1977, necessitated further construction design modifications. Between that date and April 20, 1978, the developers incurred expenditures of approximately $321,000, of which some $275,000 went for planning and design. By the time the suit was filed on May 2, 1978, in an attempt to put a halt to the project, they had incurred further expenditures of approximately $7,500 for planning and design. These expenditures for planning and design were incurred by reason of, and in compliance with, council action on their application, and in reliance upon the implicit assurance that if the special construction conditions imposed by the council were met, a building permit would issue.

Id. at 450-51, 592 P.2d at 29.

[61] Here, the trial court ruled that appellees had a right to rely on the A-3 zoning and that the city was liable for appellees' nonrecoverable preparatory expenses. On review of the record it is difficult to ascertain the basis of that ruling.

[62] 58 Hawaii at 436, 571 P.2d at 330.

[63] Justice Kidwell is not so sure. In his dissent he notes the alternate grounds presented by corporation counsel for the city for approving the project. 60 Hawaii at 456-57, 592 P.2d at 32. However, it is clear from the brief majority opinion that the court is speaking in estoppel terms, citing *Denning* and *Allen* with approval.

[64] "They first acquired development rights to the property on August 22, 1975 . . . ." 60 Hawaii at 450, 592 P.2d at 29.

counselled quite the opposite considering the court's apparent reliance on the *Avco*[65] case from California, a jurisdiction to which Hawaii often looks for guidance on issues of first impression.

One of the dissenting justices[66] set out additional problems with the decision in what is virtually a parallax opinion to that of the majority. Three issues were raised in that dissent: (1) Good faith reliance and notice, (2) good faith reliance and certainty, and (3) legislative intent.

The first is one of good faith reliance and notice. By virtue of the very fact that the interim moratorium ordinance was just that — interim and moratorium — any property owner to whom it applied *must* have been put on notice that changes were in the wind. Indeed, the whole purpose of such an ordinance is to freeze development until such time as a new scheme is in place, expressly to prevent developers from becoming grandfathered into the existing system while the government perforce works its public way to change the rules.[67] Moreover, it appears that for some time the developers here knew precisely what was being planned for the property — an ordinance that would virtually prohibit their development.[68] Under these circumstances, it is not easy to characterize the developer here as having relied in good faith and *without notice.*

There is a more difficult issue as well. Good faith reliance requires a relatively certain set of development possibilities. Here there was hardly any such certainty. While it may well be that the developers had more than what the dissent characterized as "ambiguous promises that the pro-

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[65] Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) (rejecting developer's claim to vested right in construction of project even though developer before passage of the permit legislation had spent more than $2 million in constructing storm drains, culverts, utilities, and similar improvements, had incurred several thousand dollars in liability, and was losing nearly $10 thousand per day; rejecting claim of estoppel based on agreement between developer and government agency on ground that government cannot contract away its police powers, including land use regulations).

[66] Justice Kidwell, since retired, wrote the dissenting opinion.

[67] *See* Silvera v. City of South Lake Tahoe, 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970); Hagman, *A "Back Door Run" Around Limitations on Granting Zoning Variances*, 22 LAND USE L. & ZONING DIG. 146 (1970).

[68] 60 Hawaii at 456, 592 P.2d at 32 (Kidwell, J., dissenting):

> From some date prior to September 2, 1977, the Developers were aware that a draft of an ordinance creating a "historic, cultural and scenic district" which would include the Admiral Thomas parcel was under consideration by a committee of the Council and that the draft ordinance contemplated height restrictions which were inconsistent with the Developers' plans. The Developers had, prior to September 21, 1977, presented arguments directly to a member of the Council in an attempt to defeat the ordinance. A public hearing on the proposed ordinance was scheduled to be held on January 25, 1978. On January 24, 1978 the Developers filed an application for a building permit. The proposed ordinance became effective as the HCS Ordinance by its passage by the Council and its approval by the mayor on February 22, 1978. The HCS Ordinance by its terms prohibits construction on the Admiral Thomas parcel of any structure in excess of a height limit computed by a formula. It is not disputed that the building proposed to be constructed by the Developers would exceed that height limit.

posed construction would be permitted in the legislative discretion of the Council,"[69] nevertheless it is fair to characterize their reliance, especially after passage of the interim moratorium, as something less than the relative certainty provided by an existing and unencumbered zoning classification. The dissenting opinion set out the lack of assurance which the developers had here, contrasting it with the *Denning* decision:

> It is necessary at the outset to recognize a critical difference in the posture of the Developers from that of the landowner in *Denning*. There the existing ordinance left nothing to be determined by the county authorities except compliance of the proposed development with a set of criteria spelled out in the ordinance. In the present case, on the other hand, the governing ordinance forbade the proposed development, subject only to modification of the application of the ordinance in the legislative discretion of the Council. The Developers could receive assurances that their proposed construction was not prohibited by the IDC Ordinance only by way of action by the Council. Moreover, the IDC Ordinance contained an express limitation on the power, as distinct from the discretion, of the Council, that any such modification must be consistent with proposed amendments to existing land use regulations and with "the health, safety, morals and general welfare."
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> The Developers must find the assurances they need to satisfy the *Denning* test in the action of the Council on September 21, 1977 and November 10, 1977. These actions were far from unqualified and unambiguous. . . .
>
> It is not possible to read the resolution of November 10, 1977, as the Developers seemingly would have us do, as merely an expression of hope on the part of the Council with no sanction available to the Council to enforce its directives. In my opinion, the action of the Council can reasonably be interpreted only as conditioning its approval upon the satisfactory compliance by the Developers with those directives. Not only did these directives require the Developers to engage in a course of negotiation with other parties which would be subject to subsequent evaluation by the Council, but also the Developers were required to consider changes in the design of the project as necessary to conform to the standards of the HCS Ordinance when enacted. It is clearly implied that the Council was to review the Developers' consideration of these standards and that the Council would have to be satisfied that its directive had been observed before the building permit would issue. Such confirming action on the part of the Council did not take place until October 28, 1978.
>
> These facts do not support equitable estoppel under the *Denning* test. On the date of enactment of the HCS Ordinance the Developers had, instead of assurances that the proposed construction met zoning requirements, only ambiguous promises that the proposed construction would be permitted in the legislative discretion of the Council if the efforts of the Developers subsequent to November 10, 1977 to comply with the Council's directives were determined to meet some unexpressed standard of sufficiency.[70]

If the Council's actions were more than "ambiguous promises" — and I

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[69] *Id.* at 464, 592 P.2d at 37. (Kidwell, J., dissenting).

[70] *Id.* at 463-65, 592 P.2d at 36-37 (Kidwell, J., dissenting).

submit that they were — they were also something less than a certainty upon which to build a case of equitable estoppel.

Finally, the dissent raised an interesting question of legislative intent: Did the passage of the HCS District Ordinance contain any exception for the Admiral Thomas project, and if not, could the court supply one? The answer is plainly, no. Rules of statutory construction permit no reading in of unexpressed intent; the council, with a clear opportunity to express its intent in the ordinance, passed a measure that was unambiguous and expressly effective upon enactment.[71] But it is worth examining the consequences of this particular answer: no vested rights or equitable estoppel will apply to any project upon which construction has not yet begun, regardless of the good-faith reliance of the developer or the amount expended in such reliance. This is a bit far reaching and would put Hawaii at or near the forefront among jurisdictions (like California) in which the absence of a building permit virtually forecloses either vested rights or equitable estoppel regardless of the other circumstances.[72]

The most recent (January 1980) supreme court decision on these facts[73] did not really resolve many of these issues, holding as it did that the city never *intended* that the HCS District Ordinance restricting heights in the Thomas Square area should apply to the developers here.[74] Thus, the court avoided the vested rights issue almost entirely by construing the facts in such a way as to make the passage of the aforesaid ordinance,

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[71] *Id.* at 460, 592 P.2d at 34 (Kidwell, J., dissenting):

> Rules of statutory construction do not permit a court to read into legislation which changes zoning standards an unexpressed intent to leave proposed construction unaffected. The HCS Ordinance is unambiguous. It expressly was effective on enactment, with no exception for the Admiral Thomas project. There was no occasion for the Council to express its intent more clearly in order for the ordinance to be effective in accordance with its terms.

[72] Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); Hagman, *The Taking Issue: The* HFH *et al. Round*, 28 LAND USE L. & ZONING DIG. No. II, at 5 (1976); *see* Kanner, *Public Right to Compensation for Public Land Use Control*, in VESTED RIGHTS DEVELOPMENT RIGHTS 43 (Proceedings of June 22, 1979 Conference on Planning for Growth Management, Honolulu, Hawaii); Kanner, *The Consequences of Taking Property by Regulation*, 24 PRAC. LAW. 65 (1978).

In fairness, it is worth observing that there is no mention of equitable estoppel in the quotation from Justice Kidwell in note 71 *supra*, and it is therefore arguably separable from the equitable estoppel issue and the way I have chosen to phrase it.

[73] Life of the Land, Inc., v. City Council, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980). The court discusses a host of technical and procedural issues raised by plaintiff-appellant Life of the Land which, while of some importance to the outcome of this particular appeal, are beyond the scope of the survey article which focuses on the major issue of vested rights. It is worth noting that the court seems more concerned with compliance with the *spirit* of the plethora of procedural requirements for land use changes in Honolulu than with their strict letter. *See, e.g., id.*, slip op. at 48 (no need to formally state "self-evident" undue hardship); *id.* at 52 (no need for formal "justification" report).

[74] *Id.* at 66.

otherwise restricting the developers' rights, inapplicable to the now virtually completed condominium building.[75]

To do so, the court exhaustively set out the facts, especially the sequence of events leading to the approval of the HCS District Ordinance by the city council.[76] Pointing in particular to language from various members of the council in the course of hearings on the ordinance and the "compromise" by which the Thomas Square developers agreed to reduce building height and density,[77] the court held:

> It is clear from (a) the discussion at the Committee of the Whole meeting of November 10, 1977; (b) the discussion at the public hearing held on the proposed HCS District No. 5 Ordinance on January 25, 1978; and (c) the HCS District No. 5 Ordinance as finally enacted, that the City Council did not intend that the ordinance should operate to deny to the Developers the building permit for the Admiral Thomas project, to which they would have been entitled, pursuant to the November 10, 1977, approval of their application for variance or modification under the Kakaako Ordinance.
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> . . . .
>
> Those provisions in the Revised Kakaako Ordinance affirmed and expressed the clearly ascertainable intent of the City Council that the Admiral Thomas project be exempted from the operation of the HCS District No. 5 Ordinance.[78]

Then, the court emphasized the absence of anything in the record or legislative history indicating the HDC ordinance was meant to apply *retroactively*. Since the court decided that the developer had received approval *before* HDC's passage, the ordinance would have to be retroactive in order even to *raise* a vested rights question: "There is no provision in the quoted section, or in any other section of the ordinance, which makes it operate retrospectively. Consequently, it operates only prospectively."[79]

Finally, the court proceeded to deal briefly with the question of equitable estoppel. After citing *Denning*[80] and *Allen*,[81] the court set out its definition of the applicable rule (which, by virtue of its earlier joining of the two concepts, applies in Hawaii to vested rights as well):

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely pro-

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[75] *Id.*
[76] *Id.* at 2-36, 60-70.
[77] *Id.* at 61-62, 65-68.
[78] *Id.* at 66, 70.
[79] *Id.* at 69.
[80] *Id.* at 73 (citing Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971)).
[81] *Id.* (citing Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977)).

ceed with the project.[82]

More questionable is the court's assertion that the official assurances which developers received at various times in 1977 were "official assurances on which the Developers had a right to rely to proceed with their projects,"[83] *in light of similar fact situations in Denning.* Recall that Denning also was in compliance with then existing zoning ordinance provisions. Recall that Denning also was aware of pending legislation that would make his project unbuildable *but* that he was advised by appropriate officials that he was then in compliance. He also spent sums in reliance on that assurance.[84] While it is true that Denning spent far less in reliance upon these assurances (by several hundred thousand dollars) *and* Denning had not sought a formal "variance" from existing zoning restrictions as did the developers in *Life of the Land,* nevertheless the theoretical distinction is weak. The court in *Denning* held that Denning failed to demonstrate he had been given assurances (upon which he had a right to rely) that his project met existing zoning requirements.[85] Yet, he appears to have received about as much assurance as the developers in *Life of the Land.* If Denning could not proceed, then why should not the Victoria Partnership have been similarly precluded if the Hawaii Supreme Court continues, as it says it does, to rely on *Denning* for precedent in the area of estoppel and vested rights?

Of course, it is again worth noting that vested rights — equitable estoppel — was only one of several issues discussed by the court and raised by plaintiff-appellants.[86] Moreover, based upon earlier conclusions with respect to the intent of council and the prospective nature of the HDC ordinance, such rights may have been irrelevant to the outcome of *this* case. The importance of the decision lies in its continued cloud over the issue of vested rights — equitable estoppel as applied to land use decisions in Hawaii.[87]

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[82] *Id.*

[83] *Id.*

[84] See discussion of *Denning* in text accompanying notes 16-30 *supra.*

[85] *See* text accompanying note 24 *supra.*

[86] No. 7240, slip op. at 30 (validity of council action; effective dates of approval of developers' application and the HCS Ordinance).

[87] A final note. The supreme court discussed the issue of variance in connection with the existing ordinance scheme pertaining to the land upon which the condominium structure was proposed to be built. The court discussed the nature of interim ordinances and found them *not* to be zoning ordinances at all, and therefore the council's activities with respect to developers' request for a variance therefrom not to be subject to the customary requirements and procedures usually required for such land use changes:

> That provision did not apply to the Developers' application because the Developers' application was not a petition for varying the application of a zoning ordinance with respect to a particular parcel of land, but was an application for variance or modification under the Kakaako Ordinance, which was not a zoning ordinance.

Id. at 47.

II. THE RELATIONSHIP OF PLANNING TO ZONING

"The best-laid schemes o' mice an' men gang aft a-gley."

Robert Burns

While it may very well be that the best of plans are all for naught in practice, there is no question that plans, at least land use plans, were always *supposed* to precede land use controls as exemplified by zoning.[88] That they did not for decades after the judicial[89] and legislative[90] actions which led to the rapid spread of zoning is well nigh indisputable.[91] Recently, however, many jurisdictions have thought better of it,[92] and, at least at the state level,[93] zoning is once more to be in accordance with a

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It will be interesting to see how this language is interpreted by the courts in subsequent decisions. There is a tendency in Hawaii for variance requirements to be more or less loosely observed. The court's language here will do nothing to circumscribe that tendency. It is also not true that all interim land use ordinances are not zoning ordinances, despite the court's interpretation and citing of eminent authority to the contrary, 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 11.01 (1979), *cited in id.* at 42. Many interim land use ordinances *are* zoning ordinances, and are entitled to the same procedural and substantive treatment upon application for modification as any so-called standard zoning ordinance.

It is worth noting that two radically different bills were introduced in the current Hawaii legislative session, each purporting to resolve the vested rights issue. *See* H.B. 2671-80, H.D. 1; S.B. 3097-80, S.D. 1, 10th Hawaii Leg., 2d Sess. (1980). The house bill died; the surviving senate bill (as of March 1980) restates the common law in several jurisdictions.

[88] *See* R. BABCOCK, THE ZONING GAME (1966); THE QUIET REVOLUTION, *supra* note 1; Garner & Callies, *supra* note 22; Haar, *"In Accordance With a Comprehensive Plan"*, 68 HARV. L. REV. 1154 (1955).

[89] Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).

[90] STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce 1928); STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce rev. ed. 1926).

[91] *See* R. BABCOCK, THE ZONING GAME (1966); THE QUIET REVOLUTION, *supra* note 1; Garner & Callies, *supra* note 22.

[92] *E.g.*, California, Florida, and Oregon. *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 931-44 (1976).

[93] How it will fare at the federal level, which has recently reentered the zoning game after five decades of silence, is another matter. Despite an impassioned plea from an amicus brief filed on behalf of the National Association of Homebuilders, the American Institute of Planners, and the American Society of Planning Officials (the last two since merged into the American Planning Association) the United States Supreme Court in City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976), did much to destroy the efficacy of planning as a necessary prelude to land use controls. *See* Callies, *The Supreme Court is Wrong About Zoning by Popular Vote*, 42 PLANNING 17 (1976). *But see* DuBose, *The Supreme Court Is Right About Zoning By Popular Vote*, 42 PLANNING 4 (1976). Its pale rehabilitation in its unfortunate decision in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (effectively setting back antidiscrimination by zoning a decade or so, contrary to the hopes and wishes of many commentators — *see, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969)), is too little, too late.

comprehensive plan.[94] Some states have gone so far as to require that no future local land use regulation shall be enacted or amended unless it is in accordance with a comprehensive plan,[95] causing some courts to invalidate those zoning ordinances and amendments passed after the date of such legislation if the zoning is not clearly in accordance with the approved comprehensive plan.[96] So it appears to be with Hawaii.

A. The Importance of a Plan

The benchmark for such an interpretation is *Dalton v. City & County of Honolulu*.[97] The case is significant primarily for its interpretation of that part of the Charter for the City and County of Honolulu[98] which requires zoning to follow the direction of a comprehensive plan. Less clear is what procedural and substantive planning and research steps must precede a change in the general plan in light of 1973 revisions to the charter made specifically in response to *Dalton*. The case also set out some points concerning standing[99] and laches[100] in land use decisionmaking which are not pertinent here.

In *Dalton* the city and county amended the Comprehensive Zoning Code [CZC] to permit increased density on Castle Estate land. The amending ordinances were passed after the council first amended the general plan detailed land use map and general plan text so that the permissible use of the Castle Estate land changed from residential and agricul-

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[94] *See generally* Haar, *"In Accordance with a Comprehensive Plan"*, 68 HARV. L. REV. 1154 (1955).

[95] *See, e.g.*, Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); CAL. GOV'T CODE § 65860 (West Supp. 1978-1979); FLA. STAT. ANN. 163.3194 (West Supp. 1979). *See also* Charter of the City and County of Honolulu art. V, § 5-412(3).

[96] Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); 1000 Friends of Ore. v. Board of County Comm'rs, 32 Or. App. 413, 575 P.2d 651 (1978). *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 956-65 (1976).

[97] 51 Hawaii 400, 462 P.2d 199 (1969). See the discussion of *Dalton* in Chatburn, *Comprehensive Planning: Only as Certain as Your Survival*, VIII HAWAII B.J. 15 (1971).

[98] Honolulu is a home rule municipality. It is therefore more independent of the State in many functional areas than it would be as simply a creature of the State, as an incorporated governmental unit whose powers are solely what the State chooses to grant. *See* HAWAII CONST. art. VIII.

[99] 51 Hawaii at 402-03, 462 P.2d at 202. For a discussion of a more recent decision focusing on the standing issue, see text accompanying notes 191-204 *infra*.

[100] *Id.* at 403-08, 462 P.2d at 202-05 (remanding the issue to trial court). "Laches" is an equitable doctrine in which the plaintiff is estopped from enforcing his rights because, due to his delay in invoking those rights, the position of the other party has so changed that he cannot be restored to his former condition. Wisdom's Adm'r v. Sims, 284 Ky. 258, 144 S.W.2d 232 (1940). The doctrine requires both passage of time and express or implied acquiescence in the alleged wrong. Tracerlab, Inc. v. Industrial Nucleonics Corp., 313 F.2d 97 (1st Cir. 1963).

tural to medium-density residential.[101] The plaintiffs contended that the *zoning amendment* was invalid because it was based upon an invalid *general plan amendment*. The Hawaii Supreme Court agreed.[102]

The court first dealt with the question of procedures for amending the general plan. Noting that the charter's provisions for initial passage of the plan (as an ordinance, which procedure has been changed to a resolution under the revised charter) required submission to both the planning director and the planning commission before the council could consider it (and an extraordinary majority council vote to override their recommendations),[103] the court held the same procedural safeguards were applicable to *amendments* to the general plan as well.[104] Similar procedural treatment was necessary for amendments, said the court, to avoid defeating the safeguards necessary to ensure the long-range and comprehensive nature[105] of the planning process and its integrity.[106] The court then af-

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[101] 51 Hawaii at 401, 462 P.2d at 201.

[102] *Id.* at 416, 462 P.2d at 209.

[103] *Id.* at 412, 462 P.2d at 206-07.

[104] *Id.*, 462 P.2d at 207:

> The effect of these special procedures, applicable only to the general plan, is that when the general plan is submitted to the council, the council is powerless to make additions or changes without first referring its additions or changes to the planning director and the planning commission for their recommendation. Without their recommendation, the council may adopt such additions or changes "only by the affirmative vote of at least two-thirds of its entire membership."

[105] The meaning of "long-range" and "comprehensive" is clarified by reference to (1) expert testimony received by the charter commission in formulating § 5-509, and (2) the supporting data of the general plan submitted by the planning commission to the council.

Shortly before adopting the requirement that the general plan be "long-range" and "comprehensive", the charter commission solicited and received the advice of a city planning expert:

> He believed that it should be the primary responsibility of the planning department to study, prepare and maintain a *long range comprehensive general plan* to guide the physical development of the city on a current basis, which would be recommended to the planning commission for further study and which in turn, if agreed on, would be recommended for adoption by the policy body. He believed it very important that the development and carrying out of the general plan *be spelled out in the charter*, explaining that such a plan should, of course, look forward to the needs of the community *not for just one or two years but twenty years hence*, and which would have to do with matters of traffic, police, fire, schools and playgrounds, land use, etc. Without a general plan, which is also a policy statement concerning zoning and subdivisions, there could be no long-range planning.

Minutes of the 64th Meeting of the Charter Commission held March 25, 1957, p. 2, on file in the Public Archives, at Honolulu, State of Hawaii.

In the supporting data of the 1964 general plan, p. 48, it is stated:

> Land uses proposed in this report and designated on Plate [*sic*] 39, the General Plan for the City and County of Honolulu, *cover the next 20 years*—as far ahead as it is safe to predict.

B. To insure that the general plan would be "long-range" and "comprehensive", stringent procedural hurdles were required to be overcome before a general plan could be

firmed the critical relevance of the general plan. Based on the applicable

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adopted. These hurdles are:

> § 5-503. . . . The planning director shall:
>
> (a) Prepare a general plan and development plans for the improvement and development of the city.
>
> . . . .
>
> § 5-505. . . . The planning commission shall:
>
> . . . .
>
> (b) Review the general plan and development plans and modifications thereof developed by the director. The commission shall transmit such plans with its recommendations thereon through the mayor to the council for its consideration and action. The commission shall recommend approval in whole or in part and with or without modifications or recommend rejection of such plans.
>
> . . . .
>
> § 5-512. . . .
>
> 1. The council shall adopt the general plan or any development plan by ordinance.
>
> . . . .
>
> 4. Any addition to or change in the general plan proposed by the council shall be referred by resolution to the planning director and the planning commission for their recommendation prior to final action by the council. If the commission disapproves the proposed change or addition, or recommends a modification thereof, not accepted by the council, or fails to make its report within the period of thirty days, the council may nevertheless adopt such addition or change, but only by the affirmative vote of at least two-thirds of its entire membership.

Id. at 410-12, 462 P.2d at 206-07 (footnote omitted) (original emphasis). This language is no longer contained in the applicable revised charter provisions pertaining to the general plan (or, for that matter, development plans). Charter of the City and County of Honolulu art. V, § 5-408.

[100] 51 Hawaii at 412-13, 462 P.2d at 207:

> These stringent requirements for initial adoption of the general plan would be pointless if the council's general power to amend were held applicable to the general plan. For example, suppose that after the general plan had been prepared and recommended to the council, five of the nine members of the council proposed to change the plan. Charter § 5-512.4 would require that this proposal be referred by resolution to the planning director and the planning commission. Without the approval of the commission, the five councilmen would be powerless to adopt the change. But if the general plan could be amended as the defendants here contend, the five councilmen could join the other councilmen and adopt the general plan without proposing any changes, and thereafter, the five councilmen could promptly amend it in any manner they wished, subverting the limitation expressed in charter § 5-512.4.

Id. at 415-16, 462 P.2d at 208-09:

> A careful review of the legislative history of § 5-515 and of the other pertinent sections of the charter compels this Court to conclude that the amendment process must meet certain strict procedural hurdles. Looking at the totality of the problem before us with the whole of Honolulu as one indivisible unit, we conclude that the better and correct interpretation of charter § 5-515 requires that in the process of amending the general plan, not only a public hearing is necessary but the council, the planning commission and the planning director are required to follow a course of conduct consistent with the safeguards that were required in the initial adoption of the general plan. This interpretation will not only meet the spirit of the law but fulfill the true intent of the laws covering the

charter provisions,[107] the court concluded that "the charter commission . . . wrote into the charter a specific prohibition against zoning ordinances which do not conform to and implement the general plan."[108] The revised charter contains identical language, only substituting "development plan" for "general plan."[109] Presumably the court would make the same comment with respect to development plans today.

Second, the court set out in detail what it regarded as minimum substantive criteria for amending of the general plan:

> [A]lterations in the general plan must be comprehensive and long-range. More specifically, if the city believes the general plan of 1964 is obsolete, then comprehensive updating of the 1964 plan's "studies of physical, social, economic and governmental conditions and trends" is in order. If new study reveals, among other things, (a) a housing shortage that was underestimated in the 1964 general plan, (b) the most rational solution to this housing shortage is more apartments, (c) some of these new apartments should most rationally be in Kailua, (d) the land set aside in the 1964 general plan for apartments in Kailua must be increased to meet this need, and (e) the acreage in question in this case is the best site for additional apartments (rather than some other site, or rather than some other use for this land to fit some other need underestimated in the 1964 plan); then the general plan may be amended to permit a change in zoning.[110]

This last is particularly significant. The court seems to preclude a general plan amendment meeting all of the appropriate procedural safeguards unless it is supported by studies demonstrating a sound basis for such amendment.[111] While the opinion clearly addresses only the question of

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general plan.

We conclude that the city's general power to amend ordinances is not applicable to the general plan. The purpose of Honolulu Charter § 5-509 was to prevent the deterioration of our environment by forcing the city to articulate long-range comprehensive planning goals. The purpose of Honolulu Charter § 5-512.2 was to prevent the compromise of these planning goals. These sections of the charter allow less room for the exertion of pressure by powerful individuals and institutions. To allow amendment of the general plan without any of the safeguards which were required in the adoption of the general plan would subvert and destroy the progress which was achieved by the adoption of the charter's sections on planning, and by their effectuation in the 1964 general plan.

[107] Charter of the City and County of Honolulu art. V, § 5-512 (1959) provided in part:

1. The council shall adopt the general plan or any development plan by ordinance. The general plan and all development plans shall be kept on file in the office of the planning department.

2. No public improvement or project, or subdivision or zoning ordinance shall be initiated or adopted unless it conforms to and implements the general plan.

[108] 51 Hawaii at 415, 462 P.2d at 208.

[109] Charter of the City and County of Honolulu art. V, § 5-412(3).

[110] 51 Hawaii at 416-17, 462 P.2d at 209.

[111] In this the court seems to foreshadow the emphasis on such studies in the approval of certain growth management ordinances passed and judicially approved in New York, Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138

support for such amendments to the general plan, it is worth considering whether such requirements would also be made of new or amended detailed plans, the detailed land use map plans of today, and the new development plans.

This *may* in part depend upon how the court will apply *Dalton* in view of the changes in the revised charter of 1973. That charter now calls for a general plan that is a broad statement of textual policies for long range development which is adopted and amended by resolution, rather than a comprehensive mapping of planned land uses that is adopted by ordinance.[112] As noted above, the requirement for consistency between planning and zoning has shifted to the local development plans.[113] The development plans (DPs) are required to be more detailed and shorter range textual statements of principles and standards for implementing the general plan, and while a map of the area covered by the plan is still required, it need no longer show planned land uses,[114] even though current drafts of DPs do show them.[115]

In changing the nature of the general plan, the charter commission ostensibly intended to relieve the city of only the cumbersome procedural burdens imposed by *Dalton*.[116] The absence of a requirement that the general plan be comprehensive and founded on detailed studies (which was arguably the court's lever in *Dalton* for requiring that amendments also be based on detailed studies) from the revised charter's definition of the general plan and the DPs is more troublesome. The charter commission said it intended to move away from physical, end-state planning to a *process* which included *social* planning as well.[117] The question remains: What is the status of the detailed, comprehensive studies requirement? As the cases below suggest, it is likely they are still basic requirements as the necessary support for plans to which future land use changes must comply even though it is true that these former general plan requirements were not transferred to the DP requirements in the revised charter.[118]

The court has considerably amplified its decision in *Dalton* in the decade since 1969. In *Hall v. City & County of Honolulu*,[119] the court dealt

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(1972), and California, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975).

[112] Charter of the City and County of Honolulu art. V, § 5-408.

[113] *Id.* § 5-412(3).

[114] *Id.* § 5-409.

[115] *See, e.g.*, DEP'T OF GEN. PLANNING, CITY AND COUNTY OF HONOLULU, DEVELOPMENT PLAN ORDINANCE; PRIMARY URBAN CENTER (Draft, Sept. 1979).

[116] FINAL REPORT OF THE CHARTER COMMISSION, CITY AND COUNTY OF HONOLULU, 1971-72, at 24.

[117] *Id.*

[118] Charter of the City and County of Honolulu art. V, § 5-409. Minimally, the inquiry shifts from their necessity as *charter* requirements to their necessity as indicia of a rational basis for the development plans.

[119] 56 Hawaii 121, 530 P.2d 737 (1975).

with requirements for amending the DPs and the detailed land use maps (DLUMs) which were to give specific and detailed land use direction under the general guidance of the general plan. The court seemed to require that detailed studies accompany any modification or drawing up of DPs and DLUMs by way of requiring a review of the general plan for the area. The court reached this conclusion upon examination of pertinent language in the revised charter together with a review of its decision in *Dalton*.

The case arose upon a review of procedural requirements to amend the general plan in the Diamond Head area. As part of proceedings to adopt a DLUM and a DP for the area, the planning director recommended changing the general plan designation from residential to park. The change was challenged both as to the adequacy of the hearings held and the studies conducted.[120] The court held the hearings were improper and stale.[121] As to the plans and studies, the court sharply distinguished the general plan, on the one hand, and the DPs and DLUMs, on the other:

> The trial court has failed to take into consideration the important difference that exists between the General Plan and the Development Plan, and the difference between the General Plan and the Detailed Land Use Map.
>
> Clearly, under Charter Section 5-509 (1969), the General Plan provides, *inter alia*, designated specific use of the land available within the City of Honolulu.
>
> The Development Plan, under Charter Section 5-510 (1969), *merely* provides the "*detailed scheme for the placement or use of specific facilities* within a defined area so as to insure the most beneficial use of such area . . . . *A development plan* is *within the framework of and implements the general plan.*" (Emphasis added.)
>
> Evidence adduced at the trial shows that the Detailed Land Use Map *merely* provides in more detail the specific boundaries of *the various land use activities shown on the General Plan.*[122]

What follows from this distinction, however, is not so clear. The court first declared that plans and studies in support of a DP or DLUM do *not* suffice for the general plan because they are not sufficiently long range or comprehensive.[123] The court then declared that in order to amend the general plan (in this case presumably necessary) what was needed was "[a]n updated comprehensive and long-range study of the General Plan and of any amendments thereto."[124]

But the nagging question remains: Having distinguished between a DP-DLUM and a general plan, what is needed to draw up or change a DP-DLUM for which no general plan amendment is necessary? Something,

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[120] *Id.* at 126-27, 530 P.2d 740-41.

[121] *Id.* at 128, 530 P.2d at 741.

[122] *Id.* at 127, 530 P.2d at 741 (original emphasis).

[123] *Id.* at 128, 530 P.2d at 741.

[124] *Id.*

presumably; but what or how much is not yet clear. All we know for sure is that the presumably shortrange studies of the type found in *Hall* will not suffice for *both* general plan and DP-DLUM amendments, either or both of which may be a necessary precedent to a zoning amendment:

> The facts further show . . . seven to nine months from June 17, 1969, was necessary *for the preparation of a comprehensive and long-range study for the proper consideration of an amendment to the general plan of the subject area. No such study was ever submitted and considered before the enactment of the amendment* to the General Plan.[125]

Next, in *Akahane v. Fasi*,[126] the court addressed the question of *who* makes the studies precedent to plan modification. The answer for all three planning documents (general plan, DLUM, and DP) appears to be the department of general planning (DGP) rather than the city council, unless the DGP fails to respond to a legitimate city council request in a timely manner.

The question of authority to perform studies to support plans arose over a proposed contract between the city council and an independent consultant for a study of that area along Ala Moana Boulevard between Piikoi and Punchbowl Streets known as Kakaako. The city council was in the process of formulating development policies for the Kakaako area which would require amendments to all three planning documents as well as zoning ordinances. To accomplish this the council intended to retain a firm of planning consultants to review, evaluate, consolidate, and update all the previous studies made by public agencies.[127] The administration contended that the performance of such studies was an executive function and therefore beyond the power of the council, a legislative body, under traditional separation of powers principles.[128]

After reviewing the pertinent parts of the city charter,[129] the court held

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

[126] 58 Hawaii 74, 565 P.2d 552 (1977).

[127] *Id.* at 83, 565 P.2d at 558.

[128] *Id.* at 79, 565 P.2d at 556.

[129] *Id.* at 82, 565 P.2d at 557:

Section 5-412 of the charter states, *inter alia:*

1. The council shall adopt the general plan or revisions thereof by resolution and development plans or amendments thereto by ordinance. Resolutions adopting or revising the general plan shall be laid over for at least two weeks after introduction. . . . Upon adoption, every such resolution shall be presented to the mayor, and he may approve or disapprove it pursuant to applicable provisions governing the approval or disapproval of bills.

The general plan and all development plans shall be kept on file in the department of general planning.

2. Any revision of or amendment to the general plan or any existing development plan may be proposed by the council and shall be processed in the same manner as if proposed by the chief planning officer. Any such revision or amendment shall be referred to the chief planning officer and the planning commission by resolution. If the planning

that, at least in the first instance, the responsibility for producing such plans lay with the administration through its executive offices.[130] The charter enumerates general planning powers and reserves them, although not exclusively to, executive agencies. And the executive branch is fully staffed to expeditiously proceed with the reserved power. In part, this is to avoid wasteful duplicate efforts.[131] Therefore, the city council first formally must request such a report or study, if it wants one, from the administration, and there was no evidence of any such request by the council here.[132] Following a request to the executive, the council is free to contract for services on its own.

> Where, however, after a proper request by the city council is made, the executive branch is uncooperative or has failed, within a reasonable period, to assume and proceed with their responsibility, we are of the opinion that the city council can and must assume the reserved, but not exclusive, powers of the executive branch in the issue herein as an incidental exercise of their power to amend or revise an existing general plan or development plan.
>
> Moreover, where the executive branch has submitted to the city council proposed general or development plans or revisions and amendments thereto, the city council is necessarily empowered and authorized to employ consultants with the necessary expertise to review, evaluate, consolidate, and to advise the council on these various proposals.[133]

The Hawaii Supreme Court has also discussed the applicability of the Hawaii Administrative Procedure Act (HAPA)[134] to the decisions of Honolulu's chief planning officer (CPO) in *Kailua Community Council v. City*

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commission disapproves the proposed revision or amendment or recommends a modification thereof, not accepted by the council, or fails to make its report within the period of thirty days, the council may nevertheless adopt such revision or amendment, but only by the affirmative vote of at least two-thirds of its entire membership.

[130] *Id.* at 83-84, 565 P.2d at 558.

[131] *Id.* at 86, 565 P.2d at 559-60:

> The above procedure would avoid duplication of costs which the taxpayers of this State would sustain if each branch of government had an independent power to proceed with the primary responsibilities and duties of the other. It should be made clear that the holding in this case does not foreclose the city council from obtaining this assistance because the information obtained might also be relevant to the formulation by the executive branch of an original general plan and/or development plan. Our opinion herein would further avoid a competitive situation between the branches and would also prevent a complete bypassing of the executive responsibility thereby diluting or damaging to a point of impotency the executive responsibility.

[132] *Id.* at 85, 565 P.2d at 559.

[133] *Id.* There was a strong dissent by Chief Justice Richardson and Justice Kidwell, principally on the ground that council should be free to obtain whatever help it needs in making legislative decisions, including the changing of the general plan. Whether this same information related to the DP process was therefore irrelevant. *Id.* at 87, 565 P.2d at 560 (Kidwell, J., dissenting, joined by Richardson, C.J.).

[134] HAWAII REV. STAT. ch. 91 (1976 & Supp. 1979).

& County of Honolulu.[135] The case revolved around the CPO's promulgation of *Instructions for Requesting Amendments to the General Plan for the City and County of Honolulu.* The instructions set out application procedures together with data to be submitted by an applicant.[136] There was no evidence the rules were formally adopted as set out in HAPA.[137] Subsequently, the CPO forwarded a recommendation for a general plan amendment to the city council, which passed appropriate ordinances in accordance with the recommendation, over plaintiff's objections.[138] Plaintiff then challenged the ordinances on the ground they were based on administrative rulemaking proceedings subject to HAPA, which had not been followed.[139]

The court, however, held HAPA inapplicable on the facts of this case.[140] The court divided the CPO's duties into two categories: (1) Those determinations of public and private rights, in which he *may* be required to conform to HAPA;[141] and (2) those "intimately connected with the enactment of municipal legislation affecting the general plan and the development plans of the city."[142] In this latter category, HAPA does not apply because the final action is in the hands of the council and hence legislative in character. The court described the CPO's role in these situations as purely advisory and factfinding. Only the final action of the council affects the interests of the public. The function of the CPO in this process is analogous to that of a legislative committee.[143]

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[135] 60 Hawaii 428, 591 P.2d 602 (1979). Although the actions of the planning officer occurred in 1970, and HAPA has since been amended, the court's analysis would apply to the current statute.

[136] *Id.* at 429, 591 P.2d at 603.

[137] *Id.*

[138] *Id.* at 430, 591 P.2d at 604.

[139] *Id.* at 430-31, 591 P.2d at 604.

[140] *Id.* at 431, 591 P.2d at 604:

> The determinative issue in this case is, whether the CPO, in processing applications for amendments or revisions to the general plan or development plans of the city, was subject to the provisions of the Hawaii Administrative Procedure Act. HRS Chapter 91. We agree with the defendants-appellants that in these situations the HAPA is not applicable to the CPO.

[141] *Id.*

[142] *Id.* at 432, 591 P.2d at 605.

[143] *Id.* at 432-33, 591 P.2d at 605-06:

> [T]he final operative act giving legal effect to the proposal is the legislative action of the city council. The City Charter vests in the city council sole legislative power in municipal affairs. R.C.H. § 3-101 (1973). It also requires that revisions to the general plan be effectuated by council resolution and amendments to the development plans by ordinance. R.C.H. § 5-412 (1973). Thus, whether amendments or revisions are to be made is within the absolute discretion of the city council in the exercise of its legislative function. Its actions on the proposals are the only acts declarative of and affecting the interests of the public.
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> . . . .
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> In fulfilling his responsibility in this legislative process, the CPO serves as the initial factfinder for the city council, and he is in that sense performing a function which a

B. *Planning in a Statewide Context*

It is not the purpose of this section to detail the creation and operation of Hawaii's State Land Use Law, which has been more than adequately and elaborately described in a host of books,[144] articles,[145] and reports[146] over the past dozen years. Suffice it to say that by statute[147] Hawaii divides all the lands in the State into four zones: agriculture, conservation, rural, and urban. The State controls both the classification system *and* the use of land in the first zone, and shares some of that control with the counties in the second and third. Local government (counties, in Hawaii, as there are no separately incorporated cities or villages) controls the use of land within the urban zone.[148]

An amendment to the State Land Use Law concerning land use commission standards for deciding boundary amendment applications also provides that no such amendment could be adopted unless it conforms to the state plan.[149] This, together with statements in the newly enacted Hawaii State Plan,[150] give the plan considerable significance in Hawaii.

1. State Plan. — The Hawaii State Plan is divided into three major parts dealing with objectives and policies,[151] planning implementation and coordination,[152] and priority directions.[153] It is the second part dealing with planning implementation and coordination that is most significant for purposes of land use control and management. This is so because of the language contained in the Hawaii Revised Statutes: "The decisions

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legislative committee would normally perform. He reviews applications for revisions and amendments, R.C.H. § 5-403 (1973), and makes his recommendations to the planning commission which in turn reviews the proposals and transmits its own recommendations to the city council. Throughout this process, the CPO and the planning commission are performing a purely advisory function.

The court cited Melemanu Woodlands Community Ass'n v. Koga, 56 Hawaii 235, 533 P.2d 867 (1975), in support of this last proposition. There, the court held an action for injunction to stop the council from considering a recommendation from the planning commission (on a planned unit development ordinance) was premature as the recommendation was "advisory." *Id.* at 239, 533 P.2d at 870.

[144] *See, e.g.*, THE QUIET REVOLUTION, *supra* note 1, at ch. 1; MANDELKER, *supra* note 1, at ch. VII; ZONING HAWAII, *supra* note 1.

[145] *See, e.g., Whither Hawaii, supra* note 2; Callies & Dinell, Land Use Control in an Island State, 3 THIRD WORLD PLAN. REV. ___ (1980) (forthcoming publication); Selinger, Van Dyke, Amano, Takenaka & Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978).

[146] *See, e.g.*, ECKBO, DEAN, AUSTIN & WILLIAMS, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (1969).

[147] HAWAII REV. STAT. ch. 205 (1976 & Supp. 1979).

[148] *See* THE QUIET REVOLUTION, *supra* note 1, at ch. 1.

[149] Act 4, 1976 Hawaii Sess. Laws 4, 5-6 (codified at HAWAII REV. STAT. § 205-4(h) (1976)).

[150] HAWAII REV. STAT. ch. 226 (Supp. 1979).

[151] *Id.* §§ 226-5 to -28.

[152] *Id.* §§ 226-51 to -63.

[153] *Id.* §§ 226-101 to -104.

made by the state land use commission shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter."[154] Thus it is that after the adoption of those functional plans the state's major land use decisionmaking body will be bound by the state plan and its subordinate functional plans in its boundary change decisions.[155] Moreover, the Hawaii State Board of Land and Natural Resources, which has the authority to decide what uses shall be made of both public and private land in the thousands of acres of land classified as conservation under the State Land Use Law, is similarly subject to the pertinent functional plans and the state plan.[156]

While broad policy outlines are sketched in the state plan, it is the functional plan to which one must look for detailed direction. The state plan provides for the preparation of twelve such plans to be eventually adopted by the legislature by concurrent resolution.[157] The initial responsibility for preparing each functional plan lies with named state agencies[158] which are required to submit their plans periodically to an advisory committee[159] and policy council,[160] each of which is entitled by statute to have its recommendations accompany the functional plan to the legislature for action.[161] So far, the legislature has adopted no functional plans, but most are due to be submitted in time for consideration by the 1980 legislature.[162]

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[154] *Id.* § 226-52(b)(2)(D).

[155] Nor is this the *only* effect on the use of land. It is common knowledge — and rather obvious — that a minimum level of so-called infrastructure improvements are generally held to be necessary for the development of raw land. *Id.* §§ 226-52(b)(2)(A) to -52(b)(2)(B) require that the appropriation of funds under both the biennial and supplemental budgets, as well as the capital improvements program, be subject to the state plan and functional plans as well.

[156] *Id.* § 226-52(b)(2)(E).

[157] *Id.* § 226-52(a)(3) provides:

> State functional plans shall be prepared for, but not limited to, the areas of agriculture, conservation lands, education, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resources development. State functional plans shall define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter. County general plans and development plans shall be used as a basis in the formulation of state functional plans.

Id. § 226-57(a) mandates the adoption of functional plans and amendments thereto by concurrent resolution.

[158] *Id.* § 226-57(a).

[159] *Id.*

[160] *Id.* § 226-58. Form and content are set out in some detail in draft administrative guidelines issued by the state department of planning and economic development as staff to the policy council and as required by the state plan under subsection 55(10).

[161] *Id.* §§ 226-57(c), -58(b).

[162] At this writing (March 1980) it appears that none of the functional plans will be adopted this year. Interim guidelines for the use of the LUC have been drafted, *see* H.B. 1775-80, 10th Hawaii Leg., 2d Sess. (1980), and likely will become law by the end of the

2. *County Plans.* — The state plan, which is in effect a statutory instrument, also requires that each county adopt a two-part planning system, wherein a series of area-specific DPs fit into a general plan:

> County general plans shall indicate desired population and physical development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. County general plans or development plans shall further define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter. State functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as guidelines in amending the county general plans to be in conformance with the overall theme, goals, objectives, and priority directions.[165]

Such plans now are required by the state plan, and hence state law, to contain certain elements by January of 1982:

> § 226-61 **County general plans; preparation.** (a) The county general plans and development plans shall be formulated with input from the state and county agencies as well as the general public.
>
> County general plans or development plans shall indicate desired population and physical development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. The county general plans or development plans shall further define and implement applicable provisions of this chapter, provided that any amendment to the county general plan of each county shall not be contrary to the county charter. The formulation, amendment, and implementation of county general plans or development plans shall utilize as guidelines, statewide objectives, policies, and programs stipulated in state functional plans adopted in consonance with this chapter.
>
> (b) County general plans shall be formulated on the basis of sound rationale, data, analyses, and input from state and county agencies and the general public, and contain objectives and policies as required by the charter of each county. Further, the county general plans should:
>
> (1) Contain objectives to be achieved and policies to be pursued with respect to population density, land use, transportation system location, public and community facility locations, water and sewage system locations, visitor destinations, urban design and all other matters necessary for the coordinated development of each county and regions within each county.
>
> (2) Contain implementation priorities and actions to carry out policies to include but not be limited to, land use maps, programs, projects, regulatory measures, standards and principles and interagency co-

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current legislative session.

[165] HAWAII REV. STAT. § 226-52(a)(4) (Supp. 1979). As discussed at length *supra*, the City and County of Honolulu already has such plans.

ordination provisions.

(c) The county general plans and development plans shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained in this chapter by January, 1982.[164]

3. Potential Conflicts Between State and County Plans. — A troublesome issue is the potential conflict between the state plan and the county plans. Each relates to the other. The state plan requires that "[c]ounty general plans and development plans shall be used as a basis in the formulation of state functional plans."[165] But it also states: "State functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as guidelines in amending the county general plans to be in conformance with the overall themes, goals and objectives, and priority directions [of the state plans]."[166]

The question is, which takes precedence? The administrative guidelines issued by the Hawaii State Department of Planning and Economic Development address the question but do not resolve it.[167] Only in a single instance is the conflict potentially resolved in the state plan statute. The legislature may site a "specific project" regardless of county general plans to the contrary, upon a finding of "overriding state concern".[168]

In counties where there is not yet a general plan which meets the statutory criteria, the issue may never arise if the State legislature passes concurrent resolutions adopting all or most of the functional plans before such county plans are formulated. But what of the State's most populous county, Honolulu? Here there is a general plan in place,[169] and the city council is moving rapidly toward the adoption of new DPs.[170] What, for example, would be the status of land use controls adopted by Honolulu, regulating the redevelopment of Kakaako if, based upon the Oahu General Plan and a DP for that area, they conflicted with a state functional plan for tourism approved (by joint resolution) of the legislature and in accordance with the state plan? Could the State claim the county plans failed to conform to the state plan or use the functional plan as a guideline? But then, could the county — a home rule unit of local government — claim with equal right that the functional plan failed to utilize the

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[164] *Id.* § 226-61.

[165] *Id.* § 226-52(a)(3).

[166] *Id.* § 226-52(a)(4).

[167] HAWAII DEP'T OF PLANNING & ECONOMIC DEV., THE HAWAII STATE PLAN ADMINISTRATIVE GUIDELINES I-3 (Draft, June, 1979): "The formulation and amendment of State Functional Plans must conform to the State Plan *and utilize as guidelines County General Plans and Development Plans.* . . . The formulation, amendment and implementation of County Plans must conform to the State Plan *and utilize as guidelines the State Functional Plans.*" (emphasis added).

[168] HAWAII REV. STAT. § 226-59(b) (Supp. 1979).

[169] GENERAL PLAN: CITY AND COUNTY OF HONOLULU (Res. No. 238, Jan. 18, 1977).

[170] Smyser, *The Fight Over Development,* Honolulu Star-Bulletin, Oct. 10, 1979, at A-14, col. 2.

county's general plan and DP as guidelines in its formulation?[171] Note this is not merely a matter of conflict between plans and land use controls. Each jurisdiction's land use *controls* are bound by the contents of the respective *plans*.

III. Boundary Amendments: The Character of State Zoning Changes

Cases in the last decade have tended to focus on the manner in which reclassification takes place. The question of standards and facts relied upon to support such reclassifications runs through those reported decisions. As discussed in the preceding Part IIB, the new state plan,[172] together with the subject-specific functional plans, will provide the basis for these and other land use decisions.[173] This section addresses these two major areas of activity.

Authority to reclassify land among the four districts described in Part IIB rests with Hawaii's land use commission (LUC).[174] These changes are generally referred to as "boundary amendments". The manner in which the LUC made such changes was apparently subject to considerable public criticism,[175] finally resulting in the landmark case of *Town v. Land Use Commission*.[176] Not only did the case decide the character of boundary amendments (whether legislative or quasi-judicial), but in light of recent decisions elsewhere, it may have inadvertently decided whether such decisions will ever be subject to binding initiative and referendum as well.

The case arose out of Town's objection to the LUC's delay in deciding a boundary amendment application (from agricultural to rural) which affected his property and to the LUC's taking of applicant testimony out of his presence.[177] The former — delay — was contrary to specific regulatory language requiring the LUC to render a decision within forty-five to ninety days of a required hearing.[178] The latter was contrary to the requirements of HAPA.[179] The LUC answered that a petitioner could waive

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[171] While failing to resolve this issue legislatively, the legislature apparently did foresee potential conflict between the State and the counties on the location of various projects. The legislature expressly reserved to itself the power to override county plans in those situations. *See* note 168 and accompanying text *supra*. Perhaps this type of solution should be utilized to settle the land use control question as well.

[172] Act 100, 1978 Hawaii Sess. Laws 136 (signed into law on May 22, 1978) (codified at Hawaii Rev. Stat. ch. 226 (Supp. 1979)), *reprinted in* Hawaii Dep't of Planning & Economic Dev., The Hawaii State Plan (1978).

[173] Hawaii Rev. Stat. § 226-52 (Supp. 1979).

[174] *Id.* § 205-2 (1976 & Supp. 1979).

[175] *See* Mandelker, *supra* note 1, at 309.

[176] 55 Hawaii 538, 524 P.2d 84 (1974).

[177] *Id.* at 539, 524 P.2d at 86.

[178] State Land Use District Regulation 2.35.

[179] Hawaii Rev. Stat. ch. 91 (1968) (amended 1973, 1978).

the right to a decision within the time period (as here) and that HAPA was inapplicable as boundary amendments constituted "rulemaking" rather than a "contested case."[160] The court disagreed on both points.

The matter of delay was dealt with speedily. The court noted there was no provision for varying the time period; the language was clearly directory and mandatory. Moreover, to hold otherwise put objectors "in a state of limbo at the discretion of the applicant."[161] Allowing a petitioner to pick and choose the LUC meeting at which his petition would be decided places an objector, like Town, in an impossible position.[162]

More far reaching in the decision was the characterization of the boundary amendment process as quasi-judicial rather than quasi-legislative. The court said:

> We are of the opinion that the adoption of district boundaries classifying lands into conservation, agricultural, rural or urban districts, or the amendment to said district boundaries is not a rule making process within the meaning of the above cited definition. . . . It logically follows that the process for boundary amendment is not rule making or quasi-legislative, but is adjudicative of legal rights of property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature.
>
> . . . .
>
> HRS § 91-1(5) defines "contested case" as: 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.
>
> We are of the opinion that the instant case is a "contested case" within the definition cited above. The appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted. East Diamond Head Association v. Zoning Board, 52 Hawaii 518, 479 P.2d 796 (1971); Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969). Therefore, any action taken on the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party and is entitled by law to have a determination on those rights.[163]

It then held that the contested case procedures of HAPA applied.[164] As HAPA specifically granted parties such as Town the right to cross-examine witnesses[165] and forbade the presenting of additional evidence without notice to parties such as Town,[166] the LUC's hearing a witness in Town's absence and the acting chairman's "field investigation" evidence

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[160] 55 Hawaii at 545, 524 P.2d at 89.
[161] *Id.* at 544, 524 P.2d at 88.
[162] *Id.* at 545, 524 P.2d at 89.
[163] *Id.* at 546-48, 524 P.2d at 90-91.
[164] *Id.* at 548, 524 P.2d at 91.
[165] HAWAII REV. STAT. §§ 91-9(c), -10(3) (1968).
[166] *Id.* § 91-10(4).

rendered the LUC's decision invalid.[187]

It is this characterization of boundary amendments as quasi-judicial that is critical. Indeed, by including even initial classifications and changes regardless of size, the court may have cast too wide a net. For decades standard local zoning theory held that so-called map amendments were legislative in character.[188] Not only did this usually render local administrative procedure acts inapplicable (therefore requiring courts to hear most cases contesting such rezonings in lengthy de novo proceedings rather than abbreviated administrative appeals), it also made such activities subject to initiative and referendum, where such procedures were available. It is, however, generally agreed that neither is available for the recall of a quasi-judicial decision, by whatever manner or agency made, on the ground the general public has no legitimate interest in the outcome of a contested case.[189] Under this theory, then, the court has virtually insulated *all* the land use decisions involving boundary changes (translate: map amendments, which are identical to zoning map changes at the local level) from initiative and referendum. *Should* they be so exempt? It is, one would expect, perfectly reasonable to insulate as contested cases those decisions involving land areas so small that no one but the immediate parties should be concerned. But what of *major* boundary changes? Can it really be said that a reclassification of, say, upwards of 100 acres for an industrial park, a college campus, a theme park, or a new community is merely a contested case, quasi-judicial in nature and beyond any applicable referendum or recall? It is likely the court did not have in mind such a situation when it rendered its decision in *Town*. Perhaps the opinion should be restricted only to the class of cases similar to the case before the court in *Town*, that is cases which involve small land area and lack issues of real public interest.[190]

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[187] 55 Hawaii at 549, 524 P.2d at 91-92.

[188] *See, e.g.*, Fasano v. Board of County Comm'rs, 264 Or. 576, 579, 507 P.2d 23, 26 (1973); 1 WILLIAMS, *supra* note 5, at §§ 33.02, 16.03.

[189] *See* Callies, *The Supreme Court is Wrong About Zoning by Popular Vote*, 42 PLANNING 17 (1976). *See also* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (upholding a mandatory referendum procedure applicable to all zoning decisions. The character of the zoning decision, which involved an eight-acre parcel, was only an issue for dissenting Justice Stevens, who viewed it as "administrative," *id.* at 692, and therefore inappropriate for referendum procedures); Fasano v. Board of County Comm'rs, 264 Or. 576, 507 P.2d 23 (1973) (rezoning of a 32-acre parcel is "quasi-judicial" in nature). *But cf.* Neuberger v. City of Portland, _ Or. _, 603 P.2d 771 (1979) (rezoning of 601 acre parcel, owned by relatively few individuals and involving application of existing policy to specific facts, was quasi-judicial function).

[190] The implications of an unmodified *Town* decision for initiative and referendum in Hawaii are, of course, conjectural. Hawaii does not presently have initiative or referendum at the state level, although the possibility has been considered in recent years. *See, e.g.*, S.B. 390, 10th Hawaii Leg., 1st Sess. (1979). The immediate implication of the *Town* quasi-judicial characterization of the LUC decisions is in the procedures followed by the commission. In fact, the case led to a revision in 1975 of the State Land Use Law to incorporate the contested case provisions of HAPA. Act 193, 1975 Hawaii Sess. Laws 441, 443 (codified at

Another major recent case affecting state land use decisionmaking is *Save Hawaiiloa Ridge Association v. Land Use Commission*[191] where the procedural issue of standing was raised. The issue is a critical one, given the predilection of citizens' groups to raise important land use and environmental issues which often extend beyond the narrow interests of the applicant for a boundary change. The court held that owners of land on the periphery of property which such owners sought to have "reclassified" had no standing to so petition.[192] The court reasoned that the statutory language "any property owner"[193] meant any property owner *of the parcel in question.*[194] The court noted this accorded with a subsequent amendment clarifying this interpretation.[195] The result was a somewhat chilling effect upon such citizens' group actions on behalf of the environment.

The court may have had second thoughts on the standing question in the recently decided *Life of the Land, Inc. v. Land Use Commission.*[196] Life of the Land (LOL) had sought to challenge a LUC boundary reclassification of some 532 acres of land from the agricultural to the urban district classification under the State Land Use Law.[197] The court noted that both HAPA[198] and its own prior decisions[199] demonstrated a trend towards a permissive definition of standing, *especially* when the environment is at issue:

> As illustrated by the above cases, this court has in recent years recognized the importance of aesthetic and environmental interests and has *allowed those who show aesthetic and environmental injury standing to sue where their aesthetic and environmental interests are "personal" and "special", or where a property interest is also affected.*[200]

With this meaningful preface, the court found that LOL did indeed have

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HAWAII REV. STAT. § 205-4 (1976)). For a discussion of the procedural and substantive changes wrought by Act 193, see MANDELKER, *supra* note 1, at 308-12.

[191] 57 Hawaii 84, 549 P.2d 737 (1976).

[192] *Id.* at 86, 549 P.2d at 738.

[193] HAWAII REV. STAT. § 205-4(a) (1968 & Supp. 1972) (amended 1975, 1976).

[194] 57 Hawaii at 85, 549 P.2d at 738.

[195] *Id.*; HAWAII REV. STAT. § 205-4(a) (1976) now provides, in part: "[A]ny person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district."

[196] 61 Hawaii _, 594 P.2d 1079 (1979).

[197] HAWAII REV. STAT. ch. 205 (1968 & Supp. 1974) (amended each year thereafter). The reclassification decision arose under the LUC's periodic review of districts, *see* HAWAII REV. STAT. § 205-11 (1968) (repealed 1975). The commission no longer conducts periodic reviews.

[198] *Id.* § 91-14(a) (1968 & Supp. 1975).

[199] *In re* Hawaiian Elec. Co., 56 Hawaii 260, 535 P.2d 1102 (1975); Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Hawaii 40, 514 P.2d 861 (1973); East Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Hawaii 518, 479 P.2d 796 (1971); Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969).

[200] 61 Hawaii at _, 594 P.2d at 1082 (emphasis added).

standing both as an "aggrieved party" and in a "contested case," as required under HAPA.

The fact that some of LOL's members lived in an area adjoining the subject property was sufficient to establish LOL as a party "specifically, personally and adversely affected by the agency's action."[201] Two of those members owned residences in the area. The court also noted that LOL's members generally used the area for diving, swimming, hiking, camping, sightseeing, exploring, and hunting, and that:

> [F]uture urbanization will destroy beaches and open space now enjoyed by members and decrease agricultural land presently used for the production of needed food supplies. Appellant contends that construction will have an adverse effect on its members and on the environment, and that pursuits presently enjoyed will be irrevocably lost.[202]

The court held that the proceedings in which LOL participated also qualified for "contested case" status, despite the fact it did not participate in the so-called judicial portion of the hearings, since the LUC did not permit any property owners to so appear and participate: "We hold that, given the LUC's restrictions on access to the judicial portion of its hearings, appellant should not be penalized for failing to participate in the judicial portion. Therefore we hold that in each of these cases appellant's participation amounted to participation in a contested case."[203] This decision has clearly expanded judicial notions of what is necessary to surmount the standing hurdle for citizens' action and environmental organizations who cannot show a direct property interest in a land use dispute governed by HAPA.[204]

IV. The Role of the Federal Courts: Of Coastal Zones and Navigable Waters

This survey would be incomplete without reference to two significant

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[201] *Id.*

[202] *Id.*

[203] *Id.*, 594 P.2d at 1083.

[204] Indeed, my colleague Jon Van Dyke, a constitutional law scholar, has been moved to note that:

> This recent decision thus puts Hawaii law in close conformity with Federal law, relaxing the standing requirement in suits involving the environment because of a recognition of the important public interest involved in decisions affecting the environment. Only a token formal inquiry is now needed to permit a plaintiff to challenge actions that affect our fragile environment.

Hearings before the House Committees on the Judiciary and on Ecology and Environmental Protection, August 27, 10th Hawaii Leg., 1st Sess. (1979) (interim hearing) (statement of Jon Van Dyke).

Thus federal law would appear to be, as Professor Van Dyke notes, United States v. SCRAP, 412 U.S. 669 (1973), as it modifies Sierra Club v. Morton, 405 U.S. 727 (1972).

cases from Hawaii finding their resolution in the federal courts. While each deals with subjects on the periphery of land use management and control, they are, as federal cases, worth at least brief mention, particularly the litigation recently culminated in the Supreme Court decision in *Kaiser-Aetna v. United States.*[205]

A. United States v. Kaiser-Aetna: *The "Publicking" of a Private Pond*

During the 1960's the late Henry J. Kaiser conceived the development of 6000 acres of leased land[206] into a new residential community approximately twelve miles from downtown Honolulu. The proposed development, called Hawaii Kai, fronts for hundreds of yards on Maunalua Bay. Much of the land area is, however, separated from the ocean by what remains of an ancient Hawaiian fishpond known as Kuapa Pond.[207] In its

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[205] 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738), *rev'g*, 584 F.2d 378 (9th Cir. 1978), *aff'g and rev'g in part*, 408 F. Supp. 42 (D. Hawaii 1976).

[206] The land, including the pond discussed below, was and is owned in fee simple by the Bernice P. Bishop Estate, a charitable trust whose income supports the local Kamehameha Schools for Hawaiians. As the name of the trust implies, its res consists of the estate of Princess Bernice Pauahi Bishop as a descendent of the recipient of large trusts of land (known as *ahupua'a*) granted by King Kamehameha III at the 1848 land division known as the Great Mahele. United States v. Kaiser-Aetna, 408 F. Supp. 42, 47, *aff'd and rev'd in part*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738). *See generally* J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958).

[207] The ponds were a part of early Hawaiian fishing, as discussed below by the district court:

> Kuapā Pond covered 523 acres and extended approximately 2 miles inland from Maunalua Bay and the Pacific Ocean on the island of Oahu, Hawaii. The pond was contiguous to Maunalua Bay, the latter being navigable water of the United States.
>
> A not uncommon barrier beach delineated Kuapā Pond from the bay. The area probably was a stream mouth prior to the end of the ice age, at which time the rise in sea level caused the shoreline to retreat from a position that is now submerged by Maunalua Bay, and is marked by the reef edge. Partial erosion of the headlands adjacent to the bay formed sediment which accreted to form the barrier beach at the mouth of the pond, creating a lagoon.
>
> Early Hawaiians used that lagoon as a fishpond and reinforced the natural sand bar with stone walls where the tidal flows in and out of the ancient lagoon occurred. Approximately two-thirds of the pond's water came from the sea. Runoff waters from the surrounding mountains provided the balance. Part of the seawater present in the pond percolated through the barrier beach. As indicated above, for the area's use as a fishpond the barrier was incomplete in its normal state. Wave and tidal action from the sea and occasional heavy fresh water flow breached the sand barrier and allowed the ocean tides to flood the pond.
>
> Recorded history prior to annexation of Hawaii and geological evidence indicate two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. During high tide, water from the bay and ocean entered the pond through the gates. During low tide, the current flow reversed toward the ocean.
>
> The Hawaiians utilized the tidal action in the pond to raise and catch fish, primarily

natural state, the pond is closed to the ocean. However, in the course of development, Kaiser-Aetna dredged a channel from the ocean through the coral "wall" into the pond and widened it to permit access to the pond for "pleasure" boats.[208] The "shore" of the pond is now lined with 1500 residential lots, many having their own boat docking facilities.[209]

It is this improvement to the pond that gave rise to litigation. As the federal district court found, Hawaiian fishponds always have been considered private property both by landowners and by the State of Hawaii.[210] However, having made Kuapa Pond navigable, Kaiser-Aetna found the United States Army Corps of Engineers not only asserting federal jurisdiction over it as navigable waters of the United States but also claiming a public navigational easement had thus been created, which gave the public rights to enter the pond without the consent of Kaiser-Aetna.[211]

The Federal District Court for the District of Hawaii, after a long discourse on Hawaiian history as it related to fishponds and the current dispute,[212] found that Kaiser-Aetna had indeed made the pond navigable waters of the United States.[213] However, it refused to grant the United States an injunction to prevent Kaiser-Aetna from denying public access thereto.[214] Both sides appealed.

The Court of Appeals for the Ninth Circuit upheld in part and reversed in part, agreeing in full with the contentions of the Federal Government. First, it reviewed the contention of Kaiser-Aetna as to navigability. Citing previous federal cases defining navigability, the court noted that the pre-

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mullet. During ebb tides, the sluice gates allowed water but not large fish to escape, thus "flushing" and enriching the pond while preserving the crop. Water depths in the pond varied up to 2 feet at high tide. Large areas of land at the inland end were completely exposed at low tide. The fishermen harvested the pond with the aid of shallowdraft canoes or boats, but the barrier beach and stone walls prevented boat travel directly therefrom to the open bay.

United States v. Kaiser-Aetna, 408 F. Supp. 42, 46, *aff'd and rev'd in part*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738). For a discussion of ancient Hawaiian water rights, see Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori & Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141, 146-75 (Hawaii Institute for Management and Analysis in Government 1979) [hereinafter cited as *Water Rights in Hawaii*].

[208] 408 F. Supp. at 47.

[209] *Id.* at 48.

[210] *Id.* at 46.

[211] United States v. Kaiser-Aetna, 584 F.2d 378, 380 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738); 408 F. Supp. at 52.

[212] 408 F. Supp. at 46-47.

[213] *Id.* at 49-51.

[214] *Id.* at 51-54. The court implies that whereas Kaiser-Aetna could not necessarily exclude the public, given its use of the property as a marina, it had the right, as owner of the pond, to regulate that public use and charge tolls and fees. The court denied the claim that the public automatically acquired a servitude over the pond by virtue of its new character as navigable waters of the United States. For such a servitude the United States would have to pay compensation. *Id.* at 53-54.

vious status of the pond and the land thereunder could have no bearing on the jurisdiction of the United States over navigable waters.[215] The sole question was whether the waterway in question is *presently* navigable.[216] *How* it became so, whether naturally or, as here, by artificial means, was irrelevant,[217] even if the Engineers "acquiesced" in the improvements making it navigable.[218] As to the question of navigability, the court held that there was little doubt that the pond became navigable since over 600 boats were using the waterway.[219]

The court next turned to the question of public use of the pond. Emphasizing the loss of character as a fishpond once Kaiser-Aetna transformed the pond into a marina,[220] the court first refused to separate federal regulatory authority over navigable waters and the right of public use because "[i]t is the public right of navigational use that renders regulatory control necessary in the public interest."[221]

Therefore, it followed that the public right of use is a characteristic which attaches automatically to all navigable waters of the United States, and it does not represent an independent taking or seizure for which Kaiser-Aetna would be entitled to compensation:

> Secondly, the federal navigational servitude and the public right of use are not imposed or appropriated by action of the government in the nature of seizure. They exist as characteristics of all navigable waters of the United States. [citations omitted.] Land underlying navigable water differs from fast

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[215] United States v. Kaiser-Aetna, 584 F.2d 378, 382 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738).

[216] *Id.* at 382-83.

[217] *Id.* at 383.

[218] *Id.*

[219] *Id.* at 381.

[220] *Id.* at 383. *See also* the district court's findings of fact on this issue, 408 F. Supp. at 47-48:

> Since development of the marina, 668 boats have been registered and authorized to use the pond. Kaiser-Aetna oversees the operations of the marina and has generally excluded all "commercial" vessels, although it has not yet decided whether or not businesses in the shopping center that abuts the marina may operate commercial vessels.
>
> Kaiser-Aetna owns and operates a small vessel within the marina, the "Marina Queen", which can carry up to 25 persons. During 1967-72, Kaiser-Aetna operated the Marina Queen primarily to show Hawaii-Kai to possible subdevelopers and purchasers of homes or homesites. On Sundays, they invited the general public to join the cruises. During 1973, the marina shopping center merchants' association took over operation of the Marina Queen. The ship ran six or seven times a day for the purpose of attracting people to the marina shoreside and adjoining shopping facilities. As a part of the general promotion, Kaiser-Aetna chartered buses to pick up tourists at various points in Waikiki and transport them to the marina area. The tourists were given a special package of shop discounts and a ride on the Marina Queen, for which they paid $1 and later $2 per person for the package. During the period, 18,254 tourists and a total of 38,821 persons rode the Marina Queen. The boat ride was available without charge to anyone who came to the marina.

[221] 584 F.2d at 383.

> land in its servient characteristics which result from the dominant property characteristics of the navigable water by which it is submerged. If fast land is to be subjected to public use for transportation, it must voluntarily be dedicated to the public by the owner, or must be acquired by the public with due compensation to the owner. But land underlying navigable water underlies an existing public roadway. By virtue of the water's presence it is burdened with a public servitude. If the water body is interstate or forms part of an interstate waterway the navigational servitude runs to the federal government.[222]

This was so regardless of any applicable principles of Hawaii property law:

> Hawaii property law at most relates to any servitude the state may claim. If the state chooses to relieve land underlying fishponds such as Kuapa Pond from any navigational servitude otherwise owing to the *state* (even after the pond's transformation into a marina), that is the state's business. The effect of Hawaii law on *state rights*, however, is not before us. No matter what those rights may be they can have no effect on the *federal interest* in interstate commerce nor the rights and obligations of the federal government in this respect under the Constitution. *When the waters of the pond became navigable waters of the United States, the federal navigational servitude attached.*[223]

In December of 1979 the United States Supreme Court reversed the Ninth Circuit opinion in part, agreeing for the most part with the district court.[224] While concurring that the navigability of the pond-marina subjected it to the regulatory authority of the corps, it held that the corps had not thereby acquired a navigational servitude permitting free public access.[225] It did so by invoking the taking issue: At what point does a regulation go so far as to amount to a taking for which just compensation must be paid?[226]

As to the matter of regulatory authority, the Court had no doubts at all!

> With respect to the Hawaii Kai Marina, for example, there is no doubt that Congress may prescribe the rules of the road, define conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interests of furthering navigation or commerce.[227]

But with respect to the navigational servitude, whether it could be asserted without payment of compensation for thus removing some sticks

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[222] *Id.* at 383-84.
[223] *Id.* at 384 (emphasis added).
[224] Kaiser-Aetna v. United States, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738).
[225] *Id.* at 4047-48.
[226] *Id.* at 4049-50; *see* BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE (1973).
[227] 48 U.S.L.W. at 4048.

from the bundle of property rights held by Kaiser-Aetna (Justice Rehnquist's words)[228] was a question to be decided on the particular facts of this case, rather than by reviewing "the shifting back and forth of the Court in this area" which "bears the sound of 'Old, unhappy, far off things, and battles long ago.' "[229]

First, the Court observed that Kuapa Pond was not navigable in fact before improvement[230] (a factor the dissent regarded as irrelevant).[231] Second, it noted that the pond "has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water."[232] Third, the Court observed that the corps had specifically granted Kaiser-Aetna the right to dredge, which, said the Court, it could have refused to do on the ground it would have impaired navigation in the bay.[233] Therefore, reasoned the Court, (emphasizing again the private property nature of the pond under Hawaiian law) the corps' consent led to the fruition of an expectancy embodied in the concept of property; namely, the right to exclude, which is so fundamental a property right that the corps cannot take it by compelling Kaiser-Aetna to open the marina to the general public without payment of compensation.[234]

The decision of the United States Supreme Court in this case may have significance for Hawaii well beyond determining the limits of private ownership of waters made navigable by improvements such as those made by Kaiser-Aetna to Kuapa Pond. A more critical, though presumably more parochial, issue is the extent to which federal courts will interfere in local land use decisions which, while arguably raising federal questions, are based on uniquely Hawaiian property concepts dating back to its independent days under a monarchy with feudal tenurial incidents.[235] While carving out a special niche for Hawaii may be difficult, it is virtually the only way in which uniquely Hawaiian concepts which survive in modern Hawaiian property law generally (and upon which many transactions tend to be wholly or partially founded) will be preserved in the federal system of which Hawaii is a part. Just how important the staking out of such a "uniquely Hawaiian" area in the law of real property can be is

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[228] *Id.*

[229] *Id.* at 4049. The Court earlier in the opinion had made much of its inability in Penn Central Transp. Co. v. City of New York, 98 S. Ct. 2646 (1978), to come up with a "set formula" in deciding takings cases.

[230] 48 U.S.L.W. at 4049.

[231] *Id.* at n.9.

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] See J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); *Water Rights in Hawaii, supra* note 207 at 141-75; T. CREIGHTON, THE LANDS OF HAWAII: THEIR USE AND MISUSE chs. 1-4 (1978).

even more starkly illustrated by the current litigation on the constitutionality of Hawaii's Land Reform Act[236] and on shoreland ownership. The latter is discussed briefly below.

B. Sotomura v. County of Hawaii: *Who Owns the Seashore?*

The question of who owns shorelands, and especially beach, is one which increasingly confronts courts as clashes between private ownership and public use become more frequent in this valuable and much sought area.[237] Given the unique geography of Hawaii and the shoreland orientation of much of its resident and visitor population, it is no surprise to find the conflict right here as well. *Sotomura v. County of Hawaii*[238] is the latest in a series of cases in which the Hawaii Supreme Court has attempted to assert public rights over private rights in the area of land adjacent to water.[239]

The dispute in *Sotomura* arose over the payment of compensation to the owners of beachfront property, which the County of Hawaii attempted to condemn in 1970 for a public beach park.[240] The lower court separated the parcel into two parts for the purposes of valuation: that part *seaward* of the line formed by debris from the highest wash of the waves, for which it awarded $1.00; and that portion *inland* from the debris line, for which it awarded $1.20 per square foot or something in excess of $200,000.[241]

The Hawaii Supreme Court not only affirmed this definition of the seaward boundary, but also held (1) that the owners had lost title to part of the land by erosion and (2) that the seaward boundary should be established by the *vegetation* line, not the debris (or high water) line.[242] The

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[236] *See* Midkiff v. Tom, No. 79-0096 (D. Hawaii Dec. 19, 1979) (upholding the constitutionality of aspects of the Land Reform Act, HAWAII REV. STAT. ch. 516 (1976 & Supp. 1979)).

[237] *See, e.g.*, State v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

[238] 460 F. Supp. 473 (D. Hawaii 1978).

[239] *See, e.g.*, Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed*, Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978); McBryde v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), *cert. denied*, 417 U.S. 976, *cert denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974). The critical specific issues raised by these cases are discussed in detail in *Water Rights in Hawaii*, *supra* note 207, at 176-218. The authors rightfully express grave doubts about the integrity of the state's judicial process with respect to land use and real property if these cases were ultimately sustained. The subject deserves far more extensive treatment in the periodical literature of the law than is warranted in a land use survey to which these cases are but tangentially relevant. For an analysis of the issues raised in the *McBryde* litigation see Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts "Take" Property?*, 2 U. HAWAII L. REV. 57 (1979).

[240] 460 F. Supp. at 474.

[241] *Id.* at 475-76.

[242] County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973), *cert. denied*, 419

second holding withdrew 31,600 square feet of land between the debris line and the vegetation line from that part of the property hitherto valued at $1.20 per square foot (a total value of $37,920). This the federal court reversed. The court first noted that the plaintiffs had neither briefed nor argued the question of land *ownership*. The only issue before the Hawaii Supreme Court on appeal, according to the federal district court, was the manner of valuating the land for compensation. Therefore, having failed to grant Sotomura a hearing before thus depriving him of some 31,600 feet of property without compensation, the Hawaii Supreme Court had denied him due process of law.[243]

Procedural due process aside, however, the court held that there had been a denial of *substantive* due process as well.[244] Entirely aside from the registered boundaries of the tract,[245] the district court could find no precedent for the use of the vegetation line in determining the seaward boundary of Sotomura's land,[246] and a good deal of precedent for the use of the high water, or seaweed, or debris line for determining said boundary.[247] What particularly troubled the court was the use of what it considered inapposite Oregon precedent to bolster what the Hawaii Supreme Court declared to be a longstanding public use of Hawaii's beaches to an easily recognizable boundary that had ripened into a customary right.[248]

U.S. 872 (1974).

[243] 460 F. Supp. at 477-78.

[244] *Id.* at 478.

[245] *Id.*

[246] A single decision by the Hawaii Supreme Court, *In re* Ashford, 50 Hawaii 314, 440 P.2d 76 (1968), was noted by the district court but was restricted to the facts of record. The court said:

> The Hawaii Supreme Court's opinion in *Sotomura* does not indicate any legal basis for the presumption that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth when such a line occurs inland from a debris line marking the wash of the waves. The only basis for the presumption is the Court's statement that "the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves." No evidence of a legal or factual nature supporting the presumption was offered either in the State trial court or in this Court.

460 F. Supp. at 480 (footnotes omitted).

[247] 460 F. Supp. at 478-79.

[248] *Id.* at 480. The court continued at some length:

> Evidence was introduced by the Owners in this Court to show that original grants of title by the government were not limited to dry upland, above the highest wash of the waves, but in some cases extended to low water mark, or to rocks in the sea constituting the termini of lateral boundaries and, in at least one instance, included submerged reef land. There was also expert testimony from a title abstractor with 50 years experience that the monuments "sea," "seashore," "high water mark," "low water mark," "sea at high tide," "sea at low tide," "sea at very low tide" or equivalent expressions in the Hawaiian language were used to describe seaward boundaries, in both original title documents and subsequent conveyances. The same witness testified that monuments such as "debris line," "edge of vegetation" and "highest wash of the waves" were not to be found in these documents. No evidence or claim to the contrary has been offered or asserted in

It said that no evidence was offered to show public use or customary right. On the contrary, evidence offered actually belied the existence of any customary right.[249] The court concluded:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. . . . The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shorelines. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.[250]

V. CONCLUSION

While the *Sotomura* and *Kaiser-Aetna* cases are clearly on the way to legal significance outside Hawaii, their major impact *within* the State will be the extent to which uniquely Hawaiian land use issues will be decided in uniquely Hawaiian fashion, unencumbered by mainland precedents, regardless of the settling of the particular areas of law to which they relate. Of considerably greater land use significance is the direction the Hawaii Supreme Court will take in the area of vested rights after *Life of the Land* and the implementation of land use plans after *Dalton* and its progeny and the state plan. The planning process may control the development process as never before in Hawaii — indeed, in the nation generally — and the system of reclassification pursuant to those plans in which so-called development rights are reduced or destroyed will likely lead to many a claim of vested rights. Liability for substantial sums must surely affect the decisions of those charged with rezoning in accordance with comprehensive plans. The City and County of Honolulu, at a minimum, is enjoined by charter only to conform *future* rezonings to those plans, and substantial damage awards to the private sector based on vested rights claims cannot help but have a chilling effect on the speed with which such rezonings occur. On the other hand, how long can such a body avoid the presumably rational basis of its own plans? These issues bear consideration as a newly constituted supreme court and newly authorized appellate court consider the increasing number of legal challenges to state and local land use decisions in the coming decade.

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this case.

Id.

[249] *Id.* at 479-80.

[250] *Id.* at 480-81.

TORTS AND WORKERS' COMPENSATION

James Koshiba*

The task of identifying and commenting on the significant tort decisions decided by the Hawaii Supreme Court during 1978 posed a multi-headed hydra. Arguably, all decisions rendered by the court are in some sense significant, yet it is obvious that not all rulings are noteworthy or generally important.[1]

This article considers cases within the generic description of "torts"[2] as opposed to a strictly legal definition.[3] Significance was determined by precedential value[4] and/or the explanatory guidance provided by the decision.

I. NEGLIGENCE

A. *Duty and Proximate Cause*

In *Ajirogi v. State*[5] the appellees were injured by a detainee of the Ha-

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[1] This is particularly true when, at least up to the present, the court has had no discretion with respect to the cases it must hear on appeal. This situation should change with the constitutional establishment of the Intermediate Court of Appeals. HAWAII CONST. art. VI, § 1. *See*, Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAWAII L. REV. 1 (1979).

[2] Strict liability has replaced the concept of negligence in certain areas like workers' compensation, which is covered in Part III *infra*.

[3] "Three elements of every tort action are: Existence of legal duty from defendant to plaintiff, breach of duty, and damage as proximate result." City of Mobile v. McClure, 221 Ala. 51, 54, 127 So. 832, 835 (1930).

[4] Precedential value essentially refers to the power of the supreme court to issue opinions which constitute binding precedent in all state and, in many instances, federal courts. For a discussion of the applicability of state or federal law *see*, 1A MOORE'S FEDERAL PRACTICE ¶ 0.301-.328 (1979). In addition, precedential value is sometimes defined as "whether the case, or any issue raised by it, is adjudicated on the merits." Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1718 (1978) (footnote omitted).

[5] 59 Hawaii 515, 583 P.2d 980 (1978).

waii State Hospital.[6] The accident occurred when the escaped mental patient fled from the scene of a burglary in a stolen car and, speeding on the wrong side of the highway, crashed head-on into the vehicle occupied by appellees. In a bench trial, the court found that the patient's conduct was a reasonably foreseeable consequence of the hospital's negligence in permitting the escape and that the State was liable for damages to appellees. A majority of the Hawaii Supreme Court[7] reversed and held, as a matter of law, that the risk of negligent operation of a vehicle by the escapee was unforeseeable under the circumstances.

Knowledge of the rather complex circumstances surrounding the detainee's hospital stay and his medical history is especially important to understanding the court's final disposition of this case. The detainee was a "borderline mental patient."[8] He had a long history of institutionalization[9] punctuated by unauthorized leaves. During these absences he committed burglaries for which he was never prosecuted. In 1969 he was charged with larceny, found insane by the presiding court, and committed to the state hospital. The circuit court modified its order in 1970 to allow the patient to take leaves of absence. In the two years that followed, he twice fled to the mainland and was returned in both instances. After his last return, the hospital conditionally discharged the patient to Halawa jail upon finding that he was not psychotic. He was subsequently indicted for robbery in the second degree[10] and hospitalized under a July 1972

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[6] The fact that the case involved a state facility rather than a privately owned hospital is ostensibly of no consequence. "The liability of the State for negligence in exercising control over persons in its custody is to be judged under the same principles of tort liability as those which determine the liability of private individuals in the same circumstances." *Id.* at 520, 583 P.2d at 984 (citing Upchurch v. State, 51 Hawaii 150, 454 P.2d 112 (1969), HAWAII REV. STAT. § 662-2 (1976) for the principle). Statutory exceptions to state liability were not raised. *See id.* § 662-15 (Supp. 1979).

[7] Chief Justice Richardson and Justice Menor joined the majority opinion of recently retired Justice Kidwell. Justice Kobayashi, also retired, dissented and was joined by Circuit Judge Sodetani, who replaced Justice Ogata. Justice Ogata recused himself apparently because he had ordered the pretrial detention for psychiatric examination, see note 11 *infra*, when he was a judge of the first circuit court. *See* Complaint and Summons at 2.

[8] 59 Hawaii at 516, 583 P.2d at 982.

[9] The detainee was voluntarily admitted to the Waimano Training School and Hospital for the mentally retarded at age twelve. A year later he was judged to be mentally ill rather than mentally retarded, and a district magistrate ordered that he be removed to the state hospital. He was transferred two years later to the Hawaii Youth Correction Facility. He was later readmitted to the state hospital from which he left without authorization, committed burglaries, and was returned by police on several occasions. After his twentieth birthday, the hospital discharged him, but two months later he was readmitted for an examination to determine his criminal responsibility under a charge of larceny. He was found to be incompetent and was committed by court order to the state hospital. *Id.* at 516-17, 583 P.2d at 982.

[10] The robbery was committed during the patient's second unauthorized absence following the 1970 order allowing leaves. In 1973, he was acquitted by reason of insanity and, pursuant to a stipulation regarding his mental disability, once again confined to the state hospital by a court order forbidding release or transfer without court approval. *Id.* at 519,

court order.[11] The purpose of the court order was to place the patient under medical examination to determine his criminal responsibility in the pending prosecution.

Thus, when he escaped on August 29, 1972, the patient was confined under two separate court orders. The earlier order permitted minimum security and leaves. The later one required detention. The patient was being kept in a portion of the hospital designed for detention and was permitted to leave his room only under the observation of an attendant. The trial court found that the State was negligent in allowing the detainee to escape. An attendant had not accompanied the detainee to a waste basket near an open door and did not pursue him diligently after he ran away. Four days later, the escapee injured appellees.

The critical question was not whether the state hospital was negligent in allowing the patient's escape, but rather whether that institution owed a duty to third parties to protect them from possible harm inflicted by a person detained at the hospital under these circumstances. Appellees sought to have the court apply the standard of care which is set out in the *Restatement (Second) of Torts:*

523, 583 P.2d at 984, 986.

[11] The court ordered detention and examination pursuant to HAWAII REV. STAT. § 711-91 (1968) (repealed 1972, effective June 1, 1973). Court-ordered examinations now fall under the Hawaii Penal Code which provides in pertinent part:

> Examination of defendant with respect to physical or mental disease, disorder, or defect. (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, *or there is reason to doubt his fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case,* the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.
>
> (2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case the court shall appoint at least one psychiatrist and at least one certified clinical psychologist. The third member may be either a psychiatrist, certified clinical psychologist or qualified physician. One of the three shall be a psychiatrist or certified clinical psychologist designated by the director of health from within the department of health. *The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or such longer period as the court determines to be necessary for the purpose,* and may direct that one or more qualified physicians retained by the defendant be permitted to witness and participate in the examination.

HAWAII REV. STAT. § 704-404 (1976 & Supp. 1979) (emphasis added).

The trial court has a duty to order sua sponte a hearing when a substantial question of defendant's capacity exists. State v. Tyrrell, 60 Hawaii 17, 586 P.2d 1028 (1978). Confinement orders for the purpose of psychiatric examination are matters within the court's discretion. *Cf.* State v. Alo, 57 Hawaii 418, 558 P.2d 1012 (1976) (motions are addressed to the court's sound discretion; there was no abuse of discretion by the court which did not raise the issue sua sponte).

> Duty of Those in Charge of Person Having Dangerous Propensities
> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.[12]

In analyzing the *Restatement*, the majority formulated a two-pronged test to determine the duty of care owed by a mental hospital to an injured third party. Under this test, the court looked first to the purpose for which the patient was detained to determine whether a duty of care existed and second to the foreseeability of harm to third persons should the patient be set free.[13]

Although the court noted that the State's tort liability must be judged under the same principles as those applied to private individuals,[14] the majority opinion candidly acknowledged that policy considerations may dictate limiting liability[15] under each part of the test. Indeed, the majority invoked public policy in determining the foreseeability issue in favor of the State.

> The duty of care which is imposed upon the administrators of the State hospital should be one which arises out of an appropriate balancing of the interest in protection of individuals from foreseeable harms and the interest in use of therapeutic procedures which afford hope of returning mental patients to the community as useful members of society. These considerations militate against a rule which requires preventive detention of mental patients in the absence of discernible risks.[16]

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[12] RESTATEMENT (SECOND) OF TORTS § 319 (1965) [hereinafter cited as RESTATEMENT].

[13] 59 Hawaii at 520-21, 583 P.2d at 984:

> The black letter text of [*Restatement (Second) of Torts*] § 319, if it is assumed to correctly snythesize [*sic*] the disparate conclusions in these cases, leaves for case-by-case determination what constitutes the exercise of reasonable care to control the person in custody. Clearly, both the purpose of the detention and the foreseeable risks of setting the detained person at liberty are to be considered in making that determination.

[14] *See* note 6 *supra*.

[15] 59 Hawaii at 522 n.3, 527, 583 P.2d at 985 n.3, 988. The evolution of judicial decision-making has progressed from the days of the "natural law theory" to the contemporary view that many judicial decisions require the same policy considerations as the legislative process. *See* Ely, *The Supreme Court, 1977 Term — Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). Although eminent jurists were willing to admit the latter view, they were not always so candid in their opinions. *Compare* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), *with* his seminal opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *But see* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, _, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting). For a modern view that courts should hide evaluative decisions to enhance compliance with decisions, see Eckoff, *The Mediator and the Judge*, in SOCIOLOGY OF LAW: SELECTED READINGS (V. Aubert ed. 1969).

[16] 59 Hawaii at 528, 583 P.2d at 988-99.

Even though the thrust of those policy considerations would apply equally to private mental institutions, the opinion contains dicta[17] from which it may be inferred that the policy considerations limiting liability under the first part of the test would apply only in those cases where the government is the defendant. This potential difference in results, based on the distinction between private and public institutions, may in part explain why the majority assumed that the State had a duty of care to third persons based on the commitment orders[18] and then limited liability under the more universally applicable foreseeability test.

In briefly addressing the threshold issue of the State's duty arising from the dual status of the patient, the majority stated that the commitment orders and the court-ordered mental examination did not, in themselves, create duties owed by the hospital to the appellees, but rather created duties owed to the court.[19] Conceding that the duties of care were arguably different under each order, the majority suggested that no duty to appellees would be found under the order granting leaves if the patient's diagnosis at the time of escape would have justified authorized leaves.[20] Moreover, the court-ordered detention might not give rise to a

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[17] 59 Hawaii at 522 n.3, 583 P.2d at 985 n.3 (citations omitted):

> A substantial body of authority imposes liability upon a state with respect to harms committed by prisoners or mental patients who are negligently released or permitted to escape. Yet liability is generally denied for failure of the state to restrain the same individual before he has been physically apprehended, except where official action has increased the risk of harm. Prevention of harm may be accomplished by preservation of general order or by detention of potentially harmful individuals. Both methods involve much the same questions of policy and allocation of public resources. The present is a period of expanding expectations of government action. Where a duty assigned to a public employee is ineptly performed, but the risk of harm to individuals in the community is not increased thereby as compared to that which would have existed had no governmental action been attempted, there may be strong policy considerations against recognizing governmental tort liability for the harms which the public employee failed to prevent. Whichever way this issue is resolved, however, liability to the individual who suffers such harm does not extend beyond the limits defined by general principles of negligence law, which we apply in this case.

The court recently has limited the State's liability in other contexts. *See, e.g.*, Pickering v. State, 57 Hawaii 405, 557 P.2d 125 (1976) (although the State is under a duty to design, construct, and maintain safe highways for their intended uses, it is not required to exercise extraordinary care to guard against unusual accidents); Ikene v. Maruo, 54 Hawaii 548, 511 P.2d 1087 (1973) (State is not obligated to make a highway with a posted speed limit of 35 miles per hour safe for cars speeding at more than 40 miles per hour). *Cf.* Freitas v. City and County of Honolulu, 58 Hawaii 587, 574 P.2d 529 (1978) (failure of the police officers to perform their official duty to preserve the peace is not actionable under normal circumstances). *But cf.* McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Hawaii 460, 558 P.2d 1018 (1977) (city and county has a duty to maintain safe highway shoulders whether entry upon them is due to operator's negligence or for emergency purposes).

[18] 59 Hawaii at 522, 583 P.2d at 985-86.

[19] *Id.*, 583 P.2d at 985. *But cf.* Hicks v. United States, 511 F.2d 407, 415 (D.C. Cir. 1975) (court-ordered confinement for pretrial psychiatric examination created duty to the court and to wife of detainee under the circumstances). See note 26 *infra*.

[20] 59 Hawaii at 521 n.2, 583 P.2d at 985 n.2. *But see* Semler v. Psychiatric Institute of

duty if the detainee were "entitled" to freedom by posting bail in connection with the crime for which the examination had been ordered.[21] Ironically, this view would tend to eliminate a duty under the only order which required constant detention, inasmuch as bail was set in connection with the detainee's robbery charge.[22]

The majority called the dual status of the detainee "a confusing aspect of the present case,"[23] and the court's failure to resolve the confusion suggests the possibility that the State, under normal circumstances,[24] would not be liable for foreseeable injuries inflicted on third persons by an escaped pretrial detainee.[25] Such a proposition would seem to conflict with the *Restatement*[26] by confusing the purpose of pretrial detention[27] with

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Washington, D.C., 538 F.2d 121, 124-25 (4th Cir.), *cert. denied*, 424 U.S. 827 (1976) (duty of care arising out of court order subsequently modified to allow weekend leaves from mental hospital upon probation officer's approval).

[21] 59 Hawaii at 521 n.2, 583 P.2d at 985 n.2.

[22] *Id.*

[23] *Id.* at 521, 583 P.2d at 985.

[24] Defendants are entitled to bail as a matter of right in all cases except where the alleged offense is punishable by life without possibility of parole. HAWAII CONST. art. I § 12; HAWAII REV. STAT. § 804-4 (1976). Even when the offense is punishable by the maximum penalty, bail may be denied only "when the circumstances disclosed indicate a *fair likelihood* that the accused is in danger of a jury verdict punishable by imprisonment for life not subject to parole." Bates v. Hawkins, 52 Hawaii 463, 467, 478 P.2d 840, 842 (1970) (original emphasis). The court in Sakamoto v. Chang, 56 Hawaii 447, 451, 539 P.2d 1197, 1200 (1975), construed section 709-9 of the Hawaii Revised Statutes (1968) (currently codified at HAWAII REV. STAT. § 804-9 (1976)) to require that "bail shall be fixed in a reasonable amount, considering the financial status of the defendant and the punishment to be imposed upon him on conviction," and reduced the bail set for a defendant charged with the murder of a State senator. Although defendants are generally entitled to secure their freedom by posting bond, there are statutory exceptions to the rule. *See* HAWAII REV. STAT. § 706-626 (1976) (commitment without bail allowed where defendant is on probation or under a suspended sentence); *id.* §§ 804-7.1 to -7.3 (Supp. 1979) (revocation of bail upon violation of conditions).

[25] This would appear to be true whether the escapee had been in custody at the police cellblock, the State jail or Hawaii State Hospital. Although a private hospital also might have custody of a pretrial detainee under HAWAII REV. STAT. § 704-404 (1976 & Supp. 1979), *see* note 11 *supra*, and might not owe a duty of care to third persons if the detainee were entitled to bail, the policy considerations supporting the absence of duty appear to apply exclusively to government liability. *See* note 17 *supra*.

[26] A revision in the second *Restatement*, upon which the majority relied, would seem to put court-ordered confinement squarely within the contemplated duty of care.

> [Section 319] has been changed from the first Restatement by eliminating the word "voluntarily," so that the Section now includes those who "involuntarily" take charge of third persons, if that be possible. None of the decisions supporting the Section has laid stress upon the defendant's voluntary conduct in taking charge, and it would appear that his protests against being required to do so would not be material to the rule stated, *so long as he does so.*

RESTATEMENT, *supra* note 12, at Explanatory Notes § 319 (emphasis added). *See* Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir.), *cert. denied*, 424 U.S. 827 (1976) (the standard of reasonable care (confinement) was set by the court order).

The policy supporting a duty based on court orders has been succinctly expressed: "While this duty is owed to the courts, appellees are logical persons to enforce it. Unless persons

the fact of custody and by truncating the inquiry regarding known propensities. The latter could be based on prior or present knowledge unrelated to the alleged offense, including the behavior of the detainee while in custody.[28]

The proposition that no duty was owed to third persons would, however, be consistent with the majority's suggestion that the State should not be held liable for policy reasons.[29] Detention which results from the fact that bail has not been posted does not increase the risk of harm to the community which would have existed if the detainee had been able to free himself on bail.[30]

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injured by the hospital's failure to properly perform its functions can recover for their injury, society's ability to insure that the hospital conscientiously performs its duties is rendered haphazard at best." Hicks v. United States, 511 F.2d 407, 422 (1975) (Tamm, J., joined by McGowan, J., concurring). In *Hicks*, the hospital recommended release of a patient who was confined for a pretrial psychiatric examination in connection with charges of assault against his wife. Fifty-six days after his release he killed her.

For an expansive view of the duty owed under section 319 of the *Restatement*, see Christensen v. Epley, 36 Or. App. 803, 585 P.2d 416 (1978) (claim stated where youth correction inmate and her visitor, whom officials knew had previously stolen a car with the inmate, escaped and visitor stabbed police officer). *Cf.* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (special relationship between psychotherapist and outpatient creates duty to exercise reasonable care to protect the foreseeable victim where psychotherapist knew or under applicable professional standards should have known that patient poses a serious danger of violence to others). For a critical analysis of Justice Tobriner's opinion, see Stone, *The* Tarasoff *Decisions: Suing Psychotherapists To Safeguard Society*, 90 HARV. L. REV. 358 (1976).

[27] The majority would look behind the purposes of detention in connection with psychiatric diagnosis to determine the defendant's legal responsibility for the alleged crime and his fitness to stand trial. Hence, the purposes of detention in lieu of bail become relevant. In Sakamoto v. Chang, 56 Hawaii 447, 450-51, 539 P.2d 1197, 1199-1200 (1975), the court indicated that the major purpose for bail is to secure the presence of the defendant at trial. However, the current law introduces an element of deterrence by allowing conditions of bail to be set, *inter alia*, "[u]pon a showing that there exists a danger that the defendant will commit a serious crime," HAWAII REV. STAT. § 804-7.1 (Supp. 1979). Violation of bail conditions may result in the imposition of additional conditions or commitment without bail, *id.* § 804-7.3. Arguably, deterrence is therefore one purpose of the pretrial detention of those defendants who do not or cannot post bond where the court has imposed bail conditions. Perhaps, under those circumstances at least, the court would find that the State owed a duty to third persons.

[28] The *Restatement* imposes a duty of care in situations where "the actor has charge of a third person who does not belong to . . . [a class of persons to whom the tendency to act injuriously is normal] but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know." RESTATEMENT, *supra* note 12, at § 319, Comment a. *See* Sylvester v. Northwestern Hosp. of Minneapolis, 236 Minn. 384, 53 N.W.2d 17 (1952) (hospital liable for injuries to plaintiff proximately caused by patient where authorities knew or should have known that the patient was intoxicated).

[29] *See* note 17 *supra*.

[30] This analysis ignores the fact that although a defendant may be entitled to post bail and may have done so, that would not itself entitle him to freedom under court-ordered confinement pursuant to HAWAII REV. STAT. § 704-404 (1976 & Supp. 1979). There is nothing in the court's opinion to suggest such an anomalous result under the statutes so long as

The dissent[31] began its analysis under the *Restatement*, with the undisputed fact of the state's custody of the patient at the time of his escape. The court orders were relevant to place the detainee within "a class of persons to whom the tendency to act injuriously is normal."[32] The dissent, however, omitted the fact that the original commitment order of 1969 had been modified to allow leaves, a fact which presumably would have been important to the majority if they had not resolved the duty of care issue by assumption.

The dissent also found the *Restatement* applicable on the grounds that the state hospital had personal knowledge, based on the patient's mental history and frequent hospital confinements, of the detainee's tendency to act injuriously. Having thus determined that a duty was owed to third persons under the *Restatement*, the dissent would have held the State liable for its negligence notwithstanding any of the policy arguments raised by the majority.[33]

The court was divided on nearly every issue related to foreseeability: Whether foreseeability was properly a question of fact or a matter of law which admits of policy considerations by the court; whether a foreseeable risk should be confined to past patterns of behavior or include those risks within the general type of harm; and whether there was sufficient evidence to make foreseeable the detainee's negligent operation of a stolen vehicle. The test of foreseeability of risk used by the court in *Ajirogi*[34] is

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they are constitutionally applied. Moreover, since a pretrial psychiatric examination may eliminate the possibility of a criminal conviction (which is exactly what happened in this case; *see* note 10 *supra*), confinement which is incidental to effectuating that beneficial purpose apparently would not violate the patient's due process rights. *Cf.* State v. English, 61 Hawaii _, 594 P.2d 1069 (1979) (juvenile's due process rights not violated by nine-month confinement in jail prior to family court jurisdictional waiver to circuit court for trial on criminal charges).

It is unlikely that due process would require a standard of proof beyond a reasonable doubt for involuntary commitment for pretrial examination. *Cf.* People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975) (proof beyond a reasonable doubt required to commit *convicted* sex offender on basis of mental disorder); *In re* Doe, 61 Hawaii _, 594 P.2d 1084 (charges against minor presumed accurate for purposes of waiver hearing to avoid double jeopardy at trial). *But cf.* Suzuki v. Alba, 438 F. Supp. 1106, 1110-12 (1977) (HAWAII REV. STAT. § 334-60(b)(4)(G) (Supp. 1978), providing for five-day nonemergency, nonconsensual civil commitment to determine if indefinite civil commitment is warranted, violated due process because statute did not require proof beyond a reasonable doubt that individual was dangerous to himself or others). *See* notes 77, 78 *infra* and accompanying text.

[31] 59 Hawaii 515, 529, 583 P.2d 980, 989 (1978) (Kobayashi, J., joined by Circuit Judge Sodentani, dissenting).

[32] *Id.* at 529, 583 P.2d at 989 (Kobayashi, J., dissenting) (quoting RESTATEMENT, *supra* note 12, at § 319, Comment a).

[33] "[O]n the matter of balancing policy considerations . . . this case is an outstanding case wherein the State must be held liable for its dereliction and be required to pay for the harm resulting to the appellees. Sense of justice and equity calls for such a result." *Id.* at 533, 583 P.2d at 991.

[34] Thus a further limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those who are

exactly the same as that articulated in *Rodrigues v. State*.[35] However, the majority's application of the standard differs from its antecedent on the issue of whether foreseeability is a question of fact or law. In *Rodrigues*, the question of liability required a two-step process. The majority[36] there first determined, as a question of law, whether there was a duty of care: "Duty, however, is a legal conclusion which depends upon 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' "[37] The court balanced policy considerations[38] in discussing the duty of care and established the tort of negligent infliction of serious mental distress.[39] Although the dissent in *Rodrigues* urged that serious mental distress resulting from damage to material possessions could not be foreseeable as a matter of law,[40] the majority placed the foreseeability of risk question squarely within the province of the trier of fact[41] and remanded on that issue.[42]

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foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.

Id. at 522, 583 P.2d at 985 (quoting Rodrigues v. State, 52 Hawaii 156, 174, 472 P.2d 509, 521 (1970)).

[35] 52 Hawaii 156, 174, 472 P.2d 509, 521 (1970). Mr. and Mrs. Rodrigues had instituted suit against the State for flood damage sustained by their home and for the family's accompanying mental distress. The court found the State negligent and remanded, *inter alia*, the issue of whether serious mental distress to the Rodrigues was a reasonably foreseeable consequence of the government's failure to maintain the culvert that flooded.

[36] Chief Justice Richardson wrote the majority opinion, joined by Circuit Judge Hawkins, replacing Justice Marumoto, and then Circuit Judge Laureta, who substituted for Justice Kobayashi. Both supreme court members were disqualified.

[37] 52 Hawaii at 170, 472 P.2d at 518.

[38] *Id.* at 172-73, 472 P.2d at 519-20.

[39] *Id.* at 174, 472 P.2d at 520. The court defined serious mental distress as that which occurs "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* Application of the standard is a matter for the trial court or jury. *Id.*

[40] *Id.* at 179, 472 P.2d at 523 (Levinson, J., dissenting, joined by Abe, J.):

> It further appears to me that when a person's material possessions are threatened by the negligence of another, it cannot be said that the owner is within a foreseeable zone of "psychic" risk. Even though a person's injury may be very real and can be proven, I would question the policy behind recognizing the value of an attachment to material possessions.

The dissent noted that the majority was comprised of two circuit judges, see note 36 *supra*, and suggested that the policy issue would not be clearly resolved until the full court dealt with it. *Id.*

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

> Indeed, our decision does shift a part of the burden of administering claims of mental distress inordinately assumed by the courts to juries. As in other mental tort cases, the jury, representing a cross section of the community is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress. . . . [T]hat decision is properly a function which should be shared with the jury.

[42] The court also remanded for trial court determination whether the facts met the standard of serious mental distress established by the decision. *Id.* at 174-75, 472 P.2d at 521.

In contrast, the majority in *Ajirogi* assumed a duty existed and then resolved foreseeability as a matter of law,[43] simply noting that the *Rodrigues* case was remanded to the trial court.[44] The majority ultimately relied on the most recent decision[45] in the trilogy of cases dealing with negligent infliction of emotional harm[46] to sustain its position that the trial court's finding on foreseeability in *Ajirogi* did not bind the supreme court. "As we pointed out in *Kelley*, the recognition of foreseeability and the consequent duty of care is an expression of the result of balancing policy considerations."[47]

The majority ostensibly reached its policy-influenced result under the auspices of a single, undeveloped sentence[48] in the 1975 majority decision, *Kelley v. Kokua Sales & Supply, Ltd.*.[49] On further analysis, it appears that Justice Kidwell first applied a rule developed in a 1977 opinion he wrote for a unanimous court, *McKenna v. Volkswagenwerk Aktiengesellschaft.*[50] *McKenna* dealt with the concept of a superseding cause,[51] which

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See note 39 *supra*.

[43] 59 Hawaii 515, 526-27, 583 P.2d 982, 988 (1978):

> Whether the facts before the trial court in the present case permitted a finding that the risk of negligent operation of the stolen car by . . . [the detainee] was sufficiently foreseeable to meet the Rodrigues test of liability on the part of the State is a question of law upon which the court is not bound by the trial court's finding.

[44] *Id.* at 526, 583 P.2d at 987.

[45] Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975).

[46] *Id.* (plaintiff must be within reasonable distance from scene of accident to sustain liability); Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) (absence of blood relationship between physical victim of negligence and plaintiff witness to accident does not foreclose liability); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (duty to refrain from inflicting serious mental distress established). *See generally*, Koshiba, *Negligent Infliction of Mental Distress:* Rodrigues v. State *and* Leong v. Takasaki, XI HAWAII B.J. 29 (1974); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 29-32 (1976).

[47] 59 Hawaii at 527, 583 P.2d at 988 (footnote omitted).

[48] "Stated in a different terminology, but reaching the same conclusion as above, we hold that the appellees could not reasonably foresee the consequences to Mr. Kelley." Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 209, 532 P.2d 673, 676 (1975), *quoted in* Ajirogi v. State, 59 Hawaii 515, 527 n.6, 583 P.2d 980, 988 n.6 (1978).

[49] 56 Hawaii 204, 532 P.2d 673 (1975). The court concluded that no duty of care to refrain from inflicting serious mental distress was owed to a California man who suffered a fatal heart attack upon receiving a long distance telephone call from Hawaii informing him that his daughter and one grandchild had been killed and a second grandchild critically injured in an accident which occurred when the defendant's truck lost its brakes on the Likelike highway and smashed into the rear of their automobile.

[50] 57 Hawaii 460, 558 P.2d 1018 (1977). In *McKenna* the jury could have found that a car driven by an intoxicated person veered across the highway and crashed into another car because the shoulder on which the automobile was partially travelling was negligently maintained by the city. The court reversed a directed verdict and judgment for the city and remanded for a new trial, holding that as a matter of law it was not unforeseeable that a driver would negligently enter upon the highway shoulder. Only the dissent in *Ajirogi* cited *McKenna*. 59 Hawaii at 533, 583 P.2d at 991.

[51] The elements of this principle are set out in RESTATEMENT, *supra* note 12, at § 440.

hinges on the foreseeability of an intervening act.[52] *McKenna* left no doubt that foreseeability is normally a question of fact[53] and may only be decided as a matter of law where the evidence does "not admit of a reasonable inference that the [intervening cause] . . . was a foreseeable result"[54] of the defendant's negligence.[55] Hence, the majority examined the record in *Ajirogi* to determine whether the hospital's knowledge of the detainee's propensities was sufficient to allow a rational inference of foreseeability.

It was not enough that the State knew of the patient's propensities to commit crimes, including automobile theft, since the risk of harm was that the detainee would "operate the stolen car in a negligent manner so as to endanger others on the road."[56] The dissent contended that the ma-

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[52] 57 Hawaii at 465, 588 P.2d at 1022-23.

[53] *Id.* at 465-66, 588 P.2d at 1023 (quoting Jones v. City of South San Francisco, 96 Cal. App. 2d 427, 435, 216 P.2d 25, 30 (1950)).

[54] 57 Hawaii at 466, 558 P.2d at 1023. *Accord,* Christensen v. Epley, 36 Or. App. 603, _, 585 P.2d 416, 422 (1978) (after preliminary determination by the court as a matter of law, foreseeability of the plaintiff and the hazard is a jury decision).

[55] The State's opening brief argued that the detainee's negligence was a superseding cause which insulated the government from liability. Brief for Appellant at pt. II. The court in *Ajirogi* cites, *inter alia,* Dunn v. State, 29 N.Y.2d 313, 327 N.Y.S.2d 622, 277 N.E.2d 647 (1971), for the proposition that other jurisdictions have found the negligent operation of a vehicle by an escapee to be unforeseeable. *Dunn* held that the state's negligence in allowing a mental patient to escape was not a proximate cause of a motorist's death because there were intervening causes which broke the chain of causation. These intervening causes were the escapee's finding a car with keys in the ignition and negligently driving the car while attempting to avoid apprehension by the police. The facts of *Dunn* appear to be very similar to *Ajirogi.* Hence, the majority might have followed the *Dunn* analysis, but since the threshold inquiry of superseding causes involves foreseeability, it was unnecessary to go beyond that issue.

[56] 59 Hawaii at 524, 583 P.2d at 986. The language of McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Hawaii 460, 466, 558 P.2d 1018, 1023 (1977), supports the majority's requirement that the manner in which the detainee was negligent must be foreseeable. Section 319 of the *Restatement* provides some guidance in illustrations. "*A* operates a private sanitarium for the insane. Through the negligence of the guards employed by *A*, *B*, a homicidal maniac, is permitted to escape. *B* attacks and causes harm to *C*. *A* is subject to liability to *C*." RESTATEMENT, *supra* note 12, at § 319, Comment a, Illustration 2. Note that at the time of B's escape it would be far more remote that *B* negligently injure *C* with an automobile than that *B* attack *C*. *Cf.* Annot., 44 A.L.R. 3d 899 (1972) (liability for negligent as opposed to intentional acts of escaped prisoners generally denied). If, however, *B* intentionally harms *C* by attacking *C* with an automobile, *A* may be subject to liability, unless the court follows those jurisdictions that restrict the foreseeability element to the same pattern of attack. *See* Thall v. State, 69 Misc. 2d 382, 329 N.Y.S.2d 837, (1972), *aff'd,* 42 App. Div. 2d 622, 344 N.Y.S.2d 453 (1973) (State held liable to victim of escapee from psychiatric hospital where assault followed almost the identical pattern of two previous attacks); RESTATEMENT, *supra* note 12, at § 302B, Comment f, Illustration 16; Morris, *Duty, Negligence and Causation,* 101 U. PA. L. REV. 189 (1952). *But cf.* Rum River Lumber Co. v. Minnesota, 48 U.S.L.W. 2132 (Minn. Sup. Ct. July 27, 1979) (affirming jury instructions on hospital's duty of care and foreseeability where maximum security mental patient with history of escapes, unauthorized absences, burglaries, and violent behavior while confined set fire to lumberyard); Christensen v. Epley, 36 Or. App. 803, 585 P.2d 416 (1978) (claim stated where

jority had drawn the issue too narrowly and that the foreseeable risk of harm need only be of a general type.[57]

The majority found that unverified reports concerning two incidents of the patient's reckless operation of stolen cars,[58] which occurred four years before the accident and were contained in hospital records, were insufficient to allow the inference that the hospital was on notice of the detainee's propensity to drive negligently.[59] The dissent treated the evidence of propensity as part of the duty issue as well as foreseeability and, in both analyses, determined that the record was at least adequate to sustain the hospital's liability.[60]

The law versus fact debate over foreseeability may be somewhat academic in light of the apparent ease with which courts employ the language of foreseeability in defining the duty of care owed.[61] It was not, however, academic to dissenting Justice Kobayashi, who wrote the majority opinion in *Kelley*.[62] Justice Kobayashi vigorously disputed that *Kelley* was authority for disregarding the findings of the lower court. He explained that the supreme court's treatment of foreseeability in *Kelley* was only incidental to the legal issue of "limiting 'the scope of the duty of care.' "[63] Hence, the dissent concluded that the "clearly erroneous" stan-

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youth, whom guards knew had run away from home and stolen vehicle, fatally stabbed a police officer while helping inmate to escape).

[57] 59 Hawaii at 533, 583 P.2d at 991. *See* Sylvester v. Northwestern Hosp. of Minneapolis, 236 Minn. 384, 390, 53 N.W. 2d 17, 21 (1952).

[58] 59 Hawaii at 524-25, 583 P.2d at 986-87. The majority noted that no expert testimony had been presented to show that negligent operation of a stolen vehicle was foreseeable conduct and that the predictability of human behavior through psychiatric examination and diagnosis is questionable. *Id.* at 524, 583 P.2d at 986.

[59] *Id.* at 525, 583 P.2d at 987. The majority analogized the sufficiency of information known to the hospital with that required to be found in order to charge the defendant in Abraham v. Onorato Garages, 50 Hawaii 628, 446 P.2d 821 (1968), with negligent entrustment of a vehicle. *Id.* at 525-26 & n.5, 583 P.2d at 987 & n.5. The dissent disputed the majority's representation of the holding in *Abraham* and its application to the facts. *Id.* at 530-31, 583 P.2d at 989-90.

[60] 59 Hawaii at 530, 531, 583 P.2d at 989, 990.

[61] *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); Ikene v. Maruo, 54 Hawaii 548, 551, 511 P.2d 1087, 1089 (1973); Palsgraf v. Long Island R.R., 248 N.Y. 339, 334, 162 N.E. 99, 100 (1928).

[62] Chief Justice Richardson dissented on the ground that allowing claims only for serious mental distress was a sufficient limitation on the tort and that the trier of fact "in accordance with traditional tort principles" would determine the seriousness of the injury and its foreseeability. 56 Hawaii at 212, 532 P.2d at 678. This is consistent with the opinions he authored in *Rodrigues*, *see* note 41 *supra*, and Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974). The chief justice's posture in *Ajirogi*, where he was among the majority which determined foreseeability as a matter of law, perhaps may be reconciled with his earlier opinions on the basis that they dealt with mental torts, while *Ajirogi* and *McKenna* did not.

[63] 59 Hawaii at 532, 583 P.2d at 990 (quoting Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 209, 532 P.2d 673, 676 (1975)). Justice Kobayashi also distinguished *Kelley* from *Ajirogi* on the grounds that imposing liability in the latter instance would not lead to a duty of care "premised on a worldwide basis." *Id.* Unfortunately, neither the majority nor

dard[64] was applicable to the trial court's factual determinations in *Ajirogi*[65] and that the record strongly supported the finding of foreseeability.[66]

Perhaps the most intriguing aspect of the majority's decision was its application of the public policy considerations which argued against imposing liability on the State. Aside from ensuring the medical community flexibility in utilizing therapeutic procedures,[67] the majority focused on the constitutional rights of the detainee.

> The record shows that a policy of minimum security had been extended to . . . [the detainee], in his status as a committed mental patient, by a court order permitting leaves of absence. Upon a showing that he was not dangerous to himself or others, . . . [the detainee] might have asserted his constitutional right to freedom as declared in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), subject to inquiry whether his confinement was necessary to his treatment. The test of foreseeability of risk which determines the State's duty of care to appellees does not produce a different result whether . . . [the detainee's] status is viewed as that of a patient or of a prisoner under psychiatric examination.[68]

The Supreme Court in *O'Connor v. Donaldson*[69] held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of

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dissent in *Ajirogi* found it necessary to explain where the accident occurred. The collision took place on Manoa Road near Terrace Drive, about 10 miles from the hospital. Amended Complaint and Summons at 2. Arguably, the geographic limits of the duty of care established in *Kelley*, see note 49 *supra*, would not be applicable even if the accident in *Ajirogi* had occurred on the mainland since the hospital knew that the patient fled to the mainland on each of his most recent, unauthorized absences. 59 Hawaii at 518, 583 P.2d at 983. For a critical discussion of the *Kelley* decision, see Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAWAII L. REV. 1 (1979).

[64] HAWAII R. CIV. P. 52(a).

[65] *Accord*, Hicks v. United States, 511 F.2d 407, 422 (D.C. Cir. 1975) (Tam, J., joined by McGowan, J., concurring). The trial court in *Ajirogi* found, *inter alia*, that the hospital had knowledge of the patient's propensity for "car stealing and dangerous operation of automobiles, without a driver's license." 59 Hawaii at 523, 583 P.2d at 986.

[66] 59 Hawaii at 533, 583 P.2d at 991.

[67] *See* text accompanying note 16 *supra*. Overcommitment, however, appears to correlate less with potential civil liability than with the inability of psychiatry to understand and predict human behavior. "Even in the absence of threat of civil liability, the doubts of psychiatrists as to the seriousness of patient threats have led psychiatrists to overcommit to mental institutions." Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 463, 131 Cal. Rptr. 14, 41-42, 551 P.2d 334, 361-62 (1976) (Clark, J., dissenting). For a historical perspective of the overcommitment phenomenon, see Note, *Liability of Mental Hospitals for Acts of Their Patients Under the Open Door Policy*, 57 VA. L. REV. 156 (1971).

[68] 59 Hawaii at 528, 583 P.2d at 988.

[69] 422 U.S. 563 (1975).

willing and responsible family members or friends."[70] The Court found that Florida hospital authorities violated Donaldson's right to liberty by confining him for nearly fifteen years[71] without authorizing leaves,[72] although the patient had never manifested a danger to others or to himself[73] and had never committed a dangerous act.[74] Donaldson had held a job for fourteen years before his commitment and became employed immediately after his release.[75] The personal and medical history of the detainee in *Ajirogi* could not be more factually distinct.[76]

Although the constitutional challenge in *O'Connor* did not involve the original civil commitment,[77] there is reason to suspect that the Court's posture would be different if it were analyzing hospitalization resulting from criminal charges or pretrial detention for psychiatric examinations.[78] Yet, the majority in *Ajirogi* implies that the same standard is applicable[79] and incorporates those constitutional principles into its policy decision regarding tort liability.

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[70] *Id.* at 576.

[71] *Id.* at 567.

[72] *Id.* at 567-68.

[73] *Id.* at 568. The Court did not limit "danger to self" to suicide, but included the risk that a patient could not avoid the "hazards of freedom." *Id.* at 574 n.9.

[74] *Id.* at 568.

[75] *Id.*

[76] *See* text accompanying notes 8-10 *supra*. The detainee in *Ajirogi* had attempted suicide during his detention at Halawa jail following his return from his second unauthorized flight to the mainland. 59 Hawaii at 518, 583 P.2d at 983. A second psychiatric evaluation, which was filed in connection with the pretrial examination, but after the accident, found that the detainee "presented a 'mild to moderate' risk of danger to himself or to the person or property of others, 'chiefly as a result of his inability to control situations that he himself may initiate'." [*sic*] *Id.* at 519, 583 P.2d at 983.

[77] 422 U.S. at 567. Suzuki v. Alba, 438 F. Supp. 1106 (1977), held parts of Hawaii's involuntary civil commitment statute unconstitutional. The court required a showing beyond a reasonable doubt that a patient is a danger to himself or others, but danger to property was unconstitutional grounds for commitment. Moreover, the danger requirement must be met by "a finding of *imminent* and *substantial* danger as evidenced by a recent overt act, attempt or threat." *Id.* at 1110 (original emphasis).

[78] We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person — to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.

422 U.S. at 573-74 (footnote omitted). The Court made the following observation in a footnote: "That a wholly sane and *innocent* person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted." *Id.* at 573 n.8 (emphasis added). The Chief Justice noted that one underlying theory of a constitutional right to treatment for involuntarily confined patients may be derived from the fact that "many of the safeguards of the criminal process are not present in civil commitment." *Id.* at 585 (Burger, C.J., concurring).

[79] *See* text accompanying note 68 *supra*.

B. *Res Ipsa Loquitur*

In 1978 the Hawaii Supreme Court decided two negligence cases which dealt with the doctrine of res ipsa loquitur.[80] In *Stryker v. Queen's Medical Center*[81] a man ingested a drug and went berserk. He was admitted to the hospital twice and was discharged both times to the care of his family before he was finally hospitalized in the psychiatric ward and diagnosed as an acute schizophrenic. He subsequently escaped from the closed psychiatric ward and either jumped or fell from another floor to his death. The decedent's family prosecuted a survival and wrongful death action[82] against the hospital for failure to provide adequate psychiatric care and supervision and for improper administration of drugs.[83]

Finding the decedent's voluntary drug ingestion to be a proximate cause of his death, the trial court directed a partial verdict for the hospital. Furthermore, the trial court refused to give the plaintiff's res ipsa loquitur instruction which compelled rather than permitted a finding that the hospital was negligent. The trial court also refused to give plaintiff's instruction setting forth a heightened duty of care for a hospital housing a mental patient with a known desire to escape. An appeal was taken on all three points.[84]

In unanimously affirming the lower court, the Supreme Court of Hawaii did not decide whether the trial court had erred in partially granting a directed verdict. Instead, the court ruled that even if the trial court had erred in doing so, this error was harmless because the trial court later instructed the jury that there could be multiple proximate causes of a single actionable incident.[85]

The trial court's refusal to give the plaintiff's res ipsa loquitur instruction was held not to be error, as the instruction was improperly worded.[86]

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[80] RESTATEMENT *supra* note 12, at § 328 D defines res ipsa loquitur as follows:

(1) It may be inferred that harm suffering by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

[81] 60 Hawaii 214, 587 P.2d 1229 (1978).

[82] Suit was brought pursuant to HAWAII REV. STAT. §§ 663-7, -3 (1976).

[83] 60 Hawaii at 215, 587 P.2d at 1230.

[84] *Id.* at 215-16, 587 P.2d at 1231-3.

[85] *Id.* at 216-18, 587 P.2d at 1232.

[86] *Id.* at 218, 587 P.2d at 1232.

The doctrine creates but a permissible inference of negligence.[87]

Finally, inasmuch as the trial court instructed the jury on the duty of reasonable care which a hospital owes a patient and on the precautionary guidelines to keep mental patients in check which were in effect at the defendant hospital at the time of the decedent's death, the court found that it was not error to refuse to give plaintiff's instruction that a hospital on notice of a patient's intent to escape owes a *heightened duty of care* and is obligated to exercise extreme precautions.[88] Although the jury found the hospital negligent, it also found that the hospital's negligence was not a proximate cause of the decedent's death.[89]

The court also addressed the issue of proper wording of res ipsa loquitur instructions in *Turner v. Willis*.[90] Ursula Turner and her husband were walking along a curved portion of a highway in Kailua-Kona when a pickup truck travelling in the opposite direction passed them. As the truck passed, Mrs. Turner was hit by what she thought was a rock and sustained serious injuries to her right eye and cheek. Mr. Turner then noticed that the truck had stopped and that a pipe was protruding from the truck's right side.[91]

At trial the truck driver testified that he had not checked to see whether the pipe was securely wired flush against the side of the truck on the day of the accident. The appellants, however, alleged at trial that the Turners were contributorily negligent by walking down the middle of the two-lane road, while the Turners maintained that they were on the shoulder. The jury's verdict, upon special interrogatories, found Willis negli-

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[87] Winter v. Scherman, 57 Hawaii 279, 282, 554 P.2d 1137, 1139 (1976); Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 412 P.2d 669 (1966); Guanzon v. Kalamau, 48 Hawaii 330, 335 n.3, 402 P.2d 289, 292 n.3 (1965). In Mochen v. State, 57 App. Div. 719, 396 N.Y.S.2d 113 (1977), a divided New York court sustained dismissal of a claim involving somewhat similar facts for plaintiff's failure to establish causal negligence by the state hospital. The plaintiff had attempted to escape from the mental institution by cutting through restraining window bars and jumping or falling to the ground, thereby injuring himself. The hospital acknowledged that it would have been desirable to have two attendants on the floor instead of one on the night of the incident, but the facts showed that the single attendant had checked the patient and window bars 40 minutes before the aborted escape. The majority reasoned:

> In the absence of constant guarding and watching, an unreasonable requirement under the circumstances, it would not appear that defendant could have prevented the escape attempt. No evidence was offered to show that the bars on the window from which claimant fell were defective or deteriorated or in a state of negligent disrepair or how their removal was effected. Claimant failed to sustain the burden of establishing causal negligence on the part of defendant. Nor was there any showing of probability that the fall from the window could not have occurred in the absence of the State's negligence, which showing would have to be made to invoke the doctrine of res ipsa loquitur.

Id. at _, 396 N.Y.S.2d at 114 (citation omitted).

[88] 60 Hawaii at 219-20, 587 P.2d at 1232-33.

[89] *Id.* at 215, 587 P.2d at 1231.

[90] 59 Hawaii 319, 582 P.2d 710 (1978).

[91] *Id.* at 321, 582 P.2d at 712.

gent and that his negligence was a proximate cause of the accident; the jury likewise found Mrs. Turner negligent but failed to find that her "contributory" negligence was a proximate cause of her injury.[92]

One of the instructions to the jury was a res ipsa loquitur instruction which compelled the jury, if it found the three elements of res ipsa loquitur[93] to be present, to find that the appellants had been negligent and that such negligence was a proximate cause of the accident. The appellants objected to the instruction at trial on the general grounds that res ipsa loquitur was inapplicable to the facts of the case.

On appeal, the appellants based their objection to the instruction on different grounds; namely, the fact that the instruction compelled rather than permitted a finding of negligence once the jury had found that the accident had occurred under the described conditions. The appellants further argued that the instruction was erroneous because it required the jury, upon inferring negligence, to find that such negligence was a proximate cause of the accident.

The case was reversed and remanded for a new trial. The court held that an objection to an instruction different from the objection raised at trial is not improper. Not only does the court construe rule 51(e) of the Hawaii Rules of Civil Procedure in a liberal manner, the court regards an assumed failure to object adequately at trial as no bar to the appellate court's consideration of an instruction which the court finds constitutes reversible error.[94]

The court found that the instruction was clearly erroneous because previous decisions had made it clear that the effect of applying the doctrine of res ipsa loquitur is merely to raise a rebuttable inference of negligence, permitting, but not compelling, the inference by the jury.[95] Furthermore, although the trial court was permitted to find, as a matter of law, that the defendants were negligent and that such negligence was a proximate cause of the accident,[96] the instruction was potentially misleading. Al-

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[92] *Id.* at 321-22, 582 P.2d at 712-13.

[93] See note 80 *supra.*

[94] 59 Hawaii at 324, 582 P.2d at 713-14.

[95] *See, e.g.,* Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 87, 412 P.2d 669, 678, *rehearing denied,* 49 Hawaii 267, 414 P.2d 428 (1966).

[96] *See, e.g.,* Winter v. Scherman, 57 Hawaii 279, 283, 554 P.2d 1137, 1140 (1979) (if evidence is such as to compel inescapably an inference of negligence, court should direct a verdict unless other issues remain for jury determination; where the inference is so strong that the jury could not reasonably have rejected it, the court may properly grant judgment notwithstanding the verdict). *Cf.* Stryker v. Queen's Medical Center, 60 Hawaii 214, 587 P.2d 1229, 1232 (1978) (court determined that trial court's granting of a partial directed verdict in a negligence action was at most harmless error because of trial court's subsequent instruction regarding possibility of more than one proximate cause for a single injury). In *Winter* there were no witnesses to the fatal accident that occurred soon after the vehicle was last seen proceeding normally along the highway. Defendant argued that alternative causes for the accident included a mechanical defect, but there was no evidence to support that contention, and the court found the inference of driver negligence sufficiently strong to sup-

though it is "well-established that the doctrine of res ipsa loquitur has no application to proximate cause,"[97] the instruction in effect told the jury that if the three conditions of res ipsa loquitur were found to exist, the jury then must find that the defendant's negligence was a proximate cause of the accident.[98]

II. BATTERY

In *Rossell v. City and County of Honolulu*,[99] the Hawaii Supreme Court held that an action for battery[100] arises when a physician takes a blood sample from a person arrested for driving while under the influence of intoxicating liquor absent the arrestee's consent to the procedure.[101] In reaching its decision, the court construed Hawaii's "implied consent" statute[102] and distinguished the Supreme Court decision in *Schmerber v.*

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port judgment notwithstanding the verdict. This decision appears to negate the dictum in Stewart v. Budget Rent-A-Car, 52 Hawaii 71, 470 P.2d 240 (1970), which would allow recovery against a manufacturer or lessor of automobiles on the theory of strict liability, absent evidence of a mechanical defect: "In the most extreme circumstances a court might hold that where no specific defect can be shown, recovery is to be allowed anyway as a carefully driven vehicle does not leave the road in the absence of a defect in the car." 52 Hawaii at 76 n.5, 470 P.2d at 244, n.5.

[97] 59 Hawaii at 325, 582 P.2d at 715 (citing Travelers Insurance Co. v. Hulme, 168 Kan. 483, 486, 213 P.2d 645, 647 (1950)).

[98] 59 Hawaii at 325, 582 P.2d at 715.

[99] 59 Hawaii 173, 579 P.2d 663 (1978).

[100] The RESTATEMENT, *supra* note 12, at § 13 defines "battery" as follows:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results.

Battery is often defined in terms of lack of consent. In Nishi v. Hartwell, 52 Hawaii 188, 190, 473 P.2d 116, 118 (1970), "battery" was defined as the "unlawful touching of another person without his consent." Professor Prosser also defines it in this manner: "The gist of the action for battery is . . . the absence of consent to the contact on the part of plaintiff." W. PROSSER, LAW OF TORTS § 9 at 36 (4th ed. 1971).

[101] 59 Hawaii at 184, 579 P.2d at 670. The court found that it was not error for the trial court to give the following jury instructions: "If you find that blood was taken from the plaintiff against his will and without his consent, then a battery has been committed and you may award such damages, general and/or punitive as in your sound discretion you may deem appropriate." *Id.* at 183-84, 579 P.2d at 670. The court also rejected defendants' claims that the trial court erred in refusing to instruct the jury that taking a blood sample under the circumstances did not violate the plaintiff's constitutional rights, *id.* at 178 & nn.5 & 6, 182, 579 P.2d at 667 & nn.5 & 6, 699. The court also sanctioned the refusal to give a third jury instruction which was a restatement of the statute regarding inability of a driver to consent, *id.* at 184-86, 579 P.2d at 670-71.

[102] HAWAII REV. STAT. § 286-151 (1976) (amended 1977) provides in relevant part: "Any person who operates a motor vehicle upon the public highways of the State shall be deemed to have given his consent . . . to a test . . . of his breath or blood for the purpose of determining the alcoholic content of his blood."

California[103] which dealt with the constitutionality of the police practice.

Michael Rossell was arrested for driving while under the influence of alcohol. Pursuant to sections 286-151 and -155 of Hawaii Revised Statutes (1976),[104] he was informed of the possibility that his driver's license would be revoked for six months if he refused to submit to a breath or blood test for the purpose of determining the alcoholic content of his blood. The question of whether Rossell consented or refused to take any form of sobriety test was disputed at trial.

Police officers testified that Rossell elected the blood test and was then taken to the medical facility in the police station where Rossell questioned the identity and qualifications of the physician stationed there. Police officers testified that Rossell became disorderly and had to be subdued by a choke hold which rendered him unconscious. Officers further claimed that after Rossell regained consciousness, he passively allowed a blood sample to be taken by the police physician.

On the other hand, Rossell testified that he had never agreed to either type of examination. He denied having caused any commotion and claimed that he simply spoke in an excited manner while gesturing to indicate that he did not want to take a test. He further alleged that a blood sample was taken from him while he was unconscious.[105]

Rossell brought an action for battery against the physician, the police officers, and the City and County of Honolulu as employer of the other defendants[106] for injuries sustained as a result of these incidents. The jury

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[103] 384 U.S. 757 (1966).

[104] HAWAII REV. STAT. § 286-151 (1976) (amended 1977) provides in relevant part:

> The test or tests shall be administered at the request of a police officer having reasonable grounds to believe the person driving or in actual physical control of a motor vehicle upon the public highways is under the influence of intoxicating liquor only after (1) a lawful arrest, and (2) the police officer has informed the person of the sanctions of section 286-155.

Id. § 286-155 (1976) provides:

> If a person under arrest refuses to submit to a test of his breath or blood, none shall be given, but the arresting officer shall, as soon as practicable, submit an affidavit to a district judge of the circuit in which the arrest was made, stating:
>
> (1) That at the time of the arrest, he had reasonable grounds to believe the arrested person had either been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor;
>
> (2) That the arrested person had been informed of the sanctions of this section; and
>
> (3) That the person had refused to submit to a test of his breath or blood.
>
> Upon receipt of the affidavit, the district judge shall hold a hearing as provided in section 286-156, and shall determine whether the statements contained in the affidavit are true and correct. If the district judge finds the statements contained in the affidavit are true, he shall revoke the arrested person's license, permit, or any nonresident operating privilege for a period of six months.

[105] 59 Hawaii at 175, 579 P.2d at 665-66.

[106] The suit against the City and County of Honolulu was brought under the doctrine of respondeat superior. It has long been the law that a police officer may be held personally liable for battery committed in the exercise of his law enforcement duty.

> A peace officer is not liable for injuries inflicted by him in the use of reasonably neces-

returned a verdict in favor of Rossell.[107]

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sary force to preserve the peace and maintain order or to overcome resistance to his authority; but if unnecessary violence is used to accomplish the purpose, or he assaults a person without just excuse, he becomes a trespasser and is liable as such.

Leong Sam v. Keliihoomalu, 24 Hawaii 477, 482 (1918). The issue of municipal immunity remains a controversial principle in many jurisdictions, *see, e.g.*, Budetti & Knight, *The Latest Event in the Confused History of Muncipal Tort Liability*, 6 FLA. ST. L. REV. 927 (1978); Article, *Government Tort Liability*, 10 URB. LAW. 376 (1978); 78 W. VA. L. REV. 278 (1976), but the Hawaii Supreme Court has consistently favored the claimant. The only case that actually held a municipality immune was Perez v. City & County of Honolulu, 29 Hawaii 656 (1927), and that decision was based on the discredited distinction between governmental and proprietary functions which was finally overruled in Kamau v. Hawaii County, 41 Hawaii 427 (1957).

> [T]he narrow rule heretofore followed as to so-called "governmental" or public functions and "proprietary" or private functions should not control the question of municipal liability for its torts; that where agents are *negligent* in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature.

Id. at 552 (emphasis added). Although *Kamau* ostensibly dealt only with negligent acts, it seems clear that the common law did not differentiate between negligence and intentional torts in determining immunity, Matsumura v. County of Hawaii, 19 Hawaii 18, 39 (1908) (Wilder, J., dissenting), even though a distinction was sometimes drawn between nonfeasance and negligence. *Id.* at 22-23. *Perez* had based immunity also on the theory that police are not servants or agents of a municipality, 29 Hawaii at 662, but the historical analysis in *Kamau*, 41 Hawaii at 537, 552, makes it clear that such reasoning is obsolete. *Accord*, Maki v. City & County of Honolulu, 33 Hawaii 167, 175 (1934) (modern trend is to hold municipalities liable for acts of its police officers and firefighters). Indeed, *Kamau* rejected the view that the county was an agent of the State and therefore enjoyed sovereign immunity to the same extent as the State. 41 Hawaii at 542. The court temporarily retreated from this progressive principle in Salavea v. City & County of Honolulu, 55 Hawaii 216, 517 P.2d 51 (1973), when it held that the statute of limitations in the State Tort Liability Act superseded a county charter provision. The late Justice Levinson dissented partly on the ground that construing the Act to include counties would defeat the advances of *Kamau* and insulate counties from liability for the intentional torts of its agents. *Id.* at 222 & n.2, 517 P.2d at 55 & n.2. Two years later, the court limited its holding in *Salavea* to the applicability of the statute of limitations provision contained in the Act and expressly held that the State's statutory immunity from intentional torts is not applicable to counties. Orso v. City & County of Honolulu, 56 Hawaii 241, 534 P.2d 489 (1974) (affirming damages awarded for defamation of character, false arrest, false imprisonment, and malicious prosecution claims). *Cf.* Breed v. Shaner, 57 Hawaii 656, 562 P.2d 436 (1977) (State's right to nonjury trial under the Act is not applicable to counties). Hence, only the State is immune from liability for intentional torts under the statute which precludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." HAWAII REV. STAT. § 662-15(4) (1976). Counties are therefore liable, as was the city and county in *Rossell*, for the batteries of their agents under the doctrine or respondeat superior. For a discussion of expanded liability for nongovernmental employers under the common law doctrine, see Note, *Respondeat Superior and the Intentional Tort: A Short Discourse on How To Make Assault and Battery a Part of the Job*, 45 U. CIN. L. REV. 235 (1976). The Hawaii court has, however, construed the statute that authorizes suits against counties, to disallow punitive damages against the municipal corporation while permitting such award against "a person superior in authority who expressly authorizes, ratifies or condones the tortious act of the

On appeal to the Hawaii Supreme Court, defendants contended that under *Schmerber v. California*[108] they were lawfully entitled to take a blood sample by force from a person arrested for driving while under the influence of intoxicating liquor despite his refusal to submit to the test.[109] The facts of the *Schmerber* case are similar to those of *Rossell* in that both individuals were arrested for driving while intoxicated, and both were forced to undergo sobriety tests to which they objected. In each case a blood sample was withdrawn by a physician at the direction of a police officer. Unlike Rossell who filed a civil action, Schmerber appealed his criminal conviction, challenging the admissibility of the test results on constitutional grounds.

The Court held in *Schmerber* that the withdrawal of blood, in a medically accepted manner,[110] without the consent of the arrested person does not deny the arrestee due process of law, nor violate his privilege against self-incrimination, his right to counsel, nor his right to be free from unreasonable searches and seizures.[111] Hence, the evidence was admissible at Schmerber's trial. The defendants in *Rossell* argued that *Schmerber* was authority for permitting the noncensensual blood test in this case even though the relevant Hawaii statute provides that "[i]f a person under arrest refuses to submit to a test of his breath or blood, *none shall be given.*"[112]

Justice Ogata, writing for a unanimous court, easily distinguished *Schmerber* by pointing out that the Supreme Court of the United States "was never confronted with an implied consent statute, for no such stat-

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employee." Lauer v. YMCA, 57 Hawaii 390, 402, 557 P.2d 1334, 1342 (1976) (construing HAWAII REV. STAT. § 662-15(4) (1976) and affirming jury award of compensatory and punitive damages for trespass and violation of fourth amendment by police officer). Defendants in *Rossell* argued that the no-punitive damage rule is nullified by an award of punitives against individual employees, especially where respondeat superior is the basis of suit and the employees are acting within the scope of their duties. Memorandum of Points and Authorities in Support of Motion for Judgment Notwithstanding the Verdict or Remittitur, Civ. No. 36671, at 300-21 (1st Cir. Ct. Hawaii Nov. 28, 1975). Given the language of *Lauer*, defendants were prudent to have omitted this argument on appeal.

[107] 59 Hawaii at 177, 579 P.2d at 667. The judgment awarded $123.76 special damages and $15,000 general damages. Punitive damages also were awarded in the amounts of $2,000, $3,000, and $10,000 against the two police officers and the physician, respectively. All defendants were jointly and severally liable for the cost of the suit, $215.40, plus 6% interest. Civ. No. 36677, at 275 (1st Cir. Ct. Hawaii Nov. 28, 1975).

[108] 384 U.S. 757 (1966).

[109] 59 Hawaii at 178-79, 579 P.2d at 667.

[110] The Court found the procedure was reasonable: Extraction of blood samples for testing is a highly effective means to determine blood-alcohol contents; it is appropriate to administer such tests promptly before the body has diminished the percentage of alcohol in the blood; and, the specific process used to extract the blood was commonly employed by the medical profession. 384 U.S. at 759-72.

[111] *Id.* at 760-61.

[112] HAWAII REV. STAT. § 286-155 (1976) (emphasis added).

ute was in effect in California at the time that the case was decided."[113] Relying on a pre-*Schmerber* case,[114] the Hawaii court noted that the Supreme Court has "long approved of the concept behind implied consent statutes as 'part of a sensible and civilized system' of protecting the driver as well as other citizens."[115] The court concluded that the State was not prohibited from limiting the circumstances under which sobriety tests may be required of suspected drunken drivers.[116]

The court next examined the statutory mandate that police refrain from imposing such tests when the arrested driver refuses to submit. The attempt to discern legislative intent in support of a literal construction of the statutory wording was in vain because the relevant language of the law was not addressed by legislative history.[117] As a result, the court considered two California cases[118] which construed that state's similar statutory provision and determined that the legislative policy was to avoid violent confrontations between police and motorists. Hawaii's statutory scheme similarly provided an appropriate alternative to the official use of physical force by threatening the revocation of a driver's license in order to encourage voluntary submission to chemical sobriety tests. The court thus found literal construction of section 286-155 essential to the legislative purpose. This interpretation is supported by decisions in other jurisdictions.[119]

The court also considered whether defendants had lawfully administered the blood test by virtue of section 286-154, which states that the

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[113] 59 Hawaii at 179, 579 P.2d at 668 (footnote omitted).

[114] Breithaupt v. Abram, 352 U.S. 432, 435 n.2 (1957).

[115] 59 Hawaii at 179, 579 P.2d at 668 (quoting 352 U.S. at 435 n.2).

[116] *Id.*:

> [A]though *Schmerber* holds that there is no Constitutional impediment to the forcible taking of blood from an arrestee despite his refusal, nowhere in *Schmerber* is it stated that the Court thereby intended to prevent the states from legislatively providing narrower guidelines for law enforcement authorities in the administration of sobriety tests upon suspected drunken drivers.

[117] *See* STAND. COMM. REP. No. 809, 4th Hawaii Leg., 1st Sess., *reprinted in* HOUSE JOURNAL 788 (1967) (purpose of bill was to establish a traffic safety program to save lives and reduce property losses); STAND. COMM. REP. No. 234, 4th Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 951 (1967).

[118] People v. Superior Court, 6 Cal. 3d 757, 765, 493 P.2d 1145, 1150, 100 Cal. Rptr. 281, 286 (1972) (en banc) (implied consent statute compels submission to a sobriety test by providing for revocation of driver's license for refusal to submit rather than by allowing forcible removal of a sample); Buch v. Bright, 264 Cal. App. 2d 788, 790, 71 Cal. Rptr. 123, 124 (1968) ("The obvious reason for acquiescence in the refusal of such a test . . . is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.").

[119] *E.g.*, Longino v. Cofer, 148 Ga. App. 341, 251 S.E.2d 113 (1978); Hendryx v. State Dep't of Pub. Safety, 311 So. 2d 547 (La. App. 1975); People v. Keen, 396 Mich. 573, 242 N.W.2d 405 (1976); State v. Beckey, 291 Minn. 483, 192 N.W.2d 441 (1971); State v. Freymuller, 26 Or. App. 411, 552 P.2d 867 (1976); Peterson v. State, _ S.D. _, 261 N.W.2d 405 (1977); State v. Parker, 16 Wash. App. 3d 632, 558 P.2d 1361 (1976); Metcalf v. State Dep't of Motor Vehicles, 11 Wash. App. 3d 819, 525 P.2d 819 (1974).

implied consent of a person arrested for driving while intoxicated "shall not be withdrawn by reason of his being dead, unconscious, or in any other state which renders him incapable of consenting to examination, and the test may be given."[120] Defendants contended that Rossell's vacillation as to whether to permit the sobriety test combined with his unruly behavior constituted sufficient evidence that he was not capable of consent.[121]

However, the court narrowly construed the phrase "in any other state which renders him incapable of consenting to examination" in order to promote the policy of avoiding violent confrontations between police and drivers. Consequently, a nonconsensual sobriety test may be given "only where an arrestee is *absolutely incapable* of manifesting, through words, acts, conduct or other means, his willingness or unwillingness to submit to a test."[122] The court found that Rossell had demonstrated his refusal both by his initial vacillation and by his subsequent physical resistance.[123]

The court also rejected defendants' argument that the district court's decision to admit the blood test evidence in a prior criminal proceeding[124] estopped Rossell from relitigating the legality of the test in his civil action. The court emphasized that the results were admissible evidence, even though they were obtained in violation of a statute, only because no constitutionally protected rights were violated. However, the evidentiary status was irrelevant to a determination of civil liability for failure to

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[120] HAWAII REV. STAT. § 286-154 (1976).

[121] The jury was keenly interested in what constituted consent. During deliberations, the following correspondence between jury and judge occurred:

> Question: We would like to know if a person's *written* consent (signature) is required by law before a *blood test* can be administered by the City and County government to determine if a person is intoxicated.
>
> Answer: No.
>
> Question: We would also like to confirm if there is a law prohibiting the taking of a blood test from an unconscious person.
>
> Answer: Blood may be taken from an unconscious person if the unconsciousness results from an accident, illness or intoxication. Blood may not be taken from an unconscious person if the unconsciousness results from improper police activity.
>
> Yoshimi Hayashi
> Judge, 10th Div.

Civ. No. 36671, at 265 (original emphasis).

[122] 59 Hawaii at 184-85, 579 P.2d at 670-71 (emphasis added). Although the court did not attempt to enumerate all the possible situations in which an arrestee would be deemed "incapable of consenting," it did give one example — when the arrestee is conscious but in such a state of shock that he is totally unable to respond to a police officer's request to submit to a sobriety test. *Id.* The court further noted that if the arrestee were incoherent merely because of extreme intoxication, he would not be "incapable of consenting" but rather would be deemed to have refused, thus prohibiting any administration of the sobriety test. *Id.* at 185 n.13, 579 P.2d at 671 n.13.

[123] *Id.* at 186, 579 P.2d at 671.

[124] Rossell had been convicted for the offense of driving while under the influence of liquor, HAWAII REV. STAT. § 291-4 (1976), prior to filing his civil complaint.

comply with the statutory requirements.[125] The court thus affirmed the judgment of the lower court that a battery had been committed upon Rossell when a physician extracted his blood without his consent in violation of the implied consent statute.

It could be argued that the decision will affect future police practices because it may be difficult for officers to determine whether an arrestee has "refused" a sobriety test. In dubious circumstances an officer is likely to infer that the driver had indeed refused and therefore refrain from either giving the breath test or having a blood sample withdrawn.[126]

III. Workers' Compensation

The Supreme Court of Hawaii decided three important workers' compensation cases in 1978. One was a "lent employee" case, another dealt with the compensability of influenza, and a third concerned awards for permanent total disability and for disfigurement. In *Yoshino v. Saga Food Service*,[127] the court determined whether, under Hawaii's "lent employee" statute,[128] liability for workers' compensation benefits awarded to a claimant should be assessed only against his "special employer" or against both his "general" and "special employers."[129]

A. Yoshino v. Saga Food Service: *Who Pays for Workers' Compensation?*

Mid-Pacific Institute, a private educational institution, had employed claimant Yoshino as a chef. In 1971, Mid-Pacific contracted with Saga to allow the latter to assume the operations of the food service. Saga agreed to retain the claimant as head chef. However, Yoshino remained on the Mid-Pacific payroll so that his eligibility for retirement benefits would not be jeopardized, and Saga reimbursed Mid-Pacific for the wage and benefit payments which the school made to Yoshino. The claimant

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[125] The court stated that "while the results of a blood test may be admissible in a criminal prosecution for driving while intoxicated . . . such a determination does not confer legitimacy upon the undeniable violation of the implied consent statute." 59 Hawaii at 187, 579 P.2d at 672.

[126] *Cf.* State v. Pandoli, 109 N.J. Super. 1, 262 A.2d 41 (Super. Ct. App. Div. 1970) (defendant's qualified agreement to take drunkometer test construed as flat refusal).

[127] 59 Hawaii 139, 577 P.2d 787 (1978).

[128] Hawaii Rev. Stat. § 386-1 (1976) (amended 1978, 1979).

[129] *Id.* provides in pertinent part:

> Where an employee is loaned or hired out to another person for the purpose of furthering the other person's trade, business, occupation, or profession, the employee shall, beginning with the time when the control of the employee is transferred to the other person and continuing until the control is returned to the original employer, be deemed to be the employee of the other person regardless of whether he is paid directly by the other person or by the original employer.

worked for Saga during the regular school year. During the remaining month-and-a-half each year, he was employed exclusively by Mid-Pacific to operate the food service facility for summer conferences.

Yoshino sustained injuries arising out of and during the course of his employment with Saga, and it was undisputed that he was entitled to workers' compensation benefits.[130] The Hawaii State Labor and Industrial Relations Appeals Board affirmed the decision of the director of labor and industrial relations which assessed the entire payment of such benefits against Saga and its insurer.[131] Saga contended on appeal that Mid-Pacific should share with Saga the liability for workers' compensation benefits on the theory that they were joint employers.

The court rejected this contention and ruled that under the Hawaii statute[132] Saga was the sole employer.[133] Although the court concurred in the board's decision, it disapproved of the board's emphasis on the "relative nature of the work test,"[134] one of two tests the board had used to determine if more than one employer were liable. The court stated its preference for the "control test" and quoted its previous decision in *Kepa v. Hawaii Welding Co.*[135] which clearly held that the control test is the primary guideline for deciding whether an employer is a special employer in lent employee cases. "The paramount consideration . . . is whether the alleged special employer exercised control over details of the work of the loaned employee and such control strongly supports the inference that a special employment exists."[136]

Analysis focused on a single statutory provision[137] because the factual situation presented a "classic example of the 'lent employee' case": Mid-Pacific was the claimant's original employer; when Saga assumed the food service operations, claimant remained in the general employ of Mid-Pacific by being retained on the payroll and by being in the school's exclusive employ for part of each year; when the claimant worked for Saga for ten-and-a-half months each year he was being "loaned or hired out" to

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[130] 59 Hawaii at 142, 577 P.2d at 789-90.

[131] *Id.* at 140, 577 P.2d at 789.

[132] HAWAII REV. STAT. § 386-1 (1976) (amended 1978, 1979).

[133] 59 Hawaii at 147, 577 P.2d at 792.

[134] The "relative nature of the work test" focuses on the answers to the following questions:

(a) How much is the employee's work a regular part of the employer's regular work?
(b) Which employer's work is being done by the employee?
(c) Which employer benefits from the work of the employee? How and to what extent does the employer benefit?
(d) Is there an immediate employment relationship such that it markedly intervenes between the employee's relationship with other employers?

See Record at 66-67.

[135] 56 Hawaii 544, 545 P.2d 687 (1976).

[136] *Id.* at 548, 545 P.2d at 691, *quoted in* Yoshino v. Saga Food Serv., 59 Hawaii 139, 143, 577 P.2d 787, 790 (1978).

[137] HAWAII REV. STAT. § 386-1 (1976) (amended 1978, 1979).

Saga by Mid-Pacific; and while working for the "borrowing employer" the loaned employee was injured, giving rise to a conflict between employers over liability for the benefits payable.[138] The court found that two statutory conditions had to be met before a "borrowing" or "special" employer will be considered the exclusive employer for workers' compensation purposes: (1) The employee must be loaned or hired out to the other employer for the purpose of furthering the other employer's trade, business, occupation, or profession; and (2) control of the employee must be transferred from the original employer to the other employer.[139]

The court first looked at Saga's primary business, which was the provision of food services at the Mid-Pacific facilities, and found that the claimant's employment activities were "directed entirely toward that end."[140] Ostensibly, analysis of the first prerequisite to Saga's liability would be met by simple recitation of the fact that the loaned employee was hired out as a chef. However, the court's subsequent discussion concluded that the claimant's efforts did not "directly further" the trade or business of Mid-Pacific,[141] which was to provide educational services. The provision of food services, in which Saga and Yoshino were engaged, was merely incidental to the principal business of Mid-Pacific, and thus the claimant's work was "essentially that of Saga" rather than Mid-Pacific.[142] Although the statute is silent on the matter, the court seems to imply that a general employer may be liable with the special employer if the activities of the injured worker directly furthers the primary trade or business of both.

Addressing the second condition, the court found that Saga exercised the requisite control over the details of the claimant's work. The food service director directly supervised Yoshino in his preparation of menus selected by Saga, and Saga prescribed Yoshino's working conditions, including hours of duty, break periods, vacation schedule, overtime employment, days off, and rules of conduct. The court noted that, although Mid-Pacific may have had consultative rights to changes in employment or wage and benefit status, the record did not show that Mid-Pacific would have prevented Saga from firing the claimant or changing his wage and benefits schedule for good cause. The court further noted that the claimant was unequivocally told by Saga that he was working for Saga rather than Mid-Pacific.[143]

The finding that Mid-Pacific transferred its control over the claimant to Saga is reconcilable with the court's prior decision in *Kepa v. Hawaii*

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[138] 59 Hawaii at 144, 577 P.2d at 791.
[139] *Id.* at 145, 577 P.2d at 791.
[140] *Id.*
[141] *Id.* at 145-46, 577 P.2d at 791-92.
[142] *Id.* at 146, 577 P.2d at 792.
[143] *Id.*

Welding Co.[144] Kepa was employed by Hawaii Welding, a firm that rented out men and equipment. Kepa was hired out to Thompson, which had a contract with the board of water supply to install a water line in Kahaluu, and appeared at the job site fully equipped with Hawaii Welding equipment. Thompson's project superintendent informed Kepa of the nature and general details of the tasks that needed to be done but Kepa "had control on the manner, specific details, and methods of his own work."[145]

The court found that control of Kepa had not been transferred to Thompson. The determinant factor seemed to be that the lent employee was using heavy equipment owned by the lending employer.[146] The court noted that many jurisdictions find continuing liability in the general employer under similar circumstances on the premise that " 'the general employer would naturally reserve the control necessary to ensure that his equipment is properly used, and that a substantial part of any such operator's duties would consist of the continuing duty of maintenance of the equipment.' "[147]

The special employer in *Yoshino* seems to have had greater control over the details of the employee's work than the special employer in *Kepa*. Although the assignment of welding tasks may be analogous to the planning of menus, Chef Yoshino was given full instruction in the preparation of the menus whereas Kepa was not directed as to the manner, specific details, and methods of accomplishing the welding tasks. Furthermore, although Mid-Pacific did supply the cooking facilities and equipment, Saga apparently was responsible for maintenance and replacement of items lost or broken in the normal course of events.[148] Thus, the rationale that the general employer would tend to reserve control in order to safeguard the condition of his equipment was diminished in *Yoshino*.

Although the court was constrained to apply the statutorily created "furtherance of business" and "transfer of control" tests[149] in determining whether Yoshino was a loaned employee at the time of his injury, the court employed fewer criteria than have been judicially created and applied in other jurisdictions. Use of the phrases "essentially that of" and "control over the details" mirrors only two of the standards summarized by Professor Arthur Larson:

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[144] 56 Hawaii 544, 545 P.2d 697 (1976).

[145] *Id.* at 546, 545 P.2d 697.

[146] *Id.* at 550, 545 P.2d at 701. The court did not determine whether Kepa's work at the time of the injury furthered the primary business or trade of Thompson rather than that of Hawaii Welding because it had already decided that control had not been transferred to Thompson.

[147] 56 Hawaii at 549-50, 545 P.2d at 701, (quoting A. LARSON, 1B WORKMAN'S COMPENSATION § 48.30 (1973) [hereinafter cited as LARSON].

[148] Record at 70.

[149] Hawaii is the only State that has codified a specific test to be used in determining whether an employee is a "loaned" employee for workers' compensation purposes.

> When a general employer lends an employee to a special employer, the special employer becomes liable for worker's compensation only if
> a) the employee has made a contract of hire, express or implied, with the special employer;
> b) the work being done is *essentially that of* the special employer; and
> c) the special employer has the right to *control the details of* the work.[150]

The *Yoshino* court's construction of Hawaii's statute is therefore consistent with conditions (b) and (c) above, but it is not readily apparent from the opinion that Hawaii's lent employee provision also requires that the employee must have contracted with the special employer. However, the statute defines "employment" as "any service performed by an individual for another person under any contract of hire . . . express or implied, oral or written lawfully or unlawfully entered into."[151] It may be argued that Hawaii's lent employee provision contains a third requirement, which the court did not address; that in order for an employee to be in the "employment" of a special employer, the employee must have made a "contract of hire" with the special employer.

Even if the court had considered whether Yoshino entered a contract of hire with Saga, the inquiry likely would have led to the same result. Implied consent on the part of the loaned employee would be sufficient.[152] Consent could be implied from the employee's acceptance of the special employer's control and direction.[153] It may be persuasively argued that the claimant accepted Saga's control and direction inasmuch as he continued to work under Saga's direct supervision after Saga unequivocally told him that he was an employee of Saga and not of Mid-Pacific.[154]

B. Lawhead v. United Airlines: *What Is a Compensable Out-of-State Injury?*

In *Lawhead v. United Airlines,*[155] a second workers' compensation case,

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[150] 1B LARSON, *supra* note 147, § 48.00 (emphasis added). *See* Ryan, Inc. v. Indus. Comm'n, 39 Wis. 2d 646, _, 159 N.W. 2d 594, 596 (1968) in which it was stated that

> it is essential that the employee understands the existence of and agrees to the temporary new relationship. Unless such consensual relationship, express or implied, exists between the employee and the borrowing or special employer, there is a presumption that the employee continues in his general employment and liability under workmen's compensation act remains with the general employer . . . .

See also Alter Sales Co. v. Sykes, 190 So. 2d 746 (Fla. 1966); Emma v. Norris, 130 Ill. App. 2d 653, 264 N.E.2d 573 (1970); Bendure v. Great Lakes Pipe Line Co., 199 Kan. 696, 433 P.2d 558 (1967); Dickhaut v. Bilyeu Refrigerated Transp. Corp., 441 S.W.2d 54 (Mo. 1969).

[151] HAWAII REV. STAT. § 386-1 (1976) (amended 1978, 1979).

[152] *See* 1B LARSON, *supra* note 147, § 48.10, at 8-214 (Supp. 1979). *See also,* Martin v. Phillips Petroleum Co., 42 Cal. App. 3d 916, 117 Cal. Rptr. 269 (1974).

[153] *See* sources cited in note 150 *supra.*

[154] 59 Hawaii at 147 & n.5, 577 P.2d at 792 & n.5.

[155] 59 Hawaii 552, 584 P.2d 119 (1978).

the Hawaii Supreme Court considered two issues: First, whether the Hawaii State Labor and Industrial Relations Appeals Board had jurisdiction under the Hawaii statute[156] to determine if claimant was entitled to compensation for a work injury sustained out-of-State; and second, whether influenza is a compensable injury within the meaning of the statute.[157]

In 1968 United Airlines, a multistate corporation with bases of operation located throughout the United States, hired claimant as a flight attendant. Employment forms were completed in both California and Illinois. In 1971, claimant Lawhead transferred to United's Honolulu base and subsequently became a resident of Hawaii.

During a Honolulu-Chicago-Honolulu flight, claimant worked in the galley of the aircraft where the temperature was extremely low. During her stopover in Chicago, she stayed in a hotel provided by United for its flight attendants. The air in the rooms was very dry because of a defective heating and air-conditioning system. The next day, Lawhead awoke with a sore throat, later diagnosed by United's physician as influenza. Lawhead filed a claim for workers' compensation, which the Hawaii State Director of Labor and Industrial Relations approved and the board affirmed.[158]

The Supreme Court of Hawaii held that the board had jurisdiction to hear the claim based on the statutory provision that an employee who is injured outside the State is entitled to workers' compensation if he has been hired in the State.[159] The decision hinged on interpretation of the phrase "hired in the State".

United Airlines urged the court to adopt the "contract theory" of workers' compensation for out-of-State injuries.[160] Under this theory, the employee must be under a contract of hire created in Hawaii before he can recover compensation benefits for injuries suffered outside the State.[161] United thus argued that since its employment contract with Lawhead was not made in Hawaii, she was not entitled to workers' compensation.[162]

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[156] HAWAII REV. STAT. § 386-6 (1976).

[157] Id. § 386-3.

[158] 59 Hawaii at 552-53, 584 P.2d at 121.

[159] HAWAII REV. STAT. § 386-6 (1976) provides in pertinent part:

> If an employee who has been hired in the State suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right to compensation shall exclude all other liability of the employer for damages as provided in section 386-5. All contracts of hire of employees made within the State shall be deemed to include an agreement to that effect.

[160] Most jurisdictions have enacted statutory provisions defining which out-of-State injuries are covered by their respective workers' compensation laws. These provisions tend to fall into three categories: those that emphasize the place of contract; those that stress the place of regular employment; and those that apply to out-of-State injuries without restriction. For a summary of the relevant state statutes, see 4 LARSON, *supra* note 147, §§ 87.10-.14 (1979).

[161] *See id.* § 87.31.

[162] 59 Hawaii at 557, 584 P.2d at 123-24.

The court declined to follow the contract theory and chose to adopt the "employment relationship" test which conditions coverage for an out-of-State injury upon the existence of an employment relationship within the State at the time of claimant's injury.[163] Citing with approval a Utah case, *Fay v. Industrial Commission*,[164] the court indicated that the contract theory leads to unsatisfactory results.[165] In *Fay*, the Utah Supreme Court had rejected the contract theory in construing the similar phrase "who has been hired in this state".[166] The Utah court reasoned that the contract theory would seriously impede the administration and effectiveness of workers' compensation legislation, particularly where the employer operates in several states and the employee's job requires a great deal of interstate travel.[167] An employer could avoid liability for out-of-State injuries merely by completing the employment contract outside of the State.[168] Two other factors influenced the Utah decision: the impracticality of examining an employee's new assignment of duties to determine if there had been a new hiring or contract;[169] and the possibility that the employee seeking compensation may never have resided or even worked in the State where the contract was made.[170]

The Hawaii court found further support for its position in *Southern Underwriters v. Gallagher*,[171] where the Texas Supreme Court held that

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[163] *See* 4 LARSON, *supra* note 147, §§ 87.41-.42 (1979).

[164] 100 Utah 542, 114 P.2d 508 (1941).

[165] 59 Hawaii at 556, 584 P.2d at 123.

[166] The Utah extraterritoriality provision provided in relevant part:

> If a workman who has been hired in this state receives personal injury by accident arising out of or in the course of such employment, he shall be entitled to compensation according to the law of this state, even though such injury was received outside of this state.

UTAH REV. STAT. § 42-1-52 (1933) (current version at UTAH CODE ANN. tit. 35 (1953 & Supp. 1979)). This provision was amended before the *Fay* decision to provide "who has been *or is regularly employed* in this state." (emphasis added). Later, in Allen v. Comm'n, 110 Utah 328, 172 P.2d 669 (1946), the Utah Supreme Court construed this phrase as providing alternative grounds for finding jurisdiction. "Hired in this state" was construed to require the creation of an employment contract in the State and "regularly employed in this state" was construed to require the status of employment to be localized in the State. *Id.* at 336, 172 P.2d at 671.

It is open to speculation what the Utah legislature was attempting to accomplish by amending the above language. For example, it may be argued that the addition of "or is regularly employed" shows that the original "hired in this state" was not intended to encompass the criteria of an employment relationship. On the other hand, it may be argued that the legislative intent was merely to clarify the meaning of the provision in response to the *Fay* decision and that jurisdiction always had depended upon the existence of an employment contract or employment relationship within the State.

[167] 100 Utah at 548, 114 P.2d at 510.

[168] *Id.*

[169] *Id.*, 114 P.2d at 510-11.

[170] *Id.*, 114 P.2d at 511.

[171] 135 Tex. 41, 136 S.W.2d 590 (1940).

the phrase "who has been hired in this State"[172] did not refer to the location where the contract of hiring took place. The real question was whether claimant occupied the status of a Texas employee at the time of injury.[173] The Texas court commented:

> The primary purpose of our Compensation Law is to protect our own workmen. The purpose of the extraterritorial provision is to protect, under our law, employees *who are such in this state* under some contract of hiring, and who are incidentally or temporarily sent out of this state to perform labor or services.[174]

The Hawaii court's preference for the employment relationship theory also finds support in the statements of Professor Larson. He believes that the place-of-contract test is unrealistic because it is construed "to depend upon the sheer formality of being physically present in a particular geographical subdivision when a signature is scrawled or a word spoken into a telephone mouthpiece."[175] This technicality has no "relevance to the choice of an appropriate statute for practical compensation purposes."[176] Rather, he believes that the employment relation theory on extraterritoriality "is the more relevant to compensation theory and the least artificial."[177] He points out that the government has an interest in controlling the incidents of employee-employer relationships that exist within its jurisdiction, and one such incident is the concomitant right to receive and obligation to pay workers' compensation.[178]

Applying the employment relationship test, the court found that Lawhead was maintaining her employment status in Hawaii at the time of her out-of-State injury. She had been assigned to United's Honolulu base, her principal place of employment was in Hawaii, and she was a bona fide Hawaii resident. Thus, the court found that the board had jurisdiction to hear the appeal.[179]

The court next addressed the issue of compensability of Lawhead's claim; that is, whether influenza is an injury within the meaning of the relevant statute[180] and whether Lawhead contracted influenza as a result

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[172] The extraterritorial provisions of the workmen's compensation statute of Texas provided in relevant part: "If an employee, who has been hired in this State, sustains injury in the course of his employment, he shall be entitled to compensation . . . even though such injury was received outside of the State." TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (Vernon 1925) (amended 1927, 1931, 1977).

[173] 135 Tex. at 45, 136 S.W.2d at 592.

[174] *Id.* at 44, 136 S.W.2d at 592.

[175] 4 LARSON, *supra* note 147 § 87.34 at 16-83 to 84 (1979).

[176] *Id.* at 16-84.

[177] *Id.* § 87.41 at 16.84.

[178] *Id.*

[179] 59 Hawaii at 124, 584 P.2d at 557-58.

[180] HAWAII REV. STAT. § 386-3 (1976) provides in relevant part:

Injuries covered. If an employee suffers personal injury either by accident arising out of

of her employment. The court first held that an illness such as influenza is a "disease" and thus an injury within the meaning of the statute.[181]

In determining whether the influenza was contracted as a result of Lawhead's employment, the court emphasized that a claimant is favored by a statutory presumption[182] which places the burden on the employer to show by "substantial evidence" that the claimed injury did not result from working conditions.[183] Noting the "broad humanitarian purpose of the workers' compensation statute,"[184] the court stressed that all reasonable doubt would be resolved in favor of the claimant.[185]

United argued that claimant must first show that "she was exposed to an *increased risk* attributable to work."[186] Citing prior Hawaii cases,[187] the court quickly disposed of this argument and stated that "[t]he relevant point is not whether a claimant would more likely have suffered an injury at work than elsewhere but whether her injury occurring in the course of employment was *work-related*."[188]

There was evidence to support the finding that Lawhead's illness was proximately caused by or resulted from the nature of her employment: The aircraft in which she worked was extremely cold; the Chicago hotel in which she stayed had a faulty heating and air-conditioning system; and she immediately developed a dry and sore throat, which was verified by her fellow flight attendant and roommate and later diagnosed by United's physician. In view of the fact that United had failed to present substantial evidence to the contrary, the court held that Lawhead's influenza was

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and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, his employer or the special compensation fund shall pay compensation to the employee or his dependents as hereinafter provided.

[181] 59 Hawaii at 558, 584 P.2d at 124. Several cases in other jurisdictions have held that such illnesses as colds, influenza, and pneumonia are not compensable injuries. Schwalenstocker v. Department of Taxation & Fin., 293 N.Y. 861, 59 N.E.2d 448 (1944); Lanphier v. Air Preheater Corp., 287 N.Y. 403, 16 N.E.2d 382 (1938). The statutes construed in these cases were significantly different from the legislation before the court in *Lawhead* in that they narrowly defined compensable injuries in terms of accidents without reference to diseases.

[182] HAWAII REV. STAT. § 386-85 (1976) provides in relevant part:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:

(1) That the claim is for a work covered injury . . . .

[183] Thus, the employer has the burden of going forward with the evidence and the burden of persuasion. 59 Hawaii at 559, 584 P.2d at 124. *See* DeFries v. Association of Owners, 57 Hawaii 296, 555 P.2d 855 (1976); Akamine v. Hawaiian Packing, 53 Hawaii 406, 495 P.2d 1164 (1972).

[184] 59 Hawaii at 560, 584 P.2d at 125.

[185] *Id.* The court intimated that the presumption of compensability and the resolution of reasonable doubts in favor of claimant are crucial where the cause of the disease in uncertain.

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

[187] Akamine v. Hawaiian Packing, 53 Hawaii 406, 410-14, 495 P.2d 1164, 1167-69 (1972); Royal State Nat'l Ins. Co. v. Labor Board, 53 Hawaii 32, 39, 487 P.2d 278, 282 (1971).

[188] 59 Hawaii at 561, 584 P.2d at 125 (emphasis added).

a compensable injury.[189]

C. Cuarisma v. Urban Painters, Ltd.: *What are the Limits of Liability?*

In *Cuarisma v. Urban Painters, Ltd.*,[190] the Hawaii Supreme Court was asked to determine the interrelationship between awards for permanent total disability and for disfigurement under the Workers' Compensation Law.[191] The court specifically addressed the issues of whether, in order to avoid double compensation, the legislation precluded the award of benefits for both permanent total disability and disfigurement arising from the same work accident and whether the $35,100 statutory ceiling on an employer's aggregate liability[192] barred an award for disfigurement when that amount had already been awarded to an injured worker for permanent total disability.

On May 1, 1969,[193] claimant Cuarisma sustained an injury, the compensability of which was undisputed. The Hawaii State Labor and Industrial Relations Appeals Board awarded him lump-sum disfigurement benefits of $1,550 in addition to permanent total disability benefits of $112.50 per week. Cuarisma's employer, Urban Painters, was held liable for these weekly benefits until they totaled $35,100, after which the weekly benefits were to be paid out of a special compensation fund.[194]

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[189] *Id.*, 584 P.2d at 125-26.

[190] 59 Hawaii 409, 583 P.2d 321 (1978).

[191] HAWAII REV. STAT. ch. 386 (1968) (amended various years; see HAWAII REV. STAT. ch. 386 (1976 & Supp. 1979)). Generally, benefits were awarded for four categories of disabilities: (1) Permanent total disability, (2) temporary total disability, (3) permanent partial disability, and (4) temporary partial disability. *Id.* §§ 386-31, -32 (1968) (amended various years). That benefits for "total disability" were related to lost earning capacity can be seen from the statutory definition of "total disability": a "disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market." *Id.* § 386-1 (1968) (amended 1968, 1969).

[192] *Id.* § 386-31(c) (1968) (repealed 1972) provided in relevant part: "The aggregate liability of the employer for weekly benefit payments under subsections (a) and (b) [permanent and temporary total disability] shall not exceed the sum of $35,100." *Id.* § 386-32(c) (1968) (repealed 1972) provided in relevant part: "The aggregate liability of an employer for benefits under this section [permanent and temporary partial disability] and section 386-31(b) [temporary total disability] shall not exceed $35,100."

[193] The court decided the issues on the basis of statutes that were in effect on May 1, 1969, the date of claimant's injury.

[194] HAWAII REV. STAT. § 386-151 (1968) (amended 1973) provided in relevant part:

> There is hereby created a fund to be known as the special compensation fund which shall consist of payments made to it as provided by law. The director of finance of the State shall be custodian of the fund, and all disbursements therefrom shall be paid by him upon orders by the director of labor and industrial relations.

Id. § 386-31(a) (1968) (amended 1972) provided in relevant part: "After the employer has paid the maximum amount of weekly benefit payments specified in subsection (c), the disabled employee shall receive further compensation at the same rate from the special com-

Urban Painters and its insurer appealed this decision, contending that an award for disfigurement could not be made in addition to an award for permanent total disability and that, even if both awards could be made, appellants' liability would be subject to the $35,100 ceiling.[195] The Hawaii Supreme Court rejected both contentions and affirmed the board's decision. In view of the substantial case law and secondary authorities which have taken a contrary position,[196] the court seemed to adopt a liberal approach toward construing relevant statutory provisions in favor of the injured worker.

On the first issue, Urban Painters argued that the statutory scheme awards benefits only for loss of earning capacity and that compensation for total loss of earning capacity, resulting from total disability, necessarily satisfies all claims. After examining the structure and history of the Workers' Compensation Law,[197] the court found insufficient evidence to support the employer's argument. Other statutes employ, in varying degrees, two bases for permanent partial disability benefits: physical or mental impairment and disability to engage in an occupation measured by actual wage loss or loss in earning capacity.[198] The court concluded that the Hawaii legislature could well have decided to adopt the extent of impairment of bodily integrity, rather than loss of wage-earning capacity, as the sole measure of benefits for disfigurement.

The court focused on the 1968 statute dealing with permanent partial disability, since it contained a subsection in which the provision on disfigurement appeared.[199] This subsection set forth a schedule of benefits for a specific list of injuries and provided that the benefit be computed as a percentage of the worker's average weekly wages, to be paid weekly for a specified number of weeks. The court noted that "[d]isfigurement is not specifically designated a type of permanent partial disability by the Hawaii law"[200] and that the lump-sum method of payment, the amount of

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pensation fund."

[195] *See* note 192, *supra*.

[196] *See* note 203 *infra* and accompanying text.

[197] "Total disability" was defined as that "disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor market." HAWAII REV. STAT. § 386-1 (1968) (amended 1978, 1979). While there was no definition of "partial disability," "disability" in general was defined as "a loss or impairment of a physical or mental function." *Id.* Benefits for permanent and temporary total disability were provided for by *id.* § 386-31 (1968) (amended 1972 & later years) and those for permanent and temporary partial disability were provided for *id.* § 386-32 (1968) (amended 1970 & later years).

[198] The court pointed out that the statutes in Washington and Oregon base some benefits solely on the extent of bodily impairment regardless of preinjury earnings or loss of earning capacity. *See, e.g.*, OR. REV. STAT. § 656.214(2) (1974); WASH. REV. CODE ANN. § 51.32.080 (Supp. 1974). *See* Burton, *Permanent Partial Disabilities and Workers' Compensation*, 53 J. URB. L. 853, 867 (1976).

[199] HAWAII REV. STAT. § 386-32(a) (1968) (amended various years).

[200] 59 Hawaii at 413, 583 P.2d at 323. On the contrary, it appears that disfigurement was

which is determined by the state director of industrial relations, differs from the weekly benefits awarded for scheduled injuries.

The court found that this lump-sum award for disfigurement was "not expressly linked to preinjury earnings or to actual or assumed loss of earning capacity" and that "the statute was silent with respect to the criteria by which the director was to determine the award.[201] Consequently, the court held that "no violence would be done to the language of the statute" by saying that benefits for disfigurement were related to impairment of bodily integrity rather than to loss of earning capacity and that an award for disfigurement in addition to permanent total disability would not result in overlapping compensation.[202]

The court acknowledged that the majority viewpoint, articulated by Professor Larson, is that the underlying principle of workers' compensation contemplates that benefits relate to loss of earning capacity and not to physical injury.[203] In Professor Larson's view, "any abandonment of the pervading impairment-of-earning-capacity concept in favor of an ill-defined notion that workmen's compensation is designed to indemnify for physical injury as such could cause serious dangers to the system."[204]

Despite authority to the contrary, the court declared that the ambiguities within the Hawaii statutory framework made it difficult to find any one pervading principle underlying the compensation structure. The court did, however, cite two decisions from other jurisdictions having a similar statute which allowed the award of disfigurement benefits for bodily impairment rather than loss of earning capacity.[205]

In 1937 the Hawaii Supreme Court in *Keltz v. Cereal & Fruit Prod-*

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designated as a type of permanent partial disability because of its inclusion in the subsection dealing with permanent partial disability. However, if the court intended the quoted statement to mean that disfigurement is not specifically designated as a type of permanent partial disability for which weekly benefits are provided, then the statement would be accurate.

[201] 59 Hawaii at 414, 583 P.2d at 324.

[202] *Id.* at 413, 583 P.2d at 324.

[203] This position prevails in at least six states and in the interpretation of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1976 & Supp. 1 1979). *See, e.g.*, Todd Shipyards Corp. v. Pillsbury, 136 F. Supp. 846 (S.D. Cal. 1955), *aff'd sub nom.* Rupert v. Todd Shipyards Corp., 239 F.2d 273 (9th Cir. 1956); Miller v. General Chem. Div., 128 So. 2d 39 (La. App. 1961); Gallman v. Walt's Tree Serv., Inc., 43 App. Div. 2d 419, 352 N.Y.S.2d 516 (1974); Stanley v. Hyman-Michaels Co., 22 S.E.2d 570 (N.C. 1942); Garrett's Furniture Co. v. Morgan, 498 P.2d 1380 (Okla. 1972); Baffi v. Lehigh Valley Coal Co., 87 Pa. Super. Ct. 579 (1926); Burnette v. Startex Mills, 195 S.C. 118, 10 S.E.2d 164 (1940).

[204] 59 Hawaii at 416, 583 P.2d at 325 (quoting 2 LARSON, *supra* note 147). *See also* E. BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAW (1974).

[205] Buechler v. North Dakota Workmen's Compensation Bureau, 222 N.W.2d 858 (N.D. 1974) (permanent total disability benefit was for loss of earning capacity, and nonscheduled permanent partial disability benefit was for bodily impairment; the two awards did not result in overlapping compensation); Matthews v. Falvey Linen Supply Inc., 110 R.I. 558, 294 A.2d 398 (1972) (disfigurement award is for bodily impairment rather than loss of earning capacity).

ucts, Ltd.,[206] determined that "the purpose of the [Hawaii Workmen's Compensation] law is not to provide compensation for physical suffering but is solely for the purpose of compensating the injured employee for the loss or reduction of earning power."[207] However, the court in *Cuarisma* distinguished *Keltz* on the ground that the statute had been substantially changed. When *Keltz* was decided, the weekly benefit for nonscheduled permanent partial disability was measured in terms of loss of earning capacity computed as a percentage of the difference between the employee's average weekly wages and his wage earning capacity as reduced by the disability.[208] This earning loss measure was replaced by a method which takes a percentage of the benefit recoverable for a comparable scheduled partial disability or a benefit based on a percentage of total disability.[209] The court thus concluded that the exclusive purpose of compensating for loss of earning power was no longer apparent in the statute.

The court found further support in related legislative history. The legislative history behind the 1963 rewriting of the workmen's compensation law also made it clear that "disability" meant bodily impairment, rather than impairment of earning power, and that it was bodily impairment which formed the basis for compensability in Hawaii.[210] The court pointed out that studies and materials relied upon by the legislative drafters explicitly emphasized that compensation for permanent partial disability should be based on bodily impairment and not impairment of earning capacity.[211]

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[206] 34 Hawaii 317 (1937).

[207] *Id.* at 319.

[208] REV. LAWS HAWAII § 7493 (1935) (current version at HAWAII REV. STAT. § 386-32(a) (1976)).

[209] HAWAII REV. STAT. § 386-32(a) (1968) (amended 1970 & later years).

[210] The Workmen's Compensation Law, REV. LAWS HAWAII ch. 97 (1955), was rewritten by Act 116, 1963 Hawaii Sess. Laws 103. The definition of "partial disability" which included the "diminished ability to obtain employment owing to disfigurement" was deleted, and the currently existing definitions of "disability" and "total disability", found in HAWAII REV. STAT. § 386-1 (1976) were added: " 'Disability' means loss or impairment of a physical or mental function . . . . 'Total disability' means disability of such an extent that the disabled employee has no reasonable prospect of finding regular employment of any kind in the normal labor markert." The reasons for these changes were as follows: "A definition of disability has been added so as to make clear that disability means bodily impairment and not impairment of earning powers. The basis of compensability in Hawaii is loss of physical or mental functioning, regardless of whether or not it entails loss of earnings. . . ." S. STAND. COMM. REP. No. 334, 2d Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 788, 789 (1963). " 'Total disability' is defined in the customary manner, but taking account of the fact that the concept of disability in Hawaii is purely functional and physiological and varies from that accepted in the majority of American jurisdictions." *Id.* at 791.

[211] *See, e.g.*, S. RIESENFIELD, STUDY OF THE WORKMEN'S COMPENSATION LAW IN HAWAII 106 (Legislative Reference Bureau Report No. 1, Jan. 1963) (recommendation that minimum weekly benefit to be paid workers earning less than $18 a week be $18, rather than 100% of actual earnings, in order to compensate for loss of bodily integrity); S. STAND. COMM. REP. No. 334, 2d Hawaii Leg., 1st Sess., *reprinted in* SENATE JOURNAL 788, 791 (1963) (proposal to set a fixed weekly benefit as "an indemnity for an injury received which makes the in-

The court also drew support from a committee report on legislation,[212] which became effective after the date of claimant's injury.[213] The report reiterated the view that "permanent partial disability compensation is an indemnity payment for the loss or impairment of a physical function and, unlike temporary total disability benefits, is not compensation to replace current loss of wages."[214] Thus, the court concluded that the Hawaii statute did not preclude awards for both permanent total disability and for disfigurement resulting from the same work accident.

The court next addressed the issue of whether the employer's $35,100 maximum liability[215] applied to a combination of benefits awarded for permanent total disability and disfigurement. If this were so, the disfigurement award would have to be borne by the special compensation fund[216] rather than by the employer because the maximum amount would have been exhausted by the award for permanent total disability. In deciding this issue, the court examined past amendments to the relevant statutory provision.

Generally, there are four catagories of disabilities for which benefits are payable: (1) Permanent total disability, (2) temporary total disability, (3) permanent partial disability, and (4) temporary partial disability.[217] Prior to the 1963 amendments,[218] an employer's maximum aggregate liability for any combination of these disabilities was $25,000.[219] However, the 1963 amendments fixed an employer's maximum liability for each of the combinations of (1) permanent and temporary total disability benefits[220] and (2) permanent and temporary partial disability benefits and tempo-

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jured worker less than a whole man"; the rationale behind this flat rate of compensation was that the measure of seriousness of a bodily impairment was not the worker's previous salary but the nature of the injury).

[212] Act 25, 1969 HAWAII SESS. LAWS 29, provided that payment of benefits, after the employer had paid the maximum amount for which he was liable, was to be made out of the special compensation fund established by statute in 1955.

[213] The court noted that although the legislation became effective after Cuarisma's May 1, 1969 injury, the legislative history was still entitled to some weight as a secondary source of intent.

[214] H. STAND. COMM. REP. No. 193, 5th Hawaii Leg., 1st Sess., *reprinted in* HOUSE JOURNAL 702 (1969).

[215] *See* note 192 *supra.*

[216] *Id.*

[217] *See* note 172 *supra.*

[218] Act 116, 1963 HAWAII SESS. LAWS 103.

[219] REV. LAWS HAWAII § 97-26(d) (1955) (repealed 1963) provided in relevant part: "the total liability of an employer for compensation under this section [permanent and temporary partial disability] and under section 97-25 [permanent and temporary total disability], *taken together*, shall not exceed in the aggregate the sum of $25,000." (emphasis added).

[220] The amended law provided in relevant part: "The aggregate liability of the employer for weekly benefit payments under both preceding subsections [permanent and temporary total disability] shall not exceed the sum of $25,000." REV. LAWS HAWAII § 97-30(c) (1955) (current version at HAWAII REV. STAT. § 386-31 (Supp. 1979).

rary total disability benefits[221] but were silent as to the combination of permanent total disability benefits and disfigurement or other partial disability benefits.

The court found that the exclusion of the combination of permanent total disability benefits and disfigurement benefits from the statutorily established maximum liability was a "deliberate legislative action."[222] The court concluded that Urban Painters was therefore subject to liability for the disfigurement award in addition to its liability, up to $35,100, for permanent total disability benefits.

Because the legislature deleted the ceiling on an employer's liability[223] the issue of whether an employer's $35,100 maximum aggregate liability precludes an award for disfigurement, where the maximum amount has been awarded for permanent total disability, cannot arise under the present statutes.[224] Thus, an employer is fully liable for injuries sustained by his workers after the May 15, 1972 effective date of the amendments.

In summary, the court's opinion evidences a judicial effort to reach an outcome favorable to the plaintiff. When the *Cuarisma* decision is viewed in the context of other recent workers' compensation cases decided by the labor and industrial relations appeals board, it is clear that the Hawaii Supreme Court, like the appeals board, favors liberal construction of the law, which works to an injured worker's benefit.[225]

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[221] *Id.* § 97-31(c) provided in relevant part: "The aggregate liability of an employer for benefits under this section [permanent and temporary partial disability] and section 97-30(b) [temporary total disability] shall not exceed $25,000 . . . ."

[222] 59 Hawaii at 424, 583 P.2d at 329.

[223] Act 42, 1972 HAWAII SESS. LAWS 218.

[224] The first issue of whether an award for disfigurement may be given in addition to an award for permanent total disability may still arise since the present law limits an employer's liability for disability benefits. HAWAII REV. STAT. § 386-31 (1976 & Supp. 1979) limits the weekly benefits payable for permanent and temporary total disability to the average weekly wage in Hawaii as determined by the state director of labor and industrial relations.

[225] *See, e.g.*, Murata v. Hilo Motors, 78-1 HAWAII LEGAL RPTR. 165 (L.I.R. App. Bd. Nov. 3, 1977), *appeal docketed*, No. 6851 (Hawaii Dec. 27, 1977) (mother of deceased worker who had received 60% of her support from her son was "wholly dependent" upon him and therefore entitled to receive 50% of his average weekly wages); Matsuda v. Industrial Welding, Inc., 78-1 HAWAII LEGAL RPTR. 23 (L.I.R. App. Bd. Oct. 25, 1977) (application of both the economic loss theory and the whole-man theory in awarding permanent partial disability for loss of claimant's toes); Dettling v. Hawaiians Huddle, 78-1 HAWAII LEGAL RPTR. 17 (L.I.R. App. Bd. Sept. 8, 1977) (claimant, who had been injured after the first of twelve football games, was to be compensated at the highest value to him); Fukuhara v. Orchids of Hawaii, 78-1 HAWAII LEGAL RPTR. 1 (L.I.R. App. Bd. June 29, 1977) (upheld award of benefits to employees because employer waived its statute-of-limitations defense through its failure to report the injuries as required by the statute and by its failure to contradict statements made to claimants by a labor department field representative that timely written claims were unnecessary).

CONTRACTS AND COMMERCIAL LAW

Milton Seligson*

I. CONTRACTS

In 1978 the Hawaii Supreme Court had cause to grapple with a number of divergent contract problems, without announcing extraordinary, ground-breaking departures from established doctrine. It seems fair to observe, however, that Hawaii contract law is a lot more fluid and uncertain than it would appear. In some significant areas the case law is sparse, with some glaring gaps that remain to be filled. Many of the leading cases are older decisions which antedate recent social and economic developments, reflect outmoded concepts, and fail to take account of modern doctrinal and policy trends.

These changes of direction in contract law are reflected in the substance and spirit of both the sales article, Article 2, of the Uniform Commercial Code (U.C.C.), which has now been adopted in forty-nine states, including Hawaii, and the revised version of the *Restatement of Contracts*. The latter is still in tentative draft form but is already regarded as authoritative by many courts and commentators. Reforms adopted in the U.C.C.'s provisions have had a profound influence on the redrafted rules of the *Restatement of Contracts*. This influence goes far beyond the mandatory application of Article 2 of the U.C.C. to transactions for the sale of goods and has helped to reshape general contract doctrines, as is apparent from the comments that accompany the *Restatement's* tentative drafts. Both the U.C.C. and the revised *Restatement* have made radical inroads into traditional concepts, thereby necessitating a reevaluation of many rules derived from earlier case law on the subject.

What all this means for Hawaii is that the U.C.C. and the revised *Restatement* are destined to play an increasingly dominant role in judicial decisionmaking in all areas of contract law. There are signs that this judicial reappraisal is already under way and that, as appropriate cases present themselves for adjudication, the Hawaii Supreme Court will perforce draw heavily on these sources in remolding, expanding, and modernizing our contract law. The Court of Appeals for the Ninth Circuit will no

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doubt continue, as it did in the year under review, to give added momentum to this process by generous reference to the same sources when required to search for the applicable Hawaii law.

The message for contract practitioners is that rigid adherence to older precedent may be misleading and even downright dangerous, if it is untempered by a judicious appreciation of the impact of changes wrought by the U.C.C. and the revised *Restatement*. As in so many other areas, this may make predictability devilishly difficult, but it ushers in a new era of creativity in contract law for judges and practitioners alike!

A. Formation

It is a trite but nonetheless fundamental principle of contract law that a binding contract requires, in addition to the element of consideration, the mutual assent of all the contracting parties to its terms.[1] Such mutual assent must be manifested by words or conduct of each of the parties which reasonably indicate to the other or others an intention to be bound.[2]

The necessary manifestation of mutual assent was lacking in *Jones v. Don L. Gordon Corp.*[3] and resulted in the reversal of a judgment awarding damages to a buyer against the manufacturer of a prefabricated steel building. The buyer, Jones, had originally contracted, not with the manufacturer, Star Manufacturing Co. (Star), but with its Hawaii distributor, Don L. Gordon Corp. (Gordon), to purchase three prefabricated steel buildings to be manufactured on the mainland by Star.

There was a delay in obtaining the release of the buildings from the freight agents after their arrival in Honolulu, and, when eventually delivered, certain of the materials comprising them were found to be defective. Jones, who had paid for them in full prior to delivery, sued both the distributor (Gordon) and the manufacturer (Star) for the resulting damages.

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[1] CALAMARI & PERILLO, THE LAW OF CONTRACTS 22 (2d ed., 1977) [hereinafter cited as CALAMARI & PERILLO]; RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (Tent. Drafts Nos. 1-7, 1973) [hereinafter cited as RESTATEMENT (SECOND) OF CONTRACTS].

[2] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at §§ 20, 21. This principle was reaffirmed by the Hawaii Supreme Court in its earlier decision in Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Hawaii 466, 470-71, 540 P.2d 978, 982 (1975) (citations omitted), where it was said:

> The existence of mutual assent or intent to accept is determined by an objective standard. A party's words or acts are judged under a standard of reasonableness in determining whether he has manifested an objective intention to agree. All reasonable meanings will be imputed as representative of a party's corresponding objective intention. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties.

For a discussion of the objective and subjective theories of intention, see CALAMARI & PERILLO, *supra* note 1, at 23-24.

[3] 60 Hawaii 12, 15, 586 P.2d 1024, 1027 (1978).

The circuit court, in a jury-waived trial, found that there was a direct contractual relationship between Jones and Star—influenced no doubt by the repeated direct telephone calls made in vain by Jones to Star with the object of obtaining release of the buildings to him—and allowed Jones' claim for damages for late delivery and defective materials against Star. Jones' claim against Gordon, the distributor, was dismissed, however.

On appeal, Justice Kidwell, on behalf of a unanimous court, held that the circuit court had erroneously found a novation of the original contract, in which Star was substituted for Gordon as the seller. There was no evidence in the record to support this conclusion, the repeated telephone calls from Jones to Star being insufficient for this purpose. The evidence showed neither that agreement was ever reached between Jones and Star as to the release of the building nor the manifestation of an intent that Star should be substituted for Gordon in the purchase contract. It is of course axiomatic that a true novation of the contract between Jones and Gordon would have required the assent of Jones, as obligee, as well as that of the new obligor, Star, coupled with the agreement of Jones to discharge Gordon from its duties as original obligor.[4]

Surprisingly, the court did not refer to the relevant provisions of the Hawaii U.C.C. pertaining to agreement.[5] Clearly, these would have dictated the same result, even though contracts are easier to form under the U.C.C. than by the pure offer and acceptance formula of the common law.[6]

Consequently, Jones was not entitled to recover damages on the basis of a direct contractual relationship with Star. The court equated Jones' situation with that of an "incidental beneficiary" of the contract between Gordon and Star for the supply of goods which Gordon had contracted to sell to Jones. Such a beneficiary—as opposed to an "intended beneficiary"—has no action against the original parties to the contract to enforce their duties thereunder.[7] In a logical extension of its holding that

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[4] RESTATEMENT OF CONTRACTS §§ 424, 428, 430 (1932); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at §§ 150(3), Comment d, 155, 161. *See also* CALAMARI & PERILLO, *supra* note 1, at 667. Many authorities seem to make somewhat heavy analytical weather of what is essentially an elementary proposition.

[5] HAWAII REV. STAT. §§ 490:2-204(1), -206(1), -207(1), -207(3) (1976). The court did cite its earlier ruling in Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Hawaii 466, 540 P.2d 978 (1975), a rare and important Hawaii decision on Article 2 of the U.C.C. in which it had applied the U.C.C. provisions to the question of formation of an agreement. The subject matter of the sale in *Jones* would appear to have been movables which qualified as goods under HAWAII REV. STAT. § 490:2-105(1) (1976), and therefore also were governed by the provisions of Article 2.

[6] WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE U.C.C. 22 (1972).

[7] 60 Hawaii at 15-16, 586 P.2d at 1027 (citing RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 133); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 133, Comments d, e. Jones could not reasonably have relied on Star's promise to Gordon to supply the goods as conferring a right on *him* (Jones), and consequently there was no intent to benefit him. Commentators propound a test based on whether performance is to run di-

Star had not been substituted for Gordon as seller, the court also reversed the lower court's judgment in favor of Gordon on Jones' claims against that distributor and dismissed Star's cross-claim against Gordon.

B. Parol Evidence and Interpretation

United States v. Haas & Haynie Corp.[8] is an important decision of the Court of Appeals for the Ninth Circuit involving the application of Hawaii contract law. In that case, suit had been brought under the Miller Act[9] by a Hawaii subcontractor against a California construction company which was the main contractor on a federal construction project. The United States was not, however, an actual party. The court of appeals applied the law of Hawaii as being most appropriate to the interpretation of an ambiguous contractual provision, where the contract was both executed and performed in Hawaii. Noting the paucity of Hawaii case law regarding contract interpretation, however, the court stated:

> [W]e will have to assume that a Hawaii state court would apply general contract principles. This assumption is justified by reference to the Restatement of Contracts in several Hawaii cases. *In Re* [*sic*] *Taxes of Aiea Dairy, Ltd.*, 46 Haw. 292, 380 P.2d 156 (1963); *Kaiser Hawaii Kai Development Co. v. Murray*, 49 Haw. 214, 412 P.2d 925 (1966). We will look to the Restatement (Second) of Contracts as a primary source for the most recent statement of these general principles.[10]

The case arose from a contract between the construction company, Haas & Haynie (H&H) and the United States for the construction of the new United States Courthouse and Federal Office Building in Honolulu. H&H as prime contractor entered into a subcontract with Union Building Materials Corporation (UBM) for the supply and installation of carpeting and padding for the federal building. The subcontract documents made provision for progress payments with respect to materials delivered by UBM but not yet installed, based upon the quantity and value of such

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rectly to the promisee (in this case Gordon) or to the third party (Jones). *See* CALAMARI & PERILLO, *supra* note 1, at 608-09. Only in the latter event would the third party be an *intended*, as opposed to an *incidental*, beneficiary. Under that test, too, Jones would have failed since Star did not undertake to deliver the goods directly to him.

[8] 577 F.2d 568 (9th Cir. 1978).

[9] 40 U.S.C. § 270b (1976).

[10] 577 F.2d at 572 n.1. It is important to note that the Hawaii Supreme Court itself has recently cited the second *Restatement* in support of its ruling in Jones v. Don L. Gordon Corp., 60 Hawaii 12, 586 P.2d 1024 (1978), on the question of the rights of an incidental beneficiary. *See* note 7 *supra* and accompanying text. Also, although there was a dissenting opinion in *Haas & Haynie*, the dissent did not disagree with the approach of the majority but differed rather on the application of the principles to the facts. *See* 577 F.2d at 574 (Renfrew, J., dissenting).

materials. They did not, however, make it clear whether a proportion of the overall profit and overhead was intended to be included in such payments.[11] UBM ordered the required carpet padding for which the manufacturer's price was $68,000, but UBM's price was $125,000. UBM submitted an invoice to H&H for the full $125,000, which H&H in turn forwarded to the government, receiving full payment thereon. H&H, however, refused to pay the full amount to UBM.

The district court found in favor of UBM on the grounds that under the circumstances UBM was unilaterally mistaken about the meaning of the contract and that H&H as the drafter of the contract was accountable for failing to inform UBM of its mistake. As indicated, the court of appeals preferred to define the issue as one involving the proper interpretation of an ambiguous contract, finding the lower court's unilateral mistake analysis inept.

The court of appeals then embarked on an impressive juristic *tour de force*, reviewing the principles of contractual interpretation as gleaned mainly from the *Restatement (Second) of Contracts* and the provisions of the U.C.C. The court also raised, without deciding, the interesting question of the applicability of Article 2 of the U.C.C. to a contract involving both the sale of goods and the provision of services.[12] The close similarity between the U.C.C. and *Restatement (Second)* provisions of contractual interpretation made this unnecessary for either would have produced the same result.[13]

Finding that the contract was ambiguous as to the amount of payment due on delivery of material, the court considered it proper for the trial court to have heard extrinsic evidence to ascertain the true intent of the parties. The court might have noted that this finding was consistent with the recent ruling of the Hawaii Supreme Court in *Hokama v. Relinc Corp.*,[14] to the effect that parol evidence is always admissible in order to

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[11] The subcontract agreement provided for a breakdown of the contract price, stating that "the values in the breakdown will be used for determining progress payments. The Contractor's overhead, profit and cost of bonds shall be prorated through the life of the contract." 577 F.2d at 571.

[12] The court pointed out that the modern trend is to apply Article 2 to such mixed contracts. *Id.* at 572 n.2. It seems extremely unlikely that the Hawaii Supreme Court would disagree when it has to rule on the question.

[13] *Compare* HAWAII REV. STAT. §§ 490:1-205, :2-202, -208(1), -208(2) (1976), *with* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at §§ 246 (trade usage), 238 (admissibility of parol evidence), 228(4) (course of dealing), 229 (standards of preference in interpretation).

[14] 57 Hawaii 470, 476, 559 P.2d 279, 283 (1977). There were no other decisions involving the parol evidence rule in 1978, but reference may usefully be had to Interform Co. v. Mitchell, 575 F.2d 1270 (9th Cir. 1978). That case, which involved Idaho law, contains a helpful analysis of the contrasting views of Professors Williston and Corbin, as reflected respectively in the first and second *Restatement of Contracts*, as to the circumstances in which extrinsic evidence will be admitted when there is a written contract. The court favored the more liberal Corbin view with its focus on the intention of the parties, rather than the written document, as adopted in RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at

clarify ambiguity in a written agreement, irrespective of whether such ambiguity is latent or patent, meaning apparent on the face of the instrument itself.

The next issue addressed by the court of appeals was whether either party knew or had reason to know of the conflicting meaning given to the contract by the other. The reason for this inquiry was the rule in section 21A of the *Restatement (Second) of Contracts*: If neither party knew or had reason to know of a contrary meaning attached by the other, then there is no contract; but if one of the parties knew or had reason to know of the conflict in attached meanings, then the contract will be interpreted in favor of the party who was not aware of such conflict.[15] Relying on the district court's findings of fact, the court of appeals held that even in the absence of actual knowledge, "H&H *had reason to know* that UBM expected recovery of some profit and overhead at the time of delivery of the material."[16] Consequently, H&H had reason to know the meaning UBM attached to the contract.

But the district court had found that there was a trade custom not to allow for the recovery of profit and overhead on delivery materials and that H&H's interpretation reflected this custom. Did this not mean that UBM must be taken to have known of H&H's interpretation? Not so, ruled the court of appeals. UBM was a newcomer to the field of carpet subcontracting and had no reason to know of the trade custom in question. Accordingly, UBM could not be said to have "reason to know" of H&H's meaning.

Two other rules of interpretation were used to support the court's holding. First, the conduct of the parties during performance of the agreement—the so-called course of performance[17]—served as evidence of the parties' intent. Here, H&H's acceptance of UBM's invoice for the full $125,000, its action in forwarding it to the government for payment, and its receipt for the full payment, while not conclusive, suggested acquiescence in UBM's interpretation and supported the court's conclusion. Second, the well-established rule of interpretation contra proferentem (against the preparer of the document) in the event of unresolved ambiguity also dictated the same result. The standard form contract in question had been drafted by H&H and presented to UBM with little or no chance for negotiation, and consequently "any remaining ambiguity should be resolved against H&H, the draftsman."[18]

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§ 240 and in U.C.C. § 2-202. Consequently, the court upheld the admission of extrinsic evidence by the trial court which had the effect of showing that a transaction involving written "purchase orders" was in reality a contract of lease.

[15] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 21A.

[16] 577 F.2d at 573 (emphasis added).

[17] HAWAII REV. STAT. § 490:2-208(1) (1976); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 228(4).

[18] 577 F.2d at 574. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 232; *cf.* Gushiken v. Shell Oil Co., 35 Hawaii 402, 416 (1940) (adopting rule requiring doubts arising

The thrust of the dissenting opinion was that the district court's findings of fact were contradictory, irrelevant, and inadequate for the purpose of resolving the issues of interpretation related to whether either party knew or had reason to know of the other's interpretation and as to the effect of trade usage. The application of the subsidiary aids to interpretation, course of performance and construction against the drafting party, were not sufficient to solve the interpretation problem in the absence of clear evidence of intent. Accordingly, the dissenting judge favored a remand of the case to the district court for preparation of supplementary findings of fact and conclusions of law.[19]

In any event, the Ninth Circuit's opinion in *United States v. Haas & Haynie Corp.* is likely to be important authority for applying the standards of contractual interpretation espoused in the proposed *Restatement (Second) of Contracts* and for their final adoption by the American Law Institute. Moreover, it will serve as cogent precedent in the future in contract interpretation disputes in Hawaii.

Where a contractual provision is capable of more than one meaning, it is a time-honored rule of interpretation that in the absence of other more reliable indicia of the parties' intent, the ambiguity should be resolved against the drafter of the contract. This is the so-called contra proferentem rule of construction which was used as a subsidiary aid to interpretation in *United States v. Haas & Haynie Corp.* The rule is particularly apt where a standard form contract is used and the party providing the form occupies a superior bargaining position, as was demonstrated in *Arakawa v. Limco, Ltd.*[20] There a certain Subscription and Purchase Agreement (SPA) had been prepared by Limco, the developer of a proposed condominium housing project, in consultation with the FHA. Calvin and others entered into SPAs with Limco for the purchasing of condo apartments, but the SPAs had no date of execution of effectiveness. A dispute arose concerning the construction of a cancellation provision in the SPAs. This provision entitled Limco to cancel the agreement if title to the unit sold was not conveyed to the purchaser "in accordance with FHA requirements on or before one (1) year."[21] Limco contended that this meant within one year after the signing of the SPA, and, since a conveyance in accordance with FHA requirements had not been made within that period, it had the right to cancel. The purchasers, on the other hand, claimed that the quoted provision gave a right to terminate only if there was a failure to convey in accordance with FHA requirements within one year after completion of the building.[22]

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from ambiguity of language to be resolved against speaker or writer using inexact expression).

[19] 577 F.2d at 576 (Renfrew, J., dissenting).

[20] 60 Hawaii 154, 587 P.2d 1216 (1978).

[21] *Id.* at 155, 587 P.2d at 1217 (quoting the SPA).

[22] *Id.* at 156-57, 587 P.2d at 1218.

Justice Kidwell found that the ambiguity as to when the one year period was to commence had been created by Limco's attorney's insertion of the term "one year" in a blank space intended for a specific date and that this ambiguity should be resolved against Limco as the preparer of the agreements. Moreover, the court found that, in any event, Limco had failed to adduce evidence of the dates of execution of the various undated SPAs sufficient to show that the right to cancellation had arisen within a period of one year of such execution. Moral of story: Blanks in standard form contracts should be meticulously filled in, and any ambiguities should be removed by the drafter before or at the time of execution to avoid their being later resolved against the drafter by the court.

C. *Estoppel and Detrimental Reliance*

There were some important decisions in the year under review, applying the principles of estoppel and detrimental reliance in a contractual setting. It is now well established that detrimental reliance may provide a basis for enforcement of an agreement or promise, notwithstanding the absence of consideration or of compliance with the Statute of Frauds.[23] The doctrine of promissory estoppel which covers these cases can logically be extended to include the case of a waiver of a contractual condition (importing a promise not to enforce) which is relied on by the other party to his detriment. Yet this type of case has traditionally been viewed as an application of the concept of equitable estoppel in Hawaii as well as in other states.[24]

In *Doherty v. Hartford Insurance Group*,[25] the Hawaii Supreme Court again used the traditional analysis rather than that of promissory estoppel. *Doherty* involved an unsuccessful claim by a boatowner on a marine insurance policy. Suit was filed more than two years after the vessel, the *No Hu Hu*, was damaged, whereas a provision in the policy barred suit failing commencement of an action "within twelve (12) months next after the occurrence of the loss."[26] The court ruled that this private statute of limitations was enforceable, being not less than the minimum permissible limitation period of one year from the date of loss as prescribed for marine insurance policies by section 431-426(a)(3) of the Hawaii Revised

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[23] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 90. *Cf. id.* §§ 45, 89B(2), 89D(c) reflecting the application of detrimental reliance principles respectively to an offer for a unilateral contract, an unaccepted offer which induces action or forebearance, and a modification of an executory contract. *See also* CALAMARI & PERILLO, *supra* note 1, at 202, 211. Hawaii authorities include McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970), and Anthony v. Hilo Elec. Light Co., 50 Hawaii 453, 442 P.2d 64 (1968).

[24] *See* CALAMARI & PERILLO, *supra* note 1, at 209.

[25] 58 Hawaii 570, 574 P.2d 132 (1978).

[26] *Id.* at 572, 574 P.2d at 134 (quoting the pertinent contractual provision).

Statutes (1976).[27]

The boatowner argued, however, that the insurance company was estopped from raising the time limitation in the insurance policy as a defense. The court made short shrift of this argument. The company consistently had denied liability and had not negotiated with the plaintiff. Consequently, plaintiff was unable to establish either prerequisite for asserting equitable estoppel; that is, he had relied to his detriment on representations or conduct of the insurer which misled him, and his reliance thereon was reasonable. The decision of the lower court in favor of the insurance company was accordingly affirmed. Similar inability to show detrimental reliance on representations which were allegedly made by the State in a land grant description and accompanying map, with respect to the boundaries of the land, resulted in the rejection of equitable estoppel in *In re Mokuleia Ranch & Land Co.*[28]

The court's application of the same principle in *State v. Yamada & Sons*[29] seems questionable, however. The facts were complex but fascinating. A subcontractor on a state bridge construction project, Mars Constructors, Inc. (Mars), sued Yamada, the general contractor, for the cost of materials and labor furnished under a subcontract.[30] The trial court found an amount of $29,104.21 to be owing but reduced this sum by offsets to an amount of $5,171.67. On appeal, the issue presented was whether Yamada was entitled to set off an amount of $21,418.48 owed to Yamada, not by appellant Mars, but by another building contractor, Martin Constructors, Inc. (Martin), as held by the trial court. Martin had changed its name from *Mars* Constructors, Inc. to *Martin* Constructors, Inc. in September 1970. Shortly thereafter, appellant corporation was formed and took the name relinquished by Martin only some three weeks earlier. Sole control of Martin was at all times vested in one Lloyd M. Martin. His son-in-law, Stephen J. Herbert, was the sole stockholder in the new corporation, Mars, and was also president of both Martin and Mars. The two corporations were both engaged in construction work, used the same office and business address, and shared common employees. Mars also lent $150,000 to Martin to enable it to carry out projects in progress. Moreover, in June 1970, at a time when Martin still bore the name Mars and prior to appellant's incorporation, Martin (represented by its president, Herbert) and Yamada had entered into a subcontract with respect to a housing project, with Yamada as subcontractor. The bulk of Martin's aforementioned indebtedness to Yamada arose from this subcontract.

In October 1970, shortly after appellant was formed with the name of

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[27] *Id.*

[28] 59 Hawaii 534, 583 P.2d 991 (1978).

[29] 59 Hawaii 543, 584 P.2d 114 (1978).

[30] The suit was brought in the name of the State pursuant to HAWAII REV. STAT. § 407-17 (1976).

Mars, Yamada entered into a second subcontract with Herbert, the latter acting this time in his capacity as president of the new Mars. This subcontract related to the state bridge construction project, but this time Yamada was the main contractor and Mars the subcontractor. Yamada was not informed nor was it aware of the fact that the old Mars had changed its name to Martin. Moreover, Yamada was blissfully ignorant of the fact that it was dealing with a different corporation, the new Mars, and not the one with which it had entered into the subcontract for the housing project. The second subcontract did not contain the usual clause permitting Yamada to retain ten percent of the subcontract price until completion, but this was attributed by Yamada's president to the existence of yet another, third subcontract between Yamada and Martin, under which Martin was the general contractor and Yamada the subcontractor.

The trial court felt that under the circumstances the separate corporate entities of Mars and Martin should be disregarded and that an offset of Martin's debt to Yamada should be allowed against Mars' claim against Yamada. Not so, said the Hawaii Supreme Court. Yamada was led to believe that it was dealing with Martin, but no assets or business of Martin were transferred to Mars, except for the name, and there was no prejudice to Martin's creditors: "Nor is there any suggestion that there was identity of ownership or interest between the two corporations. While family relationships exist between those owning or controlling the stock . . . there is nothing to show that they acted in each other's interest."[31] This analysis seems of dubious validity, to say the least, when regard is had to Herbert's position as common president of the two companies, their financial interdependence, and their shared facilities and employees. "Identity of interest" there surely was!

Moreover, the court's refusal to allow Yamada to invoke equitable estoppel on the basis that there was no showing of detrimental reliance by Yamada is equally open to question. The court found that there had been no detriment to Yamada from its dealings with appellant, and that

> [n]o ground appears for ignoring the separate identities of appellant and Martin, or for estopping appellant from asserting their separate identities. The conduct of appellant in misleading those with which it did business as to its identity with Martin should not be condoned, but it did not have the effect claimed for it in this case.[32]

In the first place, the court's approach to the concept of detrimental reliance appears unduly constricted. Clearly, the reliance requirement was satisfied. Mars by its conduct "caused Yamada to believe that it was deal-

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[31] 59 Hawaii at 546, 584 P.2d at 116.

[32] *Id.* at 548, 584 P.2d at 117.

ing with Martin."[33] On the strength of that misunderstanding, Yamada concluded a further subcontract, with the new Mars, an untried corporation with which Yamada in reality had not had previous dealings. As far as Yamada knew, the corporation with which it was contracting to perform work as subcontractor on the bridge project was the main contractor with which it was already associated as subcontractor on the housing project. Moreover, the very fact of entering into the agreement with the new and different Mars, in reliance upon it being the old, meant a substantial change in Yamada's position to its prejudice,[34] since it would not be able to offset monies owed to it as subcontractor by the old Mars (Martin) under the earlier subcontract, against monies owed by it to the new Mars, the subcontractor under the later subcontract. This would seem to have been quite enough detriment on which to ground an equitable estoppel precluding the appellant from asserting a lack of identity or interest between Mars and Martin. For, as a result of being misled by the appellant, Yamada would have to bring a separate, independent action to recover any money owed it as subcontractor by Martin, rather than being able to offset this claim against its own indebtedness to appellant.[35]

Moreover, Mars-Herbert's concealment of the change of corporate identity and its-his taking advantage of Yamada's misapprehension would seem to qualify "fair and square" for characterization as inequitable or fraudulent conduct engaged in by the party sought to be estopped or, at the very least, to have constituted gross negligence amounting to constructive fraud, thereby triggering the application of the estoppel doctrine.[36] Had a setoff of Martin's debt to Yamada been permitted against Yamada's debt to Mars, one cannot help feeling that more than poetic justice would have been served!

It is to be hoped that the Hawaii Supreme Court will in the future adopt a broader and at the same time more realistically flexible standard when it again addresses the detriment element in estoppel. Estoppel is, after all, an equitable doctrine, designed to circumvent the injustice which may result from a too technical application of strict legal princi-

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[33] *Id.* at 547, 584 P.2d at 117.

[34] The older authorities speak of an alteration in the representee's previous position. *See, e.g.*, Molokai Ranch, Ltd. v. Morris, 36 Hawaii 219, 223 (1942). This is still the formulation in English law from which the doctrine is derived. *See* 16 HALSBURY'S LAWS OF ENGLAND § 1601 (4th ed. 1976) [hereinafter cited as HALSBURY'S LAWS].

[35] In English law "the parting with money, and being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the right to recover it, may amount to an alteration of position to the payer's prejudice within the rule." HALSBURY'S LAWS, *supra* note 34, at § 1601 (footnote omitted).

[36] The court in effect found that Mars deliberately misled those with which it dealt as to its identity with Martin. There was therefore a showing of intentional deception or gross negligence amounting to constructive fraud, which most authorities require in order to uphold an asserted equitable estoppel. *See In re* Henderson, 577 F.2d 997, 1001 (5th Cir. 1978); Minerals & Chems. Phillip Corp. v. Milwhite Co., 414 F.2d 428, 430 (5th Cir. 1969); Molokai Ranch, Ltd. v. Morris, 36 Hawaii 219, 222 (1942).

ples. If its requirements are made too stringent, this objective is likely to be defeated.

D. *Fraud, Mistake, and Reformation of Written Instruments*

A party seeking to avoid or reform a contract on the ground of fraudulent misrepresentation must show that the other party (1) made false representations as to material facts, (2) made them with knowledge of their falsity or without regard to their truth or falsity, and (3) made them in contemplation of the representee's reliance thereon. Evidence must support the conclusion that such reliance in fact reasonably resulted therefrom.[37]

If the contract is in writing, however, the aggrieved party must make out a clear and convincing case and will be held to a standard of proof that was characterized in *Kang v. Harrington*[38] as "extremely high." In that case the plaintiff, the lessor of a house, was found to have discharged this heavy burden where the evidence showed that the lessee had embarked upon a fraudulent scheme to obtain a perpetual option to lease the property. Whereas the initial oral agreement of the parties gave the lessee an option to renew for an additional year, he submitted documents with conflicting terms, included a *perpetual* option in the rental agreement, rushed the landlord's agent into signing it, and made improvements to the property other than those agreed upon. Moreover, the lessee was found to have prepared a fraudulent wall plan showing the additional improvements and a bogus letter to the landlord's agent referring to the latter's approval of the wall plan.

On these facts, the court (per Chief Justice Richardson) had no difficulty in affirming the trial court's reformation of the rental agreement to provide for a one-year term with an option for an additional one-year term. The negligence of the landlord's agent in failing to correct the documents or notice the improvements was held not to absolve the lessee from the consequences of his alleged fraud. The court also held that the lessee's fraudulent conduct rose "to the level of oppressiveness, wantonness, and malice sufficient to support an award of punitive damages."[39] The trial court's award of $20,000 punitive damages, however, was disapproved. Holding that in assessing the *quantum* of damages the trial court had been influenced erroneously by the appellant's attempted fraud *on the court* in preparing and using fraudulent documents at the trial, which was irrelevant to the amount of punitive damages, the court found that

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[37] Hong Kim v. Hapai, 12 Hawaii 185, 188 (1899). Moreover, the false representation must relate to an existing or past material fact and not to a promise or prognostication concerning the happening of a future event. Stahl v. Balsara, 60 Hawaii 144, 587 P.2d 1210 (1978).

[38] 59 Hawaii 652, 656, 587 P.2d 285, 289 (1978).

[39] *Id.* at 662, 587 P.2d at 291.

the sum of $20,000 was unreasonable and excessive. The degree of malice, oppression, or gross negligence of the appellant *towards the landlord* would be adequately punished by an award of $2,500 damages.[40] When a written instrument fails, through a mutual mistake of fact, to conform to the real common intention of the parties, reformation also will be allowed. This principle was reaffirmed in *In re Mokuleia Ranch & Land Co.*,[41] but the court found on the facts of that case that there was no evidence of a mutual intent inconsistent with the written deed so as to warrant reformation.[42]

E. Remedies and Breach

May a party sue in separate actions for enforcement of rights arising under the same agreement, or is recovery in a subsequent suit barred by the doctrine of res judicata? This was the issue raised by *Bolte v. AITS, Inc.*[43] The plaintiff, who had an agreement with defendant to receive a commission of twenty percent of the cost of premiums for insurance placed on a certain hotel, sued and eventually obtained judgment for his first commission of $1,458. Thereafter, plaintiff filed a second suit alleging a breach of the same commission agreement and seeking payment of commission on subsequent insurance placed on the hotel.

The circuit court's answer to the above question was in the negative, based on its holding that the second action was barred by the doctrine of res judicata. Entirely erroneous, said the Hawaii Supreme Court (per Chief Justice Richardson) on appeal. While recognizing the need to protect defendants from harrassment and a multiplicity of vexatious lawsuits, the court pointed out that the rule against splitting an action did not apply to "the bringing of successive suits based on successive breaches of the same continuing contract where the contract is not terminated by a single breach and each suit is brought after the subject breach but before a subsequent breach."[44] Moreover, if the plaintiff was ignorant of a further breach which occurred prior to institution of the first action, he will not be barred from recovery therefore in a subsequent action, even though that claim already existed at the time of recovery for another breach in the first action. Of course, the plaintiff's ignorance must not have been culpable. In such a case, too, the rationale for the rule against splitting is not present. The court rightly observed that the res judicata doctrine is predicated on consciously inequitable conduct by a plaintiff and that it should not be applied so as to produce an injustice and thwart the very policy on which it is founded.

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[40] *Id.* at 664, 587 P.2d at 293.
[41] 59 Hawaii 534, 539, 583 P.2d 991, 994 (1978).
[42] *Id.*
[43] 60 Hawaii 58, 587 P.2d 810 (1978).
[44] *Id.* at 60, 587 P.2d at 812.

Applying these principles, the court held that if the second breach occurred after filing of the first suit or if it occurred prior thereto but without the plaintiff's knowledge thereof when he filed the first suit, then the second suit would not be barred. Consequently, the trial court had erred in granting defendant's motion for summary judgment in the absence of appropriate factual findings on these questions. An entirely wholesome and commonsense exercise of the appellate jurisdiction!

F. Statute of Frauds

Judicial distaste for an overly rigid application of the Statute of Frauds with attendant harsh results has frequently led to enforcement on equitable grounds of oral agreements which are in violation of the statute. In a landmark decision in 1970, the Hawaii Supreme Court (by a four-to-one majority) in *McIntosh v. Murphy*[45] accepted the avoidance of "unconscionable injury" as a policy justification for enforcing such agreements.[46] The equitable doctrines of part performance or equitable estoppel were said to justify the granting of relief where there had been substantial reliance by the party seeking enforcement.[47]

In *Island Holidays, Inc. v. Fitzgerald*,[48] this principle was applied to an oral agreement to execute a new lease contract.[49] The court had no difficulty in holding that substantial part performance would bring an alleged new oral lease "within the exception to the applicability of the Statute of Frauds."[50] The court consequently held that the trial court had erred in granting a motion for summary judgment, where the evidence sufficiently raised disputed issues of fact as to whether the parties had entered into an oral agreement for a new lease.

G. Illegality

In *Reliable Collection Agency, Ltd. v. Cole*,[51] the plaintiff was a debt collection firm which sued as assignee of certain debts owed by defendants, the Coles, to third parties. The defendants asserted as a defense that Reliable was engaged in the unauthorized practice of law by virtue of its debt collection practices in violation of section 605-14 of the Hawaii

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[45] 52 Hawaii 29, 469 P.2d 177 (1970).

[46] *Id.* at 37, 469 P.2d at 181-82.

[47] The rule is set out in RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1, at § 217A. *See also* CALAMARI & PERILLO, *supra* note 1, at 736-38.

[48] 58 Hawaii 552, 574 P.2d 884 (1978).

[49] HAWAII REV. STAT. § 666-4 (1976) provides that oral leases not exceeding one year are valid.

[50] 58 Hawaii at 563, 574 P.2d at 891.

[51] 59 Hawaii 503, 584 P.2d 107 (1978).

Revised Statutes (1976)[52] and counterclaimed for damages and declaratory and injunctive relief on the same ground. The trial court granted Reliable a partial summary judgment on the Coles' affirmative defense and denied the Coles partial summary judgment on their counterclaim.

The Hawaii Supreme Court (per Justice Kidwell) affirmed, holding that, even assuming that Reliable was unlawfully engaged in the practice of law (which it was unnecessary to decide), the statute in question did not create a private right to damages or to declaratory or injunctive relief. This conclusion was reached on the basis of the statutory provisions for enforcement by public officials and the underlying legislative purpose of obtaining uniformity in enforcement procedures.

The Coles' defense of unauthorized practice of law by Reliable was based on the theory that Reliable's dealings with Coles' creditors so tainted its claim with illegality that the court should refuse enforcement. The court rejected this, holding that to accept this argument would allow indirect private enforcement of the statutory prohibition already referred to and that the same policy considerations which dictated rejection of the Coles' counterclaim applied here. Moreover, there was no pecuniary loss suffered by the Coles as a result of the alleged illegal conduct and consequently no impairment of any private interest recognized by law.

The court analogized the situation to that which applies where the defendant asserts the defense of illegality under the antitrust laws. In such a situation the United States Supreme Court has held that the defense of illegality is confined to claims for excessive price which would give effect to a forbidden restraint of trade.[53] The rationale is that to give a wider scope to the defense of illegality would run counter to the general policy of the law against unjust enrichment[54] and moreover would discourage the bringing of legitimate contractual claims because of the increased complexity and expense involved in such a defense.[55]

In a salutary policy ruling, the Hawaii Supreme Court found that this analogy supported denial of the Coles' defense. The important policy con-

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[52] HAWAII REV. STAT. § 605-14 (1976) provides:

Unauthorized practice of law prohibited. It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States; provided that nothing herein shall be deemed to authorize the licensing of a corporation to practice law except as provided in part VIII of chapter 416. Nothing in sections 605-14 to 605-17 contained [*sic*] shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

[53] Kelly v. Kosuga, 358 U.S. 516 (1959). *See also* Viacom Int'l Inc. v. Tandem Prods., Inc., 526 F.2d 593 (2d Cir. 1975).

[54] This was the reasoning in Kelly v. Kosuga, 358 U.S. 516 (1959).

[55] This was the rationale in Viacom Int'l Inc. v. Tandem Prods., Inc., 526 F.2d 593 (2d Cir. 1975).

siderations expounded in this decision[56] will undoubtedly have wider impact in future cases in Hawaii when defendants seek to raise breach of a statutory prohibition as an affirmative defense to private claims and the statute in issue has its own public enforcement procedures. In the final analysis the question will always be one of interpreting the particular legislative intent. But the *Cole* decision certainly indicates the policy inclination of the court in such matters.

H. Construction Contracts

Section 507-42 of the Hawaii Revised Statutes (1976)[57] creates a statutory mechanic's and materialman's lien which provides significant protection for the suppliers of building materials and services by giving them the right to foreclose on the resulting improvement as well as upon the interest of the owner of the improved real property. Such lien is dependent, however, upon the filing of notice in the circuit court where the property is situated and service thereof upon the property owner and any party who contracted for the improvements.

What happens when the notice names and is served on the contracting party but not the owner of fee title? This question arose in *Jack Endo Electric, Inc. v. Lear Siegler, Inc.*,[58] where certain building materials were supplied to the general contractor and lessee-developer of property, of

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[56] 59 Hawaii at 513-14, 584 P.2d at 13:

> Without disparaging in any way the value of citizen interest in law enforcement and particularly in the proper regulation of the practices of collection agencies, we believe that sanctioning individualized enforcement efforts would have disadvantages which clearly outweigh the possible benefits of such enhancement of enforcement pressures. Enforcement of criminal law through prosecution by public agencies, whether in conventional criminal proceedings or by injunctive process as authorized by the applicable statute in this case, produces a final disposition of the question of criminality in a single proceeding. If every collection case might be turned into a criminal prosecution by assertion of the defense of illegality, each case would dispose of the issues raised as between the parties but there would be no final determination with respect to the propriety of the practices of the collection agency which would foreclose the raising of the same question again for judicial inquiry in any number of other cases. Even if the decision in any single case could be made to be generally dispositive of the issues considered, the collection practices relevant for consideration in the particular case would necessarily be limited to those which affected the particular defendant and a comprehensive inquiry into the practices of a single collection agency might require numerous individual cases. Variation in the conclusions reached by different judges or in different judicial circuits would likely become difficult to resolve.
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> Since definition and regulation of the practice of law is inherently a function of this court, we think it is particularly appropriate for us to determine that such regulation shall take place in a uniform and coordinated manner. We conclude that the alleged unauthorized practice of law on the part of Reliable does not support the Coles' affirmative defense.

[57] HAWAII REV. STAT. § 507-42 (1976).

[58] 59 Hawaii 612, 585 P.2d 1265 (1978).

which the Bishop Estate was the lessor and owner in fee. The supplier failed to name or serve the notice of lien on the Bishop Estate. Relying on the express wording of the 1973 version of the statute which provided for the naming of and service on "the owner of fee title to the property" and used the mandatory phrase "shall not attach unless,"[59] the contractor argued that the notice requirements were obligatory and the lien consequently invalid for noncompliance therewith. The supplier on the other hand alleged that there had been substantial compliance, inasmuch as its notice was not intended to affect Bishop Estate's interests in the improvements or the land, being aimed solely at the contractor-lessee.

The court held that in the statutory context this was one of those cases in which the word "shall" with its accompanying provision for notice was directory rather than mandatory.[60] It was not open to a nonowner party

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[59] At the time of this decision, HAWAII REV. STAT. § 507-43 (Supp. 1973) (amended 1974, 1975) provided, in pertinent part:

> (a) Requirements. The lien shall not attach unless a notice thereof is filed in writing in the office of the clerk of the circuit court where the property is situated and a copy of the notice served in the manner prescribed by law for service of summons upon the owner of fee title to the property and upon the party or parties who contracted for the improvements if other than the owner of fee title of the property. If any person entitled to notice cannot be served as herein provided, notice may be given the person by posting the same on the improvement. The notice shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the claim. If the claim has been assigned, the name of the assignor shall be stated. The notice shall specify the names of the parties who contracted for the improvement, the name of the general contractor and the names of the owner of fee title to the property. The notice may (but need not) specify the names of the mortgagees or other encumbrancers of the property, if any, and the name of surety of the general contractor, if any.

HAWAII REV. STAT. § 507-43 (1976) now provides, in pertinent part:

> (a) Requirements. Any person claiming a lien shall apply therefor to the circuit court of the circuit where the property is situated. Such "Application For A Lien" shall be accompanied by a written "Notice Of Lien" setting forth the alleged facts by virtue of which the person claims a lien. A copy of the Application and Notice shall be served in the manner prescribed by law for service of summons upon the owner of the property and any person with an interest therein and upon the party or parties who contracted for the improvements if other than the owner of the property or any person with an interest therein. If any person entitled to notice cannot be served as herein provided, notice may be given the person by posting the same on the improvement. The Application shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to clear understanding of the claim. If the claim has been assigned, the name of the assignor shall be stated. The Application shall specify the names of the parties who contracted for the improvement, the name of the general contractor and the names of the owners of the property and any person with an interest therein. The Application may (but need not) specify the names of the mortgagees or other encumbrancers of the property, if any, and the name of the surety of the general contractor, if any.

[60] The court cited National Transit Co. v. Boardman, 328 Pa. 450, 197 A. 239 (1938), on the use of "shall" in a directory sense. The following test for "directoriness" was gleaned by the court (per Chief Justice Richardson) from a cross-section of decided cases: "In general, a statute is directory rather than mandatory if the provisions of the statute do not relate to

to attack the validity of the lien by reason of lack of notice to the fee owner, whose rights remained unaffected by the lien and who accordingly suffered no real prejudice by reason of the lack of notice. Failure to comply strictly with the directory provisions of the statute therefore did not invalidate the lien in its operation as to the contractor and lessee, who had been properly named and served.

No doubt the court was influenced in its interpretation by a subsequent amendment to the mechanic's and materialman's lien law in 1974, which dispensed with the need for notice to be served upon the owner of fee title of the property and instead now provides in pertinent part for service "upon the owner of property [statutorily defined to include a lessee] and any person with an interest therein and upon the party or parties who contracted for the improvements."[61] And so the result of the case felicitously reflects the spirit of the subsequent legislative amendment!

I. New Legislation

The following statutes, enacted by the Ninth Hawaii Legislature during its 1978 regular session, represent new legislation which is likely to have some impact on contract law:

1. Act 89 deals with public contracts and amends the law relating to the mandatory purchase of Hawaii products by a governmental agency where such products are available.[62] It also provides that bids based on non-Hawaii products submitted to any governmental agency must designate such products and their prices. All public works and repair or maintenance contracts are required to describe in the specifications the established classes and products of Hawaii origin that may be used.

2. Act 143 regulates the sale of fine prints, defined as those produced by a process commonly used in the graphic arts.[63] The statute requires full disclosure of pertinent information regarding the artist and the print, size of the edition, and number of signed and unsigned impressions.

3. Act 151 provides for the creation *inter alia* by agreement of land trusts controlled by the beneficiaries, and for their recording.[64] The potentially wide-ranging implications of this legislation are beyond the scope of this survey.

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the essence of the thing to be done or where no substantial rights depend on compliance with the particular provisions and no injury can result from ignoring them." 59 Hawaii at 617, 585 P.2d at 1269.

[61] For the text of the amended statutory provision, see note 59 *supra*. "Owner" is defined, *inter alia*, as "the lessee for a term of years." HAWAII REV. STAT. § 507-41 (1976).

[62] Act 89, 1978 Hawaii Sess. Laws 113 (codified at HAWAII REV. STAT. §§ 103-43 to -45 (Supp. 1979)).

[63] Act 143, 1978 Hawaii Sess. Laws 258 (codified at HAWAII REV. STAT. ch. 481F (Supp. 1979)).

[64] Act 151, 1978 Hawaii Sess. Laws 284 (codified at HAWAII REV. STAT. ch. 558 (Supp. 1979)).

4. Act 185 adds a new section to the Uniform Limited Partnership Act[65] which makes property brought into the partnership or acquired with partnership funds partnership property, title to which can be conveyed only in the name of the partnership.

5. Act 234 repeals existing hotel laws and enacts a new statute governing the rights and duties of hotel keepers toward their guests.[66]

6. Act 242 contains a general amendment of the Franchise Investment Law,[67] repeals the previous registration requirements, and requires a franchise seller to present an offering circular containing pertinent information to the prospective franchiser at least seven days before the sale. The act also regulates unfair or deceptive practices or unfair methods of competition and makes conforming changes in the duties and functions of the director of regulatory agencies in relation to franchises and the offering circular.

II. COMMERCIAL LAW

In the past decade or so since the U.C.C. was enacted in Hawaii, very few cases involving its provisions have reached the Hawaii Supreme Court, and the year under review was no exception. There were no cases decided under Articles 1 through 8 and only one under Article 9.[68] Whether this is a tribute to the confidence of litigants in the commercial adjudication powers of the lower courts of this State or a product of the aptitude of practitioners for judicious out-of-court settlement in commercial disputes, there is much U.C.C. terrain that is still virgin and untravelled.

The advantage is that a burgeoning body of decisional law is being refined in other state and federal courts, on which Hawaii will be able to draw. The disadvantage is that there are no authoritative guideposts available to practitioners of commercial law in this State when they attempt to discern the correct way on uncertain or controversial questions under the Code.

An important legislative development in 1978 was the passage of Act 155[69] by the Ninth Hawaii Legislature. This statute brought about major amendments to the law of secured transactions by enacting Article 9 of

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[65] Act 185, 1978 Hawaii Sess. Laws 390 (codified at HAWAII REV. STAT. § 425-24.5 (Supp. 1979)).

[66] Act 234, 1978 Hawaii Sess. Laws 489 (codified at HAWAII REV. STAT. ch. 486K (Supp. 1979)).

[67] Act 242, 1978 Hawaii Sess. Laws 515 (codified at HAWAII REV. STAT. ch. 482E (Supp. 1979)).

[68] *See* Part IIIB *infra*.

[69] Act 155, 1978 Hawaii Sess. Laws 293 (codified at HAWAII REV. STAT. ch. 490 (Supp. 1979)).

the 1972 Official Text of the U.C.C. almost in its entirety,[70] effective July 1, 1979, in place of the 1962 version previously adopted. In the full flush of reformist zeal, however, someone forgot about the official comments to the amended provisions of Article 9, and certain key wording and transitional provisions were omitted[71]—a gaffe which would have caused considerable legislative embarrassment had it occurred in a less esoteric area of lawmaking.

A. Secured Transactions—Amendments to U.C.C. Article 9

The following is a summary of the major alterations to Hawaii's version of Article 9[72] and their effect:

1. A completely new section 9-103 deals with perfection of security

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[70] There are a few deviations from the official text of the U.C.C. which are discussed in Part IIIA *infra*.

[71] For the omitted provisions and their purpose see HAWAII REV. STAT. § 490:11-106, Revisor of Statutes Note (Supp. 1978). They relate to the circumstances in which, and the time when, refilings will be required with respect to existing perfected security interests under the old U.C.C. or other laws. The mistake was subsequently corrected by the legislature in 1979 when it amended section 490:11-106 of Hawaii Revised Statutes (Supp. 1978) to conform accurately to the official 1972 text of the U.C.C. with effect from July 1, 1979. *See* Act 169, 1979 Hawaii Sess. Laws 347.

The Hawaii Legislature did not include the official comments as part of its initial statutory enactment of the U.C.C. in 1965. Act 208, 1965 Hawaii Sess. Laws 1. However, when the statute was codified the official comments were incorporated and appear as "Comments to Official Text" immediately after each section. In view of the substantial changes brought about by the 1972 version of Article 9, many of the official comments were completely rewritten or altered by the Permanent Editorial Board for the U.C.C. consistent with the new provisions. However, the 1979 supplement to volume 6 of the Hawaii Revised Statutes, which contains the amended Article 9 provisions adopted in Hawaii, omits the amended official comments. Anyone using the supplement must still refer to the main volume for the unamended provisions of Article 9. The result is that the user may be misled into believing that the comments to official text appearing in volume 6 are still current and appropriate with reference to the amendments. This possibility is compounded by the fact that the 1978 supplement *does* include certain specially drafted *Hawaii* comments. *See* HAWAII REV. STAT. §§ 490:9-313, -402, Supplemental Commentary (Supp. 1979).

This anomalous and potentially confusing situation should be corrected by issuing a replacement volume containing the full text of the amended Article 9, together with the new official comments. The official comments are an important guide to the application of the Code's provisions. It is not surprising that the Hawaii Supreme Court, like other American courts, has placed heavy reliance on the comments to explain and interpret code provisions. *See, e.g.*, Earl M. Jorgensen Co. v. Mark Constr. Inc., 56 Hawaii 466, 472 n.1, 474, 477, 540 P.2d 978, 983 n.1, 984, 986 (1975). No doubt this will continue to happen in the future. It is accordingly imperative that judges as well as affected parties and legal practitioners have ready access to these comments in dependable form in the official codification. Moreover it would seem desirable for the legislature to give a clear direction for publication of the relevant official comments in the revised statutes with respect to any future statutory amendments of the U.C.C. Efficient practice in this difficult area of the law demands workable as well as reliable research tools.

[72] HAWAII REV. STAT. § 490:9-101 to -507 (Supp. 1979).

interests in multiple-state transactions. The rewritten section is intended to clarify *where* perfection must take place without making any real substantive changes. The general rule is that perfection depends on the law of the jurisdiction where the collateral is when filing occurs if filing is necessary for perfection, but there are certain exceptions.

2. A security interest in a deposit account is now covered by Article 9, contrary to the official 1972 version of the U.C.C. which excludes from its ambit a transfer of an interest in any deposit account. This inclusion is also a departure from the previous enactment of Article 9 in Hawaii which did in fact exclude such transactions from its scope.[73] A definition of "deposit account" has now been added, the term meaning a demand, time, savings, passbook, or like account maintained with a bank, savings and loan association, or credit union, other than an account evidenced by a negotiable certificate of deposit.[74]

3. Sections 9-203 and -204 have been entirely rewritten. Section 9-203 now embodies all of the three elements of enforceability of a security interest (agreement, value, and rights in the collateral) formerly contained in section 9-204. It also requires a *written* agreement as a prerequisite of "attachment" of a security interest, unless the secured party has possession of the collateral. Another new provision is that, unless otherwise agreed, the right to proceeds of the collateral under section 9-306 is automatic. Section 9-204 has been redrafted to make its provisions clearer and to take account of the transfer of the "attachment" provisions to section 9-203.

4. Section 9-301 has been altered to eliminate the "without knowledge" requirement of the 1962 Code for a lien creditor to defeat an unperfected security interest. Filing is now necessary to achieve priority over a subsequent lien creditor, even if he has knowledge of the security interest. It also adds a new subsection (4) which limits the priority of a perfected security interest over a lien creditor as to future advances to those advances which were made either before lien creditor status was attained, or were made within forty-five days thereafter, or were made more than forty-five days thereafter without knowledge of the lien.

5. Secured transactions exempted from filing under section 9-302 as a prerequisite for perfection now include a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate. Another new exemption from filing is an assignment for the benefit of all the creditors of the transferor and any subsequent transfers. The same applies to security interests in deposit accounts. Section 9-302(1)(h) excludes such interests from the Code's filing requirements and provides that they are perfected: (i) Automatically upon execution of the security agreement in the case of a deposit account maintained with the secured party; and (ii) in other cases, when notice of the security interest is given

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[73] *Id.* § 490:9-104(k) (1976) (amended 1978).

[74] *Id.* § 490:9-105(e) (Supp. 1979).

in writing to the organization with whom the deposit account is maintained. The exemption from filing accorded in old section 9-302(1)(c) to a purchase money security interest in farm equipment having a purchase price not in excess of $2,500 has been removed by the 1978 amendments. Filing would now be required in order to perfect in such a case. Filing is also not necessary to perfect a security interest in property subject to chapter 286 of the Hawaii Revised Statutes;[75] that is, motor vehicles. A new subsection (5) provides that a security interest in a motor vehicle required to be registered under chapter 286, and which is not inventory, may be perfected only by registration under that chapter.

6. Amendments to sections 9-304(1) and -305 make it clear that a security interest in money can be perfected only by possession, not filing.

7. The definition of "proceeds" is made clearer in section 9-306(1). Proceeds of insurance on collateral now also are included in proceeds, except if payable to a third party. In line with the amendment to secton 9-203 referred to in *3* above, creating an automatic claim to proceeds of the collateral, there is no longer any need under section 9-306(3) to claim proceeds in the financing statement. The only limitation to this is where filing as to the original collateral is inappropriate to perfect as to certain types of proceeds. In such a case (for example, filing is inappropriate for negotiable instruments as proceeds under section 9-304(1)), the filed claim to collateral gives a perfected claim to proceeds for only ten days. Finally, section 9-306(4) has been amended to make it clear that its tracing provisions as to proceeds on insolvency are exclusive of any other claim.

8. There is a new provision, in line with the one in section 9-301(4) referred to in *4* above, that allows a security interest with respect to future advances to outrank a collateral buyer *not* in the ordinary course of business, only if the future advances were made without knowledge of the purchase and up to forty-five days from the date of the purchase or pursuant to a commitment entered into without such knowledge up to forty-five days after the purchase.

9. Section 9-308, dealing with the priority of a purchaser of chattel paper over a perfected security interest in certain circumstances, has been completely rewritten for greater clarity and to extend its provisions to purchasers of negotiable instruments as well.

10. Section 9-312, which deals with priorities as between conflicting security interests in the same collateral, has been amended to make it clear that a perfected purchase money security interest in *inventory* takes priority as to collateral but does not confer a prior right to any *proceeds* other than identifiable cash proceeds received on or before delivery of the inventory. Such priority depends, as before, on perfection of the security interest at the time the debtor takes possession of the collateral and on

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[75] HAWAII REV. STAT. ch. 286 (1976 & Supp. 1979).

prior notice to the holder of a conflicting security interest, as required by section 9-312(3). In the case of a purchase money security interest in *non-inventory* collateral, however, the new section 9-312(4) gives priority with respect to proceeds as well, and there is still a ten-day grace period after the debtor receives possession in which perfection can take place. Moreover, section 9-312 now makes clear that the date of filing as to original collateral also determines the date of filing as to proceeds.

11. The fixture provision, section 9-313, has been totally rewritten. The most important change is found in section 9-313(6) which subordinates a security interest in fixures to a construction mortgage recorded before the goods became fixtures. There is also provision for "fixture filing" in the real estate records. Section 9-408 still provides for combined real estate and fixture mortgages, requiring a single filing.

12. The new version of the Code eliminates the concept of "contract right" which is now subsumed under the term "account" in section 9-106 with conforming changes in section 9-318 which deals with limitations on the rights of an assignee of accounts.

13. There are some conforming changes in section 9-402 with respect to the form of the financing statement, but, as was the case prior to the amendments, for a fixture filing in Hawaii the financing statement must contain the name of the record owner or record lessee in addition to a description of the real estate.[76]

14. Under amended section 9-403 a filed financing statement is now effective for a full term of five years from the date of filing. The recording, indexing, and fee provisions of the former law, however, remain unchanged.[77]

15. Under the new section 9-404(1) a termination statement must be filed in the case of consumer goods even if the consumer does not so demand.

16. Hawaii has retained the provisions of old section 9-409 absolving filing officers from personal liability for errors and omissions in the performance of their duties under Article 9, except in case of "wilful negligence."[78] This provision has no equivalent in the official 1972 version of the Code, which has no section 9-409.

17. Notice of sale by the secured party in the event of foreclosure is now limited to the debtor and those persons other than the debtor who have notified the secured party in writing of their claim to an interest in the collateral, before the secured party's notification to the debtor or the latter's renunciation of his rights. Under section 9-504, the debtor may

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[76] *See id.* § 490:9-402(3) (1976).

[77] *Id.* § 490:9-403(4) to -403(5), -404(2) to -(3), -405(2). *See also id.* §§ 9-405(1), -406 (Supp. 1979).

[78] *Id.* § 490:9-409 (1976). As to the effect of filing errors by the filing officer on the validity of perfection by filing, see R. HENSON, SECURED TRANSACTIONS UNDER THE U.C.C. 86 (2d ed., 1979).

now in writing renounce or modify his right to notice of sale after, but not before, default. There are similar notice provisions in section 9-505 for the case where the secured party wishes to retain the collateral in satisfaction of the debt.

18. The amendments became effective on July 1, 1979, pursuant to section 11-101.[79] The transition provisions of section 11-103 preserve rights, duties, and interests flowing from secured transactions entered into before the effective date. The new Code will govern questions of perfection, termination, confirmation, and enforcement that arise *after* July 1, 1979 with respect to such existing security interests. Pursuant to section 11-107, questions of priority will be dealt with under the old U.C.C. if the rights of the parties were fixed prior to the existing Code; otherwise, the new U.C.C. controls. Where filing is now required in order to perfect a security interest which was previously perfected without filing, there is a grace period of three years during which such perfection and priority will continue without filing.[80] Under section 11-105(1), the duration of all existing financing and of continuation statements is extended to five years after the filing date.

B. Case Law

The solitary case under the U.C.C. decided in 1978 by the Hawaii Supreme Court was *Keller v. La Rissa, Inc.*[81] There, the appellant, La Rissa, was a corporation which had originally been formed by appellee Keller and his wife to run a ladies' dress shop in Waikiki. After some years Keller and his wife were divorced and she and La Rissa acquired his interest, giving a promissory note for $25,000 in part payment. The note was secured by a pledge of the corporation's stock and by a security agreement giving Keller a security interest in all property of the corporation which might thereafter be in his possession. Payments were made to Keller which reduced the balance due on the note to $11,622.72. Keller then sued La Rissa and his ex-wife for this balance, and, in addition to raising defenses of payment and agreement to forebear, they counterclaimed for the value of certain collateral allegedly wrongfully retained by him. The trial court rejected these defenses and the counterclaim and gave judgment in Keller's favor for the balance due on the note together with attorney's fees.

On appeal, the court accepted the trial court's findings of fact as being

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[79] Article 11, the transition provision of the official 1972 version of the U.C.C., was adopted by the Hawaii Legislature. As indicated above, material portions of section 11-106 were omitted from the 1978 amendments but this oversight was rectified by Act 169, 1979 Hawaii Sess. Laws. *See* note 71 *supra*.

[80] Act 169, 1979 Hawaii Sess. Laws 347, § 1 (substituting a new section 11-106 for the incomplete provision which was enacted in the 1978 amendments).

[81] 60 Hawaii 1, 586 P.2d 1017 (1978).

fully substantiated by the record, and it accepted the credibility findings as unimpeachable. The appeal turned, however, on the appellants' contention that Keller was guilty of conversion by reason of his refusal to return certain dresses belonging to La Rissa, which Keller had agreed to store temporarily when the corporation's dress shop was relocated. Keller had refused to return them unless certain overdue installments on the note were paid first. However, at a later stage, Keller requested his ex-wife to take back the dresses and gave her an opportunity to repossess them, but she refused on the asserted ground that it was too late, Keller already having converted the dresses.

The court (per Justice Kidwell) found that, as a secured party, Keller had the statutory right to take possession of the dresses as collateral under the security agreement, on account of the note being in default. The argument "that exercise of this right resulted in a conversion of the dresses and liability on the part of appellee for their value"[82] was rejected.

The court pointed out that section 490:9-505(1), requiring compulsory disposition of collateral comprising consumer goods, was inapplicable here and that Keller had not sought to retain the collateral in satisfaction of the debt under section 490:9-505(2). Nor was there any claim under section 490:9-207 for breach of the secured party's statutory duty to use reasonable care in the custody and preservation of collateral in his possession.

There was no reason, stated the court, why Keller was compelled to apply the collateral in reduction of the debt. The rights and remedies of a secured party are cumulative under section 490:9-501, and he may if he wishes reduce his claim to judgment. Consequently, the trial court's judgment for the balance due on the note was affirmed. The court, however, vacated the lower court's award of attorney's fees in the sum of $2,704 on the ground that there was no evidence in the record to support those fees as being reasonable and necessary.

Although there was no substance in the appellants' claim of conversion in the circumstances of the case, it would seem that a secured party who takes possession of collateral, and then does nothing with it for an unreasonable period of time, may be exposing himself to other forms of attack or defense by the debtor. While the court found that the claim did not raise such issues in *Keller v. La Rissa, Inc.*, it cited two cases which indicate that there are limitations on the secured party's right to remain supine while holding on to the collateral. In the first case, *Schultz v. Delaware Trust Co.*,[83] it was held that a secured party had elected to retain the collateral in satisfaction of the debt by retaining it for an unreasonable period of time. And in the second case, *Michigan National Bank v.*

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[82] *Id.* at 4, 586 P.2d at 1020, *construing* HAWAII REV. STAT. § 490:9-503 (1936).

[83] 360 A.2d 576 (Del. Super. Ct. 1976).

Marston,[84] the court referred to the duty of the secured party to proceed to disposition of the collateral in a commercially reasonable manner or, failing that, to return it to the debtor. In a more recent decision of the Utah Supreme Court, *FMA Financial Corp. v. Pro-Printers*,[85] the secured party's delay after repossession of the collateral, by taking "little or no action for six months, while the equipment sat in storage,"[86] formed part of the court's reasoning in holding that the sale had not been conducted in a commercially reasonable manner and that the secured party was therefore barred from obtaining a deficiency judgment.[87] These cases suggest that the appellants in *Keller* may have misconceived their remedy and that a debtor in their position can muster more effective weapons of resistance than a cursory reading of the decision would indicate.

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[84] 29 Mich. App. 99, 185 N.W.2d 47 (1970).

[85] 590 P.2d 803 (Utah 1979).

[86] *Id.* at 807.

[87] There is a split in the decisions as to whether the secured party's noncompliance with the notice and commercially reasonable sale requirements of section 9-504(3) is an absolute bar to a judgment for the deficiency or whether such recovery is subject to the debtor's right to recover damages resulting from such noncompliance as held in Barbour v. United States, 562 F.2d 19 (10th Cir. 1977). The former absolute-bar view adopted by the Utah Supreme Court, was also approved by the Ninth Circuit, interpreting California law, in Nixdorf Computer, Inc. v. Jet Forwarding, Inc., 579 F.2d 1175 (9th Cir. 1978). A third view, however, gaining increasing acceptance, is that the secured party is not barred from recovery of the deficiency, but must rebut the presumption that the collateral was worth at least the amount of the debt secured at the time of its wrongful disposition by the creditor. *See, e.g.*, United States v. Willis, 593 F.2d 247 (5th Cir. 1979) (federal rule based on Ohio U.C.C.); United States v. Conrad Publishing Co., 589 F.2d 949 (8th Cir. 1978) (federal law based on U.C.C. as adopted in N.D.); United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir.), *cert. denied*, 421 U.S. 912 (1974); *In re* Bishop, 482 F.2d 381 (4th Cir. 1973) (interpreting Va. law); Leasing Assocs. v. Slaughter & Son, 450 F.2d 174 (8th Cir. 1971) (Ark. law). The authorities permitting recovery of a deficiency, notwithstanding noncompliance with notice requirements, subject to the fair value rather than the proceeds on resale being credited to the debtor, as well as those denying any recovery, are collected in a recent District of Columbia decision. Randolph v. Franklin Inv. Co., 398 A.2d 340 (D.C. Mun. Ct. App. 1979). The rebuttable presumption rule seems preferable to the punitive absolute-bar rule since noncompliance with the notice and commercially reasonable requirements of section 9-504(3) may not have adversely affected the amount realized from the sale of the collateral. But if it did, the secured party's claim to a deficiency will fail to that extent under the rebuttable presumption rule. The widely divergent approach of the courts raises afresh the question whether there ought to be provision for recovery of a deficiency judgment at all, especially in consumer transactions. *See* Henszey, *A Secured Creditor's Right To Collect a Deficiency Judgment Under Section 9-504: A Need To Remedy the Impasse*, 31 BUS. LAW. 2025 (1976).

INDEX

1978 HAWAII SUPREME COURT CASES

The alphabetical index provides a summary of each Hawaii Supreme Court cases decided in 1978, except two memorandum opinions concerning family court matters that remain confidential. Cases which appear in heavy-faced type in the subject index or which are asterisked below are discussed more fully in the preceding articles. The index departs from *A Uniform System of Citation* by employing an abbreviated form (H.R.S.) for Hawaii Revised Statutes and by capitalizing all references to the Hawaii Supreme Court (Court). The explicit or implicit date of a statute construed in a supreme court opinion is included in the citation along with any amendments acknowledged by the court. However, in certain cases the date cannot be discerned from the opinion. Where the court did not provide the date of the statute, but the law has not been amended since 1955, the reader is referred to the most recent compilation of Hawaii Revised Statutes (1976). Parenthetical material is intended to update the reader by noting all Hawaii Supreme Court cases that cited the 1978 case and subsequent amendments to relevant statutory or constitutional material relied upon in the 1978 case.

Adair v. Hustace, 59 Hawaii 66 (1978) (mem.).

The Court denied a motion to cancel notice of lis pendens in a civil case which is still pending on remand. Civ. No. 35-88 (3rd Cir. Hawaii, filed Dec. 2, 1974). (B.W.)

***Ajirogi v. State,** 59 Hawaii 515, 583 P.2d 980, *rehearing denied,* 59 Hawaii 667 (1978).

A mental patient with a long history of institutionalization was under indictment for robbery in the second degree and was being held at the state mental hospital for psychiatric evaluation when he escaped. Four days later he injured plaintiffs in a head-on collision while speeding from a burglary scene in a stolen vehicle. The trial court found that the escapee's conduct was a foreseeable consequence of the state's negligence in permitting the escape and awarded the plaintiffs damages. The Court reversed and held as a matter of law that the risk of harm was too remote to create liability. The hospital's obligation to the court

under two orders requiring the patient's confinement did not itself create a duty of care to plaintiffs. The hospital's knowledge that the patient had twice before stolen vehicles and had a propensity to commit crimes was not relevant to the foreseeability of injury because the hospital lacked sufficient notice of the patient's propensity to operate vehicles negligently. In reaching its decision, the Court balanced the competing policies of protecting individuals from harm and promoting therapeutic procedures designed to return patients to the community. Kobayashi, J., joined by Circuit Judge Sodetani, dissented and would have held that the State owed a duty of care to the plaintiffs, that foreseeability was a question of fact sustained by the record, and that public policy considerations supported a finding of liability. (*Cited in* Figueroa v. State, No. 6437 (Hawaii Sup. Ct. Dec. 31, 1979); Seibel v. City & County of Honolulu, No. 6278 (Hawaii Sup. Ct. Nov. 6, 1979).) (B.W.)

Allstate Insurance Co. v. Morgan, 59 Hawaii 44, 575 P.2d 477 (1978).

An insurance company sought a declaratory judgment to determine the statutory limits of its liability for uninsured motorist coverage under H.R.S. §§ 431-448 and 287-7 (1968 & Supp. 1970). The daughter of the policy holder was injured when an uninsured vehicle hit the automobile she was operating. The insurance policy covering the struck vehicle was not in dispute. The daughter was covered by the terms of her father's policy which covered three other cars and provided the statutorily required minimum uninsured motorist benefits of $10,000 per automobile. The Court affirmed summary judgment for the daughter and held that she was potentially entitled to recover $30,000 by "stacking" the benefits under her father's policy, but recovery would be limited to the amount of actual injury. (B.W.)

American Insurance Co. v. Takahashi, 59 Hawaii 102, 577 P.2d 780 (1978) (per curiam).

Three persons were covered by uninsured motorist benefits in a policy on two automobiles. One person died from the accident and the injuries of the other two were already compensated for by another insurer. In *American Insurance Co. v. Takahashi,* 59 Hawaii 59, 575 P.2d 881 (1978) (this index), the Court determined that the minimum uninsured motorist benefits under H.R.S. § 287-7 (1968 & Supp. 1970) were $20,000 per covered vehicle when two or more covered persons were injured regardless of whether the covered vehicles were involved in the accident. Since two autos were covered, the insurer's potential liability was $40,000. The Court denied insurer's petition for rehearing and held that the statutory minimum coverage of $20,000 per insured vehicle depends on the number of covered persons injured notwithstanding any prior compensation. However, recovery would be limited to the amount of actual damages after deduction of any amounts already received from other insurers. (B.W.)

American Insurance Co. v. Takahashi, 59 Hawaii 59, 575 P.2d 881, *rehearing denied,* 59 Hawaii 102, 577 P.2d 780 (1978).

Three persons were injured, one of them fatally, while riding in a car that was struck by an uninsured automobile. The policy covering the car in which the injured persons were travelling was not in dispute. However, they were covered by a

policy on two other cars which limited uninsured motorist benefits to a maximum $20,000 per accident. The insurer sought a declaratory judgment to set its maximum potential liability at $20,000, and the trial court granted the insurer's motion for summary judgment on that issue. The Court reversed and found that H.R.S. §§ 431-448, 287-7 (1968 & Supp. 1970), and the rationale of *Allstate Insurance Co. v. Morgan*, 59 Hawaii 44, 575 P.2d 477 (1978) (this index), required it to hold that when two or more persons are injured, the minimum uninsured motorist benefits are $20,000 for each of the vehicles covered in the policy regardless of whether the covered vehicles were involved in the accident. Since two vehicles were covered, the defendants were entitled to recover up to $40,000. (B.W.)

Anderson v. Anderson, 59 Hawaii 575, 585 P.2d 938, *rehearing denied*, 59 Hawaii 667 (1978).

Appellant husband challenged several findings and orders giving effect to his divorce decree. The Court affirmed the lower court's actions, noting that the determinative factor in construing such decrees is the intent of the issuing court. The decree was interpreted to have made the former husband trustee for the former wife who was entitled to half the shares of stock held in the husband's name. Half the net proceeds from the husband's sale of commingled stock therefore belonged to the wife. The wife had not waived her claim by silence or by the acceptance of dividends and other stock for two reasons: She did not know that her shares were included in the stock sale, and her actions were consistent with other undisputed terms of the decree. The wife was not estopped by failure to designate her part of the commingled stock. She had no duty to earmark the stock and the husband had not shown detrimental reliance on the wife's alleged representations. The Court also rejected a quasi-estoppel theory that the wife's delay of two years in making the claim prevented her recovery. Laches did not prevent the claim since a two-year delay was not "long acquiescence" and there was no evidence of the wife's express or implied knowledge of the underlying facts. Kidwell, J., dissented and would have held that the husband was trustee of "unallocated whole shares of stock" for the wife, and any improper withholding of stock from her would give rise to a claim for damages, not half the proceeds of his stock sale. (B.W.)

***Arakawa v. Limco, Ltd.**, 60 Hawaii 154, 578 P.2d 1216 (1978).

Developer and subscriber entered into Subscription and Purchase Agreements (SPAs) under which subscribers agreed to purchase condominium units after construction. The SPAs provided that if title "is not conveyed to the subscriber in accordance with FHA requirements on or before one (1) year, the subscriber and seller shall have the right to withdraw from this agreement." A dispute arose as to whether the one year period ran from the date of execution of SPA or from the date of completion of the project. Nothing in the document or in the facts of record indicated intent of the parties as to the starting date for the one year period. The Court held that the one year period prior to the cancellation privilege began from completion of construction, as was urged by the subscribers. Absent evidence of the parties' intent, ambiguous contract terms should be construed against the drafters, the developer in this case. Also, it was unlikely that the developer would have provided for cancellation at the earlier date since that would

have released all subscribers in the event of construction delay. Evidence as to the intent of FHA representatives was not controlling since the FHA was not a party to the contract. Alternatively, even if the one year period ran from the date of execution, the SPAs were not dated and the developer did not meet its burden of showing that they were executed on a date such that cancellation was timely. *(Cited in* Kamaole Resort Twenty-One v. Ficke Haw'n Invs., 60 Hawaii 413, 591 P.2d 104 (1979).) (M.H.)

Association of Apartment Owners of the Governor Cleghorn v. M.F.D., Inc., 60 Hawaii 65, 587 P.2d 301 (1978), *rehearing denied,* 60 Hawaii 677 (1979).

Appellants' building permit was revoked for suspension of work. The Building Board of Appeals of the City & County of Honolulu granted a verbal request for an extension of time to appeal the revocation and later reinstated the permit. The circuit court reversed the reinstatement as arbitrary and capricious. The Court found that the appeals board lacked jurisdiction to consider reinstatement because Honolulu, Hawaii, Rev. Ordinances § 16-5.4 (1969), *as amended by* Honolulu, Hawaii, Ordinance 4425 (Mar. 3, 1975), unambiguously required a written request for board review within ten days of receipt of the revocation notice in order to appeal, and this requirement could not be waived by the board. The Court distinguished *Waianae Model Neighborhood Area Association v. City & County of Honolulu,* 55 Hawaii 40, 514 P.2d 861 (1973), where the time limit was not jurisdictional. In this case, the jurisdictional defect rendered the administrative board's decision void and unappealable. The revocation therefore remained effective. (B.K.)

Bagalay v. Lahaina Restoration Foundation, 60 Hawaii 125, 588 P.2d 416 (1978).

On appeal from a dismissal for failure to file a statement of readiness, the Court reversed and remanded for further proceedings. The original plaintiff had died during pendency of the action. After obtaining an extension, plaintiff's counsel failed to file a statement of readiness within the alotted time. Upon court order, plaintiff filed a purported statement of readiness which the court found inadequate for lack of proper substitution of parties. Plaintiff attempted to file a substitution but was time barred under Hawaii R. Civ. P. 25(a)(1). The complaint was dismissed under Hawaii R. Civ. P. 12(f) for failure to file a timely statement of readiness and under Hawaii R. Civ. P. 25(a)(1) for failure to file a timely motion for substitution. On appeal, the Court found that the trial court had abused its discretion in dismissing the complaint. Plaintiff's counsel had been remiss in failing to file timely substitution since decedent's will named an executrix who could have been timely substituted. However, counsel delayed in hopes of locating missing heirs. Pretrial proceedings were undertaken, and there was no evidence of deliberate delay or actual prejudice to defendants. Further, the trial court and defendants contributed to the delay by failing to seek dismissal or to expedite prosecution at an earlier date. Dismissal for want of prosecution should be judged by the facts of each case, weighing the policy favoring adjudication on the merits against possible prejudice to the defendants. Extensions under Hawaii R. Civ. P. 6(b) should be freely granted absent bad faith or undue prejudice. *(Cited in* City & County of Honolulu v. Toyama, 61 Hawaii _, 598 P.2d 168 (1979).) (M.H.)

Big Island Small Ranchers Association v. State, 60 Hawaii 228, 588 P.2d 430 (1978).

The Hawaii State Department of Land and Natural Resources, through its board, voted to auction certain parcels of State-owned land for lease. The parcels were to be leased in the same sizes and configurations as the prior leases twenty-one years earlier. Plaintiffs sought to invalidate the state auction and have the leases declared unlawful. The trial court granted defendants' motion for summary judgment. The Court affirmed and held that none of plaintiffs' theories invalidated the sale of leases by the State. Article X, section 5, of the Hawaii Constitution, mandating the widespread use of public lands for farm and home ownership, is not applicable to leases of public pasture land because the provision explicitly refers to "ownership", not leasehold interests. Plaintiffs' claim based upon H.R.S. ch. 480 (1968 & Supp. 1975), relating to regulation of trade and commerce, is barred by the defense of sovereign immunity because the legislation was never made specifically applicable to the State. Pursuant to H.R.S. § 171-6 (1968 & Supp. 1974), the board is empowered to promulgate rules and regulations. However, there is no statutory requirement that rules be promulgated to determine parcel sizes for leasing or to establish a general plan. Auctioning of public lands for lease as pasture comes within the exception to the Hawaii Administrative Procedure Act, H.R.S. ch. 91 (1968 & Supp. 1974), which states that the custodial management of state property is a matter of internal management. Therefore, the conduct of auctioning the leases does not constitute rulemaking within the meaning of the Act. (HAWAII CONST. art. X, § 5 (1959, renumbered art. XI, § 10, 1978). *See* Kahalekai v. Doi, 60 Hawaii 324, 590 P.2d 543 (1979) (repeal of HAWAII CONST. art. X, § 5 (1959) invalidly ratified). H.R.S. ch. 91 (1976 & Supp. 1978), *amended by* Acts 64, 111, 216, 1979 Hawaii Sess. Laws 136, 259, 712. This case was decided prior to enactment of H.R.S. ch. 226 (Supp. 1979) which requires, *inter alia,* a "functional plan" for conservation lands and decisions by the board consistent therewith.) (E.M.)

***Bolte v. AITS, Inc.** 60 Hawaii 58, 587 P.2d 810, *rehearing denied,* 60 Hawaii 677 (1978).

Plaintiff filed this action for insurance commissions and appealed from summary judgment granted in favor of defendant who had successfully asserted a res judicata bar due to prior litigation on the same contract. The Court reversed summary judgment. The purpose for the rule against splitting a claim as to its theory or specific relief sought is to limit litigation, harassment, and costs. This rule permits successive suits on a continuing contract only if each suit is brought before the subsequent breach occurs or if the plaintiff did not know or had no reason to know of the second breach at the time of the first suit. In this case the date of the alleged second breach and the reasons for plaintiff's initial ignorance thereof were crucial to the res judicata inquiry. Summary judgment was reversed since the trial court failed to make these factual determinations. *(Cited in* Hunt v. Chang, 60 Hawaii 608, 594 P.2d 118 (1979).) (B.K.)

Brennan v. Stewarts' Pharmacies, Ltd., 59 Hawaii 207, 579 P.2d 673 (1978).

When a rental agreement between the parties was due for renegotiation, they submitted the issue of new rental terms to an arbitration panel for resolution.

The panel decided that the rent could not be increased because of the provisions of the original agreement. The tenant appealed from the trial court's order vacating the arbitration decision and the Court affirmed. The panel had exceeded its powers, within the meaning of H.R.S. § 658-9(4) (1968), by interpreting the provisions of the rental contract instead of deciding the narrow issue of fair monthly rental. Furthermore, one of the panel members was improperly biased, within the meaning of H.R.S. § 658-9(2) (1968), because he originally was employed as appellant's negotiator and personally identified himself with appellant's position. The Court found sufficient evidence to support the finding that the award was finalized after an earlier memorandum of award was reached, and as a result appellee's motion to vacate the award was not barred by the statute of limitations, H.R.S. § 658-11 (1968 & Supp. 1972). (L.A.)

Bridges v. Ching, 59 Hawaii 404, 581 P.2d 766 (1978) (per curiam).

Plaintiffs had filed a prior mandamus action which the Court granted, ordering the criminal injuries compensation commission to enter findings of fact supporting the denial of plaintiffs' claim. A subsequent appeal culminated in compensation to plaintiffs. Under H.R.S. ch. 351, plaintiffs' attorney received fifteen percent of their net award. Plaintiffs and their attorney then brought this action under the State Tort Liability Act, H.R.S. ch. 662, claiming damages for the commission's failure to perform a ministerial duty which prompted the mandamus action. The trial court entered summary judgment for plaintiffs in an amount that apparently represented reasonable fees for seeking the writ plus an attorney's fee pursuant to H.R.S. § 662-12 for recovery in this action. The Court reversed because the record did not sustain the award under any theory. The attorney's only legitimate claim was against his clients, not the commission. Although the clients might have recovered actual legal expenses as compensatory damages under *Glover v. Fong,* 40 Hawaii 503 (1954), they failed to present evidence of incurred expenses because the attorney apparently never charged them for the mandamus action. (H.R.S. ch. 351 (1976), *amended by* Acts 77, 92, 111, 1979 Hawaii Sess. Laws 159, 182, 259; H.R.S. § 662-12 (1976), *amended by* Act 152, 1979 Hawaii Sess. Laws 332; H.R.S. ch. 662 (1976 & Supp. 1978), *amended by* Acts 152, 195, 1979 Hawaii Sess. Laws 332, 397.) (R.B.K.)

Buffandeau v. Shin, 60 Hawaii 280, 587 P.2d 1236 (1978) (per curiam).

This was an action for the recovery of a share of the profits from the sale of real property. The circuit court found that plaintiff and defendant had agreed to purchase, as equal partners, a certain parcel of fee simple land. Following the property acquisition, the parties proceeded with plans to subdivide the parcel of land. The property was eventually sold and plaintiff claimed that the net profits from the sale were to be split on a fifty-fifty basis between plaintiff and defendant. The circuit court entered a judgment in favor of plaintiff. In affirming the judgment, the Court held that the circuit court's findings of fact regarding the existence of a partnership, as defined by H.R.S. § 425-106(1) (1968) were supported by substantial evidence and would not be set aside. *(Cited in* Maeda v. Amemiya, 60 Hawaii 662, 594 P.2d 136 (1979).) (B.Y.)

Cain v. Cain, 59 Hawaii 32, 575 P.2d 468, *rehearing denied,* 59 Hawaii 667

(1978).

This was the second appeal involving a divorce decree which the Court previously affirmed without opinion. The decree ordered the former wife to convey her interest in an apartment which the former husband purchased before their marriage and later conveyed to himself and then future wife as joint tenants. The decree further required the wife to vacate the premises by a certain date and ordered the husband to pay her $2,500 appreciation value. The lower court denied the wife's motion to amend the decree, ordered her to pay rent for the period she occupied the apartment without her husband's permission after the date specified in the decree, and awarded the husband attorneys' fees. The Court affirmed for the following reasons: (1) The law of the case doctrine foreclosed the wife from challenging the family court's jurisdiction to dispose of property acquired before marriage; (2) the disposition of any property pursuant to H.R.S. § 580-47 (1976) (amended 1977) was not inconsistent with the Married Woman's Property Act, H.R.S. § 573-1 (1976), which allows a woman to keep her antenuptial property separate after marriage; (3) the divorce decree imposed independent obligations on each party so that the wife's failure to transfer her interest in the apartment and vacate on time was not excused by the husband's alleged failure to tender the $2,500; (4) the wife's proper remedies for his alleged breach were to seek court enforcement or a contempt order, not to violate the decree; and (5) attorneys' fees may be awarded to either party under H.R.S. § 580-9 (1976) for enforcement actions notwithstanding that fees had been awarded to the opposing party in the original divorce proceeding. *(Cited in* Okuna v. Nakahuna, 60 Hawaii 650, 594 P.2d 128 (1979); Brennan v. Stewarts' Pharmacies, Ltd., 59 Hawaii 207, 579 P.2d 673 (1978) (this index). H.R.S. § 580-47 (1976) (amended 1977) (amended 1978).) (B.W.)

Chambers v. Leavey, 60 Hawaii 52, 587 P.2d 807 (1978) (per curiam).

The circuit court dismissed tenant's petition for writ of mandamus to compel the small claims court to reconsider her claim for return of a security deposit. The Court viewed appellant's petition for the writ as an effort to retry the merits and ruled that mandamus cannot be used as a substitute for a statutorily prohibited appeal. H.R.S. § 633-28(a) (1968) permits reconsideration in small claims court but precludes appeal. The Court also found no grounds for granting the extraordinary remedy of a writ of mandamus. (B.K.)

City & County of Honolulu v. A.S. Clarke, Inc., 60 Hawaii 40, 587 P.2d 294 (1978).

Appellant claimed a compensable leasehold interest in certain property and appealed from a summary judgment for the condemnor in eminent domain proceedings. The Court affirmed, holding that appellant's failure to register its leasehold interest in the land court properly resulted in the city taking title free of the unregistered interest under H.R.S. § 501-82 (1976). Although the city was not a "taker" of title within the literal meaning of the statute, it gained a position superior to appellant by filing the lis pendens with the land court. As purchaser for value, a condemnor through judicial proceedings has the same protections with regard to registered property as a private purchaser. Under H.R.S. § 501-101 (1976), appellant's lease did not bind the land but only operated as a contract

with the lessor, and appellant would have to seek compensation from the lessor. The Court noted that its holding was consistent with its interpretation of the land court registration statute in *Packaging Products Co. v. Teruya Brothers*, 58 Hawaii 580, 574 P.2d 424 (1978) (this index). In so ruling, the Court expressly limited the implications of *Akagi v. Oshita*, 33 Hawaii 343 (1935), and *In re Ward*, 31 Hawaii 781 (1931), *aff'd*, 61 F.2d 896 (9th Cir. 1932), and the holding of *Mossman v. Hawaiian Trust Co.*, 45 Hawaii 1, 361 P.2d 374 (1961), where the court found that an action for specific performance was not void because the plaintiffs claimed an interest in property under an unregistered conveyance. (B.K.)

Collins v. Goetsch, 59 Hawaii 481, 583 P.2d 353 (1978).

The developers and subdividers of land that was zoned to allow for duplexes brought an action to enjoin the purchaser of a lot from building a duplex by seeking enforcement of a restrictive convenant which ran with the land. The lower court issued a permanent injunction preventing defendants from developing their property except as a single family dwelling. The pertinent provision of the covenant required that the "lot shall contain no more than one single-family dwelling, except, where a second living unit is legally permitted, any such second unit shall be a part of and annexed to the main dwelling, and maintain an outward appearance of a single-family dwelling rather than a duplex." On appeal, the Court vacated the injunction with instructions to dismiss the complaint because the conclusions of law were not supported by substantial evidence. Restrictive covenants should be strictly construed, and ambiguity should be resolved in favor of the grantee and the free use of property, subject to state laws and county ordinances. The Court interpreted the intent of the covenant, giving the words their common meaning, as follows: (1) "[S]econd living unit" was undefined and had no popular meaning; (2) the word "main" in the term "main dwelling" implied more than one unit; and (3) the exception clause focused on the exterior use. Since the outward appearance of the duplex conformed with a single family structure, defendants were entitled to use it as a duplex. The Court also found that plaintiffs had failed to clarify the restrictive covenant at the "critical time" of purchase. Plaintiffs' letter to defendants excluding duplexes was sent nearly thirteen months after the lot sale and did not preclude construction and use of the duplex. (B.W.)

Corey v. Jonathan Manor, Inc., 59 Hawaii 277, 580 P.2d 843 (1978) (per curiam).

A judgment creditor of a divorced man appealed from a permanent injunction restraining it from executing upon real property held by the divorced man in joint tenancy with his former spouse pursuant to a judicial decree issued in the divorce proceedings. Although the Court found that the intent of the judicial decree was to prevent either spouse from unilaterally defeating the other's right to survivorship, the Court held that the former husband's interest in the property—a remainder in fee contingent upon his surviving his former spouse—was subject to alienation, levy, and execution. (P.S.)

Creative Leisure International, Inc. v. Aki, 59 Hawaii 272, 580 P.2d 66 (1978).

A Hawaii resident appealed from a motion for summary judgment granted to a

foreign corporation which had sought enforcement of a foreign default judgment against appellant for amounts due under an agreement to end a joint venture. Appellant had been subjected to the forum state's jurisdiction under a longarm statute. Therefore, the lower court should have ascertained whether appellant had demonstrated the following minimum contacts with the forum state to support jurisdiction over appellant: (1) Appellant must have purposely done some act or consummated some transaction in the forum state; (2) such activity must have given rise to or have been causally connected with the obligation sought to be enforced in the forum state; and (3) the activity or contract must have been such that maintenance of the suit in the forum state would not have offended traditional notions of fair play and substantial justice. The Court found that there were genuine issues of material fact as to the extent of appellant's minimum contacts with the forum state and reversed the summary judgment. If appellee's operations in Hawaii had been solely financed in the forum state; if it had no office, employees, or other contacts in Hawaii; if the parties' joint business were solely run out of the forum state; if the business in the forum state were significant; and if appellant's duties in Hawaii had been minimal; then the minimum contacts would have been present. But if appellant's work and recordkeeping had been substantially carried on in Hawaii, and if appellee had never performed in the forum state, then the minimum contacts would not have been present. (P.S.)

***Cuarisma v. Urban Painters, Ltd.**, 59 Hawaii 409, 583 P.2d 321 (1978).

Appellee claimant was awarded lump sum disfigurement benefits of $1550 and permanent total disability benefits of $112.50 per week. The weekly payments were to be made by the employer until the ceiling of liability as provided by H.R.S. § 386-31(c) (1968 & Supp. 1969) (amended 1972) was reached, whereupon liability for the payments would transfer to a state compensation fund. The appellant employer's contention that both awards could not be made because compensation is awarded only for total loss of earning capacity and that such compensation satisfies all possible claims under H.R.S. ch. 386 (1968 & Supp. 1969) (amended 1976 & Supp. 1978) was rejected by the Court on the basis of statutory construction. Despite the abundance of case law in other jurisdictions favoring appellant's contention, the Court could not find sufficient evidence to show legislative intent to compensate only for loss of wage earning capacity in cases which included disfigurement rather than for the amount of impairment of bodily integrity. Also, the Court found that the legislature had deliberately excluded a ceiling of liability on combined benefits. As a result, the employer was liable for both awards and could not reduce its liability for permanent total disability benefits by the amount for disfigurement benefits. (H.R.S. § 386-31 (1976), *amended by* Act 66, 1979 Hawaii Sess. Laws 138; H.R.S. ch. 386 (1976 & Supp. 1978), *amended by* Acts 40, 66, 111, 114, 132, 1979 Hawaii Sess. Laws 68, 138, 259, 277, 303.) (R.B.K.)

Dependents of Feliciano v. Shield Pacific, Inc., 59 Hawaii 666 (1978) (mem.).

Dependents appealed an award of death benefits to the Hawaii State Labor and Industrial Relations Appeals Board on the grounds that the benefit rate applied was incorrect. The board found that the amended workers' compensation statute allowing increased maximum and minimum benefit rates was not applicable in

this case since the fatal accident occurred prior to the amendment. The Court affirmed on appeal. No. AB75-97 (WH) (Labor & Indus. Rel. App. Bd. Hawaii Oct. 18, 1976). (E.M.)

Devine v. Queen's Medical Center, 59 Hawaii 50, 574 P.2d 1352 (1978) (per curiam).

Plaintiff brought a medical malpractice action based on the postoperative care of her deceased husband. She claimed that defendants were negligent in moving the patient from the surgical intensive care unit to a secondary surgical care facility a few days after his coronary bypass operation and that the negligent conduct resulted in the patient's death from a pulmonary embolism two days after the move. The Court affirmed summary judgment entered for defendants and held that expert medical testimony was required to establish the postoperative care as a proximate or contributory cause of death where the record, viewed in the light most favorable to the plaintiff, failed to establish this essential element of plaintiff's case. However, plaintiff might have shown negligence absent expert testimony. (B.W.)

Disciplinary Board v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978).

An attorney misappropriated approximately $46,000 of a deceased client's trust account for his own use and failed to appear in court to offer a full accounting of the estate and trust matters of the client. The Disciplinary Board of the Hawaii Supreme Court recommended disbarment after a hearing on the complaint. The Court imposed the recommended sanction, finding that the evidence of misconduct was clear and convincing. The attorney had admitted misappropriation of the funds which violated the Code of Professional Responsibility, at least with regard to preservation of the identity of a client's funds. The Court found the attorney's arguments insufficient to mitigate the sanction of disbarment: (1) Testimony of other clients and the attorney's colleagues regarding his fitness to practice law did not guard against future misconduct; (2) generalized statements of ill health occuring at the time of misappropriation did not excuse the misconduct; (3) restitution of the misappropriated funds only after a complaint was filed did not justify a lesser penalty; and (4) the misappropriation could not have been inadvertent because there were only two relevant checking accounts and each of them was clearly labelled. *(Cited in* Office of Disciplinary Counsel v. DeMello, No. 5851 (Hawaii Sup. Ct. Oct. 15, 1979); Disciplinary Bd. v. Bergan, 60 Hawaii 546, 592 P.2d 814 (1979).) (R.B.K.)

Dobison v. Bank of Hawaii, 60 Hawaii 225, 587 P.2d 1234 (1978) (per curiam).

Plaintiff alleged fraud and negligence in oral misrepresentations made by defendant bank's employees regarding the financial status of a third party. A motion for summary judgment was granted in favor of defendant based upon a Statute of Frauds defense, H.R.S. § 656-3 (1976). The Court affirmed on appeal and held that where an action for actual fraud will lie, section 656-3 will not constitute a bar to the action. However, in this case, there was no allegation of actual fraud. Plaintiff's own deposition negated the existence of actual fraud. (E.M.)

***Doherty v. Hartford Insurance Group,** 58 Hawaii 570, 574 P.2d 132 (1978).

Plaintiff sued to recover on his yacht insurance policy because defendant insurer denied coverage, claiming that the sailboat was unseaworthy at the time of the accident. The court dismissed the suit because plaintiff failed to file the action within the twelve months required by the policy. On appeal, plaintiff argued that equitable estoppel should prevent defendant's private statue-of-limitations defense since defendant's agent had refused to supply alleged missing parts of the yacht which plaintiff needed for metallurgic testing. The Court affirmed the dismissal, which it treated as summary judgment, because plaintiff failed to establish that he reasonably relied on defendant's conduct to his detriment. Defendant consistently denied liability, refused to pay, and made no misleading representations. Furthermore, plaintiff could have compelled return of any missing parts through discovery after suit was timely filed. (M.D.C.)

Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 575 P.2d 869 (1978).

In affirming the trial court's decision that lessee materially breached the nonassignment provision in its lease agreement, the Court held that the formal agreement had to be read with subsequent letter agreements to ascertain the parties' intent with respect to the extent of lessor's freedom to withhold consent to an assignment or sublease. A lessee may be granted equitable relief from forfeiture of the lease for breach of a lease covenant where such breach is not due to gross negligence or persistent and wilful conduct, and where the lessor can be reasonably and adequately compensated for the resulting injury. Although the record in this case might well have sustained a finding that lessee's breach was persistent and wilful, the trial court did not abuse its discretion in refusing to allow lessor to terminate the lease. However, the Court reversed the damage award to lessor, based on the difference between the lease rentals and the fair market rental, and held that where a lessor has not terminated the lease the measure of damages is that amount which will place the lessor in the position it would have been had there been no breach. Since lessor continued to receive its bargained-for rent it was entitled only to nominal damages. Nevertheless, lessor was entitled to the fair market rental for the period of the lease subsequent to the date of the trial court decree, which authorized continuation of the agreement if lessee either rescinded its assignment or paid the fair market rental for the remaining term of the lease. Because lessor was the successful party, it was entitled to attorneys' fees, the amount of which would be determined on remand. This sum is limited to expenses which were reasonably and necessarily incurred but is not limited, as required by statute, to twenty-five percent of the damages awarded in this case since the nominal award was merely incidental to the principal relief sought. Kidwell, J., dissented in part and would not have entitled lessor to fair market rental for the lease period after the trial court decree for the same reasons that the Court limited lessor's recovery to nominal damages. *(Cited in* Loyalty Dev. Co. v. Wholesale Motors, Inc., No. 6544 (Hawaii Sup. Ct. Jan. 25, 1980).) (J.Y.)

Freitas v. City & County of Honolulu, 58 Hawaii 587, 574 P.2d 529 (1978).

Plaintiffs sued two police officers and their municipal employer, alleging that the officers' negligence resulted in plaintiffs being shot and imputing their negli-

gence to the city under the doctrine of respondeat superior. Plaintiffs claimed that police inaction following a prior incident caused their assailant to believe that he had nothing to fear from the authorities. This belief led the assailant to shoot plaintiffs. On appeal, the Court affirmed summary judgment entered for defendants because ordinary failure of police to provide protection is not actionable, and plaintiffs had failed to show some circumstance which created a specific duty to them. The Court held that recovery requires proof of three elements: (1) Police were under a duty to act affirmatively for plaintiffs' protection; (2) police failed to perform the special duty; and (3) if police had acted, the injuries sustained would have been avoided. (M.D.C.)

Friedrich v. Department of Transportation, 60 Hawaii 32, 586 P.2d 1037 (1978), *rehearing denied,* 60 Hawaii 677 (1979).

Plaintiff brought an action against the State for injuries sustained when he fell from a State-owned pier into shallow water. On appeal, the Court affirmed judgment for defendant and held that, in maintaining its land, the government may reasonably assume that persons will not be harmed by obvious dangers that are not extreme and which a reasonable person would avoid. Plaintiff was aware of the danger, a slippery area near the edge of the pier, and could have avoided it by not taking the narrow path between the slippery area and the edge. There was no showing that structural defects were connected with the injury. Expert testimony for plaintiff that a guardrail and warning sign were needed for the reasonable safety of sightseers was a statement of ultimate fact, and its weight was to be assigned by the judge in a bench trial. (B.K.)

Fry v. Bennett, 59 Hawaii 279, 580 P.2d 844 (1978) (per curiam).

Plaintiff brought an action for the wrongful death of his son who was hit and killed by a telephone pole which defendant accidentally dropped. Plaintiff's motions for summary judgment and for a directed verdict were denied, and the jury returned a verdict in favor of defendant. The Court held that there were valid issues of material fact as to defendant's negligence in dropping the pole, the proximate cause of decedent's injury, and decedent's own negligence. Therefore, the motions for summary judgment and for a directed verdict were properly denied. (*Cited in* Hunt v. Chang, 60 Hawaii 608, 594 P.2d 118 (1979).) (P.S.)

Gannett Pacific Corp. v. Richardson, 59 Hawaii 224, 580 P.2d 49 (1978).

The press obtained a writ prohibiting a lower court judge from closing a preliminary hearing to the public because the judge had an insufficient basis for the closure order. The Court held that only when the presiding judge, upon motion of defendant for closure, finds that the evidence sought to be introduced may be inadmissible at trial on the issue of guilt or innocence (although it is admissible at a preliminary hearing on the issue of probable cause), and further finds that there is a substantial likelihood that an open hearing on that part of the proceeding would interfere with defendant's right to a fair trial by an impartial jury, may the judge depart from the general policy of having judicial proceedings open to the public and issue a closure order for that part of the proceeding. The factors to be considered are: (1) The nature of the evidence sought to be introduced, (2) the probability of such information reaching potential jurors, (3) the likely prejudicial

impact of such information on prospective jurors, and (4) the availability and efficacy of alternative means to neutralize the effect of such disclosures. A complete record of those parts of the proceedings closed to the public must be kept and made available to the public in the future, and the factual basis for the court's determinations upon which the closure is predicated must be made apparent on the record. The Court noted that all applicable rules and precedents make no provision for nonparty intervention in criminal proceedings. (*Cited in* Honolulu Adv., Inc. v. Takao, 59 Hawaii 237, 580 P.2d 58 (1978) (this index).) (P.S.)

Hamabata v. Hawaiian Insurance & Guaranty, 59 Hawaii 666 (1978) (mem.).

The Hawaii State Labor and Industrial Relations Appeals Board denied claimant additional temporary total disability compensation for an injury sustained in an accident arising in the course of her employment, thereby reversing the decision of the director of labor and industrial relations. On appeal, the Court granted the motion for stay of payments. No. AB76-236 (Labor & Indus. Rel. App. Bd. Hawaii May 13, 1977). (E.M.)

HGEA v. County of Maui 59 Hawaii 65, 576 P.2d 1029 (1978).

Plaintiffs challenged the state constitutionality of several county charter provisions. The Court construed article VII of the Hawaii Constitution to authorize home rule subject to legislative preemption only in certain areas, thereby overruling *Fasi v. City & County of Honolulu,* 50 Hawaii 277, 439 P.2d 206 (1968), which interpreted a former version of the article. Article VII, sections 3, 5, and H.R.S. § 50-15 (1976) reserve the state's power over matters of statewide interest and laws relating to county fiscal powers. However, charter provisions that deal with the "structure and organization of executive, legislative and administrative matters" supersede conflicting statutes. The Court defined "structure and organization" and held that the charter provisions relating to the departments of water supply, police, and liquor control involved local functions directly related to county organization and government. The Court invalidated other provisions purporting to exempt certain staff members of the offices of corporation counsel and prosecutor from civil service and held that the personnel director may not serve at the mayor's pleasure because the established personnel system and compensation laws represent a policy of statewide concern. Kidwell, J., dissented in part and would have held that liquor regulation was a state, not local function. (HAWAII CONST. art. VII (1959, amended 1968, 1978, renumbered art. VIII, 1978).) (B.W.)

***Holdman v. Olim,** 59 Hawaii 346, 581 P.2d 1164 (1978).

Appellant, a female visitor to a male state prison, was denied entry because she was not wearing a brassiere in violation of a directive concerning the proper dress for women. The Court affirmed the trial court's ruling that the directive did not contravene the Constitutions of the United States and Hawaii nor the Hawaii Administrative Procedure Act because prison control is a vital governmental interest which outweighed individual concerns. Although the equal protection clause of the fourteenth amendment requires only a substantial rationality standard with respect to gender-based classifications, the Court held that the directive could survive even strict scrutiny and, it therefore could not infringe the equal

protection clause in article I, section 4, of the Hawaii Constitution. Similarly, the dress code withstood appellant's claimed violation of her right to privacy. The Court declined to decide the appropriate standard of judicial review under the equal rights amendment, article I, section 21, of the Hawaii Constitution but determined that the directive did not violate it. Assuming that the dress code was a "rule", it was not subject to the rulemaking provisions of the Hawaii Administrative Procedure Act, H.R.S. ch. 91. The term "rule", as defined in H.R.S. § 91-1(4) (1976), does not include regulations concerning internal management of an agency. Prison security regulations are primarily matters of internal management of public property. *(Cited in* Kailua Community Council v. City & County of Honolulu, 60 Hawaii 428, 591 P.2d 602 (1979); State v. Martinez, 59 Hawaii 366, 581 P.2d 765 (1978) (this index). HAWAII CONST. art. I, § 4 (1959, amended and renumbered § 5, 1978); *id.* § 21 (1972, renumbered § 3, 1978); H.R.S. ch. 91 (1976 & Supp. 1978), *amended by* Acts 64, 111, 216, 1979 Hawaii Sess. Laws 136, 259, 712.) (S.R.)

Honolulu Advertiser, Inc. v. Takao, 59 Hawaii 237, 580 P.2d 58 (1978).

In a highly publicized rape case, the judge who had presided over the preliminary hearing issued a seal order for transcripts of those proceedings because he felt the defendant's right to a fair trial by an impartial jury would be jeopardized by further pretrial publicity. The seal order was issued before the jury was selected and was to remain in effect until the trial was concluded. The press challenged the seal order arguing that it had a right to a transcript under H.R.S. § 606-12 (1976) which provides that the court reporter "may furnish a transcript of any of his notes, where the same is not intended for purposes of appeal to the Supreme Court, upon the request of any party, without the order of the judge therefore first obtained." Although the Court construed the phrase "any party" to mean any person who seeks a transcript for a legitimate and proper purpose, the Court noted that the court reporter was still subject to the orders of the presiding judge who has the discretion to limit access to judicial records as necessary in a particular case. The Court found that the presiding judge had not acted capriciously or arbitrarily and that his order was not clearly erroneous as a matter of law. The Court noted that no irreparable harm to the press or the public had been shown, the order was of limited duration, and the press had been present throughout the actual preliminary hearing. The Court distinguished *Gannett Pacific Corp. v. Richardson,* 59 Hawaii 224, 580 P.2d 49 (1978) (this index) on the basis that this case did not concern the public's right to attend a judicial proceeding. (P.S.)

Hustace v. Doi, 60 Hawaii 282, 588 P.2d 915 (1978).

A nonpartisan, mayoral candidate challenged H.R.S. § 12-41 (1976) which governed the status of nonpartisans on the general election ballot. The law permitted a plurality of party voters to nominate a partisan candidate to the general election whereas a nonpartisan had to obtain ten percent of all primary election votes cast for that office or a number equal to the lowest vote received by a partisan candidate who was nominated in the primary. The court granted defendants' motion for summary judgment which was affirmed on appeal. Appellant claimed that the statute unconstitutionally burdened her first amendment right of association

and violated the equal protection clause of the fourteenth amendment and article I, section 4, of the Hawaii Constitution by discriminating against nonpartisans. The Court employed the same balancing test it had used in *Nachtwey v. Doi*, 59 Hawaii 430, 583 P.2d 955 (1978) (this index), which involved alleged wealth discrimination in election laws. In this case the Court found that the statutory scheme was the least burdensome means of protecting the direct primary and the legal requirement was not on its face an unconstitutionally severe restriction on access to the ballot. The Court noted that it did not consider the potential impact of article II, section 4, of the Hawaii Constitution regarding open primary elections in reaching its decision. Richardson, C.J., dissented and would have reversed the summary judgment because there were disputed issues of material fact regarding appellant's ability to satisfy H.R.S. § 12-41 by exercising reasonable diligence. (HAWAII CONST. art. 1, § 4 (1959, amended and renumbered § 5, 1978); H.R.S. § 12-41 (1976), *amended by* Act 139, 1979 Hawaii Sess. Laws 313.) (B.K.)

Iaea v. Iaea, 59 Hawaii 648, 586 P.2d 1015 (1978) (per curiam).

Half interest in a certain piece of property was conveyed to plaintiff and her husband as tenants by the entirety. The other half interest was conveyed simultaneously to defendant. By a subsequent deed purportedly executed by both plaintiff and her husband, defendant assumed ownership of the entire property. Plaintiff asserted that her signature was a forgery and requested that the deed be set aside. The trial court, sitting without a jury, upheld plaintiff's claim. The Court relied on the lower court's finding that plaintiff did not sign the disputed document. Although certain facts entered by the trial court were inconsistent, findings of fact are to be viewed as a whole so as to render them consistent and will be construed to uphold rather than defeat the judgment. The Court held that the circuit court lacked jurisdiction to order the land court to expunge the false deed and resulting transfer certificates from its files but otherwise affirmed the judgment. (B.Y.)

In re Dinson, 58 Hawaii 522, 574 P.2d 119 (1978).

Defendant questioned the family court's waiver of jurisdiction over him pursuant to H.R.S. § 571-22 (1968 & Supp. 1974). The juvenile raised three issues on appeal: (1) Whether the use of a social report violated his confrontation right because information in the report was not the personal knowledge of the writer; (2) whether the use of a report withdrawn from evidence violated due process; and (3) whether it was prejudicial error to have allowed a probation officer to testify that her preparation of a report was in conformity with the law. In affirming the family court waiver, the Court noted that the probation officer's testimony was explanatory and did not offer a legal conclusion. Analogizing waiver hearings to the ordinary sentencing process, the Court found that the family court was entitled to consider all the evidence without violating due process so long as the procedural standards of *Kent v. United States*, 383 U.S. 541 (1966), were met. A juvenile must have an opportunity to challenge the information, and in this case defendant had full opportunity to rebut the statements contained in both reports. *(Cited in In re* Doe, 61 Hawaii _, 594 P.2d 1084 (1979); State v. English, 61 Hawaii _, 594 P.2d 1069 (1979); State v. Stanley, 60 Hawaii 527, 592 P.2d 422 (1979).) (M.D.C.)

In re Estate of Au, 59 Hawaii 474, 583 P.2d 966 (1978).

The widow of decedent's son, who was entitled to a portion of decedent's estate, took an interlocutory appeal from a probate ruling that sale proceeds from land held by the decedent and his wife as tenants by the entirety constituted personal property held by the entirety rather than in common. Appellant also challenged the ruling that cash funeral gifts, which amounted to less than the funeral costs, belonged to decedent's wife who had paid for the funeral but had not filed a claim against her husband's estate for reimbursement. The Court affirmed and held that "[a]bsent a contrary intent by both spouses, personalty proceeds from a sale of land held by the entirety are also property held by the entirety" because the proceeds are a substitute for the land sold and not a newly created interest. H.R.S. § 509-1 (1976) creates only a presumption that real property is held in common, and H.R.S. § 509-2 (1976), dealing with any property interest, creates no presumption as to the type of tenancy. The Court also held that funeral gifts may offset expenses and treated them as partial reimbursement for the funeral costs borne by decedent's wife. (B.W.)

In re Island Holidays, Ltd., 59 Hawaii 408, 582 P.2d 703 (1978) (per curiam).

Island Holidays requested a rehearing on its appeal, see *In re Island Holidays, Ltd.*, 59 Hawaii 307, 582 P.2d 703 (1978) (this index), regarding excise tax liability for distribution of previously taxed income paid to members of the joint venture for their services, on the ground that the decision was based upon a question which had not been briefed or argued. The Court denied the rehearing. Even though the earlier decision rejected the basis of liability asserted by the State and found a basis of liability in a statute to which the attention of the parties had not been directed, the point had been briefed and argued. (R.B.K.)

In re Island Holidays, Ltd., 59 Hawaii 307, 582 P.2d 703, *rehearing denied*, 59 Hawaii 408, 582 P.2d 703 (1978).

The Court held that where a member of a joint venture manages and operates a hotel for the benefit of the joint venture and receives guaranteed payments in return, the activities performed by the joint venturer constitute a "business" under H.R.S. § 237-2 (1968) between the joint venture and the joint venturer, and the payments for such business activities are income to the joint venturer subject to the general excise tax under H.R.S. § 237-20 (1968). The fact that the activities are required under the joint venture agreement does not exclude them from the "business" characterization. The fact that the activities also generate income to the joint venture which is subject to the general excise tax does not prevent the imposition of such tax on the joint venturer's payments for the same activities. (P.S.)

In re Kamakana, 58 Hawaii 632, 574 P.2d 1346 (1978).

The State appealed from a land court decree that applicant was the owner in fee simple of a fishpond located in the *ahupua'a* (tract of land) of Kawela. There is a presumption that when the Land Commission awarded an *ahupua'a* by name only, the grant included everything within the ancient boundaries of the *ahupua'a*. The Court affirmed, holding that since the *ahupua'a* was awarded by

name only and since there was sufficient evidence to support a finding that the fishpond in question existed at the time of the grant, the fishpond was included in the grant to applicant's predecessor in title. The government's further contention that the territory of Hawaii had obtained title to the fishpond by adverse possession was rejected on the ground that the requisite hostility was absent. (*Cited in* Okuna v. Nakahuna, 60 Hawaii 650, 594 P.2d 128 (1979).) (J.Y.)

In re Kauai Electric Division of Citizens Utilities Co., 60 Hawaii 166, 590 P.2d 524 (1978).

Appellant sought to invalidate three Public Utilities Commission (PUC) orders issued in connection with a utility company's application for rate increases. Order 3852 approved interim increases. The Court held that the power to grant interim increases was necessarily implied from the PUC's express authority, under H.R.S. § 269-16 (1973) (amended 1976), to regulate rates, supervise operations, and do all things necessary in the exercise of its jurisdiction. The statutory requirement that rate decisions be "just and reasonable" provides constitutionally sufficient limits on the exercise of the PUC's power even though the standard has not been reduced to a formula. The Court, however, remanded Order 3852 because the PUC failed to make findings of fact and conclusions of law to justify interim increases as required by the Hawaii Administrative Procedure Act, H.R.S. § 91-12 (1968). The Court affirmed Order 4048 which granted permanent rate increases because appellant failed to show that it was unjust and unreasonable in its consequences. The agency decision therefore met the "clearly erroneous" standard of judicial review. The record also did not support appellant's contention that an "energy clause" was designed to create profits. The clause authorized the utility to charge its consumers for taxes paid on revenue generated by the automatic rate adjustment for fuel price increases. The PUC had complied with the public notice requirements of H.R.S. § 269-16, and the promulgation of additional rules for public notice of rate hikes is unnecessary. Hence, the clause was validly adopted even under appellant's theory that it constituted a rate increase. The PUC had refused to reopen the case in Order 8083, and the Court held that the agency action was not an abuse of discretion because it did not appear that a different result would be reached on rehearing with additional documents. (*Cited in In re* Hawaiian Elec. Light Co., 60 Hawaii 625, 594 P.2d 612 (1979). H.R.S. § 269-16 (1976), *amended by* Act 111, 1979 Hawaii Sess. Laws 259, 270.) (B.K.)

In re Mokuleia Ranch & Land Co., 59 Hawaii 534, 583 P.2d 991 (1978).

A landowner sought to register title in land court. Royal Patent grants made around 1850 established the original boundary along an ancient road which the government retained in its possession. In 1937, the territory of Hawaii conveyed the unused road to the landowner through an exchange deed. The land court set the vegetation line as the boundary, having found a mutual mistake in the description of land in the 1937 deed. The Court vacated the decision and remanded the case because the land court's finding that the State had intended to convey the disputed area was "clearly erroneous." The Court found a lack of intent at the critical time of conveyance despite evidence showing that the landowner subsequently enjoyed uncontested use of the property and paid taxes on it. Absent the requisite finding of the parties' clear intent, reformation of the ex-

change deed could not be sustained. The Court also found no grounds for equitable estoppel to prevent the State from asserting its claim since the private landowner failed to show detrimental reliance on the 1937 exchange deed description and accompanying map. (B.W.)

***Island Holidays, Inc. v. Fitzgerald,** 58 Hawaii 552, 574 P.2d 884 (1978).

Plaintiffs sued for back rent and summary possession of the premises leased to defendants. Defendants counterclaimed for breach of an oral lease. Plaintiffs won a summary judgment on the summary possession issue but received no back rent. Defendants won on the breach of lease issue and were awarded $41,636 by the jury. Plaintiffs appealed the damage award while defendants appealed the summary judgment. The Court remanded on both issues. Initially, the Court noted that defendants had prematurely filed an appeal regarding the summary judgment as it was not a final judgment in the multiclaim suit and the trial court had not allowed an appeal on the claim in accordance with Hawaii R. Civ. P. 54(b). However, in filing a supersedeas bond after all judgments were entered and subsequent motions decided, defendants effectively refiled their appeal, thereby curing the jurisdictional defect. The Court held that summary judgment was erroneous. The disputed existence of a new oral agreement of lease followed by defendants' substantial part performance, which removes an oral contract from the Statute of Frauds requirements, would constitute an equitable defense to summary possession. In reviewing the damages issue, the Court found the actions of the trial court contradictory and confusing. Moreover, the Court concluded that erroneous jury instructions had been given which were presumed to be harmful error. *(Cited in* Windward Partners v. Delos Santos, 59 Hawaii 104, 577 P.2d 326 (1978) (this index).) (M.D.C.)

***Jack Endo Electric, Inc. v. Lear Siegler, Inc.,** 59 Hawaii 612, 585 P.2d 1265 (1978).

Plaintiff brought suit to foreclose a mechanic's and materialman's lien and to recover the amount allegedly owed for building materials supplied to defendants, one of whom leased the property on which the materials were used to make improvements. The circuit court granted defendants' motion for summary judgment because plaintiff's lien notice failed to name the fee owner of the property as required by H.R.S. § 507-43 (Supp. 1973). On appeal, the Court reversed and held that defendants, the general contractor and the lessee developer of the property, were proper parties against whom the lien could be imposed. The statutory requirement of notice to the fee owner is directory, and plaintiff's noncompliance did not invalidate the lien as to those parties who were properly notified and sued. Since the notice was defective as to the fee owner, the lien would not attach to any interest the owner had in the improvements or property upon which the improvements were situated. (H.R.S. § 507-43 (Supp. 1973) (amended 1976).) (B.Y.)

Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978).

Vendees breached two agreements of sale by failing to pay the installments when due, and the trial court granted vendors a cancellation of the agreements. The Court reversed, holding that equity will generally grant relief against forfei-

ture and decree specific performance where vendees' breach has not been due to gross negligence, deliberate actions, or bad-faith conduct so long as the vendor can be reasonably and adequately compensated for his injury. Vendees did not wilfully refuse to perform nor act in bad faith and were ready, willing, and able to make full payment of the agreement of sale and to compensate vendor for injuries suffered. The trial court also granted cancellation on the basis that vendor's broker, who was one of the vendees, had breached his duty of loyalty to vendor by failing to disclose his plans to purchase the property which vendor authorized him to sell. However, the Court rejected this reason, finding that vendor was fully aware of his broker's role as vendee. *(Cited in* Keller v. La Rissa, Inc., 60 Hawaii 1, 586 P.2d 1017 (1978) (this index).) (J.Y.)

***Jones v. Don L. Gordon Corp.,** 60 Hawaii 12, 586 P.2d 1024 (1978).

Plaintiff developer had contracted with defendant distributor for the delivery of prefabricated building parts within a specified time. The parts were to be manufactured by another defendant. Due to plaintiff's error in the building plans, the parts were not delivered on time because the distributor had to revise its plans, rescind its earlier purchase order, and submit a new purchase order to the manufacturer. There was no express agreement between plaintiff and the distributor as to the new delivery date but, when the shipment arrived, plaintiff's parts were included with those of another customer and the freight company would not release any goods without full payment for both orders. Plaintiff brought an action seeking damages for delayed and defective delivery. The circuit court granted plaintiff recovery from the manufacturer but denied recovery from the distributor on the ground that a novation had occurred by which the manufacturer was substituted for the distributor as the seller in the contract. The Court found no evidence to support the conclusion that a direct contractual relationship existed between manufacturer and plaintiff. Plaintiff was instead an incidental beneficiary of the contract between the manufacturer and distributor. Since the judgment against the manufacturer was reversed because there was insufficient evidence of novation, the trial court's conclusion that the distributor had no liability was also vacated because it had been based on the same erroneous finding of novation. (B.Y.)

***Kang v. Harrington,** 59 Hawaii 652, 587 P.2d 285 (1978).

The circuit court, sitting without a jury, found that defendant had committed fraud with respect to a rental agreement and awarded plaintiff compensatory and punitive damages. The Court held that the evidence was sufficient to meet the extremely high standard of proof required to show fraud where written contracts are involved. Defendant's actions were sufficiently wanton to permit an award of punitive damages. However, the amount of punitive damages was excessive and improperly influenced by defendant's attempt to perpetrate fraud on the court, which may be appropriately redressed only by a separate action pursuant to Hawaii R. Civ. P. 60(b). Since remittitur on appeal from a bench trial judgment posed no constitutional impediments, the Court reduced the punitive damages from $20,000 to $2,500. The Court also held that where defendant improved the plaintiff's property in his attempts to defraud plaintiff, defendant would not be entitled to recover the costs of such improvements. (B.Y.)

***Keller v. La Rissa, Inc.** 60 Hawaii 1, 586 P.2d 1017 (1978).

A secured party instituted this action to recover the balance due on a promissory note. Defendant debtors counterclaimed on the theory of conversion for value of collateral security allegedly retained by plaintiff. The circuit court entered a judgment for plaintiff in the amount due on the note together with his attorney's fees. Defendants appealed and the Court affirmed, except as to the award of the attorney's fees. Failure of the secured party, on demand, to return goods held as collateral did not constitute a conversion, and the Uniform Commercial Code, H.R.S. ch. 490, imposed no obligation on the secured party to apply the collateral in possession to the reduction of the debt. Breach of the secured party's duty to use reasonable care in the custody of collateral is measured by any loss to the goods but is not a conversion. The Court vacated the award of the attorney's fees based on the parties' contracts because the record lacked findings as to the reasonable value of the services rendered, thereby failing to meet the standard recently reaffirmed in *Jenkins v. Wise*, 58 Hawaii 592, 604, 574 P.2d 1337, 1345 (1978) (this index), requiring that attorneys' fees be "reasonably and necessarily incurred by the party seeking the award." (H.R.S. ch. 490 (1976 & Supp. 1978), *amended by* Act 169, 1979 Hawaii Sess. Laws 347.) (B.Y.)

Lau v. Valu-Bilt Homes, Ltd., 59 Hawaii 283, 582 P.2d 195 (1978).

After deciding that rules of partnerships apply to joint ventures, the Court held that in an action by a joint venturer to recover contributions there must be an equitable accounting first if, as in this case, the accounts are so extensive and complicated that a jury could not accurately ascertain the proper amount of contribution to award. Distinguishing *Christian v. Waialua Agricultural Co.*, 30 Hawaii 533 (1928), and *In re Pioneer Mill Co.*, 33 Hawaii 305 (1935), the Court held that appellants' motion to disqualify appellee's attorney because appellants were former clients of that attorney was properly denied. Appellants knew at the outset that counsel would be representing the opposing side, appellants were seeking disqualification of counsel to delay the trial, and appellants were not actually prejudiced. Further, there was no communication within the scope of the attorney-client relationship between appellants and appellee's attorney. The trial court erred in applying the doctrine of partnership-by-estoppel in its refusal to dismiss an appellant as a defendant where the defendant had never signed the joint venture agreement. Partnership-by-estoppel only applies to third persons and not between actual partners or joint venturers because everyone is presumed to know who his associates are in business. The Court expressed no opinion on two procedural issues because appellants failed to comply with Hawaii R. Civ. P. 3(b)(5) in raising the issues on appeal. Finally, the Court summarily disposed of the issue of the attorney's fees by referring the parties to the guidelines established by *Sharp v. Hui Wahine, Inc.*, 49 Hawaii 241, 413 P.2d 242, *rehearing denied*, 49 Hawaii 257, 414 P.2d 81 (1966). Kidwell, J., dissented in part and would have held that the equitable accounting issue was not before the Court because it had not been raised properly at the pretrial stage and therefore the trial court did not know the complexity of the evidence until it had been presented to the jury. *(Cited in* Wong v. Fong, 60 Hawaii 601, 593 P.2d 386 (1979).) (P.S.)

***Lawhead v. United Airlines,** 59 Hawaii 551, 584 P.2d 119 (1978).

An airlines flight attendant, hired on the mainland and transferred to Honolulu three years later, contracted influenza after a Chicago run during which she worked in a cold aircraft galley and was housed in a hotel with faulty air-conditioning. She filed a workers' compensation claim for $26.35 in medical expenses which was approved by the director of labor and industrial relations and upheld by the appeals board. In affirming the award, the Court construed H.R.S. § 386-6 (1976) which confers jurisdiction on the board to consider claims for injuries sustained outside Hawaii if the employee were hired in the State. A worker is "hired in the State" if, as in this case, the employment relationship existed in Hawaii at the time of injury. The contract itself need not have been created in Hawaii. The Court also held that influenza is an injury within the meaning of H.R.S. § 386-3 (1976) and is compensable if the employer has not overcome the statutory presumption created by H.R.S. § 386-85 (1976) that the claim is work related if it reasonably appears to be so related. (B.W.)

Life of the Land v. Ariyoshi, 59 Hawaii 156, 577 P.2d 1116 (1978) (per curiam).

Appellant sought a temporary injunction to halt construction of the Central Maui water transmission system pending determination of its appeal from an order granting defendants' motions for partial summary judgment and dismissal. Appellant contended that the environmental impact statement submitted for the project failed to satisfy the provisions of H.R.S. ch. 343 (1976). The Court refused to grant the injunction and adopted the following tripartite test utilized by federal courts considering injunctions for alleged noncompliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1970): (1) Whether the plaintiff is likely to prevail on the merits, (2) whether the balance of irreparable damage favors the issuance of a temporary injunction, and (3) whether the public interest supports granting the injunction. The Court held that H.R.S. § 343-1(6) (1976) requires a broader inquiry than NEPA but does not mandate inclusion of a cost-benefit analysis in the impact statement. Appellant failed to produce expert testimony showing that the economic, social, and environmental impacts of the project were quantifiable. Since appellant failed to establish a prima facie case on the merits, it was unnecessary to consider the two other parts of the test. However, if appellant had shown even "some probability" of success, the Court would have weighed the two other factors in reaching a decision. (*Cited in* Life of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979). 42 U.S.C. § 4332 (1970) (amended 1975); H.R.S. §§ 343-1 to -7 (1976), *amended or renumbered by* Act 197, 1979 Hawaii Sess. Laws 409.) (L.A.)

Life of the Land v. Burns, 59 Hawaii 244, 580 P.2d 405 (1978).

Members of state boards and commissions appealed from a judgment in favor of a public interest group which had sought an injunction and declaratory judgment to have the members serving beyond the 8-year maximum term permitted under H.R.S. § 26-34 (1976) removed from office and have their status as members of the boards and commissions declared illegal. The Court held that the case was moot because there were no holdover members at the time of the lawsuit and remanded with direction to dismiss the complaint. The Court found that the

mootness exception which occurs when an issue is "capable of repetition, yet evading review" was inapplicable because the senate would be quick to expose any delaying tactics of the Governor in the appointment of the members. Further, appellees conceded that the Governor would be entitled a reasonable time after a term expired to nominate a new member. The Court also found that the trial court had not abused its discretion by denying a class action as to two of the three classes of defendants because appellees had failed to meet the burden of proof under Hawaii R. Civ. P. 23(a)(1) which requires that the class be so numerous that joinder of all members is impracticable. Appellees' failure to introduce sufficient evidence on these issues could have been avoided since appellants would have furnished the necessary information to them within a reasonable time. (P.S.)

Lynch v. Blake, 59 Hawaii 189, 579 P.2d 99 (1978).

An action to remove cloud on title and a creditor's claim were consolidated at trial level in a case involving an assignment of the right to purchase property for development. Appellants questioned the jurisdiction of the lower court and the validity of the priority system established for distribution of the proceeds from the sale of the property. The Court concluded that jurisdiction was properly acquired over the foreign corporation through service of process on the director of the Hawaii State Department of Regulatory Agencies because the corporation had been engaged in negotiations in the State and listed a Honolulu address as its principal place of business. Due process requirements made service of process on a trustee ineffective to impose personal liability on the creditors and stockholders because there was no showing that the trustee was authorized to receive the process for such purposes. However, the court did have jurisdiction over the res of the trust as a result of service on the trustee. Service of process on the attorney of a corporation also created a jurisdictional defect. The Court found no basis for giving priority to full payment of the debts sued upon since a general assignment for the benefit of creditors requires distribution on a pro rata basis. (L.A.)

Michel v. Valdastri, Ltd., 59 Hawaii 53, 575 P.2d 1299 (1978) (per curiam).

Plaintiff, employee of an independent contractor, was severely injured on defendant's premises as he attempted to repair the trolley wires of an overhead crane. Testimony showed that defendant's crane was defective, but the trial court refused to admit evidence of alleged safety law violations. The Court reversed a directed verdict for defendant and held that the trial court improperly denied plaintiff's offer of proof that defendant had violated the Occupational Safety & Health Law (OSHL), H.R.S. ch. 396 (Supp. 1972) (amended 1974), and the State's General Safety Code. Proven OSHL and code violations would have required submission of the negligence issue to the jury. The Court determined that the statutory duty required by OSHL to provide a safe working place "runs to whomever . . . [the employer] requires or permits to perform work on his premises." Defendant's duty was triggered by the following: (1) The contractual relationship between the defendant and the plaintiff's employer, (2) the fact that the work by necessity had to be done on defendant's premises, and (3) the inapplicability of the statutory exception governing repair of hazards. The exception did not apply because the defective condition involved the crane's brakes, not the trolley wires that plaintiff had been dispatched to repair. (H.R.S. ch. 396 (Supp.

1972) (amended 1974) (amended 1975, 1976, 1977).) (B.W.)

Midkiff v. de Bisschop, 58 Hawaii 546, 574 P.2d 128 (1978) (per curiam).

Plaintiff landlord sought summary possession of real property leased by defendants. After summary judgment was granted in favor of plaintiff and writs of possession issued, the court allowed a partnership to intervene as a plaintiff. Defendants sought a stay order pending appeal which was granted on the condition that tenants post a $90,000 supersedeas bond, pay all rental arrearages, and pay future rents as they become due. Pursuant to Hawaii R. Civ. P. 73(e), tenants made application to the Court to reduce the amount of bond. The Court found that the record failed to show an adequate basis for intervenor's claim that the stay of judgment pending tenants' appeal would cause losses due to temporary deprivation of intervenor's development rights to the land. Therefore, the circuit court exceeded its discretion by considering intervenor's claim in setting the bond amount since the extent of loss due to delay must be reasonably certain. A supersedeas bond may not be used to deter appeal. Rather than fixing the amount of bond, the Court authorized stay of judgment pending appeal conditioned on the payment of past and future rentals and full performance of tenants' lease obligations. The Court noted that plaintiffs might later apply for a supersedeas bond, but any factual issues would be remanded to the circuit court for an evidentiary hearing. (M.D.C.)

Murray v. Murray, 60 Hawaii 160, 587 P.2d 1220 (1978).

The family court found appellant in contempt and ordered him confined for nonpayment of alimony in violation of a previous court order. On appeal, the propriety of the confinement order depended on whether it was for civil or criminal contempt. The purpose of criminal contempt is punishment, and it requires the constitutional safeguards of criminal proceedings. On the other hand, civil contempt is designed to be coercive: confinement may be avoided by payment, but there must be an ability to comply. The conditional nature of the confinement justifies omission of the constitutional safeguards of a criminal proceeding. If appellant were unable to pay the alimony, then H.R.S. § 710-1077 (1976) required a proceeding for criminal contempt. The family court had not found a present ability of appellant to pay. The Court therefore considered the order punitive, held that the procedures failed to meet the criminal contempt standards, and vacated the order. (H.R.S. § 710-1077 (1976), *amended by* Act 181, 1979 Hawaii Sess. Laws 362.) (B.K.)

Nachtwey v. Doi, 59 Hawaii 430, 583 P.2d 955 (1978).

Plaintiff sought to be placed on the ballot as a congressional candidate without complying with the requirement for indigent persons who cannot afford to pay the filing fee, as provided for in H.R.S. §§ 12-6(2), -6(4) (1976) (amended 1977). Plaintiff made the following arguments: (1) The petition requirement violated the equal protection clause of the fourteenth amendment by discriminating among political candidates based upon wealth and by creating an unreasonable means of ballot access for indigent candidates, (2) the government's failure to notify all potential indigent candidates when the petition requirement became effective was a deprivation of procedural due process, and (3) the petition requirement created

a de facto prohibition against indigent candidates seeking elective office so as to deprive such persons of substantive due process. The Court held that wealth discrimination alone has never been an adequate basis for invoking strict scrutiny. Even if a fundamental right were involved, it was not infringed since a reasonably diligent indigent candidate could have gathered the required signatures. The Court found that, rather than singling out indigent candidates for adverse treatment, the petition requirement of H.R.S. § 12-6(4) (1976) (amended 1977) released them from a condition which they could not fulfill, and it was also a reasonable method of assuring the seriousness of candidacies. *(Cited in* Maeda v. Amemiya, 60 Hawaii 662, 594 P.2d 136 (1979); Hustace v. Doi, 60 Hawaii 282, 588 P.2d 915 (1978) (this index). H.R.S. § 12-6(2), *amended by* Act 224, 1979 Hawaii Sess. Laws 731, 750; H.R.S. § 12-6(4), *renumbered by* Act 224, 1979 Hawaii Sess. Laws 731, 751.) (R.B.K.)

Napoleon v. Napoleon, 59 Hawaii 619, 585 P.2d 1270 (1978) (per curiam).

The parties were divorced by a decree of the family court that awarded custody of their two minor children to appellant, the former wife, and ordered appellee, the former husband, to pay monthly child support. Appellant later filed an order to show cause regarding appellee's alleged failure to make child support payments. A second order to show cause was filed but eventually dismissed for want of prosecution. The parties then entered into an agreement, without court approval, which released the former husband from his obligation to pay child support after he paid a certain sum to appellant. Appellant subsequently filed a third order to show cause regarding appellee's failure to make child support payments. The family court dismissed the order because it contravened the agreement between the two parties. The Court reversed, holding that the agreement was invalid without court approval. Under H.R.S. § 580-47 (1976), the court clearly had continuing jurisdiction regarding the support of the parties' minor children. In light of the statute, the agreement was void as a matter of public policy, and it did not operate as a waiver of appellant's right to seek child support. (H.R.S. § 580-47 (1976) (amended 1977, 1978).) (B.Y.)

Oppenlander v. Sears, Roebuck & Co., 59 Hawaii 666 (1978) (mem.).

A special jury verdict found defendant department store not liable for personal injuries and damages which plaintiff suffered when she fell due to spilled popcorn on the store's floor. The trial court denied appellant's motion for judgment notwithstanding the verdict or a new trial. The Court affirmed. Civ. No. 39707 (1st Cir. Ct. Hawaii Oct. 21, 1975). (E.M.)

Packaging Products Co. v. Teruya Brothers, 58 Hawaii 580, 574 P.2d 524 (1978).

This was an action for cancellation of a deed. Two partners transferred the business assets of their partnership to form plaintiff corporation. Among the assets were lot 58 which was registered with the land court and lot 58a which was only recorded with the bureau of conveyances. The copartners later conveyed both lots to one of the partners and his spouse, who then sold the lots to defendant. Plaintiff sought to void the conveyance to defendant, however, the trial court granted defendant's motion for summary judgment. On appeal, the Court

affirmed as to lot 58 and reversed as to lot 58a. The Court recognized that the sale of partnership assets to plaintiff included both lots, but land court registration by the new owner was essential to the claim for lot 58. Plaintiff had failed to register title, and defendant had taken title to lot 58 for value and in good faith. Therefore, pursuant to H.R.S. § 501-82, defendant had taken free from any encumbrances. Defendant was not required to look beyond the vendor's title. Plaintiff could only claim lot 58a. *(Cited in* City & County of Honolulu v. A.S. Clarke, Inc., 60 Hawaii 40, 587 P.2d 294 (1978) (this index).) (M.D.C.)

Poovey v. Johanson, 59 Hawaii 472, 583 P.2d 352 (1978) (per curiam).

In a summary possession action, the district court found that the tenant owed rent and entered judgment for the landlord. Pursuant to H.R.S. § 666-14 (1968 & Supp. 1972), the court ordered a stay of the writ of possession if the tenant paid the back rent and future rent as it became due. The court later issued a writ of possession because an affidavit showed that the tenant had not paid the current rent. Subsequently, the court granted the tenant's motion to cancel the writ, but the record did not contain facts that would explain the court's decision. On appeal, the Court surmised that the writ was mistakenly issued and affirmed the cancellation order, holding that Dist. Ct. R. Civ. P. 60(b) empowers the court to vacate an order entered by mistake. The Court did not decide whether the statute requires payment of postjudgment rents as they accrue. (B.W.)

***Reliable Collection Agency, Ltd. v. Cole,** 59 Hawaii 503, 584 P.2d 107 (1978).

Plaintiff collection agency brought an action as assignee of debts owed by defendants. Defendants asserted unauthorized practice of law, H.R.S. §§ 605-14 to -17 (1968 & Supp. 1975), as an affirmative defense and counterclaimed on the same theory for damages and equitable relief. The court granted partial summary judgment for plaintiff, denied defendants' motion for partial summary judgment on the counterclaim, and struck their defense. Defendants took an interlocutory appeal, and the Court affirmed. Applying the test in *Cort v. Ash,* 422 U.S. 66 (1975), to determine whether appellants were entitled to relief, the Court reasoned: (1) Appellants were not among the class of persons the statute was designed to protect because of the tenuous connection between the debt sued upon and the illegal conduct asserted, (2) the legislative history of the statute showed no intent to create a private action, and (3) a private action would conflict with uniformity of enforcement which is achieved by the statute's exclusive grant of standing to the attorney general and bar associations. The Court also declined to entertain the counterclaim under its inherent power to regulate the practice of law because appellants lacked a "personal interest which will be measurably affected by the outcome of the case." The Court noted that it is not bound by the "case or controversy" requirement of the United States Constitution but adopted the federal standing rule anyway. (H.R.S. § 605-16 (1976), *amended by* Act 105, 1979 Hawaii Sess. Laws 211, 248.) (B.K.)

Roe v. Doe, 59 Hawaii 259, 581 P.2d 310 (1978).

The Court ruled that the legislative extension of the statute-of-limitations provision of Hawaii's Uniform Parentage Act could be retrospectively applied to re-

vive actions which would have been barred under the former law. H.R.S. § 584-7 (1976) provides that a paternity suit must be brought within three years after the birth of the child or within three years after the effective date of H.R.S. ch. 584 (January 1, 1976), whichever is later. The Court viewed the phrase "whichever is later" as a clear indication of legislative intent to permit paternity actions until January 1, 1979 for children born prior to January 1, 1976. Since H.R.S. ch. 584 (1976) is remedial, it should be construed liberally to accomplish its public purposes; that is, to assist the mother in supporting the child and to provide substantive legal equality for all children regardless of their parents' marital status. However, to protect a putative father's due process rights, the Court adopted a case-by-case approach to the question of the constitutional permissibility of claims barred by the former law. If a putative father were able to demonstrate that he had relied on the former law and that special hardships or oppressive results would follow from the lifting of the bar, retrospective application of H.R.S. § 584-7 (1976) might not be constitutionally permissible. (P.S.)

***Rossell v. City & County of Honolulu,** 59 Hawaii 173, 579 P.2d 663 (1978).

Plaintiff, who had been convicted of driving while under the influence of liquor, brought this civil action for battery, claiming damages arising from the forcible taking of a blood alcohol test following his arrest for drunken driving. The Court affirmed judgment for plaintiff. Appellants, two police officers, a physician, and their municipal employer, contended that the trial court erred in refusing to instruct the jury that the police were lawfully entitled to administer the blood test. The Court distinguished *Schmerber v. California,* 384 U.S. 757 (1966), where a nonconsensual blood test taken under similar circumstances did not violate the motorist's constitutional rights. Hawaii's implied consent statute, H.R.S. § 286-155 (1976), provides greater protection to the nonconsenting driver than the Constitution by expressly precluding sobriety tests when a person refuses to submit to the procedure. The Court found that appellee was not incapable of consent due to his intoxicated state and that he had manifested refusal to consent both by his vacillation and by his subsequent physical resistance. (L.A.)

Rust's Flying Service v. Lynn Leasure, 58 Hawaii 644 (1978) (mem.).

The Court affirmed summary judgment for plaintiff in an action for enforcement of a foreign default judgment entered by an Alaska court. Defendant had opposed summary judgment on the ground that the Alaska court did not have personal jurisdiction over him in the original assumpsit action. Civ. No. 46510 (1st Cir. Ct. Hawaii June 14, 1976). (B.W.)

Sandstrom v. Larsen, 59 Hawaii 491, 583 P.2d 971 (1978).

Fire partially destroyed appellants' subdivision home which they rebuilt to a two-story height in violation of a restrictive covenant. The lower court issued a mandatory injunction requiring removal of the upper story. Appellants argued that the height covenant had been abandoned and that the lower court erred in not considering relative hardship or allowing evidence of alternative remedies. The Court affirmed the injunction and held that the covenant had not been abandoned through acquiesence to substantial and general violations even though five neighboring structures exceeded the height limit. The nonconforming structures

were either specifically exempted or never included in the covenant due to their hillside locations. The Court also held that surrounding high-rise development was not so great or radical as to preclude enforcement of the covenant based on changed conditions. There was no error in the lower court's refusal to consider relative hardship or alternative remedies since a mandatory injunction is the appropriate remedy where an owner deliberately violates a valid, express restriction or intentionally takes a chance. Appellants intentionally violated the restrictive covenant since they were aware of the height restriction, having discussed it with neighbors prior to reconstruction. *(Cited in* Maeda v. Amemiya, 60 Hawaii 662, 594 P.2d 136 (1979).) (B.K.)

Shorba v. Board of Education, 59 Hawaii 388, 583 P.2d 313 (1978).

Appellant, a tenured public school teacher, received notice of dismissal for violation of a board of education (BOE) rule limiting corporal punishment of students. At the BOE dismissal hearing, new charges and supporting evidence of incompetence were presented against appellant who subsequently sought judicial review of the administrative procedure and demanded reinstatement with back pay. The circuit court ordered a new hearing, confined to evidence of corporal punishment, and denied reinstatement. On appeal, the Court reached the following conclusions: (1) The BOE rule limited the circumstances justifying corporal punishment and was consistent with H.R.S. § 298-16 (1968) which allows "necessary and reasonable" contact; (2) reasonable physical contact may be used when necessary to maintain order or prevent possible property damage or injury to other students; (3) appellant's dismissal for violation of the BOE rule was supported by substantial evidence on the record, including four incidents in which appellant hit or pushed fourth grade students; (4) the record showed that the BOE hearing officer relied on the evidence involving corporal punishment, and appellant was not prejudiced by the irrelevant evidence of incompetency; and (5) due process requirements of notice and hearing were met, and further relief was not required by the facts. The Court affirmed denial of reinstatement and reversed the order for a new hearing. (H.R.S. § 298-16 (1968) (amended 1973).) (R.B.K.)

Stahl v. Balsara, 60 Hawaii 144, 587 P.2d 1210 (1978).

An astrological consultant was sued for fraudulent representations which allegedly induced plaintiff to make substantial gifts to defendant. Defendant counterclaimed for libel, slander, and defamation. The jury awarded three dollars to each party on their respective claims. The trial court granted judgment notwithstanding the verdict as to each claim and dismissed the complaint and counterclaim. Motions for new trials were denied. On appeal, the Court found that actions for fraud may not be predicated on alleged false predictions because predictions do not constitute material facts which are actually false. Hence, judgment on the complaint was proper. However, judgment on the counterclaim was improper because defendant failed to move for a directed verdict on the counterclaim at the close of evidence, as required under Hawaii R. Civ. P. 50(b). The trial court properly denied defendant's motion for a new trial on the issue of damages since the jury was the final arbiter of damages and the verdict was not against the manifest weight of the evidence. Kidwell, J., noted in a concurring opinion that actionable

fraud may exist against a self-proclaimed soothsayer who acts with knowledge of falsity. (M.H.)

State v. Aiu, 59 Hawaii 92, 576 P.2d 1044 (1978).

Following a high speed chase in which appellant crashed a stolen vehicle and fled on foot, appellant was apprehended and successfully prosecuted on two misdemeanors (Driving Without a License, H.R.S. § 286-102(a), and Careless or Heedless Operation of Vehicle, H.R.S. § 291-1 (1955)). Appellant was subsequently convicted of a felony (Unauthorized Control of Propelled Vehicle, H.R.S. § 708-836). The Court reversed the felony conviction and directed dismissal of the indictment because the prosecution was statutorily barred. The Court found H.R.S. § 701-109(2) (1976), prohibiting separate trials, applicable because: (1) All three offenses arose out of the same conduct of driving the stolen vehicle; (2) the prosecutor knew of the felony charge when he pursued the misdemeanors; (3) all offenses were within the jurisdiction of a single court; and (4) since the subsection's specific requirements were met, H.R.S. § 701-109(1) (1976) which generally allows separate trials for multiple offenses arising from the same conduct was not applicable. The Court also found that each subsection of H.R.S. § 701-111(1) (1976) is an independent factor in considering the effect of one prosecution on another and held that H.R.S. § 701-111(1)(b), incorporating the requirements of H.R.S. § 701-109, took priority over H.R.S. § 701-111(1)(c), under the circumstances, so that the first trial barred the second one. The Court overruled *State v. Pia,* 55 Hawaii 14, 514 P.2d 580 (1973), and *State v. Ahuna,* 52 Hawaii 321, 474 P.2d 704 (1970), "insofar as their discussion of HRS § 701-111 [is] concerned." *(Cited in* State v. Solomon, 61 Hawaii _, 596 P.2d 779 (1979). H.R.S. § 291-1 (1955) (amended 1976, 1977); H.R.S. § 708-836 (Supp. 1972) (amended 1974); H.R.S. § 286-102 (1976), *amended by* Act 85, 1979 Hawaii Sess. Laws 166.) (B.W.)

State v. Amorin, 58 Hawaii 623, 574 P.2d 895 (1978).

Defendant appealed his conviction for murder, challenging the trial court's jury instructions and the conduct of the prosecutor and a juror. The Court affirmed and held that it was proper for the trial court to modify defendant's requested instructions regarding the consequences of an acquittal by reason of insanity, so as to indicate that the instruction was to be used only as information and should not influence the decision of the jury. It was improper for the prosecutor to comment to the jury that defendant would "walk the street" if acquitted since it falsely implied that he would automatically be set free if acquitted because of insanity. However, this improper conduct was rendered harmless by the court's instructions on the actual consequences of acquittal by reason of insanity. Although it was also improper for a juror to consult the dictionary definition of "insanity" since the court is to be the only source of the law, this misconduct was harmless because the juror could not remember the definition and did not disclose it to the other jurors. (J.Y.)

State v. Apao, 59 Hawaii 625, 586 P.2d 250 (1978).

Defendant appealed his jury conviction for murder. The Court affirmed for the following reasons: (1) A phrase in the indictment alleging that defendant knew the victim was to be a witness against him in a pending murder prosecution did

not violate defendant's constitutional rights under the fourteenth amendment to the United States Constitution or article I, section 4, of the Hawaii Constitution by prejudicing the grand jury since the phrase gave defendant fair notice that proof of the charges against him would trigger the mandatory sentence of life without possibility of parole under H.R.S. § 706-606(a)(ii) (Supp. 1972); (2) the defendant has the burden of proving that improper grand jury testimony is prejudicial, and in this case defendant failed to show that a police officer's testimony regarding the victim's status as a witness clearly influenced the jurors, thus distinguishing *State v. Joao*, 53 Hawaii 226, 451 P.2d 1089 (1972), where the only grand jury witness was a codefendant who gave prejudicial testimony; (3) evidence of defendant's connection with the prior murder fell within an exception to the rule that evidence of the accused's prior crimes is generally inadmissible since the connection showed motive and intent to kill the victim in this case; (4) one black-and-white and two color photographs, including close shots of the victim's head, were admissible because their probative value in establishing the identity of the deceased outweighed their prejudicial effect; (5) admissibility of real evidence depends upon its relevancy and tendency to establish a controverted fact, and testimony by several witnesses established the significance and relevancy of a bumper jack as the murder weapon; (6) the prosecutor's misconduct in attempting to change a witness' testimony so that it further incriminated defendant did not substantially prejudice defendant's right to a fair trial since the attempt failed; (7) the trial court's denial of motion for acquittal was clearly supported by the evidence establishing a prima facie case; (8) the Hawaii Penal Code does not distinguish between principals and accomplices, and it was not error for the court to instruct the jury that a defendant may be guilty as an accomplice even though the indictment charged him as a principal; and (9) the trial court did not err by refusing to give a manslaughter instruction since defendant did not testify at trial and there was nothing presented to contradict the evidence from which a jury could reasonably conclude that defendant had the requisite intent to commit murder. *(Cited in* City & County of Honolulu v. Toyama, 61 Hawaii __, 598 P.2d 168 (1979); Chambers v. Leavey, 60 Hawaii 52, 587 P.2d 807 (1978) (this index). HAWAII CONST. art. I, § 4 (1959, amended and renumbered § 5, 1978); H.R.S. § 706-606 (Supp. 1972) (amended 1976).) (B.Y.)

State v. Bates, 59 Hawaii 666 (1978) (mem.).

Defendant was convicted as an accomplice to robbery in the first degree and appealed the following issues: (1) Defendant's five-year prison sentence, (2) denial of all his motions at trial, and (3) denial of his requested jury instructions. On appeal, the Court affirmed. Crim. No. 48250 (1st Cir. Ct. Hawaii Oct. 22, 1976). (E.M.)

***State v. Bell**, 60 Hawaii 241, 589 P.2d 517 (1978).

The State brought an appeal from three cases in which the trial court dismissed grand jury indictments of defendants. These cases were consolidated because they presented the same issue of whether the prosecution is required to present to the grand jury evidence which tends to negate the guilt of the accused. The Court reversed the dismissals of the three indictments and held that the prosecution need not present evidence favoring the defendant to the grand jury unless the

evidence is "clearly exculpatory." The prosecution also need not instruct the grand jury as to possible defenses unless the evidence clearly establishes a complete defense such as self-defense. Kidwell, J., concurred and would have added to the holding that evidence is clearly exculpatory "only when the prosecution could not in good faith rely on other evidence." (E.M.)

State v. Bogdanoff, 59 Hawaii 603, 585 P.2d 602 (1978).

In a prosecution for promoting a dangerous drug in the second degree, the trial court found that the key prosecution witness was incredible as a matter of law and therefore incompetent to testify against defendant in subsequent trials involving additional offenses. The trial court dismissed all the remaining charges against defendant. The Court reversed and remanded the case for trial on the remaining charges. It was error to find that the witness was incredible based on two inconsistent statements allegedly made by him. The jury should have been informed of the asserted inconsistencies so that, under proper instruction, the jurors could have appraised the witness' credibility and weighed it against the witness' testimony concerning the substantive aspects of defendant's alleged offenses. Where the trial court's finding that the witness was incredible as a matter of law was error, the resultant decision to disqualify the witness in later trials was also error. (B.Y.)

State v. Bonds, 59 Hawaii 130, 577 P.2d 781 (1978).

Appellant sought a reversal of his conviction for possession of marijuana and dangerous weapons on the ground that the evidence was illegally seized. A police officer suspected that appellant's car was reconstructed and stopped the vehicle to ascertain whether appellant possessed the required reconstruction permit. The officer saw the permit as he neared the car but continued his approach and saw a set of metal *nunchaku* sticks. The officer arrested appellant for possession of the weapon and sought to retrieve the sticks when he noticed a transparent package that contained marijuana. The Court ruled that the initial stop constituted an unreasonable seizure and the evidence obtained therefrom was inadmissible. Police may stop a car for investigation only when there is reasonable suspicion, applying the standard in *Terry v. Ohio*, 392 U.S. 1 (1968), and *State v. Barnes*, 58 Hawaii 333, 568 P.2d 1207 (1977), that a crime is taking place. The police officer in this case had no reason to believe that appellant's car was in violation of the reconstruction ordinance. The Court limited its holding to discretionary stops rather than nondiscretionary actions such as systematic checks for conformance with license laws. *(Cited in* State v. Powell, No. 6787 (Hawaii Sup. Ct. Nov. 20, 1979).) (L.A.)

State v. Boynton, 58 Hawaii 530, 574 P.2d 1330 (1978).

A paid police informant trespassed upon defendant's property by climbing a fence and peering over it to gain information that led to a search warrant. The evidence obtained was excluded from the prosecution of defendant on drug charges. The Court affirmed and held that the informer's search violated the fourth amendment and article I, section 5, of the Hawaii Constitution. Defendants had erected a 6-foot high, tightly overlapped plank fence that made ground observation of their growing marijuana practically impossible. An expectation of

privacy as to the enclosed area was therefore reasonable. The Court held that the informant was a police agent because police had actively recruited him by initiating contact, soliciting drug information, and offering to pay for it. The fact that he actually received money for the information would be a factor in determining agency relationship if proof of recruitment had been less dispositive. As an agent of the police, the informer was held to the same standards as the government. The Court distinguished the instant case from citizen informants who are outside the fourth amendment's restrictions and declined to decide whether searches by private parties may be subject to the exclusionary rule as in *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974). (*Cited in* State v. Powell, No. 6787 (Hawaii Sup. Ct. Nov. 20, 1979); State v. Abordo, 61 Hawaii _, 596 P.2d 773 (1979); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979); State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1978) (this index); State v. Kaaheena, 59 Hawaii 23, 575 P.2d 462 (1978) (this index). HAWAII CONST. art. I, § 5 (1968, amended and renumbered § 7, 1978).) (M.D.C.)

State v. Buchanan, 59 Hawaii 562, 584 P.2d 126 (1978) (per curiam).

Appellant tendered a guilty plea to carrying a revolver without a permit, H.R.S. § 134-9, and moved for a deferred acceptance of guilty plea (DAGP) pursuant to a plea bargain. The court accepted the guilty plea but rejected the DAGP and sentenced appellant to five years. This case arose before enactment of H.R.S. § 853-1 (1976), which gave the trial court discretion to accept or deny a DAGP. The Court, however, held that the sentencing court had such discretion under the former scheme for DAGPs. Rejection of the DAGP was not an abuse of discretion since the motion had been considered on its merits and the court had given significant and relevant reasons for denying it. (H.R.S. § 853-1 (1976), *amended by* Acts 147, 155, 1979 Hawaii Sess. Laws 327, 334.) (B.W.)

State v. Cansana, 59 Hawaii 666 (1978) (mem.).

In a consolidated case, defendant was convicted of attempted murder and appealed the trial court's refusal to give certain requested jury instructions. Appellant also alleged that the verdict was unsupported by the evidence. The Court affirmed the conviction. Crim. No. 48060 (1st Cir. Ct. Hawaii Apr. 22, 1976). (E.M.)

State v. Chincio, 60 Hawaii 104, 588 P.2d 408 (1978) (per curiam).

Defendant pleaded guilty to burglary in the first degree because the prosecutor allegedly represented that defendant would receive a maximum 10-year sentence and/or a $10,000 fine. The prosecutor then initiated extended-term-sentencing proceedings, and defendant attempted to withdraw the guilty plea claiming that the bargain had been breached. Although the facts regarding the details of the plea bargain were not fully developed at the sentencing hearing, the Court found the unsworn statement of defendant to be sufficiently corroborated by circumstantial evidence and treated the case as if it were factually similar to *State v. Waiau*, 60 Hawaii 93, 588 P.2d 412 (1978) (this index). The case was remanded for resentencing by another judge with instructions to consider defendant's motion to withdraw his plea if it were renewed. (M.H.)

State v. Davis, 60 Hawaii 100, 588 P.2d 409 (1978).

Defendant was sentenced to extended 20-year and life terms based on oral findings by the court that he was a persistent and dangerous offender. The findings were premised on a psychological evaluation appended to the presentence report, but the record contained stipulations of certain facts. The sentencing court had initiated consideration of an extended term, although the prosecutor filed notice of the hearing required by H.R.S. § 706-664 (1976). On appeal, the Court affirmed and held that H.R.S. § 706-664 does not foreclose the court from initiating extended-sentence proceedings. The statute is silent on the matter. Giving the prosecutor exclusive power to initiate extended-term sentencing would, in relevant plea bargain situations, contradict the policy that courts are not bound by plea bargains. Use of a presentence report, where the record also contains facts as to defendant's age and prior convictions, is a permissible use of hearsay required by H.R.S. § 706-601 (1976). The Court reaffirmed its holding in *State v. Huelsman*, 60 Hawaii 71, 588 P.2d 394 (1978) (this index), that H.R.S. § 706-662 (1976) is not void for lack of specificity. The Court distinguished the terms of the plea bargain in this case, where the prosecutor promised only to drop several charges, from the facts in *State v. Waiau*, 60 Hawaii 93, 588 P.2d 412 (1978) (this index), where the prosecutor breached a bargain by seeking extended-term sentencing. *(Cited in* State v. Waiau, 60 Hawaii 93, 588 P.2d 412 (1978) (this index). H.R.S. § 706-662 (1976) (amended 1978).) (M.H.)

State v. Decano, 60 Hawaii 205, 588 P.2d 909 (1978).

The circuit court quashed an indictment due to prejudicial misconduct of a grand jury witness and suppressed evidence obtained pursuant to a search warrant which the court found defective. The State claimed that the affidavit supporting the warrant was sufficient to establish probable cause and that the court lacked jurisdiction to suppress because the written suppression order was issued one week after the order to quash. The Court held that since the motions to quash and suppress were pending simultaneously the lower court had jurisdiction to dispose of both, notwithstanding the timing of the orders. However, the Court reversed the suppression order because probable cause existed to issue the warrant. Affidavits based on hearsay are usually measured by the two-part test in *Aguilar v. Texas*, 378 U.S. 108 (1964). In this case, as in *State v. Kaukani*, 59 Hawaii 120, 577 P.2d 385 (1978) (this index), the affidavit minimally met the requirement to include underlying circumstances upon which the informant based his conclusion of criminal activity. The judge reasonably could have inferred that the eyewitness identified the getaway driver by name. The required showing of an informer's credibility is directed toward professional informers and should not be strictly applied to victims or witnesses of crimes. Eyewitness information is presumed trustworthy, and proof of reliability from past information is not required since the witness has only one opportunity to provide information. In determining that the warrant was properly issued, the Court noted that great deference should be accorded the district court's finding of probable cause. (B.K.)

State v. Erickson, 60 Hawaii 8, 586 P.2d 1022 (1978) (per curiam).

An undercover police officer, posing as the probation officer of an informant, attempted to purchase marijuana from defendant at the informer's home. Defen-

dant took purchase money but later returned it and refused to complete the transaction. The Court reversed defendant's conviction for promoting a detrimental drug in the first degree, H.R.S. § 712-1247(1)(f). The State was limited by the bill of particulars to proving a "sale" or an agreement to sell, and the evidence presented to the jury did not support an inference that appellant offered or agreed to sell marijuana. Under H.R.S. § 712-1240(12) "to sell" does not mean "to buy." Since defendant acted for the undercover officer and was not associated with the supplier, he was a buyer, not a seller. The "procuring agent" defense was therefore available to defendant. The Court distinguished *State v. Kelsey*, 58 Hawaii 234, 566 P.2d 1370 (1977), where the defense was unavailable to a defendant who acted for an undercover police agent but was charged with illegal distribution, not sale. An offer to deliver marijuana would come under the definition of distribute, H.R.S. § 712-1240(11), but the bill of particulars in this case had not been amended to include distribution. The Court also noted that the refusal of an entrapment instruction pursuant to H.R.S. § 702-237 would have presented a substantial issue given the facts. (H.R.S. § 712-1240 (11)(1976), *amended by* Act 112, 1979 Hawaii Sess. Laws 275.) (B.Y.)

State v. Erwin, 59 Hawaii 666 (1978) (mem.).

Defendant entered a plea of guilty to the reduced charge of promoting a detrimental drug in the second degree and was sentenced to one-year imprisonment, with nine months' suspended. Defendant appealed the denial of his motion for reduction of sentence, however, the Court affirmed. Crim. No. 47324 (1st Cir. Ct. Hawaii Feb. 14, 1975) (E.M.)

State v. Ferreira, 59 Hawaii 255, 580 P.2d 63 (1978) (per curiam).

Even though notice of appeal from an order denying a postjudgment motion to set aside guilty pleas and to correct allegedly illegal sentences was not filed within the time period required under the Hawaii Rules of Penal Procedure, the Court held that such appeal was timely because of the unusual facts of the case. Rule 49(c) states that lack of notice will not excuse late filing. The harshness of this rule was intended to be softened by the provision in rule 37(c) permitting filing of notice of appeal at any time after the announcement of the court's decision, sentence, or order, without awaiting entry of judgment. However, the court clerk in this case neither announced the decision nor mailed to each party, immediately upon entry of the judgment, a notice thereof pursuant to rule 49(c). Therefore, the Court held that the time for filing the notice of appeal did not run until counsel had actual notice of such decision and entry of judgment. (P.S.)

State v. Gomes, 59 Hawaii 572, 584 P.2d 127 (1978) (per curiam).

Appellant sought reversal of his kidnapping conviction because the prosecutor cross-examined him about the existence of an illegally seized pistol after appellant claimed on direct examination that the police had searched his house and found no guns. The Court affirmed the conviction and held that evidence suppressed for purposes of the prosecution's case-in-chief may be referred to when impeaching a defendant's testimony as to corroborative circumstances or actions of others, but not to impeach the defendant's exculpatory version of his own actions. (B.W.)

State v. Hook, 60 Hawaii 197, 587 P.2d 1224 (1978).

The State appealed a trial court order suppressing marijuana obtained during a warrantless search. The Court reversed in part. Acting on an anonymous tip, a police officer approached defendant's residence where he observed marijuana plants growing by a stairway and in a shed. Several officers later entered a private walkway that served at least four residences, arrested defendant, ordered him to unlock the shed, and seized the marijuana. The Court held that an investigative entry on private property open to the public does not violate constitutional protections. Therefore, entry upon the common area between the dwellings was not an unreasonable search. In so ruling, the Court limited its holding in *State v. Dias,* 52 Hawaii 100, 470 P.2d 510 (1970), to an application of the plain view doctrine. The Court relied on its analysis in *State v. Kaaheena,* 59 Hawaii 23, 575 P.2d 462 (1978) (this index), pointing out that the fact of a trespass does not necessarily make a search unreasonable, and reversed the suppression order regarding the plants in plain view by the stairway. However, the fact that the shed was locked gave rise to a reasonable expectation of privacy since the public was excluded. Although probable cause existed, there were no exigent circumstances to justify a warrantless seizure of the plants in the shed. There were several officers who might have kept it under surveillance while a warrant was secured. *(Cited in* State v. Powell, No. 6787 (Hawaii Sup. Ct. Nov. 20, 1979); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979).) (B.K.)

State v. Huelsman, 60 Hawaii 71, 588 P.2d 394 (1978), *rehearing denied per curiam,* 60 Hawaii 308, 588 P.2d 407 (1979).

Defendant was sentenced for the second time to concurrent, extended terms of life and twenty years pursuant to H.R.S. §§ 706-661, -662(4) (1976). On appeal, the Court vacated the sentence and remanded the case. Applicability of H.R.S. § 706-662(4) demands proof of two elements: (1) Defendant was a multiple offender; and (2) defendant's "criminality was so extensive that a sentence of imprisonment for an extended term is warranted." The Court found that the second element conferred unconstitutionally broad discretion on the sentencing court in violation of article I, section 4, of the Hawaii Constitution. The State due process clause requires that criteria for sentencing be stated, even though the fourteenth amendment as interpreted by *McGautha v. California,* 402 U.S. 183 (1971), may not. The Court then construed H.R.S. § 706-662(4) to require a finding that an extended term is "necessary for the protection of the public," thereby limiting judicial discretion to a constitutional standard by recognizing that a defendant's potential for rehabilitation and his threat to society are the criteria employed at sentencing. The Court reaffirmed its holding in *State v. Kamae,* 56 Hawaii 628, 548 P.2d 632 (1976), that due process requires proof beyond a reasonable doubt using ordinary evidence rules that a defendant is a multiple offender but rejected the language in *Kamae* that applied the same high standard to the second element. Proof by a preponderance of the information before the court is sufficient to determine that lengthy incarceration is necessary to protect the public. The judge had not considered defendant's dangerousness so the case was remanded for resentencing. The Court directed all sentencing courts invoking the extended-term provisions to include in the record: (1) The reasons for finding that the sentence is necessary to protect the public, (2) all findings necessary to its decision, and (3) the presentence report and all evidence considered in reaching its deci-

sion. *(Cited in* State v. Ortez, 60 Hawaii 107, 588 P.2d 898 (1978) (this index); State v. Davis, 60 Hawaii 100, 588 P.2d 409 (1978) (this index). HAWAII CONST. art. I, § 4 (1959, amended and renumbered § 5, 1978); H.R.S. § 706-662 (1976) (amended 1978).) (B.K.)

State v. Iwasaki, 59 Hawaii 401, 581 P.2d 1171 (1978) (per curiam).

Defendant appealed his conviction and sentence for promoting prostitution. At trial two plainclothes police officers testified that defendant admitted them to a club, explained that the club was "strictly for sex," accepted their money, and led the officers into separate rooms to wait for women. The officers also testified to statements allegedly made by the women, that they were prepared to have sexual intercourse. The Court affirmed, holding that it was not error to admit the latter statements because they were verbal acts explaining the nature of the activity in which the women and defendant were engaged. The statements were admissible exceptions to the hearsay rule. (R.B.K.)

State v. Jim, 58 Hawaii 574, 574 P.2d 521 (1978).

Defendant attempted to withdraw his guilty plea prior to sentencing, claiming that he had not known theft in the first degree was a felony and that he now had an eyewitness willing to testify. The trial court denied the motion for withdrawal. On appeal, the Court construed Hawaii R. Crim. P. 32(d) (1960) (current version at Hawaii R. Penal P. 32(d)) to allow postsentence withdrawal of a plea only when it would prevent "manifest injustice," but prior to the imposition of sentence the motion should be granted if defendant presents fair and just reasons for withdrawal and the State has not relied on the guilty plea to its substantial detriment. In so ruling, the Court clarified language in *State v. McCoy,* 51 Hawaii 34, 449 P.2d 127 (1968), which failed to differentiate between the presentence and postsentence standards. Under either standard an evidentiary hearing is appropriate. Defendant could not claim that he was unaware the charge was a felony because he was advised of the maximum penalty at arraignment, represented by competent counsel throughout, and not entitled to be told the possible collateral consequences of his plea. The court did not abuse its discretion in disbelieving defendant's asserted reasons for withdrawal, especially since there was evidence to indicate that he was not concerned about the availability of the witness before he decided to enter his guilty plea. (M.D.C.)

State v. Kaaheena, 59 Hawaii 23, 575 P.2d 462 (1978).

The State appealed the suppression of certain evidence sought to be introduced in the prosecution of defendants for alleged gambling activities. The evidence was obtained by a police officer standing atop a stacked crate and peering through a hole in the closed curtains and venetian blinds. The Court affirmed, holding that the officer's observations constituted an unreasonable search and seizure. The Court cited *State v. Boynton,* 58 Hawaii 530, 574 P.2d 1330 (1978) (this index), for the proposition that the inquiry into the reasonableness of governmental searches and seizures is restricted to an analysis of an individual's reasonable expectation of privacy. Defendants had exhibited an actual, subjective expectation of privacy, evidenced by the closed curtains and blinds. Society recognizes their expectation as objectively reasonable, evidenced by the fact that no one could see

into the building without being elevated. The mere fact that there was probable cause to support the issuance of a search warrant did not authorize a warrantless search. *(Cited in* State v. Powell, No. 6787 (Hawaii Sup. Ct. Nov. 20, 1979); State v. Milho, 61 Hawaii _, 596 P.2d 777 (1979); State v. Abordo, 61 Hawaii _, 596 P.2d 773 (1979); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979); State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1978) (this index); State v. Hook, 60 Hawaii 197, 587 P.2d 1224 (1978) (this index).) (J.Y.)

State v. Kaukani, 59 Hawaii 120, 577 P.2d 335 (1978).

Police searched defendant's dwelling pursuant to a warrant. After transporting three arrestees to the station, police returned to the house to retrieve some evidence left behind and conducted a warrantless second search. The State appealed from a circuit court order suppressing the evidence obtained in both searches because the police officer's affidavit, based on an informant's observation of "what appeared to be a marijuana plant," did not constitute probable cause to issue the warrant. The Court reversed the suppression order and remanded the case. In applying the test of *Aguilar v. Texas,* 378 U.S. 108 (1964), the Court held that the informer's personal observation was minimally sufficient to support the inference that illegal activity was taking place. The affidavit sufficiently established the informant's reliability by asserting that on four out of seven prior occasions his information regarding law violations was accurate. It was unnecessary for the prior accurate tips to be drug related. On remand, the Court required the trial judge to determine what evidence had been inadvertently left behind so that only the evidence obtained from the second search would be suppressed pursuant to a stipulation of the parties. *(Cited in* State v. Decano, 60 Hawaii 205, 588 P.2d 909 (1978) (this index).) (N.A.)

State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1978).

Defendant was convicted of promoting a detrimental drug based on evidence obtained when a police officer climbed a neighbor's hog wire fence, used a 60-power telescope to peer over 3- to 4-foot high California grass, and observed 6-inch tall marijuana plants. The evidence was admitted by the trial court but held inadmissible upon appeal because the visual surveillance violated the fourth amendment to the United States Constitution and article I, section 5, of the Hawaii Constitution. Fourth amendment protections extend not only to one's home but also to one's "curtilage." The existence or nonexistence of a fence or screen is not, by itself, controlling. The growth of California grass in appellant's backyard created a natural barrier behind which he could reasonably expect privacy, and the intrusiveness of the police officer's conduct only reconfirmed the reasonableness of this expectation. The Court cited with approval *State v. Kaaheena,* 59 Hawaii 23, 575 P.2d 462 (1978) (this index), and *State v. Boynton,* 58 Hawaii 530, 574 P.2d 1330 (1978) (this index), in developing the criteria for determining when an expectation of privacy is reasonable. The Court essentially considered the nature of the place involved, the precautions taken by appellant to ensure privacy, and the position from which the police officer made his observations. *(Cited in* State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979). HAWAII CONST. art. I, § 5 (1968, amended and renumbered § 7, 1978).) (S.R.)

State v. Kimmel, 59 Hawaii 666 (1978) (mem.).

Defendant, who claimed to be a minister, was convicted of promoting a detrimental drug in the first degree and sentenced to probation for five years subject to conditions. Defendant appealed, *inter alia*, the trial court's refusal to instruct the jury that use of marijuana as a sacrament in a church is a defense to the charge. The Court affirmed the conviction. Crim. No. 4466 (2d Cir. Hawaii Jan. 23, 1976). (B.W.)

State v. Kumukau, 59 Hawaii 666 (1978) (mem.) (reported as *State v. Kama* [*sic*]).

Appellant was convicted of attempted murder while codefendant Kama was acquitted. The conviction was appealed on the grounds of ineffective counsel due to a time restraint imposed by the court which had appointed defense counsel less that one week before trial. On appeal, the Court affirmed and stated that defense counsel was experienced and had performed his duty with ability and zeal, in accordance with the criteria set forth in *State v. Torres*, 54 Hawaii 502, 510 P.2d 494 (1972). Crim. No. 49940 (1st Cir. Ct. Hawaii Feb. 14, 1977). (E.M.)

State v. Kupihea, 59 Hawaii 386, 581 P.2d 765 (1978).

Defendants appealed their firearms convictions on the ground that the investigative stop during which the firearms were found was unconstitutional; the resulting evidence, inadmissible. The Court held that, even though the police officers, who were investigating a known pimp, observed defendants trying to crouch out of view after they noticed the presence of police in the parking lot, there was no prior information linking defendants with any known pimp or activity from which the police could infer that criminal activity was afoot. Therefore, the conviction was reversed because the stop was unreasonable. (R.B.K.)

State v. McDougall, 59 Hawaii 305, 580 P.2d 847 (1978) (per curiam).

Defendant, after being convicted of carrying a firearm without a permit, appealed from denial of his motion to suppress the gun found on defendant by a police officer during a self-protective patdown search conducted in an active business area at an early morning hour. The Court said that it would follow *State v. Giltner*, 56 Hawaii 374, 537 P.2d 14 (1975), in which it pointed out that a field interrogation would have been proper under similar facts but, under *Sibron v. New York*, 392 U.S. 40 (1968), unless the officer knew of particular facts from which he could reasonably infer that defendant was armed and dangerous, the search was improper. The Court held that the gun should have been suppressed and therefore reversed defendant's conviction. (P.S.)

State v. McNulty, 60 Hawaii 259, 588 P.2d 438 (1978).

Appellant sought reversal of his murder conviction and a trial court order denying appellant's motion for new trial based on newly discovered evidence. The Court affirmed for the following reasons: (1) Appellant would have been entitled to a jury instruction that the State has the burden of proving beyond a reasonable doubt the absence of self-defense, but he voluntarily withdrew his own jury charge and had not objected to the court's instructions; (2) the trial court did not

err in omitting one jury instruction and giving another regarding the defense of justification where the instructions were given by agreement of counsel and no objections were made; (3) there was no newly discovered evidence because defense counsel was aware of some evidence and was not diligent in procuring other evidence prior to the conclusion of trial; (4) appellant was not denied assistance of effective counsel. Counsel's tender and withdrawal of the burden-of-proof instruction did not manifest ignorance of the law. Failure to offer a jury instruction, that a person who honestly but unreasonably believed that deadly force was necessary for self-defense could only be convicted of manslaughter, was not error since that proposition is not a rule of law in Hawaii. Failure to call a witness to establish the victim's violent propensities did not prejudice defendant since other defense witnesses provided testimony to that effect, and the judgment of counsel on such a matter is rarely reviewed on appeal. *(Cited in* State v. English, 61 Hawaii __, 594 P.2d 1069 (1979).) (R.B.K.)

State v. Malani, 59 Hawaii 167, 578 P.2d 236 (1978).

A hospitalized assault victim identified defendant from among six and twelve photographs of different males on two separate occasions prior to trial. She positively identified defendant at trial when she also contradicted earlier testimony by asserting that police showed her only two photographs the second time and provided incriminating information about the accused. The Court affirmed defendant's conviction for assault in the first degree. Evidence obtained from impermissibly suggestive, pretrial photographic displays is admissible if the totality of the circumstances shows that the eyewitness identification was reliable. It was unnecessary to consider reliability in this case because the trial court was free to accept the earlier version of facts showing no suggestiveness in the procedure. The Court also rejected defendant's contention that the accused has a right to counsel whenever police conduct a postarrest photographic display containing his picture. Under the sixth amendment to the United States Constitution there is no such right, and the identical language of article I, section 11, of the Hawaii Constitution affords no greater protection. (HAWAII CONST. art. I, § 11 (1959, amended 1968, 1978, renumbered § 14, 1978).) (L.A.)

State v. Martinez, 59 Hawaii 366, 581 P.2d 765 (1978).

Marijuana obtained when a prison visitor was subjected to a strip search was held admissible evidence at trial and on appeal. The Court held that the search did not violate the fourth amendment since it was based on a nondiscretionary policy and was regularly performed on others similarly situated. Defendant had submitted to similar searches during previous visits, thereby impliedly consenting to the procedure. A person has diminished liberty and privacy interests when seeking entrance to a prison for purely personal purposes and may be subjected to the same security measures which are reasonable when applied to inmates. The Court emphasized the vital state interest in maintaining prison security, citing *Holdman v. Olim,* 59 Hawaii 346, 581 P.2d 1164 (1978) (this index), and concluded that the public interest in avoiding the introduction of contraband into prison outweighed the intrusion upon defendant which was not carried out in an oppressive or discriminatory manner. The Court also found that the condition of probation which required defendant to "refrain from the company of people of

questionable character" was not invalid for vagueness. The probationary term was essentially a restatement of a condition authorized by H.R.S. § 706-624(f) and was generally understood to refer to those engaged in criminal activity by virtue of prior conviction or by reputation and notoriety. *(Cited in* State v. Powell, No. 6787 (Hawaii Sup. Ct. Nov. 20, 1979).) (S.R.)

State v. Mollan, 59 Hawaii 666 (1978) (mem.).

Defendant was found guilty of a traffic violation and was fined $36.00 for speeding at 65 miles-per-hour in a 45 miles-per-hour zone. The Court affirmed on appeal. No. 123995M (Dist. Ct. 1st Cir. Hawaii Apr. 29, 1976). (E.M.)

State v. Murphy, 59 Hawaii 1, 575 P.2d 448 (1978).

The Court rejected appellant's objections regarding the admissibility of various testimony and affirmed his conviction for murder. In expressly limiting *State v. Layton,* 53 Hawaii 513, 497 P.2d 559 (1972), the Court held that an indictment need not be dismissed where hearsay testimony is not used deliberately in place of better evidence to improve the case for indictment. In this case there was no suggestion that the police detective's hearsay testimony as to the fact and cause of death was inaccurate or that the prosecutor had an improper purpose. The Court also rejected appellant's claims of error at trial and sentencing for the following reasons: (1) Evidence of other crimes is inadmissible at trial unless it is relevant, tends to establish the offense charged, and is not so highly prejudicial as to outweigh its probative value or unless it helps to establish intent, motive, absence of mistake or accident, identity, or common scheme or plan; both exceptions applied to a witness' testimony that defendant had accosted her near the scene of the crime, only moments before the victim was murdered; (2) the jury instruction regarding defendant's alleged prior act "of a similar nature" was properly phrased to protect him and did not mislead the jury; (3) opinion testimony regarding the positions of defendant's hands was within the scope of the witness' expertise as a fingerprint expert, and any error was nonprejudicial in allowing the expert to describe defendant's body as being low to the floor, in the act of pulling himself forward at the time he left fingerprints; (4) it was harmless error to allow hearsay testimony regarding where the victim's keys were found; (5) testimony alleging bias of a prosecution witness was inadmissible since the proper foundation was not laid through cross-examination of the state's witness as to the facts which would prove his bias; (6) H.R.S. § 706-604 (1976) does not limit the sentencing court to consideration of the presentence report so long as defendant has the opportunity to examine and controvert additional information; in this case, defendant had an opportunity to rebut the two prior arrest records which were shown to him and defense counsel at sentencing. *(Cited in* Kekua v. Kaiser Foundation Hosp., 61 Hawaii _, 601 P.2d 364 (1979).) (J.Y.)

State v. Nakamura, 59 Hawaii 378, 581 P.2d 759 (1978).

The circuit court revoked defendant's probation when he failed to comply with a special condition, to remain at the residential program known as Habilitat until clinically released. On appeal, the Court reversed the revocation because Habilitat had arbitrarily refused to enroll defendant when he visited his mother, immediately upon his release from jail, in contravention of Habilitat rules. The short visit

was neither unreasonable nor detrimental to defendant's rehabilitation. Conditions imposed upon the granting of probation pursuant to H.R.S. § 706-624 (1976) must be reasonable, and H.R.S. § 706-628(1)(1976) permits revocation only when the probationer has inexcusably failed to comply with a substantial requirement. In this case Habilitat made defendant's compliance impossible, and revocation was grossly disproportionate to the alleged misconduct. The trial court abused its discretion by not considering reasonable alternatives keeping in mind the best interests of both the public and defendant. (H.R.S. § 706-624 (1976) (amended 1978).) (S.R.)

State v. Oclit, 58 Hawaii 644 (1978) (mem.).

Defendant was convicted of assault in the third degree, and the district court sentenced him to 6 months' jail. The court subsequently denied defendant's motion for reconsideration but resentenced defendant to 90 days' jail with work release. On appeal, the Court affirmed. Crim. No. 25-76-1-8 (Dist. Ct. 5th Cir. Hawaii Feb. 20, 1976). (B.W.)

State v. Okumura, 59 Hawaii 549, 584 P.2d 117 (1978) (per curiam).

Defendant was convicted of escape in the second degree, H.R.S. § 710-1021 (1976), and appealed on the ground that evidence presented to the grand jury did not constitute probable cause to indict. A grand jury witness had twice used the term "escape" which defendant claimed was an impermissible legal conclusion. The Court affirmed the conviction and held that use of the word "escape" was proper since lay witnesses may employ common terms or shorthand descriptions, even though they must not draw conclusions or give opinions. An indictment need only be based on probable cause which means evidence sufficient to "lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of guilt." Hence, the lay witness' testimony was sufficient to support the indictment. (B.W.)

State v. Onishi, 59 Hawaii 384, 581 P.2d 763 (1978) (per curiam).

Defendant was convicted on several counts of promoting harmful and detrimental drugs. The Court affirmed the conviction, ruling that there had been no error in the jury instruction regarding the defense of entrapment. The instruction used the phrase "authorized to sell drugs" instead of "induced" or "encouraged" to sell. The Court found the charge to be in substantial conformity with the entrapment statute, H.R.S. § 702-237 (1976), noting that the language was drawn from defendant's own requested instruction and that there had been no objection to the instruction at trial. An alleged error in an instruction to which no objection was made below will not be considered on appeal unless it is shown that substantial rights of the defendant have been affected. Hawaii R. Penal P. 52(b). *(Cited in* State v. English, 61 Hawaii _, 594 P.2d 1069 (1979).) (S.R.)

State v. Ortez, 60 Hawaii 107, 588 P.2d 898 (1978).

Upon passage of the Hawaii Penal Code (HPC), the legislature provided in Act 188, 1975 Hawaii Sess. Laws 429, for reconsideration of sentences imposed under prior criminal law so that pre-HPC offenders would not necessarily serve longer

terms than offenders sentenced for identical crimes under the HPC. The Court held that Act 188 incorporates the standards for extended-term sentencing under H.R.S. § 706-662 (1976) as interpreted by *State v. Huelsman*, 60 Hawaii 71, 588 P.2d 394 (1978) (this index). The reviewing court may retain a more severe pre-HPC sentence only upon finding that the original term of commitment is "necessary for protection of the public." The Court also found that Act 188 does not by its terms or legislative history mandate any hearing on a request for sentence readjustment, but the Constitution may afford some protection. In this case, minimum due process requirements applicable to sentencing proceedings were met or exceeded by the hearing at which appellant was represented by counsel and information upon which the court acted was disclosed to defendant, who did not ask to supplement the record or confront witnesses. However, the circuit court erred by confining its inquiry to the information available at the original sentencing. Appellant had a statutory right under Act 188 to present evidence of postsentence conduct, even though the evidence may not compel reduction of sentence. The Court set aside the order denying a resetting of appellant's sentence and remanded the motion for reduction of sentence. The Court noted that, if resentencing were permitted on remand, a factual inquiry would be required to determine the relevant HPC sentence since appellant's pre-HPC conviction could fit either HPC crimes of murder or manslaughter. The Court further directed all reviewing courts considering Act 188 requests to record: (1) The reasons for determinations, (2) all findings necessary to the decision, and (3) the presentence report and all other evidence considered. *(Cited in* State v. Goss, 60 Hawaii 526, 592 P.2d 38 (1979); State v. Kicklighter, 60 Hawaii 314, 588 P.2d 929 (1979); State v. Irebaria, 60 Hawaii 309, 588 P.2d 927 (1979). H.R.S. § 706-622 (1976) (amended 1978).) (M.H.)

State v. Patterson, 59 Hawaii 357, 581 P.2d 752 (1978).

Police responded to a report of a possible burglary in progress and, upon arriving at the scene, discovered defendant, a known police character, standing in the driveway. While two officers checked the premises, a third officer asked defendant what he was doing, whether he lived there, if he had permission to be on the premises, who owned the car in the driveway, and whether defendant owned farm tools that were in the car. Defendant's pretrial motion to suppress his answers as well as subsequent voluntary statements made en route to the station was granted by the trial court and reversed on appeal. The Court characterized the interrogation as noncustodial and held that *Miranda* warnings were unnecessary. Although the facts of each case must be considered, the general rule for at-the-scene interviews, adopted from *People v. Manis,* 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969), is that *Miranda* warnings are not required for brief detention and interrogation of a person whom police lack probable cause to arrest. In reaching its decision, the Court limited the language in *State v. Kalai,* 56 Hawaii 366, 537 P.2d 8 (1975), which implied that *Miranda* warnings were mandatory once investigation focused on an individual. Instead, the focus of the investigation is only one factor to be considered in the totality of the circumstances; that is, time, place, and manner of questioning. The circumstances determine whether coercive elements exist that require mitigation by *Miranda* warnings. *(Cited in* State v. Amorin, No. 3936 (Hawaii Sup. Ct. Dec. 21, 1979).) (S.R.)

State v. Pestana, 59 Hawaii 375, 581 P.2d 758 (1978) (per curiam).

A police officer followed the sound of a gunshot, observed a gun butt protruding from defendant's waistband, and noticed defendant enter a car and slouch over as if he were hiding the pistol under the seat. The policeman directed a later-arriving officer to search the passenger area from which a pistol was recovered and subsequently admitted into evidence. Defendant appealed his conviction for a firearms violation, and the Court affirmed. The knowledge of the directing officer would be imputed to the searching officer under the circumstances. The Court noted that findings of fact concerning motions to suppress will not be set aside unless they are clearly erroneous. (S.R.)

State v. Richards, 59 Hawaii 666 (1978) (mem.).

Defendant was found guilty of prostitution and fined $100.00. On appeal, the Court affirmed. Crim. No. 1976-1806 (Dist. Ct. 1st Cir. Hawaii May 27, 1976) (E.M.)

State v. Riveira, 59 Hawaii 148, 577 P.2d 793 (1978) (per curiam).

Defendant appealed his conviction for assault in the second degree, Hawaii Penal Code § 711 (current version at H.R.S. § 707-711 (1976)), which resulted from a jury trial on charges of robbery in the first degree, Hawaii Penal Code § 840(1)(b)(i) (current version at H.R.S. § 708-840 (1)(b)(i)(1976)), on the grounds that the State failed to produce a prima facie robbery case and the trial court erred by refusing to give a jury instruction on self-defense. The prosecution's version of the facts showed that defendant grabbed the victim's wallet and attacked him with a knife after the victim had regained his wallet. Although there was no second taking of the wallet, the Court found that the State had met its burden since a reasonable person might conclude that defendant intended to take the wallet again. Robbery only requires such intent, coupled with assault by a person armed with a dangerous instrument. The Court, however, reversed the conviction because defendant's evidence was entitled to a self-defense instruction "no matter how weak, unsatisfactory, or inconclusive the testimony . . . appeared to the court." Defendant testified that he was "scared for his life" when a stranger made sexual advances, and he ran from his assailant, hurling a knife at him. *(Cited in* State v. Unea, 60 Hawaii 504, 591 P.2d 615 (1979). H.R.S. § 707-711 (1976), *amended by* Act 84, 1979 Hawaii Sess. Laws 166.) (L.A.)

State v. Ryan, 59 Hawaii 425, 583 P.2d 329 (1978) (per curiam).

Defendant failed to appear at his client's trial and was summarily convicted of contempt of court. The issue in this case was whether the attorney had a right to appeal the conviction. H.R.S. § 710-1077 (1976) provides that contempt in the presence of court or where the court has full knowledge of the facts constituting the offense cannot be appealed. The Court reasoned that absence can logically occur only out of the presence of the court and that it was impossible for the trial court to know the attorney's state of mind in his absence. Defendant therefore had a right to appeal the judgment. In so ruling, the Court distinguished *State v. Taylor,* 56 Hawaii 203, 532 P.2d 663 (1975), where the court had knowledge of the facts constituting contempt because the defendant was outside the courtroom

waiting for her attorney and did not respond when her case was called. (H.R.S. § 710-1077 (1976), *amended by* Act 181, 1979 Hawaii Sess. Laws 362.) (R.B.K.)

State v. Schutter, 60 Hawaii 221, 588 P.2d 428 (1978) (per curiam), *rehearing denied,* 60 Hawaii 677 (1979).

The trial judge had questioned the criminal defense witness extensively, causing defense counsel to become upset and disrespectful. The trial court found the attorney guilty of criminal contempt of court and fined him $100.00. The Court reversed the contempt order because it failed to comply with H.R.S. § 710-1077(5) which requires specification of the circumstances underlying the contempt conviction. The Court noted that, subject to the reasonable exercise of judicial discretion, the trial judge has the right to examine witnesses to elicit material facts or to clarify testimony, but the judge should never assume the position of an advocate. In this case the court abused its discretion when questioning of five defense witnesses became unreasonable and unduly extended, as evidenced by the disproportionately larger number of trial transcript pages of questioning by the court than by the attorneys. However, that was insufficient reason for counsel to be disrespectful. (H.R.S. § 710-1077 (1976), *amended by* Act 181, 1979 Hawaii Sess. Laws 364.) (E.M.)

State v. Smith, 59 Hawaii 565, 583 P.2d 347 (1978).

Defendant confessed to a robbery and was later convicted of the crime. At the jury trial, a witness testified that defendant had ingested LSD prior to his interrogation. The court ruled that expert testimony by a physician as to the general effect of LSD was irrelevant and inadmissible. On appeal, the Court held that the trial court abused its discretion in disallowing the testimony. The physiological effect of LSD is a proper subject for expert testimony, and the testimony was relevant to the voluntariness of defendant's confession which was a question of fact for the jury to decide. Since the confession was the only evidence linking defendant to the crime, it was constitutional error to disallow the expert testimony. The Court therefore reversed the conviction and remanded for a new trial. *(Cited in* State v. Amorin, No. 6936 (Hawaii Sup. Ct. Dec. 21, 1979).) (B.K.)

State v. Smith, 59 Hawaii 470, 583 P.2d 346 (1978) (per curiam).

Defendant, a minor who was committed to the Hawaii Youth Correctional Facility (HYCF), appealed his second conviction for escape in the second degree. The Court found its decision in *State v. Smith,* 59 Hawaii 456, 583 P.2d 337 (1978) (this index), dispositive of the issues appealed in this case and affirmed the conviction. The first offense occurred when defendant returned to HYCF eight and one-half hours after his day pass expired. This offense occurred about two weeks later when defendant left HYCF without permission and was returned the next day by the police. The trial in this case was delayed four months longer than in the first one, but the Court found that defendant's right to speedy trial had not been violated in either case. Similarly, the family court's waiver of jurisdiction was proper in both instances. (B.K.)

State v. Smith, 59 Hawaii 456, 583 P.2d 337 (1978).

Defendant, a minor committed by family court to the Hawaii Youth Correctional Facility (HYCF), failed to return to the facility following his authorized departure on a day pass. Pursuant to H.R.S. § 571-22(a) (1976) (amended 1976), the family court waived its jurisdiction over the youth who was subsequently indicted for theft, robbery, and escape. The trial court approved defendant's request for severance of the counts. He was first convicted of robbery and later found guilty of escape in the second degree, Hawaii Penal Code § 1021 (current version at H.R.S. § 710-1021 (1976)). This appeal involved only the escape conviction which the Court affirmed. In reaching its decision, the Court held that: (1) Intentional failure to return to physical confinement is within the definition of escape from custody, and defendant was continuously in legal custody of HYCF despite his furlough status; (2) it was unnecessary to prove that defendant intended to escape prior to his physical departure from HYCF; (3) sufficient evidence of the requisite intent was provided by circumstantial evidence that defendant's day pass contained the curfew hour and he was not given permission to return late; (4) the fact that an adult could not be confined at HYCF at the time of defendant's escape was irrelevant to family court waiver under H.R.S. § 571-22(a) (1976) which measures the alleged conduct of the minor against the adult standard to determine if it would constitute a felony; and (5) defendant was not denied his right to a speedy trial under the sixth amendment or article I, section 11, of the Hawaii Constitution because the 18-month delay resulted from defendant's own request for severance and his 1-month absence due to a subsequent escape. *(Cited in* State v. Hernandez, No. 7136 (Hawaii Sup. Ct. Jan. 23, 1980); State v. English, 61 Hawaii _, 594 P.2d 1069 (1979); State v. Hopkins, 60 Hawaii 540, 592 P.2d 810 (1979); State v. Stanley, 60 Hawaii 527, 592 P.2d 422 (1979); State v. Smith, 59 Hawaii 470, 583 P.2d 346 (1978) (this index). HAWAII CONST. art. I, § 11 (1959, amended 1968, 1978, renumbered § 14, 1978).) (B.K.)

State v. Torres, 60 Hawaii 271, 589 P.2d 83 (1978).

Defendant appealed his conviction for attempted murder based on the inadmissibility of certain evidence and testimony. The type of gun used was significant to substantiate that the victim had in fact been shot by the weapon imputed to the defendant. X-rays taken in the course of treatment by the attending physician revealed a bullet-shaped object lodged in the victim's spine. At trial, the chief x-ray technologist, who was not present at the time the photographs were taken, authenticated this evidence and the x-ray procedures. A doctor in forensic pathology also testified as to the probable caliber of the bullet in the victim. On appeal, the Court affirmed the conviction and held that the x-ray photographs were admissible evidence since they qualified under the applicable business record statute, H.R.S. § 622-5 (1976), and that the lower court properly allowed the forensic pathologist to give his expert opinion. The Court noted that determination of qualification as an expert is largely within the discretion of the trial judge. In this case, the pathologist gave ample testimony as to his training and experience in forensics. His knowledge went to weight rather than admissibility of his testimony. (E.M.)

State v. Tyrrell, 60 Hawaii 17, 586 P.2d 1028 (1978).

Defendant had been treated for chronic alcoholism and manifested irrational behavior in jail. Through his private counsel, defendant requested a mental competency examination to determine, *inter alia*, his fitness to stand trial. The court ordered an examination by one psychiatrist who reported that defendant was competent to proceed. On appeal, the Court affirmed defendant's jury conviction for murder on several grounds: (1) The language of H.R.S. §§ 704-404, -405 (1976) gives the trial court discretion to empanel three professionals to examine a defendant's competency, and the court did not abuse its discretionary power by ordering a single psychiatrist to examine defendant since that report aided the judge in determining if a full panel were warranted; (2) the due process rights to a fair trial guaranteed by the fourteenth amendment to the United States Constitution and article I, section 4, of the Hawaii Constitution impose identical standards regarding the procedure for determining a defendant's competency; while the trial court has a duty to order sua sponte a hearing when a substantial question of capacity exists, defendant's case presented minimal indicia of incompetency, therefore, the psychiatrist's report may be considered either adequate due process under the circumstances or additional evidence that further inquiry was not constitutionally required; (3) the jury instruction that "voluntary intoxication is not a defense" was not misleading on the issue of defendant's state of mind when read in context; (4) the jury charge which lowered the standard for manslaughter was not prejudicial error since it benefitted defendant; and (5) although it is not clear to what degree the constitutional guaranty of effective counsel applies to private defense counsel, the failure to insist upon a competency hearing or to object to jury instructions was not unreasonable under the circumstances. (HAWAII CONST. art. I, § 4 (1959, amended and renumbered § 5, 1978); H.R.S. § 704-404(2)(1976) *amended by* Act 3, 1979 Hawaii Sess. Laws 4; H.R.S. § 704-404(1)(1976), *reenacted* Act 105, Hawaii Sess. Laws 211, 248.) (B.K.)

State v. Vaitogi, 59 Hawaii 592, 585 P.2d 1259 (1978).

Appellant, through his counsel, pleaded guilty to assault in the third degree and contempt for failure to appear in court. The court sentenced appellant without formally accepting the guilty plea or questioning appellant about it. The Court reversed the conviction, held that the plea was involuntary, and remanded the case to a different judge pursuant to the powers enumerated in H.R.S. § 602-5(7) (1976). The Court found that Hawaii R. Crim. P. 11 (1960), which has since been replaced by the more detailed requirements of Hawaii R. Penal P. 11(c), 11(d), was not followed and that constitutional requirements were also disregarded when the trial court failed to question appellant on his understanding of the plea. Although a "ritualistic litany" is not required, the record must make an affirmative showing that appellant understood the meaning of a guilty plea through colloquy between the court and defendant. Since a plea of guilty represents the waiver of certain fifth and sixth amendment rights, safeguards are necessary to ensure that the plea is not coerced. (H.R.S. § 602-5 (1976), *amended by* Act 111, Hawaii Sess. Laws 259.) (B.W.)

State v. Waiau, 60 Hawaii 93, 588 P.2d 412 (1978).

As part of a plea bargain, the prosecutor agreed not to request an extended-

term sentence or to participate in sentencing recommendations unless called upon to do so by the court. Defendant pleaded guilty under the agreement. At the sentencing court's instruction, the prosecutor filed notice of hearing for an extended-term sentence and submitted his affidavit in support thereof. Defendant was found to be a persistent and dangerous offender and was sentenced to an extended term of twenty years. On appeal, the Court held that the valid plea agreement had been breached, and since defendant was not seeking to withdraw his plea, the complete remedy in this case was to remand for resentencing before a different judge. The Court distinguished *State v. Davis*, 60 Hawaii 100, 588 P.2d 409 (1978) (this index), where the extended term sentence resulting from a court-initiated proceeding did not contravene a plea bargain, and said that the trial court in this case could have proceeded without the participation of the prosecutor, although that would have been inconvenient. *(Cited in* State v. Davis, 60 Hawaii 100, 588 P.2d 409 (1978) (this index); State v. Chincio, 60 Hawaii 104, 588 P.2d 408 (1978) (this index).) (M.H.)

State v. Watson, 59 Hawaii 666 (1978) (mem.).

Defendant appealed his conviction of assault in the first degree and ten-year prison sentence on the following grounds: (1) The trial court's denial of motion for mistrial based on inflammatory and highly prejudicial testimony of a prosecution witness, (2) granting of prosecution's motion for continuance which was prejudicial to defendant, and (3) denial of requested jury instructions. The Court affirmed on appeal. Crim. No. 47662 (1st Cir. Ct. Hawaii Feb. 6, 1976). (E.M.)

***State v. Yamada & Sons,** 59 Hawaii 543, 584 P.2d 114 (1978).

Plaintiff subcontractor brought an action pursuant to H.R.S. § 507-17 (1968) against the general contractor on a state construction project for nonpayment of goods and labor furnished. The trial court allowed a setoff for the amount owed to the general contractor on another project by a separate corporation which had permitted plaintiff corporation to use its name. Defendant contractor was unaware of the change in corporate identity and believed it was dealing with the same company. The Court denied the offset, vacated the judgment, and remanded the case with instructions to enter judgment for defendant. Absent detrimental reliance, the fact that two corporations bear the same name is insufficient grounds for attributing the debts of one to the other. Equitable estoppel may prevent a corporation which allows a second corporation to appropriate its name from denying liability for the second corporation, but that does not support a claim against the second corporation. The offset was therefore improper. (H.R.S. § 507-17 (1968) (amended 1972).) (B.W.)

***Stryker v. Queen's Medical Center,** 60 Hawaii 214, 587 P.2d 1229 (1978).

A consolidated survival and wrongful death action was brought against defendant hospital for improper administration of drugs and failure to provide adequate psychiatric care and supervision of the deceased who fell or jumped to his death while hospitalized. The trial court granted a partial directed verdict in favor of defendant, instructing the jury that the deceased was contributorily negligent in voluntarily ingesting a drug and that his negligence was a proximate cause of his death. Despite the partial directed verdict, the jury was permitted to

exercise its independent judgment in resolving the ultimate issue of liability. The jury found that defendant was negligent but its negligence was not a proximate cause of death. On appeal, the Court affirmed and held that, even assuming the trial court erred in partially granting a directed verdict, the error was made harmless by subsequent instructions that there may be more than one proximate cause of an injury. The trial court's refusal to give a res ipsa loquitur instruction was proper because the proposed instruction compelled rather than permitted an inference of negligence. The trial court gave the proper general instruction regarding duty of care and did not commit error in refusing to give a special instruction that a hospital must exercise extreme precautions if it has notice of a patient's intent to escape. *(Cited in* Figueroa v. State, No. 6437 (Hawaii Sup. Ct. Dec. 31, 1979).) (E.M.)

Tavares v. Tavares, 58 Hawaii 541, 574 P.2d 125 (1978).

Defendant wife was not notified and did not appear at the district family court hearing where plaintiff husband was orally granted a divorce, child custody, and ownership of the family residence. The court issued the divorce decree after defendant filed an answer but without referring to it. Pursuant to defendant's request, the court reconsidered the property division but limited the hearing to disposition of the family residence. The Court held that defendant was entitled to reconsideration of the parties' entire property and remanded the case. This action arose before adoption of the Hawaii Family Court Rules and was therefore governed by *Beall v. Beall,* 24 Hawaii 29 (1917), which held that a default decree may be set aside. In the present case the family court exceeded the limits placed on its discretion by *Beall.* The Court rejected the contention that defendant failed to file a timely appeal of the property disposition. Although property division in a divorce action is final and appealable, in this case the court's order to reconsider the limited matter left nothing to appeal. The Court noted that on remand a determination must be made whether plaintiff's pension plan included enforceable claims which would thereby constitute property within the meaning of H.R.S. § 580-47 (1976). Only such vested interests are subject to property disposition in matrimonial actions. The Court also noted that the family court is not bound by its original decision regarding ownership of the family residence on remand. (H.R.S. § 580-47 (1976) (amended 1977, 1978).) (M.D.C.)

***Turner v. Willis,** 59 Hawaii 319, 582 P.2d 710 (1978).

A protruding pipe from a moving truck hit and injured a pedestrian who, with her husband, sued the driver and his employer for damages. The jury found both plaintiffs and defendant negligent but concluded that plaintiffs' negligence was not the proximate cause of the accident. On appeal, the Court held that it was error to instruct the jurors that, if they found certain conditions existed, res ipsa loquitur compelled a finding of negligence and proximate cause. The doctrine of res ipsa loquitur does not compel the inference of negligence, and it has no application to proximate cause. Therefore, the judgment was reversed and the case remanded for retrial. In dicta, the Court reviewed the propriety of the costs awarded plaintiffs. Construing H.R.S. §§ 607-9, -12 (1976), and Hawaii R. Civ. P. 54(d), regarding the taxation of cost and witness fees, the Court cautioned the trial court to exercise restraint and to scrutinize requests for out-of-State witness

fees so as to facilitate the national policy of reducing the burdensome cost of litigation. The "in attendance" requirement of H.R.S. § 607-12 (1976) was construed to mean that a witness must actually be present during trial before fees are recoverable. Finally, costs incurred incidental to the taking of depositions should not be allowed by the trial court. (S.R.)

***United Congregational & Evangelical Churches v. Heirs of Kamamalu,** 59 Hawaii 334, 582 P.2d 208 (1978).

On appeal of a quiet title action, the Court reversed and held that plaintiff had failed to acquire title by reversion or adverse possession against the State because the general rule is that adverse possession cannot run against the sovereign. Although plaintiff continually occupied the land for more than one hundred years, the Court disagreed with the lower court's conclusions of law. The government had originally obtained the land through the School Lands Act of 1850. Its interest was diminished to a fee simple determinable by an 1859 statute, amended in 1864, specifying that upon the discontinuance of church and school uses, title would revert to the grantor. However, the land was being used for church purposes when the 1864 statute was repealed, and the Court construed this pattern of events to mean that the government's interest had ripened into a fee simple absolute. The Court also rejected the claim for presumed lost grant because the presumption was rebutted by the evidence. The Court instead recognized that plaintiff possessed a limited equitable right akin to a prescriptive easement which entitled plaintiff to use the land for religious and educational purposes, without interference by the State, until such uses were abandoned. Kobayashi, J., and Kidwell, J., dissented with respect to plaintiff's equitable right on the grounds that an equitable right akin to a prescriptive easement is a legal nonentity and the facts rebutting a presumption of lost grant also rebut any presumption of the equitable right. (N.A.)

Windward Partners v. Delos Santos, 59 Hawaii 104, 577 P.2d 326 (1978).

Residential and agricultural tenants testified against the landowner's petition of the Hawaii State Land Use Commission (LUC) to redesignate from "agriculture" to "urban" a parcel of land including property rented by the tenants. After the LUC denied the petition, plaintiff landlord gave written notice that the month-to-month tenancies would terminate at the end of the next month. Plaintiff brought summary possession actions, and the trial court granted summary judgment for plaintiff. On appeal, the Court held that the common law affirmative defense of retaliatory eviction is available to residential and commercial tenants "where a tenant asserts a statutory right, in the protection of his property interest as a tenant, and as a result the landlord seeks to dispossess the tenant." The Court limited *Aluli v. Trusdell,* 54 Hawaii 417, 508 P.2d 1217, *cert. denied,* 414 U.S. 1040 (1973), to the proposition that the defense is not a constitutional right and noted that its expansion of the defense was consistent with the recognition of equitable defenses to summary possession in *Island Holidays, Inc. v. Fitzgerald,* 58 Hawaii 552, 574 P.2d 884 (1978) (this index). In this case, defendants had exercised their statutory right to participate in the LUC proceeding under H.R.S. § 205-4 (Supp. 1974), and their evidence raised a genuine issue as to the landlord's retaliatory motive. The motion for summary judgment therefore should have been

denied. However, a successful defense would not preclude legitimate future evictions which depend, *inter alia*, on the length of time elapsed and whether tenants repeated the acts which caused the original retaliation. The Court also found that a genuine issue existed as to plaintiff's intent to demolish the dwellings. If residential dwellings were to be demolished, H.R.S. § 521-71 (1968 & Supp. 1975) would require 90 days' notice instead of the 28 days' notice actually given. (H.R.S. § 521-71 (1976 & Supp. 1978), *amended by* Act 95, 1979 Hawaii Sess. Laws 188; H.R.S. § 205-4 (Supp. 1974) (amended 1975).) (B.W.)

***Yoshino v. Saga Food Service,** 59 Hawaii 139, 577 P.2d 787 (1978).

An employer and its insurer appealed a decision of the Hawaii State Industrial Relations Appeals Board which awarded an injured worker benefits and assessed the costs soley against appellants despite the fact that the worker was under contract to another employer. On appeal, the Court used a "control test" under the loaned-employee provision, H.R.S. § 386-1 (1976), to determine whether full or joint liability was appropriate. The injured worker, a chef, was loaned or hired out to appellant employer for the purposes of furthering its trade and business, which was the provision of food services. The control element was satisfied because appellant supervised the worker's daily performance and maintained the capacity to fire him or to change his wages and benefits. The Court thus held that appellant was the worker's special employer for purposes of workers' compensation and therefore solely responsible for the compensation benefits payable to the worker. Since the board's action was not arbitrary or clearly erroneous, appellants' rights were not prejudiced by its result, and the Court affirmed pursuant to H.R.S. § 91-14(g) (1976). (H.R.S. § 386-1 (1976 & Supp. 1978), *amended by* Act 40, 1979 Hawaii Sess. Laws 68; H.R.S. § 91-14 (1976), *amended by* Act 111, 1979 Hawaii Sess. Laws 259, 268.) (L.A.)

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Government: 17	3	14	13	4	10	7
Private: 55	6	49	36	19	24	31
Memorandum: 16			12			
Full opinion: 86	Per curiam: 29		Memorandum: 16			

TABLE II

	Majority Opinion	Concurring Opinion	Dissenting Opinion	Total
Richardson, C. J.	20		1	21
*Kidwell	24	5	5	34
**Kobayashi	10	1	2	13
Menor	10			10
Ogata	22		1	22
Sodetani for Ogata	.			1
Total	86	6	9	

*Justice Kidwell retired on Feb. 2, 1979.
**Justice Kobayashi retired on Dec. 29, 1978.

TABLE III

Substitute Justice: / Replacing:	Richardson	Kidwell	Kobayashi	Menor	Ogata
Lum (4)	1	1		1	1
Burns (2)		1	1		
Fukushima (2)	1	1			
Sodetani (2)					2
Chang (1)					1
Hayashi (1)			1		
Kato (1)		1			
Lanham (1)			1		
Marumoto (1)		1			
Shintaku (1)		1			
Total	2	6	3	1	4