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An Essay In Family Law: Property Division, Alimony, Child Support, and Child Custody

by Amy H. Kastely*

A revolution is underway in family law. The basic tenets of traditional doctrine are being reexamined and new principles are emerging. In Hawaii, this process is reflected in and encouraged by the decisions of the Hawaii Intermediate Court of Appeals and the Hawaii Supreme Court.

Two reasons for this revolution are of particular interest to the legal community. First, the widespread adoption of "no-fault" divorce has profoundly altered the pattern of private divorce negotiation.[1] Under the "fault" system, it often was necessary for both parties to agree to the divorce and even to fabricate evidence of misconduct.[2] The poorer spouse typically could exchange cooperation for either a promise of alimony and property or an agreement on child custody and support, or both.[3] As a result, disputes over these matters often were settled informally, without the need for a decision on the merits of individual claims.

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[1] I. BAXTER, MARITAL PROPERTY § 41:2 (Supp. 1983). *See also* W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 314 (1983); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Forty-nine states and the District of Columbia now have some form of "no-fault" divorce. Only South Dakota retains traditional "fault" grounds. Foster & Freed, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 373 (1984) [hereinafter cited as Foster & Freed, *1984 Overview*].

[2] This was true because some proof of fault (usually adultery or cruelty) had to be presented and also because the defense of recrimination operated to bar a divorce if both sides were guilty of misconduct. Krauskopf, *A Theory for a "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 170 (1976) [hereinafter cited as Krauskopf, *"Just" Division*]. *See also*, Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1185 (1981) [hereinafter cited as Weitzman, *The Economics of Divorce*].

[3] This of course was not true if the poorer spouse wanted a divorce and the wealthier one did not; in such cases, the wealthier spouse had the bargaining advantage.

In contrast, "no-fault" divorce empowers one spouse to seek dissolution of the marriage even if the other spouse objects.[4] Since cooperation is not required, a poorer spouse can obtain an agreement or order transferring property or granting child custody only by establishing a claim on the merits, and thus, new attention is focused on the principles governing the property, support, and custody claims of divorcing spouses. This new focus has exposed numerous points of confusion and inconsistency in traditional doctrine, which the courts are being called upon to resolve.

The second reason for the explosion in family law is related: no-fault divorce is reflective of a profound change in our conception of marriage and the social and economic roles of men and women, and this change has resulted in a reorientation of the law governing those institutions and activities.[5] Traditional doctrine was based on a view of marriage in which the husband bore responsibility for his family's legal and financial affairs, and the wife was obligated to do child rearing and household work.[6] This conception is no longer widely held, and the change has profound implications for family law. New attention is being directed to the merits of the claims of divorcing spouses, and the doctrine that shapes analysis of these claims is being reexamined and restructured.[7]

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[4] The Hawaii statute provides that a divorce may be granted when the court finds that the marriage is "irretrievably broken" or simply that the parties have lived apart for two years. HAWAII REV. STAT. § 580-41 (1976). Either of these grounds can be created unilaterally. Mnookin & Kornhauser, *supra* note 1, at 954 n.14. *See* Hagerty v. Hagerty, 281 N.W.2d 386, 388 (Minn. 1979); Foster & Freed, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297 (1977). HAWAII REV. STAT. § 580-42 (1976) expressly authorizes the court to find irretrievable breakdown despite one party's denial. *See also id.* § 580-42.5 (abolishing defense of recrimination). *See generally* 1. BAXTER, *supra* note 1, § .41.2.

[5] For an insightful comparison of the changes in the law governing marriage and employment, see M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981) [hereinafter cited as M. GLENDON, THE NEW FAMILY]. *See also* M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE NEW LAW (1972); Weyrauch, Metamorphoses of Marriage, 13 FAM. L.Q. 415 (1980).

[6] W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 430-33 (1765 & photo. reprint 1979). This view was long-standing. A comparison of a 1659 decision with more recent case law reveals the longevity of this view. *Compare* Manby v. Scott, 86 Eng. Rep. 781, 784 (K.B. 1659) ("Besides, although it be true, that the husband is bound to maintain his wife, yet that is with this limitation, viz. so long as she keeps the station wherein the law hath placed her; so long as she continues a help-meet to him . . . ."), *with* Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940) ("As a result of the [legally prescribed] marriage contract, for example, the husband has a duty to support and to live with his wife and the wife must contribute her services and society to the husband . . . ."); *see also* Correra v. Correra, 19 Hawaii 326 (1909) ("It is the natural as well as the legal duty of the husband to support his wife."). *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 6.1 (1968) [hereainfter cited as H. CLARK, DOMESTIC RELATIONS]; L. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW pt. 1 (1981) [hereinafter cited as L. WEITZMAN, THE MARRIAGE CONTRACT].

[7] *See generally* W. WEYRAUCH & S. KATZ, *supra* note 1, at 314. In a speech to the American Bar Association Family Law Section, meeting in Honolulu in 1980, Chief Justice Hennessey of

As doctrine changes, the outcomes of individual disputes become more uncertain, and litigation increases. Thus, it is not surprising that the courts have experienced an increase in contested support and property division cases.[8] Indeed, in its first four years,[9] the Hawaii Intermediate Court of Appeals has decided twenty-nine family law cases[10]—more than the Hawaii Supreme Court has decided in this area in the past thirty years.[11]

This activity of the intermediate court of appeals is important to both practitioners and students of family law, for the decisions rendered by that court provide a rich source of guidance and debate. The landscape of family law in Hawaii is changing quickly, and these decisions will play an important part in shaping its future.

Most significantly, the intermediate court of appeals has shown a willingness to articulate general rules to guide the family courts.[12] This move towards a system of fixed rules is a very positive one, with the potential of instilling new clarity and predictability in this area of law.

In addition, the intermediate court of appeals generally has used a partnership model in the analysis of property and support claims.[13] It has indicated

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the Massachusetts Supreme Judicial Court noted the intellectual challenge of family law and made the interesting observation that this has led to a corresponding rise in the status of family law practice. Hennessey, *Explosion in Family Law Litigation: Challenges and Opportunities for the Bar*, 14 FAM. L.Q. 187 (1980). In Hawaii, the challenge has been met by an outstanding family court, including Senior Judge Betty M. Vitousek and distinguished alumni Hawaii Supreme Court Chief Justice Herman T. F. Lum, Hawaii Intermediate Court of Appeals Chief Judge James S. Burns, and United States District Court Judge Samuel P. King. *See generally* Corbett & King, *The Family Court in Hawaii*, 2 FAM. L.Q. 32 (1968).

[8] *See generally* Christensen, *Breaking The Bond—Disputes over Money and Children Swamp U.S. Divorce Courts*, Wall St. J., Jan. 28, 1980, at 1, col. 1.

[9] The Hawaii Intermediate Court of Appeals was created in 1979. Act 111, 1979 Hawaii Sess. Laws 259, 261-63 (codified at HAWAII REV. STAT. §§ 602-51 to 602-59 (Supp. 1983)). The first term of the court of appeals began on April 18, 1980.

[10] For the purposes of this count, I have included only those cases involving the creation, maintenance, and dissolution of marriage and parenthood; I have not included cases involving the closely related issues of paternity, guardianship, child abuse and neglect, termination of parental rights, juvenile delinquency, and the legal status of children.

[11] Hawaii Reports (1953-1983).

Part of the reason for this may be the disproportionate number of family law cases among the Hawaii Supreme Court's backlog in 1979, many of which were assigned to the intermediate court of appeals during its first term; almost half (13) of the 29 cases were decided within the first 11 months of the court's existence. *See* 1 Hawaii App. (1980-81). In addition, the assignment of family law cases to the intermediate court of appeals may be a reflection of the expertise of Chief Judge James S. Burns, who has authored 24 of the court's 29 family law decisions. Having served as a circuit court judge assigned to the family court from 1977 to 1980, Chief Judge Burns has an active interest in family law and in the workings of the family court.

[12] *See infra* text accompanying notes 23-94.

[13] *See infra* text accompanying notes 47-79.

some willingness to recognize nontraditional forms of property.[14] And the court has conformed to a national trend acknowledging a new range of economic opportunity for women and generally disapproving the use of permanent alimony in favor of limited or "rehabilitative" support.[15]

This article will examine the family law decisions of the Hawaii Intermediate Court of Appeals and several decisions of the Hawaii Supreme Court, in an effort to describe recent changes in the law and to explore their implications for future cases. Four substantive areas will be discussed: division of property, alimony, child support, and child custody.

I. Division of Property

With the adoption of "no-fault" divorce and the shift in emphasis from permanent alimony to temporary support, the valuation and division of property emerges as the focus of controversy in many divorce cases.[16] In addition, litigation over these issues is encouraged by the "equitable distribution" rule of section 580-47 of the Hawaii Revised Statutes.[17] Under this provision, the family court is empowered to divide all the property of the parties, "whether community, joint, or separate," in a "just and equitable" fashion.[18] The court

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[14] *See infra* text accompanying notes 112-40.

[15] *See infra* text accompanying notes 151-95.

[16] I. Baxter, *supra* note 1, at § 41:2; McGraw, Sterin & Davis, *A Case Study in Divorce Law Reform and its Aftermath*, 20 J. Fam. L. 443, 480-81 (1981); Weitzman, *The Economics of Divorce*, *supra* note 2, at 1184.

The other major issue in many cases is child custody. *See infra* text accompanying notes 249-311.

[17] Support orders; division of property.

> (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in (c) and (d) of this section, jurisdiction of such matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make such further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate; . . . In making such further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

Hawaii Rev. Stat. § 580-47 (Supp. 1983).

This provision was first enacted in 1955. Act 77, 1955 Hawaii Sess. Laws 60. Previously, the courts did not have power to order a transfer in title upon divorce. *See* Santos v. Santos, 40 Hawaii 644, 654 (1955); Nobrega v. Nobrega, 13 Hawaii 654, 660-61 (1901).

[18] The Hawaii Intermediate Court of Appeals has noted that Hawaii Rev. Stat. § 580-47 (1976) (amended 1983) is similar to "Alternative A" of the Unif. Marriage and Divorce Act § 307, 9A U.L.A. 91, 142 (1973), in authorizing the family court to award separate property to the nonowning spouse. Takaki v. Takaki, 3 Hawaii App. 189, 193 n.4, 647 P.2d 726, 728 n.4

has broad discretion in determining an equitable distribution[19] and, until recently, the case law indicated only very general factors to be considered, including the parties' relative needs and contributions to the estate.[20] Under this scheme, the outcome of any individual dispute is difficult to predict, and informal settlement negotiations must proceed against a "backdrop of uncertainty."[21] Many litigants may be reluctant to settle in the hopes of larger court-ordered awards.[22]

However, the Hawaii Intermediate Court of Appeals recently adopted more precise guidelines for dividing property under section 580-47. Two "general rules"[23] are most significant: (1) each divorcing spouse should be awarded the net value of his or her premarital property as of the date of marriage and the net value of any property as of the date of acquisition that the individual spouse has subsequently acquired by gift or inheritance[24] and (2) each divorcing spouse should be awarded one-half of the net value of property that is jointly owned at

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(1982) (construing the Hawaii provision as amended in 1978).

[19] The family court has broad discretionary power over property division, and such orders will not be reversed unless there has been a clear abuse of discretion. Au-Hoy v. Au-Hoy, 60 Hawaii 354, 357, 590 P.2d 80, 82 (1979); Farias v. Farias, 58 Hawaii 227, 231, 566 P.2d 1104, 1108 (1977). *See generally* Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213 (1939); Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415 (1981).

[20] *See, e.g.*, Carson v. Carson, 50 Hawaii 182, 436 P.2d 7 (1967); Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960). Both cases interpreted HAWAII REV. LAWS § 324-37 (1955), which included much of the significant language of HAWAII REV. STAT. § 580-47(a) (Supp. 1983).

[21] Mnookin & Kornhauser, *supra* note 1, at 968. The authors note that the effect of uncertainty is difficult to determine and that it depends in part upon each party's attitude toward and assessment of the risk. *Id.* at 970. *See also* Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 433 (1976) (noting that uncertainty created by judicial discretion impedes settlement) [hereinafter cited as Rheinstein, *Division of Marital Property*].

[22] Since divorcing spouses frequently believe that their own claim is stronger, they may be expected to overestimate the chance of a favorable award.

[23] Other "general rules" designated as such by the court are:

(1) The divorcing party who is awarded a residence should be required to pay outstanding debts related to its upkeep. Raupp v. Raupp, 3 Hawaii App. 602, 611 n.10, 658 P.2d 329, 336 n.10 (1983). *See also* Brown v. Brown, 1 Hawaii App. 533, 535, 621 P.2d 984, 986 (1981).

(2) Cash awards to a party who is being ordered to pay specified debts should be used to pay those debts before distribution of the remaining cash to the party. *Raupp*, 3 Hawaii App. at 613 n.12, 658 P.2d at 337 n.12.

The intermediate court of appeals has also reaffirmed the rule that marital fault is not relevant to property division. Wakayama v. Wakayama, No. 8981, slip. op. at 4, 673 P.2d 1044, 1046 (Hawaii Ct. App. Dec. 22, 1983). *See generally* Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960).

[24] *Raupp*, 3 Hawaii App. at 609-10, 658 P.2d at 335-36.

the time of divorce.[25]

A. Marital and Nonmarital Property

The first "general rule" was announced in *Raupp v. Raupp*,[26] a decision that is especially important in cases involving substantial premarital or inherited property. On November 13, 1980, the Family Court of the Third Circuit of Hawaii entered a decree of divorce dissolving the marriage of Kenneth and Ruth Raupp. The property of the parties at the "time of divorce"[27] included a jointly owned home worth $60,000; other jointly owned real estate worth approximately $17,500; two promissory notes payable to Ruth Raupp's account totaling $53,000; Kenneth Raupp's veteran's disability pension and unmatured retirement benefits; bank accounts totaling $62,600; stocks and life insurance totaling approximately $1,167;[28] a food concession truck worth $15,000; two cars; household and other goods of undetermined value; and approximately $6,680 in debts.[29] The net value[30] of the parties' estate, thus, was approximately $202,600.

The Raupps had been married for ten years. At the time of their marriage, Ruth Raupp owned property worth over $150,000[31] and Kenneth Raupp

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[25] Takara v. Takara, 4 Hawaii App. 68, 71, 660 P.2d 529, 532 (1983).

[26] 3 Hawaii App. 602, 658 P.2d 329 (1983).

[27] The intermediate court of appeals has not specified what is meant by the "time of divorce" for purposes of property valuation and division. *Compare* Taylor v. Taylor, 436 N.E.2d 56, 59 (Ind. 1982) (finding no abuse of discretion in use of date of separation), *with In re* Marriage of Walters, 91 Cal. App. 3d 535, 154 Cal. Rptr. 180 (1979) (using as close to the date of trial as possible). *See also* New York's Equitable Distribution Law, N.Y. DOM. REL. § 236B(1)(c) (McKinney Supp. 1983) (specifying use of date of commencement of action). Use of the date of filing may create an incentive for early filing, *see* Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 9 (1981), as would date of separation. Because the date of decree and the date of hearing are less subject to the parties' control and are more onerous undertakings, their use creates less incentive for early filing. *See generally* Skoloff, *When Is Marriage Over For Asset Acquisition Purposes?*, FAIRSHARE 3 (July 1983).

[28] The property also included five $1,000 United States Savings Bonds, the values of which were not proven. *Raupp*, 3 Hawaii App. at 606, 658 P.2d at 333.

[29] *Raupp*, 3 Hawaii App. at 605-07, 658 P.2d at 332-33; Appellant's Opening Brief at 6, 8, Raupp v. Raupp, 3 Hawaii App. 602, 658 P.2d 329 (1983).

[30] According to the figures set forth in the court of appeals' opinion, the parties' total assets were approximately $209,267, and their debts were approximately $6,680. *Raupp*, 3 Hawaii App. at 605-07, 658 P.2d at 332-33. This does not include the parties' unvalued property, which included the cars, the savings bonds, and the husband's disability and retirement benefits (these assets were not valued by the family court and neither party raised the issue on appeal). *Id.* at 606, 658 P.2d at 333.

[31] The assets were valued at the time of the marriage or thereafter at a total of $154,208. Additional property, including a car, was listed but unvalued. *Id.* at 603-04, 658 P.2d at 331-

owned property worth approximately $12,500.[32] For the first seven years, Kenneth's income was approximately $10,000 per year and Ruth's was $10,700 per year;[33] for the last three years, the couple lost $12,000 per year on a food concession business.[34]

The family court awarded Ruth cash and property worth approximately $191,700[35] and Kenneth cash and property with a net value[36] of approximately $10,900.[37] The intermediate court of appeals found that the lower court had abused its discretion by failing to award Kenneth an additional $11,000 in consideration of his premarital property.[38] Writing for the court, Chief Judge Burns defined "marital" and "nonmarital" property[39] and announced "general

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32. The intermediate court of appeals noted that no evidence was presented on the value of the wife's assets at the precise date of the marriage, but it concluded that the use of more recent values was proper because the husband had not asked for a share of the appreciated value. *Id.* at 610, 658 P.2d at 335. In another case, however, the difficulty of proving date-of-marriage values may present practical problems in applying the *Raupp* rules. *See infra* note 43.

Ruth also received the five $1,000 United States Savings Bonds as a gift from her mother during the marriage. *Raupp*, 3 Hawaii App. at 604, 658 P.2d at 332.

[33] Kenneth also had some unvalued property, including a car and pension and retirement benefits. *Id.* at 604-05, 658 P.2d at 332.

[33] The wife's income included approximately $2,219 in child support payments from a previous husband. *Id.* at 607, 658 P.2d at 334.

[34] *Id.* at 607-08, 658 P.2d at 334.

[35] Ruth also was awarded the five United States Savings Bonds, a car, and household goods and furniture. *Id.* at 606, 658 P.2d at 332.

[36] Kenneth was ordered to pay all but $80 of the couple's debts. *Id.* at 607, 658 P.2d at 333.

[37] *Id.* at 606-07, 658 P.2d at 332-33. Again, this amount does not include the value of Kenneth's car or his disability pension and future retirement benefits. Although the lower court did not determine the value of the disability and retirement benefits, the court of appeals assumed that they were worth a significant amount and that they were an appropriate offset to the wife's award of $53,000 in promissory notes and household goods. *Id.* at 611, 613 n.11, 658 P.2d at 336 n.11.

[38] *Id.* at 613, 658 P.2d at 337. The intermediate court of appeals also found that the family court had erred in ordering Kenneth to pay a debt for a solar water heater since the residence was awarded to Ruth. *Id.* at 611 n.10, 658 P.2d at 336 n.10.

[39] The Hawaii Supreme Court has used the term "separate property" in its general meaning as "separate ownership" and not in the very technical meaning given this term in community property systems. *See, e.g.*, Au-Hoy v. Au-Hoy, 60 Hawaii 354, 357-58, 590 P.2d 80, 83 (1979); Carson v. Carson, 50 Hawaii 182, 182, 436 P.2d 7, 8 (1967). The community property concept of "separate property" includes limitations on the source, use, and management of such assets. *See generally* W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 13.6 (1982).

Among the common law "equitable distribution" jurisdictions (39 states, the District of Columbia, and the Virgin Islands), at least 26 do not allow the courts to divide property acquired prior to the marriage or by gift or bequest during the marriage. Foster & Freed, *1984 Overview*, *supra* note 1, at 379-81; Foster & Freed, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289, 324-335 (1983) [hereinafter cited as Foster & Freed, *1983 Overview*]. The remaining

rules" for the distribution of nonmarital property:

> This information will permit the segregation of nonmarital property net values (the DOM [date-of-marriage] net value of each of the parties' premarital property and the date of acquisition net value of property acquired by only one of the parties during the marriage by gift or inheritance) from marital property values (value at the TOD [time of divorce] of all property owned by either or both parties minus nonmarital net values) and will facilitate the decision-making and review processes.
>
> As a general rule, it is equitable to award each divorcing party the DOM net value of his or her premarital property. . . .
>
> . . . .
>
> As a general rule, it is equitable to award each divorcing party the date of acquisition net value of gifts and inheritances which he or she received during the marriage.[40]

Thus, nonmarital property generally should be credited to each party prior to, and independent of, a division of marital property.[41]

This approach to the distribution of separate property has two important consequences. The first is procedural: the *Raupp* definition of nonmarital property rests on the single issue of the net value of each party's property at the date of marriage or, for gifts and inheritances,[42] at the date of acquisition.[43] It is not necessary to trace the source, income, and proceeds of each asset as is required under community property principles[44] and under the concept of marital property followed in most "equitable distribution" states.[45] This will result in a

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jurisdictions, of which Hawaii is one, authorize the court to consider all property of the spouses. *Id.* This issue led to a dispute over section 307 of the proposed Uniform Marriage and Divorce Act, which was resolved by including alternative provisions in the final version. Alternative A allows consideration of all property, while Alternative B is limited to "marital property." UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 91, 142 (1973). *See generally* Rheinstein, *Division of Marital Property*, *supra* note 21.

[40] *Raupp*, 3 Hawaii App. at 609-11, 658 P.2d at 335-36.

[41] Exceptions to this rule could arise when one spouse has special needs, when one has wasted marital assets, or when the parties have agreed to share nonmarital property. *See infra* notes 74-76 and accompanying text. *But cf.* Sheedy v. Sheedy, 1 Hawaii App. 595, 623 P.2d 95 (1981) (upholding division of nonmarital property even when no special need was shown, in conflict with *Raupp* general rules).

[42] Most jurisdictions treat gifts and inheritances as nonmarital property, but the issue has generated some controversy. *See generally* 1. BAXTER, *supra* note 1, § 41:8(a), Foster & Freed, *1984 Overview*, *supra* note 1, at 380 (Table IV).

[43] In many cases, especially those involving long marriages, it is difficult to prove date-of-marriage or date-of-acquisition values of many assets. However, this problem is unavoidable, and it is not so great as to warrant a different rule.

[44] W. MCCLANAHAN, *supra* note 39, § 2:28.

[45] I. BAXTER, *supra* note 1, § 41:8(a). *But cf.* Krauskopf, *Marital Property at Marriage Disso-*

significant reduction in the complexity and length of litigation.

The second consequence of this approach is substantive: under the *Raupp* guidelines, the income and appreciated value of nonmarital property is defined as "marital property" and, thus, is subject to division.[46] This is an important issue in many cases, particularly in times of high inflation and increasing prices. Since appreciated value is just one form of accumulated wealth and it is earned during the marriage, it should be included in the marital estate.

Most jurisdictions exclude appreciation in the value of separate property from the marital estate, unless the increase was caused by the contributions or efforts of the nonowning spouse.[47] Yet, in those states, "income" from separate property is included within the marital estate.[48] This distinction is artificial, and the

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lution, 43 MO. L. REV. 157, 189 (1978) (suggesting that tracing is not used as much as it could be in Missouri) [hereinafter cited as Krauskopf, *Marital Property at Marital Dissolution*].

The trial in *Raupp* apparently was conducted on the tracing theory:

> Trial lasted a total of six days spread out over a four-month period. It was conducted on the theory that wife was entitled to all of her premarital assets, the proceeds therefrom, and all of the assets that were acquired in whole or in substantial part with said proceeds. Consequently, most of the trial involved an item by item recreation of the ten-year financial history of the marriage.

Raupp, 3 Hawaii App. at 608, 658 P.2d at 334.

[46] In *Raupp* itself, the husband did not request a share of the appreciated value of his wife's premarital property; therefore, the issue was not before the court on appeal. 3 Hawaii App. at 610, 658 P.2d at 335. However, the court did approve an approximately equal division of the appreciated value of the husband's premarital property in Takaki v. Takaki, 3 Hawaii App. 189, 647 P.2d 726 (1982). And in Takara v. Takara, 4 Hawaii App. 68, 660 P.2d 529 (1983), the court upheld an award that may have included division of the appreciated value of a husband's premarital property. The family court awarded Mrs. Takara a one-half interest in real estate worth $160,000. The property jointly acquired during the marriage was worth only $70,000. The $45,000 difference (between the $80,000 interest the wife received and the $35,000 that represented half of the joint property) can be explained either as 18% of the appreciated value of the husband's separate property or as an equitable portion of gifts made by the husband to the wife during the marriage. The court did not specify which theory it was relying upon, but Chief Judge Burns, writing for the court, observed:

> With respect to the increase in value of Husband's separately owned half interest in 3579 Waialae Avenue, which accrued between the date of marriage and the time of divorce, there is no general rule. That increase in value is, however, a separately identifiable item to be awarded in the division of property upon consideration of all of the circumstances of the case.

Takara, 4 Hawaii App. at 71, 660 P.2d at 532 (citation omitted).

[47] J. KRAUSKOPF, CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION 181-190 (1984); Foster & Freed, *1983 Overview*, *supra* note 39, at 324-35. A growing minority does allow the division of passive appreciation. *See* I. BAXTER, *supra* note 1, § 41:8(a) and cases cited therein; *cf.* UNIF. MARITAL PROPERTY ACT §§ 4(g)(3), 14(b)(ii), 9A U.L.A. Supp. 1984 at 19, 27, 42 (1983) (designating passive appreciation as "individual property" while all income is "marital property").

[48] "Income" generally is used to denote rents, issues, and profits but not appreciation in value.

difference in treatment may distort decision-making within the family.[49] If appreciation is separate property while other types of wealth are marital property, then a strong incentive exists to invest in assets that appreciate in value rather than produce income, such as gold, collectibles, jewelry, and some forms of real estate.[50] Even if selling such property and investing the proceeds elsewhere presents a more profitable avenue for a family, the owner may be reluctant to agree to the sale if the law provides that appreciation will belong to the individual owner. Such a rule, thus, may influence a family's financial decisions in a wasteful and disruptive way.[51]

Moreover, the treatment of appreciation as marital property is consistent with a partnership model in which each spouse contributes both services and property.[52] Under that model, each spouse is entitled to the return of his or her contribution (the net value of his property at the time of marriage and the date-of-acquisition value of gifts and inheritance) but any income or increased value of that property belongs to the partnership and, thus, is subject to division.[53]

The use of such a model accords with the community's general expectations

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Cf. W. MCCLANAHAN, *supra* note 39, § 6.11; UNIF. MARITAL PROPERTY ACT § 1, 9 U.L.A. Supp. 1984 at 19, 23 (1983).

[49] The distinction has been criticized. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 771, 795-97 (1982).

[50] *Id.* at 796, n.105.

[51] This factor would be especially important if the owner has some doubt that the marriage will last. Of course, this would not be decisive in every case; it is significant that it would be in some. *See generally* R. POSNER, ECONOMIC ANALYSIS OF THE LAW 2-23 (2d ed. 1977).

[52] The notion of a marital partnership is fundamental to community property doctrine. *See* W. MCCLANAHAN, *supra* note 39, § 2:27. Numerous commentators have endorsed the partnership model for equitable distribution systems as well. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT prefatory note, 9A U.L.A. 91, 93 (1973) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."). *See* PRES. COMM'N ON THE STATUS OF WOMEN, REP. OF THE COMM. ON CIV. AND POL. RIGHTS, wherein Recommendation 14 states: "Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living."

See also Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROBS. 225 (1939); Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169 (1974) [hereinafter cited as Foster & Freed, *Marital Property Reform in New York*]; Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419, 430-33 (1972). *Cf.* Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 (1976).

[53] *Cf.* Uniform Partnership Act, HAWAII REV. STAT. §§ 425-101 to 425-143 (1976 & Supp. 1983). But see Professor Younger's suggestion that return-of-contribution may not be appropriate where the couple has young children, even under a partnership model. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90-94 (1981).

and sense of fairness.[54] It treats marriage as a full commitment of each spouse. If the alternative rule is adopted, and appreciated value of separate property is not included as marital property, then marriage becomes only a partial commitment, from which each spouse holds back his or her personal property. This alternative may be rejected merely as a matter of sound policy. The concept of marriage as a joint effort, to which each party contributes his financial resources and personal efforts, is gaining prominence, and it has been endorsed by numerous courts.[55] It is appropriate for the law to encourage sharing within marriage and to equalize ownership at the time of divorce.[56]

Finally, it should be noted that the *Raupp* definitions of marital and nonmarital property are ambiguous as to the significance of a gift of separate property from one spouse to the other. Under a narrow application of the *Raupp* rule, each party would be awarded the net value of his or her nonmarital property, even if some or all of it had been given to the other spouse during the marriage. Assume that a husband brings $100,000 into the marriage and the wife brings $20,000. On their fifth wedding anniversary, the husband gives the wife $10,000 out of his premarital savings. The couple is later divorced and their bank accounts total $150,000. Under a strict application of the *Raupp* rules, the husband would receive $100,000 before the remaining money was divided, even though he had given some of his premarital property to his wife. Although one might argue for such a result,[57] it would be unduly harsh for the law to refuse to acknowledge gifts between spouses, or to require the return of all such gifts.[58]

The Hawaii Intermediate Court of Appeals has indicated that it will recognize interspousal gifts. In *Takara v. Takara*, the husband owned three pieces of real estate, two of which he transferred into joint ownership with his wife after

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[54] I. BAXTER, *supra* note 1, § 41:2; L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 86; Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 2 (1977); Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 U.C.L.A. L. REV. 1269, 1279 (1981). *But see* Glendon, *Is There a Future for Separate Property?*, 8 FAM. L.Q. 315, 327 (1974) (suggesting that the values of a system of separate ownership may be more acceptable to more people than the values of a partnership model).

[55] *See, e.g.*, Steinhauer v. Steinhauer, 252 So. 2d 825, 831 (Fla. Dist. Ct. App. 1971); Lacey v. Lacey, 45 Wis. 2d 378, 382, 173 N.W.2d 142, 144-45 (1970).

[56] *See* Prager, *supra* note 54, at 11.

[57] *Cf.* Semenza v. Alfano, 443 Pa. 201, 279 A.2d 29 (1971) (implied promise to return gift made in contemplation of marriage); CAL. CIVIL CODE § 1590 (West 1982) (allowing recovery of gift made in contemplation of marriage).

[58] Indeed, the Internal Revenue Code encourages interspousal gifts. *See* R. ROTH, THE ABC'S OF SOPHISTICATED ESTATE PLANNING 4-6 (1983). *Cf.* UNIF. MARITAL PROPERTY ACT §§ 4(g)(1) and 7(b), 9 U.L.A. 19, 27, 32 (Supp. 1983) (providing that spouses may reclassify property by gift).

the marriage.[59] The court of appeals suggested that the property should not be included in the net value of the husband's premarital property under *Raupp* but instead should be divided as marital property.[60] This would have the same effect as saying the husband retained half of the date-of-marriage net value as his nonmarital property and the wife obtained half the date-of-marriage net value as *her* nonmarital property. Such an approach makes good sense where the donor actually intended to make a gift of the property.[61] No reason exists for the law to assume that every gift between spouses is conditioned on the continuation of the marriage.

B. The Division of Marital Property

Once the court awards the net values of nonmarital property to each spouse, the focus shifts to division of the "marital" property.[62] In *Takara v. Takara*,[63] the court of appeals held that "[a]s a general rule, it is equitable to award each party one-half of the net value of property jointly owned at the time of the divorce."[64] The question, thus, is whether this general rule applies to all marital property or only to property that is held in joint title. Although joint ownership

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[59] 4 Hawaii App. 68, 660 P.2d 529, 530 (1983). Since the family court decision could be upheld on other grounds, the intermediate court of appeals was not required to decide whether the mere fact of a transfer of separate property into joint ownership would be sufficient to establish an unconditional gift of one-half interest. *Compare*, Ball v. Ball, 335 So. 2d 5 (Fla. 1976) (holding that transfer to joint ownership does not raise a presumption of gift), *and In re* Marriage of Preston, 81 Ill. App. 3d 672, 402 N.E.2d 332 (1980), *with* Carter v. Carter, 419 A.2d 1018, 1021 (Me. 1980) (noting that transfer to joint tenancy evidences donative intent), *and* Purser v. Purser, 604 S.W.2d 411, 414 (Tex. Civ. App. 1980) (stating that joint title creates presumption of joint ownership). *Cf.* Smith v. Smith, 90 Ill. App. 2d 168, 177, 412 N.E.2d 985, 993 (1980) (presuming gift when title registered in spouse's name individually). The better approach is that of *Ball* and *Preston*; there are many reasons to transfer property into joint title, and some other evidence of donative intent should be required before the transfer is treated as a gift. Otherwise, the simplicity of the *Raupp* rules will be complicated by issues of title, and the problems of tracing will return. *Cf.* Bruch, *supra* note 49, at 797.

[60] *Takara*, 4 Hawaii App. at 71, 660 P.2d at 532.

[61] *See supra* note 59.

[62] *Raupp* itself gives little guidance on this issue because the value of a crucial piece of property, the marital portion of the husband's retirement benefit, was not established in the record. 3 Hawaii App. at 612, 613 n.11, 658 P.2d at 336, n.11.

[63] 4 Hawaii App. 68, 660 P.2d 529 (1983).

[64] 4 Hawaii App. at 71, 660 P.2d at 532. Traditional doctrine recognized a "rule of thumb" that permitted an award of approximately one-third of the marital estate as a substitute for dower. *See, e.g.*, Gauger v. Gauger, 157 Wis. 630, 633, 147 N.W. 1075, 1077 (1914); *cf.* Nobrega v. Nobrega, 14 Hawaii 152, 159 (1902) (limiting alimony in gross to maximum of one-third of husband's income). *But see* Richards v. Richards, 44 Hawaii 491, 502-05, 355 P.2d 188, 195-96 (1960) (rejecting the dower analogy).

may reflect the parties' belief that they will share the property equally, the mere form in which title is held should not be dispositive of the division of property.[65] The entire scheme of equitable distribution under section 580-47 of the Hawaii Revised Statutes assumes that the court should look beyond the mere form of title.[66] Indeed, in several cases the intermediate court of appeals has approved substantially equal divisions of marital property not jointly held.[67]

Moreover, a general rule favoring equal division of marital property after return of each party's nonmarital contribution is consistent with a sharing or partnership model. In the absence of an agreement to the contrary, partners share equally in the profits of the partnership, regardless of the amount of their contributions.[68] Upon dissolution, each partner is repaid his contribution (the date-of-contribution value of the property he put into the partnership originally) but the remaining property is equally divided.[69]

This rule is based on the assumption that most partners reasonably expect to share the profits equally,[70] and the same assumption is appropriate for spouses. In the typical marriage, spouses share property and equal division meets the expectations of the parties and their sense of fairness.[71] Moreover, a rule favoring equal division of marital property at divorce reflects the community's regard for equality and generosity within the marriage relationship.[72]

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[65] *See* Foster & Freed, *Marital Property Reform in New York*, *supra* note 52, at 170.

[66] *See generally* Carson v. Carson, 50 Hawaii 182, 436 P.2d 7 (1967) (interpreting HAWAII REV. LAWS § 324-37 (1955), the precedessor to HAWAII REV. STAT. § 580-47 (Supp. 1983)).

[67] Takaki v. Takaki, 3 Hawaii App. 189, 192-93, 647 P.2d 726, 728-29 (1982); Horst v. Horst, 1 Hawaii App. 617, 623, 623 P.2d 1265, 1269-70 (1981); Sheedy v. Sheedy, 1 Hawaii App. 595, 597, 623 P.2d 95, 96 (1981); Kim v. Kim, 1 Hawaii App. 288, 293, 618 P.2d 754, 758 (1980); *cf.* Wakayama v. Wakayama, No. 8981, slip op. at 3, 673 P.2d at 1046 (abuse of discretion to give 100% of house to one spouse). The Hawaii Supreme Court has not directly addressed this issue; it has, however, indicated that a less than equal distribution is not an abuse of discretion. *See* Tavares v. Tavares, 58 Hawaii 541, 545, 574 P.2d 125, 127 (1978); Fowler v. Fowler, 49 Hawaii 576, 576, 424 P.2d 671, 671 (1967); Crow v. Crow, 49 Hawaii 258, 262, 414 P.2d 82, 85 (1966).

[68] SHINN V. EDWIN YEE, LTD., 57 Hawaii 215, 224, 553 P.2d 733, 740 (1976); HAWAII REV. STAT. § 425-118(a) (1976).

[69] Distribution to partners is, of course, subordinate to payment of creditors. *See, e.g.*, HAWAII REV. STAT. § 425-140(b) (1976).

[70] *See, e.g.*, Fish v. Fish, 307 S.W.2d 46, 51 (Mo. App. 1957) (implied intent to share equally).

[71] Fairness also may require that the parties be able to vary this by agreement. *See infra* text accompanying notes 93-111.

[72] *See* authorities cited *supra* note 50. *Cf.* R. POSNER, *supra* note 51, at 108-09 (equal division is appropriate way to avoid costs of determining relative contributions); M. GLENDON, THE NEW FAMILY, *supra* note 5, at 63 (equal division is "a rule of convenience without substantial demerit"). *But see* Fineman, *Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789 (arguing that equality at divorce perpetuates inequality of economic opportunity); Weitz-

Appropriate exceptions to a rule of equal division[73] include situations when one party has special needs,[74] when one party has wasted assets,[75] or when the parties have agreed to some alternate financial arrangement.[76] In *Au-Hoy v. Au-Hoy*,[77] the Hawaii Supreme Court upheld a family court decision awarding property to each spouse according to his or her personal ownership and endorsed the following statement by Chief Justice Herman T. F. Lum, then judge of the Family Court of the First Circuit of Hawaii: "Where the parties, throughout their marriage, have treated their earnings separately, maintained separate expenses and accumulated separate estates, it is within the discretion of the [c]ourt to allow each to keep his or her separate estate . . . ."[78]

In *Au-Hoy*, the parties were married for thirty years, but had no children. Each party had worked throughout the marriage, maintained separate bank ac-

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man, *The Economics of Divorce*, *supra* note 2, at 1204-07 (1981) (concluding that equal division works to the disadvantage of women primarily because they are no longer awarded all of the marital home). *Cf.* Rothman v. Rothman, 65 N.J. 219, 232 n.6, 320 A.2d 496, 503 n.6 (1974) (rejecting a presumption in favor of equal division).

The financial hardship suffered by women in the typical divorce, in which the woman has a low earning capacity and assumes custody of children, can be relieved by alimony (in gross whenever possible), *see infra* text accompanying notes 190-95 *and* note 194, and by deferred division of the marital home, *see In re* Marriage of Duke, 101 Cal. App. 3d 152, 155, 161 Cal. Rptr. 444, 446, ("[W]here adverse economic, emotional and social impacts on minor children and the custodial parent which would result from an immediate loss of a long established family home are not outweighed by economic detriment to the noncustodial party, the court shall, upon request, reserve jurisdiction and defer sale on appropriate conditions."). *Cf.* Wakayama v. Wakayama, No. 8981, slip op. at 3, 673 P.2d at 1046 (finding error in award of 100% of family home to custodial parent). *See generally* Perlberger, *The Marital Residence—A Strategic Battleground*, 81 DICK. L. REV. 699 (1977); Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089 (1983).

[73] An additional argument may be that equal division is not appropriate where the marriage lasted only a short period and the marital property consists almost entirely of the appreciated value of separate property. *Cf. Takara*, 4 Hawaii App. at 71, 660 P.2d at 532 (upholding unequal division). The fortuitous gain by the nonowning spouse may be considered unjust. However, the sudden rise in value is as fortuitous for the owner as for his or her spouse, and the mere fact that the marriage was short-lived does not, by itself, warrant exception to the general rules of property division. *Cf. infra* note 172 and accompanying text (discussing length of marriage as relevant to alimony).

[74] *See, e.g.*, Lupo v. Lupo, 642 P.2d 1056 (Mont. 1982) (holding that wife's illness is relevant for division of property); *In re* Marriage of Griffin, 34 Or. App. 765, 579 P.2d 885 (1978) (holding that husband's disability is relevant to division of property).

[75] *See, e.g.*, Horst v. Horst, 1 Hawaii App. 617, 623 P.2d 1265 (1981) (wife spent money on her mother); Sheedy v. Sheedy, 1 Hawaii. App. 595, 623 P.2d 95 (1981) (husband spent $39,000 without wife's knowledge).

[76] *See infra* notes 93-111 and accompanying text.

[77] 60 Hawaii 354, 590 P.2d 80 (1979).

[78] *Id.* at 358, 590 P.2d at 83.

counts, and provided for his or her own needs.[79] This evidence suggests an implicit agreement to retain separate estates, and therefore an order for equal division would not be appropriate.[80]

In an approach similar to the equal division of assets, the intermediate court of appeals has indicated that the debts of the parties should be shared,[81] and under the partnership model, depreciation in value also should be divided, even if the asset was originally nonmarital property.[82] Indeed, this would be the effect of application of the *Raupp* rules in a case where one of the parties had nonmarital property that had depreciated during the marriage. Under *Raupp*, both parties would receive the date-of-marriage value of their nonmarital property. Thus, if the current value of an asset were less than the date-of-marriage value, the difference would decrease the marital property, and both spouses would bear the depreciation. Although this approach should not apply where the original owner neglected the property or was otherwise at fault in causing the depreciation,[83] it would achieve an equitable result in cases where the depreciation was fortuitous.

C. *Private Agreements Regarding Property Division*

A system of well-defined general rules is preferable to one that leaves vast discretion to individual judges.[84] A system of general rules allows attorneys and their clients to make more accurate predictions about the outcome of litigation and, thus, it encourages settlement by private agreement.[85] Moreover, because clear guidelines reduce the risk of inconsistency among different judges' decisions, such a system may help to reduce the sense of frustration and injustice felt by many divorce litigants.

In addition, if the guidelines generally provide that each spouse is entitled to half or almost half of all marital property, a married person can rely on having

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[79] *Id.* at 355, 590 P.2d at 81.

[80] *See infra* text accompanying notes 93-111.

[81] Brown v. Brown, 1 Hawaii App. 533, 535, 621 P.2d 984, 986 (1981). *Cf.* WIS. STAT. § 767 (1981-82) (presumption in favor of equal division of debts).

[82] In the marital partnership model suggested by *Raupp*, all assets of both spouses are treated as contributions to the partnership. *See supra* text accompanying notes 52-56. Therefore, any losses associated with the property should be borne equally, unless the parties agree to a different arrangement. *See* HAWAII REV. STAT. § 425-118(a) (1976); Meredith Dev. Co. v. Bennett, 444 S.W.2d 519, 523 (Mo. App. 1969) (partnership losses shared equally).

[83] *Cf.* Horst v. Horst, 1 Hawaii App. 617, 624, 623 P.2d 1265, 1271 (1981) (noting that spouse's dissipation of assets is relevant to division of property).

[84] Rheinstein, *Division of Marital Property*, *supra* note 21 at 431-35; Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761, 772-74 (1982) [hereinafter cited as Note, *Fixed Rules*].

[85] *See* authorities cited *supra* note 21.

that amount of property available to him or her if the marriage ends in divorce.[86] This will allow married couples to divide domestic and income-producing work without fear that in the event divorce occurs, the ownership of property may be left to the discretion of a single judge. The high rate of divorce in our society[87] suggests that many married people may anticipate divorce as a possibility, and courts should consider how the law governing divorce influences those still married.[88] From this perspective, two important goals for the law are certainty of outcome and protection for a spouse who chooses to forego income-producing opportunities in order to perform domestic and child-rearing work.[89] The general rules suggested by *Raupp* and *Takara* promote both of these ends.

The argument against a system of fixed rules, of course, is that it limits the family court's ability to render "individualized justice," to tailor each decree to the particular needs and circumstances of each divorcing couple.[90] However, this objection is not convincing. First, a basic principle of justice holds that like cases must be treated alike,[91] and this places a responsibility upon the courts to articulate the factors that make cases alike or different. Once a significant factor is identified, it is appropriate to form a general rule. Second, any general rule may be subject to exception. When new cases present circumstances that warrant exceptions to a general rule, the court is free and indeed is compelled to recognize them.[92] The effect of a general rule in such cases would be to shift the burden of argument to the party seeking an exception.

For all of these reasons, family law in Hawaii is improved as the courts are able to articulate general principles that reflect common expectations and values regarding the proper distribution of property upon divorce. However, once a system of general rules is adopted, fairness requires that individual couples be allowed to establish their own financial arrangements and to choose whether or not they wish to be governed by the fixed rules.[93] Individual couples should be able to "contract out" of the fixed guidelines.[94]

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[86] *See* Note, *Fixed Rules*, *supra* note 84, at 774. The same is true if the guidelines provide any other set share. *See* Rheinstein, *Division of Property*, *supra* note 21, at 433 (referring to the 2:1 fixed proportion for husband and wife under the Swiss Civil Code).

[87] *See generally* A. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 24-25 (1981) (projecting that 48% of those married in 1970 will eventually divorce).

[88] For two excellent articles that suggest very different ways to explore this question, compare Prager, *supra* note 54, with Landes, *Economics of Alimony*, 7 J. LEG. STUD. 35 (1978).

[89] This assumes that we do not want to discourage people from choosing domestic work. *See generally* G. BECKER, A TREATISE ON THE FAMILY 14-37 (1981).

[90] *See* Rheinstein, *Division of Marital Property*, *supra* note 21, at 431-33.

[91] J. FEINBERG, SOCIAL PHILOSOPHY 100-02 (1973).

[92] *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[93] Prager, *supra* note 54, at 11; Rheinstein, *Division of Marital Property*, *supra* note 21, at 435.

[94] *Cf.* UNIF. MARITAL PROPERTY ACT, § 10, 9A U.L.A. Supp. 1984 at 19, 35 (1983) (provid-

Hawaii courts have been willing to give effect to agreements made at the time of separation; the Hawaii Supreme Court has affirmed that "separation agreements are favored by the law,"[95] and the Hawaii Intermediate Court of Appeals has approved the incorporation and enforcement of property settlement agreements in several cases.[96] Yet the courts have consistently maintained their authority to review the merits of these agreements, and the court of appeals has suggested that a similar approach should be used in evaluating premarital agreements. In *Rossiter v. Rossiter*,[97] the family court ordered the sale of the marital residence and the distribution of the proceeds.[98] The husband appealed on the ground that the court should have enforced an alleged oral antenuptial agreement not to force a sale of the marital residence upon separation or divorce.[99] The court of appeals held that the family court did not err in refusing to enforce the oral prenuptial agreement.

Writing for the court, Chief Judge Burns found that the Statute of Frauds[100] barred the enforcement of the alleged oral agreement and that the husband's acts in getting married, moving to Hawaii, and building the house did not constitute part-performance sufficient to waive application of the statute.[101]

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ing that marital property agreements are freely enforceable).

[95] Harrington v. Harrington, 41 Hawaii 89, 101 (1955).

[96] Hayashi v. Hayashi, 4 Hawaii App. 286, 666 P.2d 171 (1983) (refusing to grant relief from property settlement agreement entered six years before); Lusch v. Foster, 3 Hawaii App. 175, 646 P.2d 969 (1982); Nakata v. Nakata, 3 Hawaii App. 51, 641 P.2d 333 (1982) (requiring that parties be held to settlement agreement entered voluntarily); Jendrush v. Jendrush, 1 Hawaii App. 605, 623 P.2d 893 (1981); *cf.* Wallace v. Wallace, 1 Hawaii App. 315, 619 P.2d 511 (1980) (allowing property settlement agreement to be set aside when the parties had mistakenly assumed that the husband's retirement benefits were not subject to division). *See also* Kahl v. Kahl, 49 Hawaii 688, 427 P.2d 86 (1967) (interpreting and enforcing a property settlement agreement); *but cf.* Napoleon v. Napoleon, 59 Hawaii 619, 585 P.2d 1270 (1978) (holding that agreement on child support is not binding).

[97] 4 Hawaii App. 333, 666 P.2d 617 (1983).

[98] *Id.* at 4, 666 P.2d at 619.

[99] *Id.*

[100] HAWAII REV. STAT. § 656-1(3) (1976). Under this provision, a writing is required for any agreement "made in consideration of marriage." *See generally* 2 CORBIN, CONTRACTS § 462 (1950). Many cases have found premarital agreements regarding property to be "made in consideration of marriage." *See, e.g.*, Terry v. Terry, 264 Ky. 625, 95 S.W.2d 282 (1936) (oral premarital agreement to release right to share in spouse's estate); Hutnak v. Hutnak, 78 R.I. 231, 81 A.2d 278 (1951) (oral premarital agreement to share all property); *see generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 1.9. In *Rossiter* the court must have assumed that the alleged promise not to force a sale was given in exchange for a promise to marry, although the opinion does not discuss this point directly.

[101] *Cf.* Perreira v. Perreira, 50 Hawaii 641, 447 P.2d 667 (1968) (part-performance of contract regarding land); DeLuz v. Ramos, 31 Hawaii 799 (1931) (part-performance of lease). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1979) (exception to statute of frauds when promisee has reasonably relied and reliance was foreseeable).

These acts were not "unequivocally referrable" to the agreement alone but rather were equally explicable as a part of the husband's marital duties and of his normal use and possession of the premises.[102]

This analysis is sound. Indeed, the allegation of an oral promise not to sell the marital residence given in exchange for a promise to marry is just the kind of claim that the Statute of Frauds was intended to prevent. Oral promises in general present difficult problems of proof and are often subject to misunderstanding or misrecollection;[103] an oral promise allegedly made in contemplation of marriage, regarding a residence not yet owned or constructed, must be viewed with suspicion. Without some written evidence, the alleged promise should not be enforced.

Accordingly, the Statute of Frauds provided a sufficient and appropriate basis for the court of appeals' decision. Yet the court's opinion includes an alternative rationale that casts doubt on the enforceability of even written premarital agreements:

> While it is within the trial court's discretion to consider a valid antenuptial agreement in its allocation of the parties' property, such an agreement is not binding upon the court. Thus, a valid antenuptial agreement is only one of the factors to be considered by the court in making an equitable distribution of property.[104]

This observation suggests that the family court should enforce an antenuptial agreement only if it comports with the court's view of an equitable division. This approach is not consistent with what the court terms a "trend" in other jurisdictions toward enforcing antenuptial agreements unless they are unconscionable, induced by fraud, duress, coercion, or entered without full disclosure of relevant information,[105] and this approach unduly limits the power of individual couples to define their financial arrangements.

Many jurisdictions now recognize that antenuptial agreements potentially serve the salutary goal of enabling individual couples to arrange their financial affairs with clarity and certainty.[106] Of course, these agreements remain subject

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[102] *Rossiter*, 4 Hawaii App. at 339, 666 P.2d at 621.

[103] *See generally* E.A. FARNSWORTH, CONTRACTS 369-73 (1982).

[104] *Rossiter*, 4 Hawaii App. at 340, 666 P.2d at 621-22.

[105] *Id.* at 5, 666 P.2d at 620. The court cites as evidence of this "trend" Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Posner v. Posner, 257 So. 2d 530 (Fla. 1972); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960); Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972). *See generally* Note, *For Better or For Worse . . . But Just in Case, Are Antenuptial Agreements Enforceable?*, 1982 U. ILL. L.F. 531 [hereinafter cited as Note, *For Better or For Worse*].

[106] Note, *For Better or For Worse*, *supra* note 105, at 540-56. *See also* Freed, *State Survey of Antenuptial Agreement Law*, FAIRSHARE 10 (April 1983). The Uniform Premarital Agreement Act

to the normal contract rules regarding fraud, duress, mistake, impossibility, and unconscionability.[107] In addition, most courts would subject premarital agreements to close scrutiny to assure that both parties acted in good faith, that they fully disclosed all relevant information, and that each party understood the agreement itself.[108] The requirements of full disclosure and actual understand-

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provides that premarital agreements are enforceable unless made without adequate disclosure and knowledge. UNIF. PREMARITAL AGREEMENT ACT § 6, *reprinted in* FAM. L. REP. (BNA) reference file 201:0121, 201:0124 (1983). The Uniform Act was recently approved by the American Bar Foundation. 10 FAM. L. REP. (BNA) 1233 (Feb. 28, 1984).

[107] *See* L. WEITZMAN, THE MARITAL CONTRACT, *supra* note 6, at 344-59. Courts may be reluctant to enforce a premarital agreement if it will result in one spouse becoming a public charge. *See, e.g.*, Newman v. Newman, 653 P.2d 728, 735 (Colo. 1982) (dictum, premarital agreement may be unconscionable if spouse left without support of any kind). In addition, courts may hesitate to enforce premarital agreements when a long time has passed since the agreement was made and the parties' circumstances have changed. *See* Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 151 (1979) [hereinafter cited as Clark, *Antenuptial Contracts*]; Note, *For Better or For Worse*, *supra* note 105, at 560. However, traditional contract doctrine provides relief when circumstances have changed so much as to frustrate the essential purpose of the agreement or when the parties were mistaken regarding a basic assumption. *See* E.A. FARNSWORTH, *supra* note 103, at 647-705. This doctrine is adequate to prevent undue hardship in cases when there have been substantial unforeseeable changes without depriving married people of the power to make their own financial arrangements. *See* L. WEITZMAN, THE MARITAL CONTRACT, *supra* note 6, at 3-59. *Cf.* UNIF. PREMARITAL AGREEMENT ACT § 6, *reprinted in* FAM. L. REP. (BNA) reference file 201:0121, 201:0124 (1983):

> SECTION 6. ENFORCEMENT
>
> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) that party did not execute the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) was not provided a fair and reasonable disclosure of the property [or] financial obligations of the other party;
>
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
>
> (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
>
> (c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

The Uniform Act does not provide relief from enforcement on the basis of changed circumstances alone. *Id.*

[108] Clark, *Antenuptial Contracts*, *supra* note 107, at 143-47. *See also* Spector v. Spector, 23

ing often are explained on the theory that the parties have fiduciary obligations to one another.[109] A more direct justification may be simply that judicial scrutiny is warranted because the subject of these agreements, marital relationships, and their context, on the eve of marriage, make them especially vulnerable to undue coercion or overreaching.[110]

However, if a premarital contract is found to have been made in good faith, with full disclosure and understanding, it should be enforced, regardless of the court's view of the merit of the financial arrangement it effects.[111] If the courts refuse to enforce such agreements, then they are in effect prohibiting private choice in property ownership, and that is a result few would endorse.

D. Retirement Benefits and Other Nontraditional Forms of Property

In many marriages, the most valuable asset owned by either spouse is a claim to some retirement or pension benefit to be paid in the future.[112] However, only recently have such claims been recognized as property included within the marital estate and subject to division upon divorce.[113] In *Linson v. Linson*,[114] the intermediate court of appeals held that a spouse's nonvested military retirement benefit was part of the "estate of the parties" under section 580-47 of the Hawaii Revised Statutes.[115] This interpretation establishes that retirement and

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Ariz. App. 131, 531 P.2d 176 (1975); Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. App. 1976). The presence of independent counsel for each side strongly favors enforceability. *See* Frey v. Frey, *noted in* 10 FAM. L. REP. (BNA) 1251 (Md. Ct. App. Feb. 23, 1984).

[109] *See* Clark, *Antenuptial Contracts*, *supra* note 107, at 144.

[110] *See generally id.*

[111] This issue has been the focus of much discussion. *See generally* L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 337-59; MARITAL AND NON-MARITAL CONTRACTS (J. Krauskopf ed. 1979); Clark, *Antenuptial Contracts*, *supra* note 107, at 141; Fleischman, *Marriage by Contract: Defining the Terms of Relationship*, 8 FAM. L.Q. 27 (1974); Klarman, *Marital Agreements in Contemplation of Divorce*, 10 J.L. REFORM 397 (1977); Moore, *The Enforceability of Premarital Agreements Contingent upon Divorce*, 10 OHIO N.U.L. REV. 11 (1983); Note, *For Better or For Worse*, *supra* note 105; Note, *Antenuptial Contracts upon Divorce Are Not Invalid Per Se*, 46 MO. L. REV. 228 (1981). The consensus favors enforcement of premarital agreements. *But see* M. GLENDON, THE NEW FAMILY, *supra* note 5, at 66-67 (expressing reservation because premarital agreements would most often be used by the stronger party to restrict transfer of property to the weaker party).

[112] L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 93.

[113] Under the traditional rule, only vested pension rights constituted property subject to division. *See* French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941). *French* was overruled in *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *Brown* is now a leading case on the divisibility of nonvested pension rights.

[114] 1 Hawaii App. 272, 618 P.2d 748 (1980).

[115] *Id.* at 283. As a part of the decision in *Linson*, the court of appeals held that the division of nonvested military retirement benefits by a state court was not precluded by federal law. This

pension benefits are subject to equitable division, even if they are nonvested, nonmatured, or otherwise contingent:[116]

> We have found no Hawaii case law defining the phrase "estate of the parties" as it is used in HRS § 580-47. In keeping with our legislature's intent, we define broadly, so as to facilitate and not to impair the court's ability to reach "just and equitable" results as mandated by HRS § 580-47. We hold that the phrase "estate of the parties" as it is used in HRS § 580-47 means *anything of present or projective value*, and therefore that a spouse's nonvested military retirement benefit constitutes part of the estate of the parties under HRS § 580-47.[117]

Indeed, this interpretation suggests a willingness by the court to reach a variety of assets not traditionally viewed as "property." Litigation in other jurisdictions has focused on whether professional education, licenses, and goodwill should be treated as property subject to division.[118] Although problems of valu-

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view was rejected by the United States Supreme Court in McCarty v. McCarty, 453 U.S. 210 (1981), but that decision prompted significant legislative reform, and most military retirement benefits are now subject to division. *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1001, 96 Stat. 718, 713 (1982) (codified at 10 U.S.C. § 1408 (1982)). The retroactivity of this statute is unclear. *See In re* Lockstrome, 148 Cal. App. 3d 675, 196 Cal. Rptr. 185 (1983). It apparently does not apply to military disability pensions. *See* Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983).

[116] The Hawaii Supreme Court suggested that the expectation of retirement benefits may be a part of the marital estate in Tavares v. Tavares, 58 Hawaii 541, 544, 574 P.2d 125, 127 (1978), but the issue was not before the court in that case.

[117] *Linson*, 1 Hawaii App. at 278, 618 P.2d at 721 (emphasis added).

[118] The trend appears to be in favor of including professional goodwill. *See, e.g.*, Lopez v. Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *In re* Marriage of White, 98 Ill. App. 3d 380, 424 N.E.2d 421 (Ill. App. 1981); Nehorayoff v. Nehorayoff, 108 Misc. 2d 311, 437 N.Y.S.2d 584 (1981). *But see* Nail v. Nail, 486 S.W.2d 761 (Tex. 1972) (holding professional goodwill is not a marital asset); Raggio, *Professional Goodwill and Professional Licenses as Property Subject to Distribution Upon Dissolution of Marriage*, 16 FAM. L.Q. 147 (1982); Comment, *The Recognition and Valuation of Professional Goodwill in the Marital Estate*, 66 MARQ. L. REV. 697 (1983) [hereinafter cited as Comment, *Recognition and Valuation*]; Comment, *Identifying, Valuing and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313 (1981).

The cases regarding degrees and licenses are in a confused state, but the trend apparently is against treatment as marital property. *See, e.g., In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (holding professional degree or license is not "property"); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) (adopting reimbursement alimony concept); *In re* Washburn, *noted in* 10 FAM. L. REP. (BNA) 1252 (Wash. Feb. 16, 1984); *but see* Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (Mich. Ct. App. 1982) (law degree is marital property). *See generally* Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947; Foster & Freed, *1984 Overview*, *supra* note 1, at 388-99; Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980) [hereinafter

ation may be insurmountable in some cases, it often is possible to place a specific value on these assets.[119] In such cases, these assets should be included within the marital estate, and their value should be taken into account in the division of the property.[120]

One argument against treatment of professional education, licenses, and goodwill as part of the marital estate assumes that an alimony award will reflect the enhanced earning capacity resulting from these assets.[121] Although this was generally accurate under traditional doctrine, the law governing alimony has changed substantially in recent years, and it is no longer true that the high earnings of one spouse necessarily will be shared through alimony.[122] Thus, if the genuine economic value of professional degree, license, or goodwill is to be shared, it should be included within the property division. The court's interpretation of "estate of the parties" to include "anything of present or projective value"[123] should apply to professional degrees, licenses, and goodwill, as well as to pension and retirement benefits.

Once retirement benefits are recognized as a type of property subject to division, two practical questions arise: first, what is the value of these assets and, second, how should they be divided? The intermediate court of appeals has reviewed cases involving three different measures of value and methods of division of retirement benefits.[124] In *Linson v. Linson*[125] and *Takaki v. Takaki*,[126]

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cited as Krauskopf, *Recompense for Financing Spouse's Education*]; Loeb & McCann, *Dilemma v. Paradox: Valuation of an Advanced Degree Upon Dissolution of Marriage*, 66 MARQ. L. REV. 495 (1983); Moore, *Should a Professional Degree be Considered a Marital Asset upon Divorce?*, 15 AKRON L. REV. 543 (1982); Mullenix, *The Valuation of an Educated Degree at Divorce*, 16 LOY. L.A.L. REV. 227 (1983).

[119] *See, e.g.*, Lopez v. Lopez, 38 Cal. App. 3d 93, 107, 113 Cal. Rptr. 58, 68 (1974) (valuing professional goodwill); Lundberg v. Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982) (valuing advanced degree). *See generally* Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118; Loeb & McCann, *supra* note 118; Comment, *Recognition and Valuation*, *supra* note 118; Comment, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOK. L. REV. 301 (1983) (proposing formula).

[120] Obviously neither goodwill, a degree, nor a license actually can be divided, but they can be offset by other property or divided by division of future earnings, similar to the percentage formula for dividing future pension benefits discussed in the text accompanying notes 124 to 140, *infra*. *See also* Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118.

[121] *See, e.g.*, Lurvey, *Professional Goodwill on Marital Dissolution: Is it Property or Another Name for Alimony?*, 52 CAL. ST. B.J. 27 (1977); *cf.* Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118, at 396-98 (arguing that one purpose of alimony is to compensate for contributions to the welfare of the family).

[122] *See* Erickson, *supra* note 118, at 959-60; Moore, *supra* note 119, at 550-53; *cf.* Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118, at 399. *See generally infra* text accompanying notes 151-73.

[123] *Linson*, 1 Hawaii App. at 278, 168 P.2d at 751.

[124] *See generally* Bloomer v. Bloomer, 84 Wis. 2d 124, 267 N.W.2d 235 (1978) (discussing three measures of value for future benefits).

the court approved orders requiring direct payment of a portion of each month's allotment, in an amount equal to one-half of the benefits attributable to earnings during the marriages. In *Linson*, the marriage lasted for eighteen of the twenty years required for entitlement to a retirement pension. The court affirmed an award of 18/20 of 50%, or 45%, of each month's payment.[127] In *Takaki*, the marriage lasted for eight of the husband's twenty-four years of service with the United States Postal Service. The court approved an award of one-half of 8/24, or 16.66%, of the monthly benefits.[128]

A second measure of value amd method for dividing future benefits was approved in *Kim v. Kim*,[129] where the husband was receiving civil service retirement payments based on thirty years' employment and the parties had been married for fifteen years of that time. Instead of ordering future payments, the family court determined the present value of the retirement benefits[130] and awarded the wife a lump-sum payment equal to 25% (one-half of 15/30) of this amount.[131] The court of appeals affirmed the family court's order, and held that a lump-sum award is permissible where specific division is "inappropriate or impractical."[132]

In *Kim*, the parties owned an apartment building that was approximately equal in value to the retirement benefits. The family court found that the wife should be given an opportunity to purchase the husband's interest in the apartment building and that a lump-sum award of the wife's share in the retirement benefits would help her to do so.[133] Although it would have been possible to order a specific division of the future benefits, such an award would not have met the wife's immediate need for cash to purchase the apartment building. Presumably, this special circumstance made specific division "impractical" under the court of appeals' standard.

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[126] 1 Hawaii App. 272, 618 P.2d 748 (1980).

[128] 3 Hawaii App. 189, 647 P.2d 726 (1982).

[127] 1 Hawaii App. at 284, 618 P.2d at 754. The court of appeals did reverse the lower court's order requiring the husband to arrange for a separate check payable to the wife because a separate monthly allotment check was not possible under Air Force regulations, but this should not affect the amount of the wife's share or the time of payment. *Id.* at 283-84, 618 P.2d at 754.

[128] 3 Hawaii App. at 192, 647 P.2d at 726.

[129] 1 Hawaii App. 288, 618 P.2d 754 (1980).

[130] The present value of future payments can be determined by discounting for interest in the future, for mortality, and for vesting. See Kalinoski v. Kalinoski, 9 FAM. L. REP. (BNA) 3033 (Pa. Ct. Comm. Pleas, Butter County Dec. 1, 1982) for clear instructions for calculating the present value of a contingent annuity.

[131] 1 Hawaii App. at 290, 618 P.2d at 757.

[132] *Id.* at 292, 618 P.2d at 757.

[133] The family court awarded the lump-sum as a "credit" towards purchase of the husband's share of the apartment building. *Id.* at 293, 618 P.2d at 758.

In *Green v. Green*,[134] the family court used yet a third measure of value for retirement benefits. The court calculated the total amount of the husband's "contributions" to his retirement account and awarded the wife one-half of the amount so invested during the marriage.[135] The wife did not appeal this measure of the pension's value, and so the court of appeals did not decide whether it was correct. The family court concluded that the immediate payment was preferable to the *Linson* method of deferred payment because the wife's financial needs were pressing: "Her need is likely to be greater now while she is responsible for the care and upbringing of two young children than it will be at a later time . . . ."[136]

In comparing the present value measure in *Kim* with the contributions measure in *Green*, it is important to recognize that the *Green* approach, based on actual contributions to the retirement account, will yield an accurate present value only in "defined contribution" plans, while the more complicated *Kim* formula will be necessary for "defined benefit" plans.[137] One court described the difference as follows:

> Under a *defined contribution plan*, a specified amount of money is periodically contributed to a fund by the employer, the employee, or both. This fund is invested and the earnings are divided proportionally among all plan participants. At any moment in time, there is a specific amount of money assigned to the account of each participant. These plans are thus analogous to a savings account. The total amount of benefit receivable under such a plan depends upon the success of fund investments. By contrast, under a *defined benefit plan*, the benefits are specified in advance, usually as a percentage of salary and related to years of service, and no account is kept for the employee.[138]

Despite this distinction, courts may find a valuation based on contribution preferable to the other methods for some "deferred benefit" plans where the employee has worked for only a short period of time. In such cases, as in *Green*

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[134] 1 Hawaii App. 599, 623 P.2d 890 (1981). The award in *Green* was actually in installments, $100 a month for 24 months, but this was in essence a present payment in lieu of a share of future benefits. *Id.* at 599, 623 P.2d at 890.

[135] *Id.* at 599, 623 P.2d at 891. An award based on this formula also should include employer contributions and interest already credited to the account and it should be discounted by any contingency of vesting or survival to retirement. The court does not indicate which of these adjustments was necessary in *Green*. *See generally* Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981).

[136] 1 Hawaii App. at 600, 623 P.2d at 891.

[137] *See* Hardie, *Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce*, 53 CAL. ST. B.J. 106 (1978); Note, *Vested But Unmatured Pensions as Marital Property: Interest Valuation, Allocation and Distribution Problems in Equitable Distributions*, 14 RUTGERS L.J. 175 (1982).

[138] *Johnson*, 131 Ariz. at 42, 638 P.2d at 709 (emphasis added).

itself,[139] the possibility of continued employment and eventual retirement is very speculative, leaving the contributions formula as the only practical way to achieve an acceptable degree of certainty.[140]

E. *Valuation and Division of Family Partnerships*

A final matter that has been the impetus for litigation concerns the proper method for valuation and division of a family partnership. The Hawaii Intermediate Court of Appeals was presented with this issue in *Fletcher v. Fletcher*,[141] where, before they were married, a husband and wife had formed a fifty-fifty partnership to own and operate a grocery store and both continued to work in the store after the marriage. At trial, the wife requested one-half of the "fair net value" of the partnership and one-half of the amounts her husband had drawn out of the partnership since the parties had separated.[142]

The family court awarded the wife only $2,557.75 as her share of the partnership. This award reflected the conclusion that the wife's conduct in stopping her work at the store following the marital separation constituted a "retirement" from the partnership under the Uniform Partnership Act[143] and, thus, that she was not entitled to any of the partnership profits accrued after the separation.[144]

The court of appeals reversed this order, holding that the family court erred in its valuation of the partnership and in its application of section 425-142 of the Hawaii Revised Statutes. On the first point, the court recognized that a variety of acceptable valuation methods exist and that book value, the method used by the family court, is valid, although it is the least desirable alternative:

> A business may be valued by using one or more of the following approaches (1) asset value; (2) capitalization of earnings; (3) market value. When using the asset

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[139] Roland Green had worked for the Federal Aviation Administration for only five years at the date of the divorce decree. *Green*, 1 Hawaii App. at 599, 623 P.2d at 891.

[140] *Cf.* Bloomer v. Bloomer, 84 Wis. 2d 124, 135, 267 N.W.2d 235, 241 (1978) ("It has been recognized that this kind of calculation [present value of future benefits] can be very difficult and that, where it becomes too speculative, the trial court should use a different method of valuation" (citations omitted)). Courts may be reluctant to employ the present value method in such cases even though that formula includes an adjustment for the uncertainty. *See generally* Hardie, *supra* note 137, at 108-09.

[141] 2 Hawaii App. 485, 634 P.2d 1039 (1981).

[142] The wife also requested the court to appoint an appraiser to value the partnership. The court of appeals upheld the family court's denial of this request, noting that such a procedure might force the court to choose between an estimate made by its own appraiser and that of appraisers presented by the parties. *Id.* at 488, 634 P.2d at 1041.

[143] HAWAII REV. STAT. § 425-142 (1976).

[144] *Fletcher*, 2 Hawaii App. at 489, 634 P.2d at 1041.

> value approach, one may use (a) book values or (b) reproduction values or (c) liquidation values.
>
> Book values are generally not reliable standards of actual current values because, *inter alia*, the book generally carries inventories at the lower of cost or market, and it carries fixed assets at cost less depreciation.[145]

Nevertheless, in *Fletcher*, the evidence in the record was sufficient only for a book value calculation, and the family court did not err in using that approach.[146]

However, in calculating the book value, the family court used a complicated equation that the court of appeals termed "clearly erroneous."[147] In effect, the family court had undervalued the partnership and overstated the amount of money the wife had already received. The $2,557.75 award resulting from this calculation was significantly less than the amount to which the family court itself had concluded she was entitled.[148]

On the second point, the court of appeals held that when a dissolution of a family partnership is occasioned by divorce, the provisions of the Uniform Partnership Act[149] do not restrict the broad powers granted to the family court in section 580-47 of the Hawaii Revised Statutes.[150] This interpretation is a good one. The family court's power to order an equitable division of property upon divorce should not be limited merely because part of that property is held as a partnership. Although it is appropriate to consider the parties' expectations regarding their property, and the provisions of the Uniform Partnership Act may be relevant in that effort, the family court should be free to disregard those provisions when they conflict with an equitable division or with the parties' own agreement.

II. ALIMONY

A. Rationale

Traditional doctrine held that marriage imposed an obligation of service upon the wife and an obligation of support upon the husband that lasted until

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[145] *Id.* at 487, 634 P.2d at 1040 *citing* P. HUNT, C. WILLIAMS, & G. DONALDSON, BASIC BUSINESS FINANCE, TEXT AND CASES (4th ed. 1971). *See generally* Krauskopf, *Marital Property at Marriage Dissolution*, *supra* note 45, at 161-66.

[146] 2 Hawaii App. at 487, 634 P.2d at 1040-41.

[147] *Id.* at 491, 634 P.2d at 1042.

[148] *Id.* at 489, 634 P.2d at 1042.

[149] HAWAII REV. STAT. ch. 425 (1976 & Supp. 1983).

[150] *Fletcher*, 2 Hawaii App. at 489, 634 P.2d at 1041. *See supra* notes 17-20 and accompanying text.

the death of a spouse.[151] A marriage ending in divorce released the wife's duty of service, but it required the husband to provide lifelong support in the form of alimony.[152]

The view of marriage underlying this doctrine is no longer widely held.[153] For numerous reasons, most Americans no longer perceive marriage as the primary source of support for women, and now tend to consider marriage as a joint effort, in which both parties make financial and nonfinancial contributions according to their abilities.[154] As a result of this change, the traditional reliance on alimony to provide lifelong support is no longer appropriate. The question, then, is whether alimony has any place within the current view of marriage and divorce, and if so, what its precise function is.

Courts and legislatures have rejected the traditional rationale for alimony.[155]

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[151] *See supra* note 6.

[152] *See, e.g.*, Kaelemakule v. Kaelemakule, 33 Hawaii 268, 270 (1934) ("The common law imposes upon the husband the duty to support his wife so long as she is free from conjugal fault and our statute recognizes such duty."); Isserman v. Isserman, 11 N.J. 106, 93 A.2d 571 (1952). *See generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 14.1; Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939). Under traditional doctrine, the husband was released from the obligation if the divorce was caused by the wife's misconduct, *see* Andrews v. Whitney, 2 Hawaii 264 (1912), but many jurisdictions rejected this limitation and allowed alimony to a wife in need even if she had been guilty of misconduct. *See* Comment, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 142-43 (1974); *accord* Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960). This reform was based on the view that alimony is but one form of property reallocation. *See* Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROBS. 186, 195 (1939).

[153] *See* L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 168-84.

Several scholars criticized the traditional view in *A Symposium on Alimony*, 6 LAW & CONTEMP. PROBS. 183-320 (1939). There is evidence that courts have not awarded alimony as frequently as suggested by traditional doctrine. *See* L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 45 (reporting national and California statistics ranging from 9.3% to 17% with only minor fluctuations from 1887 to 1979); *but cf.* McGraw, Sterin, and Davis, *supra* note 16, at 473 (20% in 1965); Radway, *Forward*, 6 LAW & CONTEMP. PROBS. 183 (1939) (reporting Ohio statistics of 23% periodic payments and 10.5% gross amounts for six months in 1930).

[154] L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 175-89; Weitzman and Dixon, *The Alimony Myth: Does No-Fault Make a Difference?*, 14 FAM. L.Q. 141, 150-53 (1980).

[155] M. GLENDON, THE NEW FAMILY, *supra* note 5, at 54-55; Foster & Freed, *1984 Overview*, *supra* note 1, at 382-88; *see* UNIF. MARRIAGE AND DIVORCE ACT, prefatory note, 9A U.L.A. 91, 93 (1973) ("[T]he Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses."). Some states have reacted by severely limiting the availablity of alimony. *See, e.g.*, Texas, TEX. FAM. CODE ANN. §§ 3.59, 3.63 (Vernon Supp. 1984) (alimony by agreement only); *see* Myrick v. Myrick, 601 S.W.2d 152 (Tex. Civ. App. 1980); Delaware, DEL. CODE ANN. tit. 13 §§ 1512(a)(2)-1512(a)(3) (limiting alimony to two years unless marriage lasted for more than 20 years or recipient is mentally ill); Indiana, IND. CODE ANN. §§ 31-1-11.5-9, 31-1-11.5-10 (Burns Supp. 1983) (precluding alimony unless recipient is physically or mentally handicapped or by agreement); New Hampshire, N.H. REV. STAT. ANN. §

The most common view now regards alimony as appropriate only in a limited number of cases, when a spouse is not financially independent.[156] Most courts now focus on the employability of each spouse, and they are likely to award alimony in three types of cases:[157] (1) when permanent support is needed because an ex-spouse is incapable of becoming self-supporting, either because of physical or mental disability, age, or lack of education;[158] (2) when support is needed because the ex-spouse is the full-time or part-time custodian of preschool or disabled children;[159] (3) when temporary support is needed to enable an ex-spouse to become "self-supporting."[160] This third type of support, often described as "rehabilitative" alimony, presents the most interesting theoretical and practical problems.

The Hawaii Supreme Court recognized the concept of "rehabilitative" alimony in *Lumsden v. Lumsden*,[161] holding that spousal support should last only

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458-19 (1983) (limiting alimony to six years, renewable for periods of not more than three years).

[156] *See generally* Weitzman and Dixon, *supra* note 154, at 148-49 (1980). *Cf.* UNIF. MARRIAGE AND DIVORCE ACT, § 308, 9A U.L.A. 91, 160 (1973):

> [T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property to provide for his reasonable needs; and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

This change is reflected in Hawaii law; HAWAII REV. STAT. § 580-47 was amended in 1978 to focus on the earning capacity of the party seeking support and to emphasize that alimony may be ordered for a limited period only. Act 77 § 2, 1978 Hawaii Sess. Laws 100, 100-01. *See infra* note 165.

[157] *See generally* Weitzman and Dixon, *supra* note 154, at 148-49. This is not to suggest that courts do not sometimes award alimony in cases where none of these three factors is present, but only that these three are most consistent with the current focus on "need." Three additional factors occasionally are significant to alimony awards: (1) The award may serve as a supplement to a property division when the parties desire an alimony characterization for tax reasons (or if assets are not liquid; however, that problem can be solved by installment payments); (2) Alimony may provide a means of compensating for spousal contributions to education or professional achievements. *See, e.g.*, Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) (approving "reimbursement alimony"); *cf. supra* text accompanying notes 118-20; (3) Alimony may be used as a means of compensation and punishment when one spouse is guilty of egregious misconduct. *See generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 14.5.

[158] *See, e.g.*, Nichols v. Nichols, 418 So. 2d 1198, 1200 (Fla. Dist. Ct. App. 1982); Gramme v. Gramme, 587 P.2d 144, 146 (Utah 1978). In such cases, alimony operates like a disability pension. Weitzman and Dixon, *supra* note 154, at 149-50.

[159] *See, e.g.*, Sabol v. Sabol, 2 Hawaii App. 24, 31-32, 624 P.2d 1378, 1384 (1981); Fletcher v. Fletcher, 615 P.2d 1218, 1223 (Utah 1980).

[160] *See, e.g.*, Stewart v. Stewart, 59 Or. App. 713, 651 P.2d 1379, 1381 (1982); Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982).

[161] 61 Hawaii 338, 603 P.2d 564 (1979).

so long as necessary to allow the recipient to obtain appropriate education and employment. The family court had ordered support of $400 a month for six months, then $300 a month for one year, and $150 a month thereafter until further order of the court. The initial eighteen months of payment was sufficient to allow Rosalie Lumsden to complete a master's degree in educational psychology.[162]

Three years later Mr. Lumsden sought termination of the support obligation on the ground that Rosalie had obtained her master's degree and had willfully failed to find appropriate employment. In response, Rosalie sought modification of the decree to continue the $300 a month level of support for an additional three years while she pursued a doctorate in clinical psychology. The family court granted her request for additional support; the Hawaii Supreme Court reversed, suggesting that the need for alimony should be determined as of the time of divorce, and that subsequent changes in the recipient's educational goals do not justify modification of the original order.[163]

In addition, the court found that the $150 a month support should be terminated if Rosalie were capable of supporting herself, even if she actually chose not to get a job.[164] Thus, even when the duration of an alimony award is not expressly limited, it is subject to termination as soon as the recipient is able to earn his or her own support.[165]

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[162] The family court did not specify its reason for the award, but Mrs. Lumsden testified regarding her educational goal, and the order apparently was designed to facilitate it. 61 Hawaii at 342, 603 P.2d at 567.

[163] *Id.* at 344, 603 P.2d at 568. The court observed: "It is clear from the record that appellee's pursuit of a doctorate was never contemplated by either party during marriage or at the time of the divorce . . . ." *Id.* This statement is misleading in its suggestion that rehabilitative alimony is appropriate only for those educational goals contemplated by the parties during the marriage. Instead, the focus should be on what can be done to increase the self-sufficiency and facilitate the readjustment of the recipient spouse. *See infra* text accompanying notes 170-73. *But cf.* Morgan v. Morgan, 52 A.D.2d 804, 383 N.Y.S.2d 343 (1976) (reducing rehabilitative alimony because medical degree was not contemplated during the marriage).

[164] *Lumsden*, 61 Hawaii at 345, 603 P.2d at 568. The court remanded for a determination on this issue, noting that there is language in *Richards*, 44 Hawaii at 517, 355 P.2d at 202, to the effect that both parties must "use his or her talent in income-producing endeavors."

[165] At the time of the *Lumsden* decree, section 580-47(a) of the Hawaii Revised Statutes included the following:

> Upon granting a divorce, the court may make such further orders as shall appear just and equitable . . . compelling either party to provide for the support and maintenance of the other party . . . .
>
> Upon the motion of either party supported by an affidavit setting forth in particular a material change in the physical or financial circumstances of either party, or upon the motion of the party against whom an order was entered supported by an affidavit setting forth in particular *that the other party, although able and capable of substantially rehabilitating himself or herself financially, has wilfully failed to do so*, the moving party may, in the discretion of the court, and upon adequate notice to the other party, be granted a

Of course, the difficult task under this scheme is defining "self-supporting." Is it sufficient that the person merely earn enough to stay off welfare? Or must the recipient achieve some higher standard of living before he or she is deemed "self-supporting"?

In determining whether an ex-spouse is financially independent, courts generally look at his or her actual expenses necessary to maintain a standard of living approximately the same as that enjoyed during the marriage.[166] Yet, it is not clear why this constitutes the appropriate measure of "self-support." If the primary purpose of alimony is to keep divorced spouses off the welfare rolls[167] then why was alimony awarded in numerous cases, like *Lumsden*, in which the recipient was capable of earning enough to provide for basic needs?[168] On the other hand, if alimony is justified as compensation for lost opportunities and for housekeeping, child care, and other services rendered in the past,[169] why do

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hearing.

HAWAII REV. STAT. § 580-47(a) (1976) (amended 1978) (emphasis added).

The statute was amended in 1978 to provide as follows:

> The court may order support and maintenance to a party for an indefinite period or until further order of the court; provided that in the event the court determines that support and maintenance shall be ordered for a specific duration wholly or partly based on competent evidence as to the amount of time which will be required for the party seeking support and maintenance to secure adequate training, education, skills, or other qualifications necessary to qualify for appropriate employment, whether intended to qualify the party for a new occupation, update or expand existing qualification, or otherwise enable or enhance the employability of the party, the court shall order support and maintenance for a period sufficient to allow completion of the training, education, skills, or other activity, and shall allow, in addition, sufficient time for the party to secure appropriate employment.
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> . . . .
>
> (d) Upon the motion of either party supported by an affidavit setting forth in particular a material change in the physical or financial circumstances of either party, or *upon a showing of other good cause*, the moving party may, in the discretion of the court, and upon adequate notice to the other party, be granted a hearing. . . .

HAWAII REV. STAT. § 580-47 (1976) (amended 1978) (emphasis added).

Lumsden's focus on rehabilitation should continue to be appropriate under the "good cause" criterion of the amended provision. *See Lumsden*, 61 Hawaii at 343 n.2, 603 P.2d at 567, n.2 (noting the amendment). *See* Saromines v. Saromines, 3 Hawaii App. 20, 28, 641 P.2d 1342, 1348 (1982), discussed below at text accompanying notes 178-89 & 222-24.

[166] H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 14.5. *See, e.g.*, Casper v. Casper, 510 S.W.2d 253, 255 (Ky. Ct. App. 1974) ("standard of living established during the marriage"); Richards v. Richards, 44 Hawaii 491, 516, 355 P.2d 188, 202 (1960) ("accustomed manner of living").

[167] *See, e.g.*, Nace v. Nace, 107 Ariz. 411, 489 P.2d 48 (1971); Lynn v. Lynn, 153 N.J. Super. 377, 379 A.2d 1046 (1977), *rev'd on other grounds and remanded*, 165 N.J. 328, 398 A.2d 141 (N.J. Super. Ct. App. Div. 1979).

[168] *See* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 14.5.

[169] Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16

courts and legislatures focus on the present resources and earning capacity of the spouses?

A more satisfactory explanation is that alimony is appropriate in order to minimize the overall disruption caused by divorce and to apportion fairly the problems of readjustment between the spouses.[170] As a matter of fairness, it generally is better that neither party suffer a disproportionate change in life-style as a result of the divorce.[171] Thus, the goal of "self-support" or "rehabilitation"

FAM. L.Q. 201 (1982); Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118, at 397-98; *cf.* Landes, *supra* note 88, at 39-40, 44-49 (1978) (analyzing alimony as approximate value of lost opportunities *and* as compensation for loss upon dissolution).

[170] This rationale does not depend on the notion of lost opportunities and past contributions. To illustrate this point, assume two marriages. In one, the wife had an excellent academic record and refused an offer to attend Harvard in order to get married. In the second, the wife was a below-average student, dropped out of high school, and was unemployed when she got married. Both husbands are doctors and earn $60,000 a year; both marriages lasted for ten years and yielded two children, now ages nine and seven; both wives worked as housewives and mothers, but the first wife was very active in promoting her husband's professional and social life while the second was not. Even after an equal division of property, it is likely that the wives will only be able to earn incomes substantially below their husbands', say, $10,000 a year. Should they receive similar amounts of alimony?

If the purpose of alimony is to compensate for lost opportunities and past contributions, the first wife has a strong claim and the second does not. Yet it would be unfair to say that the second wife should bear the entire financial disruption, that she should be left with a standard of living so far below that of her husband. The alimony awards for these two women may well be different; the overall disruption may be minimized by allowing the first wife to go to college and even to medical school, while it may be best to provide the second with balloon payments towards the purchase of a condominium. But these calculations should not be limited by lost opportunities and past contributions.

[171] This idea is not new. *See, e.g.*, *Richards*, 44 Hawaii at 515-16, 355 P.2d at 201-02 (suggesting that it is appropriate to allocate loss in income and standard of living); Adler v. Adler, 373 Ill. 361, 26 N.E.2d 504 (1940), *cert. denied*, 311 U.S. 670 (1940) (awarding alimony to prevent "unjustifiable hardship"); Gramme v. Gramme, 587 P.2d 144, 148 (Utah 1978) ("[t]he responsibility of the trial court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis"). But it has not been viewed as a principal rationale for alimony. *See generally* M. GLENDON, THE NEW FAMILY, *supra* note 5, at 53; ("The rationales . . . are decidedly mixed, involving indeterminate elements of principle and expediency."); Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118, at 397-98 (suggesting that compensation for lost opportunities and past contributions is the principal rationale for alimony). *But see* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, at § 14.5 (observing that reduction of social and financial disruption is one goal of alimony); Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493 (1978) [hereinafter cited as Comment, *Rehabilitative Spousal Support*].

Recognition of the essentially equitable nature of alimony helps to explain why there is a continuing tendency to consider marital fault in individual cases. If alimony is seen as merely one aspect of property division or as compensation for past losses or contributions, then fault is irrelevant. But if the question focuses on who should bear the hardship of social and economic disrup-

should be set by determining a standard of living for the recipient that requires the least disruption to both parties. In cases involving long marriages, disruption may be minimized only by leaving the parties with roughly equivalent life-styles, while after shorter marriages, it may suffice for the poorer spouse to regain his or her premarital life-style.[172] Similarly, it may be less disruptive if one spouse is provided extra support for a "transition" period of personal and professional readjustment, including, if necessary, retraining for a higher paying job.[173]

The decisions of the intermediate court of appeals are consistent with this rationale. In *Ahlo v. Ahlo*,[174] the court upheld an alimony award of $250 per month for two years. The husband appealed, arguing that the wife's $19,000 a year income made her self-supporting. In affirming the award, the court noted that the wife's usual expenses exceeded her income by $250 a month and that the husband's income was $43,000 a year.[175] Under the equitable distribution rationale discussed above, the award in *Ahlo* is justified because it would allow the wife to maintain her accustomed life-style for two years, during which time she could readjust to her reduced income.

Similarly, in *Sabol v. Sabol*,[176] the court of appeals upheld an alimony award of $150 a month to an unemployed woman with a preschool child. The husband was earning $13,860 a year and the wife was unemployed.[177] With such limited resources, the financial hardship caused by the divorce was no doubt severe; without an alimony award, the entire burden would fall to the wife. Thus, although the $150 a month alimony did not eliminate the wife's need for additional income, it would help to soften the blow and share the load. This is an appropriate justification for alimony.

In *Saromines v. Saromines*,[178] a dispute regarding modification of alimony

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tion, then issues of fairness and equity predominate, and individual fault is inexorably involved. *See generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, at § 14.5. *But see* Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960) (holding that fault is not a factor in alimony). *Cf.* Comment, *Alimony Considerations Under No-Fault Divorce Laws*, 57 NEB. L. REV. 792 (1978); Comment, *Alimony in Florida: No-Fault Stops at The Courthouse Door*, 28 U. FLA. L. REV. 521 (1976).

[172] *See, e.g.*, Nelson v. Nelson, 114 Ariz. 369, 560 P.2d 1276 (1977); Koch v. Koch, 58 Or. App. 252, 648 P.2d 406 (1982). *See generally* Inker, Walsh & Perocchi, *Alimony Orders Following Short Term Marriages*, 12 FAM. L.Q. 91 (1978).

[173] *See, e.g.*, Peckenpaugh v. Peckenpaugh, 655 P.2d 144 (Mont. 1982); *In re* Marriage of Sheer, 13 Or. App. 551, 513 P.2d 174 (1973). *See* Comment, *Rehabilitative Spousal Support*, *supra* note 171, at 495, 508-13 ("rehabilitative spousal support benefits both parties").

[174] 1 Hawaii App. 324, 619 P.2d 112 (1980).

[175] *Id.* at 327, 619 P.2d at 116.

[176] 2 Hawaii App. 24, 624 P.2d 1378 (1981).

[177] *Id.* at 32, 624 P.2d at 1384.

[178] 3 Hawaii App. 20, 641 P.2d 1342 (1982).

raised similar issues.[179] The Saromines were married for twenty-seven years. At the time of the divorce, the husband was netting approximately $1,120 a month (from a gross annual salary of $19,200) and the wife was earning a net monthly salary of approximately $490 (from a gross annual salary of $8,400). By agreement, the husband assumed an alimony obligation of approximately $391 a month,[180] giving each spouse approximately equal income.[181] Thus, both parties bore the impact of the divorce.

Three years later, the husband moved for modification of the decree on the ground that the wife was able to support herself and that he was not able to afford the alimony payments. The family court found that the wife no longer needed the full $391 payments to meet her normal expenses and that the husband could not afford to meet all of his financial obligations without contribution from his present wife. The support decree was amended to require only $185 per month.[182]

The Hawaii Intermediate Court of Appeals reversed this order, holding that the evidence did not support the trial court's finding that the wife was financially independent.[183] Chief Judge Burns, writing for the court, accepted the notion that alimony could be terminated when the recipient becomes self-supporting, but he indicated that this should be measured "at the standard of living established during the marriage."[184] In many cases, of course, it will not be possible for both parties to maintain life-styles equivalent to that enjoyed during the marriage because two households are much more expensive than one.[185] Still, the goal of reducing and sharing the disruptive impact of the divorce requires that self-sufficiency be measured against the standard of living to which the party is accustomed.[186]

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[179] *See generally* Note, *Modification of Spousal Support: A Survey of Confusing Areas of the Law*, 17 J. FAM. L. 711 (1978-79).

[180] The decree ordered the husband to pay for the mortgage, medical and dental insurance premiums, and other expenses. The parties stipulated that these payments should be considered as alimony. *Saromines*, 3 Hawaii App. at 21-22, 641 P.2d at 1344.

[181] The wife actually netted somewhat more than the husband (approximately $881/month to $729/month). *Id.* at 23, 641 P.2d at 1345. The discrepancy may have been reduced by the fact that as alimony, the payments were deductible by the husband and taxable to the wife. *See* I.R.C. §§ 71, 215 (1983).

[182] *Saromines*, 3 Hawaii App. at 22, 641 P.2d at 1344.

[183] *Id.* at 29, 641 P.2d at 1349. The court of appeals remanded the case for further proceedings.

[184] *Id.* at 28, 641 P.2d at 1348.

[185] *But see* Weitzman, *The Economics of Divorce*, *supra* note 2, at 1251 (finding men to have experienced a 42% increase in income/expenses ratio while women suffered a 73% decrease). *See infra* text accompanying notes 190-95.

[186] The opinion also suggests that savings for retirement may be a significant aspect of a party's accustomed standard of living. 3 Hawaii App. at 29, 641 P.2d at 1349.

In addition, the court suggested that the husband may have acted irresponsibly in buying a house and two cars with his new wife,[187] and that the second wife's own resources may be considered in evaluating the husband's present ability to pay.[188] This information is helpful in evaluating how the divorce has affected the husband's life-style and in determining whether the alimony obligation imposes undue hardship. However, these issues are significant only if continued alimony is otherwise justified by the recipient's circumstances.[189]

Thus, in fashioning an alimony award, the family court should attempt to minimize and allocate the social and economic disruption caused by divorce. The appellate court decisions suggest that this is being done, and they provide guidance for future cases. Close attention is required, however, in view of recent empirical studies indicating that even under a "liberal" system of equal division and rehabilitative alimony, the economic impact of divorce is borne primarily by women.[190]

After an extensive study of California divorce cases, Lenora Weitzman concluded that, while both men and women suffered a decrease in real income following divorce, men actually experienced a 42% increase in their standard of living.[191] In contrast, the women in her study suffered a 73% decrease in their standard of living.[192] This implies that alimony awards should be higher than are currently being ordered. Moreover, recent findings on the incidence of noncompliance[193] strongly suggest that whenever possible alimony should be in a

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[187] *Id.* The court reaffirmed the notion that both parties have a duty to exert reasonable efforts to meet his or her financial needs and obligations and suggested that the husband may have violated this duty. *Id.* at 28, 641 P.2d at 1349 (citing Lumsden v. Lumsden, 61 Hawaii 338, 603 P.2d 564 (1979); Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960)).

[188] 3 Hawaii App. at 23, 29, 641 P.2d at 1345, 1349.

[189] *See supra* text accompanying notes 157-60.

[190] *See* Hoffman & Holmes, *Husbands, Wives, and Divorce*, in 4 FIVE THOUSAND AMERICAN FAMILIES—PATTERNS OF ECONOMIC PROGRESS 23 (1976); McCraw, Sterin & Davis, *supra* note 16; Seal, *A Decade of No-Fault Divorce*, FAM. ADVOC., Spring 1979, at 10; Weitzman, *The Economics of Divorce*, *supra* note 2. *See also* Fineman, *supra* note 72.

[191] Weitzman, *The Economics of Divorce*, *supra* note 2, at 1251 (based on an income/need ratio).

[192] *Id.* at 1251. Although Weitzman's figures are the most dramatic, similar patterns have been reported in other studies. *See, e.g.*, Hoffman & Holmes, *supra* note 190, at 24-34 (reporting 21% increase in income/needs ratio for married couples over a seven-year period, 30% increase for divorced men, 7% decrease for divorced women); Seal, *supra* note 190, at 13-15 (finding divorced women to have less disposable money than divorced men); *see also* Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. 615 (1979); Hampton, *Marital Disruption: Some Social and Economic Consequences*, 3 FIVE THOUSAND AMERICAN FAMILIES 163 (1974).

[193] *See* Weitzman, *The Economics of Divorce*, *supra* note 2, at 1253-56 (observing that one out of six cases is in arrears after six months); *cf.* L. WEITZMAN, THE MARRIAGE CONTRACT, *supra* note 6, at 126-30 (reviewing recent studies of noncompliance with child support orders).

lump-sum[194] or in a few large payments spread over a short period of time ("balloon payments").[195]

B. *Remarriage and Roommates*

The Hawaii Intermediate Court of Appeals reaffirmed in *Vessey v. Vessey*[196] that section 580-51 of the Hawaii Revised Statutes requires automatic termination of alimony upon remarriage of the recipient spouse. This rule is consistent with the notion that alimony should be used to minimize and allocate the hardship of divorce.[197] When a recipient spouse remarries, it is fair to assume that he or she has adjusted to a new life.

Yet, the termination of alimony does discourage remarriage; a recipient may well choose to remain unmarried rather than forego alimony.[198] For this reason, some have argued that alimony also should terminate when the recipient has a marriage-like relationship with another person.[199] Most courts have taken an

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[194] Alimony in gross is permitted by HAWAII REV. STAT. § 580-47 (Supp. 1983); *but see* Santos v. Santos, 40 Hawaii 644 (1955) (indicating that alimony in gross may be appropriate only under "special circumstances").

[195] *Cf.* Krauskopf, *Recompense for Financing Spouse's Education*, *supra* note 118, at 400-09 (recommending alimony in gross for compensation purposes).

[196] 1 Hawaii App. 57, 613 P.2d 363 (1980). The statutory provision reads in part:

> *Modification of alimony on remarriage.* (a) Upon the remarriage of a party in whose favor a final decree or order for support and maintenance has been made, all rights to receive and all duties to make payments for support and maintenance shall automatically terminate for all payments due after the date of the remarriage, unless the final decree or order, or an agreement of the parties approved by the final decree or order, provides specifically for the payments to continue after such remarriage.
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> (b) The remarried party shall file a notice of the remarriage with the court which made the order for support and maintenance and serve within thirty days of such marriage, by personal service or registered or certified mail, a copy of the support and maintenance to a remarried party, the failure of that party to file a notice of remarriage shall be considered by the court in awarding attorney's fees and costs for the proceeding and in determining reimbursement to the former paying party.

HAWAII REV. STAT. § 580-51 (Supp. 1983).

[197] *See supra* 170-73. *But cf. In re* Marriage of Grove, 280 Or. 341, 571 P.2d 477 (1977), *modified*, 280 Or. 769, 572 P.2d 1320 (1977) (holding no automatic termination on remarriage of recipient, even under rehabilitative alimony analysis). If the rationale for alimony is compensation for lost opportunities and past contributions, then it should not be terminable on remarriage; payments should continue until full compensation is made. *See generally supra* note 170.

[198] *See generally* Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 638 (1981-82); Note, *Alimony Modification: Cohabitation of Ex-Wife with Another Man*, 7 HOFSTRA L. REV. 471 (1979) [hereinafter cited as Note, *Alimony Modification*].

[199] *See, e.g., In re* Marriage of Lieb, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978); Note, *Alimony Modification*, *supra* note 198, at 487-90 (recounting the history of New York's 1938 statute providing for termination of alimony upon co-habitation by the recipient).

intermediate approach, finding that cohabitation may constitute grounds for reduction in alimony, but not for total termination.[200]

The Hawaii appellate courts have not yet been presented with a clear case of an alimony recipient living in a "marriage-like" relationship. In *Sheedy v. Sheedy*,[201] the family court had considered evidence that Ms. Sheedy was living with a man when it made an alimony award. On appeal, the court of appeals held that this evidence was admissible because Ms. Sheedy was sharing household expenses with the man, and this is relevant to the amount of alimony needed.[202] However, the evidence regarding Ms. Sheedy's life-style was minimal, and it did not establish a "marriage-like" relationship. The case does not foreclose the possibility that alimony could be terminated when such a relationship is proved.

III. CHILD SUPPORT

Child support orders are authorized in a variety of contexts, including divorce, annulment, paternity actions, and direct suits for child support.[203] In these contexts, [204] the amount of support is determined according to the needs of the child and the parent's ability to pay.[205] This second factor, the parent's

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[200] Oldham, *supra* note 198, at 622.

[201] 1 Hawaii App. 595, 623 P.2d 95 (1981).

[202] *Id.* at 597-98, 623 P.2d at 97. *See generally Oldham*, *supra* note 198.

[203] HAWAII REV. STAT. §§ 580-47 (Supp. 1983) (divorce), 580-24 (1976) (annulment, putative spouse), 580-74 (Supp. 1983) (separation); 584-15 (1976) (paternity actions). For engaging critiques of our current child support system and predictions for the future, *see* M. GLENDON, THE NEW FAMILY, *supra* note 5, at 68-76; Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982); Weitzman, *The Economics of Divorce*, *supra* note 2, at 1233-68.

[204] Although the statutes permit support orders against either parent, orders generally are entered only against a noncustodial parent. *See generally* H. KRAUSE, CHILD SUPPORT IN AMERICA 3-20 (1981). Although the father traditionally was thought to have the primary obligation of child support, placing the burden on only one parent may well be unconstitutional under the equal protection clause. *Id.* at 5; A.H. v. W.B. McD, 5 FAM. L. REP. (BNA) 2556 (Minn. Dist. Apr. 13, 1979); *cf.* Orr v. Orr, 440 U.S. 268 (1979) (holding unconstitutional to allow alimony for wives but not for husbands).

There apparently was no common law duty to support one's children. 1 W. BLACKSTONE, *supra* note 6, at 434-37; Greenspan v. State, 12 N.J. 426, 97 A.2d 390 (1953). But statutes in every state now impose some duty of support on parents. *See generally* H. KRAUSE, *supra* note 204, at 3 ("Curiously, many statutes still fail to state the support obligation directly, but simply assume (and thereby imply) that there is an underlying liability . . . .").

[205] Blackshear v. Blackshear, 52 Hawaii 480, 483, 478 P.2d 852, 853 (1971); *see generally* H. KRAUSE, *supra* note 204, at 10-18; Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 S.W.L.J. 36 (1975).

ability to pay, has generated some debate,[206] and two important decisions by the intermediate court of appeals address this issue.

A. Parent's Ability to Pay: New Jobs and New Families

In *Cleveland v. Cleveland*,[207] the family court ordered the father to pay $100 per month child support for two children, aged five and six. The father's gross income at the time of the order consisted of approximately $175 per month from a part-time gardening job.[208] The payment of $100 child support left the defendant with only $75 per month for his own living expenses. The court made no findings of fact in support of this order, yet the evidence indicated that the father was a lawyer and that he had stopped practicing law at least two years before the complaint for divorce was filed. In addition, the defendant testified that he hoped to get a full-time job or a second part-time job and that he had placed a job-wanted ad in a local newspaper. Also, the defendant owned an unliquidated interest in real property worth approximately $28,600.[209]

The intermediate court of appeals upheld the award, rejecting the father's argument that the amount of support should be determined by his current income. The court held that the payor's potential earnings may be considered:[210]

> We hold that in ordering child support, the family court may consider what the payor is capable of earning if the payor attempts in good faith to secure proper employment, where the payor is temporarily unemployed or is engaged in work from which the payor does not receive the amount he or she is capable of earning in other fields of endeavor.[211]

The scope of this decision is unclear. The key question is whether potential earnings can be considered in every case, or whether they are relevant only when the parent has been unreasonable in his or her choice of work.[212] If a showing

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[206] *See, e.g.*, articles cited *infra* note 213.

[207] 1 Hawaii App. 187, 616 P.2d 1014 (1980).

[208] *Id.* at 190, 616 P.2d at 1016. The father also testified that he earned an unspecified amount from the sale of papayas, other foodstuff, and herbs he cultivated, but he lost that income because he was required to vacate the farm land under the divorce decree. *Id.* at 189, 616 P.2d at 1016.

[209] 1 Hawaii App. at 188-91, 616 P.2d at 1015-16.

[210] The court also held that in child support determinations, the family court may consider the payor's net worth, rather than merely his income. *Id.* at 192, 616 P.2d at 1017. *See generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 14.5.

[211] *Cleveland*, 1 Hawaii App. at 192, 616 P.2d at 1017 (citations omitted).

[212] In a more recent decision, the court of appeals indicated that the payor's motive for choosing a reduction in salary may be relevant to the modification decision. Davis v. Davis, 3 Hawaii

of unreasonableness is required, then the rule will be an effective way of requiring parents to give due regard to their children's needs.[213] However, if the rule extends to a parent who has made a reasonable decision to work at a job that happens to pay less than he or she could earn elsewhere, then it represents a very significant encroachment on individual choice.[214]

App. 501, 507 n.7, 653 P.2d 1167, 1171 n.7 (1982).

In this context, "reasonableness" may turn on whether the parent's reason for wanting the lower paying job outweighs the hardship suffered by the children from loss of support. *Cf.* Nelson v. Nelson, 225 Or. 257, 264, 357 P.2d 536, 540 (1960) (Father's obligation of support should be reduced to allow him to change jobs "if it is the conclusion of the court that his hardship outweighs the hardship which would be visited on his children."); Coons v. Wilder, 93 Ill. App. 3d 127, 416 N.E.2d 785 (1981) (allowing reduction in child support when father's decision to go to law school was an attempt to improve his financial condition).

[213] *See, e.g., In re* Marriage of Ebert, 81 Ill. App. 3d 44, 400 N.E.2d 995 (1980) (refusing to reduce child support when father quit job without due regard for the child's needs); Schuler v. Schuler, 81 Mass. App. 195, 416 N.E.2d 197 (1981) (denying reduction of child support when father chose to develop his own business rather than accept a salaried job). *See generally* Bruch, *Developing Normative Standards for Child-Support Payments: A Critique of Current Practice*, in THE PARENTAL CHILD-SUPPORT OBLIGATION 119, 127 (J. Cassidy ed. 1983) [hereinafter cited as Bruch, *Developing Standards*]; Note, *Modification of Child Support Decrees in the 1980s: A Jurisprudential Model*, 21 J. FAM. L. 327, 334-36 (1982-83) [hereinafter cited as Note, *Modification of Child Support Decrees*].

Lurking behind this rule may be the notion that the loss of day-to-day contact with a child causes many noncustodial parents to have less awareness of the child's needs and to give them less weight than would a custodial parent. As one court observed:

> Commonly, a divorce means that the spouses will go their separate ways, live independent lives, and accrue additional expenses which they would not have had had the family remained united. Unfortunately, it is not the isolated exception that non-custodial divorced parents, because of such additional expenses or because of a loss of concern for children who are no longer in their immediate care and custody, or out of animosity directed at the custodial spouse, cannot be relied upon to voluntarily support the children of the earlier marriage to the extent they would have had they not divorced.

Kujawinski v. Kujawinski, 71 Ill. 2d 563, 579, 376 N.E.2d 1382, 1389-90 (1978).

This also may explain the numerous instances in which the law imposes more onerous financial obligations on noncustodial parents than on custodial ones. *See generally* H. KRAUSE, *supra* note 204, at 10, 51; Comment, *Post-Majority Educational Support: Is There An Equal Protection Violation?*, 6 HAWAII L. REV. 225 (1983) [hereinafter cited as Comment, *Post-Majority Educational Support*].

[214] *See, e.g.*, Lynn v. Lynn, 153 N.J. Super. 377, 379 A.2d 1046 (1978) (refusing to reduce child support when doctor changed from lucrative specialty in hematology oncology to residence in psychiatry in good faith), *rev'd on other grounds*, 165 N.J. Super. 328, 398 A.2d 141 (1976) (affirming level of support based on potential earnings and other wealth); Mowery v. Mowery, 38 N.J. Super. 92, 118 A.2d 49 (1955) (allowing consideration of father's potential earnings even though he had been farmhand all his life).

An order of child support based on the payor's potential income in a case where the parent has made a reasonable career choice raises serious practical problems (noncompliance is likely) and constitutional issues (infringement of due process right to choose employment or disparate treat-

In *Cleveland* itself, the family court did not make specific findings of fact on the father's motive for not seeking employment as a lawyer.[215] Thus it is not clear whether he acted with reasonable concern for his children's needs.[216] Moreover, it is not even certain that the family court disapproved of Mr. Cleveland's choice to work as a gardener; perhaps the court found that he would be able to pay the $100 a month for child support out of his wages as a full-time gardener.[217] If this is true, then the needs of both parent and child were accommodated, and the father's job choice was not unreasonable.[218]

In the second case involving a parent's ability to pay, *Wright v. Wright*,[219] child support was delayed for eight years and by the time of the hearing, the father had a new wife and three children. The family court considered the father's obligations to his new family as well as those to the children of his first marriage, and ordered child support of $75 a month for each child. The mother appealed, arguing that the court should not have considered the father's remar-

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ment from married parents in violation of equal protection clause, or both). *See generally* Comment, *Post-Majority Educational Support*, *supra* note 213. But perhaps the most troubling question is one of equity. As one court observed:

> There are other [nonfinancial] considerations which may be even more important to him [the father] in seeking a change. He may wish to turn to another occupation, even though it calls for a permanent reduction in his income, because it holds the prospect of a more satisfying life for him. He should be permitted to choose such a course of action with the expectancy that the law will reduce the amount of support . . . if it is the conclusion of the court that his hardship outweighs the hardship which would be visited on his children.

Nelson v. Nelson, 225 Or. 257, 264, 357 P.2d 536, 540 (1960).

[215] 1 Hawaii App. at 191, 616 P.2d at 1016-17.

[216] The father had stopped practicing law at least two years before the divorce, which suggests that the decision was made with due concern for his family. On the other hand, the court noted that, although the father testified that he would accept a "proper offer" for legal work, he apparently was not actually looking for such work. The court may have viewed this as indicating a lack of concern. *Id.* at 188, 190, 616 P.2d at 1015-16.

[217] One way to understand the result in *Cleveland* is to say that the court found that the father was likely to find employment as a gardener fairly soon and that the award was reasonable in light of that expectation. Indeed, that would be a sensible way to handle a case of clearly temporary unemployment.

[218] The cases from other jurisdictions are "diverse." H. KRAUSE, *supra* note 204, at 21. *Compare* Lynn v. Lynn, 153 N.J. Super. 337, 379 A.2d 1046 (1977) (refusing to adjust child support for doctor's good faith change in specialty), *rev'd on other grounds*, 165 N.J. 328, 398 A.2d 141 (1979) (affirming level of support based on potential earnings and other wealth), *with* Nelson v. Nelson, 225 Or. 257, 357 P.2d 536 (1960) (reducing child support when doctor changed practice); *compare* McKeever v. McKeever, 36 Or. App. 161, 583 P.2d 31 (1978) (refusing to adjust child support upon father's change to nonpaying religious work), *with* Freeman v. Freeman, 397 A.2d 554 (D.C. 1979) (reducing child support when father quit job to take care of new child).

[219] 1 Hawaii App. 581, 623 P.2d 97 (1981).

riage in determining child support.

The court of appeals affirmed the family court's order, holding that, while the fact of remarriage itself is not sufficient to reduce child support, the needs of children born to the second marriage may be taken into account.[220] This decision is in accord with recent cases in other jurisdictions rejecting the traditional rule that the needs of a new family cannot diminish a parent's prior support obligation.[221]

The *Wright* case provides an interesting comparison with *Saromines*:[222] in *Saromines*, the court of appeals found that support for the first wife should not be reduced to accommodate the needs of the husband's remarriage, while in *Wright*, the court permitted the reduction of support for the children in consideration of the needs of the father's new family. In *Saromines*, the husband was subject to a support order at the time of his remarriage, while in *Wright*, there was no existing support order. Presumably, Saromines should have taken the existing order into account as he made new commitments, while Wright was free of such constraint.[223] Moreover, in *Saromines* there were no children from the new marriage, and the conflict was between the claims of the first and second wives, while in *Wright*, there were children from both the first and second marriages. Although in *Saromines*, when she entered the marriage, the second wife presumably was aware of her husband's obligation to his first wife, this cannot be said of the new children in *Wright*; their claim to support should be equal to all other children of that parent.[224]

B. Modification of Child Support

More general questions lurk behind the decisions in both *Cleveland* and *Wright* regarding modification of child support orders. To what extent should the court consider foreseeable changes in the parties' circumstances in determining the original award? To what extent are the criteria for modification the same as those for the original decree? Section 580-47(c) of the Hawaii Revised Stat-

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[220] *Id.* at 584, 623 P.2d at 99.

[221] *See, e.g.*, Berg v. Berg, 116 R.I. 607, 359 A.2d 354 (1976). *See also* Openshaw v. Openshaw, 639 P.2d 177 (Utah 1981); H. KRAUSE, *supra* note 204, at 20; Note, *Modification of Child Support Decrees*, *supra* note 213, at 336.

[222] *See supra* notes 178-89 and accompanying text.

[223] *Cf.* Schuler v. Schuler, 81 Mass. App. 195, 416 N.E.2d 197 (1981) (positing that parent enters second marriage conscious of his obligation to the children of his first marriage).

[224] *See* H. KRAUSE, *supra* note 204, at 20-21; Note, *Modification of Child Support Decrees*, *supra* note 213, at 336-37. *But cf.* Bruch, *Developing Standards*, *supra* note 213, at 127 (arguing in favor of the traditional preference for first families as a way to discourage parents from having more children).

utes[225] expressly preserves the power to modify child support orders. The Hawaii Intermediate Court of Appeals interpreted this provision in *Davis v. Davis*.[226]

In *Davis*, the father sought modification of child support payments for his eighteen-year-old daughter.[227] The family court found that the father failed to establish "a material change in financial circumstances" and dismissed the petition. The court of appeals reversed and remanded for a determination "on the merits" of the father's request for reduction.[228]

The court's intepretation of section 580-47(c) began with the proposition that the showing of "changed circumstances" is necessary to overcome the res judicata effect of the original order. From this, the court drew a distinction between the res judicata issue (whether the order is modifiable at all) and the question "on the merits" (whether modification should be granted):

> Consequently, a petition for modification of child support presents the trial court with three questions:
> (1) Has there been a substantial and material change in the relevant circumstances so as to permit consideration of the modification request?
> (2) Should there be a modification?
> (3) What should the modification be?[229]

Having determined that the family court's decision in *Davis* itself was based on the first question only, the court of appeals then held that this decision was

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[225] The statute states in part:

> (c) No order entered under the authority of subsection (a) of this section or entered thereafter revising so much of such an order as provides for the support, maintenance and education of the children of the parties shall impair the power of the court from time to time to revise its orders providing for the support, maintenance and education of the children of the parties upon a showing of a change in the circumstances of either party or any child of the parties since the entry of any prior order relating to such support, maintenance and education.

HAWAII REV. STAT. § 580-47(c) (Supp. 1983).

[226] 3 Hawaii App. 501, 653 P.2d 1167 (1982). The language of the statutory provision when *Davis* was decided is identical to that quoted in note 225, *supra*.

[227] HAWAII REV. STAT. § 580-47(a) (Supp. 1983) specifies that:

> Provision may be made for the support, maintenance and education of an adult or minor child and for the support, maintenance and education of an incompetent adult child whether or not the application is made before or after the child has attained the age of majority.

Cf. Id. §§ 577-1 (1976), 577-7 (Supp. 1983) (providing that parental duty of support in an ongoing family lasts only to child's majority). *See also* Ahlo v. Ahlo, 1 Hawaii App. 324, 619 P.2d 112 (1980) (finding no abuse of discretion in failure to order support for adult children when none was requested). *See generally Post-Majority Educational Support*, *supra* note 213.

[228] *Davis*, 3 Hawaii App. at 508, 653 P.2d at 1172.

[229] *Id.* at 506, 653 P.2d at 1170.

subject to a different standard of review from that applicable to a decision on the second or third questions.[230] Because the first question goes to whether consideration is foreclosed by res judicata, it is a question of law, and the court of appeals must decide it without any deference to the lower court's opinion.[231] The second and third questions, by contrast, are matters within the lower court's discretion and the court of appeals will apply a manifest abuse of discretion standard.[232]

The court then held that the family court had erred in concluding that the changed circumstances were not sufficient to warrant reconsideration of the support order. Viewing the requirement of changed circumstances as merely a threshold issue, the court indicated that it could be met by a minimal change in the parties' financial circumstances:[233]

> The evidence indicates that Father's ability to contribute has decreased; that Mother's ability to contribute has increased; and that we now have precise rather than estimated information about Daughter's need.
>
> In close cases such as this, we give the benefit of the doubt to the party seeking a hearing on the merits. Consequently, we hold that Father has established a sufficient basis for a hearing and a decision on the merits of his application for a reduction of his obligation. We do not decide whether it would or would not be an abuse of discretion for the family court to grant or deny his request for reduction.[234]

The court therefore remanded the case for a decision "on the merits." This decision carefully defines an analytic scheme for child support modification decisions and their appellate review. But crucial to the court of appeals' holding in *Davis* itself is the determination that the family court based its order on an adverse decision on the res judicata question only. The family court's order merely stated that "[Father] failed to establish . . . a material change in financial circumstances."[235] The fact that the family court held a full hearing on the father's petition suggests that its decision actually was not based on res judicata and that it ruled on the merits, on the second question of whether there should be a modification. However, the court of appeals did not view the lower court's decision in this way, and its opinion is carefully limited to review of the res judicata issue only.

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[230] *Id.*

[231] The court termed this a "right/wrong standard." *Id.*

[232] *Id.*

[233] The father's annual income had dropped from approximately $52,428 to $50,784; the mother's income had increased from $11,460 to $16,512. *Id.* at 507, 653 P.2d at 1171.

[234] *Id.* at 508, 653 P.2d at 1172.

[235] *Id.* at 504, 653 P.2d at 1169.

C. *Hawaii's Uniform Reciprocal Enforcement of Support Act*

The Uniform Reciprocal Enforcement of Support Act[236] or its equivalent[237] has been adopted in every state.[238] Hawaii's version is codified in Chapter 576 of the Hawaii Revised Statutes.[239]

This act was interpreted by the Hawaii Intermediate Court of Appeals in *Smith v. Smith*,[240] where the family court found the defendant in arrears under support orders issued by five different states,[241] and entered judgment for a total amount of $8,459. In affirming this order, the court of appeals decided two threshold questions involving the use of Hawaii's Uniform Reciprocal Enforcement of Support Act in actions for arrearage in child support orders.

First, the court held that the Hawaii family court has authority to determine the amount of arrearage due under support orders of other states.[242] Next, the court found that Hawaii courts may not retroactively reduce the amount due under the orders.[243] Section 576-21 of the Hawaii Act requires that the defendant's obligation be determined under the laws of the state in which the obligor was present during the relevant period,[244] and the court found that none of the five states involved would allow retroactive modification.[245] On the Hawaii law,

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[236] The UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9A U.L.A. 747 (1958) is in force in 23 states, including Hawaii, at HAWAII REV. STAT. ch. 576 (1976 and Supp. 1983).

[237] The Act was revised in 1968 and this version was adopted by 25 states. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9A U.L.A. 647 (revised 1968). Iowa and New York have substantially similar Uniform Support of Dependents laws. IOWA CODE §§ 252A.1-252A.13 (1979); N.Y. DOM. REL. LAW §§ 530-543 (1977).

[238] *See generally* Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAM. L.Q. 113 (1978).

[239] HAWAII REV. STAT. ch. 576 (1976 and Supp. 1983).

[240] 3 Hawaii App. 170, 647 P.2d 722 (1982).

[241] Pennsylvania, New York, Indiana, Ohio, and Hawaii. *Id.* at 172, 647 P.2d at 724.

[242] *Id. See generally* H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 6.6.

[243] *Smith*, 3 Hawaii App. at 174, 647 P.2d at 725.

[244] HAWAII REV. STAT. § 576-21 (1976) states:

> *Choice of law.* Duties of support application under this law are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

[245] There is some ambiguity in the law in Ohio. Although courts have adhered to the general rule against retroactive modification, it has been allowed in at least one case. *See* Wolfe v. Wolfe, 124 N.E.2d 485 (Ohio 1954).

In Pennsylvania, as the court of appeals concluded, support orders are retroactively modifiable, but only by the original court. *Smith*, 3 Hawaii App. at 174, 647 P.2d at 725 (citing Soloff v. Soloff, 215 Pa. Super. 328, 257 A.2d 314 (1969)). Since this limitation is imposed by Pennsylvania law, and not by the enforcing state, it may avoid the due process problems of Griffin v. Griffin, 327 U.S. 220 (1946) (finding a due process violation in the enforcement of sister-state decree without opportunity to raise defenses available in the original state) and Worthley v.

the court found that section 580-47(d) allows only prospective modification.[246] This position is consistent with the majority of jurisdictions.[247] Most statutes that do not expressly allow retroactive modification have been interpreted to allow prospective modification only.[248]

IV. CHILD CUSTODY

A. Jurisdiction

The Uniform Child Custody Jurisdiction Act[249] has contributed significantly to the stability and enforceability of child custody orders.[250] Unfortunately some of its provisions are imprecise, and these have been a source of dispute and uncertainty.[251]

One of the most serious problems concerns the retention of exclusive jurisdiction by a state that has issued a custody decree. Under section 14 of the Uni-

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Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955) (holding that enforcing state must allow defendant to seek modification if modification is available under the law of the original state).

[246] HAWAII REV. STAT. § 580-47(d) (Supp. 1983) provides:

> Upon the motion of either party supported by an affidavit setting forth in particular a material change in the physical or financial circumstances of either party, or upon a showing of other good cause, the moving party may, in the discretion of the court, and upon adequate notice to the other party, be granted a hearing. The fact that the moving party is in default or arrears in the performance of any act or payment of any sums theretofore ordered to be done or paid by him or her shall not necessarily constitute a bar to the granting of the hearing. The court, upon such hearing, for good cause shown may amend or revise any order and shall consider all proper circumstances in determining the amount of the allowance, if any, which shall thereafter be ordered.

[247] H. CLARK, DOMESTIC RELATIONS, *supra* note 6, § 454.

[248] *Id.*

[249] UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1968).

[250] The Act has been adopted in every state except Massachusetts, where it is under legislative consideration. Foster & Freed, *1984 Overview*, *supra* note 1, at 368. *See generally* S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN (1981); Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977) [hereinafter cited as Bodenheimer, *Progress*]; Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982) [hereinafter cited as Coombs, *Interstate Child Custody*].

[251] *See generally* S. KATZ, *supra* note 250, at 30-33; Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203 (1981) (discussing conflicts and inconsistencies in cases applying the Uniform Child Custody Jurisdiction Act) [hereinafter cited as Bodenheimer, *Interstate Custody*]. *See also* Bodenheimer, *Progress*, *supra* note 250; Coombs, *Interstate Child Custody*, *supra* note 250 (noting serious constitutional limitations on application of the Act); Hudak, *Seize, Run, and Sue: The Ignonimity of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521 (1974); Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 LOY. L.A.L. REV. 829 (1978).

form Act, the original decree cannot be modified by another state unless the first state has lost all jurisdiction.[252] In commentary subsequent to approval of the act, the drafters acknowleged the importance of this provision to the goal of discouraging relitigation.[253] The drafters suggested that the first state's jurisdiction should continue for so long as either parent continues to live in that state; modification by a second state would be appropriate only if both parents and the child have moved out of the first state.[254] Unfortunately, many courts have not accepted this view of the act,[255] and Hawaii's equivalent of section 14 itself does not allow for such an interpretation. Under that provision, section 583-14 of the Hawaii Revised Statutes, continuing jurisdiction is determined by applying section 583-3(a), the same criteria used to establish original jurisdiction.[256]

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[252] HAWAII REV. STAT. § 583-14 (1976) provides:

Modification of custody decree of another state. (a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction. (b) If a court of this State is authorized under subsection (a) and section 583-8 to modify a custody decree it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 583-22.

[253] *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1218-19 (1969) [hereinafter cited as Bodenheimer, *The Uniform Child Custody Jurisdiction Act*].

[254] *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 14 commissioner's note, 9 U.L.A. 153-55 (1968) (suggesting that jurisdiction should continue so long as one parent resides in state, unless he or she fails to seek custody for several years). Bodheimer, *Interstate Custody*, *supra* note 251, at 215.

[255] *See, e.g.*, Griffith v. Griffith, 60 Hawaii 567, 592 P.2d 826 (1979) (discussed at text accompanying notes 261-73, *infra*); Howard v. Gish, 36 Md. App. 446, 373 A.2d 1280 (1977). *But see* Smith v. Superior Ct., 68 Cal. App. 3d 457, 137 Cal. Rptr. 348 (1977).

[256] HAWAII REV. STAT. § 583-3(a) (1976) states:

Jurisdiction. (a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (A) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (B) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because he has been subjected to

Yet that section embodies a preference for "home state" jurisdiction.[257] If the first state is no longer the child's "home state" (and the unusual conditions of subsections (3) and (4) do not exist[258]), jurisdiction continues only if *both* the child and a parent retain a significant connection to the state *and* if significant evidence is located there (as required under subsection (2)[259]). This failure to specify separate criteria for continuing jurisdiction has given rise to much litigation.[260]

The problem was presented in *Griffith v. Griffith*,[261] in which the Hawaii Supreme Court held that section 583-14 did not prevent the Hawaii family court from modifying a prior custody order entered in California,[262] even though the child and his parents retained significant ties to California. Both mother and father were brought up in California, and their two-year-old son had lived there since birth. The child lived for six months and five days in Hawaii with both parents, from August 1974 to February 1975. After that period, the child returned to California with his maternal grandparents. The father also left for California and then filed an action for divorce and child custody. The wife attended the hearing. On April 10, 1975, the California court entered an order *pendente lite* of joint custody, awarding physical custody to the mother so long as she remained in California; physical custody would

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or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (A) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child, that this court assume jurisdiction.

[257] *See* S. KATZ, *supra* note 250, at 86. "Home state" is defined in HAWAII REV. STAT. § 583-2(5) (1976):

"Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period . . . .

[258] *See supra* note 256.

[259] *See supra* note 257; S. KATZ, *supra* note 250, at 86. *Cf.* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 8(a), 94 Stat. 3568, (28 U.S.C. § 1738A(c)(2)(B) (1980)) (providing that an original order based on best interest jurisdiction not entitled to full faith and credit unless the child has no home state at the time of the decree); *see infra* text accompanying notes 274-80.

[260] *See generally* S. KATZ, *supra* note 250, at 87 ("There is confusion inherent in the section in the Commissioner's Notes, as evidenced by cases that have construed both . . . . Unless a uniform approach to the question of modification jurisdiction is reached, § 14 may create a major loophole."); 2 J. MCCAHEY, CHILD CUSTODY & VISITATION LAW AND PRACTICE § 5.03 (1983); Coombs, *Interstate Child Custody*, *supra* note 250, at 810-12.

[261] 60 Hawaii 567, 592 P.2d 826 (1979).

[262] *Id.* at 575, 592 P.2d at 832.

vest in the father if she left the state. Five days later the mother returned to Hawaii with the child in violation of the California order. In June 1975, the California court then awarded sole custody to the father.[263]

In Hawaii, the father filed a petition for a writ of habeas corpus, and the mother filed an action for divorce and custody. The family court dismissed the father's petition and held that it possessed jurisdiction to modify the California custody order.[264] On appeal, the Hawaii Supreme Court addressed the jurisdiction question.

In upholding the jurisdiction of the Hawaii family court, the supreme court found that Hawaii was the child's "home state" under section 583-2(5)[265] and, therefore, that Hawaii had jurisdiction to decide matters relating to his custody, under section 583-3(a)(1)(A).[266] In addition, the court held that California did not have continuing jurisdiction and, thus, the Hawaii court was free to modify the California decree under section 583-14.

In reaching this conclusion, the court interpreted section 583-3(a)(2) to provide a discretionary test based on the child's "best interest":

> Even if both the significant connection and substantial evidence conditions had been manifestly satisfied, it still remained incumbent upon the family court to consider whether the best interest of the child would be served by deferring to the jurisdiction of the California court, a determination which is largely entrusted to the discretion of the family court.[267]

This interpretation presents difficulties because it compounds the continuing-jurisdiction problem in section 583-14. The court held that California did not have continuing jurisdiction even though both the significant connection and the substantial evidence requirements of section 583-3(a)(2) may have been met,[268] because the Hawaii family court found that it was in the best interest of the child to modify the decree. The supreme court held that the child's best interest is an independent requirement under section 583-3(a)(2), and that the family court's determination therefore precluded California's jurisdiction under that subsection.[269]

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[263] *Id.* at 568, 592 P.2d at 828.

[264] *Id.* at 569, 592 P.2d at 828.

[265] *See* text of statute *supra* note 257.

[266] *See supra* note 256.

[267] *Griffith*, 60 Hawaii at 574, 592 P.2d at 831.

[268] It is hard to deny that both the child and one parent had significant connections with California and that substantial evidence was located there. *See supra* text accompanying note 263.

[269] This interpretation is questionable as a matter of statutory construction. The "because" in § 583-3(a)(2) suggests that if there are significant connections and substantial evidence, then jurisdiction is in the child's best interest. *See* text of statute *supra* note 256. *But cf.* UNIF. CHILD CUSTODY JURISDICTION ACT § 3 Commissioner's Note, 9 U.L.A. 124 (1968) ("The paragraph

Under this interpretation of section 583-3(a)(2) and section 583-14, the prior decree will be subject to review by a new home state whenever it is determined that modification would be in the child's best interest. This approach undercuts the purpose of section 583-14, because it allows a parent to relitigate custody merely by taking the child to a new state and staying for six months.

Nevertheless, the result in *Griffith*—to allow Hawaii courts to decide custody of the Griffith child—may be justified because of the peculiar facts in that case. Most frequently, the original order is entered by a "home state," and subsequently one parent takes the child to a new state.[270] In contrast, the June 1975 order in *Griffith* was entered by California at a time when the child's "home state" was Hawaii.[271] When a home state is available as a convenient forum, other states should hesitate to assume initial jurisdiction under section 3(a)(2) of the Uniform Act, because of the act's preference for home state jurisdiction.[272] Thus, one could argue that California should not have assumed jurisdiction at all, and Hawaii was justified in refusing to give effect to the California order.[273]

It is a weakness of the Uniform Act that it allows a state to exercise initial jurisdiction under the "best interest" provision even though the child has another home state. And it is unfortunate that the supreme court had to adopt a

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was phrased in general terms in order to be flexible . . . .").

[270] *See, e.g.*, Schlumpf v. Superior Court, 79 Cal. App. 892, 145 Cal. Rptr. 190 (1978); Pierce v. Pierce, 287 N.W.2d 829 (Iowa 1980).

[271] 60 Hawaii at 572, 592 P.2d at 830.

[272] The home-state scheme was based on an analysis by Professor Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965). *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, *supra* note 253, at 1225. The significant-connection or best-interest alternative was included to cover the few cases in which the home-state criterion did not suffice. *Id.* at 1225-27. *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 3 Commissioner's Note, 9 U.L.A. 111, 123 (1968); see Smith v. Superior Court, 68 Cal. App. 3d 457, 137 Cal. Rptr. 348 (1977); Howard v. Howard, 378 So. 2d 1329 (Fla. 1980). *See generally* R. COOMBS, INTERSTATE CUSTODY LITIGATION: A GUIDE FOR USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY ACT 9-12 (1981); 2 J. MCCAHEY, *supra* note 260, § 5.03.

[273] *Cf.* HAWAII REV. STAT. § 583-13 (1976):

> *Recognition of out-of-state custody decrees.* The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this chapter or which was made under factual circumstances meeting the jurisdictional standards of the chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this chapter.

However, California did assume jurisdiction under its version of the Uniform Act, and that probably is sufficient under § 583-13 of the Hawaii Revised Statutes. Moreover, even if the court is not required to enforce a decree under § 583-13, it may be unable to modify it under § 583-14, which refers to jurisdiction at the time of the modification only, not at the time of the decree. *See* Coombs, *Interstate Child Custody*, *supra* note 250, at 811.

limited notion of continuing jurisdiction in order to reach the best result.[274] However, these problems may be alleviated by the federal Parental Kidnapping Prevention Act.[275]

The Parental Kidnapping Prevention Act is designed to assure full faith and credit for certain child custody orders. It provides, in essence, that orders entered under conditions that correspond to the jurisdictional criteria of section 3(a) of the Uniform Child Custody Jurisdiction Act are entitled to full faith and credit.[276] However, the "best interest" provision of the federal Act is lim-

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[274] *See supra* text accompanying notes 268-73. The *Griffith* decision limits the possibility of continuing jurisdiction even for a state that was the home-state at the time of the custody order. *Id.*

[275] 28 U.S.C. § 1738A (1982).

[276] Section 1738A of the Parental Kidnapping Prevention Act of 1980 states in part:

Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

. . . .

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and (2) one of the following conditions is met:

(A) such state (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination

ited to situations involving no current or recent home state.[277] Thus, in *Griffith*, the California order would not be entitled to full faith and credit because none of the conditions specified in the federal Act were met.[278] On the other hand, if California had been the home state at the time of its June 1975 order, Hawaii would be bound to enforce that order so long as one parent resided in California.[279] This is a better result than that apparently required by the Uniform Act.[280]

The Hawaii Supreme Court again considered the "best interest" test of section 583-3(a)(2) in *Allen v. Allen*.[281] Mrs. Allen and her son arrived in Hawaii on October 2, 1980, and she filed an action for custody on October 8, 1980. The father then filed a custody action in the child's home state of New Jersey. On November 21, 1980, the New Jersey court awarded custody to the father, who then moved to dismiss the Hawaii proceeding. The Hawaii family court granted this motion on the ground that it did not have jurisdiction under section 583-3(a). The intermediate court of appeals reversed, holding that the Ha-

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consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

See generally S. KATZ, *supra* note 250, at 121-24, 2 J. MCCAHEY, *supra* note 260, ch. 5; Coombs, *Interstate Child Custody*, *supra* note 250; Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act—A Due Process Dilemma?*, 17 TULSA L.J. 713 (1982); Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. L. REV. 89 (1982); Note, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Custody Problems*, 39 WASH. & LEE L. REV. 149 (1982) [hereinafter cited as Note, *Dual Response*].

[277] *See* text of § 1738A(c)(2)(A) *supra* note 276.

[278] Even if the order was not entitled to full faith and credit under § 1738A, a state still could enforce it as a matter of comity, and indeed, the court may be compelled to do so under § 14 of the Uniform Act. *See supra* note 252. However, consistency with the federal Act could be achieved by a holding that it is not in the best interest of the child under § 3(a)(2) of the Uniform Act to find continuing jurisdiction in a state that had entered an order not in conformance with the federal Act. This is a strained interpretation, but it does provide a way for the Uniform Act to be brought into conformity with the federal Act.

[279] This assumes that California would find that it had continuing jurisdiction under its version of § 3(a)(2). The difference in analysis between the Uniform Act as applied in *Griffith* and the Parental Kidnapping Prevention Act is in the choice of law. Under the Uniform Act, Hawaii's version of § 3(a)(2) governs, while under §§ (c)(1), (d), and (f) of the federal Act, California's version is controlling. *See* Note, *Dual Response*, *supra* note 276, at 162. This is one area of potential conflict between the federal and state laws.

[280] Under the Uniform Act, it appears that the question of continuing jurisdiction would have to be decided the same way regardless of the basis for the first state's jurisdiction; § 14 focuses on jurisdiction at the time of modification, not at the time of entry. The only way around this would be to recognize this factor as an element in "best interest" under § 3(a)(2), as suggested earlier in note 278, *supra*.

[281] 64 Hawaii 553, 645 P.2d 300 (1982).

waii court did have jurisdiction under section 583-3(a)(2) because the mother intended to become a domiciliary of Hawaii: she had "bona fide (as opposed to technical) domicile."[282]

The Hawaii Supreme Court reversed the court of appeals' decision, reasoning that the goals of the Uniform Child Custody Jurisdiction Act would be frustrated if an intention to domicile was sufficient to establish jurisdiction.[283] This decision is consistent with the Uniform Child Custody Jurisdiction Act and with the Parental Kidnapping Prevention Act. The opinion appropriately emphasized the current "home state" as the preferred place of initial jurisdiction within the scheme of section 583-3(a), and it limited the family court's discretion to find concurrent jurisdiction in Hawaii under the "best interest" criteria.

Taken together, *Griffith* and *Allen* suggest that initial jurisdiction under section 583-3(a)(2) will not exist unless the parties' connection to the state is relatively long-standing and, even then, only if the child does not have a home state.[284] In effect, section 583-3(a)(2) serves the same function as section 583-3(a)(4);[285] both are applicable to cases where no other state has jurisdiction and where the child's best interest is served by the assumption of jurisdiction.

Such a case was presented to the Hawaii Intermediate Court of Appeals in *Bullard v. Bullard*.[286] The Bullards moved to Hawaii with their two children in 1972. They separated in 1975. Eventually, the parties agreed that the father should have custody of the two children, and this agreement was incorporated into an order of the Hawaii family court in June 1977. Soon thereafter the father remarried, and, in February 1979, he moved to California with the two children. In August 1979, one of the children returned to Hawaii to visit his mother; he and his mother then decided that he should stay in Hawaii. Meanwhile, in August or early September 1979, the father and his family moved to Texas. The father filed for custody of the child in the Hawaii family court and the mother cross-filed for modification of the custody order. The family court awarded custody to the mother and the father appealed on the ground that the lower court did not have jurisdiction to determine custody issues.[287]

The Hawaii Intermediate Court of Appeals held that neither California nor Texas had jurisdiction and that section 583-3(a)(4) of the Hawaii Revised Statutes provided a basis for the exercise of jurisdiction by the Hawaii court.[288]

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[282] Allen v. Allen, 2 Hawaii App. 519, 525, 634 P.2d 609, 613 (1981).

[283] *Allen*, 64 Hawaii at 561, 645 P.2d at 306.

[284] It is arguable that in *Griffith*, California would have had continuing jurisdiction under § 3(a)(2) if the child had no home state at the time of the decree. *See supra* text accompanying notes 265-73.

[285] *See* text of statute *supra* note 256.

[286] 3 Hawaii App. 194, 647 P.2d 294 (1982).

[287] *Id.* at 197-99, 647 P.2d at 299-300.

[288] *Id.* at 201, 647 P.2d at 300.

This conclusion is sensible; of the three states, Hawaii had the greatest connection with the child, and no state qualified as his "home state." In a footnote, the court of appeals expressed doubt about concurrent application of subsection (a)(2) because *Griffith* suggests that something more than a substantial connection is required to establish jurisdiction under that provision.[289] However, the decisive factor in *Griffith* may have been that the child had a convenient home state and therefore it was not necessary for California to assume jurisdiction. In *Bullard*, on the other hand, the child had no home state and that, combined with significant connections, should be enough to warrant jurisdiction under subsection (a)(2) as well as under subsection (a)(4).[290]

The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act raise numerous questions that have not yet been addressed by the Hawaii courts or by courts in other jurisdictions.[291] The rules governing jurisdiction over child custody remain uncertain. Most significantly, the validity, effect, and influence of the Parental Kidnapping Prevention Act are as yet unclear. This is an area ripe for judicial attention.

B. Standards and Procedure

The basic standard for awarding custody is established in section 571-46(1) of the Hawaii Revised Statutes: "Custody should be awarded to either parent or both parents according to the best interests of the child."[292] The Hawaii Supreme Court has affirmed that neither parent possesses a preferred claim to custody and that the critical consideration is the best interests of the child.[293] It is clear, moreover, that the family court has broad discretion in this determination and that its decision will be reversed only if there has been a serious abuse of that discretion.[294]

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[289] *Id.* at 201 n.4, 647 P.2d at 300 n.4.

[290] This would be consistent with the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982). *See supra* notes 275-76 and accompanying text.

[291] *See* authorities cited *supra* note 276.

[292] HAWAII REV. STAT § 571-46(1) (Supp. 1983). In addition, § 571-46(2) provides that persons other than the father or mother may be awarded custody if that is in the best interest of the child:

> Custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.

HAWAII REV. STAT. § 571-46(2) (1976).

[293] Fujikane v. Fujikane, 61 Hawaii 352, 354, 604 P.2d 43, 45 (1979); Turoff v. Turoff, 56 Hawaii 51, 55, 527 P.2d 1275, 1278 (1974).

[294] *Fujikane*, 61 Hawaii at 355, 604 P.2d at 45; Crow v. Crow, 49 Hawaii 258, 261, 414 P.2d 82, 85 (1966).

In reaching its determination the family court typically will look to reports and recommendations of social workers, psychologists, and others for information and advice.[295] Indeed, section 571-46(4) provides that the court may require "an investigation and report concerning the care, welfare, and custody of any minor child" to be done by court personnel.[296]

In *Sabol v. Sabol*,[297] the family court admitted into evidence a written social study report filed by the court's professional staff. The father objected to its admission on the ground that it included hearsay.[298] The family court overruled this objection. On appeal, the Hawaii Intermediate Court of Appeals held that, in deciding custody issues, the family court may consider hearsay contained in social study reports so long as all parties are allowed to examine the report, to present evidence and arguments against it, and to cross-examine its author.[299] In support of this conclusion, the court observed that a child custody determination is unlike normal legal inquiries because the central concern is the child's best interests and because the child is usually not a party.[300] This implies that the normal adversarial model is not adequate, and the court must be free to engage in a broader inquiry than in normal litigation. Instead, the court drew an analogy to juvenile waiver hearings and to ordinary sentencing proceedings, in which hearsay evidence of this kind is admissible.[301]

Most jurisdictions do allow reports containing hearsay to be admitted in custody hearings.[302] The problem, of course, is to assure that both parents have a fair hearing on their claims for custody[303] and to prevent the court from being

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[295] This procedure was acknowledged and approved in *Turoff*, 56 Hawaii at 55-56, 527 P.2d at 1275.

[296] HAWAII REV. STAT. § 571-46(4) (1976). *See also id.* § 571-46(5) (1976) (permitting court to admit expert testimony and to call its own expert witnesses).

[297] 2 Hawaii App. 24, 624 P.2d 1378 (1981).

[298] The husband directed his objection at the exhibits to the report and at letters to the court officer from teachers and from the wife's mother. *Id.* at 26, 624 P.2d at 1381.

[299] *Id.* at 29, 624 P.2d at 1382-83.

[300] *Id.* at 28, 624 P.2d at 1382.

[301] *Id.* at 28-29, 624 P.2d at 1382.

[302] *See generally* 3 J. MCCAHEY, *supra* note 260, § 20.09. As the court of appeals noted, a minority of states do not allow admission of investigative reports. *Sabol*, 2 Hawaii App. at 28, 624 P.2d at 1381-82 (citing *In re* Swan, 173 Mont. 311, 567 P.2d 898 (1977); Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977)). *Cf.* UNIF. MARRIAGE AND DIVORCE ACT, § 404, 9A U.L.A. 91, 203 (1973) (allowing investigative reports if counsel are given access to underlying information and the opportunity to cross-examine the author).

[303] Although the due process clause apparently applies to a child custody proceeding, the United States Supreme Court cases leave much confusion on this question. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (grounds for termination of parental rights must be proved by clear and convincing evidence); Lassiter v. Dept. of Social Serv., 452 U.S. 18 (1981) (no right to appointed counsel in termination of parental rights action); Stanley v. Illinois, 405 U.S. 645 (1972) (viewing father as entitled to notice and hearing prior to children becoming wards of the

unduly influenced by the investigator's opinion.[304] Although it is important to provide an opportunity for rebuttal and cross-examination, the court should guard against particularly unreliable or uncorroborated hearsay and should exercise its authority not to consider evidence that lacks trustworthiness.[305]

In addition to the child's best interest, the second element of most custody awards is visitation rights for the noncustodial parent. Indeed, section 571-46(7) of the Hawaii Revised Statutes provides that reasonable visitation rights shall be awarded unless they are shown to be detrimental to the child.[306]

In *Bullard v. Bullard*,[307] the family court granted six weeks of visitation each year to the father, but the order imposed two preconditions: first, the father was required to execute a $2,500 bond to assure that the child is returned to Hawaii, and second, the court required him to promise that he would return the child to the mother wherever she resides and that he would not attempt to relitigate custody in any other jurisdiction. The father argued that these were unreasonable limitations on his visitation right.[308]

The court of appeals held that it is permissible to require a nonresident parent to execute a bond to assure return of the child, but that requiring the father to promise not to litigate in another jurisdiction and to formally "promise" to obey the court's order constituted an abuse of discretion.[309] The use of a bond in this context is fairly common,[310] and, although it poses only a minimal deterrence to a parent who is determined to disobey a custody order, still it may serve as a reminder of the seriousness of the court's order and the importance of reasonable compliance.[311]

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state); May v. Anderson, 345 U.S. 528 (1953) (no full faith and credit to custody order entered without personal jurisdiction over the noncustodial parent). *Cf.* Palmore v. Sidoti, 52 U.S.L.W. 4497 (Apr. 25, 1984) (finding equal protection violation in custody order based on consideraton of race and declining to reach the petitioner's due process claim).

[304] The father in *Sabol* also objected to admission of the court officer's opinion as to which parent should be awarded custody. The court held that it is appropriate for a court officer to give an opinion and recommendation regarding custody. *Sabol*, 2 Hawaii App. at 30, 624 P.2d at 1383.

[305] *See* HAWAII R. EVID. 803(b)(8)(C); *cf. id.* Rule 403.

[306] HAWAII REV. STAT. § 571-46(7) (1976) states:

> Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.

[307] 3 Hawaii App. 194, 647 P.2d 294 (1982).

[308] *Id.* at 199, 203, 647 P.2d at 301.

[309] *Id.* at 204-05, 647 P.2d at 301-02.

[310] *See* 3 MCCAHEY, *supra* note 260, § 16.02[3][K].

[311] *Compare* Badertscher v. Badertscher, 10 Ariz. App. 501, 460 P.2d 37 (1969) (regarding bond appropriate when father had attempted to seize custody in the past), *with* Grimditch v. Grimditch, 71 Ariz. 237, 226 P.2d 142 (1951) (declaring error to require bond when there was no reason to think that father would disobey court's order). *Cf.* Kresnicka v. Kresnicka, 42

V. CONCLUSION

Recent decisions of the Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals have laid the foundations for new doctrine in family law. As the community's view of marriage and family change, the law must reevaluate the rights and obligations attendant on these important institutions.

The Hawaii courts have acted responsibly in this effort. They have moved towards a system of general rules that will yield greater predictability and fairness, they have adopted new models for alimony and division of property, and they have attempted to clarify the law governing child support and child custody. Future cases will provide opportunities to further develop this crucial area of the law.

A.D.2d 607, 345 N.Y.S.2d 118 (1973) (requiring father to leave passport with the mother as security for each visit).

Development Rights in Hawaii

by Dorothy Tom*

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INTRODUCTION

In the fall of 1982, the Hawaii Supreme Court issued an opinion in *County of Kauai v. Pacific Standard Life Insurance Company*,[1] concerning the legality of a multi-million dollar resort project at Nukolii Beach on the Island of Kauai. A three-year battle between interests seeking to promote the development and interests seeking to preserve the beach from private development culminated in the supreme court appeal. The battle began as a political issue when the anti-resort interests implemented the referendum process as a means of checking the proposed development. The referendum resulted in a revocation of the resort zoning granted to the development but failed to resolve the legal controversy of whether the project could be stopped. The county went to court to determine the effect of the referendum on a project for which building permits had already been issued and construction begun. The interplay of the referendum with the permit approval process presented an issue of first impression in Hawaii. The supreme court ultimately held that the project was invalid and terminated further construction. The decision, perceived by many as a blow to private development, generated as much controversy as the underlying dispute.

The Nukolii dispute concerned a property-owner's development right: the right to complete a development in accordance with pre-existing zoning regulations, regardless of subsequent changes in those regulations restricting or prohibiting completion of the development as originally planned.[2] The dispute is interesting because it illustrates the powerful role that public opinion can play, via the referendum mechanism, in determining the legality of a project. The developer and county attempted to establish the project in accordance with existing permit procedures but public opinion in the form of the referendum vote overruled them. Since all the counties now have a referendum procedure, a fact situation similar to the Nukolii controversy may appear again.[3] Moreover, the principles laid down in the opinion will continue to govern development in Hawaii until judicial decision or legislative action modifies or pre-empts them.

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[1] 65 Hawaii 318, 653 P.2d 766 (1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1762 (1983) [hereinafter referred to as the "Nukolii" opinion].

[2] *See generally* 4 A. & D. RATHKOPF, THE LAW OF ZONING AND PLANNING (4th ed. 1981) ch. 50; 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 41.02[3] (1983); C. SIEMON, W. LARSEN & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (Urban Land Institute 1982); Cunningham and Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L. J. 625 (1978); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URBAN L. ANN. 63.

[3] All four counties in the state now have charter provisions for initiative or referendum. The Honolulu charter was amended in 1982 during the general election. Its provision for initiative now appears as Article III of the charter. Kauai adopted Article V pertaining to initiative in 1976. Article 11 in the Maui charter has been in effect since 1977 and Hawaii County's Article 11 has been operative since 1969.

The Nukolii decision establishes that in order to acquire a development right and be exempt from adverse zoning changes, a developer must show that the developer made substantial expenditures in reasonable reliance on final discretionary approval of a project.[4] Typically, such approval must come from the county council or some administrative agency. The Nukolii decision, however, recognizes certification of a referendum petition to change the existing zoning of the project as an important exception to typical approval procedures. Certification occurs when the county clerk issues a certificate that a referendum petition meets all formal requirements for submission to the council and the electorate. If certification occurs before a developer receives final discretionary approval from the county council or an administrative agency, authority to grant such approval shifts to the electorate. In those circumstances, a developer may rely only on a referendum vote to retain the existing zoning. Final approval by government officials does not guarantee a developer a right to proceed with a development.[5]

This rule presents certain problems for a developer because although it resolves some issues, it raises others. The decision clearly designates the referendum vote as final discretionary approval under the referendum process.[6] The referendum process is too cumbersome a mechanism for most zoning decisions, however, so a developer normally seeks final discretionary approval under the non-referendum approval process. The decision fails to specify which particular approval or permit serves as final discretionary approval under that process. Instead, a developer must determine from the development procedures governing each particular project which discretionary approval is "final." Such approval occurs when a government's own process for making land use decisions leaves nothing to discretion and requires only ministerial processing of a building permit.[7]

Moreover, the Nukolii opinion does not state whether a pending ordinance to amend zoning, like a pending referendum for the same purpose, suspends a developer's right to rely on official approval of a project. This uncertainty may cause problems. For example, a developer may rely on "final" approval from an official only to have a court hold that the right to rely was suspended by the prior introduction of an ordinance.[8]

The court's analysis of the good faith element of the development rights rule also presents problems. The court emphasizes that a developer's reliance on final discretionary approval must be in good faith (or "reasonable" under the objec-

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[4] *See infra* notes 131-34 and accompanying text.

[5] *See infra* notes 136-38 and accompanying text.

[6] *Id.*

[7] *See infra* notes 131-35 and accompanying text.

[8] *See infra* notes 142-46 and accompanying text.

tive standard the court adopts).[9] A developer who fails to rely in good faith acquires no development right. The court, however, seems to characterize haste to avoid imminent zoning changes as lack of good faith.[10] Hurrying either to secure final discretionary approval, or to make substantial expenditures in reliance on it, may be construed as lack of good faith.

The opinion clarifies several other development rights issues. The court decided that zoning amendments were legislative acts and therefore subject to referendum.[11] In doing so, the court implicitly rejected the view of some courts that subjecting specific property and property owners to zoning amendments by referendum infringes on the due process rights of the affected property owners.[12] The court also determined that a zoning regulation which reduces the value of land is not an unconstitutional taking of property unless it totally prohibits all reasonable use of the land.[13] Under this view, rezoning the Nukolii parcel from resort to agricultural status was not a total prohibition of development, since it allowed an owner an economically viable use of his land.[14] Finally, although the court recognized a theoretical distinction between the "vested rights" and equitable estoppel theories of development rights, its analysis minimized the practical effects of this distinction.[15] The court clearly selected the estoppel theory as its preferred method of analyzing development rights disputes.

The impact of the Nukolii opinion and the precedent it sets for the future can be better appreciated by examining some of the problems of development rights and how those problems have previously been resolved in Hawaii and other jurisdictions. This article will then discuss the case itself and its posture on appeal, examine the opinion and its practical implications, and finally survey some legislative responses to the issue of defining development rights. Hereafter, the Nukolii opinion will also be referred to as the "Nukolii" opinion or case, as the decision is more popularly known.

I. Theories of Development Rights

A development rights rule establishes at what stage of the development process and under what conditions a developer should be allowed to proceed. In formulating such a rule, courts must balance competing public and private in-

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[9] *See infra* notes 149-58 and accompanying text.

[10] *Id.*

[11] *See infra* note 124 and accompanying text.

[12] *Id.*

[13] *See infra* notes 162-66 and accompanying text.

[14] *See infra* notes 164-65 and accompanying text.

[15] *See infra* notes 125-26 and accompanying text.

terests. A developer spends considerable amounts on plans, permits, and site preparation before construction even begins.[16] A rule that grants a development right early in the development process protects these expenditures. Granting a development right, however, exempts a developer from subsequent changes in the land use laws and may inhibit governmental land use planning.[17] A rule that prevents a landowner from acquiring a development right until late in the development process preserves government freedom of action but burdens private development.

In either event, a rule which clearly establishes the conditions under which a development right will be granted benefits both public and private interests. A developer knows when preliminary expenditures are protected; the government can determine when it can enforce changes in land use laws without risking legal action by an aggrieved developer.[18] In determining when to grant a development right courts rely primarily on the doctrines of vested rights and estoppel.

A. *Vested Rights*

The doctrine of vested rights is founded on principles of real property law[19] and the accompanying constitutional considerations governing the regulation and confiscation of private property.[20] Historically and by way of analogy, the

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[16] *See, e.g.*, Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971) (over $38,000 in pre-construction expenditures); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977) (over $67,000 in pre-construction expenditures); *see also infra*, note 40.

[17] C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at 48-49; Cunningham & Kremer, *supra* note 2, at 649-56; *see also* Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977) (monetary awards in zoning disputes inhibit governmental experimentation in land use controls and have a detrimental effect on allocation of community resources).

[18] *See generally* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at ch. 4 (suggesting a need for a more certain development rights rule).

[19] Heeter, *supra* note 2, at 63, 64-65.

[20] U.S. CONST. amend. V: "[N]or shall private property be taken for public use without just compensation." *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (excessive regulation may convert into a taking). In general, governmental regulation of property uses does not violate the fifth amendment unless the regulation deprives the landowner of all reasonable uses of the property and does not bear some rational relationship to the promotion of the public health, safety, morals, and welfare. *See, e.g.*, Fred. F. French Investing Co., Inc. v. City of New York, 39 N.Y.S.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976); Land Development Corp. v. Bloomfield Township, 55 Mich. App. 438, 222 N.W.2d 768 (1974); Watson v. Mayflower Property, Inc., 223 So. 2d 368 (Fla. Dist. Ct. App. 1969); Stachnik v. Village of Norridge, 68 Ill. App. 2d 361, 216 N.E.2d 207 (1966). *See generally* Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970); Note, *Real Property Zoning Ordinances - Validity*, 39 TENN. L. REV. 542 (1972); Note, *Criteria for Determining Constitutionality of Zoning Ordinances in Missouri*, 35 MO. L. REV. 572 (1970).

doctrine of vested rights can be viewed as a variation of the law of nonconforming uses.[21]

The law of nonconforming uses developed in the wake of *Village of Euclid v. Ambler Realty Company*[22] in which the United States Supreme Court upheld the police power of the state to promote the public health, safety, morals and welfare through the implementation of zoning. The decision in *Euclid* paved the way for the proliferation and implementation of local zoning techniques. The attendant problems of enforcing newly enacted zoning regulations on noncomplying, pre-existing structures and property uses soon followed. The law of nonconforming uses developed to deal with those problems.

When immediately abolishing a use or destroying a structure may violate fifth amendment proscriptions against the taking of private property,[23] the law of nonconforming uses allows an existing land use or structure to continue in its established form under certain conditions.[24] A nonconforming use is recognized as a property right which the government cannot abridge arbitrarily simply because the use fails to comply with a newly enacted zoning or building law.[25]

The vested rights doctrine grants an uncompleted development similar protections from subsequent changes in land use laws. The law of nonconforming uses protects an existing use of property; the vested rights doctrine protects a use which has "acquired so many of the characteristics of a property right that

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[21] At least some commentators have preferred to describe a vested development right as a variant of a nonconforming use. *See, e.g.*, 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW ch. 111 (1975); 6 P. ROHAN, *supra* note 2, at § 41.02[3] (1984). *See also* Cable & Hauck, *The Property Owner's Shield - Nonconforming Uses and Vested Rights*, 10 WILLAMETTE L.J. 404 (1974); Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966). Other commentators view vested rights as interest arising out of a validly issued building permit. *E.g.*, 4 A. & D. RATHKOPF, *supra* note 2, § 50.03.

[22] 272 U.S. 365 (1926).

[23] With regard to an existing use of property, the application of a new zoning regulation may also be construed as an ex post facto law, forbidden by the United States Constitution, article I, section 10, clause 1. *See generally* Cunningham & Kremer, *supra* note 2, at 660-63; Anderson, *The Nonconforming Use - A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214 (1959).

[24] For a nonconforming use to be protected, it may not be altered, expanded or abandoned. *See generally* 4 A. & D. RATHKOPF, *supra* note 2, at ch. 51; 6 P. ROHAN, *supra* note 2, ch. 41. Prevailing policy, however, seeks to discourage or eliminate the nonconforming uses. This is most commonly done through the technique of amortization which sets an expiration date for the termination of the use. *See generally* Fell, *Amortization of Nonconforming Uses*, 24 MD. L. REV. 323 (1964); Comment, *Elimination of Nonconforming Uses: Alternatives and Adjuncts to Amortization*, 14 U.C.L.A. L. REV. 354 (1966); Note, *Zoning - Termination of Pre-existing Nonconforming Uses*, 32 ARK. L. REV. 797 (1979).

[25] *See, e.g.*, Sanderson v. De Kalb County Zoning Bd. of Appeals, 24 Ill. App. 3d 107, 320 N.E.2d 54 (1974); Board of County Comm'rs of County of Sarpy v. Petsch, 172 Neb. 263, 109 N.W.2d 388 (1961); Village of Skokie v. Almendinger, 5 Ill. App. 2d 522, 126 N.E.2d 421 (1955); Brown v. Gerhardt, 5 Ill. 2d 106, 125 N.E.2d 53 (1955).

it should receive protection *as if* it were an *existing* use of property."[26] Thus a vested development right entitles a property owner to proceed and enjoy a nonconforming use prospectively.

B. *Estoppel*

In deciding whether to grant a development right, courts also use the doctrine of equitable or "zoning" estoppel. Under this doctrine, a court may allow a developer to complete a proposed development, not because of a constitutionally protected property right in the development, but because of good faith reliance on unfair or misleading actions by the government. Estoppel has three basic elements: (1) a showing of good faith; (2) reliance by the property owner on some act or omission of the government; and (3) a substantial change in position as a result of such reliance.[27] Estoppel is an exception to the government's power to enact and enforce new zoning laws. The doctrine precludes a government from applying a new law to a landowner who would be unjustly injured because of reliance on prior representations of the government. Instead, it permits the property owner to proceed with development according to the terms of those prior representations.[28]

Estoppel and vested rights are theoretically distinct. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights focuses on whether a landowner has acquired a real property right which cannot be taken away by subsequent government regulation.[29] This theoretical distinction seems to have little practical effect. Some courts base the vested rights doctrine on estoppel principles.[30] Sometimes a court will use the terms "vested rights" and "equitable estoppel" interchangeably.[31] Many

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[26] Cunningham & Kremer, *supra* note 2, at 671.

[27] Heeter, *supra* note 2, at 66; Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572 (Fla. Dist. Ct. App. 1975).

[28] Hawaii courts rely on the estoppel doctrine in development rights decisions. Cases challenging a municipality in land zoning situations include Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Life of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979); Life of the Land, Inc. v. City Council, 61 Hawaii 390, 606 P.2d 866 (1980). For cases involving a state agency in general, see Yamada v. Natural Disaster Claims Comm'n, 54 Hawaii 621, 513 P.2d 1001 (1973); State v. Zimring, 58 Hawaii 106, 566 P.2d 725 (1977).

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

[30] *E.g.*, Avco Community Developers 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) (vested rights theory is predicated upon estoppel of the governing body); Aries Development Corp. v. California Coastal Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315, 325 (1975) (acquisition of a vested right is grounded on principles of estoppel).

[31] *See, e.g.*, Pioneer Trust & Savings Bank v. County of Cook, 7 Ill. 2d 510, 17 Ill. Dec. 831,

times, either doctrine may be applicable, since the two doctrines overlap in many respects.[32] Both look to the conduct of the government in giving assurances that the official position may be relied upon.[33] The developer's conduct is scrutinized for good faith attempts to comply with all the legal requirements known to him.[34] Either theory permits the developer to proceed as originally anticipated in spite of a change in applicable law.[35] Given these similarities, and in view of the confusion over the rationales underlying vested rights and zoning estoppel, too much emphasis on the theoretical distinctions between them seems misplaced. Moreover, although courts recognize the theoretical distinctions between vested rights and estoppel, they seem unwilling to allow the outcome of a case to be dictated merely by the doctrine under which a developer chooses to bring a claim.[36] More important is the way in which a court implements either doctrine to determine at what stage in the development process a developer acquires an irrevocable right to proceed. Possible choices range from the initial planning to the construction phases of a development. Given this wide range of choices, it is not surprising that each jurisdiction has its own, unique development rights rule.

Of these numerous rules, this article briefly examines those of California, Florida and Illinois. The Hawaii Supreme Court has relied on decisions from all three jurisdictions in formulating its own development rights rule. Moreover, the three rules illustrate the different stages of the development process at which a developer's right to proceed has been held to exist and indicate the reasons for selecting a particular stage. At one end of the spectrum, California has a rigid

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377 N.E.2d 21 (1978). In that case, the bank had received rezoning for the construction of a nursing home and had executed a restrictive covenant to limit the use of the property for nursing and convalescent homes. Some years later, the bank obtained a building permit for the construction of a new type of retirement facility. Prior to developing the full-fledged facility, the bank reapplied for a permanent building permit and zoning certificate which the county denied. Because of the preliminary building permit and an understanding imparted to the bank by the county that a retirement facility was desirable, the bank not only acquired a vested right as a result of the preliminary building permit, but was able to estop the county from repudiating its prior encouraging statements.

[32] C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at 9, 12-13; Cunningham & Kremer, *supra* note 2, at 626-28; Heeter, *supra* note 2, at 64-66.

[33] C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at 12-13; Heeter, *supra* note 2, at 66.

[34] C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at 12-13; Heeter, *supra* note 2, at 66.

[35] C. SIEMON, W. LARSEN & D. PORTER, *supra* note 2, at 6-10; Heeter, *supra* note 2, at 64-66.

[36] *See, e.g.*, Allen v. City and County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977). There the court noted that equitable estoppel permitted a developer only a right to proceed. Although damages for an aborted project might theoretically have been available under the legal theory of vested rights, the court refused to permit damages for reasons of public policy. *See also* Heeter, *supra* note 2, at 65 ("[C]ourts seem to reach the same results when applying these defenses to identical factual situations.").

vested rights rule that is generally unfavorable to the developer. Florida has a more flexible rule based on estoppel. Illinois has adopted a rule somewhere between the two, which is based on both vested rights and estoppel.

II. Development Rights in Other Jurisdictions

A. *California*

The California vested rights rule can be characterized as a "building permit only rule."[37] For a developer to acquire a vested right, there must be: (1) the issuance of a final, valid building permit or equivalent thereof; (2) good faith reliance by the developer on the permit; and (3) the commencement of substantial construction according to the terms of the permit.[38] Once these requirements are met, the permit holder acquires the right to complete a development according to the terms of the permit. The building permit is chosen as the dispositive element of the rule, because it represents an advanced stage in development when substantial compliance with all zoning and building regulations has been achieved and confirmed.[39] Without a building permit, good faith efforts and expenses incurred in reliance on preliminary work permits do not entitle the developer to the immunity offered by the vested rights doctrine,[40] nor to the issuance of the requisite building permit.[41] A document other than a building permit may be sufficient under the rule, however, if it fulfills the same

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[37] California generally follows a vested rights doctrine that has estoppel as one of its major theoretical bases. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); Pettit v. Fresno, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973), *appeal dismissed*, 419 U.S. 810 (1974); Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977). *See generally* Cunningham & Kremer, *supra* note 2, at 648-60.

[38] Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 389 (1976), *cert. denied*, 429 U.S. 1083 (1977).

[39] *Id.* at 793, 553 P.2d at 551-52, 132 Cal. Rptr. at 391.

[40] *See, e.g.*, Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *appeal dismissed*, 431 U.S. 951 (1977) (over $27 million spent in preliminary development preparations without acquiring a vested right); Avco Community Developers 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) (over $2 million in pre-construction expenditures; over $740,000 in liabilities spent prior to obtaining building permit of no avail in vesting a development right); Aries Development Corp. v. California Coastal Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975) (over $353,000 spent in pre-construction preparation; entered into construction loans of over $1 million); Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 15 Cal. 3d 577, 542 P.2d 645, 125 Cal. Rptr. 485 (1975) (over $11 million spent in pre-permit preparations).

[41] Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d at 793-95, 553 P.2d at 551-53, 132 Cal. Rptr. at 391-92 (1976), *cert. denied*, 429 U.S. 1083 (1977).

function and purpose as a building permit.[42] Even after a valid permit is issued, a developer must have commenced actual and substantial construction for revocation of the building permit to constitute a deprivation of property.[43]

The California vested rights rule presents difficulties because a developer's rights depend on the procurement of a valid building permit issued in its final, irrevocable form. A developer must comply with the land use regulations in effect at the time the building permit is issued, not those in effect at the beginning of the permit process.[44] Until issuance of the permit, the development remains subject to any changes in the law enacted in the interim — changes which may require a complete modification or diminution of the original development plan. This position favors governmental land use policies as they arise under new legislation and places planning considerations ahead of private development interests.[45] The rule provides certainty to a developer who has a valid, final permit and who has completed substantial construction. Unfortunately, certainty occurs relatively late in the development process. No ambiguity exists, however, about the status of a developer who has not yet acquired the requisite permit, nor about the extent to which a new land use regulation can be imposed upon an ongoing project not yet in the construction stage.

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[42] *Id.* at 793-94, 553 P.2d at 551, 132 Cal. Rptr. at 391. Such a document has yet to be identified.

[43] *See, e.g.*, San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973).

[44] Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 795, 553 P.2d 546, 553, 132 Cal. Rptr. 386, 392 (1976), *cert. denied*, 429 U.S. 1083 (1977); Russian Hill Improvement Ass'n v. Bd. of Permit Appeals, 66 Cal. 2d 34, 423 P.2d 824, 828, 56 Cal. Rptr. 672, 676 (1967).

[45] Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 797-98, 553 P.2d 546, 554, 132 Cal. Rptr. 386, 394 (1976), *cert. denied*, 429 U.S. 1083 (1977). For a general discussion of the rationales behind California's vested rights position, see Hagman, *The Vesting Issue: The Rights of Fetal Development Vis A Vis the Abortions of Public Whimsy*, 7 ENVIRONMENTAL LAW 519 (1977). The same policy favoring governmental/community interests over individual development concerns also appears in discussions on the operation of the estoppel theory in California. *E.g.*, Chaplis v. County of Monterey, 97 Cal. App. 3d 249, 158 Cal. Rptr. 395 (1979); Pettit v. Fresno, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973), *appeal dismissed*, 419 U.S. 810 (1974). *But cf.* criticism of vested rights rule by California appellate court in Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977):

> In the evolutionary dynamics of California environmental law, the plasticity of equitable estoppel has been replaced by the rigidity of the vested rights rule. Doctrinal evolution has come full circle - from the formal, unmoral rigidities of medieval common law to the individualized humanity of equity and back again to the fixed demands of the vested rights rule.

Id. at 985, 137 Cal. Rptr. at 712.

B. *Florida*

The rule of equitable estoppel in Florida requires proof of three elements before an estoppel can be raised against the government. A landowner must have (1) substantially changed position by incurring extensive obligations or expenses (2) as a result of good faith reliance (3) on an act or omission of the government.[46] This rule is based on judicial policy which posits: "A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds. . . ."[47]

In Florida, representations on which a developer may rely include the issuance of a building permit,[48] a grant of rezoning,[49] a positive response to a landowner's inquiry,[50] or the issuance of a preliminary work permit.[51] This presents a clear contrast to the California rule that the issuance of a building permit is the *only* governmental act on which a party can rely.[52]

The Florida rule permits a court sitting in equity to engage in a balancing of variables and equities that would support arguments on behalf of both the governmental entity and the private developer. This flexible approach has a distinct disadvantage. The stage of development at which a property owner acquires an equitable right to proceed with his project becomes indefinite and unpredictable. As a result, judicial intervention will often be required to ascertain a developer's rights.

C. *Illinois*

Illinois employs both the vested rights and equitable estoppel doctrines when resolving disputes over development rights. The Illinois development rights rule is less stringent than that of California but more demanding than that of Florida.

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[46] City of Coral Gables v. Puiggros, 418 So. 2d 367 (Fla. Dist. Ct. App. 1982); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572 (Fla. Dist. Ct. App. 1975).

[47] *Town of Largo*, 309 So. 2d at 573.

[48] Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963); Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950).

[49] *Town of Largo*, 309 So. 2d 571.

[50] Project Home, Inc. v. Town of Astatula, 373 So. 2d 710 (Fla. Dist. Ct. App. 1979).

[51] *Id.*

[52] Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 793, 553 P.2d 546, 551, 132 Cal. Rptr. 386, 391 (1976), *cert. denied*, 429 U.S. 1083 (1977) ("By zoning the property or issuing approvals for work preliminary to construction, the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property. . . .").

The Illinois equitable estoppel rule requires proof of the same basic elements as the Florida rule: good faith reliance on a governmental act or omission which leads to a change in position.[53] The Illinois rule, however, imposes greater restrictions on the types of official action on which a developer may rely. Illinois requires that the governmental action relied on be official and in accordance with statutorily prescribed procedures.[54] Generally, a government cannot be estopped from enforcing a new zoning law because of mistaken or unauthorized actions by a municipal official.[55] Nevertheless, if the official actions induced a landowner to act, and if without relief the landowner will suffer substantial loss, the courts may permit estoppel.[56] Thus, this estoppel rule prevents enforcement of both newly enacted laws and existing laws that have been overlooked or misapplied to a project.

The elements of the Illinois version of the vested rights rule are (1) good faith reliance by a landowner (2) on the probability that a building permit will be issued, and (3) a substantial change in position as a result of such reliance.[57] The probability that a building permit will be issued is inferrable from proof of compliance with all applicable ordinances in effect at the time of the building permit application and from the receipt of assurances from governmental officials that a building permit will be forthcoming.[58] A city may lawfully withhold approval of a permit application, however, if amendments to the zoning

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[53] City of Peru v. Querciagrossa, 73 Ill. App. 3d 1040, 392 N.E.2d 778, 30 Ill. Dec. 123 (1979); People *ex rel.* American Nat'l Bank & Trust Co. of Chicago v. Smith, 110 Ill. App. 2d 354, 249 N.E.2d 232 (1969).

[54] *E.g.*, Scanlon v. Faitz, 75 Ill. 2d 472, 27 Ill. Dec. 507, 389 N.E.2d 571 (1979) (approval of construction permit should have been passed by formal ordinance after compliance with statutory notice provisions, not by mere resolution); People *ex rel.* Beverly Bank v. Hill, 75 Ill. App. 2d 69, 221 N.E.2d 40 (1966) (estoppel upheld although rezoning never rendered into formal ordinance).

[55] Diakonian Society v. City of Chicago, 63 Ill. App. 3d 823, 20 Ill. Dec. 634, 380 N.E.2d 843 (1978); O'Laughlin v. City of Chicago, 65 Ill. 2d 183, 2 Ill. Dec. 305, 357 N.E.2d 472 (1976); Ganley v. City of Chicago, 18 Ill. App. 3d 248, 309 N.E.2d 653 (1974); Kirk v. Village of Hillcrest, 15 Ill. App. 3d 415, 304 N.E.2d 452 (1973).

[56] *E.g.*, Emerald Home Builders, Inc. v. Kolton, 11 Ill. App. 3d 888, 298 N.E.2d 275 (1973) (city estopped from revoking building permit in spite of one of its arguments that the permit had been issued erroneously due to a miscalculation in lot size necessary for zoning reclassification); Cities Service Oil Co. v. City of Des Plaines, 21 Ill. 2d 157, 171 N.E.2d 605 (1961) (city failed to ascertain whether setback requirement for storage of flammable materials had been met).

[57] *See, e.g.*, Kramer v. City of Chicago, 58 Ill. App. 3d 592, 16 Ill. Dec. 157, 374 N.E.2d 932 (1978); Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968); Hoerdt v. City of Evanston, 99 Ill. App. 2d 307, 241 N.E.2d 685, *cert. denied*, 395 U.S. 944 (1969); Deer Park Civic Ass'n v. City of Chicago, 347 Ill. App. 346, 106 N.E.2d 823 (1952).

[58] Cos Corporation v. City of Evanston, 27 Ill. 2d 570, 190 N.E.2d 364 (1963).

have already commenced and are merely awaiting final legislative approval.[59]

The Illinois development rights rule lies between California's strict building permit rule and Florida's more flexible rule of estoppel. Illinois courts require less than the actual issuance of a building permit, yet place more limits on the types of official assurances on which developers may rely.

In the Nukolii decision, the Hawaii Supreme Court appeared to adopt a similar position by explicitly selecting what it perceived as a development rights rule midway between two possible extremes.[60] Prior to the Nukolii decision, the court seemed to broaden the range of official actions on which a developer could rely. The Nukolii decision seems to reverse this trend by permitting a developer to rely only on "final" discretionary approval of a project by officials.

III. DEVELOPMENT RIGHTS IN HAWAII

In Hawaii, the development rights issue is dealt with in the framework of equitable (or zoning) estoppel. In 1971, the Hawaii Supreme Court adopted this approach to development rights in the case of *Denning v. County of Maui*.[61]

The *Denning* case involved a condominium project on the island of Maui. Denning sought to construct a six-story structure and received many of the agency approvals needed to proceed to the building permit stage of development.[62] Before Denning received a building permit, however, the county amended the general plan and corresponding zoning regulations. The amendments limited the permissible height of buildings in the district, including

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[59] Chicago Title and Trust Co. v. Village of Palatine, 22 Ill. App. 2d 264, 160 N.E.2d 697 (1959); *see also* American Nat'l Bank & Trust Co. of Chicago v. City of Chicago, 19 Ill. App. 3d 30, 311 N.E.2d 325 (1974); People *ex rel.* Gustafson v. Calumet City, 101 Ill. App. 2d 8, 241 N.E.2d 512 (1968). A city, however, cannot withhold a permit approval in an effort to obstruct the proposed development by delaying processing of a permit until a prohibitory zoning amendment has been effected. Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968).

[60] 65 Hawaii 318, 328 n.8, 653 P.2d 766, 774 n.8. The court suggested two extremes: (1) making a valid building permit a threshold requirement for granting a right to proceed; and (2) granting a right to proceed at the time of a developer's permit application.

[61] 52 Hawaii 653, 485 P.2d 1048 (1971).

[62] Denning originally sought construction of a twelve-story building as then permitted under the county's land use laws. Subsequently, however, a new county general plan was proposed which reclassified Denning's land as "Resort Commercial," a classification for which no implementing zoning regulations had yet been prepared. Pending completion of zoning regulations for the proposed classification, the county enacted Interim Ordinance No. 621 which reduced the permissible height of buildings in Denning's project to six stories. Denning adjusted his plans accordingly. The County General Plan was adopted in August 1969. In October of that year, the county planning director informed Denning that his development plans conformed with the interim ordinance and other zoning. *Id.* at 654-57, 485 P.2d at 1049-50.

Denning's building, to two stories.[63] The county refused to issue a building permit for the six-story structure and Denning sought a writ of mandamus to obtain the permit.

The supreme court remanded the case to the trial court[64] and announced the applicable rule of law:

> [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 [the county] 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 rezoning ordinance].[65]

Denning's right to rely had to be based on more than a good faith expectation that a building permit would be issued because the project complied with existing zoning. The rule required evidence of affirmative assurances from the county that the permit would be issued.

In formulating this rule, the court cited the Illinois case of *Cos Corporation v. City of Evanston*[66] and the Florida case of *Bregar v. Britton*.[67] Although both cases invoked a theory labeled as estoppel, the cases took slightly different perspectives in their analyses. The Illinois case upheld the developer's right to rely because the project complied so completely with existing zoning that the issuance of a building permit was a reasonable expectation and good probability.[68]

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[63] After receiving confirmation in October 1969 that his development complied with all then-existing zoning regulations, Denning was required to further reduce the height of his buildings to two stories. Ordinance No. 641, which implemented the specific zoning regulations for "Resort Commercial," became operative in December 1969 and the planning director interpreted Ordinance No. 641 as subsequently invalidating Denning's project. *Id.* at 656-57, 485 P.2d at 1050.

[64] Part of the appeal involved a procedural dispute concerning which body should determine the need for Denning's project to conform to Ordinance No. 641. The Board of Adjustment and Appeals which heard Denning's appeal from the decision of the planning director was not the proper body because it was obliged to apply the laws in effect at the time of the hearing. The circuit court was the only body, therefore, which could determine Denning's rights under the former law and whether the new ordinance superseded such rights. *Id.* at 657-59, 485 P.2d at 1051.

[65] *Id.* at 658-59, 485 P.2d at 1051.

[66] 27 Ill. App. 2d 570, 190 N.E.2d 364 (1963).

[67] 75 So. 2d 753 (Fla. 1954).

[68] In *Cos Corporation*, the city of Evanston was estopped from withholding issuance of a building permit even though Cos Corporation's development did not comply with a recently enacted zoning ordinance which increased the number of parking spaces to be provided in the plans. The Supreme Court of Illinois found that the corporation had substantially changed its position by expending substantial sums of money for architectural, legal and organizational fees in anticipation of receiving a building permit. Because of the corporation's actual compliance with ordinances effective at the time of the permit application coupled with confirmation of compliance

The Florida case concerned a government retreating from its initial approval of a project after the developer had been induced to rely on that approval to his detriment.[69] The Illinois case emphasized the good faith expectation of the developer while the Florida case emphasized the need for good faith conduct by the government. The *Denning* opinion adopted elements of both by requiring evidence that some overt act of the county induced the developer to become confident his project would be approved.

The development rights issue next came before the court six years later, in 1977, with the case of *Allen v. City & County of Honolulu*.[70] In the *Allen* case, however, instead of seeking the right to proceed with construction of his condominium as originally planned, a developer sued for damages resulting from the termination of the project due to a restrictive zoning amendment.[71] Allen based his claim on both the estoppel and the vested rights theories of development rights. The supreme court reversed the judgment of the lower court which had granted Allen money damages.

The supreme court first dismissed Allen's claim of estoppel on the ground that, because Allen sought damages in law, the equitable theory of estoppel provided an inappropriate framework for analysis. Citing back to its position in *Denning*, the court clarified the estoppel rule by limiting its application to ac-

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from city officials, the probability that a building permit would be issued was very high. The purpose of a "probability of a building permit" rule was to prevent city officials from postponing approval of a permit while a zoning amendment that would adversely affect an applicant was pending. 190 N.E.2d at 368. *See also* Court House Plaza Co. v. City of Palo Alto, 117 Cal. App. 3d 871, 173 Cal. Rptr. 161 (1981); California Central Coast Comm'n v. McKeon Construction Co., 38 Cal. App. 3d 154, 112 Cal Rptr. 903 (1974); Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968).

[69] In *Bregar v. Britton*, the builder of a proposed drive-in theater relied upon a resolution passed at a public hearing by the board of city commissioners approving his plans for development. In reliance on the resolution, Britton entered into obligations for the construction of facilities and the purchase of sound equipment. Upon receiving adverse feedback from persons opposed to the development, the city commissioners rescinded their resolution. The Florida Supreme Court held that the rescission violated principles of equitable estoppel since governmental action had caused the petitioner to change his position to his detriment on the city's resolution.

[70] 58 Hawaii 432, 571 P.2d 328 (1977).

[71] In *Allen*, the developer purchased oceanfront property for the construction of an eleven-story condominium and submitted an application for a building permit. A group of neighborhood residents opposed to high-rise developments in the area submitted a bill to the city council proposing the downzoning of the area to exclude high-rise buildings. During the following two months, the developer's application went through various agencies for review, receiving preliminary approval therefrom. Before the building department could act decisively on the permit application, a zoning amendment took effect which limited the permissible height of buildings to four stories. Allen then withdrew his application for a permit and sued the city on both theories of equitable estoppel and vested rights in an attempt to recover $77,000 in development expenses lost as a result of the restrictive zoning amendment. The circuit court awarded Allen money damages but was reversed on appeal. *Id.* at 433-35, 571 P.2d at 328-29.

tions in which the remedy sought was the right to proceed with construction.[72] Although neither Allen nor the court expressly labeled it as such, Allen's claim for money damages under the vested rights theory was a claim for "inverse condemnation."[73] As a matter of public policy, the court refused to entertain actions for damages in zoning disputes.[74] Instead, it ruled that when the city was estopped from enforcing zoning changes against a developer, it could either condemn the property or allow the project to be completed. The choice, however, should be left solely to the city's discretion.[75] The court reaffirmed the

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[72] "*Denning, supra*, does not deal at all with the issue of payment of damages by the government for the development costs of petitioners, but speaks only in terms of the right to proceed with construction." *Id.* at 437, 571 P.2d at 330.

A question remains whether Allen would have prevailed had he not withdrawn his application for a building permit and proceeded solely under a theory of estoppel for the right to proceed. Since the permit had already passed through several agency channels, he could have argued that he had a right to rely on such actions. The city could have countered with the argument that Allen failed to fulfill the element of good faith reliance since he knew of the pending zoning amendment and had even testified against its enactment at a public hearing. *Id.* at 436, 571 P.2d at 329.

[73] "Inverse condemnation" refers to legal actions where private owners injured by an act of government take the initiative and sue for just compensation. *See generally* Cunningham, *Inverse Condemnation As A Remedy for "Regulatory Takings"*, 8 HASTINGS CONST. L.Q. 517 (1981); Comment, *Inverse Condemnation: Its Availability In Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); Note, *Takings Law - Is Inverse Condemnation An Appropriate Remedy For Due Process Violations?*, 57 WASH. L. REV. 551 (1982).

[74] In our opinion, to permit damages for development costs is not only unprecedented but would 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.

58 Hawaii at 438, 571 P.2d at 331. This issue arose recently in Agins v. City of Tiburon, 447 U.S. 255 (1980). In *Agins* the United States Supreme Court upheld a California court's denial of a landowner's claim of inverse condemnation resulting from a downzoning of his land. The Court, however, specifically declined to consider whether a state court could deny damages to a landowner whose property had been taken without just compensation. 447 U.S. at 263.

[75] The court in *Allen* further commented:

Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its power 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.

58 Hawaii at 439, 571 P.2d at 331. Within the text of its opinion, the court made mention of two other cases not appealed, Guerin v. Yuasa (Civil No. 39390) and Hale Kona Kai Development Corp. v. Yuasa (Civil No. 39391). *Id.* at 437, 571 P.2d at 330-31. These two cases involved the same zoning amendment to which Allen objected and were consolidated at trial below and made part of the record of Allen's appeal. Of the three separate plaintiffs, only Allen failed to obtain an award of damages.

estoppel rule established in *Denning* and refused to recognize the vested rights theory as a basis for a compensatory damages claim against the county.

The third and fourth Hawaii Supreme Court decisions on development rights involved a fact situation which appeared before the court on two separate occasions. Both decisions are captioned *Life of the Land, Inc. v. City Council.* The first opinion dealt with Life of the Land's motion for an injunction to halt construction of a high-rise condominium building pending an appeal on the question of whether construction violated applicable zoning ordinances. This interlocutory opinion will be referred to as *Life of the Land I.*[76] The second opinion involved an appeal of summary judgment entered below against Life of the Land in favor of the city council and the developers. This second opinion will be referred to as *Life of the Land II.*[77]

In both cases, Life of the Land challenged the construction of a 350-foot high luxury condominium building, the Admiral Thomas,[78] in a district slated to be rezoned as a Historical, Cultural and Scenic District (HCSD).[79] The proposed

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In the two *Yuasa* cases, the plaintiff-developers received valid building permits and commenced actual construction by the time the new zoning amendment went into effect. The city revoked the developers' permits, thus precluding them from completing construction. The city entered into stipulated judgment with the developers which compensated them for lost development expenses. Neither the city nor the developers appealed the judgments. This indicated that the parties were satisfied with the awards. Evidently the city must have believed that the rights of Guerin and Hale Kona Kai Development Corporation had "vested" in the constitutional sense and were entitled to compensation. The standard of vested rights employed by the city appears akin to the rule used in California which requires the issuance of a final, valid building permit plus the commencement of substantial construction. *See supra* notes 37-45 and accompanying text.

[76] 60 Hawaii 446, 592 P.2d 26 (1979).

[77] 61 Hawaii 390, 606 P.2d 866 (1980).

[78] Life of the Land, Inc. is a non-profit environmental organization. It opposed the Admiral Thomas project in order to preserve the historical, cultural, and scenic qualities of the Thomas Square Park and Academy of Arts vicinity by enforcing compliance with the terms of the Historical, Cultural and Scenic District Ordinance, No. 78-18. *See infra* note 79.

[79] Historical, Cultural and Scenic (HCSD) Districts are authorized under Article 12 of the Comprehensive Zoning Code of Honolulu. HONOLULU, HAWAII, REV. ORDINANCES, ch. 21 (1978). "The purpose of this article is to provide the vehicle by which certain areas, structures and objects within the City that have historic, cultural or scenic significance may be preserved and protected." Creation of an HCSD allows the formulation of zoning regulations tailor-made to suit the particular needs of the district.

Additionally, the proposed development site was subject to the Kakaako Ordinance, Ordinance No. 4551, which targeted the Kakaako area as the subject of special land use policies and treatment. The Kakaako Ordinance entailed amendments to the county general plan and an overhaul of zoning regulations for the area. The proposed HCSD would have centered around the Thomas Square Park and the Academy of Arts. The condominium project was located across the street from both. The proposed condominium was named "The Admiral Thomas" because of its proximity to the park. 60 Hawaii at 447-49, 592 P.2d at 27-28.

zoning amendments to implement this new designation would have prohibited construction of the condominium.[80] The city placed the area covered by this new ordinance under a building permit moratorium pending completion of the rezoning bill.[81] The developers applied for and obtained an exemption from the moratorium from the city council.[82] After satisfying certain conditions and obtaining clearance from the city council, the developers applied for and received a building permit.[83] By this time, however, the Thomas Square Historical, Cul-

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[80] 60 Hawaii at 456, 592 P.2d at 32.

[81] Pending completion of specific zoning regulations for the Kakaako area, the Kakaako Ordinance imposed a moratorium on the acceptance of building permit applications for certain use districts, such as the apartment district in which the Admiral Thomas site lay. However, the ordinance also contained a provision that exemptions from the moratorium could be granted by the city council by variance.

The Kakaako Ordinance did not alter existing zoning regulations governing the areas included within the Kakaako area. The site in question was zoned A-4 which permitted multi-family dwellings. The Admiral Thomas project as proposed, was permissible under that zoning classification; its only obstruction was the inability to apply for a building permit. 60 Hawaii at 448, 592 P.2d at 28.

[82] The developers applied for a variance exempting the project from the building permit moratorium in July 1977. 60 Hawaii at 448, 592 P.2d at 2. In September 1977, the council approved the variance application, attaching three conditions, two of which were precedent to the issuance of a final building permit. The conditions were (1) modification of the exterior finish of the building, (2) approval of all exterior finishes and landscaping plans by the director of land utilization, and (3) completion of all landscaping prior to the issuance of a certificate of occupancy. *Id.* at 454, 592 P.2d at 31.

The council action aroused opposition to the development which was seen as a threat to the effectiveness of the proposed HCSD Ordinance. In response to this adverse reaction, the developers offered to modify the building by reducing its height from the maximum 350 feet to 299 feet, increasing building setback from the Academy, and decreasing the bulk of the building by reducing the number of apartment units. In November 1977, the council passed a resolution accepting the modified structure. *Id.* at 454-55, 592 P.2d at 31.

In January 1978, the developers proceeded to submit an application for a building permit for the project. The building department then forwarded the application to the Department of Land Utilization which continued to monitor the developer's construction plans for conformance with conditions imposed by the city council. *Id.* at 449, 592 P.2d at 28.

[83] *Id.* at 448-49, 592 P.2d at 28. In addition to accepting the developers' plans for a modified structure, the council passed Resolution No. 512 on that same day. That resolution set forth four development alternatives conceived by the council, itself, for the developers to explore. 60 Hawaii at 455 n.4, 592 P.2d at 31 n.4. In the resolution, the council "reserved jurisdiction over the Admiral Thomas project." *Id.* at 457, 592 P.2d at 32.

In *Life of the Land II*, the court construed the council's reservation of jurisdiction as the retention of a power to modify its variance approval in the event that the developers decided to pursue any of the options suggested in Resolution No. 512. The reservation, however, was not intended to impose further conditions or restraints on the effectiveness of the variance approval. Once the developers' submitted their application for a building permit, the council's jurisdiction over the four options lapsed because no further amendment to the variance would be needed since the developers determined that none of the options were feasible. 61 Hawaii at 444-45, 606 P.2d at

tural and Scenic District Ordinance (hereinafter HCSD Ordinance) had been enacted.[84] The plaintiff-appellant, Life of the Land, Inc. sued to have the Admiral Thomas project conform to the new building restrictions imposed by the HCSD Ordinance.[85] Both the developers and the city council opposed the move to obstruct the project.

Pending its appeal of the merits of the case, Life of the Land moved for a temporary injunction to halt all construction.[86] The court denied the motion for an injunction because Life of the Land was unable to show that it would likely prevail in an appeal on the merits under the rule of equitable estoppel.[87] Relying on the rule established in *Denning*, the court determined that the city council would in all likelihood be estopped from denying the validity of the Admiral Thomas project. The developers not only received council assurances that a building permit would be issued upon satisfaction of certain conditions but also expended over $350,000 in reliance on these assurances.[88]

Two justices filed dissents to the majority opinion. Justice Kidwell argued that the developers would not prevail under the *Denning* rule of estoppel.[89] Justice Ogata expressed concern about the risk the developers were taking by proceeding with construction and the possibility that the structure would have to be abated if it was later deemed illegal.[90]

The majority opinion in *Life of the Land I* indicated that principles of equita-

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[84] Ordinance No. 78-18 creating the Thomas Square Historical, Cultural and Scenic District was passed on February 22, 1978. 60 Hawaii at 449, 592 P.2d at 28.

[85] *Id.*

[86] 60 Hawaii at 447, 592 P.2d at 27.

[87] *Id.* at 451, 592 P.2d at 29. The standard for qualifying for an injunction is to show a substantial likelihood that the petitioner will prevail on the merits of the case plus a threat of irreparable injury if the injunction is not granted. *Id.* at 447, 592 P.2d at 27.

[88] *Id.* at 450-51, 592 P.2d at 29.

[89] Justice Kidwell maintained that under the *Denning* rule of estoppel, the city council approvals of September and November 1977 were not the kind of assurances on which the developers had a right to rely:

> 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 . . . . When the Council enacted the HCS Ordinance on February 25, 1978, it changed the rules laid down on November 10, 1977. . . . [T]he Council withdrew the benefits of the [Interim Development Control] Ordinance and left the Developers with only such rights as they possessed by way of equitable estoppel.

60 Hawaii at 464-65, 592 P.2d at 37. The Interim Development Control Ordinance referred to was the Kakaako Ordinance. Interim development controls freeze all improvements in an area whose zoning classification is scheduled for a change. 61 Hawaii at 418-19, 426-27, 606 P.2d at 884, 889.

[90] 60 Hawaii at 466-67, 592 P.2d at 38.

ble estoppel would control on appeal. In the subsequent appeal[91] on the merits in *Life of the Land II*, however, the court held for the developers and the city council primarily on the grounds of legislative intent rather than estoppel. After analyzing the procedural validity of the council's decision to grant the Admiral Thomas an exemption from the building permit moratorium, the court decided that the council had never intended to apply the terms of the proposed HCSD Ordinance to the project. Although fully aware of the Admiral Thomas development, the council had studied and enacted the HCSD Ordinance without attempting to revoke its prior approval of the project. In short, the new HCSD Ordinance was simply not intended to affect the project.[92] The Admiral Thomas project was fully approved and completely in place by the time the new HCSD Ordinance became effective and could not be impaired by the new legislation.[93]

The court addressed the rule of equitable estoppel in the latter part of the *Life of the Land II* opinion merely as an additional ground for the decision in the case.[94] The court reiterated the elements necessary to support an estoppel: (1) a change in a developer's position evidenced by substantial expenditures (2) made in good faith reliance (3) on official assurances of approval (4) on which the developer had the right to rely.[95] The court found that the assurance on which the developers could rely was not the final, ministerial approval of a building permit application but the earlier discretionary city council approval.[96] The developers' entitlement to a building permit became assured prior to changes in the underlying zoning restrictions when the council's approval of the project ceased to be contingent or conditional.[97] The developers also made sub-

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[91] When the Admiral Thomas controversy returned to the court in 1980, the composition of the court had changed considerably. Justice Kidwell, who had dissented in *Life of the Land I*, had retired and Retired Justice Kobayashi was no longer assigned. Retired Justice Marumoto, who wrote the opinion in *Life of the Land II*, and Judge Chang from the circuit court below, sat in substitution on the high court bench. The decision in *Life of the Land II* was unanimous.

[92] Justice Marumoto relied on transcribed statements of council members in their meetings to substantiate the finding of intent. 61 Hawaii at 447-50, 606 P.2d at 899-900.

[93] The court felt that the variance approval was executed and completed upon the submission of an application for a building permit, which took place on January 24, 1978, and not upon issuance of the permit in October 1978, as Life of the Land contended. Acceptance of the permit application overcame the moratorium. Issuance of the permit was not subject to the terms of the variance but to zoning and building code regulations in effect while the permit was being processed. 61 Hawaii at 444-46, 606 P.2d at 898-99.

[94] *Id.* at 453, 606 P.2d at 902.

[95] *Id.*

[96] 61 Hawaii at 453-54, 606 P.2d at 902-03.

[97] *Id.* The issuance of a permit was assured because:

> [T]he project was in compliance with the existing zoning ordinances, and the function of the Building Department, after the acceptance of the application, was purely ministerial, to process the application for compliance with all applicable statutes, ordinances, rules and

stantial expenditures in reliance on the city council's assurances and conducted themselves in good faith throughout the approval process.[98]

The *Life of the Land* opinions illustrated the application of the estoppel rule within a more complex fact situation than that of *Denning* or *Allen* without materially altering the elements of the rule. Prior to the Nukolii decision, the development of the rule in Hawaii had been gradual and incremental. *Denning* introduced the rule, *Allen* limited its application to equitable remedies, and *Life of the Land II* defined official assurances as discretionary, non-ministerial approval of a project. The legal trend of these decisions, if any, indicated an attempt to refine the rule to give private developers a better understanding of when projects would be protected from subsequent new regulation. The policy trend of these decisions is clearer. *Denning* required that a developer have more than a mere good faith expectation that a building permit would be issued; *Allen* emphasized the necessity and importance of governmental freedom of action. *The Life of the Land* opinions, on the other hand, treated the developer more favorably, apparently because the council's direct participation in the permit approval process protected the public interest.

The Nukolii opinion represents a progression of prior case law by further qualifying and restricting the application of the elements of the rule and by further postponing the point in time at which a development becomes immune from subsequent legislation. The court's insistence that the estoppel rule be applied to evaluate the Nukolii controversy came as a surprise. Specific protection of "vested rights" in the referendum provision of the county charter suggested that a new and separate rule, distinct from the existing rule of estoppel, would evolve from the controversy.

IV. BACKGROUND TO THE NUKOLII OPINION

The controversy in *County of Kauai* revolved around the construction of a beachfront resort at Hanamaulu Bay, also known as Nukolii, on the Island of Kauai. The project was sponsored by the Pacific Standard Life Insurance Company and Graham Beach Partners. The Committee to Save Nukolii, an unincorporated association, led the movement to halt the development. The County of Kauai was a party to all proceedings and instigated the legal action that led

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regulations, and the conditions attached to the approvals, and to issue the requested building permit after such processing.

Id.

[98] The good faith conduct of the developers was manifested by their offer to modify the building in response to initial adverse public reaction to the September 1977 variance approval and by the council's opinion that the developers were acting appropriately. 61 Hawaii at 456-57, 461-63, 606 P.2d at 904, 907.

to the appeal.[99]

A. Facts of the Case

In 1974, the developers purchased over sixty acres of unimproved land at Nukolii as the site for three 500-room hotels.[100] At the time of the purchase, the land was classified for agricultural and open space uses under the state land use law.[101] The state changed this classification to urban in 1976.[102] Amendments were made to the Kauai County General Plan, in November 1977, to designate the parcel as "resort."[103] In February 1979, the county council approved a zoning amendment allowing the construction of a single 350-room hotel and 150 condominium units on twenty-five out of the sixty acres of land.[104] Soon after the zoning amendment ordinance was enacted, the Committee to Save Nukolii was organized and began a drive for a referendum to repeal the offending ordinance by gathering signatures on a petition in support of a referendum.[105] In the meantime, the developers proceeded to apply for a Special Management Area (SMA) use permit.[106] On January 30, 1980, the county clerk certified that the Committee's petition bore enough signatures to hold a referendum.[107] Upon presentation of the petition, the county council reconsidered and affirmed its decision to allow the resort development to take place at Nukolii.[108] No special election on the referendum was called; instead the issue

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[99] 65 Hawaii at 320-21, 653 P.2d at 769-70.

[100] *Id.* at 320, 653 P.2d at 770.

[101] The State of Hawaii controls land use by classifying all land into urban, rural, agriculture and conservation districts. HAWAII REV. STAT. ch. 205 (1976 & Supp. 1983). Changes in the boundaries of these districts are made by a nine-member state land use commission. HAWAII REV. STAT. § 205-4 (1976).

[102] 65 Hawaii at 321 n.1, 653 P.2d at 770 n.1. The court also noted that conforming amendments to the Kauai County General Plan and the more specific County Comprehensive Zoning Code were required to consummate the reclassification.

[103] *Id.* at 321, 653 P.2d at 770.

[104] *Id.*

[105] *Id.* Section 5.03 of the Kauai County Charter requires that a referendum action be commenced upon presentation to the council of a petition bearing the signatures of at least 20% of eligible voters registered for the last general election. 65 Hawaii at 323 n.2, 653 P.2d at 771 n.2.

[106] 65 Hawaii at 321, 653 P.2d at 770. State law requires a Special Management Area use permit whenever any environmentally sensitive land within the coastal zone or wetlands is to be affected by certain types of improvements. The planning commission of each county is authorized to review and issue SMA use permits. HAWAII REV. STAT. ch. 205A (1976 & Supp. 1983).

[107] The Committee to Save Nukolii acquired over 4,000 signatures on its petition to repeal the resort zoning ordinance. 65 Hawaii at 321, 653 P.2d at 770.

[108] Section 5.07 of the county charter requires that a certified referendum petition be presented to the council for reconsideration of the ordinance to be repealed. The council has thirty days to act on the petition and either, by ordinance, repeal the offending ordinance, or adopt a

was placed on the November 1980 general election ballot.[109]

In April 1980, well in advance of the general election, the county planning commission approved the developers' application for an SMA permit upon advice of corporation counsel that certification of the referendum petition did not suspend the validity of the resort zoning ordinance.[110] On August 4, 1980, the developers applied for building permits for both the hotel and condominiums. The county issued permits for the condominiums the next day.[111] Subsequently, the Committee unsuccessfully sought an injunction to prevent construction of the condominium units.[112] On November 3, 1980, the day before the general election, a building permit for the hotel was issued.[113] Voting on the referendum took place on November 4, 1980.[114]

On November 25, 1980, the referendum results were certified by the county clerk. By a margin of almost two to one, the citizens of Kauai voted in favor of repealing the resort zoning ordinance.[115] On that same day, the county filed an action for declaratory and injunctive relief to determine whether the Nukolii project could be invalidated at that stage after building permits for the project had already been issued.[116]

The Kauai County Charter contained an immunity provision pertaining to results of a referendum. Section 5.11 of the charter stated: "A referendum that nullifies any existing ordinance shall not affect vested rights or any action or expenditure made up to the date of the referendum."[117]

The Kauai Circuit Court which heard the declaratory action concluded that the developers had acquired "vested rights," within the meaning of § 5.11, to proceed with development prior to the date of the referendum. Moreover, the rule of equitable estoppel prevented the county from terminating the project. In so ruling, the court also granted the developers' motion for summary judgment on the action. The Committee to Save Nukolii appealed.[118]

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resolution affirming it. 65 Hawaii at 323-24, 653 P.2d at 771-72.

[109] 65 Hawaii at 321, 653 P.2d at 770.

[110] *Id.* at 21-22, 653 P.2d at 770.

[111] *Id.* at 322, 653 P.2d at 770-71.

[112] *Id.* at 322, 653 P.2d at 771.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] The action was filed by the county in Kauai Circuit Court as Civil No. 2388 (filed Nov. 25, 1980). The Committee to Save Nukolii and the developers were named as defendants in the declaratory action. The Committee filed a counterclaim and cross-claim, and a third-party complaint against the incumbent mayor. *Id.*

[117] 65 Hawaii at 325, 653 P.2d at 772.

[118] *Id.* at 322-23, 653 P.2d at 771.

B. *Issues on Appeal*

The arguments on appeal focused on two basic issues: (1) the interpretation and application of § 5.11 of the county charter; and (2) whether estoppel principles prevented the referendum decision from repealing the developers' resort zoning ordinance.

The Committee challenged the lower court's determination of a vested right. The Committee urged the adoption of a California-style "final, valid building permit plus substantial construction" rule of vested rights, as characterized in the case of *Russian Hill Improvement Association v. Board of Permit Appeals.*[119] Under such a rule, the developers' actions failed to rise to the level of vested rights, and the county was not estopped from enforcing the referendum decision against the developers.[120]

The developers argued that they had acquired a right to proceed before the results of the referendum vote were certified. Therefore, the developers' rights had "vested" within the meaning of § 5.11, and the county was estopped from enforcing the referendum results. The developers advocated a construction of the estoppel rule and vested rights provision along the lines of a "probability of a building permit" analysis.[121]

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[119] Committee to Save Nukolii Opening Brief at 25-27. In *Russian Hill*, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967), a tentative building permit was issued for the construction of a high-rise apartment building notwithstanding the fact that a new height limitation was scheduled to go into effect in a few days. The permit bore on its face a stipulation that it was subject to appeal within ten days of issuance to the Permit Board of Appeals. Within the 10-day period the Russian Hill Improvement Association filed a protest to the permit. The board refused to revoke the permit on the grounds that it had already bestowed a vested property right on the holder. The board based its position on its obligation to apply the law in effect at the time of the permit application, not the new law in effect at the time of the appeals hearing. The developer argued that the permit was protected in accordance with section 150 of the City Planning Code of San Francisco and that the section provided that a building for which a permit had been lawfully issued would be allowed to be completed if construction had already commenced prior to any amendment in the city's land use laws.

The California Supreme Court rejected the arguments of both the board and the developers. Since the permit was subject to appeal, it was subject to subsequent modification during the ten-day appeals period. Since the board erred in not applying the laws in effect at the time of the hearing, not of the permit application, the board decision was a nullity. Furthermore, substantial construction had not occurred so the permit could be rescinded.

The *Russian Hill* case followed the general California vested rights rule. *See supra* text accompanying notes 37-45.

[120] Opening Brief at 27-38.

[121] Developers' Answering Brief at 13-14, 20-22. The Nukolii developers did not argue for adoption of a new rule of vested rights per se but sought mainly to rebut the Committee's arguments in favor of adopting a California-style formula for stopping a project. The *Denning* rule of estoppel did not require the actual issuance of building permits or substantial construction. *Denning* resembled the Illinois version of vested rights which requires good faith reliance on a

The parties argued "vested rights" because that term appeared in § 5.11 of the Kauai County Charter. It should be noted that none of the parties argued "vested rights" in the strict "property" sense that would have invoked considerations of constitutional due process, uncompensated takings of property, excessive regulation or retroactive operation of law.[122] Vested rights were being argued in the sense of rights no longer subject to conditions or contingencies that should be recognized as accomplished realities.[123]

Because the parties raised no constitutional questions concerning property rights, no specific challenge arose on the question of whether the referendum itself violated due process.[124] The questions before the supreme court were limited to whether § 5.11 rendered the referendum decision unenforceable, and the role, if any, that the referendum played in the equitable estoppel analysis. The issues on appeal, therefore, were narrowly phrased and directed towards the enforceability of the referendum results, not the loss of property or lack of due

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reasonable probability that a building permit will issue. *See supra* text accompanying notes 53-59. This probability would satisfy the *Denning* requirement that a developer have more than "a mere expectation" that his project would be approved. The developers argued that when their actions were analyzed under the Illinois model, their rights to proceed had vested before the building permits were even issued.

[122] The very concept of "property" for the purposes of constitutional analysis is amorphous and assumes different philosophical forms. For an enlightening treatise on the problem of defining what constitutes "property," see Oakes, *"Property Rights" In Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981).

[123] Committee's Opening Brief at 25-28; Developers' Answering Brief at 9-17. *See* discussion of Damon v. Tsutsui, 31 Hawaii 678 (1930), *infra*, note 125.

[124] The only constitutional issue regarding the referendum was in the county's brief arguing that the referendum should not be given the special consideration urged by the Committee, but should be regarded as co-equal with legislative acts of elected officials and subject to the same constitutional due process standards. Other than to de-emphasize the Committee's argument for giving the referendum special standing in the development process, no further reference to state or federal constitutional considerations were cited in the briefs.

Several criticisms of zoning by referendum have been made on due process grounds. A major criticism concerns the unfairness of making a property owner submit a decision affecting his property to thousands of voters, many of whom have little direct interest in the matter. Although, a property-owner may have no right to any particular relief from zoning restrictions on his property, he does have a right to a fair procedure when he requests relief from those provisions. A fair procedure includes a reasonable opportunity to have the dispute resolved on the merits by reference to articulable rules and standards. Zoning by referendum does not provide those safeguards. City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 688-94 (1976) (Stevens, J., dissenting). *But see, e.g.*, Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983) (zoning ordinance which changed zoning for a specific parcel of land was subject to referendum vote by citizens); Margolis v. Dist. Ct., County of Arapahoe, 638 P.2d 297 (Colo. 1981) (upholding rezoning of specific parcel by referendum). *See generally* 2 E. YOKELY, ZONING LAW AND PRACTICE § 11.5 (4th ed. 1978); Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection With Zoning Amendments*, 51 S. CAL. L. REV. 265 (1978).

process.

V. Opinion of the Court

A. No Vested Rights

In the *County of Kauai* opinion, the supreme court dealt with the issues in the order and manner posed by the parties. Addressing the argument for the adoption of one rule or another of vested rights, the court found no need to develop a new theory revolving around "vested rights." This refusal to recognize vested rights ended hopes for a constitutionally-based property rights rule with which to determine and protect a developer's right to proceed. The court felt that use of the term "vested rights" in the county charter did not imply a rule of law any different from the estoppel analysis employed by the court in its earlier decisions.[125] Since the ultimate goal of the appeal was to determine the

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[125] The court searched for the legislative history behind each section to discern what the drafters of the section intended "vested rights" to mean, but found none. The court then examined the practical effect and purpose of section 5.11:

> While there is no legislative history to section 5.11, we presume that the section stands for the general proposition that a successful referendum may not, under certain circumstances, operate to repeal an ordinance as it applies to certain persons . . . . [T]his general principle has been embodied in two similar yet theoretically distinct theories: vested rights and equitable estoppel . . . . In the land use context, the vested rights doctrine was employed synonymously with the estoppel theory by a majority of courts at the time the charter amendment [Article V] was drafted and adopted . . . . At that time, the only decision addressing the vested rights issue in this jurisdiction enunciated zoning estoppel principles . . . . Thus, while we note the constitutionally based aspect of "vested rights" later, we will discuss section 5.11 primarily as an embodiment of equitable estoppel theory.

65 Hawaii 325, 653 P.2d at 772-73. Although the court was not entirely accurate in stating that no precedent existed for identifying a vested right, the definition given to the term in an early decision nevertheless leads to the same result. In Damon v. Tsutsui, 31 Hawaii 678 (1930), which involved a determination of whether respondents had acquired "vested rights" in a Hawaiian sea fishery within the meaning of section 96 of the Organic Act, the court cited the following defintion of vested rights:

> Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of some present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.

Id. at 693-94. The contingent existence of the developers' rights to proceed, which depended on the continuing existence of the resort zoning ordinance, falls squarely into the definition stated in the *Damon* case. Equitable estoppel provides the framework for determining whether a developer's rights are still conditional or contingent.

developers' right to proceed with construction, the established estoppel analysis would continue to suit that purpose.[126]

The court decided to disregard the literal wording of § 5.11 which states, "A referendum that nullifies an existing ordinance shall not affect . . . any action taken or expenditure made up to the date of the referendum." The court noted that "date of the referendum" meant the date of the referendum vote. Nevertheless, it rejected a literal interpretation of § 5.11 because to do otherwise would "grandfather" in all activities the referendum sought to prevent.[127] Such rejection was justified where a literal construction would produce an "absurd" and "unjust" result, clearly inconsistent with the purposes and policies of the section.[128]

The court seemed concerned that without such a construction of § 5.11, the electorate would rarely have an opportunity to use the referendum procedure to decide zoning matters. Under a literal interpretation of § 5.11, a developer would be able to acquire a vested right merely by spending substantial amounts during the interim between certification of the referendum petition and the referendum vote itself. By the time a referendum vote took place, the developer would already have acquired a right to proceed. Therefore, the court held that § 5.11 only gave the developer the same protection he received under principles of zoning estoppel.[129] Having deflected all arguments in favor of a law-based vested rights rule, the court proceeded to the next line of argument concerning equitable estoppel.

B. Refinement of the Estoppel Rule

The court reiterated the four elements that *Life of the Land II* had established as necessary to support an estoppel: (1) good faith reliance; (2) assurances of

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[126] The court's unwillingness to recognize more than a theoretical distinction between vested rights and equitable estoppel might have been predicted from *Allen v. City and County of Honolulu*. *See supra* notes 70-75 and accompanying text. There, the court held that a developer had no right to damages because he had sued under the equitable estoppel doctrine, which provided only for a right to proceed with construction. By holding that, as a matter of policy, damages would not be granted for development costs in zoning disputes, the court effectively foreclosed the use of the vested rights doctrine for damages claims in zoning disputes.

Later in the Nukolii opinion the court did in fact analyze the Nukolii facts under the vested rights doctrine. 65 Hawaii at 336-39, 653 P.2d at 779-81. It concluded that under equitable estoppel or vested rights, the result would be the same. Both doctrines have the same purpose: to determine when a developer acquires an irrevocable right to proceed. If the court had allowed significant practical differences to develop the outcome of a development rights suit might be determined not by the facts, but by the theory under which a developer brought his suit.

[127] 65 Hawaii at 326, 653 P.2d at 773.

[128] *Id.*

[129] *Id.*

officials; (3) substantial expenditures of money; and (4) the right to rely on such assurances.[130] The Nukolii opinion dealt first with the elements of "official assurances" and "right to rely."

1. *"Official Assurances" and "Right to Rely"*

In *Life of the Land II* the court held that, under the estoppel doctrine, a developer could rely on discretionary approval of his project to acquire a development right. In the Nukolii opinion, however, the court emphasized that a developer can rely only on *final*, discretionary approval. Final discretionary approval occurs when, under a government's own process for making land use decisions, it relinquishes the opportunity to impose additional conditions on a development.[131] After approval, only purely ministerial actions, such as the processing of a developer's application for compliance with all applicable statutes, ordinances, rules, regulations and conditions attached to approvals, remain to be completed.[132]

Under that analysis, the court concluded that, in contrast to the city council ordinance involved in *Life of the Land I* and *II*, the resort zoning amendment passed by the Kauai county council did not constitute the final discretionary act of the county. The development procedures applicable to the Nukolii project also required the developer to apply for a Special Management Area (SMA) Permit. The SMA permit procedures gave the county planning commission discretion to impose additional conditions on the development. Therefore, final discretionary approval of the project could not have occurred before the planning commission authorized the SMA permit.[133]

The Nukolii decision stresses that no one particular act qualifies as final discretionary approval and that which "final" act triggers an estoppel depends on the particular permit process required of each project.[134] Unless developers ana-

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[130] 65 Hawaii at 327, 653 P.2d at 774.

[131] *Id.* at 328, 653 P.2d at 774.

[132] *Id.* at 328 n.9, 653 P.2d at 774 n.9.

[133] *Id.* at 330, 653 P.2d at 775-76. The court never decided whether the SMA permit constituted final discretionary approval. Footnote 11 of the opinion suggests that, had the SMA permit been obtained prior to the date of the referendum, the court might have looked to whether state health department approval of a required sewage treatment plant constituted the "final discretionary" act of government. Footnote 19 also suggests that health department approval might have been the final discretionary act. There, the court reiterates that issuance of a building permit is invalid unless all conditions attached to prior discretionary approvals have been complied with by the developer. The court further notes that the SMA permit prohibited issuance of a building permit until health department approval had been given.

[134] 65 Hawaii at 329, 653 P.2d at 775. The court stated, "[t]his rule acknowledges the incremental nature of the modern development process . . . balance[s] competing public and private interests [and] preserves government control, over development until the government's

lyze the sequence of permits needed and the timing of approvals they may have difficulty predicting when final approval has been given. Furthermore, any condition attached to a discretionary permit represents a potential trap for a developer, if the condition postpones the effective date of approval or if it must be fulfilled before a building permit can be issued.[135]

The court also qualified the element of "right to rely" by examining the role of the referendum procedure in the permit approval process. When a referendum petition is certified before a developer receives final discretionary approval from officials, the referendum itself becomes an integral part of the approval process.[136] At that point, final discretionary approval must come not from officials or bureaucrats but from the electorate itself. A favorable referendum vote becomes the only act on which a developer can rely.[137] Official approvals, given subsequent to the certification of the petition and before the referendum vote, are irrelevant for estoppel purposes. Under the particular facts of the Nukolii case, the developers never had a right to rely on the issuance of the SMA permit because certification of the Nukolii referendum petition occurred three months previously.[138] The "right to rely," like the element of "official assurances," requires foreknowledge of the governmental approval process that pertains to a particular project.

The court also discussed what should happen when a developer receives final approval *before* certification of a referendum. Until certification of a petition occurs, the ordinary permit system controls. If, before certification, a developer receives final discretionary approval under the ordinary permit system, the developer may rely on that approval for estoppel purposes.[139] Since the ordinance that is the subject of the referendum remains in effect until the vote is tallied,

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own process for making land use decisions leaves nothing to discretion." *Id.* at 328, 653 P.2d at 774. Moreover, the rule marked "a midpoint in a wide spectrum of possibilities represented by decisions of other jurisdictions." 65 Hawaii at 328 n.8, 653 P.2d at 774 n.8.

Certainly the rule is more favorable to a developer than California's "building permit only" rule. Hawaii continues to characterize issuance of a building permit as a purely non-discretionary or ministerial function, which does not affect the estoppel analysis. *Id.* at 328 n.9, 653 P.2d at 774 n.9.

[135] 65 Hawaii at 336 n.19, 653 P.2d at 779 n.19.

[136] 65 Hawaii at 329-30, 653 P.2d at 775. By choosing to treat the referendum process as a mere variable in the estoppel analysis, the court was able to avoid commentary on the political aspects of the case, such as whether the will of the people can be ignored in legitimizing a development project.

[137] *Id.*

[138] *Id.* The developer may continue to apply for permits in the interim between certification and the referendum vote. Provided those permits are valid, the developer may continue his project in accordance with their terms subject to the risk that an unfavorable referendum vote will deny final discretionary approval. 65 Hawaii at 330, 653 P.2d at 775.

[139] 65 Hawaii at 329, 653 P.2d at 775.

ministerial functions such as the issuance of a building permit can continue to be performed.[140] Even if the referendum vote repeals the ordinance in question, § 5.11 mandates issuance of ministerial permits to a developer who has complied with the conditions of final approval and has made substantial expenditures in reasonable reliance on that approval.[141]

The Nukolii decision raises an issue of whether introduction of an ordinance, like certification of a referendum petition, suspends a developer's right to rely on official approvals until the appropriate legislative body decides on the proposed changes. The issue is important because the referendum process is so cumbersome and difficult to initiate, that zoning and land use changes will typically be made by ordinance and not by referendum. Logically, since referendum and ordinance are both methods of promulgating new law, their effect on uncompleted development projects should be the same. Under this reasoning, once an ordinance to amend the zoning of a project reaches a stage in the legislative process that corresponds to certification of a referendum, a developer's right to rely on official approvals should be suspended until the council votes on the pending ordinance.[142] The council vote should become the only final discre-

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[140] 65 Hawaii at 331 n.12, 653 P.2d at 776 n.12.

[141] *Id.* The court decided that section 5.11 of the Kauai County Charter and principles of zoning estoppel provide identical protection for a developer. 65 Hawaii at 326, 653 P.2d at 773. Therefore, this same rule should also apply when a developer relies on principles of zoning estoppel rather than on section 5.11.

The court based its holding on the "official assurances" and "right to rely" elements of the estoppel rule. Receipt of final discretionary approval, however, does not, in itself, guarantee a developer the right to complete a project. The developer also must show substantial expenditures made in reasonable reliance on that approval even though a developer has already secured a right to rely. *Id.*

[142] Courts have expressed various views on when an ordinance or zoning change is "pending":

> For a zoning change to be pending within this rule, it does not have to be before the city council, provided the appropriate administrative department of the city is actively pursuing it. Of course, mere thoughts or comments by city employees concerning the desirability of a change are not enough. There must be active and documented efforts on the part of those authorized to do the work which, in the normal course of municipal action, culminate in the requisite zoning change. The city council or the applicable city planning board must at least be aware that these efforts are going forward. For a zoning change to be pending, however, it is not essential that the property owner be advised of these activities, except to the extent that he is unaware of them, he might justifiably continue to expend funds upon his project which, if the matter does not in due time become public, may result in the application of equitable estoppel.

Smith v. City of Clearwater, 383 So. 2d 681, 689 (Fla. Dist. Ct. App. 1980). *See also* Chicago Title and Trust Co. v. Village of Palatine, 22 Ill. App. 2d 264, 160 N.E.2d 697 (1959) (ordinance is pending when municipality has begun statutorily prescribed amendatory procedures, such as hearings on planning commission recommendations for ordinance amendments); Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971) (ordinance is pending when zoning commission proposes new zoning, makes proposal open to public inspection and advertises public meeting on

tionary approval on which the developer may rely.

Nevertheless, the Nukolii decision suggests significant differences exist between a pending ordinance and a pending referendum, so their effect should *not* be the same. This conclusion results from the distinctions the court drew between *Life of the Land II* and the Nukolii case.[143] The former involved a pending ordinance; the latter, a pending referendum.

In *Life of the Land II*, despite impending legislative changes in the zoning affecting the developer's project, the court held that the developer acquired a right to rely on approval of his project by the council.[144] Absence of a referendum procedure meant public opposition could have no direct legal impact on council action. Therefore, in *Life of the Land II*, the city council was the sole and exclusive source of new legislation and land use policy. As such, its decisions were the final authority on land use matters, including whether or not a project should be approved in the face of pending zoning changes.[145]

In the Nukolii situation, however, the acts of the county council were subject to rescission by referendum. The power of the Kauai electorate to revoke approvals of the council prevented the developer from treating council actions as the exercise of final discretionary approval. The certification of the referendum petition put the developers on notice of the possibility of revocation of approval and preempted their right to rely on the resort zoning approval of the council. The primary purpose of the referendum would have been frustrated by permitting discretionary approval from the council to prevent the electorate from enforcing its decision to repeal the zoning of the project.[146]

The court emphasized two factual distinctions between *Life of the Land II* and the Nukolii case. First, the Kauai referendum procedure gave the public direct control over the zoning of the Nukolii development. Second, in the Nukolii case, the referendum procedure divided final authority over new land use legislation and policy between two bodies; in *Life of the Land II* final authority over such matters was vested in a single body.

These distinctions suggest sound reasons why the introduction of an ordinance should not have the same effect on a developer's right to rely as the certification of a referendum. In contrast to certification of a referendum, introduction of an ordinance causes no change in authority over zoning legislation or policy. Authority remains with a single body, the council. Unless a referendum

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proposal). *But cf.* Town of Largo v. Imperial Homes Inc., 309 So. 2d 571 (Fla. Dist. Ct. App. 1975) (rejecting date of notice of public hearings on planner's recommended changes as date of notice that changes were to be made). *See generally* 2 E. YOKELY, ZONING LAW AND PRACTICE § 14-7 (4th ed. 1978); C. SIEMON, W. LARSON & D. PORTER, *supra* note 2, at 30-31.

[143] 65 Hawaii at 331-32, 653 P.2d at 776.

[144] *See supra* notes 76-79 and accompanying text.

[145] 65 Hawaii at 331, 653 P.2d at 776.

[146] *Id.* at 331-32, 653 P.2d at 776.

is certified, the electorate has no control over land use decisions. The council's decision to grant final discretionary approval of a project can hardly be viewed as undermining its subsequent decision to amend the zoning. Indeed, by giving its approval, the council is implicitly deciding that the purposes of a pending zoning ordinance will not be frustrated by such action.[147] To ensure the effectiveness of the proposed ordinance, the council also has the flexibility to impose additional conditions on the the development before giving final approval. The electorate does not have the same flexibility under the referendum process. *Life of the Land II* demonstrates that when one body controls project zoning and approval, the developer may negotiate a compromise with that body despite the threat of adverse zoning changes.[148] As a matter of policy, where one body has sole authority over land use decisions, the introduction of a new ordinance should not prevent that body from granting final approval of a development. In such a situation, a council decision to grant final approval should concurrently establish a right to rely, regardless of the potential effect of pending legislation. Only if authority over a project is split between two bodies must a right to rely depend on a decision by the body with final authority.

The court was satisfied that the failure of the developers to qualify for an estoppel on the elements of "right to rely" and "official assurances" was enough to defeat the project. Nevertheless, it addressed the effect of the referendum on the good faith and substantial expenditures elements of the rule.[149] These two elements are the heart of the estoppel rule. Even a developer who acquires final discretionary approval and the concomitant right to rely must make a change in position in order to prevent enforcement of newly enacted rules and regulations against an incomplete development. Substantial expenditures are the best evidence of a change in position, but they may be ineffective unless made in good faith.

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[147] In *Life of the Land II* Justice Marumoto found explicit evidence that the council did not intend the pending restrictive zoning ordinance to apply to the developer's project. He relied on transcribed statements of council members to substantiate his conclusion. *See supra* note 92 and accompanying text.

[148] *See supra* notes 76-98 and accompanying text.

[149] The court stated:

> The estoppel analysis in this case terminates with the certification of the referendum. Therefore it is irrelevant whether the Developers made substantial expenditures on the Nukolii project before the referendum vote. We will, however, briefly discuss the impact the pending referendum had on the good-faith element of expenditures because independent consideration of this matter supports our holding that there was no official assurance on which the Developers had a right to rely in making expenditures.

65 Hawaii at 331, 753 P.2d at 776.

2. *Good Faith and Substantial Expenditures*

The Nukolii opinion places several qualifications and limitations on the substantial expenditures requirement of the estoppel rule. The opinion establishes that expenditures made prior to the receipt of final discretionary approval will not be considered for estoppel purposes. Only amounts spent in reliance on final discretionary approval can support an estoppel claim and those expenditures must be both substantial and made in good faith.[150] This dual requirement can present problems for developers. If, after receiving final discretionary approval, developers incur expenditures too quickly, their haste may be construed as bad faith. On the other hand, if they do not move fast enough, their expenditures may be insufficient to satisfy the substantial expenditures requirement of the estoppel rule. As discussed below, no clear guidelines exist to assist developers in gauging what pace of activity they should undertake in order to avoid this problem.

Having narrowed the types of expenditures that qualify for estoppel purposes, the court examined the amounts spent by the Nukolii developers. The court appeared to examine only the total amount spent rather than examining what percentage of the total cost of the project the expenditures represented. This method of comparison suggests large-scale projects may be more likely to satisfy the element of expenditures even though for modest projects a smaller dollar amount may represent a greater proportion of overall project costs. The court regarded a considerable portion of the developers' post-zoning expenditures as irrelevant to the estoppel analysis. To further confound the developers' expectations, a large proportion of the remaining amounts were disregarded because of the developers' lack of good faith.

Certification of the referendum petition placed the developers on notice that a real and substantial challenge to the continuing validity of the resort zoning ordinance had materialized. With the validity of the ordinance in jeopardy any action taken pursuant to the ordinance was at the developers' sole risk.[151] Although the court acknowledged that the developers were entitled to proceed

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[150] 65 Hawaii at 332-36, 653 P.2d at 777-79. The court held that development expenses incurred prior to the day of the referendum vote merely reflected reasonable reliance on preliminary approvals. Only expenses made in reliance on final discretionary approval are important in the estoppel analysis. Therefore the $158,797.64 in pre-referendum expenditures of the Nukolii developers incurred prior to certification of the referendum were meaningless within the estoppel analysis. *Id.* The end result for a Kauai developer is that no amount or type of expenditure will save a project if a referendum is certified before the developer receives final discretionary approval and the subsequent referendum vote goes against the developer.

[151] The developers' awareness of the consequences of an adverse referendum was clearly evidenced in the disclosure statements in the public condominium reports given to prospective condominium purchasers and contingency provisions contained in the developers' construction loan agreement with a Hawaii lending institution. 65 Hawaii at 334-35, 653 P.2d at 777-78.

with the permit approval process,[152] their decision to commence construction of the condominium structures while the threat of the referendum still existed demonstrated lack of good faith. The court evaluated the good faith of the Nukolii developers' pre-referendum activities on the basis of their reasonableness "according to the practices of the development industry."[153] When viewed objectively, the developers' actions manifested an attempt to engage in a "race of diligence to undermine the referendum process."[154] The court frowned on the idea of the developers' attempt to have the project recognized as an irreversible physical reality before the referendum was concluded. The court expressed little sympathy for the developers' fear of lost investment expenses, bluntly stating, "Zoning estoppel is not intended to protect speculative business risks."[155]

The Nukolii decision examines the good faith of the developers in connection with the pace and nature of their activities subsequent to the certification of the referendum petition. The court noted that the Nukolii developers knew the exact date of the referendum vote when the uncertainty of the status of the project would be determined one way or another.[156] Instead of simply waiting for the referendum vote to be tallied, the developers attempted to pre-empt the risk of an unfavorable result by accelerating construction. The court contrasted this knowledge of the referendum date with the "uncertainty inherent in the normal legislative process."[157] Although it did not elaborate, the court may have been referring to the possibility of a proposed bill being redrafted or rejected, thus removing the threat to a project. The reference to the "uncertainty" of the legislative process also gives rise to a potential dual standard of good faith. Although the court examined the Nukolii developers' good faith on the basis of commercial reasonableness, the reference to the uncertainties of the legislative process appears to make allowance for a subjective test of good faith.[158] If a developer knows the exact date of the enactment of a new law or conclusion of a referendum, the opinion indicates that his conduct will be scrutinized for objective reasonableness. In the absence of such a certain date, the opinion implies that the developer will have more leeway to determine the extent to which proposed new laws threaten the project and how fast and how far to proceed in

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[152] The court acquiesced in the circuit court's ruling that certification of the referendum petition did not operate to suspend the validity of the resort zoning ordinance. Such an ordinance would not be repealed until certification of election results. The developers were free to try and obtain an SMA permit, even after certification of the referendum petition as they proceeded to do. The permit would not have estoppel effect but would nevertheless be valid. 65 Hawaii at 330-31 n.12, 653 P.2d at 775-76 n.12.

[153] 65 Hawaii at 332-35, 653 P.2d at 779.

[154] *Id.* at 333, 653 P.2d at 777.

[155] *Id.* at 332, 653 P.2d at 777.

[156] *Id.* at 335 n.18, 653 P.2d at 778 n.18.

[157] *Id.*

[158] 65 Hawaii at 332, 335 n.18, 653 P.2d at 777, 778 n.18.

the meantime. If this interpretation of the opinion is correct, this will supply more opportunity for dissension in the future on which standard of good faith should apply in a given situation.

In summation, a finding of good faith (or lack thereof) can affect the entire complexion of a case. The court's preoccupation with good faith in the Nukolii opinion no doubt was precipitated by the fact that the estoppel rule is based on equitable principles. Lack of good faith on the part of the Nukolii developers made the court's final decision palatable: the court was more easily able to reconcile the conflicting policies of preserving a project that has been carried out in black-letter compliance with existing law and vindicating public disapproval of a project as expressed in a referendum. As the rule stands now, the good faith element comes into play only when examining how the limited class of allowable expenditures was made. If the court imposes too high a standard of good faith, it will undermine the significance of the final discretionary approval. Receipt of final discretionary approval will cease to be a safe harbor if it can be subsequently rendered meaningless by lack of good faith. Furthermore, some degree of good faith prior to the exercise of final discretionary approval may be imposed in the future to prevent improper maneuvering or manipulation of the permit approval process.

C. Constitutional Dicta

The Nukolii opinion was based in equity on estoppel, but the court felt obliged to harmonize its decision with the constitutional issues inherent in the term "vested rights." The court recalled its observation in *Allen* that, the rules of equitable estoppel and vested rights are similar in effect, yet theoretically distinct. Although the parties did not raise the issue themselves, the court decided that a regulation which reinstated the original zoning classification of the land did not constitute an unconstitutional "taking" of property. The court remarked, "zoning that terminates inchoate rights to develop land . . . is a legitimate exercise of the police power."[159] Therefore, until the government is estopped from enforcing new rules and conditions on a development, development rights and interests in land are inchoate and remain subject to the police power. Police power becomes a taking only when it deprives a property owner of *all* reasonable uses of the property.[160] The instant case presented no such

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[159] 65 Hawaii at 336-37, 653 P.2d at 779.

[160] Under agricultural zoning, the Nukolii developers could have developed such uses as commercial recreation, golf courses and single family detached dwellings at the rate of one dwelling per acre in addition to conventional agricultural uses. Under open space zoning, the developers would have been more or less confined to outdoor recreational facilities and single family dwellings at one dwelling per acre. COMPREHENSIVE ZONING CODE OF KAUAI, COUNTY OF KAUAI,

deprivation. The reinstatement of original zoning on the land did not violate substantive due process.[161] The agricultural and open space classifications were rationally related to the legitimate state interest in preserving open space and the rural environment of the district.[162] The court's discussion of these constitutional issues highlights and underscores its basic premise: if the developers' actions were insufficient to justify an estoppel, how could they rise to the dignity of constitutionally protected property rights?[163]

D. Residual Holding

The court's choice of language in the opinion also gave some indication that if it ever abandoned the equitable estoppel rule, it might do so in favor of a stricter, California-style "vested rights" formula. The first indication of this inclination appeared in the discussion of the developers' good faith expenditures. The court concluded, "Finally we note that even good faith expenditures will be disregarded if made in reliance on an invalid building permit."[164] In the court's estimation, the building permits for the condominium structures did not become valid until October 31, 1980, just four days before the referendum vote. Since most of the developers' expenditures occurred prior to that date, they too were disregarded for estoppel purposes.[165] Subsequently, near the conclusion of the discussion on the constitutionality of its decision, the court stated: "Other

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HAWAII, REV. ORDINANCES art. 7, 8 (1976).

[161] 65 Hawaii at 337, 339, 653 P.2d at 779-81.

[162] 65 Hawaii at 337, 653 P.2d at 780.

[163] Failure of the parties to argue "vested rights" in the constitutional sense, and focusing on "vested rights" as only involving the construction of a county charter may have been a main factor in the U.S. Supreme Court's denial of certiorari for lack of substantial federal question. _ U.S. _, 103 S. Ct. 1762 (1983).

[164] 65 Hawaii at 335-36, 653 P.2d at 778. The cases cited by the court for the proposition allow a city to revoke or modify approval of a plan to make it conform to rules and regulations erroneously applied or construed when the building permit was issued. Thus a city is not estopped from *correcting* an erroneously approved project. *But cf.*, Waianae Model Neighborhood Ass'n v. City & County of Honolulu, 55 Hawaii 40, 514 P.2d 861 (1973), which involved the validity of a building permit issued by an official who believed the project was exempt from the terms of the city's newly enacted zoning code. The court held that a permit issued by an official in good faith but upon an erroneous interpretation of an ordinance could not be invalidated once the applicant had substantially changed his position in reliance on the permit. Therefore, the city was not obliged to revoke the permit and was estopped from attempting to do so. Oddly, this case did not cite *Denning* which had been decided two years earlier.

[165] The building permits did not become effective until the state department of health approved sewage treatment plant plans on October 31, 1980. Health department approval was a condition precedent imposed by the SMA permit on the building permit. 65 Hawaii at 336, n.19, 653 P.2d at 779 n.19. The issuance of the building permits for the condominiums in August, therefore, was in violation of the SMA permit.

jurisdictions have developed a harsh rule denying either estoppel or vested rights absent substantial construction in reliance on a valid building permit. . . . We are persuaded that the application of our rule in this case has no more harsh effect . . . ."[166] The court did not seem to consider a rule focusing on the finality and validity of a building permit too harsh. Nevertheless, the court stopped short of adopting the California rule which requires both a valid building permit and substantial construction.[167] If it ever did so, the focus of the court would shift from whether an act of the government unfairly induced a developer to rely, to the application of a stricter rule with less opportunity for equitable arguments.

VI. PRACTICAL IMPLICATIONS OF THE NUKOLII DECISION

A. *Impact on the Nukolii Controversy Itself*

The Nukolii decision reversed the summary judgment granted in favor of the developer and remanded for issuance of an order halting further construction at the site to allow further hearings on the proper disposition of the project. The parties were so concerned with the issue of the developers' right to proceed with construction of the hotel,[168] that no one fully anticipated the practical consequences of a decision against the developers. By the time the supreme court issued its decision, the condominium structures had been completed, many units had been sold and occupied, and construction of the 350-room hotel had begun.[169] The lack of proposals for a remedy perturbed the court, but it offered some advice. "[A]bsent conscious wrongdoing, we believe that the severity of the remedy [of an injunction for the removal of completed improvements] should be reserved for circumstances where the waste engendered by the destruction of a completed improvement is clearly justified by preservation of the

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[166] 65 Hawaii at 338-39, 653 P.2d at 780-81.

[167] *See supra* notes 37-45 and accompanying text.

[168] By the time of the filing of the appeal, construction of the condominiums had commenced and had progressed substantially. A month after filing its opening brief, the Committee filed a Motion for Injunction Pending Appeal. On page 7 of its memorandum in support of the motion, the Committee states: "To the extent that the condominiums are already constructed and are likely to remain standing regardless of whether they were built illegally, Appellant herein, and the entire Kauai community, have already been damaged irreparably." Although the Committee's brief argued the illegality of the project as a whole, continued construction of the hotel phase was specifically targeted. Notwithstanding the de facto completion of the condominium phase, it was argued that the developers still had not acquired any right to proceed with the hotel phase of construction. The Motion for Injunction related only to the hotel since the "right to proceed" at that point applied only to hotel construction.

[169] Honolulu Advertiser, April 19, 1983, at A-1, col. 1.

interests protected by the zoning involved."[170] The court concluded that the developers were not guilty of "intentionally violating underlying zoning"[171] and therefore the condominiums at least would not have to be destroyed. The Committee to Save Nukolii was free to seek other alternative remedies, including damages or other forms of injunctive relief.

In August 1983, on the island of Kauai, the parties filed position statements as to their proposals for disposing of the work done at the site. The Committee to Save Nukolii proposed the demolition of the unfinished hotel structure and the conversion of the condominium units to public housing.[172] The developers argued for completion of the hotel and commencement of operations.[173] The county agreed with the developers but proposed levying a fine for each day that construction proceeded in contravention of law.[174] To complicate the situation further, a second round of referendum proceedings to determine the fate of the site began in August 1983.[175] On October 5, 1983, the Kauai circuit court stayed all further judicial proceedings pending conclusion of the second referendum efforts.[176]

The second referendum became the subject of a special election conducted on February 4, 1984. The election resulted in the reinstatement of the resort zoning for the hotel complex.[177] It seems appropriate that the referendum mecha-

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[170] 65 Hawaii at 339 n.22, 653 P.2d at 781 n.22.

[171] *Id.*

[172] Honolulu Advertiser, August 17, 1983, at A-5, col. 1.

[173] *Id.*

[174] *Id.* Article 23 of the Kauai County Zoning Code prescribes a maximum daily penalty of $500.00 for violations of the code.

[175] Honolulu Advertiser, August 24, 1983, at A-6, col. 1. In summer of 1983, the Committee to Save Nukolii and an ad hoc committee called Kauaians for Nukolii which was supported by the Kauai Chamber of Commerce, began petition drives to hold a new referendum on the disposition of the Nukolii project. The committee proposed several alternative remedies to abate the project to the electorate, such as allowing completion of the hotel but requiring the developers to contribute 10 percent of annual gross proceeds to a community fund. Kauaians for Nukolii supported the restoration of resort zoning to the project on the same terms and conditions originally granted by the county council in 1979.

[176] Honolulu Advertiser, Oct. 6, 1983, at A-11, col. 1.

[177] The developers' problems continued despite the favorable results of the second referendum. The developers offered the county $50,000 to subsidize the costs of conducting a special election instead of postponing voting on the matter until the November 1984 general election. Honolulu Advertiser, April 15, 1984, at A-3, col. 3. The county's acceptance of this money, and the thousands of dollars contributed by the developers to the Kauaians for Nukolii organization brought protests from the Committee to Save Nukolii that big money was tainting the election process. *Id.* On April 2, 1984, the Committee to Save Nukolii filed a suit in federal district court challenging the legality and constitutionality of the special election. Soules v. Kauaians for Nukolii Campaign Committee, Civil No. 84-0297 (D. Hawaii filed April 2, 1984). Whether the developers attempt to finish the hotel structure while the federal suit is still pending remains to be seen.

nism which caused the controversy should also be invoked to solve it. Since the supreme court opinion offered no remedy or position for the circuit court to follow, responsibility for the creation of a workable and acceptable remedy was left to the parties most closely related to the project who would have to live with the results: namely the developers, county, and people of Kauai. Since virtually no precedent applicable to a situation where major construction has taken place exists, it is perhaps best that the Nukolii controversy was resolved in the political arena without judicial intervention.[178]

Even if no solution had arisen from the second round of referenda and the issue returned to the court, the law of nonconforming uses could have provided a framework for the court's evaluation of the situation.[179] Since the supreme court opinion precluded demolition of the condominium buildings, those structures will remain untouched. The buildings constitute nonconforming structures, however, since only detached, single family dwellings are allowed in an agricultural or open space district.[180] They would be subject to Article 22 of the county zoning code regarding nonconforming uses and structures and allowed to continue until they deteriorate or are demolished.[181]

On April 13, 1984, the Hawaii Supreme Court decided that the second referendum was valid so construction on the hotel could legally re-commence. Honolulu Advertiser, April 15, 1984, at A-3, col. 3.

[178] No case concerning vested rights or estoppel appears to have faced the problem of fashioning an appropriate remedy. When a project has been required to conform to a new law or regulation, presumably the developers performed whatever modifications were required to bring the project into conformance, such as reducing the height or bulk of buildings to permitted limits, abandoning the illegal portions of the project, and making the project suitable for whatever uses would be permitted of the project. Certainly no case seems to have ordered demolition or destruction of major improvements, although conforming a project to new zoning might require removal of certain features or undoing certain features of the project. In Welton v. 40 East Oak St. Bldg. Corp., 70 F.2d 377 (7th Cir. 1934), *cert. denied*, 293 U.S. 390 (1934), a mandatory injunction to force developers of a 20-story building to comply with setback requirements was affirmed. The opinion does not specify what degree of reconstruction was necessary to comply with the injunction.

[179] "Vested rights" and "nonconforming uses" are conceptual cousins and nonconforming uses are often defined as a form of vested rights. *See supra* notes 19-26 and accompanying text. *See also* Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190, 192 (1973) ("The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted.").

[180] *See supra* note 163. Any use or structure which is prohibited on a given piece of land at the time of inquiry is a nonconforming use. 4 A. & D. RATHKOPF, *supra* note 2 § 51.01; 6 P. ROHAN, *supra* note 2 § 41.01[1].

[181] Sections 8-22.1(b) & (c) of the county zoning code provide:

> (b) Ordinary maintenance and repairs may be made to any non-conforming building or structure, provided that no structural alterations are made, the building or structure is not enlarged, and the cost of work does not exceed twenty per cent (20%) of the replacement cost of the building or structure in any one (1) year.

The unfinished hotel structure in its present condition also constitutes a nonconforming structure. Completion of the hotel would be a material alteration or enlargement of the nonconformity in violation of Article 22. It is unclear how the hotel structure might be treated under the nonconforming use theory. Article 22, however, does empower the county planning commission to declare the unfinished hotel a danger to public health and safety and order abatement of the danger.[182]

Characterizing a project as a nonconforming use or structure is consistent with the intent and purposes of vested rights and estoppel. All three theories recognize that a use or structure lawfully established under prior law cannot be invalidated by a subsequent change in law absent some overriding state interest.[183] The law of nonconforming uses acknowledges that a use or structure which in fact exists may continue, but that any abandonment or material alteration will cause the owner to forfeit the protection and benefit of the law in effect when the nonconformity was established.[184]

Other remedies would have included condemnation of the hotel site by payment of just compensation. If it exercised this option, however, the county would have to pay compensation based on the market value of the development.[185] Since the Nukolii decision upheld the validity of the referendum vote returning the property to its open space/agricultural zoning, the county could

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(c) A non-conforming building or structure that is damaged or destroyed may not be reconstructed other than in accordance with the provisions of this Chapter unless the cost or reconstruction does not exceed fifty per cent (50%) of the replacement cost of the building or structure prior to the damage having occurred, exclusive of foundations. . . . Where reconstruction is prohibited, the remaining portion of the non-conforming building or structure shall be removed or brought into conformity with the requirements of this Chapter. The Department of Public Works shall determine the extent of damage to determine whether the building may be restored.

Section 8-22.2(b) provides:

(b) If any non-conforming uses [sic] ceases for any reason for a continuous period of twelve (12) calendar months or for one (1) season if the use be seasonal, then the use shall not be resumed and any use of the land or building thereafter shall be in full conformity with the provisions of this Chapter.

[183] Sections 8-22.1 and 8-22.2 of the Kauai County Zoning Code have the common clause: "provided that the Planning Commission may, after hearing, order the termination of a nonconforming use that creates substantial danger to public health or safety."

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

[184] *See, e.g.*, 6 P. ROHAN, ZONING AND LAND USE CONTROLS, § 41.02[3] (1979), George Washington University v. Board of Zoning Adjustment, 429 A.2d 1342 (D.C. App. 1981); Miorelli v. Zoning Hearing Bd., 30 Pa. Comm. 330, 373 A.2d 1158 (1977); Service Oil v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972).

[185] When property is taken for public use by the exercise of public domain, market value is, by the great weight of authority, the general standard for measuring compensation to the owner. 4 NICHOLS ON EMINENT DOMAIN § 12.1[5], 12.2 (J. Sackman ed. 1979).

have argued for a valuation based on the value of the site under either of those classifications.[186]

The county could have also allowed the developers to complete the hotel up to the two stories now standing, but require that the building be put to a conforming use. By remanding the question of the proper remedy to the circuit court, the supreme court indicated its willingness to allow local conditions, creativity, and policy to produce an equitable solution to the issue.

B. Precedent for the Future

The Nukolii decision creates more uncertainties in the land development process and imposes more risks on private developers. Nevertheless, the opinion does attempt to offer a "safe harbor" to a developer who acquires final discretionary approval. Since only final, discretionary action establishes a right to proceed, a developer must determine which approval process will be required for a project and identify the last "discretionary" approval. Although the cases have settled that issuance of building permits are ministerial acts,[187] many other permits need to be classified as "discretionary" or "ministerial" actions. Even a developer who acquires a building permit must examine it carefully to ascertain whether it is final and valid. Failure to comply with contingencies or conditions attached to prior discretionary approvals may delay the effective date of a building permit.[188] If a referendum petition against the project is certified before final discretionary approval is obtained from officials, the *County of Kauai* opinion advises that physical site work should be suspended lest the developer appear to be engaged in a "race of diligence." Other development work may proceed, such as application for other permits, but such costs are incurred at the developer's sole risk.[189] Pre-sales programs, financing arrangements and contract

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[186] "Insofar as zoning restrictions circumscribe the available uses to which land may be devoted, they unquestionably affect the market value of the property . . . ." *Id.* § 12.322. *See also* City & County of Honolulu v. Market Place Ltd., 55 Hawaii 226, 517 P.2d 7 (1973).

[187] Life of the Land v. City Council, 61 Hawaii 390, 454, 606 P.2d 866, 903 (1980); County of Kauai v. Pacific Life Ins. Co., 65 Hawaii 318, 328-29 n.9, 653 P.2d 766, 774 n.9 (1982).

[188] 65 Hawaii at 336 n.19, 653 P.2d at 779 n.19.

[189] 65 Hawaii at 330 n.12, 653 P.2d at 776 n.12. In one author's criterion, the Hawaii court would be an "anti-development" court because the Nukolii decision does not project awareness of the complexity of the present system of land development. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. L. REV. 545 (1979). The various approvals needed for a project are rarely discrete and separate actions. Often qualification for one type of approval is dependent upon concurrent or prior approval of another kind of permit. For example, in the Nukolii case, the court held the condominium building permits to be ineffective until the state health department approved sewage treatment facilities. Conditions subsequent such as the health department approval may extend the approval process far beyond what the Nukolii court may

negotiations will be inhibited pending the outcome of the referendum vote. In short, the precautionary approach suggested by the Nukolii decision can create more delay, uncertainty and cost for developers and the consuming public. Even though final, discretionary approval also prevents the electorate from imposing changes on a project, such approval is likely to be obtained at a relatively late stage in development. The safe harbor offered by the rule may provide little comfort to developers.

To reduce the possibility of a referendum arising and prolonging the approval process, a developer should make public relations a significant component in the development process. It should be noted that third-party public interest groups initiated the last two Hawaii cases on development rights, *Life of the Land II* and *County of Kauai*. The government sided with the developers in both cases and favored the projects.[190] Hostility towards development, therefore, has emanated not from land use officials but from unhappy segments of the population. The Nukolii controversy on future development may make the land development process more political with the real approvals being made outside the realm of land use officials and city hall.

Beyond the likely cost consequences of avoiding the same fate suffered by the Nukolii developers lies the potential for social benefit. If citizens force developers to respond more sensitively to public demands and developers show a willingness to make modifications, as did the Admiral Thomas developers, a development approved by a larger segment of the community may result. If developers inform and educate the public about the impact of a proposed development to secure public approval, the public may become less critical and more appreciative of private development efforts as understanding of the process increases. A project that generates sufficient concern to raise a referendum may be either ill-conceived, ill-managed or simply premature.

Until the Hawaii Supreme Court again examines the status of development rights in Hawaii,[191] the legislature serves as the forum for modifying, minimizing or avoiding the effect of the Nukolii decision.

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have realized.

[190] *Life of the Land II*, 61 Hawaii at 391-416, 606 P.2d at 871-83; *County of Kauai*, 65 Hawaii at 320-22, 653 P.2d at 770-71.

[191] When the Nukolii case was heard, only two of the regular supreme court justices heard oral arguments and participated in the opinion. Chief Justice Richardson retired from the bench in January 1983. Judge Greig from the circuit court sat in substitution, along with retired justices Ogata and Menor. The remaining member of the panel, associate Justice Lum is now the chief justice. In short, only one of the justices deciding the Nukolii controversy is likely to hear any future cases regarding development rights.

VII. LEGISLATIVE RESPONSES TO DEVELOPMENT RIGHTS

In the wake of the *Life of the Land* opinions, a senate[192] and a house[193] bill were introduced during the 1980 session of the Hawaii State Legislature to provide some security and predictability for developers in the project approval process. While the legislature passed neither bill during the session,[194] the attempt is noteworthy because it reflects the need for some mode of certainty and assurance to encourage development in the state. The bills were nearly identical in content and would have authorized the counties to enter into development agreements which would stipulate in advance the type and size of a proposed development and the time frame for the commencement of construction. Although the committee reports on the two bills do not explicitly identify their sources, the bills appear to be modeled on a California statute authorizing such agreements.[195] Since the California statute was passed in 1979, it is premature to evaluate its success or failure, or to determine whether it relieves developers from the harshness of California case law.[196]

During the 1983 legislative session, in response to the Nukolii decision, a total of five bills on the issue of development rights and vesting were introduced in the house and senate subsequent to the *County of Kauai* decision. None of these bills were enacted during the session. Senate Bill No. 642 reintroduced the notion of development agreements as a means of protecting a project from future changes in land use laws. Senate Bills Nos. 639 and 1033 and House Bill No. 1209[197] were limited to subdivisions. These proposals based final subdivision approval on the law in effect at the time preliminary or tentative approval occurred.[198] Upon receipt of final approval, the applicant would

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[192] S.B. No. 3097-80, 10th Hawaii Leg., 2d Sess. (1980).

[193] H.B. No. 2671-80, 10th Hawaii Leg., 2d Sess. (1980).

[194] The house bill was referred to the Committee on Water, Land Use and Development and the Committee on Judiciary where it died. The senate bill similarly died after referral to the Committee on Judiciary.

[195] California added Article 2.5 to Chapter 4, Title 7 of the Government Code beginning with § 65864, allowing cities and counties to enter into development agreements so that a project can be evaluated according to the laws and regulations in effect at the time the agreement is entered into. However, even development agreements are subject to referendum actions: "A development agreement is a legislative act which shall be approved by ordinance and is subject to referendum . . . ." CAL. GOV'T CODE § 65867.5 (West 1983).

[196] For general commentary on the operation of the act, see Holliman, *Development Agreements and Vested Rights in California*, 13 URBAN L. REV. 44 (Winter 1981); Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29 (Summer 1981).

[197] These three bills are identical in language and were assigned different numbers because they were introduced by different legislators.

[198] Each of the three bills reads:

> Notwithstanding any other law to the contrary, when an application and map for the subdivision or consolidation of land has received preliminary or tentative approval as pro-

have five years in which to "commence and complete any aspect" of development in accordance with the final map.

House Bill No. 1208 proposed to codify the holding of the *County of Kauai* opinion with a few extra details. The house bill designated what acts constitute "final discretionary approval"[199] and provided for payment of just compensation for the impairment of any rights which have "vested" within the terms of the bill.[200]

The bills limiting vested rights treatment to subdivisions and consolidations, however, exclude a wide spectrum of development projects from protection. In order to be effective, a bill permitting development agreements would probably have to consider referendum action as a potential vehicle for thwarting the in-

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vided in the applicable county or city and county ordinance, any later change or amendment to the zoning, planning, subdivision, or other governing ordinance or plan shall not affect the final approval decision on such application in a manner that is adverse to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans at the time that preliminary or tentative approval was granted. Notwithstanding any other law to the contrary, when an application and map for the subdivision or consolidation of land has received final approval, no subsequent change or amendment to the zoning, planning, subdivision, or other governing ordinance or plan shall be applied to affect adversely the right of the applicant to commence and complete any aspect to the approved subdivision or consolidation in accordance with such approval and duly filed map within five years from such approval.

S.B. No. 639, 12th Hawaii Leg. § 2 (1983); S.B. No. 1033, 12th Hawaii Leg. § 2 (1983); H.B. No. 1209, 12th Hawaii Leg. § 2 (1983).

[199] Section 1(d) of the bill reads:

(d) For the purposes of this section, the "final discretionary action" is the issuance in final form of the last permit or approval required by law so that a person can begin excavation or construction of permanent project improvements. Final discretionary action does not include any county building permits. The permits or approvals included after final discretionary action include, but are not limited to, adoption of ordinances modifying the zoning of land, issuance of special management area permits under section 205A-28, approval of a variance or exemption to interim zoning moratorium ordinances, and issuance of special use permits under section 206-6. Where a permit or approval is contingent upon that person's compliance with conditions other than county building permit requirements, the final discretionary action takes place when all conditions are satisfied. Such conditions include, but are not limited to, the submission of environmental or historical site impact studies, and assessment of the impact of the development on recreational resources. Where appeals have been filed, a permit or approval is not issued in final form until all appeals available under state or county law has [sic] been exhausted.

This section attempts to avoid all the pitfalls experienced by private developers in past court decisions.

[200] Subsection (c) of House Bill No. 1208 states:

(c) No county shall enforce any law, ordinance, resolution, rule, regulation, or policy, or any modification thereof, which was not in existence at the time that persons's [sic] rights vested and which shall substantially diminish these rights without the County providing just compensation as provided by law.

tent to protect development rights.[201] It remains to be seen which mode of legislative relief will gain momentum and final enactment.[202]

VIII. CONCLUSION

Case law on development rights in Hawaii has gradually attained a more clearly defined form. *County of Kauai* replaced the general principles of estoppel formulated in *Denning* with a more certain but less flexible rule. This rule eliminates some of the opportunity for individual developers to argue the respective equities and good faith reliance. Certain questions remain, however, concerning the detailed applications of the rule. The rule allows some flexibility in fashioning an appropriate remedy for physical improvements already constructed at a site in order to vindicate land use controls without necessarily penalizing a developer for having been found wrong. Despite the court's stricter view of development rights, the legislature has actively tried to develop a means for mitigating the harsh effects of case law and to provide a more favorable environment for private developers. Although the courts may be closed as a forum for promoting laws which facilitate development, the legislature remains open to innovation and change.

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[201] If construed as legislative actions akin to planned unit development ordinances, development agreements will be subject to referenda even if no provision is made in the applicable statute. *See* Peachtree Development Co. v. Paul, 67 Ohio St. 345, 423 N.E.2d 1087 (1981) where such a planned unit development (called a Community Unit Plan - CUP in the case) was held to be tantamount to rezoning and therefore legislative in nature. As a legislative act, the CUP approval was subject to referendum, and the developer could not gain the injunction sought to stop the referendum from proceeding.

[202] None of the bills were enacted into law during the 1984 legislative session.

Nonconsensual Civil Commitment In Hawaii: A Reexamination of The Requisite Standard of Proof

by Carl J. Schlack, Jr.*

One does not have to echo the scepticism uttered by Brian, C.J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time.[1]

INTRODUCTION

The past decade has witnessed a revolution in the field of mental health law. Jurisdictions throughout the nation have scrutinized their laws authorizing the nonconsensual civil commitment of the mentally ill to ensure constitutional prohibitions against deprivation of liberty without due process of law are not transgressed.[2]

Hawaii has been no exception. In 1976, *Suzuki v. Quisenberry*[3] provided the Federal District Court for the District of Hawaii the opportunity to focus on the constitutional deficiencies, both substantive and procedural,[4] of Hawaii's then

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[1] Leland v. Oregon, 343 U.S. 790, 803 (1952).

[2] U.S. CONST. amends. V, XIV.

[3] 411 F. Supp. 1113 (D. Hawaii 1976).

[4] For an examination of these deficiencies, see Wexler, *Comments and Questions About Mental Health Law in Hawaii*, 13 HAWAII B.J. 3 (1978) [hereinafter cited as Wexler].

existing civil commitment law.[5] In *Suzuki*, Chief Judge Samuel P. King, sought to balance the complex and competing considerations involved in nonconsensual civil commitments:[6] (a) the protection of society from anti-social, destructive behavior, (b) the need to care for the welfare of its citizens who cannot care for themselves, and (c) the protection of the individual's liberty interest.

Although *Suzuki* invalidated most of the nonconsensual features of Hawaii's existing law on substantive grounds, dicta as to procedural due process rights afforded the legislature guidance in drafting a constitutionally adequate commitment statute.[7] Judge King relied upon an established and uniform body of precedent for such procedural safeguards as the subject's right to adequate notice, the effective assistance of counsel, a prior hearing and the right to be pre-

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[5] HAWAII REV. STAT. § 334 (1976).

[6] Although this type of commitment is generally referred to as "involuntary civil commitment," Judge King prefers the term "nonconsensual civil commitment" as a more accurate description of the procedure followed. 411 F. Supp. at 1117 n.3. Judge King's terminology has been adopted in this article.

[7] Judge King suggested the following as the minimum procedural safeguards required by due process in connection with nonemergency, nonconsensual civil commitments:

(1) The right to adequate prior notice of date, time, place of hearing, purpose of proceedings, possible consequences of the hearing, a statement of the legal standard upon which commitment is authorized, the names of examining physicians and others who may testify in favor of detention, and the substance of their proposed testimony.
(2) The right to a prior hearing before a neutral judicial officer in lieu of psychiatric judgment for commitment.
(3) The right to effective assistance of counsel, including the right to appointed counsel and a right that counsel be made available far enough in advance of the hearing to provide adequate opportunity for preparation.
(4) The right to be present at the hearing, to participate to the extent of the subject's ability, and not to be excessively medicated prior to or during the hearing.
(5) The right to cross-examine witnesses and to offer evidence.
(6) Adherence to the rules of evidence applicable in criminal cases.
(7) The right to assert the privilege against self-incrimination, and to be informed of the privilege.
(8) The right to proof beyond a reasonable doubt, with the burdens of production and persuasion upon the State as to evidence of mental illness and dangerousness.
(9) The right to consideration of less restrictive alternatives.
(10) The right to a record of the proceedings and written findings of fact.
(11) The right to appellate review and habeas corpus relief.
(12) The right to periodic redeterminations of the basis for confinement (non-jury hearing every 90 days and a maximum period of confinement without hearing of 180 days, excluding the pretrial period.

411 F. Supp. at 1127-34. For a thorough examination of these procedural safeguards, see generally Hall, *Hawaii's Noncommitment to Civil Commitment: Out of Sight, Out of Mind, Out of Theory*, 13 HAWAII B.J. 21 (1978).

sent and participate in that hearing.[8] However, courts had only recently begun to discuss, with little agreement, the standard of proof applicable to nonconsensual civil commitment proceedings.[9]

The standards of proof applied throughout the country ranged from the most lenient "preponderance of the evidence," to the most stringent "beyond a reasonable doubt."[10] Judge King, persuaded by the reasoning of *In re Ballay*,[11] concluded that "the standard of proof in nonconsensual civil commitment proceedings must be beyond a reasonable doubt."[12] The Hawaii Legislature responded with Act 130,[13] a revised mental health statute that incorporated the procedural safeguards outlined in *Suzuki*, including the beyond a reasonable doubt standard of proof.

Nationally, subsequent commentaries, as well as rulings from the bench, indicated continued controversy as to the standard of proof required by due process.[14] Then, in 1979, the United States Supreme Court held in *Addington v. Texas*[15] that under Texas' nonconsensual civil commitment statute, the due process guarantees of the fourteenth amendment[16] were met by a "clear and convincing" standard of proof. Despite *Addington*, Hawaii's more stringent standard of proof remained unchanged for four years. Finally, in 1983, the legislature enacted Act 173[17] which provided, among other things, a reduction in the standard of proof for two of the three commitment criteria[18] from "beyond a reasonable doubt" to "clear and convincing evidence."[19]

This article reexamines the standards of proof applicable to nonconsensual commitment proceedings in Hawaii, and argues that, in light of the substantive and procedural safeguards built into the current statute, and the practical problems associated with proving the subjective criteria for commitment, the clear and convincing standard strikes the proper balance between state and individual liberty interests, and thus should be made applicable to all three commitment criteria.

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[8] 411 F. Supp. at 1129-30.

[9] *See* Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. C.L. REV. 209, 209 [hereinafter cited as Share].

[10] *Id.* at 209 n.5.

[11] 482 F.2d 648 (D.C. Cir. 1973).

[12] 411 F. Supp. at 1132.

[13] Act 130, 1976 Hawaii Sess. Laws, replaced Act 259, 1967 Hawaii Sess. Laws.

[14] *See generally* Share, *supra* note 9, at 209-10.

[15] 441 U.S. 418 (1979).

[16] U.S. CONST. amend. XIV.

[17] 1983 Hawaii Sess. Laws.

[18] *See infra* text accompanying notes 123-27.

[19] HAWAII REV. STAT. § 334-60(b)(4)(I) (Supp. 1983).

STANDARDS UTILIZED IN NONCONSENSUAL COMMITMENT PROCEEDINGS

The standard of proof required in any adjudicative proceeding represents the degree of error society will tolerate in the factfinding process.[20] The function of a standard of proof is to reduce the risk of an erroneous decision to an acceptable level. One must look to the interests involved to determine what level of risk is acceptable. In criminal cases, for example, society demands a high degree of certainty because of the importance of the interests at stake, and requires proof beyond a reasonable doubt.[21]

In nonconsensual civil commitment cases, courts and legislatures have employed a range of standards, varying from the least exacting "probable cause" standard,[22] to "preponderance of the evidence", to "clear and convincing proof", to the most exacting "beyond a reasonable doubt" standard.

In order to understand fully the utilization of such different standards of proof, one must distinguish the two "fundamentally irreconcilable"[23] approaches to the civil commitment process—medical and legal. The medical viewpoint emphasizes the doctor/patient relationship and the need for flexibility and informality in evaluating and treating the mentally ill. Commitment is viewed as "a legitimate, even morally necessary function of a state when it is directed at proper persons and reasonably limited in scope."[24] Proponents of the medical model believe the strictly structured mental health "reforms" of the last fifteen years result in more harm to those who might benefit therefrom than was previously the case when the medical profession played a more predominant role in the commitment process.[25]

By contrast, advocates of the legal model frequently analogize nonconsensual civil commitment to the imprisonment of criminals.[26] Consequently, they look to objective substantive criteria in the commitment process and devolve upon the judiciary the responsibility for ensuring fairness through procedural safeguards.[27] Proponents of the legal model seek to refashion commitment law so

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[20] 441 U.S. at 423; *In re* Ballay, 482 F.2d 648, 656 (D.C. Cir. 1973).

[21] 441 U.S. at 423-24.

[22] The probable cause standard is borrowed from the preliminary hearing in a criminal case and means reasonable grounds to believe that something is true. Because the standard demands little certainty from the factfinder, the risk of an erroneous commitment is high. Consequently, states opt for the preponderance standard at a minimum. *See* A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 241 (3d ed. 1977).

[23] Share, *supra* note 9, at 213.

[24] *Id.* at 212 (citation omitted).

[25] In passing Act 259 (1967 Hawaii Sess. Laws), the Hawaii Legislature had given almost unanimous approval to the adoption of the medical model for the handling of civil commitments. 411 F. Supp. at 1116-17.

[26] Share, *supra* note 9, at 210 n.7.

[27] The 1978 Report of the Task Panel on Legal and Ethical Issues of the President's Commis-

that only those who are truly incapable of functioning in society are committed; they would prefer to err in favor of individual liberty, i.e., where there is doubt, commitment should be avoided.

The legal model is clearly the foundation stone of contemporary commitment law. However, the dichotomy between the two models explains the competing positions which have given rise to different standards of proof. One who would entrust the commitment decision to physicians is not likely to encumber it with a high standard of objective proof. Accordingly, one who views commitment as akin to imprisonment would require a stringent standard. The shift to the legal approach, and to more exacting standards of proof, in nonconsensual civil commitment proceedings, has been gradual, based primarily upon the increased application in contemporary jurisprudence of due process principles to states through the fourteenth amendment.

Application of Due Process Safeguards

The United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.[28] " 'Due process,' " however, "is an elusive concept . . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings."[29] In *Morrissey v. Brewer*,[30] the United States Supreme Court was concerned with the procedural due process protections of a non-economic liberty interest outside the prosecutorial context.[31] The Court utilized a two-step analysis of the due process

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sion on Mental Health recognized that while many procedures have been constitutionally compelled, sound social policy dictates that commitment should be authorized only if fair procedures are employed to resolve the major issues. The panel recommended: procedural protections should include, but not necessarily be limited to, initial screening of potential commitment cases by mental health agencies, a prompt commitment hearing preceded by adequate notice to interested parties, the right to retained or assigned counsel, the right to retained or assigned independent mental health evaluator, a transcript of the proceedings, application of the principle of the least restrictive alternative, a relatively stringent standard of proof (at least "clear and convincing" evidence), durational limits on confinement (with the ability of a court to specify a period of confinement short of the statutory maximum) and the right to an expedited appeal. At the commitment hearing, the rules of evidence shall apply and the respondent should have the right to wear his or her own clothing, to present evidence and to subpoena and cross-examine witnesses. Ideally, the petitioner should also be represented by counsel.
Recommendation 4(b) at 93.

[28] U.S. CONST. amend. XIV.

[29] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[30] 408 U.S. 471 (1972).

[31] Petitioners had challenged, in a habeas corpus proceeding, the revocation of their paroles without a hearing.

issue: whether any procedural due process protections were required, and, if so, which protections were due.

The first question requires an affirmative response where an individual will suffer a "grievous loss" to an interest "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[32] Once such an interest is subject to such a loss, a determination must be made as to which procedural protections are necessary to safeguard the interest to the extent contemplated by the United States Constitution. "[C]onsideration of what procedures due process may require under any set of given circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action."[33] The procedures chosen, then, should reflect a balance of the governmental function and the private interest affected by that function[34]—a balance that ensures the "fundamental fairness" which is the touchstone of due process.[35]

The determination of which standard of proof is required by due process in nonconsensual civil commitments must begin with an examination of the individual liberty interest at stake. That liberty interest must then be weighed on judicial scales against the interests of the state.

Individual Interests

Few would doubt that the nonconsensual civil commitment of an individual to a state mental hospital involves a substantial deprivation of liberty within the meaning of the due process clause of the fourteenth amendment.[36] Patients

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[32] 408 U.S. at 481.

[33] *Id.* (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

[34] A number of factors to consider in this balancing process were suggested by Justice Frankfurter, concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951):

> "[D]ue process" cannot be imprisoned within the treacherous limits of any formula . . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

[35] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[36] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967). In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court spoke of the "liberty" protected by the fourteenth amendment:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration . . . . With-

have their physical liberty restricted to the facility to which they are admitted, requiring official permission to leave, and may even find themselves confined to locked wards to restrain violent outbursts.[37]

Moreover, terminating a patient's hospitalization does not always end the constraints imposed by the commitment process. The stigma attached to mental illness can result in employment discrimination and general social rejection.[38] Thus, since a deprivation of a liberty interest is involved, protection against unjustified commitment must be ensured. The state cannot impose the severe abridgment of personal freedoms inherent in civil commitment without due process of law.[39] The *Morrissey* balancing test teaches that the relative stringency of a standard of proof is dependent upon the balance achieved when the permissible and legitimate state interest is weighed against the individual's liberty interest.

State Interests

The state's power of compulsory commitment stems from two sources: fulfillment of its historic *parens patriae*[40] function, and accomplishment of its police power objectives.

Pursuant to *parens patriae* rationale, the state commits the mentally ill based on humanitarian objectives: the need of the *individual* for care and treatment when he is not capable of acting for himself and/or presents a significant risk to his well being due to an inability to recognize responsibly his needs.[41] Recently, however, the Supreme Court limited the extent of the *parens patriae* power. In

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> out doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Id. at 572.

[37] *See* Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA L. REV. 447 (1973).

[38] *See* American Psychiatric Association, *Position Statement on Discrimination Against Persons with Previous Psychiatric Treatment*, 135 AM. J. PSYCH. 643 (1978).

[39] *Supra* note 35.

[40] Literally "parent of the country"; BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

[41] *See generally* Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1326 (1974); Note, *"We're Only Trying to Help": The Burden and Standard of Proof in Short-Term Civil Commitment*, 31 STAN. L. REV. 425, 438 (1979); Kent v. United States, 383 U.S. 541, 554-56 (1966); Note, *Standard and Burden of Proof in Mental Commitment and Release Proceedings*, 3 WM. MITCHELL L. REV. 193, 210-11 (1977).

O'Connor v. Donaldson,[42] the Court held that mental illness alone was not sufficient justification to invoke the power: "[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 willing and responsible family members or friends."[43]

By contrast, the police power objectives of the state in committing the mentally ill are predicated upon the state's duty to protect the *public* from harm or threat of injury. Civil commitment statutes focusing on dangerousness to others, then, promote a societal interest rather than the individual interest of the mentally ill. Yet, the individual interest is not necessarily forgotten by the state, which may combine the exercise of its police power with its *parens patriae* function to meet the individual's need for care and society's need to be free from harm.[44]

THE STANDARDS OF PROOF THAT HAVE EVOLVED THROUGH INTEREST BALANCING

1. Preponderance Standard

The nature of the procedural safeguards applied to nonconsensual commitment proceedings was established early by its label as a "civil" proceeding. Some courts and legislatures pointed to the civil label of the proceeding and the fact that the state's motives were benevolent in determining the appropriate standard of proof.[45] The preponderance standard, which is common to most civil actions,[46] requires the factfinder to determine whether the existence of a fact is "more probable than not,"[47] and was thought to satisfy due process requirements since the state's intent was not punitive and it had no interest in harming the defendant. Comparisons to criminal incarceration, and a higher standard of proof, were usually discounted by the belief that the care and treat-

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[42] 422 U.S. 563 (1975).

[43] *Id.* at 576.

[44] *Supra* note 40.

[45] *See generally* Note, *Conservatorship of Roulet and Cramer v. Tyars: Inconsistency in Involuntary Civil Commitment Protections*, 68 CALIF. L. REV. 716, 719-20 (1980).

[46] *See* 9 J. WIGMORE, EVIDENCE § 2498 (Chadbourn rev. 1981) [hereinafter cited as WIGMORE].

[47] *See* D. MCCORMICK, EVIDENCE § 339 (Cleary ed. 1972) [hereinafter cited as MCCORMICK]. For various definitions of "preponderance" see 93 A.L.R. 155 (1934). The preponderance standard can be said to have an intrinsic mathematical indifference to the outcome of the litigation: "we view it as no more serious . . . for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

ment a patient received sufficiently distinguishes civil commitment from penal incarceration.[48]

Additionally, it was recognized that the realities of medical science necessitate a workable standard of proof. The predictive function of doctors and psychiatrists with regard to mental illness and dangerousness is ideally served under this standard because medical predictions are usually expressed in terms of being more probable than not.[49]

A collateral concern of those who advocate the preponderance standard is to cast the net wide enough to catch those acquitted of criminal charges by reason of insanity.[50] The fear is that the defendant may avoid the criminal penalty by submitting enough evidence of an abnormal mental condition to raise a reasonable doubt as to his responsibility at the time of the offense. If the beyond a reasonable doubt standard is utilized at the commitment hearing, the defendant could then submit enough evidence of a normal mental condition to raise a reasonable doubt concerning psychiatric predictions of his mental affliction.[51] This possibility is substantially reduced by adopting the preponderance standard for nonconsensual civil commitments.

2. *Beyond a Reasonable Doubt Standard*

In choosing the beyond a reasonable doubt standard, courts and legislatures are turning toward the imposition of *criminal* due process safeguards in civil commitment proceedings. This choice is based on the potentially adverse consequences to the individual, regardless of the state's beneficent purposes.[52] Rejecting such beneficence as a rationale for a less stringent standard of proof, proponents of the criminal standard cite Justice Brandeis' oft-quoted distrust of government motives: "[E]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."[53]

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[48] "[I]t is not, nor can it be, claimed that the title 'hospital,' given to our regular mental institutions, is a mere euphemism for penal or correctional institutions." Fhagen v. Miller, 65 Misc. 2d 163, 173, 317 N.Y.S.2d 128, 138 (1970). *See* People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 260, 217 N.E.2d 636, 637, 270 N.Y.S.2d 573, 575 (1966) (Bergan, J., dissenting).

[49] Share, *supra* note 9, at 219-20.

[50] *See generally* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973); Warren v. Harvey, 472 F. Supp. 1061 (D. Conn. 1979).

[51] *See* Warren v. Harvey, 472 F. Supp. 1061, 1072 (D. Conn. 1979).

[52] *See* Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U.L. REV. 227, 252 (1974) [hereinafter cited as Greenberg].

[53] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The dispositive characterization of commitment as a civil proceeding is discarded along with the state's beneficent motive. Espousing the analysis developed by the United States Supreme Court in *Specht v. Patterson*,[54] *In re Gault*,[55] *In re Winship*,[56] and *In re Ballay*[57] a growing number of courts have focused not upon the nature of the inquiry, but upon the nature of the deprivation which the injury might engender.[58]

In re Winship, which involved the standard of proof required in a juvenile proceeding, held that the individual's interest in personal liberty and freedom from stigma are significant enough when matched against the state's interest to bring into play the full panoply of due process protections normally applicable to criminal proceedings.[59]

> [C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[60]

The *Winship* Court, after strongly rejecting the argument "that there is, in any event, only a 'tenuous difference' between the reasonable doubt and preponderance standards,"[61] concluded that proof beyond a reasonable doubt was required by due process to balance the interests of an alleged juvenile delinquent against the state's police power interests.[62]

Seeing similar liberty interests involved, many courts followed the *Winship* lead and required the reasonable doubt standard in nonconsensual civil commitment proceedings.[63] The court in *Lessard v. Schmidt*[64] was the first to do so and

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[54] 386 U.S. 605 (1967). In *Specht*, the Court said: "[C]ommitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 608.

[55] 387 U.S. 1 (1967).

[56] 397 U.S. 358 (1970).

[57] 482 F.2d 648 (D.C. Cir. 1973).

[58] *In re* Gault, 387 U.S. at 1 (1967); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

[59] 397 U.S. at 365-68.

[60] *Id.* at 365-66 (quoting *In re* Gault, 387 U.S. 1, 36 (1967)).

[61] *Id.* at 367.

[62] Justice Harlan, concurring in *Winship*, suggested a different analysis to reach the same result:

> The standard of proof influences the relative frequency of these two types of erroneous outcomes [convicting the innocent and acquitting the guilty] . . . . Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied should, in a rational world, reflect an assessment of the comparative social disutility of each.

Id. at 371 (Harlan, J., concurring).

[63] *See, e.g., In re* Ballay, 482 F.2d 638 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F. Supp.

explicitly base its decision on Supreme Court precedent. After comparing the loss of freedom and stigma possible in juvenile delinquency hearings to commitment proceedings, and finding the consequences to the individual equally grievous, the *Lessard* court required "the state [to] prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous."[65]

In re Ballay[66] followed *Lessard* by a year and remains one of the most comprehensive opinions to adopt the beyond a reasonable doubt standard in nonconsensual civil commitment proceedings. The court in *Ballay* utilized the *Morrissey* balancing test to determine the process that was due Ballay, an alleged mental incompetent, when the state sought to have him committed.[67] Both the state's *parens patriae* and police power interests were scrutinized by the court; neither was found to warrant a lesser standard of proof than demanded by due process in juvenile and criminal proceedings where the personal liberty interests involved were of "equivalent proportions" to those in civil commitments.[68]

Comparisons to criminal incarceration led the court to conclude that confinement through the state's police power was certainly no more warranted in civil commitment proceedings than in criminal actions.[69] As for *parens patriae* commitments, the court was unconvinced as to the beneficial effects of involuntary hospitalization.[70] Therefore, proof beyond a reasonable doubt was required as to the issues of mental illness and dangerousness before Ballay could be involuntarily committed.

This strong judicial trend toward maximum procedural safeguards has yet another basis in addition to discarding the state's beneficent motives and commitment's civil label, and analogizing the public and personal interests in civil commitment to those same interests in criminal and juvenile actions. A distrustful view of the benefits of in-patient mental health care, combined with a disdain for psychiatric expertise is often cited as a primary reason for the imposi-

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1113 (D. Hawaii 1976); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271, 372 N.E.2d 242 (1978); State v. O'Neill, 274 Or. 59, 545 P.2d 97 (1976).

[64] 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974).

[65] *Id.* at 1095.

[66] 482 F.2d 648 (D.C. Cir. 1973).

[67] *Id.* at 655-56.

[68] "As we have highlighted throughout, the loss of liberty—the interest of 'transcending value'—is obviously as great for those civilly committed as for the criminal or juvenile delinquent." *Id.* at 668 (citation omitted).

[69] The Court looked to the goals sought to be accomplished by the criminal system—deterrence, rehabilitation, retribution, and societal protection—and found they did not apply equally with those of police power commitments. *Id.* at 657.

[70] *Id.* at 667.

tion of the beyond a reasonable doubt standard.[71]

Expert psychiatric testimony is routinely relied upon to provide the requisite evidence as to a subject's alleged mental illness and proclivity toward dangerousness. The inaccuracy of psychiatric predictions,[72] however, is frequently pointed to by those who advocate the reasonable doubt standard. They argue that the most stringent standard is the only logical way to counter such uncertain evidence: "[I]f the disparate opinions of psychiatrists and the vagaries of proof and prediction suggest anything, it is the desirability of the utmost care in reaching the commitment decision."[73]

3. *Clear and Convincing Standard*

It has been noted that the required standard of proof in civil litigation is generally a preponderance of the evidence.[74] For certain issues, however, civil courts have required a greater degree of proof—clear and convincing evidence.[75] Beyond stating that it falls between the preponderance and reasonable doubt standards, defining the clear and convincing standard has proved disconcerting at best. A number of courts and commentators have tried to formulate a workable definition.[76] The results range from suggesting that the clear and convincing standard is met when "the fact-finder's mind is left with an abiding conviction that the evidence is true,"[77] to when the disutility of finding against one party outweighs the disutility to finding for the other.[78] Despite the lack of precision, it is generally agreed that the clear and convincing standard assures greater cer-

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[71] *See* People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Shuman, *The Road to Bedlam: Evidentiary Guideposts in Civil Commitment Proceedings*, 55 NOTRE DAME LAW. 53 (1979); Miller, Lower & Bleechmore, *The Clinical Psychologist As An Expert Witness on Questions of Mental Illness and Competency*, 4 L. & PSYCH. REV. 115 (1978) [hereinafter cited as Miller, Lower & Bleechmore]; Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L. & CRIMINOLOGY 226 (1978); 1 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Roth, Dayley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA L. REV. 400 (1973).

[72] *Supra* note 71.

[73] United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

[74] *Supra* notes 46 & 47.

[75] *See* WIGMORE *supra* note 46, § 2498; MCCORMICK *supra* note 46, § 340.

[76] For a cogent examination of the various approaches taken, *see* Share, *supra* note 9, at 237-39 (1977).

[77] State v. Valdez, 88 N.M. 338, 343, 540 P.2d 818, 823 (1975) (quoting *In re* Sedillo, 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972)).

[78] Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1072 (1968).

tainty since the factfinder is not merely asked to weigh the evidence and decide which is more probable than not, but to actually believe in the verity of the asserted proposition from the evidence presented.

Courts which have applied the clear and convincing standard to nonconsensual civil commitments have relied upon *Woodby v. Immigration & Naturalization Service* which raised a question as to the burden of proof the government must sustain in deportation proceedings.[79] In *Woodby*, the Supreme Court held that the proof by clear and convincing evidence met due process requirements for proceedings that have a substantial effect on personal liberty. Acknowledging that the deportation proceedings involved in *Woodby* differed from criminal prosecutions, the Court nevertheless recognized the potentially "drastic deprivations" of liberty involved: "[T]his Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."[80] The Court found the clear and convincing standard appropriate in two respects: it was stringent enough to protect the important liberty interests involved, yet flexible enough to respond to the particular circumstances of a given case.

This two-fold aspect is seen as a logical middle ground by some courts. They acknowledge that the individual's interest in personal liberty would receive inadequate protection under the preponderance standard, yet find the criminal analogy inappropriate because of the belief that commitments actually do benefit the individual.[81] Rather than follow the *Ballay* approach and analogize the state and individual interests involved in civil commitments to those involved in criminal and juvenile cases, these courts balance the state's interest in the commitment proceeding against those of the individual.[82]

Because of a less cynical attitude toward the ability of mental health care to benefit patients, courts adopting the clear and convincing standard seek to make the state's legitimate objectives of protecting the public and caring for its mentally ill attainable. In *Lynch v. Baxley*,[83] the court voiced the concern that the reasonable doubt standard was practically unattainable in that eliminating *all* reasonable doubts was not feasible due to the nature of commitment proceedings. This is especially true concerning the psychiatric evaluation of mental illness and dangerousness:

> At this level of medical knowledge there may be many urgent cases in which it is

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[79] 385 U.S. 276 (1966).

[80] *Id.* at 285.

[81] *See* concurring and dissenting opinion of Justice Clark in Estate of Roulet, 23 Cal. 3d 219, 238, 590 P.2d 1, 13, 152 Cal. Rptr. 425, 437 (1979).

[82] *See* People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

[83] 386 F. Supp. 378, 393 (M.D. Ala. 1974).

> impossible to exclude every reasonable doubt, and it appears that the likelihood of harm to individuals and society because of a standard of proof which makes commitment almost impossible greatly outweighs the likelihood of harm to the individual attributable to a less restrictive standard.[84]

Thus, the clear and convincing standard is seen by some to have the flexibility to safeguard adequately the individual's interests while allowing the state to perform its responsibilities. The standard is applied out of a concern for the welfare of both the individual and the general public, and is particularly adapted to the sensitive and delicate nature of commitment proceedings.

ADDINGTON V. TEXAS

By 1979, the application of such divergent standards of proof to nonconsensual civil commitment proceedings throughout the nation set the stage for the United States Supreme Court to decide the standard required by due process. *Addington v. Texas*[85] presented the Court with this opportunity.

1. Background

The appellant, Frank Addington, had a history of mental disorder. He had been temporarily committed to various Texas state mental hospitals on seven occasions between 1969 and 1975.[86] Addington's mother filed a petition for indefinite commitment after he was arrested for "assault by threat" against her on December 18, 1975. Pursuant to his arrest, Addington was interviewed by the county psychiatric examiner who diagnosed Addington as mentally ill and in need of hospitalization. Addington retained counsel to contest the state's right to have him committed.[87]

The state's evidence at trial supported both its police power and *parens patriae* interests. The state contended that Addington, who was diagnosed by experts as suffering from psychotic schizophrenia with paranoid tendencies, was not only dangerous to those around him, but also to himself. For his defense, Addington, while conceding that he suffered from mental illness, attempted to show that "there was no substantial basis for concluding that he was probably dangerous to himself or others."[88]

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[84] State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 126-27 (W. Va. 1974).

[85] 441 U.S. 418 (1979).

[86] Appellant Addington had also been committed for indefinite periods to Austin State Hospital on three different occasions. *Id.* at 420.

[87] *Id.*

[88] *Id.* at 421.

Using the "clear, unequivocal, and convincing" standard of proof, the jury found Addington to be mentally ill and in need of hospitalization for his own and others' welfare. Addington appealed the order to have him committed, arguing that "the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that required for criminal convictions, *i.e.*, beyond a reasonable doubt, violated his procedural due process rights."[89] Agreeing, the Texas Court of Civil Appeals reversed the trial court's decision.[90]

Relying primarily on the previous decision in *State v. Turner*,[91] the Texas Supreme Court reversed the court of civil appeals and reinstated the trial court's judgment.[92] The Texas Supreme Court ruled that because *Turner* held that a preponderance of the evidence standard of proof satisfied due process in civil commitment proceedings, the trial court's use of a higher standard than that required by law in Addington's case constituted harmless error. The United States Supreme Court granted certiorari to determine the standard of proof required by the fourteenth amendment in the involuntary commitment of an individual to a state mental hospital for an indefinite period of time.

2. *Analysis*

The United States Supreme Court reaffirmed its earlier position in *Winship* that the "function of a standard of proof, as . . . embodied in the Due Process Clause . . ., is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' "[93] Because "adopting a 'standard of proof is more than an empty semantic exercise,' "[94] the Court examined the three levels of proof generally used in adjudicative hearings to determine which should govern civil commitment proceedings.

The Court rejected proof by a preponderance of the evidence for failing to meet due process requirements.[95] Balancing the state's police power and *parens patriae* interests against the individual's interests, the Court concluded that the

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[89] *Id.* at 421-22.

[90] Addington v. State, 546 S.W.2d 105 (Tex. Civ. App. 1977).

[91] 556 S.W.2d 563 (Tex. 1977), *cert. denied*, 435 U.S. 929 (1978).

[92] State v. Addington, 557 S.W.2d 511 (Tex. 1977).

[93] Addington v. Texas, 441 U.S. at 423 (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

[94] *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

[95] The Court noted that only two states allow involuntary civil commitment based on a preponderance of the evidence: Mississippi by statute (MISS. CODE ANN. § 41-21-75 (Supp. 1978)), and Texas by judicial interpretation. *Id.* at 426.

individual should not have to share the risk of error equally with society. "[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[96]

Turning to the beyond a reasonable doubt standard, the Court also rejected Addington's argument that its opinion in *Winship*, requiring proof beyond a reasonable doubt in juvenile delinquency hearings, applied with equal force to civil commitment proceedings. The Court distinguished *Winship* on four grounds. First, in contradistinction to criminal prosecutions, confinement is not exercised in a punitive sense.[97] "Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution."[98] Second, the Court hesitated to apply to noncriminal cases a standard historically reserved, although not "prescribed or defined in the Constitution,"[99] for criminal cases. Next, the Court noted that "[t]he heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free."[100] But this ideology, the Court believed, did not apply with full force to civil commitments. Agreeing that erroneous *commitments* were undesirable, the Court stressed that such errors could be more easily rectified than erroneous *convictions*. The Court's rationale was that "the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[101] Further, the Court was persuaded that releasing someone with a mental illness is worse for the individual released than the failure to convict the guilty is for the guilty person. "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma."[102] Finally, and most importantly, the Court pointed out that the nature of the inquiry in a commitment proceeding is different from a criminal prosecution. Instead of resolving "a straight-forward factual question—did the accused commit the act alleged?"[103] as in criminal hearings, the commitment process must determine conditions of mental illness and dangerousness that turn "on the *meaning* of the facts which must be interpreted by expert psychiatrists

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[96] 441 U.S. at 427.

[97] The Court pointed out that the state's purpose is to provide care and treatment. A confined individual is entitled to (i) treatment; (ii) periodic review of his mental condition; and (iii) release when he no longer presents a danger to himself or others. 441 U.S. at 428 n.4.

[98] *Id.* at 428.

[99] *Id.*

[100] *Id.* (citation omitted).

[101] *Id.* at 428-29.

[102] *Id.* at 429.

[103] *Id.*

and psychologists."[104] Given the subjective analysis involved in psychiatric diagnosis, the Court doubted "whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."[105] Therefore, "the state [should not] be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments."[106]

Having concluded that the preponderance standard was constitutionally deficient and the beyond a reasonable doubt standard was improper given the nature of the commitment proceeding, the Court chose the clear and convincing standard. The Court took notice of the fact that a clear majority of the courts and legislatures acting on this issue[107] had selected some form of the clear and convincing standard. The *Woodby* standard of "clear, unequivocal, and convincing" evidence, however, was held not to be constitutionally required. The term "unequivocal . . . admits of no doubt,"[108] the Court stated. Such a standard was acceptable in *Woodby* where the issues surrounding the deportation hearing were factual and susceptible to objective proof. Commitment proceedings, however, involve the subjective analysis of psychiatric diagnosis. Thus, the standard of proof required by due process for involuntary civil commitments is clear and convincing evidence. Such a burden, the Court stated, "strikes a fair balance between the rights of the individual and the legitimate concerns of the state."[109]

HAWAII NONCONSENSUAL CIVIL COMMITMENT LAW

At the time of the United States Supreme Court's unanimous decision in *Addington*[110], Hawaii law required proof beyond a reasonable doubt to commit a person to a state mental hospital against his will.[111] However, Hawaii's adoption of this standard occurred well before *Addington*. In his 1976 *Suzuki* opinion, Judge King expressed the belief that due process demanded the highest standard available—proof beyond a reasonable doubt.[112] *Addington* demonstrated that this was not necessarily true; at least under Texas' then existing

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[104] *Id.* (original emphasis).

[105] *Id.*

[106] *Id.* at 430.

[107] 441 U.S. at 431 n.6.

[108] *Id.* at 432.

[109] *Id.* at 431.

[110] 441 U.S. 418 (1979). Chief Justice Burger's opinion was joined by all the other justices except Justice Powell who took no part in the consideration or decision of the case.

[111] HAWAII REV. STAT. § 334-60(b)(4)(I) (1976).

[112] *Supra* note 7.

commitment statute[113] the stringent, yet less restrictive, clear and convincing standard satisfied due process concerns.

Had the Supreme Court scrutinized Hawaii's commitment statute, rather than Texas', the result would have been the same. Even a cursory comparison of the then existing statutes regulating nonconsensual civil commitment in Hawaii and Texas reveals Hawaii's more careful safeguarding of individual liberty interests. In Hawaii, for example, the subject of a petition for commitment had the right to have the petition heard no later than ten days after it was filed;[114] a subject in Texas faced a thirty-day waiting period.[115] The commitment period in Hawaii could not exceed ninety days[116] unless the court made a subsequent determination that the criteria for commitment continued to exist;[117] Texas allowed indefinite hospitalization.[118] A person recommitted against his will in Hawaii could have petitioned as a *matter of right*, for a judicial reexamination of his condition every six months;[119] a person in Texas would have had to wait a year to two years for the same right.[120]

Clearly, the adoption of a clear and convincing standard into Hawaii's then existing civil commitment statute would have passed constitutional muster. However, because the existing standard of proof was more stringent than due process required, there was not the same sense of urgency to amend it as there would have been had a constitutionally deficient standard (e.g., preponderance of the evidence) been statutorily required. Moreover, the Supreme Court's opinion in *Addington* made it clear that our federal system allows the states freedom "to develop a variety of solutions to problems and not be forced into a common, uniform mold."[121] Since "a state does not violate the Due Process Clause by providing alternatives or additional procedures beyond what the Constitution requires,"[122] states have the flexibility to adopt a more stringent standard of proof in nonconsensual civil commitment proceedings. For Hawaii, this meant additional time for further inquiry and reflection as to the wisdom of amending the standard of proof to bring it in line with *Addington*.

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[113] TEX. REV. CIV. STAT. ANN. Art. 5547-43 (Vernon 1958).

[114] HAWAII REV. STAT. § 334-60(b)(4)(B) (1976).

[115] TEX. REV. CIV. STAT. ANN. Art. 5547-43 (Vernon 1958).

[116] HAWAII REV. STAT. § 334-60(b)(5) (1976).

[117] *Id.* Even upon such a determination by the court, the recommitment period cannot exceed ninety days.

[118] TEX. REV. CIV. STAT. ANN. Art. 5547-40 (Vernon 1958).

[119] HAWAII REV. STAT. § 334-85 (1976).

[120] TEX. REV. CIV. STAT. ANN. Art. 5547-82(g) (Vernon 1958).

[121] *Id.*

[122] Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 853 (1977).

THE LEGISLATIVE RESPONSE

In 1983, a bill[123] was introduced in the Hawaii Senate, a portion of which reduced the standard of proof from "beyond a reasonable doubt" to "upon clear and convincing evidence." This reduction in the standard would have applied to all three of the then existing criteria for nonconsensual civil commitments:

1. That the person is mentally ill or suffering from substance abuse, and[124]
2. That he is dangerous to himself or others or to property, and[125]
3. That he is in need of care and/or treatment, and there is no suitable alternative available through existing facilities and programs which would be less restrictive than hospitalization.[126]

A joint House and Senate committee, however, amended the bill so that the second and third criteria required proof upon clear and convincing evidence while the first criterion continued to require proof beyond a reasonable doubt. According to the joint committee, the rationale for dual standards was that "requiring 'clear and convincing evidence' as to the issues of dangerousness and the need for care will provide a more realistic and practical standard of proof, adequate protection for subjects of the proceedings, and an opportunity for treatment that had been foreclosed to them. However, . . . evidence showing mental illness and substance abuse 'beyond a reasonable doubt' can be generally provided to the court."[127]

It is unclear upon what basis the joint committee relied in concluding that the diagnostic function (i.e., the determination that the subject is mentally ill) is generally capable of proof beyond a reasonable doubt. Stated another way, it is unclear why the joint committee recognized the need for a "realistic and practical standard of proof" (clear and convincing evidence) as to the predictive function (i.e., the determination that the subject is dangerous) but failed to recognize a similar need as to the diagnostic function.

Unfortunately, available records of legislative testimony are not only few in number and general in nature, but they also present few specific facts which would clarify the joint committee's conclusions. The original bill which proposed the reduction in the standard as to all three criteria was supported by the

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[123] Senate Bill No. 631, S.D. 1, H.D. 1.

[124] HAWAII REV. STAT. § 334-60(b)(1)(A) (1976).

[125] HAWAII REV. STAT. § 334-60(b)(1)(B) (1976).

[126] HAWAII REV. STAT. § 334-60(b)(1)(C) (1976).

[127] Conf. Comm. Report No. 38, April 19, 1983, S.C.C. Rep. No. 38, 12th Leg., 1st Sess., *reprinted in* 1983 Senate Journal 1017-18.

State Department of Health[128] and the Family Court of the First Circuit.[129] The Department of Health and the family court believed that the adoption of the clear and convincing standard would allow certain people to receive needed care and treatment which was otherwise foreclosed to them under the beyond a reasonable doubt standard.[130]

The American Civil Liberties Union (hereinafter ACLU) took the position that involuntary commitment could be justified only pursuant to the highest standard of proof, and therefore opposed any such reduction.[131] The ACLU later softened this position when it stated it could see the need to lower the standard, but only as to proving dangerousness to self or others in the future.[132]

Given the positions taken and the inadequate explanations provided by available testimony as to the factual basis for those positions, perhaps it is not unfair to suggest that, like many legislative decisions, the joint committee's rationale for dual standards was born of political compromise. Nobody would leave the legislature empty-handed: the Department of Health and the family court would have the clear and convincing standard as to the issues of dangerousness and the need for care, while the ACLU would retain the beyond a reasonable doubt standard as to the issue of mental illness. And so it was: the joint committee's amended bill became Act 173.[133]

Practically speaking, however, such a compromise accomplished very little. The issue of mental illness, like the issue of dangerousness, is extremely subjective in nature. The failure of the legislature to realize this, and to provide for it, leaves a situation similar to that existing under the prior statute, except that now, a person may be found by clear and convincing evidence to be dangerous to himself or others and in need of care or treatment before being denied such care or treatment because of reasonable doubts as to his mental condition.

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[128] Pursuant to HAWAII REV. STAT. § 334-31 (1983), the Department of Health is responsible for administering a state hospital suitable for the care, custody, diagnosis, treatment and rehabilitation of mentally ill persons.

[129] The family courts have exclusive original jurisdiction to hear involuntary commitment proceedings under HAWAII REV. STAT. §§571-11(7) (children), 571-14(5) (adults).

[130] *Relating to Mental Health, 1983; Hearing on S.B. No. 1282 Before the Sen. Comm. on Health, 12th Leg., 1st Sess. (1983)* (statement of John Chalmers, M.D.); *Relating to Mental Health, 1983; Hearing on S.B. No. 1282 Before the Sen. Comm. on Health, 12th Leg., 1st Sess. (1983)* (statement of Betty M. Vitousek, Senior Judge, Family Court of the State of Hawaii); *Mental Commitment Law Change Urged*, The Honolulu Advertiser, Mar. 8, 1983, at A-8, col. 1.

[131] *Relating to Mental Health and to the Commitment of the Gravely Disabled, 1983; Hearing on S.B. No. 1282 and H.B. 1576 Before the Sen. Comm. on Health and the House of Rep. Comm. on Health, 12th Leg., 1st Sess. (1983)* (statement of David A. Johnson, on behalf of the American Civil Liberties Union).

[132] *Mental Commitment Law Change Urged*, The Honolulu Advertiser, Mar. 8, 1983, at A-8, col. 1.

[133] Act 173 (1983 Hawaii Sess. Laws).

Although one would naturally expect the factfinder to be less certain about subjective determinations than purely objective ones, there is more involved than merely recognizing the subjective nature of the diagnostic and predictive functions. There must be an understanding of, and an attempt to deal with, the criticism leveled at the use of physicians, psychiatrists and psychologists to assess the mental condition of the subject as well as the likelihood that he is, or will be, imminently[134] dangerous. This criticism ranges from the observations in *Ballay*, that the disciplines of psychiatry and psychology are far from satisfactory despite their recent advances in the diagnostic and predictive fields,[135] to the more caustic appraisal in *People v. Burnick*[136] that "[s]urely we have not gone so far toward 1984 and Orwell's bleak prospect of 'government by experts' that in a proceeding in which human liberty is at stake the function of our juries is reduced to 'confirming' the *guesses* of doctors hired by the State."[137]

The ability or inability to diagnose mental illness and predict dangerousness, however, should not be cast into the black and white of Mánichaeism. Such testimony at a commitment hearing should not be accepted unquestioningly as emanating from "experts," nor should it be cast aside as a mere "guess." Commitment law necessarily involves assessments of mental illness and dangerousness; it should therefore seek to benefit from the contributions psychiatry and psychology can make, to realistically evaluate their strengths and compensate for their weaknesses.[138]

It is not realistic or logical, though, to compensate for the uncertainties inherent in diagnosis and prediction by requiring mental illness or dangerousness to be proved beyond a reasonable doubt. Even the *Ballay* court, which chose the beyond a reasonable doubt standard prior to the *Addington* decision, observed that "'the devil himself knoweth not the mind of men' . . . . Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field."[139]

> Moreover, while we may frequently be fairly confident about predicting someone's future on the basis of past behavior or a general fund of knowledge about how most people behave in common situations, the incompleteness of our information about a given individual, the possibility of unforeseen external contingen-

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[134] Act 173 (1983 Hawaii Sess. Laws) also amended HAWAII REV. STAT. § 334-60(b)(1)(B) to require that dangerousness to self or others be imminent.

[135] 482 F.2d at 665.

[136] 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 473 (1975).

[137] *Id.* at 323.

[138] *See Note, In re Ballay*, 42 U. CIN. L. REV. 751, 758 (1973).

[139] 482 F.2d at 664 (quoting Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter and Black, JJ., dissenting)).

> cies intervening and the limitations in our understanding of psychodynamics necessarily raise reasonable doubts about the accuracy attainable in predicting future human behavior.[140]

Even under the best circumstances, then, the very nature of the inquiry makes the beyond a reasonable doubt standard virtually impossible to meet.

Because reasonable doubts inhere in both the diagnosis and prediction of human behavior, the logical solution is a stringent yet less restrictive standard that, when combined with the statute's other substantive and procedural safeguards, protects the individual's liberty against erroneous commitment while allowing the state to achieve its care and protection goals.

A clear and convincing standard as to the issue of mental illness, when combined with the substantive and procedural safeguards already built into Hawaii's present statutory scheme, would go a long way toward protecting the individual's liberty interests in nonconsensual civil commitment proceedings. Rigorous requirements, coupled with counsel's effective legal assistance to assure they are not circumvented, serve to reduce sharply any possibility of erroneous commitments.

The comprehensive statutory notice provisions inform the subject's attorney of the witnesses, particularly the examining physician, and the testimony his client will face at the hearing. The subject's right to cross-examine such witnesses and to present evidence offer opportunity to identify real and potential errors. First of all, counsel can examine whether the mental health professionals who testify as "experts" really do have expertise in the area of their testimony. A physician who is not a psychiatrist, for example, or even a psychiatrist who has not received significant training in the area of abnormal behavior, has neither the training nor expertise to qualify as an "expert" on mental illness.

> Characterizing the psychiatrist as an expert on psychopathology is as misleading as characterizing all medical doctors as being experts in this area. While almost all psychology departments require doctoral students to have at least two or three courses offering exposure to personality theory and abnormal behavior, only the clinical psychologist is requied [*sic*] to attain expertise in these areas.[141]

Once the proper person has been qualified as an expert, counsel should focus upon that person's testimony. The recitation of statutory "buzz words" or unexplained psychiatric jargon should not pass unchallenged. Forcing the expert to translate his conclusions into intelligible and meaningful explanations will assist the factfinder and prevent "canned" testimony. Of course, counsel should also point out the uncertainties inherent in diagnosing mental illness and predicting

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[140] Greenberg, *supra* note 52, at 266 (citations omitted).

[141] Miller, Lower & Bleechmore, *supra* note 71, at 123.

dangerousness, as well as any evidence which relates to the specific expert's ability to make these determinations, such as a past record of poor predictions.

The statute again serves to prevent errors and to aid in specificity by requiring not only dangerousness in addition to mental illness, but also that the danger be *imminent*.[142] Overpredictions of dangerousness by mental health professionals are severely curtailed by such a behavioral indicator. Full use of the other statutory provisions by the subject's counsel, such as obtaining an independent medical evaluation for his client and a thorough exploration of less restrictive alternatives, will further reduce the possibility of erroneously committing an individual against his will.

Once counsel has exhausted the defense possibilities available under the statute, the factfinder would then determine whether all three criteria for involuntary commitment have been established by clear and convincing evidence. This standard, while not as high as proof beyond a reasonable doubt, still serves as a redoubtable barrier to erroneous commitments. As with the reasonable doubt standard, the factfinder must assess the evidence in terms of his belief in the *validity* of the propositions asserted. The state's own evidence must overcome the statutory presumption of sanity and, when weighed against the subject's evidence, establish *clearly* and *convincingly* that the subject is (1) mentally ill, *and* (2) imminently dangerous to himself or others *and* (3) in need of care or treatment, or both, that cannot be provided through existing facilities or programs that would be less restrictive than hospitalization.[143] If the factfinder is clearly convinced that this burden has been met, hospitalization not to exceed ninety days[144] will be ordered with rights of appeal[145] and periodic reexamination becoming operative.

CONCLUSION

The nonconsensual civil commitment of an individual involves complex issues. Among these is the standard of proof necessary not only to safeguard the fourteenth amendment's guarantee of liberty, but also to allow the state a realistic opportunity to achieve its *parens patriae* and police power objectives. It must be remembered, though, that practical considerations in a given type of proceeding often limit the degree of certainty possible, resulting in a compromise "between what is possible to prove and what protects the rights of the individual."[146] This was noted by the Court in *Addington* which pointed out that the

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[142] *Supra* note 134.

[143] HAWAII REV. STAT. § 334-60(b)(1) (1983).

[144] HAWAII REV. STAT. § 334-60(b)(5) (1983).

[145] HAWAII REV. STAT. § 334-81 (1983).

[146] HAWAII REV. STAT. § 334-60(b)(5) (1983).

reasonable doubt standard was a good example of "practical considerations . . . limit[ing] a constitutionally based burden of proof. . . . If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond *all* doubt."[147] Due process, though, does not demand that the possibility of an erroneous conviction be eliminated.[148] In nonconsensual civil commitment, then, commitment should be authorized only upon proof of "evidence having the highest degree of certainty *reasonably attainable in view of the matter at issue.*"[149]

We have seen that, given the nature of the inquiry, this standard is proof upon clear and convincing evidence. It is demanding yet flexible enough to account for the uncertainties inherent in determining issues of mental illness and dangerousness and, when combined with the comprehensive substantive and procedural safeguards embodied in Hawaii's commitment statute, provides the needed balance between individual and state interests. By adopting the clear and convincing standard as to two of the three commitment criteria, the Hawaii Legislature has moved in the right direction. However, as long as the issue of mental illness remains subject to proof beyond a reasonable doubt, the effectiveness of this move is severely undermined.

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[147] 441 U.S. at 430.

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

[149] Patterson v. New York, 432 U.S. 197, 208 (1977).

[150] Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974)(emphasis added).

The Federal Rights of Hansen's Disease (Leprosy) Patients at Kalaupapa

by Joshua R. Floum*

INTRODUCTION

Hansen's disease[1] patients rarely have turned to the courts to redress their grievances, perhaps because of the isolation and castigation traditionally inflicted upon them. Changes in social attitudes and intelligent legislation have removed most of their reluctance to pursue legal remedies to perceived injustices. The federal Rehabilitation Act of 1973[2] may provide for Hansen's disease patients an avenue of relief from discriminatory employment practices at the Kalaupapa settlement.

Kalaupapa is an isolated peninsula on the island of Molokai in Hawaii. It is bounded by the Pacific Ocean on three sides and steep cliffs on the fourth. It is accessible only by narrow mule path, sea or air. Although a place of striking beauty, it has been for many over the past century a place of last refuge and ultimate despair. It has also been a place of hope. For those who came to Kalaupapa to work and to heal, and for others who have struggled to better the life there, it has symbolized the possibility of human and humane cooperation under the most trying and fearful circumstances.

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* J.D., Harvard Law School (1983); A.B., University of California at Berkeley (1980). The author wishes to thank Elizabeth Bartholet, Mari Matsuda, Sidney Wolinsky, Bernard Punikaia, Norbert Palea, Sam Mamala, Castle Kalaukoa, Mary Kailiwai and George Kahoonei for all that they are working to achieve. Mr. Floum assisted counsel for the patient-employees in preparing for litigation in Palea v. Clarke, No. 83-0387 (D. Hawaii filed Apr. 8, 1983).

[1] Hansen's disease, more commonly referred to as leprosy, is a chronic disease caused by infection with an acid-fast bacillus (Mycobacterium Leprae). It is characterized by the formation of nodules on the surface of the body and especially on the face or by the appearance of tuberculoid macules on the skin and loss of sensation. These symptoms are followed sooner or later in both types by involvement of nerves with eventual paralysis, wasting of muscle, deformation and death. Dr. Armauer Hansen of Christiana, Norway, first isolated the leprosy bacillus in 1871, and fully reported it in 1874. *See generally*, WORLD HEALTH ORGANIZATION, SCIENTIFIC MEETING ON REHABILITATION IN LEPROSY (1960) (meeting held in Viellore, India).

[2] 29 U.S.C. ch. 16 (1976 & Supp. V 1981).

Although the number of Hansen's disease cases directly attributable to contagious contact are relatively few, they are celebrated.[3] Because of widespread fear of contagion, and because of the particularly gruesome effects of the disease, those afflicted by it traditionally have been shunned by society,[4] and isolation has been the preferred medical recourse.[5] Although it is not known for certain when the first unfortunate was involuntarily brought to Kalaupapa, ships carried Hansen's disease victims to the lowlands under the great windward cliff of Molokai as early as 1850.[6]

For the next one hundred and nineteen years, Hansen's disease victims were brought from all parts of the Pacific to Kalaupapa and isolated from society. Then, in 1969, sulfur-based remedies[7] were developed. Treatments with these remedies arrest the tissue damage caused by the disease within a short time and render the patient non-contagious. Although involuntary confinement of Kalaupapa ended in 1969, many of the residents at the Hansen's disease settlement chose to remain. They stayed for a number of reasons. For some, family contacts were severed when they were sent to Kalaupapa and surrogate ties were developed within the settlement. For others of advanced age, Kalaupapa is the

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[3] Most have heard, for example, of the fate of Father Damien, Joseph de Veuster, who came to Kalaupapa in 1873. He cared for the sick and dying of Molokai for over eighteen years, until he contracted the disease and died in 1889. *See* C. STODDARD, THE LEPERS OF MOLOKAI (no date on book); FARROW, DAMIEN THE LEPER (1937).

[4] The Mosaic Law was explicit in regard to the treatment of those afflicted with leprosy: they were to be set apart, without the gates, and to walk alone, crying: "Unclean! unclean!" Their garments were to be burned, their houses cleansed, and all direct communication between the clean and the unclean was expressly prohibited.

C. STODDARD, *supra* note 3, at 25-26. Similarly, the Bible warns:

> And the leper in whom the plague is, his clothes shall be rent, and the hair of his head shall go loose, and he shall cover his upper lip, and shall cry unclean, unclean. All the days wherein the plague is in him he shall be unclean; he is unclean; he shall dwell alone; without the camp shall his dwelling be.

Leviticus 13:45.

[5] "[S]egregation was considered the only hope for the Hawaiian race. A suitable place was sought to which the lepers might be removed, where they might be tenderly cared for and jealously guarded; and there they were to end their miserable days." C. STODDARD, *supra* note 3, at 26.

[6] *Id.*

[7] Since approximately 1941, scientists have experimented with "sulfones" in treating Hansen's disease. Doctors in the United States currently employ double or triple chemotherapy in treating these patients. Dapsone is the most commonly used sulfone. It is effective and inexpensive, but patients frequently develop resistance to the drug after extended use. Doctors also use clofazimine, an effective drug with the unfortunate effect of turning the skin reddish or purple. Finally, rifampin is employed, a powerful and expensive drug that is also used to treat tuberculosis.

Effective treatment will arrest the disease within one to four weeks. Telephone interview with Dr. John Trautman, Director of the U.S. Gov't, Dep't of Health and Human Services, National Hansen's Disease Center, Carville, La. (May 24, 1984).

only place they remember as home. Finally, many stayed to avoid the discrimination and castigation they would face in open society because of their disfigurement.[8]

Although the degradation of forced confinement no longer faces the patients at Kalaupapa, they are currently struggling to overcome the residue of past discrimination. An important area of concern for the patients is employment. Those patients who are able to work are employed by the State of Hawaii Department of Health (hereinafter DOH) at the settlement, in a variety of jobs ranging from librarians, to rubbish-truck laborers, kitchen workers and buildings and groundskeepers. Employed patients often work alongside state civil servants performing similar or identical work.[9] Yet, although the civil servants receive at least the minimum wage and average approximately $6.00 an hour for the work they perform, patient-employees at Kalaupapa have been paid less than $2.00 an hour for comparable work.[10] Moreover, patient employees are

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[8] Palea v. Clarke, No. 83-0387 (D. Hawaii filed Apr. 8, 1983) (complaint).

[9] The Office of Civil Rights (hereinafter OCR) of the Department of Health and Human Services Region IX conducted an on-site investigation at Kalaupapa in 1980. OCR made the following findings:

> [M]any patient employees either (a) work side-by-side with civil service workers performing the same work (e.g., rubbish truck laborers/drivers, swing gang, store clerk), (b) substitute for civil service workers by doing their jobs in their absence (e.g., special clerks at Bay View Home, hospital janitor), (c) perform some of the same duties as civil service employees (e.g., yardmen, ranchman), (d) perform jobs for which, civil service employees would otherwise have to be hired (e.g., kitchen helpers, policemen, librarians), or (e) perform jobs that are virtually identical to civil service class specifications for entry level positions but where there are currently no slots for such positions at Kalaupapa (Groundskeeper I, General Laborer I, Domestic Attendant, Librarian Assistant, and Paramedical Assistant I).

Office of Civil Rights, U.S. Dep't of Health and Human Services, Statement of Findings, OCR Docket No. 09-80-3157 (May 11, 1981) (unpublished report) [hereinafter cited as OCR Findings].

[10] Until very recently, the pay schedules of the patient-employees at Kalaupapa have been calculated as a percentage of the minimum wage. Before amendment in 1983, section 326-21 of the Hawaii Revised Statutes provided in relevant part:

> For service rendered, the compensation of a patient shall be set by the department as a percentage of the minimum wage . . . . The department shall establish a patient pay plan for six grades of work. The pay for grade I employees shall be equal to fifty-three per cent of the minimum wage . . . . The pay for grade VI employee shall be seventy and one-half per cent of the minimum wage . . . . There shall be a spread of three and one-half per cent between each of the grades from one to six. The department of health shall set the pay for any other patient employee not covered under the foregoing six grade pay plan.

HAWAII REV. STAT. § 326-21 (Supp. 1983).

The Hawaii legislature recently amended § 326-21 to provide patient-employees the full state minimum wage. After weeks of debate, additional funds were designated for this purpose. Act 183, 1983 Hawaii Sess. Laws 378.

accorded employment rights and benefits greatly inferior to those accorded the civil servants.[11]

Hansen's disease victims rarely have turned to the courts to redress their grievances. Since 1969, however, when the status of those at Kalaupapa

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[11] After its investigation, OCR made the following finding:

> In addition, to receiving less than the minimum wage and less than civil service employees receive at Kalaupapa for work performed, patient employees are subject to a separate and different employment system from other employees. The differences are summarized as follows:
>
> 1. The patient employee wage scale does not provide for pay increases based on years of service; the civil service wage scales do provide such step increases.
>
> 2. Patient employees are not afforded the same fringe benefits as civil service employees. They are not given sick leave. . . . Civil service employees accrue 14 hours of paid sick leave per month with no limit on accumulation.
>
> 3. If patient employees must work on a holiday or weekend, they receive compensatory time off at a later date. If civil service employees must work on a holiday or weekend, they receive premium pay.
>
> 4. Patient employees may accumulate 240 monthly credits to qualify for a patient pension (one monthly credit is earned after 88 hours of work per month). Civil service employees may retire and receive retirement benefits after 25 years of service. However, any civil service employee who is 55 years of age and has worked at least 5 years is also eligible for retirement. Patient employees, regardless of age, must have worked the equivalent of 10 full-time years.
>
> 5. Patient employees are not afforded the benefit of a State-provided life insurance policy, while civil service employees are entitled to a State-provided $15,000 life insurance policy if they are under age 45 or a $11,250 policy if they are under age 65. Civil service employees also have the option of applying the State premium toward a union policy if they so desire.
>
> 6. Patient employees receive no death benefits; civil service employees' beneficiaries receive at least the equivalent of one year's salary if the employee has served at least one year.
>
> 7. Patient employees are excluded from Social Security while civil service employees are covered.
>
> 8. Patient employees are not covered by Worker's Compensation; civil service employees are covered.
>
> 9. Finally, Chapter 89, H.R.S. and Section 89-6(c), H.R.S., exclude patient employees from collective bargaining. . . . Civil service employees are part of a collective bargaining unit. [In addition,] [p]atient employees do not receive written performance evaluations from their supervisors. Civil service employees receive written evaluations on a regular basis. Performance evaluations enable employees to recognize their strengths and improve in their weak areas. They are the most effective vehicle for affording employees opportunities for promotions. Patient employees are, in effect, denied such opportunities by the Department's failure to provide them with written performance evaluations.
>
> [E]ven though DOH has extensive procedures for communicating the employment process to other applicants, it has failed to inform handicapped patients what their expectations should be with respect to patient preference.

OCR Findings, *supra* note 9.

changed from involuntary detainees to "residents," the patients on Molokai have become more willing to assert what they perceive to be their legal rights.[12] Believing that the vast disparity in employment wages and benefits between patient employees and civil servants at Kalaupapa is unjust, certain residents of the facility have filed a lawsuit in the United States District Court for the District of Hawaii. They allege in part that the employment practices of the DOH contravene federal law.[13]

This article will examine the role of the Rehabilitation Act of 1973,[14] one act designed to have broad remedial effect in this specific problem area. The provisions of the Act, the legal obstacles to applying its provisions to the patient employees at Kalaupapa, and an appropriate judicial remedy will be discussed. Finally, the article will point to the responsibility of both the federal and Hawaii state governments to take swift action to eliminate these last vestiges of societal exclusion.

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[12] For example, Hansen's disease patients have waged an unsuccessful legal battle to reopen the Hale Mohalu leprosarium in the City and County of Honolulu. This facility was established on federal land in the 1940s to enable Kalaupapa residents who needed sophisticated medical care to live near Honolulu hospitals where better equipment and medical care are available. In 1956, the federal government conveyed the land on which Hale Mohalu is situated to the State of Hawaii for use as a leprosarium. Although patients were fully satisfied with the condition of Hale Mohalu, the state decided to shut down the facility in 1978, due to the buildings' allegedly unsafe condition and for economic reasons. Punikaia v. Clark, 720 F.2d 564, 565 (9th Cir. 1983).

The state sought to move the residential and medical support facilities of Hale Mohalu to Leahi Hospital in Honolulu, but many residents did not wish to be so abruptly uprooted. They brought an action in federal court to enjoin the State of Hawaii from closing the facility. *Id.* They claimed that federal and state statutes and regulations, and custom created a property or liberty interest which entitled them to continued medical care and access to residence facilities at Hale Mohalu. *Id.*

Although state statutes provide that patients will not be transferred from one hospital to another without their consent, (Hawaii Public Health Reg. 27-6) the Ninth Circuit affirmed the district court's finding that these "provisions were superseded by HAWAII REV. STAT. section 326-3 which states that '[n]otwithstanding any of the provisions of . . . chapter [326] or of any other chapter relating to [the treatment of Hansen's disease patients],' the Department of Health is authorized to make arrangements for the care and treatment of leprosy patients." *Id.* at 566. The court stated that "although '[t]he state ha[d] statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium . . . [t]aken together, these statutes appear to authorize patient transfers 'at will' and therefore the Hale Mohalu residents would enjoy no more than 'a unilateral expectation' to continued services at that facility." *Id.* (citing Brede v. Director for the Dep't of Health, 616 F.2d 407, 411 (9th Cir. 1980)).

After the closing of Hale Mohalu, many patients there returned to Kalaupapa, the only remaining facility with which they were familiar. *Punikaia* makes federal protection of the rights of those at Kalaupapa even more important.

[13] Palea v. Clarke, No. 83-0387 (D. Hawaii filed Apr. 8, 1983). The complaint also alleges state common law violations. The action is pending.

[14] 29 U.S.C. ch. 16 (1976 & Supp. V 1981).

THE REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973 represents a comprehensive federal response to the needs of the handicapped. With the enactment of the law, Congress announced its goal of complete integration of disabled persons into society. Section 504 of the Rehabilitation Act provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .[15]

Senator Dole of Kansas stated, "[t]he primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society."[16] Senator Cranston of California stressed that the Rehabilitation Act would contain a requirement "that there be no discrimination against qualified handicapped individuals in any program or activity receiving Federal funds."[17] Senator Packwood of Oregon emphasized that the "legislation is not just a game of words—it is literally the difference between dependency and self-sufficiency . . . ."[18]

In the 1978 amendments to the Rehabilitation Act, Congress described factors which a court should consider in determining relief for violations of section 504:

> In fashioning an equitable or affirmative action remedy . . ., a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.[19]

These statutes make it clear that in order for the patient employees at Kalaupapa to prevail in a claim under the Rehabilitation Act, they must demonstrate: (1) that they are "handicapped individuals" within the meaning of the Act; (2) that they are "otherwise qualified;" (3) that the administration of Kalaupapa is "a program or activity receiving federal financial assistance;" and (4) that they are subjected to discrimination solely because of their handicap. In addition, they must be able to convince a court that requiring equal pay and employment benefits is a reasonable remedy considering the cost of neces-

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[15] 29 U.S.C. § 794 (1976 & Supp. V 1981).
[16] 119 Cong. Rec. 24589 (1973).
[17] 119 Cong. Rec. 29628 (1973).
[18] 119 Cong. Rec. 29633 (1973).
[19] 29 U.S.C. § 794a(a)(1) (1976 & Supp. V 1981).

sary accommodations, if any, and available alternatives. Each of these factors will be considered below, as well as other legal obstacles particular to this situation.

A. "Handicapped Individuals"

It can hardly be argued that the patient employees at Kalaupapa are not handicapped within the meaning of the Act. The Act defines a handicap, in part, as a "physical or mental impairment which substantially limits one or more of [a] person's major life activities."[20] Regulations issued by the Secretary of Labor pursuant to the Act and Executive Order supplement this definition.[21] The regulations describe "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[22] The regulations further provide that an individual "who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited."[23] It is obvious that the debilitating effects of Hansen's disease limit many of these major life activities so as to make securing regular employment difficult. To this extent, the patients at Kalaupapa are entitled to the protection of the Act.[24]

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[20] 29 U.S.C. § 706(7)(B) (1976 & Supp. V 1981).

[21] Although regulations promulgated by an agency charged with implementing an Act of Congress are not binding on a court, they are entitled to great weight in interpreting that Act. Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 103 S. Ct. 3221, 3227 (1983); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978).

[22] 45 C.F.R. § 84.3(j)(2)(ii) (1983). The regulations provide that "Life activities" include "communication, ambulation, self-care, socialization, vocational training, [and] employment . . . ." 41 C.F.R. § 60-741.54, Appendix A (1983).

The Hansen's disease patients suffer from physical and often mental impairment as a result of their affliction. The regulations provide that "physical or mental impairment" means:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1983). Hansen's disease in its advanced stages affects all of the above listed body systems.

[23] 41 C.F.R. § 60-741.30 Appendix A (1983).

[24] After its on-site investigation, OCR concluded that the patient-employees at Kalaupapa are handicapped individuals within the meaning of the Act. OCR Findings *supra* note 9. The Hawaii State Legislature also has suggested that it considers the patients at Kalaupapa to be handicapped. It has referred to them as "Hansen's Disease sufferer[s]", and has established special provisions for their care, treatment and employment. HAWAII REV. STAT. ch. 326 (1976 & Supp. 1983).

B. "Otherwise Qualified"

The Rehabilitation Act contains the somewhat peculiar requirement that a successful plaintiff demonstrate that he or she is handicapped to the point of making employment difficult, but not so handicapped as to make employment *unreasonably difficult*. In order to prevail under the Act, the patient employees at Kalaupapa must be careful to show that, although they suffer from a severe handicap, they are capable of overcoming that handicap to be productive workers. Being able to draw this distinction between handicap and complete disability may be the key to obtaining relief under the Act.

Regulations adopted pursuant to the Act define an otherwise "qualified handicapped person" as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."[25] The Hawaii State Legislature, under whose mandate DOH administers the settlement, has explicitly stated that the patient employees at Kalaupapa are qualified workers who perform valuable services. As a preface to a legislative amendment of the state statutes pertaining to Kalaupapa the legislature stated:

> Labor and services *essential to the continued operation and maintenance* of state hospitals, settlements and places for the care and treatment of persons suffering from Hansen's disease, are performed, in large measure, by patients, temporary release patients and discharged patients therefrom, compensation for which, being less than that otherwise required to obtain comparable services of nonpatient employees, results in substantial savings to the State.[26]

Further support for the ability of the patients at Kalaupapa to perform their jobs is the fact that they *have* been successfully performing their jobs for a number of years.[27] DOH has not complained, nor has there been any evidence, that the necessary work at the settlement is going undone or is performed poorly.[28]

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[25] 45 C.F.R. § 84.3(k)(1) (1983). The regulations provide that "reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part time or modified work schedules . . . and other similar actions." 45 C.F.R. § 84.12(b) (1983). These accommodations must be made unless to do so would impose "undue hardship" on the operation of employer's program. Factors to be considered in determining undue hardship include: the size and budget of the employer's program; the type of the employer's operation, including the composition of the workforce; and the nature and cost of the accommodation. 45 C.F.R. § 84.12(c) (1983).

[26] Act 34, H.B. 311, 1968 Hawaii Sess. Laws 58 (emphasis added).

[27] *See supra* text accompanying note 9.

[28] OCR specifically found that:

> [P]atient employees perform work that is equivalent to work described in civil service class specifications. . . . [A]n adequate level of productivity [and] effort results in completion of the tasks necessary to the operation of the Settlement. . . . [No jobs at Kalaupapa

Nevertheless, DOH apparently has taken the position that the patient employees at Kalaupapa are less qualified than civil servants performing comparable jobs and that, therefore, less than comparable pay and employment benefits for the patients are justified.[29] Specifically, DOH asserts that the patients have not met the requirements for civil service employment, including physical testing and written examinations, and that, consequently, they are not entitled to the employment benefits civil servants receive.[30] Others might argue that such policies are justified because the patients' medical condition causes them to be a risk at the workplace.

Decisions interpreting the Act, however, indicate that handicapped individuals only need be qualified for the jobs in question, *not* that they be as strong as and/or as talented as non-handicapped employees.[31] Although the handicapped person must be able to meet all of an employment program's requirements in spite of his or her handicap,[32] such program requirements must be directly related to the specific jobs in question.[33] Further, these requirements must be *necessary* to the safe and viable operation of the workplace.[34] Moreover, if alter-

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go undone, and there was no showing] that patient employees are any less productive than civil service employees during hours that they work.

OCR Findings, *supra* note 9.

[29] *Id.*

[30] *Id.*

[31] In E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), the district court addressed this very issue. In *E.E. Black*, an employee with a back problem was denied employment as an apprentice carpenter. The court found that the employee "was capable of performing the job," and held that "[t]his is the only relevant inquiry in determining whether [a person] is a qualified handicapped individual." *Id.* at 1103. The court noted that in some cases the risk of injury could be "so immediate as to prevent an individual from being considered presently capable of performing a particular job. This is not the case." *Id.* n.16.

[32] Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

[33] 29 C.F.R. § 32.14(b) (1983) provides that when an employer uses job qualification requirements in determining employment status "which would tend to exclude handicapped individuals because of their handicap, the qualifications shall be related to the specific job or jobs for which the individual is being considered . . . . The [employer] shall have the burden to demonstrate that it has complied with the requirements of this paragraph."

[34] *Id.*

> The importance of preserving job opportunities for the handicapped sets a high standard for the effectiveness of job qualifications that adversely affect the handicapped. The regulation makes consistency with business necessity an independent requirement, and the courts must be wary that business necessity is not confused with mere expediency. If a job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote, "business necessity and safe performance."

Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982).

The "job-relatedness" and "business necessity" tests traditionally have been used in interpreting the requirements of anti-discrimination statutes. *See, e.g.*, Dothard v. Rawlinson, 433 U.S.

native requirements exist which would ensure good work and screen out fewer handicapped persons, the more restrictive requirements must be rejected.[35]

Since the patient employees at Kalaupapa are capably performing their job duties, it is apparent that requirements such as civil servant status are not necessary to ensure good work. Even if the civil service examination were demonstrated to be an indicator of work ability, such a requirement would have to be rejected in favor of alternative criteria more favorable to the patients. This requirement, therefore, may not be used as justification for unequal employment practices.[36] The fact that the patients' handicap *may* cause them to be more susceptible to injury does not prevent them from being presently qualified to do their jobs, and may not be used to avoid the requirements of the Act.[37]

C. *"Program or Activity Receiving Federal Financial Assistance"*

The federal government has long played a role in providing for the care of the nation's Hansen's disease victims. It has maintained a federal leprosarium in Carville, Louisiana since 1921[38] and has funded in large part Hawaii's Hansen's

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321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[35] 45 C.F.R. § 84.13(a)(2) (1983).

[36] *See, e.g.*, Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1982) (Permanent denial of job tenure protection afforded other employees solely because of federal employee's handicap violated the Rehabilitation Act. The fact that a deaf employee had been hired under an exception to the normal competitive appointment processes did not allow the National Aeronautics and Space Administration to afford the employee lesser protection.).

[37] Courts suggest a different result may be in order if the handicap is "more directly tied to increased risk of injury . . . something all physicians testifying in [a] case [agree] would markedly increase the risks from injury . . . if applied to applicants for a job that carries elevated risks of injury." Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 623 n.3, (overturning Secretary of Labor's determination that city's employment requirement of "controlled" blood sugar levels for diabetics did not violate the Rehabilitation Act); *cf.* Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (overturning preliminary injunction requiring admission of prospective medical student who had exhibited self-destructive behavior); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (upholding denial of injunction against exclusion from sports of partially blind high school students). There has been no showing that Hansen's disease is directly tied to increased injury in the jobs the patients perform.

[38] The United States Public Health Service has funded a federal Hansen's disease center in Carville since 1921. Between 1894 and 1921 a state operated leprosarium existed at Carville and Hansen's disease victims were sent from populous New Orleans to this more isolated facility. Currently, the Carville facility treats approximately 325 patients, 100 of whom are "out on pass" at any given time. One hundred twenty of the patients at Carville are employed from two to 36 hours a week. Although these patient employees were formerly receiving as little as 62 cents an hour for their work, they are currently receiving the federal minimum wage. The severely handicapped work in sheltered workshops doing things such as making fish lures. These workshops are funded in large part by donations from the community.

In addition to the patient employees at Carville, the facility employs federal civil servants and

disease facilities. DOH receives approximately $1.7 million a year from the federal government to provide for its patients.[39] As a recipient of federal funds, DOH is subject to the non-discrimination requirements of section 504 of the Act.[40]

D. "Discrimination Solely on the Basis of Handicap"

It is uncontested that the patient employees at Kalaupapa are not accorded pay and employment benefits equal to those accorded to non-patient employees.[41] The questions remain, however, whether this disparity is "discrimination" within the meaning of the Act, and whether the disparity results solely from the fact that some employees suffer from Hansen's disease, while others do not.

Inferior pay schedules and other employment benefits are expressly prohibited by the Act and its regulations.[42] The fact that certain of these employment practices are authorized by state law[43] does not obviate the obligation to com-

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commissioned officers from the Public Health Service. These employees are paid according to the pay schedules of their respective organizations. Telephone interview with Dr. John Trautman, Director of the U.S. Gov't, Dep't of Health and Human Services, National Hansen's Disease Center, Carville, La. (May 24, 1984).

[39] Telephone interview with Melvin Tomooka, Communicable Disease Division, Hawaii State Dep't of Health (July 2, 1984). 42 U.S.C. § 247e(a) (Supp. V 1981) provides:

> The Surgeon General (now the Secretary of the Department of Health and Human Services) is authorized and directed to make payments to the Board of Health of Hawaii (now DOH) for the care and treatment in its facilities of persons afflicted with leprosy
>
> . . . .

[40] OCR expressly found that "[a]s a recipient of funds from HHS [Department of Health and Human Services], DOH is subject to the provisions of 504 of the Rehabilitation Act of 1973, and HHS's effectuating regulation." OCR Findings, *supra* note 9.

[41] *See supra* text accompanying note 26.

[42] 45 C.F.R. § 84.11 (1983). The nondiscrimination provision of the Act applies to (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring; (3) rates of pay or any other form of compensation and changes in compensation; (4) job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment, whether or not administered by the recipient; (7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activitities, and selection for leaves of absence to pursue training; (8) employer sponsored activities, including social or recreational programs; and (9) any other term, condition, or privilege of employment. 45 C.F.R. § 84.11(b). *Cf.* OCR Findings, *supra* note 9.

[43] HAWAII REV. STAT. §§ 326-21, 326-22 (Supp. 1983) authorize the pay schedule for patient-employees at Kalaupapa. HAWAII REV. STAT., § 326-23 (Supp. 1983) provides for a special patient-employees' pension. HAWAII REV. STAT. § 89-6 (1976) excludes patient-employees from collective bargaining agreements.

ply with the non-discrimination requirement of the Act.[44] Furthermore, the fact that the current employment practice saves the State of Hawaii money is not a sufficient basis for otherwise discriminatory policy.[45]

DOH, however, appears to maintain that its employment practices are *not discriminatory* because of the special relationship it has with the patients at the settlement.[46] It is true that DOH and the State of Hawaii have provided valuable care and treatment to its Hansen's disease patients over the years.[47] But this fact, and the fact that employment is beneficial to the patients' physical and mental health, does not justify DOH's policy of paying less to the patient employees than it pays to those who do not suffer from the disease.

A moment of reflection shows the fallacy of such a position. Asserting that employment is therapeutic for the patient-employees at Kalaupapa, and therefore wages and other employment benefits accorded to others need not be accorded to them, is *discrimination precisely because of their handicap*. Moreover, the "therapy argument" would always be available to an employer charged with violating the Act.[48]

The fact that employment is valuable, indeed necessary, to many of the patients at Kalaupapa does not distinguish them from any other employee. The "therapy" of employment therefore fails as a basis of differentiation, and one is

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[44] 45 C.F.R. § 84.10(a) (1983).

[45] The only sufficient basis for otherwise discriminatory policies under the Act is business necessity. *See* notes 31-37, *supra* and accompanying text.

[46] DOH is the sole employer of patients at Kalaupapa. Palea v. Clarke, No. 83-0387 (D. Hawaii filed Apr. 8, 1983) (defendant's response to request for admissions). "According to Department [DOH] officials at Kalaupapa, the patient employment program at Kalaupapa was instituted as a form of 'occupational therapy' under the theory that those patients who worked and kept active were better able to cope with their disease." OCR Finding, *supra* note 9.

[47] *See supra* note 46.

[48] As one court stated:

> The fallacy of the argument that the work of a patient-worker is therapeutic can be seen in extension of its logical extreme, for the work of most people, inside and out of institutions, is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way. Yet that can hardly mean that employers should pay workers less for what they produce for them.

Souder v. Brennan, 367 F. Supp. 808, 813 n.21 (D.D.C. 1973). (Minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, apply to patient-workers of nonfederal hospitals, homes, and institutions for the mentally retarded and mentally ill.) The fallacy of the therapy argument with respect to the minimum wage requirement of the Fair Labor Standards Act is equally applicable to the Rehabilitation Act.

Courts have held that prisoner-employees need not be paid the minimum wage under the Fair Labor Standards Act. *See, e.g.*, Alexander v. Sara, Inc., 505 F. Supp. 1080 (M.D. La. 1981); Sims v. Parke Davis & Co., 334 F. Supp. 774 (E.D. Mich. 1971), *aff'd*, 435 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). It would be disingenuous, however, to apply these cases to the situation at Kalaupapa. Society no longer chooses to punish those who have had the misfortune to contract Hansen's disease. *See supra* notes 1-5, and accompanying text.

left with the reality that the patients' handicap is the only basis for DOH's discriminatory employment practices.

E. Remedies

As of this writing, the Hawaii State Legislature is considering whether to change its prescription for the employment rights of the patients at Kalaupapa. A law suit may not be the most effective route to a remedy if the parties to it already agree that basic change is in order. The state legislature recently has revised its statutes so as to provide the patient-employees at Kalaupapa the state minimum wage, and has appropriated funds accordingly. This is a welcome step. However, there remains the disparity between these minimum wages and the wages of non-handicapped workers at Kalaupapa, as well as the question of back pay and damages for the years the patient-employees labored at less than the minimum wage. Thus, a law suit still may be the only avenue to complete relief.[49]

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[49] Although certain justiciability hurdles remain for the patient-employees, the Rehabilitation Act claim is likely to succeed were it litigated. The thorniest problem is establishing that the patient employees have a private right of action under the Act.

Section 505 of the Act, 29 U.S.C. § 794a(2) (Supp. V 1981) provides in relevent part:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 . . . .

Upon examination of the legislative history of the Act, and by analogy to title VI, the Ninth Circuit agreed with every court which has addressed the issue, and held that a private right of action exists under the Act. Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980); *see also*, Camenisch v. Univ. of Texas, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); Leary v. Crapsey, 566 F.2d 863 (2nd Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1977 (7th Cir. 1977).

However, in a case many commentators believe was wrongly decided, the Ninth Circuit severely limited the private right of action in suits under the Act for employment discrimination. In Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982), *reh'g denied* (Sept. 22, 1982), a person suffering from diabetes and partial blindness brought suit under the Rehabilitation Act alleging that he was wrongfully denied a job as a graduate student assistant in a hospital. Following the reasoning of another highly criticized decision, Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), the court, over the strong dissent of Judge Ferguson, held that the plaintiff did not have a private right of action because he did not demonstrate that a "primary objective of the federal financial assistance is to provide employment." *Scanlon*, 677 F.2d at 1272.

In *Trageser*, a registered nurse with deteriorating eyesight alleged that she was wrongfully terminated because of her handicap. The *Trageser* court noted that the remedies under the Rehabilitation Act and title VI are the same. It found, however, that title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) "discrimination in employ-

Although requiring a state agency to compensate for past discrimination is problematic,[50] mandating prospective pay and benefits equal to those received by the civil service employees at Kalaupapa is the best judicial solution, considering the factors listed in section 505 of the Act. As mentioned, these factors include the cost of accomodations and the availability of alternatives.[51] The cost of work accommodation will be minimal because the patients already are ably performing their jobs. Furthermore, DOH should have little problem locating funds for the increased salaries and benefits from the $1.7 million it receives annually from the federal government.[52] Finally, for the patient-employees at Kalaupapa, there is no acceptable or equitable alternative to equal pay and

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ment necessarily causes discrimination against the primary beneficiaries of the federal aid." Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 88-99 (4th Cir. 1978). The summary affirmance in *Scanlon* adopted the reasoning of *Trageser*. *Scanlon*, 677 F.2d at 1272.

As Judge Ferguson noted in dissent in *Scanlon*, the *Trageser* opinion has been criticized by the Senate Committee on Labor and Human Resources, (S. Rep. No. 316, 96th Cong., 1st Sess. 13 (1979)) by the Department of Health Education and Welfare (*see* 45 C.F.R. § 84, Appendix B (1980); 44 Fed. Reg. 17168, 17174 (1979)) and by the Department of Justice. (Nondiscrimination Based on Handicap in Federal Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980)). *Scanlon*, 677 F.2d at 1273. Judge Ferguson believed that *Trageser* was wrongly decided because the Section 604 limitation to title VI remedies does not, as the majority concluded, limit the private right of action for race-related employment discrimination. *Scanlon*, 677 F.2d at 1275-1277 (Ferguson, J., dissenting.)

Even the Ninth Circuit itself has intimated that it believes *Scanlon* was wrongly decided. In Meyerson v. Arizona, 709 F.2d 1235 (9th Cir. 1983), although three judges of the circuit felt bound by *Scanlon*, they did not ascribe to its reasoning:

> Since we are not permitted to reverse the decision of a panel of this court, absent a contrary intervening Supreme Court decision or a convening of our court en banc, we must adhere to our holding in *Scanlon*.

Id. at 1237.

Even with *Scanlon*, the patient-employees can establish a private right of action. Although it is difficult to contend that employment was a primary objective of the federal funding to DOH authorized by 42 U.S.C. § 247e, the patient-employees should have no trouble establishing a private right of action under the second standard announced in *Trageser*, and adopted in *Scanlon*. This standard, that "discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid" is clearly met in their situation. Hansen's disease victims are the *only* intended beneficiaries of the federal funds, and therefore discrimination against them in employment is necessarily discrimination against the beneficiaries of the federal aid.

[50] A claim for past damages against state agencies or officials under the Act may be barred by the eleventh amendment to the United States Constitution. *See, e.g.*, Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982).

[51] *See supra* note 19 and accompanying text.

[52] In October of 1980, the last time OCR formally visited Kalaupapa, only 23 of the 120 patient residents at Kalaupapa were patient-employees. The figures are approximately the same today. OCR Findings, *supra* note 9; Palea v. Clarke, No. 83-0387 (D. Hawaii filed Apr. 8, 1983).

equal benefits to remedy the employment discrimination they have suffered.

CONCLUSION: FEDERAL AND STATE RESPONSIBILITY

The federal and Hawaii governments share responsibility for ensuring equal protection[53] for those at Kalaupapa who wish to work for the state and for themselves. Although the federal government directly supervises the care and treatment of Hansen's disease patients on the mainland,[54] it is unable to do so for patients in the Pacific. As a result, Congress has delegated responsibility for Hawaii's Hansen's disease victims to the State of Hawaii and has appropriated funds accordingly.[55] Even without the mandate of the Rehabilitation Act, it is incumbent upon both governments to take special measures to treat fairly those people uniquely dependent upon them. It is a sorry situation when the adversary judicial process and federal law must be invoked to persuade state decisionmakers to take these measures.

Nevertheless, the Rehabilitation Act was legislated precisely to provide fed-

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[53] While extended constitutional analysis is beyond the scope of this article, it should be noted that the patients at Kalaupapa have a strong position under the equal protection clauses of the fifth and fourteenth amendments to the United States Constitution. Although the Supreme Court repeatedly has stated that government employment is not a fundamental right, *see, e.g.*, San Antonio Independent School District v. Rodrigues, 411 U.S. 1 (1973); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); and courts addressing the issue have stated that handicap is not a "suspect classification," *see, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society"); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979), it can be strongly argued that prejudice against a small and unique group who for so long have been involuntary wards of the government and who have been feared and isolated by society is truly "prejudice against discrete and insular minorities . . . which may call for a . . . more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Under such close scrutiny, DOH could not provide the requisite compelling justification, *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), for its discrimination against patient-employees.

Even if strict judicial scrutiny is not utilized, courts may well use intermediate standards of review where, as here, "sensitive" criteria of classfications are combined with "important" liberties or benefits. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (household containing unrelated members deprived of food stamps); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed fathers deprived of child custody); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (aliens deprived of federal civil service employment). DOH would be hard pressed to find an "important" governmental interest for according inferior wages and employment benefits to the patient employees at Kalaupapa. Such an interest is required for the court to uphold these employment practices under the intermediate standards of review.

[54] *See supra* note 38.

[55] *See supra* note 39 and accompanying text.

eral oversight of the integration of the nation's handicapped into society.[56] Medical science has come far in liberating the victims of Hansen's disease from centuries of isolation and castigation. One would hope that political leaders will follow suit, without judicial prodding, to ensure equal rights, including equal employment rights, to those who have suffered, often silently, for too long.

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[56] *See supra* notes 15-18 and accompanying text.

Enabling and Implementing Legislation and State Constitutional Convention Committee Reports

BACKGROUND

In the summer of 1978 the State of Hawaii held its third constitutional convention (hereinafter "Con Con"). The 102 elected delegates proposed over a hundred changes to the Hawaii State Constitution which were ratified by the voters at the 1978 General Election. At least forty-five of the new constitutional amendments either specifically allow or require the legislature to enact enabling or implementing legislation.

This comment will concentrate on new provisions in the Hawaii State Constitution which mandate action on the part of the legislature. For example, the 1978 amendments require the legislature to implement the right to privacy;[1] to provide for the term and compensation of the independent counsel for the grand jury;[2] to provide for public funding of election campaigns and campaign spending limits;[3] to create and provide for the staff and operating expenses of the judicial selection commission;[4] to establish a state general fund expenditure ceiling;[5] to provide standards and criteria for the conservation of agricultural lands;[6] to provide for a water resources agency;[7] and to adopt a code of ethics.[8]

The Con Con delegates officially expressed their intents and purposes in committee reports attached to the proposed constitutional language. For those amendments which mandate legislation, the committee reports often contained directions as to what the legislation should or should not do. For example, the

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[1] HAWAII CONST., art. I, § 6.
[2] HAWAII CONST., art. I, § 11.
[3] HAWAII CONST., art. II, § 5.
[4] HAWAII CONST., art. VI, § 4.
[5] HAWAII CONST., art. VII, § 9.
[6] HAWAII CONST., art. XI, § 3.
[7] HAWAII CONST., art. XI, § 7.
[8] HAWAII CONST., art. XIV.

Committee on Environment, Agriculture, Conservation, and Land attempted to rule out water development agencies from those the legislature may designate as the state water resources agency.[9] The Taxation and Finance Committee attempted to require the legislature to adopt total personal income or a comparable index to measure the estimated rate of growth of the state's economy in calculating the state's expenditure ceiling.[10] The Education Committee attempted to require the legislature to give all major neighbor islands representation on the Board of Education and limit the total membership of the Board.[11] The Hawaiian Affairs Committee purported to prevent large developers from taking lands belonging to Hawaiians by adverse possession.[12]

To illustrate, the Education Committee proposal requires that the Board of Education be elected in a non-partisan manner; that there be two at-large districts (to satisfy the one-person/one-vote requirement); that the legislature provide for departmental school districts within the at-large districts; and that at least one school board member reside in each departmental district.[13] The actual location and size of the departmental school districts is left up to the legislature, but the committee report explains:

> After much discussion and research on the question, your committee decided to leave the precise number of board members to the legislature. However, there was discussion among the committee members that this board consist of between 13 and 19 members. A board which is any larger than 20 would be unwieldy and prevent the effective operation and management of the public school system. It is, however, the intent of your committee that there be at least one member residing in the school districts of Hawaii, Maui, and Kauai.[14]

The committee left it to the legislature to determine the departmental school districts in case these districts would need to be changed because of shifts in population. The committee was concerned that the major neighbor islands have representation on the board, and the constitutional language itself allows for this, but does not specifically require it. The committee report purports to require it, however. This article will examine whether the committee report can legally affect legislative action in this manner.

The two-volume Proceedings of the Constitutional Convention of Hawaii along with documents and films in the State Archives comprise the legislative

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[9] STAND. COMM. REP. NO. 77, 3d HAWAII CONST. Conv. (1978), *reprinted in* I PROCEEDINGS OF THE CONST. CONV. OF HAWAII OF 1978, at 685, 688-89 (1980) [hereinafter cited as I PROCEEDINGS].

[10] STAND. COMM. REP. NO. 66, *reprinted in* I PROCEEDINGS, *supra* note 9, at 653, 659.

[11] STAND. COMM. REP. NO. 39, *reprinted in* I PROCEEDINGS, *supra* note 9, at 585, 588-89.

[12] STAND. COMM. REP. NO. 56, *reprinted in* I PROCEEDINGS, *supra* note 9, at 628, 640-41.

[13] STAND. COMM. REP. NO. 39, *reprinted in* I PROCEEDINGS, *supra* note 9, at 589.

[14] *Id.* at 589.

history of the 1978 Constitutional Convention. The convention had sixteen standing committees, including a separate committee for each major article in the constitution. The committees agreed to propose constitutional amendments to the convention in the form of committee proposals, accompanied by a committee report. The convention delegates as a whole then considered these proposed changes. Any amendments adopted in the Committee of the Whole were then submitted to the convention for approval, along with the proposals not amended in the Committee of the Whole.

If the Committee of the Whole made any changes to the original standing committee proposal, these changes were explained in the Committee of the Whole report. Therefore, the standing committee report explains the Committee proposals made by the standing committee, and the Committee of the Whole report explains those proposals that emerged from the Committee of the Whole—additional proposals, or amendments to existing standing committee proposals.

Certain committee reports carry instructions to the legislature. In other words, although the constitutional language itself is general on its face, when read in conjunction with the committee report explanation, the legislature would be subject to limitations outside of the constitution itself, if the intent expressed in the committee report is accepted.

In 1979 the Hawaii State Senate Judiciary Committee of the first session of the Tenth Legislature adopted the following posture toward the 1978 Constitutional Convention committee reports:

> *Overview of the legislative task.* At this final point, your Committee feels that a brief clarification of the guidelines it has considered for bills referred on matters addressed to amendments to the Hawaii State Constitution, is in order. In this regard, we preliminarily note the differential role between the Constitution and our legislative responsibility. The Constitution sets out the essential structures of government and the essential rights of the governed. The function of legislation is to provide necessary details to the Constitutional framework and within its confines provide comprehensive laws in the interest of the general welfare. Upon that note your Committee observed the following guidelines:
>
> First of all, conditioned upon consideration of the federal constitution, your Committee has considered itself bound by the expressed language of the amendments to the Constitution and also by matters inescapably implicit in such language.
>
> Secondly, *your Committee considered matters expressed by the delegates in the Committee Reports of the Constitutional Convention to be discussions and suggestions worthy of serious consideration, but advisory only and not mandatory.* We considered that the delegates to the Constitutional Convention had similar regard for the differentiated role between the Constitution and our legislative responsibility as previously discussed and would have expressed themselves in the body of the constitution had they intended any matter to be mandatory upon the

legislature.[15]

This statement appeared in the Senate Judiciary Committee report accompanying the bill to establish the intermediate appellate court.[16] The Con Con committee reports appear to fall within a modified version of the Plain Meaning Rule, which allows for the use of committee reports and other legislative history for interpretation of laws only when the language of the laws is ambiguous. The Senate Judiciary Committee's version seems to be that the legislature is bound by the actual and implied meanings of the constitutional amendments themselves, and is free to interpret these meanings with or without the help of the accompanying committee report as it sees fit.

The Senate Judiciary Committee opinion that the 1978 Con Con would have expressed itself in the body of the constitution on all matters it deemed mandatory upon the legislature ignores the dilemma faced by constitution writers. The delegates have a definite idea of what the enabling legislation should do when it is initially enacted, but fully realize that this may not be appropriate in later years. This is particularly true of amendments that are affected by economic factors or governmental organization. For example, the convention may wish that a particular governmental department implement a constitutional provision, but not so specify in the constitution simply because of the possibility of subsequent government reorganization. Indeed, that department may be merged with another and cease to exist. Such reorganization may render that department no longer appropriate to carry out the intent of the Con Con delegates.

This comment will present the opposing view that the constitutionality of enabling and implementing legislation can, under some circumstances, depend upon not only the language of the constitution itself, but also instructions in the Con Con committee report—that the committee report can, indeed, be "mandatory upon the legislature" in the legal sense.

A. Constitution Writing - The Need for Flexibility and the Role Played by the Committee Report

A constitution establishes the institutions that perform the business of the public, including the government itself.[17] It sets forth the fundamental laws of

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[15] STAND. COMM. REP. NO. 134, Senate Judiciary, *reprinted in* JOURNAL OF THE SENATE OF THE 10TH LEGIS., REG. SESSION OF 1979, at 1064 (1979) (emphasis supplied).

[16] The Senate Judiciary Committee Report, SCR 134, was signed by all members of the committee except Senator Campbell, husband of Con Con Judiciary Committee member and Judiciary Committee of the Whole Chairperson Naomi Campbell.

[17] 'O Ka Po'e Ke Kumu O Ke Kanawai, A Project of the League of Women Voters of Hawaii Education Fund, Inc., *Issues 1978* at 7 (May 1978).

government and embodies our values of liberty and order.[18] It deals directly with the government and its procedures, and is the law from which all governmental power is derived.[19] It is an important document. Since the state constitution establishes the foundation of state government, it is designed to be a lasting document. The constitution is difficult to amend. Hawaii will have a Con Con no more than once every ten years and only if approved by a referendum.[20] All constitutional amendments approved by the legislature or a Con Con must be approved by a majority of the votes cast in the election.

While Hawaii has already had three Con Cons, examination of the amendments adopted reveals that most of these amendments *add* to existing rights and duties. On the other hand, thousands of bills come before the state legislature annually, resulting in hundreds of amendments to Hawaii's statutes.[21] Statutes fill in the details needed to implement fundamental law—details that may later require changes based upon new information. To illustrate how this contrast affects the drafting of a constitutional amendment as opposed to a statute, the Hawaii legislature is annually pressed to allow the importation of the unagi eel for aquaculture experimentation. Those favoring the importation insist the eel will not escape into the environment, and furthermore that it can only reproduce in the Atlantic Ocean. If the legislature, based upon this information, passed the bill allowing the importation of the eel, and subsequently learned that the eel could escape and reproduce in the sewer system, a rapid change in the law would be in order. In constitution writing, however, the writers cannot presume that a constitutional provision will be easily changed if it turns out to be a bad idea. Whatever they propose, if ratified, may be for all practical purposes carved in stone, as the right to bear arms is carved in stone.

Other states have had adverse experiences as a result of nearsighted inclusion of specific details in their constitution.[22] A constitution writer must be able to use language that is both meaningful and flexible. For example, the constitution writers may want to write a general provision to promote aquaculture with a proviso that the unagi eel is not to be imported for this purpose. But, the environmentalists might be wrong about the dangers of importing the eel. A compromise might be to add a clause that environmentally detrimental animals shall only be imported as provided by law. The Con Con delegates might then spell out in the committee report which "detrimental animals" they had in mind, naming the unagi.

Of course, it would be possible to state in the constitution itself that "envi-

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[18] *Id.*

[19] *Id.*

[20] HAWAII CONST., art. XVII, §§ 2, 3.

[21] *See, e.g.*, JOURNAL OF THE HOUSE OF REP. OF THE 11TH LEGIS., REG. SESSION OF 1981, at 1452-1937, History of House Bills (1980).

[22] *See Issues 1978, supra* note 17, at 9.

ronmentally detrimental animals shall not be imported, as provided by law, including but not limited to the unagi eel, until such time as it may be determined that such aquatic animal is proven to be no longer environmentally detrimental as provided by law." There is, however, a certain desire for esthetics as well as practicality in constitution writing. Yet, if the Con Con's committee report can be legally ignored at will by the legislature, this type of wording would be necessary.

If the convention delegates felt that their committee reports could be and would be ignored in a situation analogous to the hypothetical eel/aquaculture situation, they would be compelled to write a "messy" constitution. The Con Con could have reasonably expected that the legislature would not want them to do this. They knew that the legislature would look to the committee report for guidance to fill in the details of constitutional mandates. It is reasonable that they therefore used the committee reports to tell the legislature what that legislation should do or contain in order to avoid messy and inflexible constitution writing. Otherwise the constitution would stifle legislative adaptation to change based on new information.[23]

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[23] One of the most significant changes proposed by the 1978 Con Con was the modification in the manner of selection of judges. Previously, the governor nominated and appointed justices of the supreme court and the circuit courts, subject to senate approval. The 1978 Con Con introduced a judicial selection commission system. In structuring the Judicial Selection Commission the Con Con Committee on the Judiciary left nothing to legislative discretion, save the power to provide for the commission's staff and operating expenses. Instead of enacting a broad and flexible provision, leaving it to the legislature to structure the Judicial Selection Commission, the Con Con chose to set forth this structure in the body of the constitution. The constitution provides that the commission shall have nine members, three appointed by the governor, one by the president of the senate, one by the speaker of the house, two by the chief justice of the supreme court, and two elected by and from the members of the Hawaii Bar. Only one of the governor's and one of the chief justice's appointees may be a licensed attorney, and no more than four of the total commissioners may be licensed attorneys. The commission is to be nonpartisan, uncompensated, and its members are to serve for staggered terms of six years. The constitution even spells out exactly how the terms will be staggered—whose appointees will serve the shorter terms at the outset. Members of the commission are precluded from taking an active part in political management or campaigns, and may not themselves be eligible for judicial appointments while serving and for three years thereafter.

If the Con Con had written a provision that simply called for merit selection of judges "as provided by law," then spelled out the desired structure in the committee report, it is easy to see that there might have been fewer appointees by the governor and more by the legislature, or any number of combinations if committee reports could be disregarded. The Con Con Judiciary Committee chose not to take this chance.

The structure of the judicial selection commission and the do's and don'ts spelled out in the constitution "look like" statutory law rather than constitutional law. Since the judicial selection system is locked into the constitution, there is little chance of development of a better system. This leads to the question of whether a Con Con should feel obligated to structure a body such as the judicial selection commission in the constitution in order to avoid legislative subversion of

If the Con Con wanted the legislature to ban the eel and so stated in its committee report, the legislature should not be free to subvert this intent at the outset by doing the opposite or not acting at all. If the legislature could do this, the Con Con delegates would be confined to keeping their fingers crossed in hopes that the legislature would carry out their wishes. This is poor payment for creating a flexible and esthetically pleasing document.

The constitution binds the legislature indefinitely. The committee report instructions to the legislature regarding what is intended for implementing or enabling legislation should bind the legislature at the outset. That is, assuming that the legislature will enact the required legislation within a reasonable time, the initial legislation should pursue the intent of the Con Con as set forth in the committee report, if any. Once the legislation, reflecting the intent of the Con Con, is on the books, it is then within the realm of the legislative process. Assuming good faith on the part of the legislature, the checks and balances of that process should determine whether a change is needed. In other words, it is not proposed that the committee report govern beyond enactment of initial enabling or implementing legislation, unless that legislation is subsequently changed in a bad faith attempt to undermine the Con Con. Otherwise, the legislature must be able to adapt to changing circumstances and new information, which may come quickly, many years down the road, or not at all.

It is not suggested that the committee report should be binding in and of itself, apart from the remaining legislative history of the Con Con, but when that history strongly supports the recommendations of the committee report, legislative subversion should be precluded in enacting enabling or implementing legislation. Legislative "subversion" would occur if the legislature enacted legislation that would defeat the intent of the provision. For example, Article XI, Section 9 of the Hawaii Constitution gives all persons standing to enforce laws relating to environmental quality. The provision also gives the legislature the power to impose "reasonable limitations and regulation" of this right to stand-

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Con Con intent, thus sacrificing any possibility of improvement of the system.

If the legislature were completely entrusted with the responsibility to decide the structure and manner of selection of the commission, with the Con Con's intended structure in the committee report alone, there would be nothing to stop the legislature from selecting the majority of the commission itself if the committee report were deemed merely "advisory." Yet at the time the Con Con structured the commission it was proposing a completely new system without knowing if or how well it would work. Only experience could show how well the Con Con's plan would work. Would the governor still be able to control who is nominated simply because of his powerful position? Would the commission merely relieve the governor of accountability and not responsibility and thus be an unnecessary addition to the bureaucratic maze? If the legislature could be bound to achieve the intents and purposes of the Con Con as set forth in the committee report, it would not be necessary for the Con Con, subject to its own biases and uncertainties about the future, to impose a virtually unalterable system that may or may not work.

ing.[24] The committee report explains: "Your committee intends that the legislature may reasonably limit and regulate this private enforcement right by, for example, prescribing reasonable procedural and jurisdictional matters, and a reasonable statute of limitations."[25] A subversion of the intent of the amendment to allow individuals to "directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality," by removing "standing to sue barriers"[26] would be to impose limitations beyond those contemplated in the committee report. If the legislature enacted a stringent standing requirement which would have the effect of removing few, if any, existing barriers, this would be a subversion. A requirement that the citizen wishing to sue lives within a five-mile radius of the situs of the alleged violation would subvert the intent of giving all citizens the right to sue. A subversion would for all practical purposes neutralize the effect of the constitutional provision, and retain the status quo.

When committee report recommendations are supported by such documents as the debates, minority reports, resolutions, and signatures on the reports themselves, and when the expression of the committee is sufficiently definite, there should be no room for legislative discretion to subvert the intent expressed in the committee report.

B. Anatomy of the Committee Report

Con Con committee reports were prepared by the committee chairpersons and their staffs with the assistance of a staff attorney assigned to each committee. Rarely do legislative committee reports approach the quality of Con Con committee reports in terms of providing details regarding the committee's deliberations and legal analysis. Only the most novel or far-reaching legislation receives the degree of committee report treatment that characterizes Con Con committee reports. For example, the report of the Taxation and Finance Committee of the Con Con, in its original form, was twenty pages long.[27] Legislative committee reports often contain a half dozen or fewer lines.[28]

The Con Con committee reports list all of the individual delegate proposals which were referred to the committee, give the names of those who testified at public hearings before the committee and the organizations they represented,

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[24] HAWAII CONST., art. XI, § 9.

[25] STAND. COMM. REP. NO. 39, *reprinted in* I PROCEEDINGS, *supra* note 9, at 589-90.

[26] *Id.* at 590.

[27] II PROCEEDINGS OF THE CONST. CONV. OF HAWAII OF 1978, Comm. of the Whole Debates at 464 (Sept. 6, 1978) (statement of Del. Lewis).

[28] *See, e.g.*, STAND. COMM. REP. NOS. 786 and 1102, *reprinted in* JOURNAL OF THE HOUSE OF REP. OF THE 10TH LEGIS., REG. SESSION OF 1979, at 1532 and 1687.

and discuss the amendments proposed by the committee. These discussions include summaries of testimony received, descriptions of committee debates among the delegates, and reasons proposals were adopted or rejected. In short they attempt to recreate the highlights of the committee's deliberations.

To illustrate the type of detail typical of Con Con committee reports, the following passage is excerpted from the Ethics Committee report:

> With respect to Proposal Nos. 492, 500, 523 and 734, your Committee has deliberated at length on the question of extending codes of ethics applicability to judges and justices. During committee hearings, Mr. Daniel Case of the Hawaii State Bar Association and Mr. Gary Slovin of the State Ethics Commission testified against the specific inclusion of judges under this section, on the grounds that judges and justices have their own code of ethics, and therefore this would be an unnecessary restriction on the independence of the judiciary.[29]

1. *Attitudes of Delegates Toward Committee Reports*

The committee reports were taken very seriously by the delegates. One delegate who declined to sign a committee report entered into the record of the convention her particular objections to precise portions of the committee report in order to influence the legislature against those portions of the committee report.[30] Another delegate felt the committee report would "take care" of concerns he had about the constitutional language itself since it would explain what the language actually meant.[31] A committee chairperson rejected a committee report prepared by a staff attorney because the attorney did not attend the committee's deliberations, and had it rewritten by her own staff member who did attend.

But perhaps the strongest evidence that the Con Con delegates expected their committee reports to be taken very seriously was the "now you see it in the constitution/now you see it in the committee report" wording of the water resources amendment by the Committee on Environment, Agriculture, Conservation, and Land (EACL). The original committee proposal reads: "All waters shall be held by the State *as a public trust* for the people of Hawaii."[32] The committee thus explained this sentence: "[Y]our Committee concluded that the Constitution should specify that the State holds the water resources in trust with the responsibilities of a trustee to actively *protect, control, and regulate the*

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[29] STAND. COMM. REP. NO. 26, *reprinted in* I PROCEEDINGS, *supra* note 9, at 566.

[30] II PROCEEDINGS, *supra* note 27, at 612-13 (Sept. 8, 1978) (statement of Del. Barnard).

[31] *Id.* at 909 (Sept. 14, 1978) (statement of Del. Barnes).

[32] STAND. COMM. REP. NO. 77, *reprinted in* II PROCEEDINGS, *supra* note 27 at 688 (emphasis added).

development of water resources in the State . . . ."[33]

There was objection to the use of the word "trust" in this proposed amendment because "the term 'public trust' in some people's minds connotes ownership."[34] The committee had to search for alternative language that carried the public trust concept, and the majority faction in the Con Con held a special private meeting on this and EACL proposals in general. At this meeting the delegates were asked to try to come up with alternative language that has the same meaning as "public trust." A solution was found, and the next day there was an amendment to change the committee proposal to read: "The State has an obligation *to protect, control and regulate* the use of Hawaii's water resources for the benefit of its people."[35] The Committee of the Whole adopted this wording directly from the committee report explanation of the original "public trust" wording, and the accompanying committee report from the Committee of the Whole urges that the new language was not intended to change the original purpose:

> Some confusion has been generated by the term because "trust" implies ownership. However, it was never intended that the proposal confront the question of ownership of water resources because that is more appropriately a matter for the courts . . . . [T]o avoid confusion . . . your Committee has substituted language which your Committee believes fully conveys the theory of "public trust."[36]

The committee obviously intended the committee report and the constitutional amendment to be read together in this case, so that the public trust concept would not be lost.

Nevertheless, it has been argued that a Con Con committee report carries no more weight, in fact that it carries less weight, than a legislative committee report.

2. *The Voter Ratification Requirement*

It has been argued that Con Con committee reports should have a lower status than legislative committee reports because of the manner in which constitutional amendments are enacted into law. In its committee report accompanying the bill to establish the Office of Hawaiian Affairs, the Senate Judiciary Committee stated:

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[33] *Id.* at 688 (emphasis added).

[34] II PROCEEDINGS, *supra* note 27, at 857 (Sept. 14, 1978) (statement of Del. Fukunaga).

[35] HAWAII CONST., art. XI, § 7 (emphasis added).

[36] Comm. of the Whole Rep. No. 17, *reprinted in* II PROCEEDINGS, *supra* note 27, at 1026.

> [U]nlike legislative committee reports which reflect the will of the legislators, the committee reports of the Constitutional Convention do not reflect "the will of the electorate" and cannot be given similar weight. Accordingly, in responding to the mandate of the Constitutional amendments, the legislature is not mandated to implement them in strict compliance with matters that may be discussed in committee reports but are not expressly reflected in the Constitutional text.[37]

Unlike the legislature, which enacts legislation directly, subject to the veto power of the governor, the Con Con enacts proposals requiring referendum approval by the electorate. In the legislature all those who will be voting on proposed legislation are given individual copies of the accompanying committee reports. On the other hand, the Con Con committee reports are not distributed to all voters as part of the voter education materials submitted by the convention. They are, however, frequently quoted in newspaper explanations of Con Con amendments.[38]

The ideal member of the electorate would have attended Con Con committee and convention deliberations, and read all committee reports and newspaper accounts of the decisions of the convention. Conceivably a large percentage of the population was "represented" by voters who in fact did all this, such as lobbyists from large labor unions and the Chamber of Commerce. But unlike the legislature, the public votes secretly and individually so that the actual intent of the voters is not ascertainable. One can only speculate as to their intent. It is only known that the public had access to all the official documents of the convention, and could talk to individual delegates and organization representatives.

The Con Con, like the legislature, made committee reports available to all interested citizens and organizations throughout the convention. Subsequent to the convention, the convention established an information office, with a delegate staffer to answer questions over the voter information hotline.[39] That office continued to make the committee reports available. The convention received extensive newspaper, radio, and television coverage, with reporters from each daily newspaper assigned full-time to the convention.[40] Voters were given more access to the language of the constitution than the committee reports, but they were given access to both.

In the legislature the public is given the opportunity to voice approval or disapproval of proposed legislation in testimony at public hearings, or by letters,

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[37] STAND. COMM. REP. NO. 784, Senate Judiciary, *reprinted in* JOURNAL OF THE SENATE OF THE 10TH LEGIS., REG. SESSION OF 1979, at 1352.

[38] *See, e.g.*, The Honolulu Advertiser, Oct. 25, 1978, at A-3; Honolulu Star-Bulletin, Oct. 31, 1978, at A-2.

[39] Del. Barnard.

[40] Sandra Oshiro, The Honolulu Advertiser; Lee Gomes, Honolulu Star-Bulletin.

phone calls, and personal interviews. In the Con Con, the public not only performs this function, but also has the ultimate power to vote the Con Con's proposals up or down. In both cases the public is given the same access to committee reports. Where the legislature is concerned, the public does not vote on the proposed legislation itself, but certainly has the power to influence it in other ways. This influence is not so attenuated from the influence of the voters over Con Con proposals because the Con Con is voting on what it wants in the constitution, while the legislature is voting on what it wants in the statutes. The ratification requirement is an additional check upon what the delegates want in the constitution, but the "real" decision-making is at the Con Con legislative level since the delegates know that whatever they propose may wind up in the constitution. In other words the voter participation in the Con Con itself is as important as voter participation in the legislature, and it should not be assumed that the voters have not taken advantage of their opportunity to become fully educated on the Con Con proposals any more than it should be assumed that they have not informed themselves on bills before the legislature.

It is only the nature of the voters' influence on the Con Con versus the legislature that differs. The voters' participation in the Con Con matches their participation in the legislature, but the voters' participation in the Con Con extends a step further. In the legislature, legislators have the final say; in the Con Con the voters have the last word. The voters who participated in the Con Con therefore influenced the proposals in their formulative stage as they do bills before the legislature, then in turn ratified what their delegates adopted. Thus the fact that the voting public enacted the Con Con proposals by ratifying the decisions of their delegates should give more weight, not less, to the work of the convention.

In summary, the intent of the public and its representatives is not ascertainable, the public had access to the committee reports, these reports represent the official expressions of intent of the Con Con, and the nature of the representative form of government implies that the voters placed their trust in their representatives. This trust would of necessity include trust in intent. The public at large has, at the polls, given its stamp of approval to the work of the convention, and that work includes the committee reports.

C. The Courts and the Plain Meaning Rule

As mentioned, the Senate Judiciary Committee appeared to have adopted a form of the Plain Meaning Rule in its posture toward Con Con committee reports. Therefore, at this point it would be appropriate to examine some judicial uses of the Plain Meaning Rule. Constitutional interpretation is an obliga-

tion shared by all three branches of government.[41] However the court has the ultimate power to select the "correct" interpretation, if it chooses to exercise this power. If the court determines that the legislature enacted an unconstitutional statute, and the court's finding resulted from an interpretation based upon a Con Con committee report, the legislature is then tied to the interpretation, that is, to the constitutional provision as explained by the committee report. This should give the legislature a strong incentive, if not obligation, to follow the committee report at the outset.

In *State v. Miyasaki*[42] the Hawaii Supreme Court held that Hawaii's use immunity statute contravened Hawaii's constitutional privilege against self-incrimination, based upon the 1950 Con Con committee report:

> The record of the convention proceedings reveals that when the relevant provision was adopted, *there was a definite intent* to also adopt the interpretation of the Fifth Amendment to the Federal Constitution. That portion of the Committee of the Whole Report No. 5 . . . reads in pertinent part:
>
> This section is derived from the first three clauses of the 5th Amendment to the Federal Constitution and will give to this State the benefit of Federal decisions construing the same.
>
> Since the definitive doctrine borrowed by the framers of the Hawaii Constitution held that nothing less than immunity from prosecution would be adequate to supplant the privilege against self-incrimination, we are convinced they expected no less to be conferred in lieu of the privilege.[43]

In this case the Hawaii Supreme Court accepted without question that the committee report of the Con Con expressed the intent to be followed by the legislature. But the cases interpreting constitutional provisions from Con Con committee reports have not squarely addressed the question of whether committee reports can limit legislative discretion in enacting enabling legislation. The committee report quoted in *Miyasaki* was not written to steer the course of enabling legislation. However, an examination of caselaw on related questions reveals that the United States Supreme Court is receptive to the use of committee reports in statutory interpretation,[44] and that until recently the Hawaii Supreme Court has been similarly receptive to the use of Con Con committee reports in interpreting state constitutional law.

Although this comment deals with state constitution interpretation rather than federal statute interpretation, the process of interpretation is very similar.

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[41] Andrew Jackson, Veto Message, July 10, 1832, II MESSAGES AND PAPERS OF THE PRESIDENTS, 576-89 (Richardson ed. 1897).

[42] 62 Hawaii 269, 614 P.2d 915 (1980).

[43] *Id.* at 922 (emphasis added).

[44] JONES, KERNOCHAN, MURPHY, LEGAL METHOD CASES AND TEXT MATERIALS, 344-566 (1980) [hereinafter cited as JONES].

The primary difference is the nature of the language to be interpreted. Statutes are often more specific than constitutional provisions, but not always. Statutes granting powers and duties to an administrative agency often contain "fundamental law," not unlike a constitution's grant of powers and duties to a legislative body. Therefore, recognizing that constitutional and statutory interpretation may have their differences, interpretive rules as applied by the United States Supreme Court to congressional acts are sufficiently similar to state constitutional law interpretation to compare uses of legislative history. Thus, discussion of the United States Supreme Court's use of committee reports in statutory interpretation is sufficiently analogous to state use of Con Con committee reports to illuminate the issue of state constitutional amendment interpretation.

The canons of statutory construction consist of "two opposing canons on almost every point."[45] An example of these opposing canons is "the legislative intention approach" as contrasted with the Plain Meaning Rule. Under the legislative intention approach, the court examines the legislative history and historical context to discover the meaning of the language in a statute.[46] Under the Plain Meaning Rule, extrinsic sources of "legislative intent" are only used to construe statutory language which is ambiguous or contradictory. When the meaning of a statute is "clear" from the language of the statute, courts are required to interpret the statute according to the facially plain meaning.[47]

However, the Supreme Court has deviated from the Plain Meaning Rule when the "clear" meaning of the statute leads to an unjust or absurd result. In *Holy Trinity Church v. United States*[48] the plaintiff, an incorporated church, contracted for the services of a foreign minister. The question was whether a law enacted by Congress forbidding any corporation from assisting in the migration of aliens "to perform labor or service of any kind in the United States" barred the plaintiff's hiring a foreign minister. The Court stated: "It is a familiar rule that a thing may be within the letter of the statute and not within the statute because not within its spirit nor within the intention of its framers."[49] The Court then examined the legislative history of the act and concluded: "[T]he title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of . . . cheap, unskilled labor."[50]

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[45] Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

[46] JONES, *supra* note 43, at 388-89.

[47] *Id.* at 389, citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899); Sturges v. Crowninshield, 4 Wheat. 122, 202, 4 L. Ed. 529, 550 (1819).

[48] 143 U.S. 457 (1892).

[49] *Id.* at 459.

[50] *Id.* at 465.

The current trend in the highest Court is "in favor of resort to extrinsic aids regardless of the clarity of the statute."[51] This approach was taken in *United States v. American Trucking Ass'ns.*,[52] and reiterated in *Cass v. United States.*[53] In *American Trucking*, the Court was required to decide whether the Motor Carrier Act, 1935, which gave the Interstate Commerce Commission power to establish maximum hours of motor vehicle common carrier employees, applied to non-transportation employees of common carriers, or whether the non-transporation employees still came under the Fair Labor Standards Act, which exempted employees covered by the Motor Carrier Act.

On the basis of the interpretation of the Act given by the Interstate Commerce Commission, the congressional committee reports, and the explanations of the members of Congress in charge of the bill, the Court held that the word "employees" under the Act only applied to transportation employees. The Court stated:

> There is, of course, no more persuasive evidence of the purposes of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. *When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."*[54]

The emphasized statement is quoted in recent Hawaii Supreme Court opinions, including *Black Construction Corp. v. Agsalud*,[55] which held that a subsidiary of a Hawaii corporation engaged in construction on Guam and incorporated under Nevada laws was subject to Hawaii's Employment Security Law for purposes of unemployment insurance fund contributions. After quoting *American Trucking*, the court went on to state: "[W]hen there is a plethora of material evidencing legislative purpose and intent there is no reason for a court to seek refuge in 'strict construction,' 'plain meaning,' or 'the popular sense of the

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[51] JONES, *supra* note 43, at 464.

[52] 310 U.S. 534 (1940).

[53] 417 U.S. 72 (1974).

[54] United States v. American Trucking Ass'ns., 310 U.S. 534, 543-44 (1940) (emphasis added).

[55] 64 Hawaii 274, 639 P.2d 1088 (1982).

words.' "[56]

Some state supreme courts, including Hawaii's, in an apparent recent departure from past practice, have not been receptive to the use of extrinsic aids to interpret constitutional language. In interpreting the 1978 Con Con's provision calling for an independent counsel for the grand jury, the Hawaii Supreme Court in *State v. Rodrigues*[57] saw fit to "examine the intent of the framers" from the committee report. The issue was whether the provision creating the independent counsel was self-executing. On its face the provision is obviously not self-executing: "When a grand jury is impaneled, there shall be an independent counsel appointed *as provided by law* to advise the members of the grand jury . . . . [T]he term and compensation for independent counsel shall be *as provided by law*."[58]

The court found that in the committee report, "the framers . . . instructed the legislature to enact legislation defining the appointment, term, and compensation of the independent counsel."[59] The court combined this expressed intent with the language of the constitution to find that the provision was not self-executing. Conspicuously absent from the opinion is any talk of disregarding extrinsic material where the constitution is clear and unambiguous, although the court could have easily done so and written a much briefer opinion.

Thus, in *Rodrigues* the Hawaii Supreme Court appeared to consider the 1978 Con Con committee report an important source for ascertaining correct interpretation of the constitutional provisions under consideration. However, somewhat inconsistently in the 1975 case of *State v. Baker*[60] the issue was whether the statute proscribing possession of marijuana for personal use violated the privacy provision of the then Article I, Section 5 of the Hawaii Constitution. Quoting from the committee report, the court stated:

> While our State Constitution has a right of privacy provision, we do not find *in that provision* any intent to elevate the right of privacy to the equivalent of a first amendment right. *The intention was to* "effectively protect the individual's wishes for privacy as a legitimate social interest," including protection against "undue government inquiry . . . and regulation." *By the plain wording of the constitution* the right of privacy is protected only against *unreasonable* invasion.[61]

Thus, the court uses the committee report explanation, but in the next breath states that the constitutional language is "plain."

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[56] *Id.* at 284, 639 P.2d at 1094.

[57] 63 Hawaii 412, 629 P.2d 1111 (1981).

[58] HAWAII CONST., art. I, § 11 (emphasis added).

[59] State v. Rodrigues, 63 Hawaii 412, 629 P.2d 1111 (1981).

[60] *State v. Baker*, 56 Hawaii 271, 535 P.2d 1394 (1975).

[61] *Id.* at 280, 535 P.2d at 1399 (emphasis added).

In *State v. Kahlbaum*[62] the Hawaii Supreme Court again interpreted the provision regarding the independent counsel for the grand jury. This time the issue was whether the constitution required the independent counsel to be physically present during grand jury proceedings for an indictment to be valid. The court recited the Plain Meaning Rule, citing cases from other jurisdictions, in construction of constitutional provisions:

> When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument. . . . However, if the text is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment.[63]

Thus the Hawaii Supreme Court appears to have dichotomized statutory and constitutional interpretation when *Kahlbaum* and *Black Construction* are compared.

Kahlbaum also appears to have adopted the 1979 Senate Judiciary Committee posture, by stating:

> In order to give effect to the intention of the framers and the people adopting a constitutional provision, an examination of the debates, proceedings and committee reports is useful. But, the debates, proceedings and committee reports do not have binding force on this court and its persuasive value depends upon the circumstances of each case.[64]

The court cites the senate standing committee report on the implementation of the Office of Hawaiian Affairs in support of this proposition. Like the prior committee report on the intermediate appellate court, this committee report states:

> [W]e find it unnecessary to establish the weight that the legislature must accord to matters discussed in the committee reports of the Constitutional Convention which did not appear in the text of the Constitutional amendment placed before the voters for ratification. In dealing with all bills addressed to implementation of Constitutional amendments, we have considered only the text to have been ratified by the voters and therefore . . . mandatory. Conversely, matters in the committee reports are entitled to serious consideration, but were nonetheless only advisory.[65]

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[62] 64 Hawaii 197, 638 P.2d 309 (1981).

[63] *Id.* at 201-02, 638 P.2d at 314.

[64] *Id.* at 204, 638 P.2d at 316.

[65] Senate Judiciary, *supra* note 37, at 1352.

Prior to the *Kahlbaum* decision it appeared that the Hawaii Supreme Court was less willing than courts of other states to shrug off Con Con committee reports, regardless of lack of ambiguity in the constitution itself.

D. Committee Reports "Plus" Can Be Legally Binding

The Hawaii Supreme Court has used Con Con committee reports to ascertain the intent of the provisions of the constitution, at least when those provisions were ambiguous, and occasionally when they were not. But the question posed here is whether an individual could successfully sue in a court of law in an action claiming that a statute passed by the legislature to carry out a constitutional mandate is unconstitutional because the statute contravenes the intent expressed in a Con Con committee report, although not the constitutional provision standing alone. The answer to that question proposed here is that when it is virtually unmistakable that the committee report expresses the intent of the Con Con, the intent expressed therein is legally binding. That intent may range from giving free rein to legislative discretion to prescribing or proscribing actual content of enabling or implementing legislation.

The question of whether the intent expressed in the committee report is virtually unmistakable as a valid reflection of intent depends upon the ability to ascertain this "virtual unmistakability." This depends upon support for the committee report from extrinsic sources—the remainder of the proceedings, testimony from committee report files, press coverage among others. A high degree of support found in these documents and a low degree of dissent would support a finding that the committee report's expressed intent is virtually unmistakable as a true reflection of intent and therefore should be legally binding upon the legislature. An enactment by the legislature which contravenes the prescriptions or proscriptions of committee reports "plus" would be unconstitutional under this theory.

In Hawaii there is easy access to extensive documentation of Hawaii Con Cons, which would provide a means to make the determination whether a committee report should be binding. Other documents include speeches by the delegate in charge of the proposal, minority reports, floor debates, resolutions, petitions, individual delegate proposals, and correspondence. The files in the State Archives include minutes of Con Con committee meetings, and copies of all written testimony presented to the committees, as well as motion pictures of portions of the proceedings, and voter information materials.

The rules of the convention, patterned after those of the 1968 Con Con, allow the convention to resolve itself into a Committee of the Whole to consider committee proposals from the standing committees.[66] The Committee of the

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[66] Rule 22, Rules of the Convention, *reprinted in* I PROCEEDINGS, *supra* note 9, at 1142.

Whole then reports its recommendations to the convention for second reading.[67] The Committee of the Whole feature as well as the subsequent second reading gave delegates an opportunity to submit proposals that had been rejected by the standing committee to the entire membership of the convention. This was done in the form of proposed amendments to the committee proposals. Many delegates took full advantage of this opportunity, so that in some cases the Committee of the Whole debates became a reenactment of much of the dicussion that occurred in committee. Therefore, delegates heard much of what was said by other delegates in committees on which they were not sitting. They heard committee speeches recycled.

In Congress or in the Hawaii legislature, on the other hand, the members of the body do not have this type of access to committee deliberations. Yet, "[c]ommittee reports are now definitely a part of the equipment of the court for the interpretation of the meaning of statutes and for deciding their constitutionality."[68] In *Securities Exchange Comm. v. Robert Collier & Co.*[69] Judge Learned Hand explained that the realities of the legislative process demand acknowledgement that committee reports be deemed accepted by the legislative body. In that case the question was whether the Securities Exchange Commission (SEC) was authorized under the Securities Exchange Act to seek an injunction against violators of the Act independently or whether it must do so through the Attorney General. The court held that the SEC could independently seek an injunction. The holding was based upon an interpretation of the Act using testimony before the congressional committee as the source of interpretation. Judge Hand indicated it is acceptable that the committee's deliberations be taken as the intent of Congress, even though members of Congress had not heard the testimony or deliberations of the committee. He explained:

> The amendments of a bill in committee are fertile sources of interpretation . . . It is of course true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. On the most rigid theory possible we ought to assume that they accept the words just as the words read . . . . But courts have come to treat the facts more really; they recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.[70]

As Hand maintains, then, the Congressional committee reports are impliedly adopted by the other members of Congress despite the fact that members of

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[67] Rule 46(d), *Id.* at 1145.

[68] Chamberlain, *The Courts and Committee Reports*, 1 U. CHI. L. REV. 81, 87 (1933).

[69] 76 F.2d 939 (2d Cir. 1935).

[70] *Id.* at 941.

Congress have probably not followed the committee's deliberations. With respect to the Con Con in Hawaii there is more evidence of adoption than merely the "implied" variety, because the content of the Committee of the Whole deliberations included much of what was said in committee. These "re-runs" became a source of irritation for some, and one delegate was prompted to propose that the legislature conduct all business by Committee of the Whole and abolish standing committees.[71]

E. The Money and Environment Committee Reports and Adverse Possession

The Taxation and Finance and the Environment, Agriculture, Conservation and Land (EACL) committee reports from the 1978 Con Con are illustrative of attempts to limit legislative discretion outside of the constitution. The Hawaiian Affairs committee report section dealing with adverse possession represents a case where the legislature acted unconstitutionally under this theory, which the legislature avoided doing with respect to the State spending limit.

1. *Taxation and Finance*

The Taxation and Finance Committee proposed a state general fund expenditure ceiling. The amendment reads in part: "[T]he legislature shall establish a general fund expenditure ceiling which shall limit the rate of growth of general fund appropriations . . . to the estimated growth of the State's economy as provided by law."[72] In explanation of this provision the committee stated:

> After lengthy discussion, your Committee decided to allow the legislature to prescribe the standard of growth of the State's economy. There was strong support in your Committee for using total state personal income as the standard. It was argued that a number of experts testifying before your Committee agreed that state personal income was currently the best indicator of the State's ability to support government services and should be included in the Constitution itself.
>
> There was also the view that neither personal income nor any economic measure should limit government spending and that spending limits should be a matter for the legislature to decide. However, the majority of your Committee believed that the State should not be tied to one particular index. A standard such as total state personal income which is a federal index, may be valid and useful today but outmoded at some later time. Your Committee preferred to allow the legislature the flexibility to devise an appropriate indicator and change

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[71] Proposed Amendment to Comm. Proposal No. 8, Introduced by Del. Crozier, *reprinted in* II PROCEEDINGS, *supra* note 27, at 921 app.

[72] HAWAII CONST., art. VII, § 9.

it later, if necessary.[73]

The "suggestion" to the legislature that total state personal income should be used as the indicator of the estimated rate of growth of the state's economy gains considerable support from Minority Report No. 11, which insists language requiring a total personal income index should be put into the constitution:

> [W]e do not concur with permitting the legislature to establish its own spending ceiling limitation . . . .
>
> We believe the language should be explicit so that the legislature will not be faced with a cloudy issue. If the present provision should be approved by the electorate, there is no compulsion or even motivation upon the legislature to devise a limitation in consonance with the beliefs of the delegates or their constituencies.[74]

This minority report expresses concern that "if the legislature is permitted to develop its own measurement of growth of the economy, it will be possible for the legislature to circumvent the intent of the delegates to the Constitutional Convention."[75] This minority report was signed by seven of the thirty delegates on the Taxation and Finance Committee, including one of the committee's vice chairpersons. This minority recommended the provision be amended to read: "[T]he legislature shall establish a general fund expenditure ceiling which shall limit the rate of growth of general fund appropriations . . . to the [estimated] rate of growth of the State's [economy as provided by law] *total personal income, utilizing the federal state personal income series.*"[76] This proposed amendment was brought before the Committee of the Whole, and debate on it consumed the final two and a half hours of a twelve-hour session. Seven delegates spoke in favor of the amendment, expressing the views of the minority report. The four who spoke against it supported flexibility in the event a superior econometric model is developed. Only one delegate questioned the need for a spending limit at all. Overall the debate centered not on what the legislature should do, that is, base the spending limit on total personal income, but whether this desire should be "carved into stone." An awkward amendment to the amendment was offered to allay the fears of those favoring flexibility for the legislature. It would have added the words "until the legislature shall specify another index."[77] This failed, then the amendment itself failed by a vote of thirty-five

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[73] STAND. COMM. REP. NO. 66, *reprinted in* I PROCEEDINGS, *supra* note 9, at 659.

[74] Min. Rep. No. 11, *See id.* at 993.

[75] *Id.* at 994.

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

[77] II PROCEEDINGS, *supra* note 27, at 557.

ayes, forty-four noes, and twenty-three excused. In general, then, the legislative history of the convention shows firm support for the idea that total personal income or a comparable index should be used by the legislature in its initial legislation implementing the spending limit provision. It should also be noted that extensive popular support and editorial praise for limiting spending existed at this time, which fell in the wake of California's Proposition 13 (taxpayers' revolt) in 1978. Therefore, not only the legislative history, but also the intent of the voters, was ascertainable by the legislature. One newspaper account read:

> Advocates of the spending limit say its intent is to make sure that expenditures stay in line with the ability of Hawaii residents to pay.
>
> Under the spending limit proposed the Legislature will determine which indicator will be used to measure growth of the State's economy. Some convention delegates wanted total personal income to be spelled out in the constitution as the indicator to be used, fearing that legislators would choose an indicator that would allow them to spend more money.[78]

The implementing legislation that was passed in 1980 begins with a statement of purpose which indicates that the legislature ascertained an "intent" on the part of the voters: "These constitutional amendments were overwhelmingly ratified by the electorate in the 1978 general elections and the public thereby expressed its mandate that limits be placed on government spending."[79] The amendment was overwhelmingly approved by the voters, and the committee report, when read in conjunction with the amendment itself, clearly indicates that the spending limit was intended to have "teeth." The constitutional amendment bars appropriations in excess of the spending ceiling "unless the legislature shall, by a two-thirds vote of the members to which each house of the legislature is entitled, set forth the dollar amount and the rate by which the ceiling will be exceeded and the reasons therefor."[80]

An expenditure ceiling that is tantamount to no ceiling at all would reduce the two-thirds vote requirement to an absurdity. On the other hand, if a stringent standard for estimating the rate of growth of the state's economy were carved in stone in the constitution there would be no room to accommodate drastic changes in economic conditions. Such drastic changes occurred, in fact, less than three years after the Con Con when cutbacks in federal funding of state programs increased state spending burdens.

The Taxation and Finance Committee report as supported by the other legislative history of the Con Con as well as popular understanding (which is, incidentally, not a mandatory factor under this theory), called for a strict standard

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[78] Honolulu Star-Bulletin, Oct. 23, 1978, at A-2.

[79] 1980 HAWAII SESS. LAWS 529.

[80] HAWAII CONST., art. VII, § 9.

such as total personal income to measure the estimated rate of growth. Thus a strict standard was constitutionally required. The committee report also left it to the legislature to determine if and when the standard is no longer appropriate. The legislature did follow the intent expressed by the Con Con in Act 277, adopted in 1980. The Act requires that the legislature refrain from exceeding the expenditure ceiling, which is to be computed by adjusting the ceiling by state growth. State growth is defined as "the estimated rate of growth of the State's economy and shall be established by averaging the annual percentage change in total personal income for the three calendar years immediately preceding the session of the legislature making appropriations from the state general fund."[81]

Public knowledge of and support for the contents of a committee report such as that of the Taxation and Finance Committee probably made the legislature feel politically bound to follow the committee report. But public knowledge is not a controlling factor in the theory that virtually unmistakable intent of the Con Con is legally binding upon the legislature. The question is whether the legislature would *ever* undermine Con Con intent as expressed in the committee report where virtual unmistakability is present. The fact is that the legislature did so when it "implemented" the new constitutional amendment on adverse possession in 1979.

2. *Adverse Possession*

The constitutional amendment bans the acquisition of land over five acres by adverse possession.

> No person shall be deprived of title to an estate or interest in real property by another person claiming actual, continuous, hostile, exclusive, open and notorious possession of such lands, except to real property of five acres or less. Such claim may be asserted in good faith by any person not more than once in twenty years.[82]

The amendment originally proposed by the Con Con Standing Committee would have totally banned adverse possession. The committee report explaining the total ban stated: "Your Committee determined that this section be prospective in nature and that all claims that have already matured under present statutes and common law are recognized."[83] The legislature implemented the adverse possession amendment in accordance with the committee report

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[81] 1980 Hawaii Sess. Laws 529-30, HAWAII REV. STAT. § 37-91(1) (1980).

[82] HAWAII CONST., art. XVI, § 12.

[83] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS, *supra* note 9, at 641.

explanation of the total ban rather than the amendment which actually passed. The conference committee of the legislature explained its implementation of the Con Con amendment thusly: "As for land parcels of more than five acres, *the bill is drafted to apply prospectively*. Accordingly, where adverse possession of twenty years has matured previous to the voters' ratification of section 12 of Article XVI on November 9, 1978, such claim could still be enforceable under this bill."[84] This prospective application was lifted from the Con Con committee report which was rendered obsolete by a change to the adverse possession proposal on second reading.[85] At least the prospective application instruction was obsolete. Therefore the legislature "implemented" an amendment that did not pass the Con Con. What passed the Con Con was not a total ban. The original ban was amended to include the five-acre exception to take care of the problem originally thought to require prospective application. The overall intent in limiting adverse possession was to prevent the continued taking of land belonging to Hawaiians by large landowners.

Under the total ban, prospective application was intended to allow Hawaiians to get their lands by adverse possession if their claims had matured. This was considered overinclusive and unsatisfactory, however, and thus the five-acre exception was adopted. Therefore, the prospective application intent no longer applied to achieve the purpose of the proposal.

3. *Water Resources Agency*

A second attempt to limit legislative discretion through a committee report was made by the EACL committee. The constitutional amendment requires the legislature to establish a water resources agency. It reads:

> *The legislature shall provide for a water resources agency* which as provided by law shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds, and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all new uses of Hawaii's water resources.[86]

The committee emphasized that the agency was bound not only to regulate but also to protect water resources, and therefore gave instructions regarding which type of government body would not be appropriate to administer the amendment. The committee report did not, however, specify which agency it

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[84] CONF. COMM. REP. NO. 52, *reprinted in* HOUSE JOURNAL, *supra* note 28, at 1111 (emphasis added).

[85] STAND. COMM. REP. NO. 56, *reprinted in* 1 PROCEEDINGS, *supra* note 9, at 641.

[86] HAWAII CONST., art. XI, § 7 (emphasis added).

was referring to when it described the type of agency that should *not* be designated by the legislature:

> It is the intent of your Committee that the word "agency" be used in a broad sense to allow the legislature to designate an existing governmental body or to create a new one to carry out the trust responsibility. However, *your Committee notes that it should not be an existing governmental body which is a competing user of water*, because no one user should have full authority to regulate other water users or to regulate its own water use.[87]

The government agency that is a competing user of water is the Department of Land and Natural Resources (DLNR), which has responsibility for the development of water resources. The delegate in charge of the proposal explained:

> It is true that presently we have several agencies which are responsible for water regulation, and these agencies sometimes have overlapping and conflicting duties. For example, the Department of Land and Natural Resources has conflicting interests in water regulation; on the one hand it must regulate, and on the other hand it must use water for agricultural development. Thus the DLNR is a competing water user and has an inherent conflict when it comes to water allocation.[88]

This statement supports the committee report, but the remainder of the speech seems to contradict the first portion:

> First of all, the legislature is not required to establish a new agency; it may vest all of the duties listed in an already existing governmental body. Thus, if the legislature should decide that DLNR should be the appropriate agency, it can designate the DLNR, or a subdepartment of that department, as the water resources agency. However, as the committee report indicates, the legislature should be very careful in making such a decision to insure that whatever agency it gives these duties to is not already a competing user . . . .[89]

The delegate in charge of the proposal cleared up this discrepancy when privately queried on why the committee report did not specifically state that the legislature was not to attach the water resources agency to the DLNR.[90] She pointed out that a very influential delegate would have objected to this. The influential delegate was not only a major Democratic Party leader and powerful

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[87] STAND. COMM. REP. NO. 77, *reprinted in* I PROCEEDINGS, *supra* note 9, at 688-89 (emphasis added).

[88] II PROCEEDINGS, *supra* note 27, at 858 (Sept. 14, 1978) (statement of Del. Fukunaga).

[89] *Id.* at 858.

[90] Conversation with Carol Fukunaga (Feb. 1983).

union leader, but had personally been helpful to the delegate in charge of this proposal.

The debates surrounding the water resources amendment do not address the DLNR issue, although there was a move to delete the entire provision,[91] indicating that the proposal itself was somewhat controversial.

The case for binding the legislature to not attaching the water resources agency to DLNR, then, is somewhat weaker than the case for using total personal income or a comparable index to determine the estimated rate of growth of the state's economy. The Taxation and Finance Committee report was supported by the committee's minority report, the debates, and by the voting public. The water resources proposal, on the other hand, was supported primarily by a speech by the committee member in charge of the proposal that appears contradictory on the surface. The report itself lacks the specificity of actually stating which agency it is describing. Five years later, the legislature has yet to provide for the water resources agency, and is only beginning to take incremental steps toward implementing the amendment.

Factors weighing in favor of the binding effect of a constitutional convention committee report, then, would include support in floor debates; support in minority reports (which is an especially strong factor since minority reports normally represent dissent); the signatures on the committee report, indicating that the committee report was endorsed or not endorsed by the committee member signing the report; and the quality of the committee report itself in terms of specificity.

Indications of public knowledge and support are especially significant to bolster the legal effect of committee reports, as well as the political effect, of course. Just as the 1978 Con Con delegates had a greater opportunity to learn the content of committee deliberations in the Committee of the Whole, unlike members of Congress, the voting public had access to the content of some committee reports through newspaper coverage. In the *Collier* case, Judge Hand pointed out that committee reports are persuasive for judicial interpretation despite the lack of knowledge of the members of Congress of individual committee deliberations. Even without this added strength of knowledge of committee deliberations by delegates and the public in the 1978 Con Con, it can be argued that the public and the delegates delegated authority to the committee to speak for the convention. The public in turn adopted the work of the convention in the same way the Congress adopts the work of its committees, because constitution-making could not go on in any other way.

Other potential sources of pronouncements of intent on the part of the delegates to the Con Con are resolutions. A resolution was used to state the intent

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[91] Proposed Amendment to Comm. Proposal No. 17, Introduced by Del. Souki, *reprinted in* II PROCEEDINGS, *supra* note 27, at 938 app.

of a proposed constitutional amendment in only one instance, however, in the 1978 Con Con. The resolution was that the right to privacy in the Bill of Rights "is not intended to violate freedom of the press."[92] This resolution was probably adopted to counteract a statement in the committee report which upset local newspaper editors. That statement intimated that the right to privacy may restrict certain types of publicity.[93] Otherwise the resolution device was not used to state intent, but was more often used to make recommendations to the legislature to consider proposals the convention thought had merit but were primarily appropriate as statutory rather than constitutional material.

F. Factors That Could Be Said to Undercut the Weight of Committee Reports

Certain factors would detract from arguments that a particular committee report or that committee reports in general should be binding. The most obvious of these would be clear expressions of dissent in the committee itself, evidenced by members of the committee writing "I do not concur" next to their signatures or simply not signing the report at all. But often this disapproval was not expressed because of what passed the committee but because of what *did not* pass, and the committee report's explanation of why it did not pass. Minority reports disagreeing with the committee proposal, and dissent in debates might also be interpreted by the legislature as indicating that what is expressed in the committee report may not truly reflect the intent of the Con Con. Nonetheless, under the democratic system of majority rule, the convention's proposed amendments to the constitution were adopted by the convention and the accompanying explanations of them in the committee reports were adopted by the majority of committee members.

Less obvious, or indirect factors may also detract from the weight of the committee reports in the minds of members of the legislature. For example, not all committee reports are of the same quality. The writer of the report of the committee on Public Health & Welfare, Labor and Industry, for example, had the difficult task of justifying inclusion of several policy statements in the committee proposal that passed the committee with very little debate. The "public safety amendment" is one of these. The amendment simply gives the state the power "to provide for the safety of the people from crimes against persons and property."[94] The committee report paints a rather exaggerated picture of what the amendment will do: "[S]uch a policy statement would contribute to a better

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[92] RES. NO. 51, *reprinted in* I PROCEEDINGS, *supra* note 9, at 556.

[93] "[P]ublicity placing the individual in a false light." *See* STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS, *supra* note 9, at 674.

[94] HAWAII CONST., art. IX, § 10.

environment in our community."[95]

Of course constitutional policy statements don't require the legislature to enact enabling legislation, and therefore the committee report explanations of them would not be written with the intent to influence or dictate the specific contents of specific legislation. Therefore, the committee report writer is relatively free to embellish the attributes of the committee proposal. Thus, the committee report stated that the committee proposal *would* contribute to a better environment when in fact the proposal wouldn't do anything except put the legislature on notice that the Con Con and the ratifying public wanted public safety (not exactly a novel desire).

The "right to privacy" provision, which does require the legislature to enact legislation, is explained in a committee report in rather confusing and vague terms, leaving little guidance to the legislature as to exactly what the committee had in mind in the form of enabling legislation. Although the report promises "to explicitly state the intent of your Committee as the scope and nature of the right,"[96] this promise is far from fulfilled.[97] The legislature is to prohibit "abuse, misuse or unwarranted revelations of highly personal information."[98] No examples are given. We are told "the right can be used to protect the individual from invasion of his private affairs, public disclosure of embarrassing facts, and publicity placing the individual in a false light."[99]

Committee report explanations of convention intent, then, vary in credibility. Some committee reports, most notably those of the Taxation and Finance and Judiciary Committees, are high in credibility because of their scholarly and technical presentation. The fact that some committee reports lack this quality should not detract from the credibility of those that are of high quality. The committee reports should be individually judged on the amount of thought and research that went into them. The poorer quality reports should be taken for what they are worth. In other words, each committee report should be given the weight due it. If the report is vague on an issue, the Con Con was probably vague on the issue, and thus the legislature would not be bound to any specific action. If the committee report is specific and definite, the legislation adopted to implement it should reflect the intent of the convention.

Another problem that might affect the legislature's respect for committee reports could be a well-written and convincing committee report in support of a poor quality constitutional provision. This happened in the 1978 Con Con when one provision passed the Committee of the Whole "accidentally," and

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[95] STAND. COMM. REP. NO. 36, *reprinted in* I PROCEEDINGS, *supra* note 9, at 583.

[96] STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS, *supra* note 9, at 674.

[97] The Committee of the Whole report dealing with the right to privacy was somewhat more specific in that it cited a few U.S. Supreme Court opinions dealing with privacy issues.

[98] *Id.* at 675.

[99] *Id.* at 674.

was subsequently voted down. The amendment would have required legislative amendment of voting procedures.

> The legislature shall provide for the registration of voters and for absentee voting; and shall prescribe the method of voting at all elections. The ballots for all elections shall offer, in addition to the names of the candidates for office, the option to vote for "NONE OF THE ABOVE." Only votes cast for the named candidates shall be counted in determining nomination or election, but for each office the number of ballots on which "NONE OF THE ABOVE" was chosen shall be listed following the names of the candidates and the number of their votes in every official posting, abstract and proclamation of the results of the election.[100]

The "None of the Above" amendment passed by only one vote because although the proponent was able to gather commitments to vote in favor of it, some of those who committed themselves chose to disappear from the floor of the convention when the vote came up, rather than offend the movant. Although the amendment seemed either negative, silly or simply not a constitutional matter to many delegates, the committee report is so convincing that the provision sounds like an excellent idea:

> Your Committee believes that this would be one method of allowing voters disenchanted with candidates running for a particular office to register their lack of choice in a concrete and positive manner rather than withdrawing from the electoral process. Since voters can choose "NONE OF THE ABOVE" to register any negative feelings about a candidate or candidates, your Committee believes that votes for a candidate can be interpreted as a positive sign of support.
>
> A large number of "NONE OF THE ABOVE" would clearly indicate a vote of nonsupport for those running for a particular office and encourage new candidates to enter that race to capitalize on such feelings.[101]

A convincing committee report for a "silly" constitutional amendment could carry the message that a good writer can make anything sound good, so committee reports should therefore not be taken very seriously. However, rejection of the amendment nullified the committee report, and had the amendment not been rejected, the committee report should have, indeed, been taken seriously. In that case the delegates would have registered their support for the constitutional amendment, indicating the majority found it desirable, and the desirability expressed in the committee report would be "true," because the majority of the committee would have endorsed it by signature.

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[100] COMM. OF THE WHOLE REP. NO. 16, *reprinted in* I PROCEEDINGS, *supra* note 9, at 1024.
[101] *Id.* at 1025.

1. *Political and Personality Factors*

As already demonstrated in connection with the water resources amendment, where a committee report was "watered down" to retain the support of a powerful delegate, and as members of the legislature well realize, there are many unknown and unknowable political and personality factors that affect what is or is not included in the committee reports. For example, sheer human vulnerability caused the passage of the "None of the Above" amendment. This proposal was enormously important to the youngest delegate, age twenty. She had even printed "None of the Above" bumper stickers early in the convention to push the idea. Many if not most members of the convention felt protective toward the youngest delegate, and she was thus able to gather more commitments than those committing themselves anticipated, delegates who in their hearts did not truly wish to see "None of the Above" carved in stone.

It is undeniable that the committee reports may have been influenced by unknown and unknowable political and personality factors, but this is no more true of the committee reports than of the constitution itself. Therefore, it is no better reason to disregard the committee reports than to disregard the constitution itself.

The delegates indicated their endorsement or lack of endorsement of the committee reports by signature. They endorsed or did not endorse proposed constitutional revisions by their votes for or against them. They had the opportunity to express their "true" intent regarding their endorsement or lack of endorsement in the official record of the convention. If they did express their intent in the record, it should be taken into consideration as part of the totality of factors from the legislative history for or against the instructions in the committee report. If they did not express their true intent in the record, then their intent should be deemed to support what *is* in the record, just as a voter who chooses not to vote in an election is deemed to accept the will of the majority of those who choose to vote. Therefore, if the delegates were unclear or were unwilling to be clear on the meaning of a constitutional provision such as the right to privacy, then the intent of the committee report was probably that the committee report not have the force of law, but merely be a guide to the legislature. If the delegates *were* clear in the record, however, then these expressions should have the force of law where they purport to limit legislative discretion.

2. *The 1979 Legislature and the 1978 Constitution*

In January 1979 the Tenth Legislature of the State of Hawaii held its first session with five 1978 Con Con delegates among its new members. Fourteen Con Con delegates were on the staff of the legislature during this session, the

first to deal with implementing the new constitutional amendments.[102] During this session, twenty-five bills purporting to implement new constitutional amendments were adopted and sent to the governor for signature.[103] Of the 156 bills introduced to implement the constitutional amendments, eighty passed at least one committee, and therefore there are legislative committee reports on them.[104] It should be noted that in both houses of the legislature there was considerable hostility toward the 1978 Con Con. This was partially a reaction to public opinion against the convention by supporters of initiative. There was also strong opposition to the manner of submission in the referendum election.

Another reason for hostility of legislators could also be that many of the new amendments altered the legislative process itself, thus changing a system with which the legislators were comfortable. The hostility of the legislature is clearly reflected in the easy passage of a proposed constitutional amendment, later adopted, which raised the percentage of voters who must ratify an amendment to the Constitution, from 35 percent to 50 percent of the entire votes cast.[105]

The Senate Judiciary Committee report that is the focus of this article reflects this hostility of the Tenth Legislature.[106] The policy of the Senate Judiciary Committee regarding Con Con committee reports was stated in the committee report on the bill to implement the constitutional amendment requiring the legislature to create an intermediate appellate court. The Con Con Judiciary Committee report presents a lengthy discussion of the intents and purposes of the intermediate appellate court. However, the Con Con Judiciary Committee made no recommendations to the legislature on the actual structure of the court: "Your Committee received proposals recommending the size and structure of an intermediate appellate court. However, your Committee feels that the legislature is better able to structure the intermediate appellate court and makes no recommendation in that regard."[107] Therefore, it is ironic that the Senate Judiciary Committee chose to declare committee reports non-mandatory relative to a committee report that didn't attempt to mandate anything. The Senate Judiciary Committee in fact very carefully followed the Con Con Judiciary Committee report in performing the task of "delineation of the jurisdiction and powers of the intermediate appellate court and its coordination with that of the supreme court and that of other courts and sources of appeal."[108] It quoted the Con Con

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[102] Con Con Newsletter No. 1, May 9, 1979 (circulated to delegates).

[103] Tenth Legislature, 1979 Session Con Con Amendments (status report of Con Con-related bills and resolutions, prepared by staff of Rep. Fukunaga, circulated to Con Con delegates).

[104] *Id.*

[105] Senate Judiciary, *supra* note 15, at 1184.

[106] Senate Judiciary, *supra* note 15, at 1064.

[107] STAND. COMM. REP. NO. 52, *reprinted in* I PROCEEDINGS, *supra* note 9, at 619.

[108] Senate Judiciary, *supra* note 15, at 1060.

report, then summarized the objectives set forth in that report, and concluded:

> The foregoing enumeration and terse discussion of the various objectives sought to be achieved indicates to your Committee that the delegates to the Constitutional Convention intended that the legislature should act affirmatively to explore these separate objectives, weigh their interrelationship and obtain a rational balance between them in fashioning the ultimate structure of the intermediate appellate court.[109]

Throughout its explanation of the implementing legislation, the Senate Judiciary Committee refers to the Con Con Judicary Committee report as well as requests from representatives of the State Judiciary. Where there was a conflict between the suggestion of the Judiciary and the Con Con regarding the jurisdiction of the supreme court and the Intermediate Appellate Court, with the Judiciary wanting all appeals from the district courts, family court, and administrative agencies to go to the intermediate appellate court, the Senate rejected this because of the Con Con committee report: "Your committee has not adopted the judiciary's suggestion . . . because categorical division for purposes of case assignment would be contrary to the Constitutional Convention's suggestion that both courts should hear 'all types of cases.' "[110] It is apparent that the Senate Judiciary Committee felt compelled to follow the Con Con Judiciary Committee report even as it insisted that it was not compelled to. A possible explanation of the apparent contradiction between this and its policy regarding committee reports in general is that the Senate Judiciary Committee wished to assert that it had a right to disregard committee reports that it found less palatable than the Con Con Judicary Committee report. By asserting the right where it *did* follow the Con Con committee report, the Senate seems to be saying, "Okay, we're following the committee report here, but we don't have to, and don't expect us to do it every time."

The Senate Judiciary Committee report on the Office of Hawaiian Affairs (OHA), cited in the *Kahlbaum* opinion, makes the well-taken point that the constitution, and not the committee report, should have spelled out that OHA be independent from the executive branch, using the education amendments as an example:

> *Degree of Independence in Matters of Internal Organization and Management.* Your committee is aware of the divergence between the actual language of article XII, sections 4, 5 and 6 and the language of Committee of the Whole Report No. 13 and Standing Committee Report No. 59 of the Constitutional Convention. More particularly, we are aware that Standing Committee Report No. 59

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[109] Senate Judiciary, *supra* note 15, at 1060-61.

[110] Senate Judiciary, *supra* note 15, at 1063.

> speaks broadly about the desire that "the Office of Hawaiian Affairs . . . be independent from the executive branch and all other branches of government" and that such office was "based on the model of the University of Hawaii."
>
> We note with particularity the different treatment accorded the board of regents of the University of Hawaii and the board of trustees of the Office of Hawaiian Affairs by the actual texts of the Constitutional amendments.
>
> Article XII, section 6 states that "the board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law . . . ." In contrast, article X, section 6 provides that the board of regents "shall have the power as provided by law, to formulate policy . . .; *except that the board shall have exclusive jurisdiction over the internal organization and management of the university.*"
>
> Accordingly, it is improper to equate the Constitutional status of these offices. It must be construed that the voters did not intend to give the board of trustees of the Office of Hawaiian Affairs exclusive jurisdiction over its internal organization and management as it did with the board of regents. In that respect, the statement in Committee on the Whole Report No. 13 that the establishment of the Office of Hawaiian Affairs was intended to grant the "power to make their own substantive rules in internal matters" is inconsistent with what was presented to the voters for ratification and cannot be given consideration.[111]

OHA was the subject of considerable public controversy, and it is easy to imagine that this controversy would have intensified if the constitution required what the committee report requests of the legislature: "The Committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency."[112] Establishment of a "separate entity independent of the executive branch of government" based on the University of Hawaii model is simply the type of fundamental law that is appropriately set forth in the constitution itself. The legislature was justified in distrusting the committee report on this point in the absence of clearer constitutional language suggesting this result. The Con Con committee report suggests that granting the OHA power to govern itself through a board of trustees automatically makes OHA independent of the executive branch. It is difficult to assume this is the case, and more difficult to assume the ratifying public would draw this conclusion.

The Senate Judiciary Committee was given the task of handling all Con Con related legislation, and carried its theme that Con Con committee reports are non-mandatory to some of the Senate Judiciary committee reports on Con Con amendment legislation, but not to others. The Senate Judiciary Committee used the non-mandatory theme in its committee report regarding legislation to implement campaign spending limits and public financing of elections. The Senate stated, "[w]e note *for informational purposes only* that the delegates to the Con-

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[111] Senate Judiciary, *supra* note 37, at 1352 (emphasis added).

[112] STAND. COMM. REP. NO. 59, *reprinted in* I PROCEEDINGS, *supra* note 9, at 645.

stitutional Convention expressed great concern in the depletion and damage of public confidence in our political process by its domination by money."[113] The Senate then quoted a portion of the Con Con committee report, which stated that whether candidates not receiving public financing may be limited in their expenditures is an unsettled legal question and that the Con Con welcomes litigation of the issue "because the public interest served by campaign spending limits is so essential."[114] The Senate then reiterated its position: "Your Committee does not, and has not, considered the foregoing Committee Report as in any way mandatory upon our task, but have recited it for information purposes only."[115]

Here the Senate claimed to be unwilling to endorse the Con Con committee report, but in fact the Con Con committee report, from the Committee on Bill of Rights, Suffrage and Elections (BORSE), was similar to the report of the Committee on the Judiciary. It expressly left the actual content of the legislation to the discretion of the legislature, but set forth the objectives the Con Con wished to accomplish. The Senate again balanced these objectives as set forth in the BORSE committee report in arriving at the spending limits and public financing procedures of the implementing legislation.

The Senate Judiciary Committee Report on legislation to implement the two-term limitation for the governor and lieutenant governor does not insist that the Con Con committee report is non-mandatory: "*The Constitutional Convention felt* that a strong executive office should be retained as a part of the Constitution. However, *it was concerned* that without a limitation on the number of terms, an incumbent would be able to build a political machine to perpetuate re-election . . . ."[116]

The Senate Judiciary Committee thus ascertained how the Con Con "felt" and what it "was concerned" about from the Con Con committee report, indicating acceptance of the committee report as the Con Con's intent as a body.

Although the Senate Judiciary Committee, then, appeared to adopt a plain meaning rule allowing it to disregard Con Con committee reports, it often chose not to ignore them, and in fact followed them quite carefully (with the exception of adverse possession and OHA).

Meanwhile, on the other side of the capitol, the House of Representatives did not choose to reserve to itself a right to disregard Con Con committee reports. In one case, the House accepted a Con Con committee report at the level of a legal mandate:

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[113] STAND. COMM. REP. NO. 697, *reprinted in* SENATE JOURNAL, *supra* note 15, at 1292-93 (emphasis added).

[114] *Id.* at 1293.

[115] *Id.*

[116] STAND. COMM. REP. NO. 25, *reprinted in* SENATE JOURNAL, *supra* note 15, at 1016 (emphasis added).

> The *guidelines established* in the 1978 Hawaii Constitutional Convention's Standing Committee Report No. 39, that the board of education consist of between thirteen and nineteen members, with at least one member residing in the Neighbor Island Departmental school districts . . . . Committee report No. 39 also states that "a board which is any larger than twenty would be unwieldy and prevent the effective operation and management of the public school system."
>
> Your Committee believes that *within the foregoing constraints*, it has provided for a school board apportionment plan which satisfies the "one man, one vote" constitutional requirement.[117]

The Senate bill on the intermediate appellate court went to a house and senate conference committee. Conference committee reports are identical for both houses, and the conference committee report retained discussion of Con Con committee reports as non-mandatory, but the original senate version of this discussion was considerably softened:

> [A]lthough your Committee has not considered the discussions in the Committee reports of the delegates to the Constitutional Convention to be mandatory, we have given such discussion serious consideration, and would note, at this time, that we have found them to be comprehensive and thoughtful. This is not to imply that all of the members of your Committee agreed with the delegates that the establishment of the Intermediate Appellate Court was the best solution to the problem at hand. Every member, however, recognized that the policy to establish such court is imposed upon the Legislature by the voters as a Constitutional mandate. Within that posture, we have found the delegates' discussion to be very helpful, and proceeded to fulfill our legislative task.[118]

This new version of the non-mandatory theme carries praise for the committee reports, but most significantly omits the statement that "the delegates to the Constitutional Convention . . . would have expressed themselves in the body of the constitution had they intended any matter to be mandatory upon the Legislature."[119] Perhaps the House conference committee members were influenced by Con Con delegate House members, and this softened version of the original policy represents some sort of compromise. It is entirely possible that the Con Con delegates did wish their committee reports to be mandatory upon the legislature, but in the interests of flexibility in the constitution did not wish them to be permanently mandatory. For example, a change in the United States Supreme Court's across-the-board one-person, one-vote reapportionment requirement might allow for an improvement in the structure and size of the

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[117] STAND. COMM. REP. NO. 648, *reprinted in* HOUSE JOURNAL, *supra* note 28, at 1450 (emphasis added).

[118] CONF. COMM. REP. NO. 70, *reprinted in* HOUSE JOURNAL, *supra* note 28, at 1121-22.

[119] Senate Judiciary, *supra* note 15.

school board, so that it would not have to contain "between thirteen and nineteen members"[120] in order for the neighbor islands to be adequately represented.

CONCLUSION

It is a bold proposition that the strong presumption of constitutionality which accompanies acts of the legislature can be overcome by limitations accessory to the constitution. Yet, some committee reports from the Con Con were written to explain to the legislature what should or should not be contained in implementing and enabling legislation. A constitution is unique in its permanence, while society moves, economic conditions change, and different political parties gain power. The legislature must not stifle the Con Con's ability to write flexible provisions by ignoring committee reports. The proposition here is that the legislature is bound to follow the intent expressed in the committee report in its initial enabling and implementing legislation, not that the committee report governs permanently under all circumstances.

How long the legislation implementing a Con Con amendment should remain as the Con Con intended it to be is a matter committed to the checks and balances of the political process and good faith of the legislature. Some might argue that the time has already come to expand the boundaries of the spending limit because of unanticipated federal funding cuts. On the other hand, changing the school board election so that candidates do not have to run at-large would take a change in the one-person, one-vote requirement. It may take fifty years, and it may never happen.

If the legislature acted in bad faith and changed implementing legislation to undermine the intent of the Con Con where there were no changes in circumstances warranting such a change, this would be unconstitutional under this theory. But normally the political process would assure that the legislature acts in good faith. Although it is difficult to amend a statute, this is not nearly as difficult as amending a constitution.

It is too simplistic to assume the delegates expected that only the words of the constitution itself would be mandatory upon the legislature. Such provisions as those requiring the legislature to establish an intermediate appellate court or a general fund expenditure ceiling simply do not show on their face what details the legislature should fill in to implement them according to the intent of the framers. The legislature must of necessity look somewhere for guidance where these types of general provisions are concerned. The delegates must have known that the first place the legislature would look would be the committee reports. It is reasonable to assume that when the proceedings in general and the com-

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[120] STAND. COMM. REP. NO. 77, *reprinted in* I PROCEEDINGS, *supra* note 9, at 588-89.

mittee reports reflect a "united front" toward the expressed intent of the committee report the legislature is compelled to follow that intent.

"True intent" can be hidden in the silent thoughts or even unconscious minds of individual delegates, but they have selected committee reports as their official expressions of intent. In other words, the committee reports are the intended sources of intent. When these official expressions of intent are clear, accurately recorded, and sufficiently supported by other documentation, they cannot be legally ignored by the legislature.

Problems to be Avoided by the Next Con Con

The legislature acted quickly to implement many of the 1978 Con Con amendments requiring legislation. It continues to drag its feet on others, particularly the mandate to establish a state water resources agency. The legislature directly undermined the intent of the Con Con on adverse possession.

The legislature not only implemented many of the Con Con amendments requiring legislative action, it also "implemented" amendments for which enabling legislation was neither required nor desired. The starkest example was the "implementation" of the "loyalty" amendment. In 1950 the first Con Con in Hawaii drafted a constitution which was part of Hawaii's campaign to achieve statehood. This original constitution included a provision that "no person who advocates, or who aids or belongs to any party, organization or association which advocates the overthrow by force or violence of the government of this state or of the United States shall be qualified to hold any public office or employment."[121] Hawaii, through its constitution, was seeking to demonstrate its loyalty to the United States at a time when Hawaii's labor movement was reputedly Communist-led.[122] The 1978 Con Con attempted to improve upon the 1968 improvements to this original loyalty amendment to make it as reasonable as possible: "No person shall hold any public office or employment who has been convicted of any act to overthrow, or attempt to overthrow, or conspiracy with any person to overthrow the government of this State or of the United States by force or violence."[123] Instead of leaving this provision alone as a relic of an unfortunate era in American history, the 1979 legislature chose to include these words in the Uniform Act on Status of Convicted Persons. In other words, the legislature took action where no action was warranted, or even wise, while at the same time failing to act where timely action was desired.

It was hoped that in 1979 the legislature would at minimum set into motion

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[121] HAWAII CONST. of 1950, art. XIV, § 3.

[122] N. MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII at 4 (1971).

[123] HAWAII CONST., art. XVI, § 3.

the formulation of a state water code as the first step toward implementing the water resources amendment. Instead, the legislature authorized a study of ocean leasing as a first step in implementing the amendment which allows state-licensed mariculture. The mariculture provision was envisioned by the Chair of the Con Con EACL committee as an option for the distant future, while water use control was considered an immediate problem.[124]

Subsequent Con Cons in Hawaii should therefore be aware that they should, wherever politically feasible, give the legislature time deadlines, in the constitution, for enacting enabling legislation. The convention should not presume that the legislature will know when enabling legislation is neither required nor desired.

When the Con Con takes the unusual step of amending a proposal after it has passed the Committee of the Whole, the person in charge of the amendment should fully explain which portions of the committee report no longer apply because of the amendment to the committee proposal. This would help prevent the legislature from following an obsolete committee report statement, as the tenth legislature did on adverse possession.

The Con Con, or its individual committees, should also attempt to establish an official policy regarding their view of the legal status of committee reports. Finally, the convention should give the legislature guidance as to which amendments are "futuristic" and do not require immediate response.

For all its protests to the contrary, for the most part the legislature did follow the Con Con committee reports, in those cases where it took action. The greatest problem was not so much the action taken, but the action not taken. By failing to act, the legislature is declining to follow not only the committee report but the constitution itself. It is one thing to put a water resources agency in the DLNR in defiance of the committee report. It is another thing not to establish the water resources agency at all within a reasonable time.

If there is another Con Con, and if it manages to pass any amendments under the stricter ratification requirements, it is hoped that its committees recognize the difficulties they may encounter when their mandates are taken up by the legislature.

Mary Ann Barnard

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[124] Conversation with Tony Chang, Chairperson of the Committee on Environment, Agriculture, Conservation, and Land, 1978 Constitutional Convention (February 1979).

Midkiff v. Tom: The Constitutionality of Hawaii's Land Reform Act*

I. INTRODUCTION

On March 28, 1983, the Ninth Circuit Court of Appeals decided *Midkiff v. Tom*,[1] holding the Hawaii Land Reform Act[2] to be unconstitutional. The Act allows long-term lessees of real property to purchase their land in fee simple through state condemnation proceedings.[3] This decision, which is on appeal to the U.S. Supreme Court,[4] has important impacts both on future landholding patterns in the State of Hawaii and on the law of eminent domain.[5]

The Ninth Circuit Court of Appeals held that the Act was not for a public use.[6] The court found that the Act violated the fifth amendment's prohibition[7]

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* This casenote was written prior to oral arguments and the decision by the U.S. Supreme Court.

[1] 702 F.2d 788 (9th Cir. 1983).

[2] HAWAII REV. STAT. § 516 (1982).

[3] *Id.*

[4] Hawaii Housing Authority v. Midkiff, 702 F.2d 788 (9th Cir. 1983), prob. juris. noted, 104 S. Ct. 334 (1983). Oral argument was heard on March 26, 1984.

[5] *See generally* J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN (rev. 3d ed. 1983) [hereinafter cited as NICHOLS ON EMINENT DOMAIN]; Kratovil & Harrison, *Eminent Domain—Policy & Concept*, 42 CAL. L. REV. 596 (1954) [hereinafter cited as Kratovil & Harrison]; Marquis, *Constitutional & Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958); Sackman, *The Right to Condemn*, 29 ALB. L. REV. 177 (1965) [hereinafter cited as Sackman, *Right to Condemn*]; Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972) [hereinafter cited as Stoebuck, *Eminent Domain*].

[6] Midkiff v. Tom, 702 F.2d at 798. On the public use doctrine, see generally 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5; Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Sackman, *Public Use Updated—(City of Oakland v. Oakland Raiders)*, 1983 INST. ON PLANNING, ZONING, AND EMINENT DOMAIN 203 (1983) [hereinafter cited as Sackman, *Public Use Updated*]; Sackman, *Right to Condemn*, *supra* note 5; Stoebuck, *Eminent Domain*, *supra* note 5; *Special Project, The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681 (1974) [hereinafter cited as *Special Project*];

— "nor shall private property be taken for a public use"[8] — which applies to the states through the fourteenth amendment's due process clause.[9] Over thirty years ago, a student commentator suggested that the public use limitation was no longer a restraint on the exercise of eminent domain.[10] *Midkiff v. Tom*[11] raises important questions concerning the extent to which the doctrine of public use is still viable in federal judicial review of state eminent domain proceedings.

The court also concluded that state legislative declarations of public use require a higher standard of judicial review[12] than the minimum rationality standard used to review taxation and socioeconomic legislation.[13] On a broader

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Comment, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266 (1971); Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200 (1968); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) [hereinafter cited as *Advance Requiem*]; Note, *The Public Use Doctrine: "Advance Requiem" Revisited*, 1969 L. & SOC. ORD. 688 [hereinafter cited as *Advance Requiem Revisited*]; Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983).

This Note deals solely with the public use doctrine in the law of eminent domain. On the related question of regulatory takings see generally F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Stoebuck, *Police Power Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) [hereinafter cited as Stoebuck, *Police Power*]; Freilich, *Solving the Taking Equation: Making the Whole Equal the Sum of Its Parts* 192 INST. ON PLANNING, ZONING, AND EMINENT DOMAIN 301 (1982).

[7] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[8] U.S. CONST. amend. V. The prohibition against taking private property for a private use is implied in the language of the amendment. 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.1[2].

[9] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV. Missouri Pacific Railroad Co. v. Nebraska, 164 U.S. 403, 417 (1896). *See* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.14[1].

[10] *Advance Requiem Revisited*, *supra* note 6. Some commentators question whether the public use limitation ever existed at all. "One fault with [*Advance Requiem*] . . . is that it assumes the courts took the pure form of the public use doctrine more seriously than they probably did. It is thus easy to establish the 'demise' of a thing that hardly ever existed." Stoebuck, *Eminent Domain*, *supra* note 5, at 589 n.123.

[11] 702 F.2d 788 (9th Cir. 1983).

[12] *Id.* at 797.

[13] In general, use of the minimum rationality standard results in judicial affirmation of taxation and socioeconomic legislation unless no reasonably conceivable set of facts exist to establish the relationship between the challenged legislation and the legitimate government goal. *E.g.*,

> It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an abitrary and irrational way.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

The U.S. Supreme Court has applied an intermediate level of scrutiny in equal protection review of standard gender classifications and will uphold the classification only when it is substan-

scale, the question facing the U.S. Supreme Court in its review of *Midkiff v. Tom*[14] is whether the three basic government powers — eminent domain, regulation, and taxation — are subject to identical standards of judicial review.[15] In other words, are these three basic government powers substantially the same in requiring some public purpose or public use for their exercise?[16]

Public use cannot be defined precisely, and actual uses have varied according to local conditions, yielding a "crazy-quilt pattern" of U.S. Supreme Court decisions.[17] Historical analysis reveals that courts generally defer to legislative findings of public use and apply a minimum rationality standard of review. If the purposes set forth in an act are rationally related to protecting the legitimate police power goals of public health, safety, and welfare and if the legislature has not acted arbitrarily, capriciously, or unreasonably, the act is constitutional.[18]

This casenote describes the land tenure system in Hawaii and the factors that make land use issues in Hawaii unique from the rest of the United States. It then discusses the Hawaii Land Reform Act, including its stated purposes and the mechanisms by which land can be condemned by use of eminent domain proceedings. It traces the history of eminent domain and the public use doctrine

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tially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court also appears to invoke intermediate rationality in reviewing illegitimacy classifications, *Mills v. Habluetzel*, 456 U.S. 91, 97-99 (1982) (requiring restrictions relating to illegitimacy to be substantially related to a legitimate state interest), and alienage classifications, *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (cases generally reflect close scrutiny of alienage classifications by state governments, although all limitations on aliens are not suspect).

Several justices have also advocated closer judical scrutiny in reviewing the reasonableness of some economic and social welfare legislation. *See Schweiker v. Wilson*, 450 U.S. 221, 239-47 (1981) (Justice Powell, joined by Justices Brennan, Marshall and Stevens, in dissent, would require review of reasonableness of classification giving reduced Social Security benefits to institutionalized persons); *Minnesota v. Clover Leaf Creamery Co.* 449 U.S. 456, 489 (1981) (Justice Stevens, in dissent, would have allowed a state court to use the fourteenth amendment equal protection clause to review reasonableness of classification of containers for the sale of milk).

[14] 702 F.2d 788 (9th Cir. 1983).

[15] *See generally*, 2A NICHOLS ON EMINENT DOMAIN, *supra*, note 5, § 7.11; Stoebuck, *supra* note 5, at 569-72; Waite, *Governmental Power and Private Property*, 16 CATH. U. L. REV. 283 (1967). Thus "[i]t has been held that the scope of eminent domain has been made as broad as the powers under the police and tax provisions of the constitution," 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02[2]. "Taxation is not merely similar to eminent domain; it is the same, as far as the power itself goes." Stoebuck, *supra* note 5, at 571.

[16] "Although it is considered by some that the constitutional provision pertaining to eminent domain has no application to the power of taxation, it is well settled that money cannot be raised by taxation to be applied to a use not public, *and the meaning of public use in connection with taxation is much the same as in its application to eminent domain.*" 1 NICHOLS ON EMINENT DOMAIN, *supra*, note 5, § 1.41[2] (emphasis added).

[17] Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (1962).

[18] Berman v. Parker, 348 U.S. 26, 32-33 (1954).

in the United States, focusing on the standards used by courts to determine whether a taking under eminent domain proceedings constitutes a public use. After reviewing the Hawaii federal district court[19] and Ninth Circuit Court of Appeals opinions, this note concludes that the Hawaii Land Reform Act is constitutional. This casenote focuses entirely on the public use issues that relate to eminent domain proceedings and ignores the abstention issue also considered by the Ninth Circuit Court of Appeals.[20]

II. BACKGROUND

Hawaii's residential landholding pattern is characterized by a few major landowners leasing residential lots to long-term lessees; the lessees own their houses, but lease the land underneath. This situation prompted passage of the Hawaii Land Reform Act and its subsequent challenge by Bishop Estate, the largest private landowner in Hawaii.

A. Hawaii's Unique Landholding Pattern

The land tenure system in ancient Hawaii was somewhat feudal in form, although unlike Europe, the tenants were not serfs tied to the soil.[21] When King Kamehameha I united all of the islands under his control at the beginning of the nineteenth century, he simply utilized the land system in existence.[22] He reserved the lands he desired for his personal use and divided the remainder among his principal warrior chiefs for distribution to the lesser chiefs, with some eventually passing to the tenant commoners.[23] Such allotments, however, were on a revocable basis.[24] When King Kamehameha III ascended to the throne in 1824, a large foreign population lived in the islands consisting mostly

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[19] Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979).

[20] The doctrine of abstention permits a federal court to refrain from exercising jurisdiction when it is necessary to avoid needless conflict with the administration by a state of its own affairs. *See* 1A, Pt. 2 J. MOORE, W. TAGGART, A. VESTAL, & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.203 (2d ed. 1983). The Ninth Circuit Court of Appeals ruled that the Hawaii federal district court implicitly exercised its discretion to decline abstention. Midkiff v. Tom, 702 F.2d 788, 789 n.1 (9th Cir. 1983). The Ninth Circuit majority reviewed the several bases upon which a federal court may abstain from exercising jurisdiction; *id.* at 789-90 n.1, 799-803. It concluded that federal abstention is only appropriate in exceptional cases where such an action clearly serves an important countervailing state interest. *Id.* at 799, *citing* Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). The Ninth Circuit majority held that the district court did not abuse its discretion by declining abstention.

[21] J. CHINEN, THE GREAT MAHELE 5-8 (1958).

[22] *Id.* at 6.

[23] *Id.*

[24] *Id.*

of western missionaries and merchants.[25] He was encouraged by the westerners to change the system of land tenure to one with which they were more familiar and under which they could more easily hold land.[26]

As a result of westerner pressure, Kamehameha III started the Great Mahele (division of lands) in 1848[27] which laid the foundation for modern land titles in Hawaii. Kamehameha III reserved about 1,000,000 acres of land for himself as "Crown Lands" and set aside about 1,500,000 acres for the alii or chiefs.[28] The Great Mahele, however, allotted only about 30,000 acres to native tenants.[29] Thus, the Great Mahele did little to change Hawaii landholding patterns.

Today, land ownership in Hawaii is concentrated in the hands of relatively few owners because of this earlier feudal land tenure system. Concentration of land ownership is evident on a statewide basis, especially on Oahu where a few private estates own about half the land. About thirty percent of Oahu is owned by government entities, and this portion is almost equally divided between the state and federal governments.[30] This leaves only about twenty percent of the land in the hands of small private owners.[31]

Hawaii is extraordinary in being an island state. It is small in size, ranking 47th in area among the states[32] and possessing only about 6,425 square miles.[33] Because 2,000 miles of ocean separate Hawaii from the contiguous United States, the state is confronted by unique problems concerning land use and natural resource management that differ not only in degree but in kind from problems faced by other states. Consequently, land use management and control are very important in Hawaii.[34]

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[25] *Id.*

[26] *Id.* at 7.

[27] P. VITOUSEK, J. REILLY, & R. REDISKE, PRINCIPLES AND PRACTICES OF HAWAIIAN REAL ESTATE 1 (8th ed. 1980-81).

[28] J. CHINEN, *supra* note 21, at 31.

[29] *Id.*

[30] The state owns 56,672 acres and the federal government owns 56,313 acres. R. W. ARMSTRONG, ATLAS OF HAWAII 140 (1973).

[31] *Id.* P. VITOUSEK, J. REILLY & R. REDISKE, *supra* note 27 at 1, presents somewhat different figures for land tenure on Oahu. The authors state that:

> 21 major landowners collectively own 57% of the total area. They also lease additional acreage from the state, federal government and other private owners, effectively thereby controlling 87% of the total area of Oahu, leaving only 13% for other individual landowners.

[32] Connecticut, Delaware and Rhode Island have less area. NEWSPAPER ENTERPRISE ASSOCIATION, INC., THE WORLD ALMANAC AND BOOK OF FACTS 437 (1983).

[33] R. ARMSTRONG, *supra* note 30, at 135.

[34] *See generally*, Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979). Hawaii is one of the few states to have adopted statewide land use plans as law. HAWAII REV. STAT § 519 (1982). In addition, Oregon,

The economy[35] and the demographic patterns of Hawaii's residents exacerbate land shortages. Although eight major and 128 minor islands comprise the state, about eighty-two percent of Hawaii's residents live on Oahu and about half of those reside in Honolulu.[36] Because Oahu has only 9.2 percent of the total land area of Hawaii,[37] and because much of Oahu is too mountainous to be developed,[38] the scarcity of land is particularly acute precisely where most of Hawaii's residents live.

The shortage of residential land on Oahu made it feasible for large landowners to lease lots on a large scale basis after World War II.[39] These owners preferred to sell long-term leases rather than the fee simple interest for a variety of reasons.[40] Thus, leasehold ownership, almost unknown within the continental United States, accounted for almost thirty-five percent of owner-occupied units on Oahu by 1979.[41]

B. The Hawaii Land Reform Act

Faced with this landholding pattern, the Hawaii State Legislature debated how to diminish the concentration of residential land ownership for several years. It enacted the Hawaii Land Reform Act in 1967[42] and extensively revised it in 1975.[43] Its primary purpose is to give long-term residential leaseholders an opportunity to purchase in fee simple the land that they occupy in leasehold.[44] The legislature made numerous findings regarding the necessity for

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Vermont, and Florida have to a more limited extent adopted statewide land use planning statutes. *See generally* D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND MANAGEMENT (1980).

[35] More than 80 percent of Hawaii's economic activity occurs on Oahu. R. ARMSTRONG, *supra* note 30, at 132.

[36] *Id.* at 135.

[37] *Id.* at 100.

[38] Forty-six percent of Oahu is mountainous with slopes exceeding twenty percent. *Id.* at 119.

[39] Appellant's Opening Brief at 119, Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

[40] These included the inability of most people to pay for both the fee simple lot and the residence, potentially high income taxes for the sellers, and restrictions on the sale of land in some trust instruments. *Id.*

[41] *Id.* at n.56.

[42] Hawaii Land Reform Act, 1967 Hawaii Sess. Laws 488.

[43] Hawaii Land Reform Act, 1975 Hawaii Sess. Laws 408.

[44] Specifically, the law states that:

> It is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purpose and such condem-

the Hawaii Land Reform Act, although it is not certain that such findings were supported by studies or careful analysis.[45] Among the findings was an assertion that the proliferation of residential leaseholds by a few large landowners was causing an artificial increase in the value of residential lands. The legislature stated that converting leaseholds to fee simple would result in a decrease in land prices.[46] The legislature further stated that the concomitant increasing cost of living denied Hawaii residents sufficient nutrition, safe housing and preventive health services.[47] The legislature feared that widespread disruptions in lawful social behavior would result from the artificial high cost of living.[48] In sum, the legislature declared the Hawaii Land Reform Act to be for the "public use and the purpose of protecting public safety, health and welfare of all people in Hawaii."[49]

The Act applies to all lands leased as residential lots, including lots owned by the state or its political subdivisions.[50] However, in practice the Act functions primarily to break up the residential leasehold developments that are owned by a few large trusts and corporations.[51] The Act empowers the Hawaii Housing Authority (hereinafter HHA), a state agency, to exercise the power of eminent domain,[52] to acquire all interest of the fee owner,[53] and later to sell the fee interest to the private resident living on the land.[54] Individuals wishing to purchase the fee interest in their leasehold must satisfy several statutory criteria. For example, not more than one lot may be sold in fee to any purchaser[55] and a buyer may not own in fee any land suitable for residential purposes within the same county.[56] In addition, if state funds are used to purchase the fee interest, HHA retains an option to repurchase the property if the new owner wishes to sell within the first ten years.[57]

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nation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

HAWAII REV. STAT. § 516-83(b) (1982).

[45] The plaintiffs intended to submit evidence that the Act would not meet its stated goals, but were unable to do so because the case was decided on summary judgment in the district court. Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Hawaii 1979).

[46] HAWAII REV. STAT. § 516-83(a)(2) (1982).

[47] *Id.* § 516-83(a)(6).

[48] *Id.* § 516-83(a)(7).

[49] *Id.* § 516-83(a)(10).

[50] *Id.* § 516-2.

[51] The Act applies only to single, contiguous parcels of real property not less than five acres that have been developed and subdivided into residential lots. *Id.* § 516-1(2).

[52] *Id.* § 516-23.

[53] *Id.* § 516-25.

[54] *Id.* § 516-30.

[55] *Id.* § 516-28.

[56] *Id.* § 516-33(7).

[57] *Id.* § 516-35.

During the first fourteen years of the land reform program, thirty tracts have been converted from leasehold to fee simple, and all have been either uncontested conversions or negotiated settlements.[58] While well over 5,000 individual parcels have been converted, many of the procedures for state condemnation have not been tested in court.[59] State money was appropriated for one condemnation to act as a test case[60] but the conversion was eventually negotiated voluntarily.[61] Recently, the Hawaii Circuit Court in *Hawaii Housing Authority v. Midkiff*[62] held the Act to be constitutional.

C. Midkiff v. Tom

The case of *Midkiff v. Tom*[63] was filed in 1979, twelve years after the enactment of the Hawaii Land Reform Act. It questioned the constitutionality of the eminent domain provisions of the Act. The plaintiffs are the trustees of the Estate of Bernice Pauahi Bishop[64] (hereinafter Bishop Estate), the largest private landowning entity in Hawaii.[65] Bishop Estate filed for a declaratory relief in the federal district court, alleging the Act to be unconstitutional because it condemned land for the private benefit of the leaseholders and was not for a public use.[66] Because the suit was based on the United States Constitution and therefore presented a federal question, federal jurisdiction was granted. The suit named the commissioners and executive director of the HHA and the HHA itself as defendants[67] because HHA administers the Act. The suit arose because

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[58] HAWAII HOUSING AUTHORITY, ANN. REP. 3 (1982).

[59] *Id.*

[60] In 1975 the State Legislature appropriated $1.3 million for condemnation of Manoa Valley's Puulena subdivision. *Id.* at 6. It seems, however, that as long as the parties to a conversion or condemnation can negotiate a sale or settlement, the use of state money is unnecessary.

[61] *Id.* at 3.

[62] Civ. No. 63408 (Haw. 1st Cir. September 6, 1983) (Grieg J.). This case involves condemnations in Kamiloiki Valley. Judge Grieg made extensive findings of fact and found the condemnations to be for a public use. This case is the test vehicle within the State of Hawaii court system and is on appeal to the Hawaii Supreme Court.

[63] 483 F. Supp. 62 (D. Hawaii 1979).

[64] In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha I, established by will the Kamehameha Schools and Bishop Estate. The estate is a perpetual educational trust for the support of two schools, one for boys and one for girls. Midkiff v. Tom, 483 F. Supp. at 64 n.1.

[65] The Bishop Estate owns almost 370,000 acres in Hawaii, which is twice as much as the next largest private landowner possesses, and almost as much land as the federal government owns in Hawaii. All of the small private landowners combined (defined as owners who own less than 5,000 acres) own only 257,000 acres in Hawaii. Bishop Estate owns more than 15,000 residential leasehold lots in Hawaii. R. W. ARMSTRONG, *supra* note 30, at 141.

[66] Midkiff v. Tom, 483 F. Supp. at 64-65.

[67] *Id.* at 64.

HHA had begun proceedings to require Bishop Estate to sell its fee simple interest to the lessees of Waialae-Kahala's Tract "H", a luxury residential area. The Waialae-Kahala Tract "H" Association, Inc. was granted intervenor status. In addition, nineteen other community associations or similar entities became intervenors.[68]

The district court held that the statute was constitutional on HHA's motion for summary judgment.[69] On appeal, a three-judge panel of the Ninth Circuit Court of Appeals reversed on a split decision,[70] with each judge writing separately and offering different rationales to reach his conclusion. The majority held that the statute violates the fifth and fourteenth amendments' prohibition against taking private property for anything except a public use.[71] The court also concluded that federal judicial review of the Act was appropriate and that the district court properly did not abstain from considering the case.[72]

III. History of Eminent Domain

An understanding of the history of eminent domain and the public use limitation of the fifth and fourteenth amendments[73] is critical to an analysis of the *Midkiff* decisions. First, it is helpful to more fully understand the five-part factual paradigm that the Ninth Circuit majority applied to determine when a taking is for a public use.[74] Second, an historical perspective is important because the majority interpreted the public use limitation in light of James Madison's and Alexander Hamilton's views on the protection of private property.[75] Third and most important, an understanding of the meaning of public use and the standard of judicial review which the U.S. Supreme Court has applied to state declarations of public use[76] can best be understood by analyzing the development of the public use doctrine.

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[68] *Id.* at 62.

[69] *Id.* at 69-70.

[70] Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

[71] *Id.* at 789-98.

[72] *Id.* at 789-90 n.1.

[73] This casenote focuses solely on the public use limitation. On the question of just compensation, see 3 Nichols On Eminent Domain, *supra* note 5, § 8; Stoebuck, *supra* note 5, at 572-88.

[74] Midkiff v. Tom, 702 F.2d at 793-96.

[75] *Id.* at 791-93. Judge Alarcon cites letters from James Madison to Thomas Jefferson cautioning against the "invasion of private rights . . . [where] the Government is the mere instrument of the major number of the Constituents." *Id.* at 792 (*quoting* letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 The Writings of James Madison 271-72 (G. Hunt, ed. 1909)).

[76] The substantive due process/police power standard of review has been applied by the Supreme Court since Berman v. Parker, 348 U.S. 26 (1954), in review of congressional determinations of public use. *Id.* at 31-33.

The fluidity and expansion of the public use limitation during times of local economic need emerges as a central theme from this historical analysis. From colonial uses of eminent domain for resource development and exploration to present-day uses for urban economic redevelopment, economic need and expediency have constantly expanded the uses for which eminent domain is employed.[77] Thus, a review of the public use limitation reveals that it has rarely been a serious impediment to takings for largely a private use that have little or no public benefits but which fulfill an important economic need. Moreover, the actual uses of eminent domain have varied markedly depending on local conditions and local declarations of public use.

This section concludes with a consideration of landmark U.S. Supreme Court decisions articulating the type of scrutiny that the Court has applied in its review of state declarations of public use. The standard which the Court has applied has essentially remained unchanged since its first review of state eminent domain statutes nearly ninety years ago.[78] The Court has consistently deferred to local determinations of public use by evaluating each case on an ad hoc basis in light of the local conditions that prompted the taking.[79] Moreover, the Court has reviewed infrequently state public use declarations and has only once overturned a state finding of public use.[80] This note concludes that the present-day minimum rationality standard of review articulated by the Court in *Berman v. Parker*[81] is the standard which the Court in fact has applied since its first review of state eminent domain statutes. This standard requires deference to a legislative finding of public use unless it was acting arbitrarily, capriciously, or unreasonably.

A. The Power of Eminent Domain

Eminent domain[82] is "the power of the sovereign to take property for public

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[77] *See infra* notes 92-152 and accompanying text.

[78] *See supra* note 9.

[79] *See infra* notes 153-64 and accompanying text.

[80] In Missouri Pacific Railroad v. Nebraska, 164 U.S. 403 (1896), the U.S. Supreme Court overturned a state supreme court decision which upheld a statute requiring a railroad to grant an individual the right to build a grain elevator on railroad land. *But see* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.05[1]: "[T]he Court has never held a use to be private which the courts of a state . . . have declared to be public." *See also* Hairston v. Danville and Western Railroad, 208 U.S. 598, 607 (1908): "[n]o case is recalled where this court has condemned as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

[81] 348 U.S. 26 (1954).

[82] Hugo Grotius coined the term "dominium eminens" in DE JURE BELLI ET PACIS (1625). 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.12[1]. The origin of the power of eminent domain is obscure. *Id.*, § 1.2[1]. The earliest record of sovereign taking has been said to be King

use without the owner's consent upon making just compensation."[83] The power of eminent domain is an inherent attribute of sovereignty[84] and thus may be exercised without constitutional authorization.[85] The constitutional provisions of just compensation and public use therefore represent limitations upon the exercise of eminent domain and are not a grant of the power.[86] The decline of the feudal system and the rise of individual ownership and private property rights led to the development of the eminent domain power as it is known today.[87] Although some disagreement exists whether eminent domain developed out of the system of sovereign prerogatives,[88] inquest of office,[89] or the parliamentary power to take,[90] by the middle of the sixteenth century the British Parliament regularly passed statutes requiring condemnation of private lands with payment of compensation.[91]

Ahab's taking of Naboth's vineyard in the Old Testament, 1 KINGS 21. Other sources point out that Naboth was first stoned to death, Stoebuck, *supra* note 5, at 553, not a usual requirement of eminent domain. The government of Rome may have exercised something akin to eminent domain, although how and to what extent is in considerable doubt. *Id.* There is no record of eminent domain during the medieval period nor during the feudal period because all real property ownership vested in the sovereign. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.2[2].

[83] 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.11.

[84] United States v. Jones, 109 U.S. 513, 518 (1883); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); Kohl v. United States, 91 U.S. 367, 371-72 (1875).

Thus the power of eminent domain is inalienable and cannot be bargained away. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.141[3].

[85] As the Court noted in United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896), "[t]he government has the constitutional power to condemn land for the proposed use. It is, of course, not necessary that the power of condemnation for such purposes be expressly given by the Constitution." *Id.* at 681.

For a discussion of the several theories of the source of the power of eminent domain, see 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.14; Stoebuck, *Eminent Domain*, *supra* note 5, at 557-69.

[86] 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.3.

[87] *Id.* § 1.2[2].

[88] Blackstone wrote that eminent domain was a natural consequence of the royal prerogatives inherent in the concept of feudalism. The royal prerogatives allowed the king to erect fortifications, navigational improvements and to mine silver and gold on a private property without compensation. *Id.* at §§ 1.13[2], 1.21.

[89] The ancient proceeding known as inquest of office required that the king not seize property without an inquiry by a jury. *Id.* at § 1.21[1]. Early takings under this doctrine were for highways, water supply and drainage. *Id.*, § 1.21[2]-[4].

[90] "[W]e cannot pinpoint the origins of eminent domain in English law until we find two things: (1) an act of Parliament that (2) authorized a compulsory taking of an estate in land." Stoebuck, *Eminent Domain*, *supra* note 5, at 565.

[91] The first definite evidence of eminent domain is a 1427 statute appointing commissioners of sewers to maintain a Roman drainage system with at least a "fleeting" power to take land. *Id.* By 1514, "we have clear examples of eminent domain with compensation in a form we would recognize today." *Id.* at 566. Thus in seventeenth and eighteenth century England, eminent do-

B. The Public Use Doctrine

The public use limitation upon the exercise of eminent domain cannot be defined precisely.[92] The reason for this is because determination of public use has been to a great extent a local question determined on a case by case basis.[93] The U.S. Supreme Court has recognized that diversity of local conditions should govern its consideration of whether a taking is for a public or private use.[94] In addition, local courts in their review of public use have been governed more by the settled practices, the relative importance of local industries, and the vital necessities of their particular state than by reasoned analysis.[95] For example, in states where lumbering is vital to the local economy, condemnation of timber land on behalf of the lumbering industry is viewed as proper.[96] On the other hand, in states where lumbering is not as important, state takings on behalf of the lumber industry have been held to be for a private use.[97] With this caveat in mind, this short history of the public use limitation attempts to outline the parameters of a concept that eludes categorization.[98]

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main was used for roads, bridges, fortifications, river improvements and fen drainage projects. *Id.* at 561-62.

[92] *See* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02; Berger, *supra* note 6, at 205; *Advance Requiem*, *supra* note 6, at 601-03.

[93] *See* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.05. Moreover, there was some doubt as to the federal government's power of eminent domain because the federal government is a government of delegated powers only. Thus, federal condemnation proceedings were initially carried out in state courts using the state's inherent power of eminent domain. *Id.*, § 1.24[2]. It was not until 1875 that the United States exercised condemnation proceedings in federal court. Kohl v. United States, 91 U.S. 367 (1875). *See also* 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.24[4]; Stoebuck, *Eminent Domain*, *supra* note 5, at 559 n.18. Thus, local courts had exclusive authority to shape development of the public use doctrine during most of the nineteenth century.

[94] *E.g.*, "[W]hat is a public use frequently and largely depends upon facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159-60 (1896); "The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absense of such facts, the use would clearly be private." Clark v. Nash, 198 U.S. 360, 368 (1905).

[95] 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.2.

[96] Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 P. 426 (1906). *See* Sackman, *Public Use Updated*, *supra* note 6, at 206.

[97] Garth Lumber & Shingle Co. v. Johnson, 151 Mich. 205, 115 N.W. 52 (1908); Brewster v. J. & J. Rogers Co., 169 N.Y. 73, 62 N.E. 164 (1901).

[98] Efforts have continually been made to find a concise definition which will embrace all the undertakings which may be constitutionally supported by the power of eminent domain and will exclude all others, but the task has never been accomplished. The difficulty is due in part to the impossibility of reconciling decisions of the courts of various states (or even of the same state), in part to the fact that the courts are more influenced by estab-

The public use limitation is of obscure origin. The requirement that land be taken for a public use was never imposed in England.[99] Although the civil writers Grotius, Vattel, and Puffendorf spoke respectively of the requirements of public advantage, public welfare, and necessities of state, they disagreed over the exact parameters of the limitation.[100]

1. *American Colonies*

Because no firmly rooted precedents were established in common law, the concept of eminent domain and public use developed sua sponte in the American colonies.[101] During the colonial period, eminent domain was rarely used because government activity was limited. Moreover, because vast tracts of land were available, government seldom needed to resort to eminent domain in order to obtain land.[102] However, statutes authorizing the taking of land for roads were passed as early as 1639.[103] These statutes enabled the colonies to expand physically and develop. Some of these roads were public, but others were for private uses, such as giving the owner of a landlocked parcel access to his property.[104] Grist mills[105] and land drainage[106] provided other reasons for passing colonial eminent domain statutes. In general the enactment of such statutes allowed the community to use its available resources more productively.[107]

2. *Colonial/Federal Period*

During the colonial and early federal periods, courts often looked to the natu-

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lished customs of the various states at the time that the constitutions were adopted than by a literal interpretation of the words of the instrument, and in part by the difference in conditions in different parts of the United States and in the same part at different times. 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02.

[99] 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.21[5].

[100] *Id.*, § 1.2[2].

[101] *See* Stoebuck, *supra* note 5, at 554.

[102] *Advance Requiem*, *supra* note 6, at 600. The abundance of land made the relatively few instances of government taking rather painless. Thus, compensation was really the only significant limitation "on the rare exercise of eminent domain." *Id.*

[103] However, there are no records of its use in Jamestown or Plymouth. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.22[1].

[104] *Id.* § 1.22[7]. Berger notes that compensation was usually paid for improved lands and probably not for unimproved lands. Berger, *supra* note 6, at 204.

[105] Mill owners were allowed to flood upper riparian owners' land to create a water power source. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.22[8].

[106] *Id.*, § 1.22[13].

[107] Sackman, *Public Use Updated*, *supra* note 6, at 207.

ral law limitation of public good, requiring some public benefit,[108] as a condition for the exercise of eminent domain. Some commentators maintain, however, that during the colonial period, neither practice nor doctrine limited eminent domain to public uses.[109] Under either view, the purposes for which eminent domain was employed had no internal limits or consistency. The natural law limitation proved to be of "wondrous elasticity,"[110] resulting in takings for private purposes with little direct public benefit. For example, many early takings were made on behalf of private individuals where the advantage to the public was tenuous at best.[111]

3. *Federal*

At the time of independence, only two states had constitutional provisions limiting the power of eminent domain for public purposes.[112] This is not surprising because eminent domain was not one of the powers that England had abused during colonial times.[113] Thus, eminent domain failed to present a major concern during consideration of the Bill of Rights and nothing indicates that the public use limitation or the just compensation requirement occupied a major item in debate during adoption of the fifth amendment.[114]

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[108] *Advance Requiem*, *supra* note 6, at 600-01.

[109] Meidinger, *supra* note 6, at 16.

[110] *Advance Requiem*, *supra* note 6, at 601.

[111] "Eminent domain was employed without objection for purposes such as mills, private roads and the drainage of private land, which now seem rather private than public. . . ." 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.01; Berger, *supra* note 6, at 208. Berger notes that the mill acts represent an early acceptance of the broad view of public use. *Id.* at 206.

Of mill acts, it has been said that "[n]o clearer instance of a taking of property for the benefit of private individuals could be present . . . ." *Advance Requiem*, *supra* note 6, at 605.

[112] Only Virginia and Pennsylvania had eminent domain provisions in their constitutions. Stoebuck, *Eminent Domain*, *supra* note 5, at 591.

All state constitutions except North Carolina now have eminent domain provisions. Stoebuck, *Eminent Domain*, *supra* note 5, at 554. *See* 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.3 for a complete chart of federal and state constitutional provisions of eminent domain.

[113] "Add to this the fact, which we well know, that eminent domain had been hardly written on, and one wonders how it got into our constitutions at all." Stoebuck, *Eminent Domain*, *supra* note 5, at 594-95.

[114] "Nor does there now seem to be much readily available evidence about what, if anything, the draftsmen thought about 'public use'." *Id.* at 591.

Professor Sackman postulates that the public use limitation was put into the federal constitution to embody the principles of Grotius and the other civil writers. 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.01. Stoebuck concurs and notes that the civil writers restricted eminent domain's use to somewhat more important and necessary situations than those in which other government powers are used. The American draftsmen may have assumed a similar notion, which they did not state explicitly. Stoebuck, *Eminent Domain*, *supra* note 5, at 595.

During the first decades after independence, states exercised the power of eminent domain for primarily the same purposes as during the colonial period.[115] States also invoked its use for general government functions such as the building of court houses, schools, state capitols, and town halls.[116] As during the colonial period, limited government activity and an abundance of land resulted in limited use of eminent domain. However, eminent domain enabled the young nation to open up its interior and exploit its resources through road condemnations[117] and to promote development of new industries through mill condemnations for water power.[118]

During the early nineteenth century, the need for industrial growth and economic expansion prompted many states to increase the use of eminent domain on behalf of private enterprises. States during this period began to delegate the power of eminent domain to private entities, particularly railroads.[119] These delegations of state power precipitated the first challenges to eminent domain statutes on the basis that they were for a private purpose.[120] The New York Court of Appeals took the lead in attempting to narrow the uses for which eminent domain could be employed. In the landmark case of *Bloodgood v. Mohawk & Hudson Railroad Co.*,[121] Senator Tracy in a concurring opinion upholding the delegation of eminent domain to a railroad, voiced concern that public use would have no limit at all if it meant simply public benefit.[122]

In the 1840's and 1850's, a few state courts adopted a more narrow view of public use and required actual use by the public or right to use as a condition for the exercise of eminent domain.[123] However, even courts which adopted

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Madison's first draft of the constitutional provision contained stronger language: "No person shall be . . . obliged to relinquish his property, where it may be necessary for a public use, without just compensation." 1 ANNALS OF CONGRESS 434 (J. Gales ed. 1789); Stoebuck, *Eminent Domain*, *supra* note 5, at 595.

[115] *See supra* notes 101-07 and accompanying text.

[116] 1 NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 1.23[1].

[117] *Advance Requiem*, *supra* note 6, at 601; *Special Project*, *supra* note 6, at 692.

[118] The mill acts were passed first for community grist mills, but later were increasingly used for cotton, pulp, and sawmills. Berger, *supra* note 5, at 206.

[119] *Advance Requiem*, *supra* note 6, at 601-02; Berger, *supra* note 6, at 208; *Special Project*, *supra* note 6, at 690. *See* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, §§ 7.51[2], 7.60.

[120] It was not until the introduction of improved methods of transportation operated by private corporations and the general extension of the activities of municipal governments which began in the (nineteenth) century that the limits of the power of eminent domain with respect to the purposes for which it could lawfully be exercised became a living issue. 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.01.

[121] 18 Wend. 9 (N.Y. 1837).

[122] With public interest as the only limitation on the exercise of eminent domain, "is there any limitation which can be set to the exertion of the legislative will in the appropriation of private property?" *Id.* at 60 (concurring opinion of Senator Tracy).

[123] Berger, *supra* note 6, at 208; *Advance Requiem*, *supra* note 6, at 603-04; *see generally* 2A

this restrictive view still upheld takings that involved no actual public use or right to use. These essentially private takings were upheld on the basis of historical acceptance or public acquiescence.[124] Overall, it is doubtful that judicial adoption of the narrow view of public use presented any significant impediment to industrial growth or economic development.[125]

During the nineteenth century, many state courts did not adopt the narrow view and instead continued to maintain a broader view of public use that required only some accrual of advantage or benefit to the public.[126] The broad view of public use was most widely applied in the western part of the United States, particularly during the mid- and late-1800's.[127] The western territories and states were undergoing the same physical exploration and exploitation that occurred earlier in the colonies and the first states. The need to exploit the western resources and to open vast tracts of land for railroad development, mining, and irrigation led many western states to define these activities as public uses in their state constitutions.[128] Other states increasingly used eminent domain on behalf of local utilities and for agricultural, industrial, and other local development uses.[129]

The U.S. Supreme Court first reviewed a state declaration of public use in 1896 in *Missouri Pacific Railroad v. Nebraska*.[130] This and other early court decisions illustrate the economic uses for which eminent domain was employed during the early twentieth century. For example, the Court upheld takings allowing private condemnation of irrigation ditches,[131] rights of way for an aerial

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NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02[1].

[124] Courts adopting the narrow view continued to uphold the mill dam acts under different rationales, such as historical acceptance and public acquiesence. *Advance Requiem*, *supra* note 6, at 604. Only New York, Georgia, and Alabama consistently rejected the mill dam acts, with other states formally adopting the narrow view while evading its implications. Meidinger, *supra* note 6, at 24.

[125] Meidinger, *supra* note 6, at 25.

[126] *Advance Requiem*, *supra* note 6, at 608; *see generally* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02[2].

[127] *Special Project*, *supra* note 6, at 695-96.

[128] Western state legislatures were more than willing to delegate eminent domain powers to miners, farmers, and lumbermen as well as to railroads and power mills. Condemnations by private enterprises became so common in the years from 1870 to 1910 that one scholar has characterized the period as the "heyday of expropriation as an instrument of public policy designed to subsidize private enterprise."

Id. at 696, *quoting* Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 243 (1973).

[129] Meidinger, *supra* note 6, at 32.

[130] 164 U.S. 403 (1896).

[131] Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896); Clark v. Nash, 198 U.S. 361 (1905).

bucket line for a mine,[132] and a spur line for a railroad.[133] In addition, early Court review stressed that it was not necessary for the entire community to benefit from the improvement in order for a taking to qualify as a public use.[134]

During the late nineteenth century and early twentieth century, the shift in population from the countryside to the cities transformed the United States from an agricultural to an urban society.[135] Beginning in the 1930's, the need for urban housing prompted another expansion of public use to include new economic and social goals. The Court of Appeals of New York took the lead in *New York City Housing Authority v. Muller*[136] by upholding the constitutionality of eminent domain for government housing and slum clearance. In so holding, the court of appeals specifically repudiated the narrow view it had fostered one hundred years before.[137] Within six years, twenty-two jurisdictions followed New York's lead in adopting a broad interpretation of public use.[138]

In 1946 a case was decided that has a direct impact on *Midkiff*. In *People of Puerto Rico v. Eastern Sugar Associates*,[139] the First Circuit Court of Appeals upheld the constitutionality of a Puerto Rico land reform statute[140] which was designed to improve economic and social conditions by breaking up large landed estates and redistributing land for farms and dwellings.[141] In declaring that the statute employed eminent domain for a constitutional public use, the court determined that eminent domain may be used if the taking is essential or material for the prosperity of the community.[142] The court in expanding the

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[132] Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906).

[133] Hairston v. Danville & Western Railroad, 208 U.S. 598 (1908).

[134] "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use." 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.02[2], *citing* Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923).

[135] *Special Project*, *supra* note 6, at 700.

[136] 270 N.Y. 333, 1 N.E.2d 153 (1936).

[137] *Special Project*, *supra* note 6, at 701.

[138] *Id.* at 702.

[139] 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772 (1946).

[140] P.R. LAWS ANN., tit. 47, §§ 241 *et seq.* (1941).

[141] *Eastern Sugar*, 156 F.2d at 316.

[142] [A] state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but it may be exercised if the taking 'be essential or material for the prosperity of the community' . . . [citation omitted]

[I]t is our duty to determine whether the enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist. [citation omitted]

Id. at 323-24.

public use limitation thus required "some public benefit or advantage" to justify the taking.

The U.S. Supreme Court pushed the public use limitation even further in the landmark eminent domain case of *Berman v. Parker*[143] when it upheld a congressional statute authorizing condemnation for the redevelopment of parts of the District of Columbia. The court ruled that unblighted property could be condemned for the redevelopment of an entire area pursuant to a plan.[144] It is significant to note that some of the land that was taken in *Berman* was resold back to the same private parties.

In equating the power of eminent domain with the police power, Justice Douglas in *Berman* defined public use in terms of the public welfare and found it to include physical, spiritual, aesthetic, and monetary goals.[145] In essence, Justice Douglas concluded that a taking is for a public use if it results in some public benefit. Thus a legislature may determine that a public benefit results when the taking advances the health, safety, welfare, or morals of the community as well as other unspecified goals within the scope of the police power.[146]

In the last twenty years, new urban and post-industrial needs have again expanded the uses for which eminent domain is employed. These new uses have facilitated the process of economic redevelopment or reindustrialization of urban centers and often involve public/private cooperative ventures. For example, in *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,[147] the New York Court of Appeals upheld the taking of land adjacent to the site of the New York World Trade Center. The Port Authority planned to use the land to provide funds for the development and to ensure the success of the project. The court stressed that the condemnation and resale to private individuals of property functionally related to the project is constitutional even though private persons would benefit. The court pointed to the flow of commerce as fulfilling the project's public use.[148]

In 1981, the Michigan Supreme Court pushed the public use limitation even further. *Poletown Neighborhood Council v. City of Detroit*[149] upheld the condemnation of an entire neighborhood in order to provide General Motors with a site

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[143] 348 U.S. 26 (1954).

[144] *Id.* at 28-31.

[145] The concept of the public welfare is broad and inclusive. [citation omitted] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33.

[146] *Id.*

[147] 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

[148] *Id.*, 190 N.E.2d at 404-05. *See also* Berger, *supra* note 6, at 216.

[149] 410 Mich. 894, 304 N.W.2d 455 (1981).

for a new automobile plant. The taking served the public purpose of providing jobs for the community. The court pointed to the severe economic conditions existing in Detroit and the need for new industrial development in upholding the taking as being for a public use.[150]

Other state courts have, however, balanced the private and public uses of a proposed project and have struck down public/private commercial development projects on the premise that the proposed project served a predominately private use. For example, in *In re The Westlake Project, City of Seattle*,[151] the Washington Supreme Court found that a condemnation for the purpose of building a retail mall that would have benefitted both the City of Seattle and private developers was not constitutional. However, Washington is unique because its state constitution has a stringent public use provision that requires independent judicial review of legislative declarations of public use.[152]

In conclusion, the history of the public use limitation reveals that it barely imposes a limitation at all. In times of economic opportunity or need, local legislatures have used eminent domain to exploit local resources and to encourage economic development. These takings have often been on behalf of private individuals or private industry where the community receives no direct benefit and where private parties receive a great deal of benefit.

Public use is a flexible limitation that depends on local economic and social needs. By applying only a minimum rationality standard of review to state declarations of public use, the U.S. Supreme Court has reaffirmed that local economic and social needs dictate what becomes a public use.

C. Standard of Review

U.S. Supreme Court review of state declarations of public use exhibits several characteristics. First, the Court has reviewed state declarations of public use infrequently.[153] Second, the Court has evaluated each case on an ad hoc basis and has determined public use in light of local conditions.[154] Finally and most important, the standard applied by the Court in its review of state eminent domain cases has essentially remained unchanged — it has accorded state legis-

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[150] *Id.*, 304 N.W.2d at 458.

[151] 96 Wash. 2d 616, 638 P.2d 549 (1981) [striking down public/private venture for retail/museum/parking/monorail terminus project].

[152] *Id.*, 638 P.2d at 556. WASH. CONST. art. 1, § 16 (amend. 9) provides that:

> Private property shall not be taken for private use . . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. . . .

[153] 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.14[1].

[154] *See* note 84 *supra*.

latures great deference in determining when a use is a public one. Thus, the Court has focused not on whether the use was public, but on whether the legislature might reasonably consider it public.[155]

Fallbrook Irrigation District v. Bradley[156] set the stage for Supreme Court review of state determinations of public use during this century. The Court examined local conditions and deferred to the California legislature and courts to determine public use.[157] In *Fallbrook*, a California statute allowing private irrigation districts to condemn property for water works was challenged because the statute failed to serve a public use. The Court looked to the "millions of acres of arid lands" in California in deciding that the legislative purpose "might well be regarded"[158] as a public use. The Court emphasized that it was according "very great respect" to legislative and judicial declarations of public use.[159]

Clark v. Nash[160] extended *Fallbrook*'s holding to include a condemnation for an irrigation ditch expansion for a private individual. The Court reaffirmed its deference to local determinations of public use based on local conditions.[161] It considered the unique conditions of the State of Utah and ruled that the "validity of such statutes may sometimes depend upon many different facts, the existence of which would make a use public . . . where in the absence of such facts, the use would clearly be private."[162] In *Rindge Co. v. County of Los Angeles*,[163] the Court upheld the condemnation of a road located entirely on private land. It reiterated that although public use was ultimately a judicial question, federal courts should give great respect to local judicial and legislative determinations.[164]

New York City Housing Authority v. Muller,[165] although not a federal decision, nonetheless clearly presaged the state of the law of eminent domain as

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[155] 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.16[1]. The early standard applied in review of congressional taking was also one of minimum rationality. For example, in United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896), the Court noted that "[w]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the Courts, unless the use be palpably without reasonable foundation." *Id.* at 680.

[156] 164 U.S. 112 (1896).

[157] *Id.* at 160.

[158] *Id.*

[159] *Id.* "[W]hile not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect. . . ." *Id.*

[160] 198 U.S. 361 (1905).

[161] "[W]e are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation." *Id.* at 367-68.

[162] *Id.* For a comparison of *Clark v. Nash* and the Hawaii Land Reform Act, see Conahan, *Hawaii's Land Reform Act: Is it Constitutional?*, 6 HAWAII B.J. 31 (1969).

[163] 262 U.S. 700 (1923).

[164] *Id.* at 705-06.

[165] 270 N.Y. 333, 1 N.E.2d 153 (1936).

declared in *Berman v. Parker*[166] — that the power of eminent domain, like the police power, is governed by a minimum rationality standard of review. The New York Court of Appeals reasoned that in protecting the public health, safety, and welfare, government can use one of three powers — the power to tax, the police power, and the power of eminent domain. If the menace is serious enough to require state action and the means are reasonably calculated to accomplish the public purpose, it is immaterial which of the three powers is employed.[167] Thus, in New York at least, the power of eminent domain became as broad as the power of government itself. If the object of a statute lies within the scope of the police power, then its use is a public one.[168]

Some lower federal courts in the late 1930's adopted a similar rationale as *Muller*. For example, in *Barnridge v. United States*,[169] the Eighth Circuit Court of Appeals noted, "[i]f the Federal Government, under the Constitution, has power to embark upon the project for which the land is sought, then the use is a public one."[170] Another federal court concurred that "it is a public use if the project comes within the purview of federal power."[171]

The U.S. Supreme Court adopted the lower federal courts' view in *United States ex rel Tennessee Valley Authority v. Welch*.[172] In *Welch*, the Court upheld the TVA's condemnation of a rural settlement which was isolated by flooding created by a North Carolina dam project. The Court held that the taking of excess land was within the authority of the TVA enabling statute.[173] Justice Black, writing for the Court, declared that "it is the function of Congress to decide what type of taking is for a public use."[174] Justice Frankfurter concurred, but read the majority opinion to retain judicial review of public use with extreme judicial deference to legislative determinations.[175] Justice Reed, joined by Chief Justice Stone, concurred separately, however, and specifically disagreed with Justice Black's conclusion: "[t]his taking is for a public purpose, but whether it is or not is a judicial question."[176] A commentator at the time

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[166] 348 U.S. 26 (1954).

[167] 270 N.Y. at 341, 1 N.E.2d at 155.

[168] Berger, *supra* note 6, at 215.

[169] 101 F.2d 295 (8th Cir. 1939).

[170] *Id.* at 298.

[171] United States v. 4,450.72 Acres of Land, 27 F. Supp. 167, 174 (D. Minn. 1939).

[172] 327 U.S. 546 (1946). *See generally Advance Requiem, supra* note 6, at 612-14.

[173] We hold that the T.V.A. took the tracts here involved for a public purpose, if, as we think is the case, Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T.V.A. Act . . . . We view the entire transaction as a single integrated effort on the part of T.V.A. to carry on its Congressionally authorized functions.

327 U.S. at 552-53.

[174] 327 U.S. at 551-52.

[175] *Id.* at 557-58.

[176] *Id.* at 556.

observed that "[s]ince a congressional determination of 'public' use is to be conclusive, the Court will henceforth refuse to consider the separate questions of constitutional power and public use, but having found the one will assume the other."[177]

Berman v. Parker[178] is the most important Supreme Court decision articulating the standard of judicial scrutiny to be applied to legislative findings of public use. In *Berman*, the Court expressly adopted a minimum rationality standard of review for congressional findings of public use. The standard could apply to state legislative declarations of public use because Congress was acting in its capacity as a state legislature over the District of Columbia.

Although the Court did not cite *Muller*, it adopted *Muller*'s reasoning that accorded coextensive scope to the police power and the power of eminent domain. "We deal, in other words, with what traditionally has been known as the police power."[179] Moreover, the Court did not distinguish between the public use limitation of eminent domain and the public welfare concept under the police power.[180] Characterizing the statute as social legislation, Justice Douglas propounded limited judicial review[181] of legislative declarations "in determining whether that power is being used for a public purpose . . . ."[182] Justice Douglas asserted that the question facing the Court was whether the legislature might reasonably conclude that a public use was being served.[183] The Court concluded that the taking promoted a public use and adopted the reasoning of the *Welch* decision that once an object is within the legislative authority, the legislature determines "the means by which it will be attained."[184]

In essence, Justice Douglas said (1) eminent domain is the same as other government powers, (2) eminent domain may be used as other government powers are to serve a public purpose, and (3) what constitutes public purpose

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[177] *Advance Requiem*, *supra* note 6, at 613.

[178] 348 U.S. 26 (1954).

[179] Berman v. Parker, 348 U.S. 26, 32 (1954).

[180] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[181] [T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citations omitted] or the States legislating local affairs [citations omitted]. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman, 348 U.S. at 32.

[182] *Id.* Since Congress was acting with "all the legislative powers which a state may exercise," *id.* at 31, the holding in *Berman* would seem to apply to Supreme Court review of state legislative declarations, particularly when considered with the statement in note 181 *supra*.

[183] *Id.* at 33-34.

[184] *Id.* at 33.

must be decided by the legislature rather than the courts.[185] Thus, as one commentator notes, "*Berman* made explicit what appears to have been an accomplished state of affairs: if a purpose is within government power, eminent domain may probably be used to achieve it. The main question is not whether the taking is for a public purpose, but whether it is for a *legitimate* purpose."[186]

Since *Berman*, the Supreme Court has not directly addressed the public use limitation. However, lower federal courts have generally followed a minimum rationality standard of review.[187] Thus, the standard of review applied by the Supreme Court over state eminent domain determinations of public use has always been one of great deference. A minimum rationality standard has been applied in fact, whether or not the standard was articulated as such. Moreover, the relatively infrequent Supreme Court review reinforces deference to local findings of public use.

IV. Analysis of the Opinions

This section discusses the Hawaii Federal District Court opinion and the majority, concurring, and dissenting opinions of the Ninth Circuit Court of Appeals. It concentrates on two questions: (1) What is the proper standard of review for federal scrutiny of state legislative determinations of public use? (2) What is the current meaning of the public use limitation?

A. *Federal District Court Opinion*

In order to better understand the Ninth Circuit Court of Appeals opinion of *Midkiff v. Tom*,[188] the federal district court opinion must be discussed. Judge King first considered whether the plaintiffs were denied substantive due process.[189] He set a standard of review whereby

> [i]f the Court determines (1) that *any* possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, the statute is

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[185] Stoebuck, *supra* note 5, at 590.

[186] Meidinger, *supra* note 6, at 42-43. *See also* Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975). "The significance of the *Berman* opinion is that it confirms that the public use limitation of the fifth and fourteenth amendments is as expansive as a due process police power analysis." *Id.* at 1036.

[187] *E.g.* United States v. 255.25 Acres of Land, 553 F.2d 571, 572-73 n.2 (8th Cir. 1977); United States v. 67.59 Acres of Land, 415 F. Supp. 544, 548-50 (M.D. Pa. 1976).

[188] 702 F.2d 788 (9th Cir. 1983).

[189] Midkiff v. Tom, 483 F. Supp. 62, 65 (D. Hawaii 1979).

constitutional.[190]

He relied on *Berman* to establish that courts should give great deference to the legislature on issues that concern the public interest.[191] He also relied on *Berman* to conclude that the proper test to determine public use is a police power[192] and due process analysis.[193] Judge King reasoned that "it would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else — whether stricter or not."[194] For Judge King, the key question was whether the objectives of the statute were within the police power of the legislature[195] and whether the means chosen were arbitrary, capricious, or in bad faith.

After finding that the redistribution of residential land ownership was within the police power, Judge King concluded that the takings were for a public purpose.[196] He stated in an earlier opinion, "the state may use the power of eminent domain to redefine, rearrange and redistribute interests in land."[197] His analysis relied primarily on *Eastern Sugar*[198] and *Government of Guam v. Moylan*,[199] both of which found public purposes in land redistribution schemes.

With respect to due process, Judge King asked whether the means chosen to achieve the goal of land redistribution were arbitrary. He decided that some line drawing was necessary, as in any social legislation.[200] Under these circumstances,

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[190] *Id.*

[191] *Id.* at 65. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ." Berman v. Parker, 348 U.S. 26, 32 (1954).

[192] The traditional due process test for police power regulations is that stated in Nebbia v. New York, 291 U.S. 502 (1934): "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525.

[193] Midkiff v. Tom, 283 F. Supp. at 67.

[194] *Id.*

[195] *Id.* at 66.

[196] *Id.* at 67-68.

[197] Midkiff v. Tom, 471 F. Supp. 871, 875 n.18 (D. Hawaii 1979) (motion for preliminary injunction by trustees). *See supra* notes 139-42 and accompanying text.

[198] 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

[199] 407 F.2d 567 (9th Cir. 1969). *Government of Guam* concerned a redevelopment plan for Agana, Guam. Prior to World War II, Agana was a patchwork of lots and streets like a medieval European town. After the war, the government decided to rebuild Agana with straight streets and lots. To accomplish this goal, it was necessary to condemn land to force consolidation of odd lots. The new lots would immediately be sold to other private parties. The Ninth Circuit found this transfer of land from one party to another private party to be a sufficient public purpose to render the condemnations a constitutional exercise of eminent domain.

[200] Midkiff v. Tom, 483 F. Supp. at 68-69.

he found that the legislature's determinations of what land is subject to condemnation and who is entitled to repurchase from the state were in no way arbitrary or capricious.[201] In sum, he concluded "[t]he Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court."[202]

B. *The Majority Opinion*

Circuit Judge Alarcon wrote the majority opinion, basing it on an historical interpretation of the protection of minority rights.[203] At the outset, he stated the issue to be "whether a state may take real property from a lessor and transfer title in fee simple absolute to a lessee because of a shortage of land for fee simple ownership."[204] He concluded that a state could not and found the Hawaii Land Reform Act to be unconstitutional.

Judge Alarcon traced eminent domain as far back as Grotius in 1646, but focused on the ideas of the framers of the U.S. Constitution. He was particularly concerned with the landed aristocracy views of Madison and Hamilton. He quoted Madison, who was concerned about the "need to protect minority rights from the acts of a majority that might seek to remedy unequal property distribution through legislative action . . . ."[205] He found that the intent of the framers made it "unmistakeably clear that the Hawaii Land Reform Act is unconstitutional."[206] Most important, he held that "[t]he sovereign may not take the private property of A and transfer it to B solely for B's private use and benefit."[207]

Judge Alarcon stated that each case must be evaluated on an ad hoc basis.[208] In his review of the case law, he articulated five recurring factual situations to define public use:

> (1) condemnation of property for an historically-accepted use;
> (2) a change in the use of the land;
> (3) a change in the possession of the land;

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[201] *Id.* at 69.

[203] *Id.* at 70.

[203] The founders of this nation sought to give constitutional protection to minority rights. They wisely foresaw that attempts would be made by the states to take away the private property rights of the landed minority. Our Federal Constitution and the Bill of Rights were designed to prevent such abuses by the majority.

Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

[204] *Id.* at 789.

[205] *Id.* at 791.

[206] *Id.* at 793.

[207] *Id.* at 793, 798.

[208] *Id.* at 793.

(4) a transfer of ownership from a private party to a governmental entity; and
(5) a de minimis condemnation necessary to facilitate the development of nearby land.[209]

Because none of these factual circumstances applied to the Hawaii Land Reform Act, he concluded that the taking was for a private use.

Judge Alarcon found two major activities to be historically-accepted public uses which resulted in proper condemnations. Mill acts, which allowed an owner of land upon a nonnavigable stream to build and maintain mills for manufacturing purposes were the first activity.[210] Condemnations for roads were the second.[211]

Judge Alarcon stated that a change in the use of land insures that a taking is for a public purpose.[212] For example, building a road or power plant is a change in use,[213] as is the "redevelopment of a community."[214] In the instant case, Judge Alarcon argued that dividing large private residential tracts held for investment purposes into small private houselots held for residential purposes did not constitute a change in use because the changes were merely different forms of private use.[215] In contrast, he found that the division of large agricultural holdings in Puerto Rico into small parcels[216] resulted in a change in use because some agricultural land was taken for building homes.[217]

Judge Alarcon reasoned that a condemnation is most obviously for a public use where the party in possession of the land changes after the taking.[218] He cited no cases to substantiate this assertion, but noted that the government can condemn and retain possession of the land.[219] In *Berman*, certain property owners repurchased their property after an intermediate step in which the government held the land to accomplish a public purpose. Judge Alarcon found that the key in *Berman* was this intermediate step. The property was transferred from the private owner to the government for the public purpose of redeveloping a blighted area. He found no such intermediate step in the Hawaii Land Reform Act.[220]

Judge Alarcon argued that where the government is the beneficiary, "there is

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[209] *Id.* at 793-94.
[210] *See* Otis Co. v. Ludlow Manufacturing Co., 201 U.S. 140 (1906).
[211] *See* Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).
[212] Midkiff v. Tom, 702 F.2d at 794.
[213] *Id.*
[214] *Id.* at 796.
[215] *Id.*
[216] Puerto Rico v. Eastern Sugar Assoc., 156 F.2d 316.
[217] Midkiff v. Tom, 702 F.2d at 794-95.
[218] *Id.* at 795.
[219] *Id.*
[220] *Id.* at 797.

a strong indication that the taking is for a public use. . . ."[221] He also pointed to the fact that the presumption of public use is not as strong when the power is delegated to a private corporation.[222] Under his fifth category, he argued that de minimis takings[223] are permitted to facilitate the development of nearby land.[224]

Judge Alarcon read *Berman* to require "the judiciary to *scrutinize carefully*[225] any legislative attempt to take private property so as to determine if it is in violation of any constitutional provision."[226] In addition, the judge distinguished the U.S. Supreme Court conclusion that a legislative determination of public use is entitled to deference until it is shown to be an impossibility.[227] Judge Alarcon stated that this limited review is confined to congressional determinations of public use and not those of state legislatures. He stated that his review of a state public use determintion emanates from the fourteenth amendment, not the fifth amendment, and that he was not constrained by a standard of legislative deference.[228]

In sum, Judge Alarcon declared that, "[t]o hold, as the district court below did, that the public use limitation is subsumed under a 'police power/due process analysis,'. . . would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amendment."[229]

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[221] *Id.* at 795.

[222] *Id.*

> [W]here the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation proposes to take the land is public [when declared to be so by the legislature], is not so strong as where the government intends to use the land itself.

United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896).

[223] De minimis taking is defined as a relatively small condemnation that is necessary to facilitate the development of nearby land. Midkiff v. Tom, 702 F.2d at 794.

[224] *Id.* at 759-96.

[225] *See infra* note 263.

[226] Midkiff v. Tom, 702 F.2d at 797 (emphasis added).

[227] *Id.* at 797-98. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925). *Old Dominion* was a proceeding for the condemnation of land initiated by the federal government. During World War I, the government leased land from Old Dominion Land Company for the purpose of erecting military buildings. When the lessor refused to renew the lease, the federal government offerred to purchase the fee simple interest in the land. Old Dominion Land Company refused and, pursuant to a congressional declaration of public purpose, the government condemned the land. The condemnee argued that the taking would economically benefit the federal government, but that it was not a taking for public use. The Court upheld the public purpose requirement, deferring to the judgment of Congress.

[228] Midkiff v. Tom, 702 F.2d at 798.

[229] *Id.* at 797 (citations omitted).

C. The Concurring Opinion

Although he agreed with Judge Alarcon's opinion,[230] Judge Poole, in his concurring opinion, set forth a somewhat different analysis. He held as did Judge Alarcon that "a condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment."[231]

Judge Poole apparently accepted the power of eminent domain as a legitimate exercise of the police power.[232] However, he applied a standard of review higher than minimum rationality,[233] yet lower than Judge Alarcon's careful scrutiny standard. He questioned the efficacy of the statute, stating that the Hawaii Land Reform Act "is so structured that it can only aggravate this [housing] shortage and resultant inflation of land values"[234] because the fee simple interest is much more expensive than the leasehold interest. He expressed concern that after condemnation and purchase, the new owner is not prevented from leasing the property to another, thus continuing the leasehold cycle.[235]

Judge Poole was also troubled that the lessee, through a petition to the HHA, initiates the condemnation proceedings instead of a governmental agency. While the statute permits the state to appropriate funds and issue bonds to implement its provisions, state funds have never been used to purchase condemned fee simple interest.[236] He seemed to regard this fact as indicating less government involvement in the condemnation proceedings than befits a legitimate public program. Judge Poole also expressed concern that the HHA was not required to find a shortage of fee simple housing in areas where condemnations are to occur. He noted that the large landholders had made additional leasehold sites available and that there is only a ten percent difference between the price of fee simple and leasehold property.[237] In sum, he questioned whether the Act was successful in meeting its stated goals.

Judge Poole concluded that "when as here the drastic effects of a statute

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[230] Judge Poole began by stating, "I concur in Judge Alarcon's careful and well-researched opinion . . . and in his conclusion that the Hawaii Land Reform Act violates the Fifth and Fourteenth Amendments to the Constitution of the United States." *Id.* at 798.

[231] *Id.* at 804.

[232] *Id.* at 803-04.

[233] *See supra* note 13.

[234] Midkiff v. Tom, 702 F.2d at 806.

[235] *Id.* at 804. Judge Poole does not cite any instances of owners leasing their land to others after purchasing the fee simple interest from large landowners.

[236] *Id.*

[237] *Id.* at 806-07.

contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists."[238] He conceded that these problems alone would not make the Act unconstitutional. However, coupled with the fact that the sole purpose is to constitute the "tenant as owner",[239] Judge Poole found the Act unconstitutional. He concluded, "[w]hen, as here, the only variable presented is whether A or B holds title to the land, the public purpose vanishes."[240]

D. The Dissenting Opinion

Judge Ferguson's strongly-worded dissent began by characterizing the majority's approach as cavalier.[241] He stated, "[h]aving asked the wrong question, the majority predictably arrives at the wrong answer."[242] He maintained:

> The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage.[243]

Judge Ferguson chastised the majority decision for substituting its opinion for the careful judgment of Hawaii's legislature and courts.[244] He stated, "even though the precedents require an ad hoc approach, the majority nevertheless propounds five tests . . . to determine whether the use here is public."[245] He pointed to the unique facts regarding land tenure in Hawaii, including problems associated with land monopoly in a small island state[246] and undesirable economic effects of the land holding pattern in Hawaii.[247] After extensively

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[238] *Id.* at 806.

[239] *Id.*

[240] *Id.* at 807.

[241] *Id.*

[242] *Id.* at 809.

[243] *Id.*

[244] *Id.* at 808.

[245] *Id.* at 818.

[246] *Id.* at 808. "The existence of a monopoly that can control scarce land resources in Hawaii is dangerous because control of land in an island State represents more than the economic power that the land represents in dollar value." Conahan, *supra* note 162, at 35.

[247] Midkiff v. Tom, 702 F.2d at 815. "Among the undesirable economic effects are artificially high prices on leasehold units, the discouragement of the development of fee simple units, inequality in bargaining power that strongly favors the lessor in rental negotiations, and a decline in leasehold values after the renegotiation of leases." *Id.*

reviewing the findings of fact by the Hawaii State Legislature, Judge Ferguson complained, "the majority calls none of these findings of fact into question. Indeed, they are scarcely mentioned at all. . . ."[248] In addition, he cites a commentator who notes the anomaly of the United States Government urging land reform in developing nations abroad if the Constitution prevents similar land reform at home.[249]

Judge Ferguson relied heavily on *Eastern Sugar*,[250] a case which upheld a land reform statute in Puerto Rico.[251] The *Eastern Sugar* court viewed the entire legislative scheme as a single, integrated effort to solve an important social problem and found a public benefit in the transfer of property from one private party to another.[252] This contrasts with the approach taken by the majority in *Midkiff* in which each use of condemned land is evaluated individually and in isolation from the entire land reform program.

Judge Ferguson criticized the majority's paradigm of certain factual situations in which courts have found public use.[253] He observed that "[t]he history of public use has been a history of the expansion of the concept to accomodate new circumstances."[254] Although he found the historically accepted test to be "helpful only in those simple cases that represent no expansion of past public uses,"[255] neither the mill acts nor the road building acts would pass constitutional scrutiny if they were before Judge Alarcon for the first time. Although the majority acknowledged that the Act "may change the use of the land"[256] because it would be used for residential rather than investment purposes, Judge Ferguson formulated the important issue to be "whether the public advantage gained by a change in the private employment of land yields a public use."[257]

Judge Ferguson advocated adopting a narrow standard of review by federal courts and giving deference to the Hawaii State Legislature and to the rulings of Hawaii courts.[258] He argued that state legislative determinations should be allowed to stand unless they were arbitrary or capricious.[259] In response to Judge Alarcon's argument that *Berman*'s standard of review is inapplicable to determi-

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[248] *Id.* at 817.

[249] *Id.* at 808. *See generally*, Conahan, *supra* note 162, at 31.

[250] Puerto Rico v. Eastern Sugar Assoc., 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772 (1946).

[251] Midkiff v. Tom, 702 F.2d at 817.

[252] *Id.* at 817-18.

[253] *Id.* at 814.

[254] *Id.* at 818.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 819.

[258] *Id.* at 813.

[259] *Id.* at 817.

nations by state legislatures,[260] Judge Ferguson pointed to the fact that Congress was acting in the capacity of a state legislature when it made the legislative determination at issue in *Berman*.[261]

V. COMMENTARY

The majority and concurring opinions struck down the Hawaii Land Reform Act as unconstitutional because they relied on a rigid factual pattern to determine the current meaning of public use. In doing so, both judges applied heightened federal scrutiny to state legislative declarations of public use. In contrast, *Berman v. Parker*[262] and other U.S. Supreme Court decisions require a case-by-case analysis of public use and accord greater deference to state legislative findings.

A. *Standard of Review*

Judge Alarcon's analysis not only repudiated the substantive portions of the Act, it rejected the standard of review that previously had been used for federal constitutional review of state eminent domain proceedings.[263]

The Court held in *Berman* that once a goal is within the authority of the legislature, it is the role of the legislature to fashion the means to implement that goal.[264] Any legitimate governmental policy may be achieved by using the power of eminent domain.[265] Thus, a government may protect the health, safety, or welfare of its citizens by use of the power of eminent domain.[266] When the Court enunciated a standard of minimum rationality in *Berman v. Parker*,[267] it merely affirmed the de facto standard that it had applied since 1896: "[w]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."[268] In contrast, Judge Alarcon ignored the fact that *Berman*'s determination of public use occurred when Congress was acting in the role of a state legislature for the District of Columbia.[269] Thus, judicial

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[260] *Id.* at 797-98.

[261] *Id.* at 813.

[262] 348 U.S. 26 (1954).

[263] *See supra* notes 153-87 and accompanying text.

[264] Berman v. Parker, 348 U.S. at 33.

[265] *Special Project*, *supra* note 6, at 704.

[266] *Id.*

[267] 348 U.S. 26.

[268] United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896).

[269] "The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs." Berman v. Parker, 348 U.S. at 31. *See* Midkiff v.

deference arguably applies to other state legislative determinations, not just those of Congress.

Midkiff v. Tom[270] thus represents a major aberration in the development of the law of eminent domain because it applies heightened federal judicial scrutiny of state legislative declarations of public use. If the *Berman* standard of review applies equally to Congress and state legislatures, the majority ignored its plain language. The majority opinion required the judiciary to "scrutinize carefully any legislative attempt to take private property,"[271] although the standard which was applied was never precisely articulated. At the least, Judge Alarcon espoused a standard of review higher than minimum rationality. He imposed this higher standard of review through the application of a five-part paradigm of recurring factual situations that define public use.[272] He evaluated the operation of the statute and its effect on the use of condemned land and found that a statute is not for a public use without a change in use or possession. Judge Alarcon concluded as a matter of fact that the Hawaii Land Reform Act serves no public use.[273]

Judge Poole, in the concurring opinion, also questioned whether the Act would in fact achieve its intended goals of reducing land price inflation and breaking the leasehold landholding system. Thus, he looked behind the statute to question its efficacy.[274] Judge Poole concluded that private benefit is the dominant purpose of the statute, and public benefit is only incidental to that

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Tom, 702 F.2d 788, 813 (9th Cir. 1983) (J. Ferguson, dissenting).

[270] 702 F.2d 788 (9th Cir. 1983).

[271] Midkiff v. Tom, 702 F.2d at 797.

[272] *Id.* at 793-96. "There are several recurring facts and circumstances . . . that are present in the cases in which appellate courts have found a proper exercise of the power of eminent domain." *Id.* at 793. As far as can be determined, *Midkiff* is the only opinion to impose this type of fact-based scrutiny. Courts which adopted the narrow view of public use during the nineteenth century used historical acceptance to conclude that a use is public. *See supra* notes 122-24 and accompanying text.

The other factual categories really are *factors* rather than rules or principles of law. The dissenting opinion points out that the approach taken by the Supreme Court requires an ad hoc determination of "the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Midkiff v. Tom, 702 F.2d at 814 (quoting Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159-60 (1896)).

[273] Midkiff v. Tom, 702 F.2d at 793.

[274] Because no restrictions prevent a lessee from releasing the property once he has acquired the property in fee, Judge Poole noted that the leasehold system may be perpetuated. *Id.* at 804. He determined that in spite of the statute's purpose to alleviate the shortage of fee simple residential land, "the statute itself is so structured that it can only aggravate this [housing] shortage and resultant inflation of land values." *Id.* at 806. Judge Poole also expressed concern that condemnation is initiated by the lessees by means of a petition process that the state uses no public moneys to acquire property under the statute and that the Hawaii Housing Authority need not find a housing shortage in a county in order to condemn leasehold property. *Id.* at 804.

purpose.[275] Thus, both the majority and concurring opinions applied an intermediate standard of scrutiny that requires legislation to actually achieve its goals or to be substantially related to its purposes.[276]

In contrast, the dissenting and district court decisions followed the minimum rationality standard articulated in *Berman v. Parker*.[277] Judge Ferguson relied on *Berman* and earlier Supreme Court cases[278] to require "great judicial deference to a legislative determination that a use is a public one."[279] This position is supported by Judge King's federal district court opinion, which specifically adopted the *Berman* police power/due process analysis. Judge King posited that if the object of the eminent domain statute furthers the health, safety, morals, or general welfare and the means are rational and not in bad faith, arbitrary, or capricious, the statute is constitutional.[280] He concluded as a matter of law[281] that the Hawaii Land Reform Act was constitutional and granted summary judgment to HHA.[282]

Judge Alarcon and Judge Poole accurately stated that the judiciary ultimately has the final voice in determining what constitutes public use.[283] The leading treatise on eminent domain explains that, "the legislature, in the first instance, has the power to determine the question of public use . . . [but] whether a use for which the legislature has authorized the taking of property by eminent domain is really public is ultimately a judicial one."[284] However, the same treatise

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[275] Judge Poole cited two Florida cases for the proposition that "the private benefit must be an incidental one, and not the dominant purpose of the taking." *Id.* at 805.

[276] "When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.* at 798 (Judge Alarcon).

"However, when as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists." *Id.* at 806 (Judge Poole).

[277] 348 U.S. 26 (1954).

[278] Midkiff v. Tom, 702 F.2d at 813, (citing United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 551-52 (1946) and United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)).

[279] Midkiff v. Tom, 702 F.2d at 813.

[280] Midkiff v. Tom, 483 F. Supp. at 67. Judge King also noted "[i]t would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else - whether stricter or not." *Id.*

[281] *Id.* at 65.

[282] *Id.* at 70.

[283] "Where a state legislative determination is involved: '[I]t is well established that . . . the question what is public use is a judicial one.' " *Id.*, 702 F.2d at 798 (Judge Alarcon) (quoting Cincinnati v. Vester, 281 U.S. 439, 446 (1930)). In a sense, the standard used in *Midkiff* requires an independent judicial assessment of public use.

[284] *See* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.16. *E.g.*, Rindge Co. v. Los Angeles, 262 U.S. 700, 705 (1923) ("The nature of a use, whether public or private, is ultimately a judicial question").

affirms the proposition that "the question . . . usually presented to the courts is not whether the use for which the property is taken is public, but whether the legislature might reasonably consider it public."[285]

In essence, the majority elevated property rights to a higher standard of constitutional protection by looking to the intent of constitutional framers such as Madison and Hamilton. However, there is little indication that eminent domain was an important concern to the framers,[286] although they were concerned about *taking* property. Judge Alarcon supported his historical argument with quotations that concern taking property without compensation, not eminent domain. For example, he quoted language to the effect that an attempt to take property from A and *give* it to B would be unconstitutional.[287] Under the Hawaii Land Reform Act, the State of Hawaii attempted to take land from Bishop Estate (the lessor) and *sell* it at fair market value to the lessees who were using the land as single family residences. Although Madison clearly mistrusted the will of the electorate, his concerns about property rights were probably correctly reflected in Judge Alarcon's example: the taking of land from A and *giving* it to B. Madison and other American writers in the late 1780's had personal and intellectual ties with France. They viewed the dispossession of land wrought by the French Revolution with deep concern.[288] Because these historical authorities addressed dispossession rather than eminent domain, the application of these sources in *Midkiff* is misplaced.

In sum, the majority and concurring opinions disregarded judicial precedent by fashioning a different standard of review for eminent domain proceedings. The court of appeals elevated property rights to a higher standard of review than the U.S. Supreme Court has used to review arguably more fundamental societal needs such as the schooling of children.[289]

B. The Meaning of Public Use

The majority's attempt to use historical analysis to determine public use[290] seems to misinterpret the intent and concerns of the framers of the Constitution. More important, Judge Alarcon's analysis of the public use limitation has

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[285] 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.16.

[286] "Add to this the fact, which we well know, that eminent domain had been hardly written on, and one wonders how it got into our constitutions at all." Stoebuck, *Eminent Domain*, *supra* note 5, at 594-95. "Nor does there now seem to be much readily available evidence about what, if anything, the draftsmen thought about 'public use'." *Id.* at 591.

[287] Midkiff v. Tom, 702 F.2d at 793.

[288] The French Revolution occurred in 1789. Judge Alarcon's quotations from Madison were dated 1787-89, *id.* at 791-93, and the Bill of Rights was passed in 1791.

[289] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[290] Midkiff v. Tom, 702 F.2d at 789-93.

fundamental shortcomings. He failed to appreciate the great flexibility of the concept of public use during the past two hundred years. He would determine public use by employing a static, inflexible factual analysis. Judge Alarcon's conclusion that a transfer of private property from one group to another is per se invalid does not comport with judicial precedent.

Judge Alarcon's five categories of recurring factual situations describe areas where courts have held a use to be public. Their use, however, as a framework for analysis represents an attempt to redefine the parameters of the public use limitation. Although the majority has endeavored to articulate the "vaguely and inconsistently stated"[291] scope of the power of eminent domain, each category has analytical shortcomings.

For example, the majority categorized mill acts and road building as historically-accepted public uses.[292] However, in distinguishing these uses Judge Alarcon failed to recognize that such uses arose from unique local conditions and in doing so disregarded the need for ad hoc review.[293] Moreover, the justification for some takings for mills and roads reveal a transparent private use.[294] Finally, historically accepted public use has never been the *basis* for the U.S. Supreme Court holding an eminent domain statute constitutional.[295]

Judge Alarcon and Judge Poole placed great emphasis on requiring a change in use of land to justify a public purpose. While most eminent domain takings concededly have resulted in a change in use,[296] Judge Alarcon and Judge Poole cited no court that has ever used this criterion as a basis for determining whether a use is public. They cited cases such as roads, railroad spurs, and redevelopment in which direct or indirect changes in use occurred.[297] However, the distinction that changes in use occurred in *Eastern Sugar*[298] and *Berman v. Parker*[299] but not in *Midkiff v. Tom*[300] is tenuous. *Eastern Sugar* involved the dissolution of large, private agricultural landholdings in Puerto Rico into three

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[291] *Id.* at 793.

[292] *Id.* at 794.

[293] 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5, § 7.212(1); *See id.*, § 7.05.

[294] A taking for construction of a private road was found to be a public use on the theory that it allowed the homeowner to leave his or her home to vote and serve on juries. A private gold mining operation comprised the proper exercise of eminent domain powers on the theory that gold related to the national currency. *See Advance Requiem*, *supra* note 6, at 601, nn.15-16.

[295] However, some courts have adopted the narrow view of public use to justify allowing private mills to condemn the land of their upper riparian neighbors. *See supra* note 117 and accompanying text.

[296] *See supra* notes 92-152 and accompanying text.

[297] Midkiff v. Tom, 702 F.2d at 794.

[298] People of Puerto Rico v. Eastern Sugar Assoc., 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

[299] 348 U.S. 26 (1954).

[300] 702 F.2d 788.

uses — small subsistence farms, dwellings, and "proportional-profit" farms.[301] In *Eastern Sugar*, the First Circuit Court of Appeals specifically upheld each of these uses.[302] It is inconsistent to designate the breakup of agricultural land in Puerto Rico a "change in use", and yet not draw a similar conclusion about the breakup of large residential subdivisions into small private landholdings in Hawaii.

Judge Poole struck down the Hawaii Land Reform Act because it "permits, but neither requires nor contemplates, a change in the use of the land."[303] He ignored the fact that an identical analysis of *Berman v. Parker*[304] is possible. Individuals had the opportunity to repurchase their property and put it to the same use as before, albeit in a redeveloped community. Dissenting Judge Ferguson persuasively argued that the leasehold land in Hawaii was held primarily for investment purposes, whereas the new fee simple owners would hold it primarily for residential purposes.[305] Although Judge Alarcon claimed that these are merely different forms of private use,[306] the identical argument is true for both *Berman* and *Eastern Sugar*.

Judge Alarcon and Judge Poole agreed that a change in possession of land will result in a taking for a public use, although neither pointed to any cases that support this criterion. Their analysis ignored the fact that in *Berman* certain property owners were allowed to repurchase their property, thus thwarting any true change in possession. Alarcon's argument that "[t]he key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, *i.e.*, the redevelopment of the area"[307] must be contrasted with the Hawaii Land Reform Act in which the lessee retains possession throughout the condemnation proceedings. This may be a valid distinction if one accepts Judge Alarcon's five categories, but it is difficult to reconcile the resulting notion that simply because the government holds the land in an intermediate step that a public use becomes validated. For example, the act in question might easily be modified so that the HHA held the land for a month, one year, or two years before selling it to the lessee. Such a modification would have little effect on the impact of the land reform program.

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[301] Eastern Sugar, 156 F.2d at 319.

[302] *Id.* at 323, 325.

[303] Midkiff v. Tom, 702 F.2d at 804.

[304] 348 U.S. 26 (1954).

[305] *Id.* at 818.

[306] *Id.* at 797.

[307] *Id.*

VI. IMPACT

The Hawaii Land Reform Act goes beyond what previously has been considered a public use under the fifth and fourteenth amendments. Viewed substantively, the Ninth Circuit Court of Appeals decision that the Hawaii Land Reform Act impermissibly takes land for other than a public use is not surprising. Viewed procedurally, the opinion propounds a method of analysis and standard of review which is unique in the law of eminent domain.

Midkiff v. Tom[308] holds narrowly that land may not be transferred from one private party to another, unless the taking results in a change in use or possession of the land, is an historically accepted public use, or involves a de minimis taking.[309] This holding seems only to isolate and prohibit a land redistribution scheme involving lessee condemnation. In fact, the majority never really questions the use of eminent domain for land redistribution as long as some change in use or possession results from the taking.[310] Thus, the uniqueness of Hawaii's land tenure system and the specificity of the majority's factual paradigm might diminish the impact of this decision on other state and local land redistribution schemes.

If *Midkiff*'s intermediate level of scrutiny standard were upheld by the U.S. Supreme Court, most federal, state, and local declarations of public use would be unaffected. The majority opinion specifically distinguishes congressional takings from its heightened scrunity[311] and limits its holding to state legislative declarations of public use,[312] possibly indicating that heightened scrutiny would not apply to state judicial findings.

Four states that already impose more careful scrutiny over legislative assertions of public use would continue to rely on their specific state constitutional

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[308] 702 F.2d 788.

[309] Judge Poole and Judge Alarcon agreed with the Appellant's argument that the statute:

> merely provides a procedure for the involuntary transfer of title in the affected property from the disfavored lessor to the now advantaged lessee. . . . [A] condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment.

Id. at 804 (Judge Poole, concurring).

[310] *For example*, Judge Alarcon distinguishes but does not challenge *Eastern Sugar* and *Berman v. Parker*, both of which involve land redistribution schemes. *See supra* notes 139-46 and accompanying text.

[311] "[T]he Supreme Court stated that review of a congressional public use declaration is not the same as the review of a state legislative determination." Midkiff v. Tom, 702 F.2d at 798 (citing United States ex rel Tennessee Valley Authority v. Welch, 327 U.S. 546, 552 (1946)).

[312] Although Judge Alarcon does not expressly limit the holding to state legislative declarations of public use, he asserts: "This matter involves a review, under the fourteenth amendment, of a *state legislative determination*. This court must properly make the ultimate determination of whether the use is public." Midkiff v. Tom, 702 F.2d at 798.

provisions and would be unaffected by a higher standard of review.[313] Likewise, state and local condemnations for government public works, housing, and redevelopment projects would also be less affected because of the physical change in the condemned property and direct public benefits.[314]

The most severe impact of heightened federal judicial scrutiny would be in areas where public and private benefits are intertwined, such as joint public/private economic development projects. Because of the interdependence of public and private goals, courts would be required to separate factually the public and private benefits to determine which interest predominates.[315] Although public uses would still vary considerably according to peculiar local conditions, the judiciary and not the legislature would possess ultimate decision-making authority.

The historical development of the public use limitation demonstrates that state and local governments have expanded the uses of eminent domain during times of economic need: colonial exploration and resource development during the eighteenth century, industrial expansion and transportation during the nineteenth century and urban redevelopment during the twentieth century.[316] During the last twenty years, state and local uses of eminent domain have expanded again through attempts to revitalize local economies. For example, the City of Detroit used eminent domain to successfully induce General Motors to relocate in its urban center.[317] The City of Oakland failed in its attempt to condemn a local industry — the Oakland Raiders — which eventually relocated to Los Angeles.[318] Viewed within the context of the historical expansion of the public

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[313] The constitutions of Arizona, Colorado, Missouri, and Washington have provisions in their state constitutions requiring independent judicial assessment of public use without regard to legislative declarations. *See* In re The Westlake Project, City of Seattle, 96 Wash. 2d 616, 638 P.2d 549, 556 (1981).

In a sense, the standard used in *Midkiff* requires independent judicial assessment of public use. Both Judge Alarcon and Judge Poole evaluated the effect of the statute while asserting that "the question what is a public use is a judicial one." Midkiff v. Tom, 702 F.2d at 798 (quoting Cincinnati v. Vester, 281 U.S. 439, 446 (1930)).

[314] Public works projects and other condemnations where government holds the land or the public gets a direct tangible benefit are accorded a strong presumption of validity in determining public use. *See generally* 2A NICHOLS ON EMINENT DOMAIN, *supra* note 5.

[315] For example, in In Re Westlake Project, City of Seattle, 96 Wash. 2d 616, 638 P.2d 549, the Washington Supreme Court reviewed a trial court finding that "as a fact, upon convincing evidence, the retail shops were a substantial element of the project. . . ." 638 P.2d at 556. Although the court based its review in part on a finding of insufficient statutory authority, the court also balanced the private and public uses to determine whether the private uses were only incidental to the exercise of eminent domain. *Id.* at 559.

[316] *See supra* notes 91-151 and accompanying text.

[317] Poletown Neighborhood Council v. City of Detroit, 410 Mich. 894, 304 N.W. 2d 455 (1981).

[318] City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673

use limitation, the Hawaii Land Reform Act is not revolutionary. It attempts to economically stabilize the Hawaii housing market by attacking inflationary housing costs through land redistribution. It was implemented during an era of extraordinary inflation when the local economy was severely strained.

As state and local governments are increasingly faced with budgetary and fiscal constraints, they must turn to alternative means of stimulating local economic growth or solving local economic problems. One attractive alternative is the government's use of eminent domain in joint projects with private industry where acquisition and development costs can be borne or shared by the private sector so that the financial commitment of government is kept to a minimum. Such solutions may be most attractive to financially plagued northern urban centers, although diminished federal funding and economic difficulties affect cities nationwide.

Intermediate judicial scrutiny of these takings would result in court challenges each time a state used eminent domain on behalf of a private entity. Such a situation might seriously impede new local economic initiatives and discourage both public and private sector participation.

VII. SUPREME COURT REVIEW OF *Midkiff v. Tom*

If the U.S. Supreme Court reverses the Ninth Circuit Court of Appeals, it could simply rely on the rule articulated in *Berman* that a police power/due process analysis requires judicial affirmation of state legislative declarations of public use unless the legislature acted arbitrarily, capriciously or unreasonably. If the U.S. Supreme Court in its review of this decision concludes that more than a minimum rationality standard of review is needed, the Court could follow the arguments of Judge Poole. If this option is elected, this case will be a landmark in the law of eminent domain, and for all intents and purposes the standard of review in *Berman* will be overruled.

One option for the Court might be to remand the case to the district court for a factual determination. The district court decided the case on summary judgment and did not make any findings of fact.[319] The District Court Judge asserted that any possible rationale would render the Act constitutional once its objective of land redistribution was found to be legitimate state goal.[320]

(1982). In *City of Oakland*, the California Supreme Court reversed the trial court's summary judgment in favor of the Los Angeles Raiders. The court remanded the case for a full evidentiary trial on the merits. *See* City of Oakland v. Superior Ct. of Monterey County, 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (1982); City of Oakland v. Superior Ct. of Monterey County, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983).

[319] Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Hawaii 1979).

[320] *Id.* at 65.

If the Court strikes down the Act, would a restructured statute pass constitutional muster? More state money could be used to acquire property. Condemnation proceedings could be changed so that they are initiated by the state rather than the lessees. Restrictions on alienation of the land could be implemented to insure that lessees did not use the Act for their own private gain.[321] A longer intermediate step in which the government holds the land could be instituted. The constitutionality of the statute might turn on such points. However, the overall effect of the statute would remain after such defects were cured. The state could condemn land and lease it at nominal rates or could retain the first option if a new fee simple owner wished to sell during the first ten years. Such measures might alleviate the contribution of escalating land rents to soaring housing costs in Hawaii. A major disadvantage of such an approach would be a significant expenditure of state funds during a period of economic hardship. The state might also consider other regulatory devices such as graduated property tax assessments to make it financially unattractive for large landholders to retain their vast landholdings.[322]

VIII. CONCLUSION

The Hawaii Land Reform Act goes beyond other takings that have been authorized by federal courts under the doctrine of public use. The analysis by the Ninth Circuit Court of Appeals in *Midkiff v. Tom*[323] is unique in its application of a standard of review that is higher than minimum rationality. It is also remarkable in attempting to establish factual categories to determine when a taking is for a public use and for failing to use an ad hoc approach, despite its own language to the contrary.

Two questions face the U. S. Supreme Court in its consideration of the Hawaii Land Reform Act. Is the public use limitation still viable in judicial review of eminent domain statutes? Are the powers of taxation, regulation, and eminent domain all subject to the same minimum rationality standard of review? Implicit in both of these questions is the one that is most important to Bishop Estate and its leaseholders in Hawaii. Does the Hawaii Land Reform Act go beyond the constitutional limits of the fifth and fourteenth amendments?

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[321] For example, restrictions on the transfer of certain dwelling units that were built for lower income residents already exist. For a period of ten years after the purchase of certain dwelling units, HHA retains the first option to purchase the unit. HAWAII REV. STAT. § 359G-9.2 (1982).

[322] During 1984, H.B. 2246 and H.B. 2252 were introduced in the Hawaii House of Representatives and would have limited the increase in lease rents for residential properties to 5.5 percent per annum. Neither became law.

[323] 702 F.2d 788 (9th Cir. 1983).

Addendum

Hawaii Housing Authority v. Midkiff[324] — The Hawaii Land Reform Act is Constitutional

I. INTRODUCTION

On May 30, 1984, the United States Supreme Court unanimously reversed the Ninth Circuit Court of Appeals[325] and upheld the constitutionality of the Hawaii Land Reform Act.[326] The Court found that the use of eminent domain to break up a land oligopoly[327] is permissible under the fifth and fourteenth amendments' requirement that land be condemned for only a public use.[328] The Court also concluded that the power of eminent domain is coterminus with the scope of the state's police power.[329] Thus minimum rationality,[330] which requires judicial deference to legislative socioeconomic decisions unless the legis-

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[324] 104 S. Ct. 2321 (1984).

[325] The main body of this casenote discusses the decisions of the Hawaii federal district court, 471 F. Supp. 871 (D. Hawaii 1979); 483 F. Supp. 62 (D. Hawaii 1979), and Ninth Circuit Court of Appeals, 702 F.2d 788 (9th Cir. 1983), in Midkiff v. Tom. The Hawaii Federal District Court upheld the Hawaii Land Reform Act as being for a legitimate public use. Midkiff v. Tom, 483 F. Supp. 62, 67-68 (D. Hawaii 1979). *See supra* notes 188-202 and accompanying text. The Ninth Circuit Court of Appeals, in a split decision, reversed the district court and found the Hawaii Land Reform Act to be for a private purpose and therefore unconstitutional. Midkiff v. Tom, 702 F.2d 788, 793, 798 (9th Cir. 1983). *See supra* notes 203-261 and accompanying text.

[326] 1967 Hawaii Sess. Laws 488; 1975 Hawaii Sess. Laws 408. *See supra* notes 42-62 and accompanying text for a discussion of the provisions and mechanics of the Hawaii Land Reform Act.

[327] The Court characterized the land tenure system in Hawaii as an "oligopoly," 104 S. Ct. at 2329, that is "a market situation in which each of a few producers affects but does not control the market." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 822.

[328] 104 S. Ct. at 2324. The fifth amendment provides that "private property [shall not] be taken for a public use, without just compensation," U.S. CONST. amend. V, and is made applicable to the states through the fourteenth amendment which provides that no "State [shall] deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV. *See* Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

[329] "The 'public use' requirement is thus coterminus with the scope of the sovereign's police powers." 104 S. Ct. at 2329.

[330] Use of the minimum rationality standard results in judicial affirmation of taxation and socioeconomic legislation unless no reasonably conceivable set of facts exists to establish the relationship between the challenged legislation and the legitimate government goal. *E.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). *See supra* note 13.

lature acts irrationally, was affirmed as the correct test to apply in federal judicial review of state legislative declarations of public use.[331]

This addendum reviews the United States Supreme Court decision in *Hawaii Housing Authority v. Midkiff*[332] and considers the Court's holding on the public use limitation in light of the historical and legal analysis of the preceding casenote.[333] The Court's conclusion that the police power and eminent domain power are coterminus is then addressed. This addendum concludes that the Court's opinion and analysis are dictated by sound judicial precedent. *Hawaii Housing Authority v. Midkiff* simply affirms the minimum rationality standard that the Court has always applied in its review of state legislative findings of public use. However, in affirming that the power of eminent domain is no different from the police power, the Court articulated a broad rule. As long as a legislative act is within the legitimate authority of government, the public use requirement is satisfied. Thus, federal courts need not directly address whether a taking is for a public use. If the legislative action is found to be legitimate, it will serve a public purpose.

II. ANALYSIS

Justice Sandra Day O'Connor wrote the majority opinion for an eight-member court.[334] First, the Court held that the federal district court properly did not abstain from exercising federal jurisdiction in the case.[335] Second, it held that the public use clause of the fifth and fourteenth amendments does not prohibit the State of Hawaii from taking fee simple title in real property from lessors and transferring it to lessees in order to reduce the concentration of land ownership in the state.[336]

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[331] "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause." 104 S. Ct. at 2324.

[332] 104 S. Ct. at 2321 (1984).

[333] For an historical analysis of the development of the public use limitation, see *supra* notes 92-152 and accompanying text. For a legal analysis of the standard of review applied by the United States Supreme Court in its review of state legislative declarations of public use, see *supra* notes 153-87 and accompanying text.

[334] Justice Thurgood Marshall did not participate in the decision. 104 S. Ct. at 2332.

[335] The doctrine of abstention permits a federal court to refrain from exercising jurisdiction when it is necessary to avoid needless conflict with the administration by a state of its own affairs. *See* 1A, Pt. 2 J. MOORE, W. TAGGART, A. VESTAL, & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ O.203 (2d ed. 1983) and *supra* note 20.12.

[336] "Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore the Hawaii statute must pass the scrutiny of the Public Use Clause." 104 S. Ct. at 2330.

The Court relied on *Berman v. Parker*[337] for the principles on which its opinion was based. *Berman* recognized that the power of eminent domain, like that of the police power, is merely a means through which legislative authority may be exercised to serve public needs.[338] Once an objective is within the authority of the legislature, the legislature may choose any means to achieve that end.[339] *Berman* further stated that the legislature, not the judiciary, is the main guardian of the public interest.[340] Thus, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ."[341]

Justice O'Connor recognized a role for judicial review of legislative findings of public use, but the role is an "extremely narrow one."[342] Judicial deference is required because "legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[343] Thus, judicial authority should not be exercised until the legislature's public use determination is shown to involve an impossibility.[344] Justice O'Connor concluded that "where the exercise of eminent domain is rationally related to a conceivable public purpose, the Court has never held a compensating taking to be proscribed by the Public Use Clause."[345] Whether in fact the provision will accomplish its objectives is not the question. The issue to be considered in federal judicial review of legislative findings of public use is whether the legislature "rationally could have believed"[346] a legislative act would achieve its goals or its objective would be promoted.[347]

After affirming a minimum rationality standard of judicial review, the Court

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[337] 348 U.S. 26 (1954).

[338] "[T]he power of eminent domain is merely the means to the end." *Id.* at 33.

[339] "Once the subject is within the authority of Congress, the means by which it will be attained is also for Congress to determine. . . . [T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.* at 32, 33.

[340] "[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Id.* at 32.

[341] *Id.*

[342] 104 S. Ct. at 2329 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

[343] 104 S. Ct. at 2325.

[344] *Id.* at 2324 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

[345] 104 S. Ct. at 2324. The Court distinguished Missouri Pacific Railroad Co. v. Nebraska, 164 U.S. 403 (1896), where the "order in question was not, and was not claimed to be, . . . a taking of private property for a public use under the right of eminent domain," (*id.* at 416) although the Court invalidated the taking of property for lack of a justifying public purpose. *See supra* note 80 and accompanying text.

[346] 104 S. Ct. at 2330 (quoting Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 671-72 (1981)).

[347] 104 S. Ct. at 2330.

considered the purpose for which the state's power of eminent domain was being used: to condemn fee simple private property interests of lessors for sale to residential lessees.[348] The opinion analogized the Hawaii legislature's efforts to break up a land oligopoly to the efforts of the settlers of the original thirteen colonies to rid themselves of "the feudal incidents with which large proprietors had encumbered land in the colonies."[349] The Court found the Hawaii legislature to be concerned with reducing the perceived social and economic evils of a land oligopoly[350] that was deterring the proper functioning of the state's residential land market.[351] The opinion concluded that regulating oligopoly and the evils associated with it was a classic exercise of a state's police power[352] and therefore served a legitimate public purpose.[353]

Justice O'Connor next considered whether the Hawaii State Legislature acted irrationally in passing the Hawaii Land Reform Act.[354] She concluded that the legislative means to achieve land reform were rational.[355] Under the Hawaii Land Reform Act, when the land market is malfunctioning, a sufficient number of lessees will declare that they want to buy their fee simple interest, triggering the state land condemnation process.[356] The authorization of public funds and limitations upon the number of lots any one tenant may purchase ensures that the market diluting goals will be achieved. The Court found the Hawaii Land Reform Act to be "a comprehensive and rational approach to identifying and correcting market failure."[357]

In sum, the Court narrowly held that redistribution of fee simple interests to correct housing market deficiencies is a rational exercise of the legislature's police power.[358] However, the rule that the Court actually articulated was much broader. The Court's opinion made it clear that the exercise of eminent domain

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[348] *Id.*

[349] *Id.* at 2330 n.5.

[350] "The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Id.* at 2330.

[351] *Id.*

[352] "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police power." *Id.*

[353] "The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii — a legitimate public purpose." *Id.* at 2331.

[354] *Id.*

[355] "Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power." *Id.*

[356] "The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning." *Id.* at 2330.

[357] *Id.*

[358] *Id.*

is no different from other socioeconomic legislation with respect to the proper standard of federal judicial review.[359] Justice O'Connor concluded that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts."[360]

In effect, Justice O'Connor concluded that only where a taking is executed "for no reason other than to confer a private benefit"[361] should a court invalidate the taking as violative of the public use limitation. However, a "purely private taking"[362] must be involved. A taking will be found to have no public use and will thus be void only if "it would serve no legitimate purpose of government. . . ."[363]

III. THE NINTH CIRCUIT OPINION

The Supreme Court specifically rejected the approach taken by the Ninth Circuit Court of Appeals majority opinion.[364] The Ninth Circuit had held that requiring government to possess and use property at some point during the taking ensured that a condemnation was for a public use.[365] The Ninth Circuit majority had ruled that the Hawaii Land Reform Act was not for a public use since the land passed directly from lessor to lessee and did not remain in government possession.[366] In contrast, the Supreme Court found that government has never been required to hold possession of property for an eminent domain taking to be valid.[367] The Court recognized that "the unique way titles were

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[359] *Id.*

[360] *Id.*

[361] *Id.* at 2331.

[362] "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Id.*

[363] *Id.*

[364] The Ninth Circuit Court of Appeals majority opinion articulated a five-part factual paradigm to determine if a government taking served a legitimate public use under the fifth and fourteenth amendments. The Court held that a condemnation must result in a change in use or change in possession of the land, or must be historically accepted, involve a de minimus taking or be a condemnation where government holds the land, in order to satisfy the public use requirement. 702 F.2d at 793-97. *See supra* notes 203-24 for a discussion of the Ninth Circuit majority factual paradigm. *See supra* text accompanying notes 290-307 for a critical analysis of the Ninth Circuit majority opinion.

[365] "Where the beneficiary of the condemnation is a governmental entity there is a strong indication that the taking is for a public use . . . ." 702 F.2d at 795. *See supra* notes 219-222, 307 and accompanying text.

[366] 702 F.2d at 795.

[367] "[G]overnment does not itself have to use property to legitimate the taking . . . ." 104

held in Hawaii"[368] justified the use of eminent domain for land redistribution. Thus, the fact that the government never directly took possession of the land was of no consequence.[369] The Court concluded that the purpose of the condemnation, not its mechanics, must pass constitutional scrutiny.[370]

The Court also rejected the Ninth Circuit's distinction between state and federal legislative findings of public use for purposes of federal judicial review.[371] The Ninth Circuit had held that judicial review of state legislative takings required more careful scrutiny than judicial review of congressional takings.[372] The Court concluded that federal judicial review of Congress under the fifth amendment is the same as federal judicial review of state legislatures under the fourteenth amendment.[373] The Court found that it would be "ironic to find that state legislation is subject to greater scrutiny under the incoporated 'public use' requirement than is congressional legislation under the express mandate of the Fifth Amendment."[374]

IV. COMMENTARY

Hawaii Housing Authority v. Midkiff affirms the minimum rationality standard of review that federal courts have imposed in determining whether state legislative declarations of public use violate the fifth and fourteenth amendments.[375] However, the Court announced a broad rule in reaching its decision by explicitly holding that the public use requirement is coterminus with a sov-

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S. Ct. at 2331.

[368] "As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified." *Id.*

[369] *Id.*

[370] "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Id.*

[371] *Id.*

[372] "Where a state legislative determination is involved: '[i]t is well established that . . . the question what is a public use is a judicial one.' . . . This matter involves a review, under the fourteenth amendment, of a state legislative determination. This court must properly make the ultimate determination of whether the use is public." 702 F.2d at 798 (quoting Cincinnati v. Vester, 281 U.S. 439, 446 (1930)). See *supra* notes 153-87 and accompanying text for an historical analysis of the standard the Supreme Court has applied in its review of state eminent domain statutes. See *supra* notes 225-28 and accompanying text for a discussion of the Ninth Circuit majority position on the standard federal courts should apply to state legislative declarations of public use. See *supra* notes 263-89 for a critical analysis of the Ninth Circuit majority opinion.

[373] "[T]he fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate." 104 S. Ct. at 2331.

[374] *Id.* at 4677 n.7.

[375] See *supra* notes 153-87 and accompanying text for an historical analysis of the standard the Supreme Court has applied in its review of state eminent domain statutes.

ereign's police power.[376] Thus, the Court affirmed that the meaning of public use is as broad as the scope of government power. If a legislative objective is legitimate, the use of eminent domain to achieve that objective will be deemed to be constitutional.[377]

A. *Standard of Review*

The Supreme Court's affirmation of a minimum rationality standard of review is dictated by sound judicial precedent. The Supreme Court almost ninety years ago "made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' "[378] The Court has consistently practiced judicial restraint in its consideration of state eminent domain statutes and has deferred to a legislature's public use determination "until it is shown to involve an impossibility."[379] In *Midkiff*, the Supreme Court correctly recognized that the role for courts in reviewing a legislature's judgment of public use has been "an extremely narrow" one.[380]

The Supreme Court relied on the *Berman* analysis to affirm the proposition that the public use requirement is coterminus with the scope of the sovereign's police power.[381] Justice O'Connor recognized the breadth of the *Berman* principle that the means by which a legitimate government goal is achieved is irrelevant to its constitutionality once a public purpose is established.[382] Thus, *Midkiff* affirms that public purpose is decided by the legislature, a determination that will not be disturbed by a federal court unless it is wholly arbitrary, capricious, or irrational.[383]

Berman explicitly recognized that the power of eminent domain and the police power are essentially the same.[384] Indeed, the *Berman* Court relied on cases

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[376] "The 'public use' requirement is thus coterminus with the scope of a sovereign's police power." 52 U.S.L.W. at 4676.

[377] "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of the takings — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts." *Id.*

[378] *Id.* (quoting United States v. Gettysburg Electric Railroad Co., 160 U.S. 668, 680 (1896)).

[379] Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925).

[380] Berman v. Parker, 348 U.S. 26, 32 (1954).

[381] *Id.* at 33.

[382] 104 S. Ct. at 2329.

[383] "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.*.

[384] "We deal, in other words, with what traditionally has been known as the police power."

that considered challenges to legislative socioeconomic regulation under a police power/due process analysis.[385] As in *Berman*, the Supreme Court in *Midkiff* also looked to federal judicial review of state socioeconomic legislation under a police power/due process analysis.[386] Thus, the Court chose the broadest possible rationale and support for its decision. In affirming that the public use requirement is coterminus with the scope of the sovereign's police power, the Court narrowly established that federal judicial review of any state legislative action will be governed by a minimum rationality standard of review.[387] However, the broad rule articulated by the Court goes further. *Midkiff* stands for the proposition that the public use limitation is as broad as government power itself.[388]

B. The Meaning of Public Use

Midkiff held that the use of eminent domain to break up a land oligopoly is permissible under the fifth and fourteenth amendments' requirement that land be condemned for only a public use. However, the Court ruled that once an object is within the power of government, the public use requirement is fulfilled. Only if a taking serves "no legitimate purpose of government" will it be found invalid.[389]

The Court's broad analysis is not unexpected if one considers the development of the public use limitation in the state and federal courts in the twenty years preceding *Berman*.[390] Lower federal courts recognized that if the government has the power to embark on a project, the public use requirement is fulfilled.[391] The New York Court of Appeals recognized that government objectives could be achieved by one of three government powers: the police power, taxation, or eminent domain. As long as the purpose is within the power of government, a public purpose is served and any government power may be used to achieve a legitimate government goal.[392]

Berman v. Parker, 348 U.S. 26, 32 (1954).

[385] *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[386] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[387] 104 S. Ct. at 2329.

[388] "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.* (quoting Berman v. Parker, 358 U.S. 26, 32 (1954)).

[389] "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." 104 S. Ct. at 2331.

[390] *See supra* notes 165-77 and accompanying text.

[391] *See, e.g.*, Barnridge v. United States, 101 F.2d 295, 298 (8th Cir. 1939) ("If the Federal Government, under the Constitution, has the power to embark upon the project for which the land is sought, then the use is a public one.").

[392] New York City Housing Authority v. Muller, 270 N.Y. 335, 1 N.E.2d 153 (1936).

Tennessee Valley Authority v. Welch,[393] decided by the Court eight years before *Berman*, also followed this reasoning by declaring that "it is the function of Congress to decide what type of taking is for a public use."[394] *Welch* prompted one commentator to conclude that "the Court will henceforth refuse to consider the separate questions of constituional power and public use, but having found the one will assume the other."[395] In *Berman* the Court explicitly held that "[o]nce the objective is within the authority of Congress, the right to realize it through exercise of eminent domain is clear."[396]

While the Court might have chosen a narrower basis on which to uphold the Hawaii Land Reform Act, it instead affirmed and solidified the broad rules first articulated in *Welch* and *Berman*. Although the public use limitation has never been a serious impediment to government's use of eminent domain,[397] the Court clearly and decisively affirmed that the public use requirement is the same as the police power.[398] The Supreme Court confirmed the demise, accurately predicted forty years ago,[399] of public use as a limitation upon a legislature's exercise of the power of eminent domain.

In sum, the Court had "no trouble concluding that the Hawaii [Land Reform] Act is constitutional."[400] It found that regulating oligopoly was a classic exercise of a state's police power[401] and that the Hawaii Legislature acted rationally in its approach to the problem in Hawaii.[402] The issue before federal courts is not whether a use declared by the legislature is a public one; the issue is whether the objective to be pursued is within the scope of government power.[403] Having found governmental authority that a particular objective may be pursued, the reviewing court will not overturn a legislative decision simply because the power of eminent domain is employed.[404]

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[393] 327 U.S. 546 (1946).

[394] *Id.* at 551-52.

[395] *Advance Requiem*, *supra* note 6, at 613.

[396] Berman v. Parker, 348 U.S. 26, 32 (1954).

[397] *See supra* notes 92-152.

[398] 104 S. Ct. at 2329.

[399] *Advance Requiem*, *supra* note 6. However, some commentators maintain that it is difficult to establish the demise of a limitation that hardly ever existed.

[400] 104 S. Ct. at 2329.

[401] "Regulating oligopoly and the evils associated with it is a classic exercise of a state's police powers." *Id.* at 2330.

[402] "Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. . . . This is a comprehensive and rational approach to identifying and correcting market failure." *Id.*

[403] "Once the subject is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

[404] "[T]he legislature . . . is the main guardian of the public needs served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved. . . ." 104 S. Ct. at 2329 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

V. IMPACT

Hawaii Housing Authority v. Midkiff is significant on several different levels. First, the decision immediately affects Bishop Estate and other large landowners in Hawaii and their residential lessees. Second, the ruling impacts the law of eminent domain as an affirmation of the minimum rationality standard of review and as an affirmation that the power of eminent domain is the same as other government powers. Third, in the view of one constitutional scholar, *Midkiff* reflects the Supreme Court's view of its proper institutional role in reviewing legislative actions.[405]

Hawaii Housing Authority v. Midkiff affects two groups of Hawaii residents in conflicting ways. To Bishop Estate, the ruling is the start of a "massive assault on private property."[406] Indeed, one trustee has predicted that the decision will encourage attempts to expand the Act to include condominium, agricultural and industrial leasehold property.[407] He has appealed to the native Hawaiians, beneficiaries of Bishop Estate, to amend the legislative act "to protect and preserve their most important Hawaiian legacy."[408] The residential lessees, on the other hand, are undoubtedly satisifed with the decision and its affirmation of Hawaii's use of eminent domain to convert their leasehold interests to fee simple. The Hawaii Legislature will ultimately make the political determination of whether Bishop Estate and native Hawaiians will succeed in overturning the law or whether other lessees will succeed in extending it. *Midkiff* stands for the proposition that the legislatures, not the courts, "are better able to assess what public purposes should be advanced by an exercise of the taking power."[409]

As an affirmation of minimum rationality as the proper standard of judicial review over state legislative takings, the Court's decision has slight impact. However, the Court strongly affirmed that judicial review of public use is the same as judicial review of the police power. Thus, the public use limitation retains no independent significance. If the government objective is legitimate, public use will be presumed. The Court also affirmed that federal judicial review of state legislative actions under the fourteenth amendment is the same as

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[405] Address by Laurence H. Tribe, Hawaii Institute for Continuing Legal Education and The Harvard Club of Hawaii, *The U.S. Supreme Court's Land Reform Act Decision: An Overview* (July 31, 1984).

[406] Bishop Estate Trustee Matsuo Takabuki, *quoted in* Honolulu Star-Bulletin, July 18, 1984, at A-3, col. 1.

[407] *Id.*

[408] Bishop Estate Trustee Matsuo Takabuki, *quoted in* Honolulu Star-Bulletin, July 17, 1984, at A-3, col. 1.

[409] 104 S. Ct. at 2331.

federal judicial review of congressional actions under the fifth amendment.[410] The Court soundly rejected the Ninth Circuit's imposition of a higher standard of federal judicial review of state legislative actions.[411] Thus, the rules articulated by the Court suggest that federal judicial review of *any* legislative action imposes the same deference. Although this broad conclusion was suggested by *Welch* and articulated in *Berman*, *Midkiff* left no question as to the meaning of those earlier decisions. As a practical matter, however, the impact may be slight, since federal courts in general have consistently deferred to legislative judgments of public use.[412]

Finally, constitutional scholar Laurence H. Tribe, who represented the State of Hawaii in oral arguments before the Supreme Court,[413] suggests that *Midkiff* reflects the Supreme Court's view of its proper institutional role.[414] Professor Tribe asserts that *Midkiff* is simply a logical step in the Supreme Court's modern era of substantive due process review. In 1937, when the Court decided *West Coast Hotel v. Parrish*,[415] the Court "dramatically reversed itself"[416] and abandoned its previous judicial activism of "the *Lochner* era",[417] in which the Court scrutinized and invalidated much state and federal legislation under the due process clause.[418] Thus, one year after *West Coast Hotel*, in *United States v.*

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[410] "[T]he fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate." *Id.*

[411] "Because state legislative determinations are involved in the instant cases, the Court of Appeals decided that more rigorous judicial scrutiny of the public use determinations was appropriate. The court concluded that the Hawaii Legislature's professed purposes were mere statutory 'rationalizations.' . . . We disagree with the Court of Appeals' analysis." [citation omitted] *Id.*

[412] *See, e.g.*, United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975) ("The only question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is for a Congressionally authorized public use."); United States v. 58.16 Acres of Land, 478 F.2d 1055, 1058 (7th Cir. 1977) ("Determination of the extent, amount or title of property to be taken . . . is, in the absence of bad faith, final."); Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030 (1967) ("[T]he Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith.)

[413] Oral argument was heard on March 26, 1984.

[414] Address by Laurence H. Tribe, Hawaii Institute for Continuing Legal Education and The Harvard Club of Hawaii, *The U.S. Supreme Court's Land Reform Act Decision: An Overview* (July 31, 1984).

[415] 300 U.S. 379 (1937).

[416] L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 8-7, at 450 (1978).

[417] "The Lochner era" describes the period from the turn of the century to the middle of the 1930s, ending with West Coast Hotel v. Parrish, 300 U.S. 379 (1937). During this era, the Supreme Court scrutinized both the ends sought and the means employed in reviewing legislative challenges, resulting in invalidation of some socioeconomic legislation and a period of judicial activism. *See generally* L. TRIBE, *supra* note 416 at §§ 8-2 to -7 (1978).

[418] *Id.*

Carolene Products,[419] the Court declared that it would sustain socioeconomic regulation if any state of facts either known or reasonably inferred supported the legislative judgment.[420] Since 1937, federal courts have therefore reviewed socioeconomic legislation under a minimum rationality standard. According to Professor Tribe, *Midkiff* affirms that the proper forum for socioeconomic and public use decisions is the legislature, not the judiciary.

VI. CONCLUSION

The preceding casenote posited that the broad question facing the Supreme Court in *Midkiff* was whether eminent domain, taxation and the police power are subject to identical standards of judicial review.[421] The Court affirmed minimum rationality as the standard to be applied in federal judicial review of state eminent domain takings, but also ruled that the public use requirement is coterminus with the sovereign's police powers. The Court held that a land oligopoly may be diluted by the condemnation of fee simple interests, but affirmed that the power of eminent domain is as broad as government power itself. In short, the Court affirmed that, in general, socioeconomic legislative actions are accorded the greatest deference by federal courts when they are reviewed under the fifth and fourteenth amendments. If legislative decisions are not acceptable, they should be challenged at the ballot box, not at the bar.

Tom Grande
Craig S. Harrison

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[419] 304 U.S. 144 (1938).

[420] L. TRIBE, *supra* note 416 at § 8-7, at 450 (1978).

[421] *See supra* notes 14-16 and accompanying text.

Rethinking Products Liability: *Kaneko v. Hilo Coast Processing*

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.[1]

Courts faced with products liability issues must weigh competing societal interests: the need to protect consumers from risks imposed by a modern industrial society versus the desire to promote economic growth. This balancing process has created confusing and complex law.[2]

In *Kaneko v. Hilo Coast Processing*[3] the Hawaii Supreme Court undertook the task of clarifying Hawaii's products liability law; policy issues controlled. Concern for public safety led the court to expand the term "product" and narrow the definition of "occasional seller" for products liability purposes. Awareness of commercial interests guided the court toward its decision to allow the defense of comparative negligence in products liability cases.

This note explores the objectives and policies underlying the *Kaneko* decision. Part I outlines the facts of the case. Part II analyzes and evaluates the court's application of the doctrine of strict products liability. It also examines the mechanics and ramifications of merging the concepts of strict products liability and comparative negligence. Part III discusses the effect that *Kaneko v. Hilo Coast Processing* will have on Hawaii's products liability law.

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[1] O. HOLMES, THE COMMON LAW 35 (1923).

[2] One authority explains that strict liability derived from common law contract doctrines with a tort warranty concept. While the warranty concept was subject to limitations including the "requirements of privity, the right of disclaimer, and the duty of notice to the seller in the eventuality of a defect," the law of tort continued to develop. Therefore, the law of strict liability "developed erratically . . . since compensation for injury usually depended on how determined or adept the court was to justify it in terms of conventional legal concepts." P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 187-89 (1981) (quoting Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364 (1965)).

[3] 65 Hawaii 447, 654 P.2d 343 (1982).

I. FACTS OF THE CASE

Plaintiff Milton Kaneko, an ironworker employed by Central Pacific Boiler and Piping, was injured on August 16, 1973, when he fell while erecting a prefabricated mill building. The building, owned by the Hilo Coast Processing Company,[4] had been manufactured by Mutual Welding Co., Ltd.[5]

The injury occurred while Kaneko was connecting girts (steel beams in a horizontal position) to clips on columns (steel beams in a vertical position) by standing on the girt just connected in order to work on the next.[6] He was perched on a beam approximately ten to twenty feet in the air when a clip on the column broke and the beam collapsed.[7] Kaneko suffered severe back injuries, making it impossible for him to continue as an ironworker or do any heavy lifting.[8]

The case went to trial on September 25, 1978. The jury returned its special verdict on October 17, 1978.[9] It found Mutual Welding liable under all three

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[4] *Id.* at 448, 654 P.2d at 345. At trial, the jury found that Hilo Coast Processing was not negligent. Therefore, it was not a party to the appeal. *Id.* at 448 n.1, 654 P.2d at 344-45 n.1.

[5] *Id.* at 448, 654 P.2d at 345.

[6] *Id.*

[7] *Id.* Evidence showed that Mutual Welding, intending to make a full filler weld at a later date, had welded the clip only temporarily. *Id.* at 449, 654 P.2d at 345.

[8] *Id.* at 449, 654 P.2d at 345.

[9] *Id.* The jury returned its special verdict as follows:

1. Was Mutual Welding Negligent? YES
2. If so, was said negligence a proximate cause of said accident of 8/16/73? YES
3. Is Mutual Welding strictly liable to Plaintiff? YES
4. If so, was such strict liability a proximate cause of the accident of 8/16/73? YES
5. Is Mutual Welding liable for breach of warranty? YES
6. If so, was said breach of warranty a proximate cause of the accident of 8/16/73? YES
7. Was Hilo Coast Processing negligent? NO
8. If so, was said negligence a proximate cause of said accident of 8/16/73? NO
9. Was Milton Kaneko negligent? YES
10. If so, was said negligence a proximate cause of said accident of 8/16/73? YES
11. If you have found more than one of the parties liable and that liability a proximate cause of the accident of 8/16/73 then make the following apportionment of liability for the accident of 8/16/73:

Mutual Welding	73%
Hilo Coast Processing	0%
Milton Kaneko	27%
TOTAL	100%

12. If you have found any of the Defendants liable then determine damages as follows:

A. Special Damages	
1. Medical Bills	$ 4,800.12
2. Loss of wages to date	$ 32,500.00
B. General Damages	
1. Pain and suffering	$123,000.00
2. Diminished earning Capacity	$201,500.00

Id. at 449-50, 654 P.2d at 345-46.

products liability theories[10] — negligence,[11] breach of warranty,[12] and strict liability.[13] The jury also determined that Milton Kaneko was twenty-seven percent contributorily negligent for failing to wear a safety belt or life line and that his negligence was a proximate cause of his harm.[14] As a result, the trial court reduced Kaneko's jury award from $361,800.12 to $264,114.08, and dismissed the action against Hilo Coast Processing on the merits.[15]

Mutual Welding's motion for a new trial or in the alternative for a remittitur was denied[16] as was Kaneko's motion for judgment notwithstanding the verdict

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[10] *Id.* at 449, 654 P.2d at 345.

[11] Negligence has been defined as "conduct 'which falls below the standard established by law for the protection of others against unreasonably great risk of harm.' " W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31 at 145 (4th ed. 1971) (quoting RESTATEMENT OF TORTS § 282 (1934)).

[12] RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965) states:

> A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

[13] The California Supreme Court by means of the case, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), became the first court to recognize the rule of strict liability in tort. Three years later, the American Law Institute adopted its strict liability standard in § 402A of the RESTATEMENT (SECOND) OF TORTS (1965). For the elements of § 402A see *infra* note 22.

[14] Milton Kaneko was working as a "connector," bolting girts to columns, when he noticed a co-worker experiencing difficulty bolting his end of a girt. Kaneko walked over to help and, when three to five feet from his co-worker, he fell approximately twenty-five feet onto a concrete floor and sustained serious injuries. The jury decided that Kaneko was responsible for part of his harm because he was not wearing a safety belt or life line that was available for his use. Record at 142, 156.

At trial, the plaintiff introduced into evidence testimony by ironworkers who stated that "it was the custom and practice in the industry in August of 1973, for an ironworker performing the job of a 'connector' not to use a safety belt." Plaintiff-Appellee, Cross-Appellant's Opening Brief at 65-66, Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 654 P.2d 343 (1982). Ironworkers testified that a life line could "interfere with the steel that would be hoisted up to them by the crane and create a safety hazard." *Id.*

[15] 65 Hawaii 447, 450, 654 P.2d 343, 346.

[16] *Id.*

or in the alternative motion to amend judgment.[17] Mutual Welding's appeal and Kaneko's cross appeal followed.[18] The Hawaii Supreme Court unanimously affirmed the trial court's decision.

II. ANALYSIS

The Hawaii Supreme Court addressed three issues in *Kaneko v. Hilo Coast Processing*.[19] The first was whether the doctrine of strict products liability applies to a case in which a defective component part of a building causes the harm. The second was whether Mutual Welding, the manufacturer of the component part, could escape liability under the occasional seller exception to the Restatement (Second) of Torts § 402A. The third and most controversial issue was whether a products liability defendant may assert the defense of comparative negligence in order to diminish a plaintiff's recovery.

Before analyzing these problems, the court took note of the fact that Mutual Welding did not dispute the jury findings regarding its negligence and breach of warranty.[20] Stating that plaintiff's ability to recover under those theories of liability did not preclude an examination of the trial court's application of strict liability in the instant case,[21] the court undertook its analysis.

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[17] *Id.*

[18] Mutual Welding appealed several points relating to the admission of evidence on damages and Kaneko's character. The Hawaii Supreme Court dismissed these claims without discussion. The court did review Mutual Welding's contention that it was an occasional seller and, therefore, excepted from strict liability. *See infra* text accompanying notes 52-58. Mutual Welding also appealed the finding of strict liability. This may have been done in anticipation of Kaneko's appeal on the application of comparative negligence to the strict liability action.

[19] 65 Hawaii 447, 654 P.2d 343 (1982).

[20] *Id.* at 450-51, 654 P.2d at 346. This lack of action by Mutual Welding and the fact that Kaneko did not appeal this application of strict liability to the breach of warranty theory may indicate a general belief that there is little difference between the two concepts.

One writer states:

> In fact, although the existence of separate causes of action is recognized in most jurisdictions, where personal injuries to consumers or users of defective products are involved, the general tendency appears to be to treat the claim as one arising in strict liability with little or no recognition given to the warranty cause of action.

P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 51 (1981).

[21] 65 Hawaii 447, 450-51, 654 P.2d 343, 346. As support for an analogous proposition, the court cited Cox v. Shaffer, 223 Pa. Super. 429, 302 A.2d 456 (1973) (dismissal of products liability theory did not affect plaintiff's right to recovery under a negligence cause of action) and Immergluck v. Ridgeview House Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803, 811 (1977) (dismissal of strict liability action did not affect other theories).

A. *Applicability of the Doctrine of Strict Products Liability*

The same public policy considerations that persuaded the American Law Institute to promulgate its strict products liability rule, section 402A of the Restatement (Second) of Torts,[22] convinced the Hawaii Supreme Court to adopt a modified version of that section[23] in *Stewart v. Budget Rent-A-Car Corp.*[24]

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[22] RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b)it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The policy considerations underlying the RESTATEMENT (SECOND) OF TORTS § 402A (1965) are discussed in comment c:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

[23] The Hawaii version of § 402A is considered a modified form because it eliminates the section's "unreasonably dangerous" requirement and, thus, requires only that the product be "dangerous." *See* Brown v. Clark Equipment Co., 62 Hawaii 530, 618 P.2d 267 (1980), in which the Hawaii Supreme Court explained, "[t]he phrase 'unreasonably dangerous' was not employed in the formulation of the [*Stewart*] rule . . . though we stated that we were adopting what was essentially the rule in Section 402A." *Id.* at 542, 618 P.2d at 274. The court further declared that "the language in *Stewart* may just as well suggest that this court adopted a modified version of Section 402A." *Id.* at 542 n.2, 618 P.2d at 274 n.2.

See also Ontai v. Straub Clinic and Hosp., 66 Hawaii 241, 659 P.2d 734 (1983), in which the Hawaii Supreme Court explained that "[u]nder our formulation of the rule of strict products liability, the plaintiff need not show that the article was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases or uses it." *Id.* at 245, 659 P.2d at 739.

[24] 52 Hawaii 71, 470 P.2d 240 (1970). In *Stewart*, the plaintiff was injured when her automobile veered off a road and over an embankment on the island of Hawaii. *Id.* at 72, 470 P.2d at 241. At trial, the court directed a verdict in favor of the automobile dealer and distributor.

This Hawaii rule demands that "in order to prevail in a strict products liability case, it must be proved that 'the *product* was someway defective and that the damages were caused by the defect.' "[25] The key inquiry in determining the applicability of strict liability in *Kaneko*, thereby, became whether a "product" was involved in the case.[26]

The court declared that its decision in *Stewart* did not "serve as a useful guide because that case did not define the term 'product' for purposes of the application of the doctrine of strict liability."[27] The court, therefore, referred to other sources.[28] Dissatisfaction with those sources or a general reluctance to adopt a rigid definition of "product" possibly led the *Kaneko* court to declare that "[i]n order to cope with technological advances, we decline to establish a firm definition of 'product' to which the doctrine of strict liability applies."[29] Instead, it decided to determine a "product" on a case-by-case basis guided by applicable case law,[30] public policy considerations underlying strict liability,[31]

The jury returned a verdict in favor of the plaintiff against the rental agency. *Id.*

The Hawaii Supreme Court affirmed the finding with respect to the rental agency but remanded the case for a new trial on the question of the manufacturer's and distributor's liability. *Id.* at 79, 470 P.2d at 245. The *Stewart* court explained:

> [O]ne who sells or leases a defective product which is *dangerous* to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property, if (a) the seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased.

Id. at 75, 470 P.2d at 240 (emphasis added).

The *Stewart* court offered a number of policy reasons for its adoption of a strict products liability rule:

> The leading arguments for the adoption of a rule of strict products liability have been that the public interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products; that by placing the goods on the market the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use; and that the burden of accidental injuries caused by defective chattels should be placed upon those in the chain of distribution as a cost of doing business and as an incentive to guard against such defects.

Id. at 74-75, 470 P.2d at 243 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97 at 673 (3d ed. 1964)).

[25] 65 Hawaii 447, 452, 654 P.2d 343, 347 (emphasis added) (quoting Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 75, 470 P.2d 240, 243 (1970)).

[26] 65 Hawaii 447, 452, 654 P.2d 343, 347 (1982).

[27] *Id.*

[28] *See infra* notes 30-33 and accompanying text.

[29] 65 Hawaii 447, 455, 654 P.2d 343, 349.

[30] The court looked to *Stewart*, *supra* note 24 and another Hawaii decision, Brown v. Clark Equipment Co., 62 Hawaii 530, 618 P.2d 267 (1980). In *Brown*, plaintiffs' decedent was killed when a thirty-five ton shovel loader backed over her car which was stopped five feet behind. *Id.* at 534, 618 P.2d at 270-71. The *Brown* court held that the plaintiffs could proceed on a theory

comments to section 402A[32] and the Model Uniform Products Liability Act.[33]

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of negligent design and a theory of strict liability for defective design because the loader was not equipped with rear view windows. *Id.* at 537-38, 543, 618 P.2d at 272, 275.

In other Hawaii cases, strict liability has been applied to such products as an automobile, Wakabayashi v. Hertz, 66 Hawaii 265, 660 P.2d 1039 (1983); a defective X-ray table footrest, Ontai v. Straub Clinic and Hospital, Inc., 66 Hawaii 241, 659 P.2d 734 (1983); a washer-dryer window that was not tempered, Boudreau v. General Electric Co., 2 Hawaii App. 10, 625 P.2d 384 (1981); and a defectively designed power mower, Beerman v. Toro Manufacturing Corp., 1 Hawaii App. 111, 615 P.2d 749 (1980).

The court also looked to case law in which courts considered the policies underlying the strict liability doctrine in order to determine whether something is a product under § 402A. *See* Walker v. Shell Chemical, Inc., 101 Ill. App. 3d 330, 428 N.E.2d 943 (1981) (prefabricated guard rails not products if they are an indivisible part of an entire building); Dubin v. Michael Reese Hospital & Medical Center, 74 Ill. App. 3d 932, 393 N.E.2d 588 (1979), *rev'd on other grounds*, 83 Ill. 2d 277, 415 N.E.2d 350 (1980) (X-radiation not a product when the injury is caused by professional error rather than by the X-radiation); Moorman Mfg. Co. v. National Tank Co., 92 Ill. App. 3d 136, 414 N.E.2d 1302 (1980) (grain storage tanks products because of strict products liability policies). *See also* Anderson v. Farmers Hybrid Companies, Inc., 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980) (defective gilts [female pigs] with bloody dysentery not products because they are in a constant process of development); Heller v. Cadral Corp., 84 Ill. App. 3d 677, 406 N.E.2d 88 (1980) (a condominium not a product because a plaintiff has other remedies and imposition of strict liability was not necessary to protect life and health); Immergluck v. Ridgeview House, Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977) (a sheltered care facility not a product because it is not in the stream of commerce); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977) (parking ramp and space not products because strict liability policies should determine what is a product); and Housman v. C. A. Dawson & Co., 106 Ill. App. 2d 225, 245 N.E.2d 886 (1969) (lumber a product).

[31] *See generally*, Comment, *What Is Or Is Not A Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625 (1974) which states:

> [T]he social policy underlying the doctrine has become the definition of a "product" and "sale": That is, a transaction in which the burden of consequent losses are best able to be borne by those in a position to either control the risk or make an equitable distribution of the losses when they do occur.

Id. at 627.

[32] The RESTATEMENT (SECOND) OF TORTS § 402A (1965) does not directly define "product." However, comment d to the section provides:

> The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair and an insecticide.

[33] The court also relied on the Model Uniform Products Liability Act, 44 Fed. Reg. 62714 (1979), even though it noted that the act does not have the force of law. 65 Hawaii 447, 455, 654 P.2d 343, 348. The MUPLA was published by the Department of Commerce on October 31, 1979, but has not been adopted in its entirety by any state. P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 166-67 (1981). Section 102(C) of the Act defines "product" as "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a

Leaving open the definition of "product,"[34] the supreme court then proceeded to determine whether the defective component clip which caused Milton Kaneko's fall and subsequent injuries could be considered a product to which the *Stewart* theory of strict products liability should apply.[35] The court found that section 402A of the Restatement does not directly address the issue of strict products liability of the suppliers of component parts. It further recognized that the list of products in comment d to section 402A does not include component parts,[36] but it did not deem the omission dispositive.[37]

The court continued its analysis of section 402A by examining comment q which states that "where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer."[38] Since the clip that caused Kaneko's injuries was unaltered and incorporated into the larger column, the court presumably could have concluded that the clip was a product for strict liability purposes. Instead, the court went on to inquire whether a building is a product.[39]

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component part or parts, and produced for introduction into trade or commerce." 65 Hawaii 447, 455, 654 P.2d 343, 348 (quoting 44 Fed. Reg. at 62717). The commentary to the section explains that " '[p]roduct' means property which, as a component part or an assembled whole, is movable, and possesses intrinsic value. Therefore, included are all goods, wares, merchandise, and their components, as well as articles and commodities capable of delivery for introduction into trade or commerce." 65 Hawaii 447, 455, 654 P.2d 343, 348-49 (quoting 44 Fed. Reg. at 62719).

[34] Although this decision does not provide practitioners with a bright guideline for future cases, it does allow courts a flexibility that might prove helpful in future cases. It also appears fair to plaintiffs who otherwise might be denied recovery by a rigid definition of "product" since technological advances can be expected to present the court with new objects not included in any present definition of "product." The court noted that "given the future technological advances being made, flexibility to respond to future developments is necessary." 65 Hawaii 447, 458, 654 P.2d 343, 350.

[35] *Id.* at 456, 654 P.2d at 349.

[36] Comment d to § 402A explains the term "product" and provides examples to which the section applies. *See supra* note 32.

[37] 65 Hawaii 447, 458, 654 P.2d 343, 350. This conclusion is consistent with the court's earlier statement that comment d is not a complete list of products. *Id.* at 453, 654 P.2d at 347.

[38] The full text of comment q to the RESTATEMENT OF TORTS § 402A (1965) states:

> It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

[39] 65 Hawaii 447, 456, 654 P.2d 343, 349. This further examination might indicate that the Hawaii Supreme Court interpreted comment q to mean that for strict liability to apply, the object into which the component part is incorporated also must be a product. Therefore, if the prefabricated mill building was not a product, the court might have declared that the clip was not a

An investigation of case law on this subject reveals differing viewpoints. One line of cases holds that a building is not a product because such an interpretation was not intended by the authors of the Restatement who provided for liability of builders in other sections.[40] Another line of authority has extended strict liability to buildings or parts of buildings "that were mass produced and contained a defective product."[41] The Hawaii court, believing that the latter view would promote the public policies underlying the *Stewart* decision, declared, "it is our opinion that a prefabricated building that must be assembled is a product where the seller-manufacturer may be found strictly liable for injuries caused by a defective component part."[42]

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product.

[40] *Id.* This is the observation that the Illinois Appellate Court made in Heller v. Cadral Corp., 84 Ill. App. 3d 677, 406 N.E.2d 88 (1980); Immergluck v. Ridgeview House, Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977) and Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977).

[41] 65 Hawaii 447, 456, 654 P.2d 343, 349. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) and Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (both holding that the doctrine of strict products liability applies to buildings or parts of buildings that are mass-produced and contain a defective product). *See also* Lantis v. Astec Indus., Inc., 648 F.2d 1118 (7th Cir. 1982), where the defendant was engaged in the business of designing, manufacturing and selling asphalt mixing plants. The defendant shipped such a plant, in component parts to a paving company. Lantis, an officer of the paving company, climbed a ladder to a platform to direct activities. He fell through an opening in the platform, struck his head on concrete and died two days later. *Id.* at 1119. The opening, which was present when the plant was shipped, was in violation of Occupational Safety and Health Administration (OSHA) regulations and other safety codes. *Id.* at 1120. Plaintiff was allowed to proceed to the jury to determine whether the platform constituted a product in a condition unreasonably dangerous. *Id.* at 1122.

[42] 65 Hawaii 447, 457, 654 P.2d 343, 350. In its holding, the court did not furnish examples of other assembly-type situations in which manufacturers will be held strictly liable. Furthermore, the Hawaii Supreme Court did not offer an opinion of the line of cases which did not apply strict liability to manufacturers of non-assembly type buildings. In the absence of such guidance, however, *Kaneko* supports the assumption that strict products liability will not apply to structures unless they are prefabricated buildings requiring assembly.

The Hawaii Supreme Court deemed this viewpoint to be consonant with the public policy reasons underlying the *Stewart* theory of strict products liability. *Id.* These goals, as set forth by the California Supreme Court in Daly v. General Motors Corp., 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978) (emphasis in original), include relieving "injured consumers 'from *problems of proof* inherent in pursuing negligence," and placing "the burden of loss on manufacturers rather than . . . 'injured persons *who are powerless to protect themselves.*' "

Also, it is perceived that strict liability will provide a scheme of risk distribution "whereby those in the stream of commerce of the defective product 'internalize' the potential risks involved by insuring against liability and adding the cost to the price of the product." Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889, 894 (1980).

The *Kaneko* court's decision to impose liability on component parts manufacturers in certain

Subjecting prefabricated building and component part manufacturers to strict liability for dangerous defects provides injured plaintiffs with a new and significant source of recovery. Moreover, it should serve as a safety incentive to previously immune suppliers and thereby decrease the likelihood that consumers will receive defective products.

However, according to a recent Hawaii case, *Bidar v. Amfac, Inc.*,[43] this liberal application of strict products liability is not open-ended. In *Bidar*, the court denied recovery in strict liability to a plaintiff who was injured when she attempted to use a towel bar to pull herself up from a hotel toilet seat.[44] The bar tore free from the wall and plaintiff fell, fracturing her hip and wrist.[45] At trial, the plaintiff claimed that the defendants were strictly liable but "vacillated in alleging precisely what product and defect formed the basis of the cause of action."[46] For example, "when Amfac argued that a hotel room has yet to be deemed a 'product' by a court applying the rule of strict liability in tort, the plaintiff denied ever suggesting the hotel room was the 'product' in question and asserted the towel rack was the defective product."[47] On appeal, the plaintiff argued that strict liability should apply to a defective portion of a leased or rented premises.[48]

In determining whether a product was involved in *Bidar*, the court looked to its decision in *Kaneko*.[49] It decided that "an identified component of a prefabricated building can hardly be likened to 'a portion of the leased or rented premises . . . [that] prove[s] defective.' "[50] Therefore, the court "perceive[d] no good reason here to lend a more expansive meaning to 'product' than [it] did in *Kaneko*."[51]

Thus, the identification of a "product" is left up to the discretion of the courts. Basically, the *Stewart* policy considerations should govern: If a manufacturer introduces into the stream of commerce a defective product capable of harming an unsuspecting user or consumer, the strict liability theory should apply. Courts undoubtedly will temper this practice with the judicial disfavor of indiscriminate application of the theory. Regardless, they must undertake a

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instances should further these goals and result in substantial justice since component parts manufacturers have injected themselves voluntarily into the flow of commerce to reap economic benefit and should be accountable for harm caused by their defective products.

[43] 66 Hawaii 547, 669 P.2d 154 (1983).

[44] *Id.* at 549, 554, 669 P.2d at 157, 160.

[45] *Id.* at 549, 669 P.2d at 157.

[46] *Id.* at 554, 669 P.2d at 160.

[47] *Id.* at 554-55 n.4, 669 P.2d at 160 n.4 (construing Plaintiff's Concluding Memorandum in Opposition to Defendant's Motion for Summary Judgment at 2).

[48] *Id.* at 555, 669 P.2d at 160.

[49] *Id.* at 556, 669 P.2d at 161.

[50] *Id.*

[51] *Id.* at 556-57, 669 P.2d at 161.

careful factual examination of each case before making a decision.

Having disposed of the "product" issue in *Kaneko* by affirming the trial court's application of strict products liability, the Hawaii Supreme Court turned to the issue of whether Mutual Welding was only an occasional seller.

B. *Definition of "Occasional Seller" for Strict Products Liability Purposes*

The defendant, Mutual Welding, contended that it was only an occasional seller and, therefore, excepted from strict liability by comment f to the Restatement (Second) of Torts § 402A (1965).[52] Comment f provides that the doctrine of strict liability does not apply to "the occasional seller of food or other such products who is not engaged in that activity as a part of his business."[53] The comment further states:

> The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. . . .[54]

The Hawaii Supreme Court interpreted comment f to apply only to "the ordinary person who enters into isolated sales of products" and not to "a manufacturer who is in the business of producing products."[55] Mutual Welding, therefore, could not invoke the exception because it was undisputedly in the business of manufacturing and fabricating steel structures.[56] It also could not avoid "its responsibility to put a safe product . . . into the stream of commerce" merely because the building was erected by another company.[57] This decision is consistent with the policies underlying the strict liability concept. It places the burden of producing safe products on those in control and at the same time provides vulnerable consumers with much-needed protection.

Having disposed of Mututal Welding's final objection, the court addressed

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[52] 65 Hawaii 447, 458, 654 P.2d 343, 350.

[53] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965)).

[54] 65 Hawaii 447, 458-59, 654 P.2d 343, 351 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965)).

[55] *Id.* at 459, 654 P.2d at 351.

[56] The court stated that "[a]lthough the sufficiency of evidence was not raised, we have carefully reviewed the record and find that there was sufficient evidence for the jury to conclude that Mutual Welding was strictly liable and that it placed a defective product into commerce." *Id.* at 459 n.8, 654 P.2d at 351 n.8.

[57] 65 Hawaii 447, 459, 654 P.2d 343, 351.

the main issue in Milton Kaneko's cross-appeal: whether the doctrines of comparative negligence and strict liability should be merged.[58]

C. Merger of Strict Products Liability and Comparative Negligence

The Hawaii Supreme Court agreed with the trial court's determination in *Kaneko* that the defense of comparative negligence can be asserted in a strict products liability action in order to diminish plaintiff's recovery.[59] Before announcing its holding, however, the court analyzed three arguments often made by opponents of the merger.

One such argument arises from considering negligence as a matter of "fault" and strict products liability as that of "no fault,"[60] or from the notion that, in negligence, the focus is on the conduct of the parties; in strict liability, the focus is on the product itself.[61] The objection is thus made that the two theories of liability are semantically and conceptually irreconcilable.[62]

One court that supports the objection holds that the concepts cannot be merged.[63] Other courts, including the California Supreme Court, acknowledge

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[58] *Id.*

[59] The application of the defense of comparative negligence to a strict products liability action is referred to as a "merger" of the two doctrines. In allowing such a "merger," the Hawaii Supreme Court followed the path taken previously by a number of other courts. *See* Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976); Kennedy v. Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979); Sandford v. Chevrolet Div. of Gen. Motors, 290 Or. 590, 642 P.2d 624 (1982); Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979); Hamilton v. Motor Coach Indus., 569 S.W. 2d 571 (Tex. Civ. App. 1978); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981); Dipple v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

[60] *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 763-64, 575 P.2d 1162, 1185, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting). This argument can be countered with the suggestion that both theories involve fault because products liability is "not absolute but is based on the social fault of marketing *defective* products." Fleming, *Foreward: Comparative Negligence at Last — by Judicial Choice*, 64 CALIF. L. REV. 239, 270 (1976) (emphasis in original).

[61] Daly v. General Motors Corp., 20 Cal. 3d 725, 763, 575 P.2d 1162, 1185, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting).

[62] 65 Hawaii 447, 460, 654 P.2d 343, 351. It is argued that "[t]he task of merging the two concepts is said to be impossible, that 'apples and oranges' cannot be compared, that 'oil and water' do not mix, and that strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles." *Id.* (quoting Daly v. General Motors Corp., 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 383 (1978)).

[63] *See* Smith v. Smith, 278 N.W.2d 155 (S.D. 1977), in which that court stated that

the problems, but nevertheless have approved the merger,[64] because "products liability is an area where much overlapping and interweaving has developed in order to achieve substantial justice."[65] The Hawaii Supreme Court agreed with that line of reasoning and declared that "fairness and equity are more important than conceptual and semantic consistency" and "comparative negligence is not incompatible with strict products liability."[66]

This rule appears to defeat the original purpose behind strict liability by no longer affording the public the benefit of maximum protection from defective products. It may, in fact, signal the swing of the pendulum back toward the days of "caveat emptor" when consumers were required to protect themselves.[67] Because the court cited "fairness" and "equity" as its main concerns, however, it is doubtful that the doctrine will deteriorate to that point.

A second objection to the merger is based on the belief that reducing a plaintiff's recovery by an amount equal to his degree of negligence will lessen a manufacturer's incentive to produce safe products.[68] That is, incentive to use care in manufacturing or handling products varies directly with the amount of damages recoverable in a products liability action.[69] The Hawaii court rejected

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"[s]trict liability is an abandonment of the fault concept in product liability cases. . . . We believe it is inconsistent to hold that the user's negligence is material when the seller's is not. . . . We hold that the plaintiff's or the defendant's negligence is irrelevant and contributory negligence is not a defense in strict liability." *Id.* at 160-61.

[64] *See* Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976).

[65] 65 Hawaii 447, 461, 654 P.2d 343, 352 (construing Daly v. General Motors Corp., 20 Cal. 3d 725, 735-36, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385).

[66] 65 Hawaii 447, 461, 654 P.2d 343, 352.

[67] The rule of "caveat emptor" dictates that a buyer "must examine, judge and test for himself." BLACK'S LAW DICTIONARY 202 (5th ed. 1979). However, public policy considerations in an increasingly complex society demanded that manufacturers be responsible for the quality of their goods. *See generally The Interaction of Comparative Negligence and Strict Products Liability — Where Are We?*, 47 INS. COUNS. J. 53, 56 (1980).

[68] 65 Hawaii 447, 461-62, 654 P.2d 343, 352. The argument also has been made that such a merger also will affect *plaintiffs'* behavior by providing an incentive to utilize greater care in handling products. *See* Model Uniform Products Liability Act, 44 Fed. Reg. 62714 (1979), which states that one of its goals is "[t]o place incentive for loss prevention on the party or parties who were best able to accomplish that goal." *Id.* at 62714-15.

It does not seem likely, however, that the possibility of a reduced award in a future lawsuit will affect consumers' actions. They probably will continue to use products as before — carefully, carelessly, negligently or recklessly — and, arguably, should be allowed the privilege of assuming that the product they use is not defective.

[69] In his dissent in Daly v. General Motors Corp., 20 Cal. 3d 725, 765, 144 Cal. Rptr. 380, 404, 575 P.2d 1162, 1186 (1978), Justice Mosk argued that "the motivation to avoid polluting the stream of commerce with defective products increases in direct relation to the size of potential damage awards."

this contention, repeating two arguments made by the California Supreme Court in *Daly v. General Motors Corp.*[70] The first is that "a manufacturer cannot avoid liability merely because a plaintiff has contributed to his injury;" the second provides that "a manufacturer cannot assume that the user of a defective product will be blame-worthy."[71] The court also agreed with the *Daly* view that manufacturers' safety incentive will not be significantly affected by the adoption of comparative negligence because such a rule "will only reduce the award and not the liability of a manufacturer of a defective product. Manufacturers will still be strictly liable."[72]

While theoretically sound, there are instances in which the incentive argument will have no practical significance. These situations might involve recreational products such as snowmobiles or jet skis, with respect to which a manufacturer can reasonably anticipate plaintiffs' negligent use. In such cases, a manufacturer might judge it more burdensome to expend a certain sum of money to produce a safer product than to pay the reduced damages possibly awarded in a future law suit.

The court's assertion that a manufacturer cannot escape liability in a defective product action presents another important avenue of analysis. Since Hawaii courts utilize a statutorily adopted modified form of comparative negligence,[73] two issues emerge. The first is whether the court in *Kaneko* applied a judicial

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[70] 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978). In *Daly*, the plaintiff's decedent was driving his automobile on the freeway at excessive speed when he collided with a guardrail. The automobile swung around, the driver's door was thrown open and he was ejected. Plaintiffs argued that the door was defectively designed, while the manufacturer maintained that Daly was negligent in driving at a high speed while intoxicated and not wearing his seat belt. *Id.* at 731-32, 575 P.2d at 1164-65, 144 Cal. Rptr. at 382-83.

[71] 65 Hawaii 447, 462, 654 P.2d 343, 352 (construing *Daly*, 20 Cal. 3d 725, 738, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387).

[72] 65 Hawaii 447, 462, 654 P.2d 343, 353.

[73] In 1976, the Hawaii legislature enacted HAWAII REV. STAT. § 663-31, thereby replacing common law contributory negligence with a form of comparative negligence. Section 663-31 provides a modified system of comparative negligence whereby a plaintiff can recover as long as his negligence is less than or equal to that of the defendant's. Such recovery will be diminished by the percentage of plaintiff's negligence. This modified form can be contrasted with the "pure" comparative negligence which allows the plaintiff to recover damages reduced in proportion to his contributory fault even when his negligence exceeds defendant's.

Other jurisdictions which have adopted some form of comparative negligence are Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. For citations to the relevant cases and statutes, see Note, *Application of Oregon Comparative Fault Law in Strict Products Liability Actions: Sandford v. Chevrolet Division of General Motors*, 19 WILLAMETTE L. REV. 139, 145 nn.42-45 (1983).

form of comparative negligence to strict liability actions despite the existence of a comparative negligence statute. Language in the *Kaneko* opinion[74] and in Hawaii Revised Statutes section 663-31[75] leads reasonably to the conclusion that this is the case.[76]

The second issue is whether the court adopted a "pure" or a "modified"

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[74] The *Kaneko* court concluded that "comparative negligence should be *judicially* merged with strict products liability." 65 Hawaii 447, 463, 654 P.2d 343, 353 (emphasis added).

[75] HAWAII REV. STAT. § 663-31 (1976) (emphasis added) provides:

§ 663-31 Contributory negligence no bar; comparative negligence; findings of fact and special verdicts. (a) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages *for negligence* resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

(b) In any action to which subsection (a) of this section applies, the court, in a non-jury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) The degree of negligence of each party, expressed as a percentage.

(c) Upon the making of the findings of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the award in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided that if the said proportion is greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, the court will enter a judgment for the defendant.

(d) The court shall instruct the jury regarding the law of comparative negligence where appropriate.

[76] This presumption might be rebutted by language in Bissen v. Fujii, 51 Hawaii 636, 466 P.2d 429 (1970).

In *Bissen*, the issue was whether to apply the doctrine of comparative negligence or contributory negligence in a suit in which the claim for relief accrued before the enactment of Hawaii's comparative negligence statute. However, the comparative negligence statute expressly provided that it "shall not be retroactive and shall affect only those claims accruing after its effective date." *Id.* at 637, 466 P.2d at 430 (quoting HAWAII REV. STAT. § 663-31 (1976)).

The court, therefore, declined to apply comparative negligence to the action since it "should not engage in 'wholesale' legislation such as the adoption of the doctrine of comparative negligence in place of contributory negligence. Such act [sic] on our part may frustrate the countless number of questions and problems with which they will be faced." 51 Hawaii 636, 639, 466 P.2d 429, 431.

Arguably, however, this language is not relevant because HAWAII REV. STAT. § 663-31 does not contain a similar provision which specifically precludes the application of the comparative negligence statute to products liability actions. *See supra* note 75.

form of comparative negligence.[77] Under the "pure" form, a plaintiff can recover for injuries regardless of the degree of his or her own negligence; under the "modified" form, adopted by the Hawaii legislature in 1976, a plaintiff can only recover if the degree of his or her negligence is less than or equal to the defendant's.[78] It is likely that a "pure" form was adopted since that interpretation would provide the most fair and equitable result possible.[79] The *Kaneko* court's reliance on the California Supreme Court's *Daly* decision also supports this assumption, since the California courts utilize a judicially created pure form of comparative negligence in products liability actions.[80]

The third argument against the merger relates to jury confusion. As Justice Mosk explained in his dissent in *Daly*, one authority believes that such a problem would result from instructing a jury that "if they find the defendant's product was defective, irrespective of fault, they should reduce the plaintiff's damage by considering the plaintiff's culpability in proportion to the defendant's non-culpability."[81] Consequently, "[t]his requirement may be a feat which is beyond the prowess of an American jury."[82]

The court in *Kaneko* disagreed with this sentiment and held that "jurors will not be confused in determining damages if comparative negligence is merged with strict products liability."[83] The fact that the *Kaneko* jurors did not experience difficulty in determining damages might have influenced the court's decision in this matter. This lack of difficulty probably was due to the fact that the jury found both Milton Kaneko and Mutual Welding negligent and apportioned damages accordingly.[84] However, it would not be difficult to create a

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[77] The Hawaii legislature has adopted a modified form of comparative negligence applicable in negligence actions. *See supra* note 75.

[78] For a description of the categories of comparative negligence and a breakdown of their adoption by the various states, see Note, *Application of Oregon Comparative Fault Law in Strict Products Liability Actions: Sandford v. Chevrolet Division of General Motors*, 19 WILLAMETTE L. REV. 139, 145-46 & nn.41-45 (1983).

[79] This also appears to be the approach taken by the Utah Supreme Court in Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). *See* Note, *The Merger of Comparative Fault Principles with Strict Liability in Utah: Mulherin v. Ingersoll-Rand Co.*, 1981 B.Y.U. L. REV. 964 (1981).

[80] *See* Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 532 P.2d 1126, 119 Cal. Rptr. 858 (1975).

[81] Daly v. General Motors Corp., 20 Cal. 3d 725, 763, 575 P.2d 1162, 1185, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting) (quoting Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977)) (emphasis in original deleted).

[82] 20 Cal. 3d 725, 764, 575 P.2d 1162, 1165, 144 Cal. Rptr. 380, 403 (1978) (Mosk, J., dissenting).

[83] 65 Hawaii 447, 463, 654 P.2d 343, 353. *But see* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976).

[84] *See supra* note 9.

hypothetical fact situation in which the determination of damages diminished by plaintiff's negligence might prove more troublesome. Such a situation might involve a number of defendant tortfeasors, some of whom are negligent and strictly liable and others that are only strictly liable. Such a case could provide a jury with a more problematic task of damage apportionment.[85]

Having addressed the major objections to the adoption of comparative negligence as a defense in strict products liability actions, the Hawaii Supreme Court affirmed the merger, declaring that it "will prevent an imbalance in the possibility of awards under negligence and strict products liability theories of recovery."[86]

III. IMPACT

The *Kaneko* decision turned on policy considerations and, thereby, impacts on both consumer and business interests. Consumers' means of recovery in products liability cases are increased under the broader definition of "product" and the new liability of component parts manufacturers. Business operation and development should be encouraged by the merger of comparative negligence and strict products liability.[87]

A number of issues arise in the aftermath of *Kaneko v. Hilo Coast Processing*. The court's refusal to provide a formal definition of "product" leads to specula-

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[85] One author believes that comparing fault between defendants who are liable under different theories has deleterious effects. *See* Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980). *See also* Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587 (1979) ("Loss distribution systems derived from common law indemnity theories and originally developed for use in negligence actions are poorly suited for use in strict liability cases and frequently yield a disproportionate allocation of losses.").

Such a problem might have occurred in this case if the co-defendant, Hilo Coast Processing, had been found strictly liable. *See supra* note 9.

[86] 65 Hawaii 447, 464, 654 P.2d 343, 354.

[87] The merger of comparative negligence and strict liability should achieve this result by lowering products liability insurance rates which in recent years have become unavailable or unaffordable. *See generally* Note, *Various Risk Allocation Schemes Under the Model Uniform Product Liability Act: An Analysis of the Statute of Repose, Comparative Fault Principles and the Conflicting Social Policies Arising From Workplace Product Injuries*, 48 GEO. WASH. L. REV. 588, 589 n.5 (1980) (explaining that the amount paid in 1978 by United States companies for products liability insurance was a 100% increase over the amount paid in 1975).

See also Comment, *Solving the Products Liability Insurance Crisis: A Study of the Role of Economic Theory in the Legislative Reform Process*, 31 MERCER L. REV. 755, 756-57 (1980) ("The products liability insurance crisis arose during the early 1970's when a significant number of small businesses suddenly found themselves unable either to afford sharply rising products liability premiums or to procure products liability coverage at any price.").

tion whether everything but a "service" now will be considered a "product,"[88] and, if so, whether manufacturers of such things as mass produced homes will be considered suppliers of "services" or "products."[89]

Another issue is raised by virtue of the court's two-pronged analysis of the component part manufacturer's strict liability.[90] In addition to the inquiry whether there has been a change in the component part or if it is merely incorporated into something larger, the court also questioned whether the larger object was a product. This treatment suggests that a component part, which would otherwise be considered a product, could lose this status if incorporated into a larger non-product. The inherent unfairness of this approach is obvious: a component part manufacturer's liability will turn on the nature of the larger object rather than on the nature of the product he supplied.

The confluence of comparative negligence and strict products liability will have a profound effect on Hawaii's products liability practice. Obviously, whenever a plaintiff's negligence can be identified and allocated, his recovery will be diminished; one can expect that this will occur despite evidence that the use was consistent with current custom and usage.[91] It remains to be seen whether recovery will be totally eliminated in cases where plaintiff is more than fifty percent contributorily negligent, although this result does not seem likely.[92]

Kaneko also will affect the attorneys' approach to the products liability cases they take to trial. Before *Kaneko*, plaintiffs' attorneys may have avoided alleging negligence in order to evade the subject of plaintiff's fault. Now that plaintiffs' negligence is a valid defense, more attorneys will be willing to bring products

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[88] According to one treatise:

> [W]hether a sales-service combination is treated as a "sale" and subject to strict liability or as a "service" subject only to negligence law depends on a whole host of policy factors that look toward whether society believes it is fair to impose the higher standard of strict liability on the defendant. As we move across the spectrum and approach the pure-service defendant, where no product is involved, liability is limited to the negligence doctrine.

A. WEINSTEIN, A. TWERSKI, H. DIEHLER, & W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT, DESIGN AND MARKETING 101 (1978).

[89] *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), in which the court declared that a manufacturer of mass produced homes could be liable for supplying defective products.

In *Schipper*, the plaintiff's infant son was severely scalded by hot water from a sink faucet of one of the defendant's mass-produced homes in the community then known as Levittown, New Jersey. *Id.* at 73, 207 A.2d at 316. The Supreme Court of New Jersey held that plaintiffs could rely on theories of negligence or strict liability if they could prove that the design of the heating system was unreasonably dangerous and the proximate cause of the injury. *Id.* at 92, 207 A.2d at 326.

[90] *See supra* notes 38-39 and accompanying text.

[91] Kaneko presented evidence that his use of the defective product was consistent with industry custom. *See supra* note 14.

[92] *See supra* notes 77-80 and accompanying text.

liability suits under a negligence cause of action.[93] Furthermore, it appears that defendants' attorneys will be able to use comparative negligence as a defense in both breach of warranty and strict liability actions.[94]

The Hawaii Supreme Court took special note of one other effect of the *Kaneko* decision, stating:

> In passing, we would like to note an anomaly that will be avoided by our merging the two concepts. This anomaly was addressed by the California Supreme Court in *Daly, supra*, which noted that *when a products liability action is brought under the theory of negligence*, where comparative negligence principles apply, *contributory negligence of a plaintiff only diminishes but does not bar recovery.* However, *when the cause of action is brought under the theory of strict products liability*, where comparative negligence principles traditionally played no part, *assumption of the risk as a form of contributory negligence acts to completely bar recovery.* This anomaly places a consumer plaintiff who sues in strict products liability in a worse position than if he had founded his case on simple negligence . . . . *[A]doption of comparative negligence would eliminate this bizarre anomaly* by equalizing the defenses to both negligence and strict products liability actions.[95]

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[93] The introduction of the negligence issue also might aid the jury insofar as comparing a plaintiff's negligence with a manufacturer's liability. *See supra* text accompanying note 84.

[94] *See supra* note 20 and accompanying text. This prediction is supported by one authority who explains that:

> The historical basis for the similarities between strict liability and breach of warranty is underpinned by jurisprudential considerations of the fundamental purposes underlying both causes of action.
>
> Thus, the presumption in both causes of action is that a consumer who purchases a product from a retailer expects it to be safe for use.
>
> As a result, warranty and strict liability differ most significantly from ordinary tort actions in disallowing the defense of contributory negligence.

P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 255-56 (1981).

[95] 65 Hawaii at 447, 463-64, 654 P.2d 343, 353-54 (emphasis added). It is unclear, however, whether assumption of risk, in the form of consent to relieve the defendant of his obligation of conduct toward the plaintiff, will remain a defense in a strict liability action. *Compare* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 at 671 (4th ed. 1971) (assumption of risk in its primary sense should doubtless be a defense in a proper products liability case).

See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 at 441 (4th ed. 1971). Prosser explains that the defenses of contributory negligence and assumption of risk overlap where plaintiff's "conduct is a form of contributory negligence, in which the negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk." *Id.* In such circumstances, "the traditional position of the courts has been that the defendant may at his election avail himself of either defense, or of both." *Id.*

The court in *Kaneko* does not distinguish between the different types of assumption of risk but merely states that "[b]y holding that the concepts are merged, we eliminate the harshness of the 'all or nothing' bar to recovery that results if a plaintiff is found to have misused the product." 65 Hawaii at 464, 654 P.2d at 34.

One of the more interesting aspects of this issue is the fact that in an earlier case, *Bulatao v. Kauai Motors, Ltd.*,[96] the Hawaii Supreme Court refused to acknowledge the defense of assumption of risk as a form of contributory negligence.[97] The elimination of a defense which has not been recognized by Hawaii courts is, therefore, of questionable significance.

It is also worth speculating whether a plaintiff's fault should be considered in all products liability cases. There is support for the position that a plaintiff's negligence should not reduce his recovery in design defect and failure to warn cases.[98] The rationale behind this argument is that if a defendant has a duty to protect a plaintiff from his own negligence, a plaintiff's negligence should not be used to reduce recovery for an injury that does occur. If the question arises in this jurisdiction, the Hawaii Supreme Court probably will repeat the *Kaneko* analysis by examining the relevant facts of the case and making a conclusion based on policy considerations.

The *Kaneko* decision also may have an effect on products liability legislation in Hawaii.[99] Although a bill for a Uniform Products Liability Act[100] was introduced in the Hawaii Senate in 1983, it died in the 1984 session. If a similar bill is reintroduced in the future, however, the judicial views espoused in *Kaneko* may prove significant.

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[96] 49 Hawaii 1, 406 P.2d 887 (1965).

[97] In *Bulatao*, the defendant contended that the plaintiff assumed the risk of voluntarily riding in an automobile, knowing it to be in defective mechanical condition, unless she was taking the car back to defendant's garage for further repairs. The Hawaii Supreme Court stated that "[h]owever it may be in the field of law in which the doctrine of assumption of risk originated, we decline to transport the doctrine into other fields with any 'notion that one who knew (or should have known) of a negligently created risk is barred even though free of fault, *i.e.*, even though a reasonably prudent man would have incurred the risk despite that knowledge.' " *Id.* at 14, 15, 406 P.2d at 894 (quoting Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 95 (1959)).

[98] *See* Twerski, *From Defect to Cause to Comparative Fault — Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 343 (1977) ("It becomes very questionable whether plaintiffs should have their verdicts reduced *when the very aspect which made the product dangerous and defective in the first instance has resulted in the very harm which one could expect from the defective design.*").

[99] *See generally* Igbokwe, *No-Fault Insurance and Products Liability: A Proposal for Legislative Review*, 4 J. PROD. LIAB. 1, 2 (1981) (stating that "[t]he enactment of the comparative negligence doctrine during recent years is a trend towards the direction of no-fault insurance.").

[100] S.B. No. 1037, 12th Leg., 1st Sess. (1983). The bill addressed all the issues discussed in *Kaneko*. Section 3(7) defined the term product, section 3(5) discussed the liability of component parts manufacturers and section 12 proposed that comparative responsibility should diminish any award made by the jury to a plaintiff.

IV. CONCLUSION

Hawaii's products liability law is still in the early stage of its development and the three holdings of *Kaneko v. Hilo Coast Processing* should have a substantial effect on the process.

First, expansion of the term "product" will provide plaintiffs with greater protection under the strict liability theory. Second, extending liability to other actors in the chain of product distribution will provide plaintiffs with a greater probability of recovery for injuries. Finally, and most importantly, these two pro-plaintiff holdings will be counter-balanced by the merger of the comparative negligence defense with strict products liability.

While the ultimate consequences of the *Kaneko* decision are unknown, its reach beyond judicial doctrine to civil practice undoubtedly will influence the Hawaii legislature in its consideration of products liability reform.

Debra A. McHugh

Ontai v. Straub Clinic & Hospital: Who Carries the Burden of Proving Design Defects?

I. INTRODUCTION

The Hawaii Supreme Court's opinion in *Ontai v. Straub Clinic and Hospital*,[1] is useful as a timely review of the law of products liability[2] in Hawaii. This note will discuss this analysis and *Ontai's* probable impact on the direction of the law.

In *Ontai*, the principal issue before the court was whether plaintiff Ontai had presented sufficient evidence to avoid a directed verdict against his claim for damages arising from an injury caused by a design defect in a product.[3] To resolve this issue, the court first determined the proper elements necessary to establish and sustain a claim under each of Ontai's three theories of recovery: strict liability in tort, negligence, and breach of warranty.[4] The court then held

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[1] 66 Hawaii 241, 659 P.2d 734 (1983).

[2] Products liability is a term describing "[t]he legal liability of manufacturers and sellers to compensate buyers, users and even bystanders, for damages or injuries suffered because of defects in goods purchased." Black's Law Dictionary 1089 (5th ed. 1979) *citing*, Cobbins v. General Acc. Fire & Life Assur. Corp., 3 Ill. App. 3d 379, 384, 279 N.E.2d 443, 446 (1972). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, chapter 17 "Products Liability" (1979); P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER (1981); J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT (1981).

[3] Following the court's analysis can be difficult because the principal issue is not precisely addressed until well into the opinion. 66 Hawaii at 250, 659 P.2d at 742. In the course of resolving the principal issue, the court addressed the sub-issues of: (1) Whether under Hawaii's rule of strict liability in tort, a plaintiff must show that the product was "unreasonably dangerous" or merely "dangerous"; (2) Whether the failure to equip a product with a safety device can be a design defect or constitute negligent design; (3) Whether a manufacturer has a duty to warn of latent dangers inherent in the use of its product; (4) What degree of specificity is required when pleading a claim for a breach of an implied warranty of fitness or merchantability.

[4] Products liability actions often proceed under multiple theories of recovery. *See e.g.*, Brown v. Clark Equipment Co., 62 Hawaii 530, 618 P.2d 267 (1980)(product liability action allowed to proceed under both negligence and strict liability in tort where manufacturer failed to provide

that the directed verdict was improperly granted because Ontai had presented evidence which was sufficient to defeat a motion for a directed verdict.[5] The dismissal of a cross-claim brought under identical theories was similarly considered and reversed.[6]

II. FACTS

On March 1, 1976, Plaintiff Francis Ontai ("Ontai") went to Straub Clinic ("Straub") for an air contrast barium enema examination of the colon. The examination required tilting the X-ray table to take X-rays of Ontai in various positions. While nearly vertical, the footrest at the bottom of the table gave way.[7] Ontai fell to the floor of the examination room and was injured. Ontai filed suit against Straub and the General Electric Company ("G.E.") who manufactured the X-ray table and the footrest. Ontai's claims against G.E. were based on strict liability in tort, negligence, and breach of implied warranty. Straub cross-claimed against G.E. on essentially the same theories.[8]

On September 11, 1978, the lower court during a jury trial, granted G.E.'s motion for a directed verdict against Ontai following the presentation of his case.[9] It also granted G.E.'s motion to dismiss Straub's cross-claim at the close of Straub's opening statement.[10]

On February 18, 1983, after considering a consolidated appeal by Ontai and Straub, the Hawaii Supreme Court reversed both the directed verdict against Ontai and the dismissal of Straub's cross-claim, and remanded both claims for

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forklift with rear view mirrors).

Pursuing multiple theories of recovery allows a plaintiff more than one way to establish liability. Pleading multiple causes of action also may act to improve the overall chance of recovery and total damages awarded by emphasizing the defendant's fault to the trier of fact. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY 18 (1979).

[5] 66 Hawaii at 250, 659 P.2d at 742. General Electric's motion for a directed verdict at the close of Ontai's case was proper only if there was no evidence to support a jury verdict in Ontai's favor. The court noted that in passing upon this motion the trial court should have disregarded conflicting testimony and viewed "the evidence and all legitimate inferences that can be drawn therefrom, in the light most favorable to the plaintiff." *Id.* at 244, 659 P.2d at 740, *citing* Stewart v. Budget Rent-a-Car Corp., 52 Hawaii 71, 77, 470 P.2d 240, 244 (1970).

[6] 66 Hawaii at 256, 659 P.2d at 745.

[7] *Id.* at 244, 659 P.2d at 738. The subject footrest was a detachable component of a reconditioned Monarch 90 model X-ray table sold by G.E. to Straub in 1974. *Id.* at 249, 659 P.2d at 741.

[8] *Id.* at 244, 659 P.2d at 738.

[9] *Id.* The lower court apparently believed that the accident was caused by the footrest being improperly installed and not by a defect in its design. "The Court is eminently satisfied that there is no design defect in Exhibit A [subject footrest] but if it was properly installed the accident would not have happened. This is clear. It is common sense." *Id.* at 247, 659 P.2d at 740.

[10] *Id.* at 244, 659 P.2d at 738.

proceedings consistent with its opinion.[11]

III. Analysis and Impact

The court arrived at its decision to reverse through an analysis of what is required under products liability law to establish a claim and to avoid a motion for directed verdict. Justice Menor's opinion sequentially considered Ontai's claims under strict liability in tort, negligence, and breach of warranty. The finding that the motion for directed verdict was improvidently granted constrained the court to make a similar finding with respect to Straub's crossclaim.[12] This note will follow the court's sequential treatment of Ontai's theories of recovery by examining, in turn, the court's analysis of Ontai's claims under strict liability in tort, negligence, and breach of warranty.

A. Strict Liability in Tort

The theory of strict liability in tort evolved because the traditional theories of negligence and breach of warranty failed to provide adequate protection in the mass consumer market.[13] "[P]ublic interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products."[14] Strict liability serves to shift the costs of accidental inju-

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[11] *Id.* at 257, 659 P.2d at 745. The court treated the motion to dismiss the crossclaim as a motion for a directed verdict. Under rule 50(a) of the Hawaii Rules of Civil Procedure, G.E.'s motion to dismiss was "in effect a motion for [a] directed verdict." *Id.* "A motion to dismiss in a jury case will be treated as if it were a motion for a directed verdict under Rule 50(a)." 9 Wright and Miller, Federal Practice and Procedure, § 2371 at 220 (1971).

[12] 66 Hawaii at 256, 659 P.2d at 745.

[13] *See* W. Prosser, *supra* note 2, § 98 "Strict Liability in Tort." Strict liability in tort was conceived as a means to provide consumers with a simple, streamlined remedy for harm suffered from defective products placed in the market place. Consumers seeking compensation under breach of warranty or negligence were often defeated by the complexities of those actions and were left to bear the costs of their injuries. In the words of Justice Traynor:

> The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. . . . If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 441 (1944).

[14] Stewart v. Budget Rent-a-Car Corp., 52 Hawaii 71, 74, 470 P.2d 240, 243 (1970)(driver injured when leased automobile veered uncontrollably off the road and overturned). *Stewart* is a landmark case in the law of products liability in Hawaii because it marked Hawaii's adoption of strict liability in tort. "Although this court has never had the occasion to rule on this matter, it is

ries which result when defective products are put on the market. By shifting the economic burden to "those in the chain of distribution as a cost of doing business," manufacturers and distributors are given "an incentive to guard against such defects."[15] This shift was envisioned to be a more efficient and equitable distribution of risk in society.

The general rule of strict liability in tort as expressed in the Restatement (Second) of Torts § 402A, holds manufacturers and suppliers strictly liable in tort for injuries to consumers and users caused by defective products which are unreasonably dangerous.[16] The focus of strict liability in tort is on the product and not on the conduct or representations of the manufacturer or seller.[17] To recover under strict liability in tort, a plaintiff must at least show that the product was defective and that the defect caused his injury.[18] The plaintiff need not

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the modern trend and the better reasoned view that strict liability in tort is a sound legal basis for recovery in products liability cases." *Id. See also infra* notes 20-26 and accompanying text.

[15] 52 Hawaii at 74-75, 470 P.2d at 243; *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A, comment C (1965):

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

[16] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

> §402A. Special Liability of Seller of Products For Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[17] "The shift from negligence to strict liability requires, if nothing else, that the inquiry be focused on the product and its use and away from what the manufacturer should or should not have done or perceived." A. WEINSTEIN, A. TWERSKI, H. PIEHLER, W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT AND MARKETING 8 (1978).

[18] W. KIMBLE & R. LESHER, *supra* note 4, at 35. *See e.g.*, Stewart v. Budget Rent-a-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970).

show, as under negligence, that the manufacturer failed to exercise reasonable care in the design, manufacture, or distribution of the product.[19] In contrast, while actions under breach of warranty are governed by the law of contracts, actions under strict liability in tort are not.[20]

When Hawaii formally adopted the doctrine of strict liability in tort in *Stewart v. Budget Rent-A-Car Corp.*, the Restatement requirement that the defective product be "unreasonably dangerous" was omitted. The *Stewart* formulation of the doctrine states that the defective product must only be "dangerous" to the user or consumer.[21] Hawaii's substitution of "dangerous" for "unreasonably dangerous" seemed to indicate that Hawaii was adopting a theory of strict liability similar to that developing in California. In *Cronin v. J.B.E. Cronin Corp.*, the California Supreme Court dispensed with the "unreasonably dangerous" requirement because it burdened plaintiffs with the evidence problems which strict liability was intended to alleviate.[22] Unfortunately, in *Stewart* the Hawaii Supreme Court did not follow the *Cronin* court in providing a similar principled explanation for its deletion of the "unreasonably dangerous" requirement. This oversight has created a potential for confusion over the purpose and intended effect of the deletion which can be seen in the cases leading from *Stewart* to

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[19] W. KIMBLE & R. LESHER, *supra* note 4, at 31. This reduces the plaintiff's burden of proof as compared to an action proceeding under a negligence theory. Under strict liability the plaintiff does not need to establish the defendant's duty or breach.

[20] W. KIMBLE & R. LESHER, *supra* note 4, at 33. Thus strict liability in tort avoids the warranty problems of providing "reliance upon the skill or judgment of the seller," or "any representations or undertaking on his part." *Id.* Also eliminated are the requirement of notice of breach and the availability of contractual disclaimers and limitations on liability.

[21] 52 Hawaii at 75, 470 P.2d at 243. "Therefore we adopt the rule that one who sells or leases a defective product which is dangerous to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property, if (a) the seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased. This is essentially the rule adopted in the Second Restatement of Torts, section 402A." *Id.*

[22] 8 Cal. 3d 121, 134, 104 Cal. Rptr. 433, 442, 501 P.2d 1153, 1162 (1972)(delivery truck driver injured when a safety hasp failed in a collision allowing bread racks to enter the driver's compartment). The California Supreme Court reasoned that the burden of proving a product to be "unreasonably dangerous" is only slightly less than proving its manufacturer negligent. The court thought "that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." It was concerned that a literal reading of "defective condition unreasonably dangerous" would lead to a bifurcated standard requiring the product be "first defective and, second, unreasonably dangerous." The California court feared this would defeat the objectives of strict liability in tort which the court thought were to "relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty remedies . . . and thereby to insure the cost of injuries . . . are borne by the manufacturers." *Id.*

Ontai.[23]

The significance of Hawaii's deviation from the wording of the Restatement in *Stewart* was soon questioned in *Brown v. Clark Equipment Co.*,[24] by a defendant challenging a trial court's omission of the phrase "unreasonably dangerous" from its instructions on strict liability.[25] The defendant asserted that *Stewart* had endorsed the Restatement definition of strict liability, "making it a requirement for strict liability that the defective condition render the product unreasonably dangerous for its intended use."[26] The *Brown* court rejected this assertion, noting that in *Stewart* it had not adopted "the literal definition of strict liability embodied in said Section 402A," and that the phrase "unreasonably dangerous" had not been employed in the *Stewart* formulation of strict liability.[27] The court stated that it saw "the merit of *Cronin*" and California's express rejection of the "unreasonably dangerous" requirement but felt it "unnecessary herein to reach the same result" because the trial court "did not employ the words 'unreasonably dangerous' in its instructions on strict liability."[28] Apparently, the court believed a detailed rejection of the unreasonably dangerous requirement similar to California's rejection in *Cronin* was not necessary, since the *Brown* trial court had correctly stated the law of strict liability adopted

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[23] *See infra* notes 24-33 and accompanying text.

[24] 62 Hawaii 530, 618 P.2d 267 (1980).

[25] The trial court instructed the jury that:

> In order to establish their claims of strict liability, the burden is upon the plaintiffs and upon the defendant Ward Foods to prove the following:
>
> 1. That the Michigan Loader 275 IIIA contained a defective condition at the time it was sold;
>
> 2. That a product such as the Michigan 275 IIIA loader is defective if it is dangerous to an extent beyond which would be contemplated by an ordinary user using it for its intended use; and
>
> 3. That the defective condition was a proximate cause of Mrs. Brown's death.

62 Hawaii at 541, 618 P.2d at 274.

[26] *Id.*

[27] *Id.* The court conceded that in *Stewart* it had said it was adopting essentially the rule in 402A, but that "the precise issue was not then before the court." *Id.* at 542, 618 P.2d at 275. While *Brown* found that *Stewart* eliminated the Restatement's "unreasonably dangerous" requirement as an independent element of strict liability, it seemed to endorse the Restatement's definition of the term "defective." The *Brown* court explained the use of the word "unreasonable" in the *Stewart* opinion as part of the definition of the term defect. The court then went on to point out that comment i of the RESTATEMENT (SECOND) OF TORTS § 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics." The court found this language similar to the trial court's instruction #2. *Id.* at 542, 618 P.2d at 275. Based on these findings the *Brown* court found the trial court's instructions consonant with its holding in *Stewart*. *Id.* at 543, 618 P.2d at 275.

[28] *Id.* at 543, 618 P.2d at 275.

in *Stewart*.[29]

Following *Brown*, the Hawaii Intermediate Court of Appeals in *Boudreau v. General Electric Co.*,[30] found jury instructions using the words "unreasonably dangerous" and "reasonably forseeable" were erroneous in relation to a defect as they tended to improperly equate strict liability with negligence.[31] Citing *Cronin*, the court based its decision on California's policy supporting the elimination of the "unreasonably dangerous" requirement.[32] Despite this endorsement by the Intermediate Court, the Hawaii Supreme Court did not expressly embrace the *Cronin* reasoning. The choice between a "dangerous" or an "unreasonably dangerous" requirement cuts to the essence of strict liability in tort. Any ambiguity over which standard is required necessarily questions the jurisdiction's conviction to the underlying policies and objectives of the theory. Prior to *Ontai*, the full meaning of *Stewart's* elimination of the "unreasonably dangerous" requirement was not clear.

To establish a claim under strict liability in tort, the *Ontai* court required a showing that the defect rendered the product dangerous for its intended or reasonably forseeable use, and that there was a causal connection between the defects and the plaintiff's injuries.[33] The court derived these requirements from the concept of strict liability developed by the California courts. In applying these requirements, the *Ontai* court clarified the rule of strict liability it had adopted in *Stewart*.

The court in *Ontai* reasoned that *Stewart* had cited the California case of *Greenman v. Yuba Power Products, Inc.*[34] with approval, and that the law in

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[29] *Id. Brown* was again explained in a footnote in Kaneko v. Hilo Coast Processing: "In applying the rule adopted in *Stewart*, the phrase 'unreasonably dangerous' as found in the Restatement is not a necessary element of the cause of action. . . . We held that since *Stewart* did not adopt the literal definition of strict liability embodied in Section 402A, the instruction to the jury using comment i of Section 402A defining defective product was proper." 65 Hawaii 447, 452 n.4, 654 P.2d 343, 347 n.4 (1982)(iron worker injured in a fall when an allegedly inadequately welded sub-assembly broke).

[30] 2 Hawaii App. 10, 625 P.2d 384 (1981)(woman injured in explosion of washer-dryer when window with non-safety glass shattered).

[31] 2 Hawaii App. at 16, 625 P.2d at 389.

[32] *Id.*

[33] 66 Hawaii at 247, 659 P.2d at 740 ("Ontai, in the present case, was required to show: (1) a defect in the footrest which rendered it dangerous for its intended or reasonably foreseeable use, and (2) a causal connection between the defect and his injuries.").

[34] 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (plaintiff injured by a piece of wood thrown out of a woodworking machine). The California Supreme Court allowed the plaintiff to establish the manufacturer's liability by proving he was injured while using the product "in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 901 (1962).

California has continued to evolve since *Stewart* and *Greenman*.[35] Acknowledging Hawaii's alignment with California's interpretation of strict liability, the *Ontai* court then adopted the holdings of *Cronin* and *Barker v. Lull Engineering Co., Inc.*,[36] as "logical extensions" of the *Greenman* principles it relied on in *Stewart*.[37]

In *Barker*, the California Supreme Court held that a product may be found defective in design if the plaintiff proves "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[38] Alternatively, a product may be found defective in design if "the plaintiff demonstrates the product's design proximately caused his injury and the defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such a design."[39]

Although the Hawaii Supreme Court expressly found "no reason why the *Barker* formulations may not be made to apply in this jurisdiction,"[40] it is not clear whether both of *Barker's* tests for design defects were adopted, or how they will be applied in practice. The issues before the court in *Ontai* did not require it to choose between the alternative tests and apply either to the exclusion of the other. Instead, the *Ontai* court turned to *Brown* to explain its holding. "The failure of the manufacturer to equip its product with a safety device

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[35] 66 Hawaii at 246, 659 P.2d at 740.

[36] 20 Cal. 3d 413, 537 P.2d 443 (1978)(plaintiff injured while driving a forklift when its allegedly defective design caused its load to shift).

[37] 66 Hawaii at 246, 659 P.2d at 740 ("We think the holdings of both *Cronin* and *Barker* are logical extensions of the *Greenman* principles which this court in *Stewart* found to be sound, and we see no reason why the *Barker* formulations may not be made to apply in this jurisdiction.").

[38] 20 Cal. 3d 413, 432, 537 P.2d 443, 456 (1978).

[39] *Id.* In the first printing of *Ontai*, the Hawaii Supreme Court cited the *Barker* rule as "a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and that the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." 66 Hawaii 241, 246, 659 P.2d 734 (1983). It seemed as though the court had omitted the essence of California's second test for design defects, the shifting of the burden of proving the design utility to the defendant. "The allocation of such burden is particularly significant in this context in as much as this court's product liability decisions, from *Greenman* to *Cronin* have repeatedly emphasized that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action." 20 Cal. 3d at 431-32, 537 P.2d at 455. If the omission by the *Ontai* court had been intentional, it would have so significantly altered the second California test that it would have negated any value in citing it. However, this textual difference was merely a typographical error and was corrected in later printings of the opinion.

[40] 66 Hawaii at 246, 659 P.2d at 740.

may constitute a design defect."[41] Thus, to sustain his claim against the motion for directed verdict, Ontai had only to offer evidence that the footrest lacked a safety device and that its absence was the proximate cause of his injuries.

Ontai claimed that the design of the footrest was defective and was the proximate cause of his injury because it lacked a safety device to indicate whether it was securely attached to the X-ray table, and because it was not adjustable to compensate for wear in its latching mechanism.[42] At trial, Ontai produced testimony that the footrest was properly installed,[43] and that G.E. could have incorporated existing safety devices (used in similar G.E. footrests) to prevent such a disengagement.[44] Because this testimony was not "inherently incredible and implausible as to be unworthy of belief," the court held that the trial court erred in not giving it credence.[45] The court found that the omitted safety devices which were already "within the state of G.E.'s own art" would have made the offending footrest safer for its intended or foreseeable use.[46] Presented with this information, a jury reasonably could have found the absence of these safety features to have been a design defect which was a proximate cause of Ontai's injuries,[47] and therefore the *Ontai* court held that Ontai had met his burden of proof.

Ontai's importance lies in the orientation it gives to the law of strict liability in tort. *Ontai* leaves little question that Hawaii is aligning itself with California's interpretation of strict liability. Although this alignment has been developing over time, it has never been as obvious as it is now.[48]

The previous uncertainty in the direction of Hawaii's law caused confusion

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[41] 66 Hawaii at 247, 659 P.2d at 740.

[42] *Id.* During the trial, Ontai's expert witness demonstrated how the footrest could become disengaged even after it was properly installed by subjecting it to a "push-pull force of about 20 pounds." *Id.* at 249, 659 P.2d at 741.

[43] The student X-ray technician who installed the footrest testified that he heard a click, and felt the footrest engage to the table as it normally did. He also stated that he tugged on the footrest and moved it back and forth to insure its positive attachment to the table. This testimony was supported by other members of the Straub staff who testified that the technician had followed the normal procedures for installing the footrest. 66 Hawaii at 248, 659 P.2d at 741.

[44] Ontai's expert witness demonstrated how the footrest could be disengaged even when properly installed, and testified that a latch adjustment mechanism incorporated in another, similar G.E. footrest could have prevented this disengagement. 66 Hawaii at 249, 659 P.2d at 741-42.

[45] 66 Hawaii at 248, 659 P.2d at 740.

[46] *Id.* at 249, 659 P.2d at 741.

[47] *Id.* at 250-51, 659 P.2d at 742. *See supra* note 5.

[48] Hawaii had again "followed suit" with California in Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 654 P.2d 343 (1983), which approved of the application of comparative negligence principles in strict products liability cases as sanctioned by California in Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 116 (1982). 66 Hawaii at 246 n.4, 659 P.2d at 740 n.4.

among commentators and in the courts.[49] By ratifying the holdings of *Cronin* and *Barker* as extensions of *Greenman* and *Stewart*, the Hawaii Supreme Court has eliminated some of this confusion and clarified the direction in which it tends to guide the development of strict liability in Hawaii.

While the Hawaii Supreme Court has endorsed the general policies and principles behind California's interpretation of strict liability, the degree to which it will embrace particular concepts is not certain. Two questions which *Ontai* leaves unresolved are whether Hawaii has actually adopted either of *Barker's* tests for design defects, and whether *Ontai* will apply to manufacturing as well as design defects.

1. *Barker's Tests for Design Defects*

While the *Ontai* court expressed its approval of the *Barker* tests for design defects, it did not distinctly apply either of them to reach its decision. Thus the scope to which Hawaii has embraced *Barker's* tests for design defects is advisory at best and its precedential value is uncertain.[50] This unresolved issue is important because the adoption of the second test can be seen as a step towards a no-fault concept of strict liability in tort which is closer to a standard of absolute liability.[51]

If Hawaii has adopted only *Barker's* first test for design defects, then Hawaii has retained a narrower concept of strict liability in tort. *Barker's* first test, based on "ordinary consumer expectation" puts a greater burden of proof on the plaintiff than *Barker's* second test which essentially serves to shift the burden to the defendant.[52] The first test has been criticized as allowing a jury to consider its own expectations of how the product should have performed in determining if it was as safe as it should have been.[53] The notion of an "ordinary consumer"

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[49] *See* J. BEASLEY, *supra* note 2, at 149. In a comment on *Stewart* the author wrote, "It must be conceded that the inference that Hawaii has dispensed with the unreasonably dangerous requirement is highly speculative. The elimination of the word 'unreasonably' from the Hawaii definition of strict liability may just have been happenstance." *Id.*

[50] The court found that to avoid the directed verdict under either test of *Barker*, Ontai still had to show that the footrest was dangerously defective and that the defect was the proximate cause of his harm. 66 Hawaii at 246, 659 P.2d at 742.

[51] *See* West, *A California Perspective on Strict Products Liability*, 9 PAC. L. J., 775, 810 (1978). This concern also was raised in California following *Cronin* and the deletion of the "unreasonably dangerous" requirement. There, it was held that "the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries" sufficiently prevented "the seller from being treated as the insurer of its products." 8 Cal. 3d 121, 134, 104 Cal. Rptr. 433, 442, 501 P.2d 1153, 1162 (1972). With the burden of disproving the defect on the defendant, this concern is even more poignant.

[52] *See id.* at 808-10.

[53] Erb, *The Developing Definition of Defect in California Products Liability*, 8 GOLDEN GATE

has been analogized to the "vague and amorphorus" "reasonable person" in negligence. This standard does not define what a design defect is, but results in allowing a jury to "impose liability when in their judgment the product was in such a condition that the manufacturer should be responsible for the harm caused by the product."[54] A plaintiff would have a difficult time maintaining his burden of proof if he had been injured by a product for which the jury holds low expectations of performance. Without the protection of the burden-shifting effect of *Barker's* second test, a plaintiff in such a situation may be no better off proceeding under strict liability in tort, than if he were proceeding under negligence.

The second *Barker* test "allows proof of defect without regard for reasonable conduct on the part of either party."[55] Under the second test, liability may be imposed even where there is no safer product, or where a product is normally dangerous, unless the manufacturer can show that the benefits of the product's design outweigh its inherent risks.[56] The plaintiff's prima facie case becomes simply that his injury was proximately caused by the product's design. The manufacturer is then put in a position of having to prove that the utility of the product outweighs the hazards it creates. Thus, the burden of proof, which is technically on the plaintiff, in effect is being shifted to the manufacturer. The rationale for the shift is that the factors involved in such a balancing test are more commonly within the manufacturer's knowledge rather than in the consumer's knowledge.[57]

2. *Applying Ontai To Manufacturing Defects*

Barker and *Ontai* were design defect cases. Therefore, it is not certain if the *Barker* tests for establishing design defects will be applicable also to manufacturing defect cases. A design defect is an error in a product's design that creates a condition hazardous to the consumer.[58] A manufacturing defect is a flaw in a

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U. L. REV. 263, 283-84 (1978).

[54] *Id.*

[55] West, *supra* note 51, at 810.

[56] *Id.*

[57] The court in *Barker* found these factors included "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978).

[58] *See* Erb, *supra* note 53, at 289: "Design defects are those which result from improper planning, design, product analysis, or testing, and which result in a product identical to that contemplated by the manufacturer. However because of an error in planning, design, or testing, the product is unsafe or dangerous in some way." P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 207 (1981).

product such that the finished product deviates from its intended design and results in a condition which is hazardous to the consumer.[59] Such a distinction may create a battleground for clever counsel if in a particular case it is more advantageous for a party to have one rule applied over the other.[60] Further, it may not be clear whether a defect is a manufacturing or a design defect. The classification of design defect along with the burden-shifting effect and the application of *Barker's* second test could be the decisive factor in many cases. Hawaii could avoid future classification shopping by applying the *Barker* test to both manufacturing and design defects, but this would significantly increase the defendant's burden in manufacturing defect actions.[61]

B. Negligence

The focus of negligence in products liability is on the conduct of the manufacturer.[62] A manufacturer's conduct is negligent when it falls below the standard of what a "reasonable" person would have done under the same circumstances.[63] A manufacturer has a duty to exercise reasonable care in the design[64] and manufacture[65] of his product to prevent defects that could injure the user.

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[59] *See* Erb, *supra* note 53, at 289. In proving the manufacturing defect the product may be compared against the objective standard of the manufacturer's intent. "The product either complies with that intent or fails to do so." SHERMAN, *supra* note 58, at 206.

[60] *See* Erb, *supra* note 53, at 289. Erb suggests that manufacturing defects seem to be governed still by *Cronin* and not *Barker* in California. *Id.*

[61] *See* Erb, *supra* note 53, at 291.

[62] A manufacturer's "negligence may be found over an area quite as broad as his whole activity in preparing and selling the product . . . . In between lies the entire process of manufacture and sale." W. PROSSER, *supra* note 2, at 644.

[63] Negligence has been described as "the performing of an act that a person of ordinary prudence would not have done in the same or similar circumstances, or a failure to do something that a person of ordinary prudence would have done in the same or similar circumstances." *Medical Products Liability, a Comprehensive Sourcebook*, at 18 (D. Gingerich, ed. 1981). *See generally* W. PROSSER, *supra* note 2, § 96.

[64] RESTATEMENT (SECOND) OF TORTS § 398 (1965):

§398. Chattel Made Under Dangerous Plan or Design

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses of which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

[65] RESTATEMENT (SECOND) OF TORTS § 395 (1965):

§395. Negligent Manufacture of Chattel Dangerous Uness Carefully Made

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a

This includes the inspection, testing, packaging, distribution, and final assembly or preparation of the product by distributors.[66] A manufacturer also has a duty to provide adequate instructions for the safe use of the product and warnings of any unobvious dangers to the user.[67]

To recover under the negligence theory for injuries caused by a defective product, a plaintiff must prove that (1) the manufacturer owed a duty to the plaintiff; (2) the manufacturer breached that duty; (3) the plaintiff sustained injury; and (4) the breach was the cause of the injury.[68] These are essentially the same elements a plaintiff must prove in any negligence action.[69] A plaintiff's major obstacle to recovering under the negligence theory is establishing what constitutes the manufacturer's duty of "reasonable" care under the circumstances. This determination is normally made by balancing the probability of the harm occurring and the gravity of the harm, against the burden of taking precautions to protect against the harm.[70] The greater the threat of the harm occurring, or the more serious its consequences, the greater the precautions that must be taken by the manufacturer to prevent its occurrence.

Ontai's claim under negligence contended that G.E. was negligent for designing the footrest without safety devices to protect against foreseeable dangers, and for failing to warn users of latent dangers in its use.[71] The court noted that Ontai's claim under negligence raised "essentially the same question" raised in *Brown v. Clark Equipment Co.*: "whether G.E. was negligent for failing to provide safety devices."[72]

In *Brown*, the court held that a manufacturer could be found negligent for failing to equip its product with safety devices to protect against foreseeable dangers, and for failing to notify purchasers of their availability.[73] Applying

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manner and for a purpose for which it is supplied.

[66] *See e.g.*, W. KIMBLE & R. LESHER, *supra* note 4, chapter 2.

[67] As manufacturers supply the public with increasingly complex and potentially dangerous products, they must provide instructions and warnings with the products to educate the unsophisticated consumer on proper use and possible hazards. *See generally* W. KIMBLE & R. LESHER, *supra* note 4, Chapter 11.

[68] *See e.g.*, W. PROSSER, *supra* note 2, § 30 "Elements of Cause of Action [Negligence]."

[69] *Id. See, e.g.* Young v. Price, 47 Hawaii 309, 388 P.2d 203, *rehearing* 48 Hawaii 22, 395 P.2d 365 (1963) (plaintiff injured when she tripped on hose accross sidewalk).

[70] The classic proposition of this equation was made by Judge Learned Hand: "If the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e, whether $B < PL$." United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), *rehearing denied* 160 F.2d 482 (2d Cir. 1947).

[71] 66 Hawaii at 251, 659 P.2d at 742.

[72] *Id.*

[73] *Id. citing Brown*, 62 Hawaii at 538, 618 P.2d at 272 ("In our opinion, under the record herein, the jury could conclude without the benefit of expert testimony that Clark Equipment negligently designed the loader with restricted visibility and was negligent in failing to equip the loader with mirrors correcting the restricted visibility or in failing to notify purchasers of the

Brown, the court found that Ontai needed to present sufficient evidence for a jury to conclude that G.E.'s failure to incorporate the safety devices and warn him of the latent danger in the use of the footrest, exposed him to a risk that was "unreasonable and foreseeable by G.E."[74]

Ontai's witnesses testified that the danger of the footrest becoming disengaged was not obvious to the user and could have been eliminated by the incorporation of existing safety latches in the design. Ontai also presented testimony that G.E. failed to provide an operations manual for the proper use of the footrest or provide other warning of the dangers inherent in its use.[75] In the court's opinion, Ontai raised sufficient evidence from which a jury could have found his injuries were proximately caused by G.E.'s breach of its duty to design a safe product and its duty to warn of latent dangers inherent in its product's use.[76]

The court's analysis of Ontai's claim in negligence validates the continuing vitality of the negligence cause of action in products liability. Strict liability in tort for defective design has not swallowed or replaced negligence as a viable cause of action in situations involving defectively designed products. Affirming *Brown*, the *Ontai* court makes "it clear that plaintiffs in design defect cases may

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loader that said mirrors were available.").

[74] 66 Hawaii at 251, 659 P.2d at 742. The Hawaii Supreme Court found the trial court erred in dismissing Ontai's claim. The court held that Ontai's evidence, which must be considered as credible for the purposes of evaluating his claim, clearly raised a factual inference that the footrest was properly installed. 66 Hawaii at 247-48, 659 P.2d at 740. Additionally, any improper installation was foreseeable to G.E. and therefore not a superseding cause of Ontai's injuries. *Id.* at 252-53, 659 P.2d at 743. Consequently, the trial court was not free to find that the accident was caused by the improper installation of the footrest and not by a design defect.

[75] *Id.* at 252, 659 P.2d at 743. The radiologist who performed Ontai's enema testified that G.E. had not provided Straub with an operations manual for the use of either the X-ray table or the footrest. And there was no evidence that G.E. provided any other warnings. The court divided the duty to warn into a duty to provide adequate instructions and a duty to warn of dangers "inherent in improper use." *Id. citing* Seibel v. Symons Corp., 211 N.W.2d 50 (N.D. 1975). In *Seibel* the plaintiff was injured in a fall from a concrete form when a weld broke on the support rod to which his safety belt was attached. The technical manual containing warnings not to hang off the rod was provided by the manufacturer to the employer but never reached the plaintiff. The manufacturer was held negligent for failing to use other means of warning or to make changes in the product to eliminate risk.

The absence of adequate warnings as to the dangerous characteristics of a product can also constitute a product defect for which the manufacturer may be strictly liable. Midgeley v. S.S. Kresge Co., 55 Cal. App. 3d 67, 127 Cal. Rptr. 217 (1976). In *Midgeley* a child's eyes were injured while viewing the sun through a telescope that he had improperly assembled after misunderstanding the instructions provided with it. Strict liability was imposed for "composing and furnishing a set of instructions for assembly and use which [did not] adequately avoid the danger of injury." *Id.*

[76] 66 Hawaii at 253, 659 P.2d at 743.

proceed on both" theories of liability simultaneously.[77]

C. *Breach of Warranty*

In a products liability action, the focus of a recovery under breach of warranty is on the breach of any express or implied representations made by the seller as to the quality or performance of his goods.[78] A seller who warrants his product is liable for any damages that result from the breach of the warranty.[79] This liability extends as protection to those to whom the warranty runs. It is imposed even if the seller exercises extreme care in the manufacture or sale of his product.[80]

The advantage of pursuing recovery under breach of warranty is that a plaintiff need not prove the manufacturer failed to exercise reasonable care in the design or manufacture of the product. The plaintiff need only prove the existence of the warranty, that the benefit of the warranty extended to him, and that the warranty was breached by a defect that proximately caused his injury.[81]

The operation of express and implied warranties are generally governed by the contract concepts of the Uniform Commercial Code. Hawaii's Uniform Commercial Code is found in Chapter 490 of the Hawaii Revised Statutes.[82]

In the Supreme Court's opinion, Ontai's claim based on breach of warranty was somewhat ambiguous because it referred to a breach of an implied warranty of fitness, but cited the statute section governing warranties of

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[77] 66 Hawaii at 251, 659 P.2d at 742.

[78] "A warranty has been defined as a statement or representation made by the seller of goods contemporaneously with, or as a part of the contract of sale, although collateral to the expressed object of it, having reference to the character, quality or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them." W. KIMBLE & R. LESHER *supra* note 4, at 22.

[79] Liability might even be imposed under circumstances where the seller "did not know or did not have reason to know of the condition of the product that resulted in the breach of warranty. . . ." W. KIMBLE & R. LESHER, *supra* note 4, at 29-30.

[80] *Id. See generally* W. PROSSER, *supra* note 2, § 97.

[81] W. KIMBLE & R. LESHER *supra* note 4 at 30. Offsetting this advantage is the necessity of proving the existence of the warranty and its breach, and depending on jurisdiction, possible limitations on damages, requirements of timely notice of breach, and requirements of privity of contract. *Id.*

[82] HAWAII REV. STAT. Chapter 490 (1982), governs relevant warranties under the following provisions:

2-313 Expres Warranties by Affirmation, Promise, Description, Sample.
2-314 Implied Warranty; Merchantability; Usage of Trade.
2-315 Implied Warranty; Fitness For Particular Purpose.
2-316 Exclusion or Modification of Warranty.
2-317 Cumulation and Conflict of Warranties Express or Implied.
2-318 Third Party Beneficiaries of Warranties Express or Implied.

merchantability as authority.[83] Despite this ambiguity, the court determined that Ontai had raised sufficient evidence from which a jury could conclude that G.E. breached both implied warranties.

The court initially noted that G.E.'s warranties extended by statute from Straub to Ontai as a third party beneficiary.[84] The court then pointed out that implied warranties of merchantability are incorporated by operation of law into every sale of goods by a merchant seller.[85] Under Hawaii's statute, G.E. would impliedly have warranted its footrest as being "fit for the ordinary purpose for which such goods are used."[86] The court then contrasted this warranty with the implied warranty of fitness for a particular purpose, which requires that a seller have reason to know of the particular purpose for which the goods are required, and that the buyer relies on the seller's expertise in supplying a suitable product.[87] Because G.E. knew or should have known of Straub's particular purpose for buying such specialized pieces of equipment as the X-ray table and footrest, and knew or should have known that Straub was obviously relying on G.E.'s

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[83] 66 Hawaii at 253, 659 P.2d at 743.

[84] *Id.* HAWAII REV. STAT. § 490:2-318 (1982) provides:

Third party beneficiaries of warranties express or implied. A seller's warranty whether express or implied extends to any person who may be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this selection with respect to injury to the person of an individual to whom the warranty extends.

[85] 66 Hawaii at 254, 659 P.2d at 744.

[86] *Id.* HAWAII REV. STAT. § 490:2-314 provides:

Implied warranty: merchantability; usage of trade. (1) Unless excluded or modified (Section 490:2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving of value of food or drink to be consumed either in the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promise or affirmation of fact made on the label if any . . .

[87] 66 Hawaii at 254, 659 P.2d at 744. HAWAII REV. STAT. § 490:2-315 (1982) provides: Implied warranty; fitness for a particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

expertise, the court found that an implied warranty of fitness for a particular purpose did exist.[88]

For Ontai to have maintained his claim under breach of warranty, he need only have raised sufficient evidence from which the jury could have found the footrest defective. Such a defect, even if not detectible by G.E., would be a breach of both implied warranties and make G.E. liable for Ontai's injuries.[89] The court having already established that Ontai presented sufficient evidence of the defect under his other theories of recovery, held that the trial court erred in dismissing his claims based on breach of warranty.[90]

IV. CONCLUSION

Ontai could not have been decided at a more opportune time. The law of products liability in Hawaii needed to be reviewed and updated. Spanning three theories of recovery, *Ontai* provided such a review. *Ontai* will serve as a guide to many future products liability actions brought under the theories of strict liability in tort, negligence, and breach of warranty. After *Ontai* there is no question that all three theories are "alive and well" in Hawaii.

Matthew Horn

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[88] 66 Hawaii at 255, 659 P.2d at 744.

[89] *Id. citing* Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3rd. Cir. 1967)(sale of chicks afflicted with avean leukosis). The court noted that "the entire purpose behind the implied warranty sections of the Code is to hold the seller responsible when inferior goods are passed along to the unsuspecting buyer." *Id.* The breach is established by the goods failing to be of a merchantable quality or fit for their particular purpose.

[90] 66 Hawaii at 256, 659 P.2d at 745.

State v. Brezee: Custodial Interrogation

I. INTRODUCTION

State v. Brezee[1] provides important insights into the way the Hawaii Supreme Court will decide custodial interrogation cases in the future. In *Brezee*, the issue was the extent to which indicted defendants may be held responsible for protecting their own rights to a fair trial under the fifth[2] and sixth[3] amendments. A sharply divided court[4] held that, regardless of the stage of the proceeding, a defendant who initiated a confession-producing conversation with police and who rejected his attorney's advice to remain silent could not complain later that police violated his constitutional right to counsel.[5]

The *Brezee* opinion echoes the standard set forth by the United States Supreme Court in *Edwards v. Arizona*,[6] a custodial interrogation case decided

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[1] 66 Hawaii 162, 657 P.2d 1044 (1983).

[2] U.S. CONST. amend. V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[3] The sixth amendment, enacted in 1791, reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[4] The court split three to one in favor of the trial court. 66 Hawaii at 167, 657 P.2d at 1047 (Nakamura, J., dissenting).

[5] *Id.* at 162, 164-65, 657 P.2d at 1044, 1046.

[6] 451 U.S. 477 (1981). In *Edwards*, the Court held, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

under the fifth amendment principles of *Miranda v. Arizona*.[7] The *Brezee* opinion is the first reported Hawaii case to apply the *Edwards* standard, and as such has far-reaching consequences for both defendants and prosecutors. That the court has chosen to apply *Edwards* to an accused who already has been indicted makes the *Brezee* case particularly noteworthy.[8] It erases the traditional distinctions between the fifth and sixth amendment rights to counsel and creates instead a bright line rule applicable to custodial communications that take place both before and after the filing of formal charges.

In *Brezee*, the Hawaii Supreme Court has found a practical way to minimize confusion in future fifth and sixth amendment cases arising within the custodial setting. The *Edwards* standard, as applied in *Brezee*, articulates a straightforward course of conduct that can be easily followed by all law enforcement officers. However, while *Brezee* provides needed guidance to law enforcers, it also raises thorny questions about the role of the criminal defense attorney during the pretrial stages. Because of the traditional importance attached to the constitutional right to the assistance of counsel, and because of the disastrous impact at trial of a pretrial confession, it is imperative that the court clarify the parameters of the attorney-client relationship within the context of the custodial setting.

II. FACTS

The defendant, Keith Brezee, was indicted in March 1980 for the murder and attempted rape of Sandra Damas, a high school student.[9] The court appointed Honolulu attorney Michael Weight to represent him.[10] Three months later, on June 22, 1980, Brezee was again arrested, this time for an offense unrelated to the Damas murder.[11] On June 24, 1980, while Brezee was still detained in the Honolulu Police Department cellblock on the unrelated offense, a Detective Lum visited him in his cell and invited him to discuss his involvement in the Damas murder.[12] In response, Brezee asked to speak with his attorney.[13] After police officials tried unsuccessfully for two hours to reach the attorney, Brezee changed his mind, recalled Detective Lum to his cell and of-

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himself initiates further communication, exchanges or conversation with the police." *Id.* at 484.

[7] 384 U.S. 436 (1966).

[8] 66 Hawaii at 168, 657 P.2d at 1048 (Nakamura, J., dissenting).

[9] *Id.* at 166, 657 P.2d at 1047. The victim was found with her shirt removed and stuffed in her mouth; her brassiere was pulled up over her breasts and her jeans were pulled down to her knees. In addition, she had abrasions on her back and vagina. *Id.*

[10] 66 Hawaii at 163, 657 P.2d at 1046.

[11] *Id.*

[12] *Id.*

[13] *Id.*

fered to make a statement.[14]

Detective Lum took Brezee to his office in the police homicide division.[15] While Lum was explaining the procedure,[16] the attorney called, spoke to Brezee on the telephone and advised him not to make a statement.[17] Brezee told the attorney he still planned to talk.[18] The attorney then asked Detective Lum to postpone taking the statement for about two and a half hours so that he could be present.[19]

The detective refused to wait[20] and instead called the Office of the Prosecuting Attorney for guidance.[21] Upon the advice of the deputy prosecuting attorney, Detective Lum prepared a special waiver form[22] in addition to the standard police department warning form.[23] The standard form explained the traditional *Miranda* rights.[24] Brezee orally waived each right specified on the form and then initialed and signed the form itself.[25] He also signed the special waiver that had been prepared upon the direction of the prosecutor.[26]

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[14] *Id.*

[15] *Id.* According to the court, Detective Lum explained that the defendant's statement would be taped, and he went through various other preliminary procedures without asking any questions directly related to the crimes themselves.

[16] *Id.* The majority opinion also indicated that attorney Weight's telephone call came before any substantive questions had been posed to the defendant.

[17] *Id.* The conversation with the attorney, and Keith Brezee's unwillingness to follow the attorney's advice, figured prominently in the court's conclusion that no constitutional rights had been violated. *But see*, 66 Hawaii at 169, 657 P.2d at 1049 (Nakamura, J., dissenting).

[18] *Id.* at 163, 657 P.2d at 1045.

[19] *Id.* at 165, 657 P.2d at 1046. The court did not consider a delay of several hours reasonable and found no difficulty understanding why the detective would refuse to wait.

[20] *Id.*

[21] *Id.* at 163, 657 P.2d at 1045.

[22] The special waiver form stated, "I have had the oppurtunity [sic] to converse with my lawyer Michael WEIGHT by telephone this morning at about 1130 hours, 6-24-80. My lawyer advised me not to make a statement concerning the death and my involvement of Sandra DAMAS. I make the following statement on my own free will against the advise [sic] of my attorney." 66 Hawaii at 164, 657 P.2d at 1046.

[23] This warning form contained the traditional rights delineated in Miranda v. Arizona, 384 U.S. 436 (1966).

[24] *Miranda* requires that prior to any questioning, the person must be warned that he has a "right to remain silent, that any statement he does make may be used against him, and that he has the right to the presence of an attorney, either retained or appointed." 384 U.S. at 444. This decision goes on to note that any of these rights may be waived, provided the waiver is made "voluntarily, knowingly and intelligently." *Id.* at 445. The fifth amendment does not mention a right to counsel. However, as explained in *Miranda*, this right arose through the need to protect the suspect's right against self-incrimination during custodial interrogation. *Id.* at 444-45.

[25] 66 Hawaii at 166, 657 P.2d at 1045.

[26] *Id. But see*, 66 Hawaii at 171, 657 P.2d at 1049 (Nakamura, J., dissenting). The guidance of the prosecutor's office led Justice Nakamura to conclude that this was a sixth amendment and not a fifth amendment case.

The dissenting opinion emphasized entirely different facts, noting in particular that Brezee had already been indicted and given counsel for the crimes Detective Lum sought to discuss.[27] The dissent also noted that the pre-statement briefing conducted by the detective was uncounseled,[28] lasted approximately thirty minutes and involved appeals to Brezee's manhood.[29] Additionally, when attorney Weight finally spoke with Brezee, the detective "listened to Keith Brezee's end of the conversation,"[30] ignored Weight's request to wait and instead followed the advice of the prosecutor during the interrogation process.[31]

The trial court admitted Brezee's incriminating statements and found him guilty of murder and attempted rape as charged.[32] The Hawaii Supreme Court, relying on *Edwards v. Arizona*,[33] affirmed. It held that the police "scrupulously honored" the *Edwards* principles, and that it was the defendant himself who initiated the conversation that produced his confession.[34]

III. The Right Against Self-Incrimination: Historical Perspective

Historically, the fifth amendment was meant to prohibit the use of inquisitorial tactics to elicit confessions.[35] In recent years, the United States Supreme

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[27] Justice Nakamura also made particular note of the fact that on June 22, 1980, Keith Brezee had been arrested on suspicion of having committed an offense unrelated to the Damas murder and attempted rape. *Id.* at 169, 657 P.2d at 1048 (Nakamura, J., dissenting).

[28] 66 Hawaii at 169, 657 P.2d at 1048-49 (Nakamura, J., dissenting). Justice Nakamura noted that the defendant's testimony was, "I asked him [Detective Lum] to make a call to you [the attorney] because we couldn't get in contact with you." The defendant claimed he had agreed to talk only in response to the detective's inquiry. 66 Hawaii at 169, 657 P.2d at 1048 (Nakamura, J., dissenting).

[29] *Id.* at 170, 657 P.2d at 1049 n.4.

[30] *Id.* at 169, 657 P.2d at 1049 (Nakamura, J., dissenting). The dissent cited disciplinary rule DR 7-104, Code of Professional Responsibility. *Id.* at 172, 657 P.2d at 1050 n.6 (Nakamura, J., dissenting). The Code states in pertinent part that communication between an attorney and client is privileged. Although DR 7-104 does not apply to police officers, Detective Lum violated the spirit of the rule.

[31] *Id.* at 170, 657 P.2d at 1049 (Nakamura, J., dissenting).

[32] *Id.* at 162, 657 P.2d at 1045.

[33] 451 U.S. 477 (1981).

[34] *Brezee*, 66 Hawaii at 164, 657 P.2d at 1046.

[35] In the Star Chamber and the ecclesiastical courts of seventeenth century England, persons suspected of having committed a crime, but not formally charged, were required to take an oath to answer questions. Torture and brutality were frequently part of the procedures and the result inevitably was self-incrimination. *See* Levy, Origins of the Fifth Amendment 327-28 (1968). A correlation between the voluntariness of a confession and the self-incrimination clause of the fifth amendment first surfaced in Bram v. United States, 168 U.S. 532 (1897). The *Bram* Court stated that the voluntariness of a confession "is controlled by that portion of the Fifth Amend-

Court has interpreted this prohibition to include the right to have an attorney present during custodial interrogation, regardless of whether formal charges have been filed.[36]

A. *Miranda v. Arizona:*[37] *New Guidelines*

Unfortunately, the use of coercion to secure uncounseled confessions did not disappear with the adoption of the fifth amendment.[38] In 1966, the United States Supreme Court put teeth into the constitutional right against compelled self-incrimination by handing down its landmark *Miranda*[39] decision. In *Miranda*, the accused had been grilled for more than two hours before agreeing to give a written confession.[40] At the top of the paper was a typed paragraph stating that his confession was voluntary and made with full knowledge of his rights.[41] The uncounseled confession was admitted at trial and Miranda was convicted of rape and kidnapping.

The United States Supreme Court reversed, stating that "overzealous police

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ment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " *Id.* at 542. *See generally*, Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

[36] In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court recognized the inherent coerciveness of the custodial setting and the need to "dispel the compelling atmosphere of the interrogation." *Id.* at 465. The Court further saw the presence of counsel as an effective counterbalance and at one point in its opinion noted that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensible to the protection of the fifth amendment privilege under the system we delineate today." *Id.* at 469.

[37] 384 U.S. 436 (1966). *See also* Culombe v. Connecticut, 367 U.S. 568, 605 (1961) (where coercive forces are "powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subject to such an exacting process," the confession is voluntary).

[38] For example, in Brown v. Mississippi, 297 U.S. 278 (1936), police whipped and beat a confession out of an accused person, prompting the Court to hold that the use of police brutality to force confessions exceeded the standard of voluntariness and violated a suspect's right to due process under the fourteenth amendment. *See also* Thomas v. Arizona, 365 U.S. 390, 400 (member of arresting posse twice lassoed accused around neck. Court strongly condemned these actions, but held that the defendant's confession was not the result of fear); Chambers v. Florida, 309 U.S. 227, 238 (1940) (condemning police conduct "calculated to break the strongest nerves").

[39] 384 U.S. 436 (1966). *Miranda* actually involved four separate cases in which suspects were subjected to uncounseled custodial interrogation. In each case, the questioning produced a confession. *Id.* at 491, 493-94.

[40] *Id.* at 491-92.

[41] *Id.* at 492.

practices" were "at odds" with the fifth amendment.[42] The *Miranda* Court also made it clear that the government bore the burden of showing that any waiver of fifth amendment rights was "knowing and intelligent,"[43] and in accordance with the traditional standard articulated in *Johnson v. Zerbst*.[44]

Miranda was the culmination of many other Court decisions handed down over the years to deal with coerced confessions.[45] Before *Miranda*, confessions were considered admissible under a general voluntariness standard.[46] For example, in *Brown v. Mississippi*,[47] the first state confession case to reach the Supreme Court, the accused was beaten by police until he confessed. Using due process analysis, the Court concluded that any confession procured through police brutality could not be considered voluntary.[48]

If *Miranda* changed the way the nation viewed custodial interrogation, *Edwards v. Arizona*[49] changed the way the nation viewed *Miranda*. In *Edwards*, a

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[42] 384 U.S. 436 (1966). In *Miranda*, the Court made it clear it was responding not only to the overt act of questioning the accused but also to other long standing interrogation techniques, such as one where an officer will "posit . . . the guilt of the subject as fact," "minimize the moral seriousness of the offense" and "cast blame on the individual and society." *Id.* at 450. The Court also recognized other techniques traditionally used by law enforcement officers, including the "false line up" in which "[t]he witness or complainant (previously coached, if necessary) studies the lineup and confidently points out the subject as the guilty party." *Id.* at 453 (*quoting* C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 106 (1st ed. 1956)).

[43] *Id.* at 475. The *Miranda* Court discussed waiver as follows: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. . . ." *Id.*

[44] The "intentional relinquishment or abandonment of a known right or privilege" constitutes a valid waiver. 304 U.S. 458, 464 (1938) (footnote omitted).

[45] *See, e.g.*, Bram v. United States, 168 U.S. 532 (1897) (police may not use hope or fear to "induce" confessions). *See also* Malloy v. Hogan, 378 U.S. 1 (1963) (fifth amendment prohibition against compelled self-incrimination applies to states); Culombe v. Connecticut, 367 U.S. 568 (1961) (use of a confession obtained from an accused whose "will has been overborne" and "capacity for self-determination critically impaired" offends due process).

[46] *See, e.g.*, *Brown*, 297 U.S. 278. *Miranda* itself reflected a voluntariness standard inasmuch as its holding was designed to ensure that statements given were the "product of free choice." At one point, the Court stated:

> In these cases, we might not find the defendant's statements to have been voluntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police investigation procedures . . . the fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

384 U.S. 436, 457 (1966).

[47] 297 U.S. 278 (1936).

[48] *See id.*

[49] 451 U.S. 477 (1981).

custodial detainee who had demanded an attorney the night before and was reapproached the following morning in his cell and told that he "had to" talk to detectives even though no attorney had been provided for him.[50] During the forced meeting, the detectives played a tape recording of statements made by one of Edwards' co-defendants.[51] After hearing the tape, Edwards made several incriminating statements, which then were used to convict him at trial.[52]

The Supreme Court reversed, and in doing so, formulated a rule to govern the reopening of communication between police and suspect once the *Miranda* right to counsel has been invoked. The Court held that once a suspect has invoked his right to counsel, he no longer is subject to further interrogation until counsel is provided, or unless the suspect initiates further communication with the police himself.[53] This rule, designed to prevent police officers from badgering detainees into changing their minds about remaining silent,[54] became the benchmark for the Hawaii Supreme Court's decision in *State v. Brezee*.[55]

IV. The Right to the Assistance of Counsel: Historical Perspective

From the beginning, the drafters of the sixth amendment recognized the need for an attorney to present an accused's best defense at trial.[56] What the drafters could not have envisioned was the need for an attorney's assistance at lineups,[57] interrogations[58] and other confrontations between the accused and accuser along the road to trial.[59] However, with sophisticated police technology

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[50] *Id.* at 479.

[51] *Id.* at 480.

[52] *Id.*

[53] *Edwards* was an attempt to answer the question left unresolved by Miranda v. Arizona, 384 U.S. 436 (1966), namely, when and under what circumstances custodial interrogation could resume once a suspect has invoked her right to counsel. *See Edwards*, 451 U.S. at 484. *See also* United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982) (*Edwards* not applicable where defendant not in custody between first invocation of right to counsel and subsequent interrogation); Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982) (*Edwards* invalidates confession of suspect continuously in custody between first invocation of right to counsel and subsequent interrogation the following day).

[54] Oregon v. Bradshaw, _ U.S. _, 77 L. Ed. 2d 405, 411, 103 S. Ct. 2830 (1983).

[55] 66 Hawaii at 162, 657 P.2d at 1044 (1983).

[56] *See* W. Beaney, The Right to Counsel in American Courts (1955). *See also* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-45 (1965).

[57] *See* United States v. Wade, 388 U.S. 218 (1967) (accused is entitled to assistance of counsel at post-indictment lineup).

[58] *See* Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion) (for sixth amendment purposes, adversary process does not begin until initiation for formal judicial proceedings. Until then, no right to counsel under the sixth amendment).

[59] *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel at trial applies to misdemeanors resulting in imprisonment); Gideon v. Wainright, 372 U.S. 335 (1963) (counsel

and an increasingly complicated judicial system, the Supreme Court has come to recognize the need for the guiding hand of counsel long before the trial itself.[60] During the 1960's and 1970's several decisions had major impact on the application of the sixth amendment right to the assistance of counsel in the pretrial setting. Among them were *Massiah v. United States*,[61] *Escobedo v. Illinois*,[62] and *Brewer v. Williams*.[63]

In 1964, the United States Supreme Court handed down its landmark *Massiah*[64] decision, which held that any incriminating statements deliberately elicited from an indicted defendant in the absence of counsel were inadmissible at trial.[65] Massiah had been indicted on narcotics charges and while released on bail, had made several incriminating statements to a co-defendant who had lured him into talking about their case.[66] This co-defendant had agreed to cooperate with federal agents,[67] who then eavesdropped on the incriminating conversation and used Massiah's words at trial to convict him.[68]

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must be provided at state felony trials for noncapital offenses); *cf.* Scott v. Illinois, 440 U.S. 367 (1979) (no right to counsel at trial when imprisonment is authorized by law but not imposed).

[60] The Court has referred to indictment, rather than formal charge, as marking the onset of adversary judicial proceedings, but subsequent cases have made it clear that this line is movable. *See* Brewer v. Williams, 430 U.S. 387, 398 (1977) (sixth amendment right attached upon filing of formal charge).

[61] 377 U.S. 201 (1964).

[62] 378 U.S. 478 (1964).

[63] 430 U.S. 387 (1977).

[64] Perhaps the clearest in-depth analysis of *Massiah* and its progeny is that of Professor Yale Kamisar. *See* Kamisar, *Brewer v. Williams, Massiah and Miranda: What is Interrogation? When Does It Matter?*, 67 GEO. L.J. 1 (1978). Professor Kamisar suggested that the so-called "indictment rule," while announced for the first time in *Massiah*, was not unexpected. Five years earlier, in Spano v. New York, 360 U.S. 315 (1959), the Court appeared ready to hand down the rule. In separate concurring opinions, Justices Douglas and Stewart observed that once a person is formally charged or adversary proceedings have begun, his right to the assistance of counsel has attached. 360 U.S. at 325-26 (Douglas, J., concurring); 360 U.S. at 327 (Stewart, J., concurring). *See* Kamisar, *supra*, at 34.

[65] 377 U.S. at 206. Professor Kamisar suggested that the "clear rule of *Massiah* . . . is that once adversary proceedings have commenced against an individual, he has a right to legal representation *whether or not* the government interrogates him." *See* Kamisar, *supra* note 64, at 33.

[66] 377 U.S. at 201-03 (1964). Massiah had retained an attorney and pled not guilty.

[67] *Id.* at 202-03. The co-defendant's car had been equipped with a hidden radio transmitter. A federal agent then used a receiving device to eavesdrop on the conversation. *Id.*

[68] *Id.* at 202. In the United States District Court, *Massiah* was treated as though it were a routine fourth amendment "electronic eavesdropping" case. *See* Kamisar, *supra* note 64, at 34 (citing Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 56-57 n.32). According to Professor Kamisar, the United States Court of Appeals, Second Circuit, considered it "too odd" to exclude statements obtained from an individual who, at the time, was "speaking freely and without restraint of any kind." United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962) (Lombard, C. J.). Kamisar, *supra* note 64, at 34.

The Court reversed Massiah's conviction,[69] seeing little difference between the statements secretly elicited from Massiah and the confession "deliberately elicited" by police through an all-night interrogation in *Spano v. New York*.[70] In both cases, the Court noted, the defendants' chances of receiving fair trials had been jeopardized by the denial of their right to the assistance of counsel.[71]

Decided only five weeks after *Massiah*, *Escobedo v. Illinois*[72] held that the sixth amendment right to counsel applied not only to post-indictment situations, but to any pretrial interrogation where the focus was upon a particular suspect and the purpose was to elicit incriminating information.[73] The defendant in *Escobedo* had been detained and questioned despite many attempts to speak with his retained attorney.[74] Police also had refused the attorney's requests to speak with Escobedo.[75] Finally, after being told the attorney did not want to speak with him, Escobedo gave a confession that was used at trial to convict him.[76] The Court reversed, noting that the accused's right to counsel began when the investigation no longer was a general inquiry, but had begun to center on a particular accused in custody.[77]

More than a dozen years later, *Massiah* and its progeny formed the cornerstone of *Brewer v. Williams*.[78] In *Brewer*, a police detective used psychological trickery to induce a mentally ill defendant to reveal the location of a murdered

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[69] 377 U.S. 206.

[70] 366 U.S. 315 (1959).

[71] In *Massiah*, the majority noted that government agents had jeopardized the accused's chances for fair representation at trial by using uncounseled preliminary procedures to obtain evidence needed for conviction. 377 U.S. at 206.

[72] 378 U.S. 478 (1964).

[73] For the *Escobedo* Court, it was sufficient that Escobedo was in custody and that the purpose of his being interrogated was to "get him to confess his guilt." *Id.* at 485-86. The Court discounted the fact that formal charges had not been filed against Escobedo. *Id.*

[74] *Id.* at 481. The Court held that Escobedo was entitled under the sixth amendment to be advised by his lawyer of his fifth amendment privilege against self-incrimination.

[75] *Id.* at 480-81.

[76] *Id.* at 481-83.

[77] *Id.* at 492 (Stewart, J., dissenting). Justice Stewart, who wrote the majority opinion in *Massiah*, 377 U.S. 201 (1964), dissented in *Escobedo*. At one point in his dissent, Justice Stewart observed:

> Under our system of criminal justice, the institution of formal, meaningful judicial proceedings, by way of indictment, information or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial.

Id. at 493-94 (Stewart, J., dissenting).

[78] 430 U.S. 387 (1977). Interestingly, Williams' conviction had been appealed on grounds that the accused's rights under *Miranda* were violated. However, the Supreme Court, in a opinion by Justice Stewart, quickly disposed of the *Miranda* issue by simply stating there was "no need" to review it. *Id.* at 397. Instead, the Court went straight to *Massiah*, finding the two cases "constitutionally indistinguishable." *Id.* at 400.

child's body.[79] As a result of this disclosure, the defendant was convicted of murder.[80] However, the Court affirmed a writ of habeas corpus,[81] noting that the detective had "deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him."[82] The *Brewer* Court further held that the State had the responsibility of proving that the accused had intentionally relinquished his right to counsel, and that this standard applied both at trial and at any time

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[79] *Id.* at 392-93. The Hawaii Supreme Court in *Brezee*, 66 Hawaii at 165, 657 P.2d at 1046 (1983), paid considerable attention to the factual differences between *Brezee* and *Brewer*. Williams, who had been arrested in Davenport, Iowa, for the Christmas Eve murder of a child in Des Moines, was driven to Des Moines by Captain Leaming. 430 U.S. at 392. Williams had retained attorneys in both cities. *Id.* at 391. Captain Leaming's promise to Williams' Davenport lawyer that his client would not be questioned en route to Des Moines, *id.* at 392, was factually important to the *Brezee* court inasmuch as the detective had made no such promise to Brezee's attorney. *See Brezee*, 66 Hawaii at 165, 657 P.2d at 1045-46. In the *Brewer* case, the evidence was that Captain Leaming, en route to Des Moines, addressed Williams as "Reverend" and delivered the famous "Christian Burial Speech" as follows:

> I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get snow on top of it you yourself may be unable to find it. And since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel that we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

430 U.S. at 392-93.

[80] 430 U.S. at 394.

[81] *Id.* at 406. The federal district court had granted habeas corpus relief on the ground that Williams' statements were involuntary and obtained in violation of his *Miranda* rights. The federal district court further held that Williams' sixth amendment right to counsel, secured through *Massiah*, also had been violated. *See* 375 F. Supp. at 175. The United States Court of Appeals for the Eighth Circuit affirmed. *See* Williams v. Brewer, 509 F.2d 227, 233-34 (8th Cir. 1975).

[82] 430 U.S. at 401. Justice Stewart wrote for the majority: "The clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." *Id.* Professor Kamisar, *supra*, note 64, at 33, observed that the "rule of *Massiah*" quoted by Justice Stewart in *Brewer*, actually "is the clear rule of *Miranda* when, as was Williams, the individual being interrogated is in 'custody'—regardless of whether adversary proceedings have commenced—and especially when, as did Williams, the individual asserts his right to counsel. The clear rule of *Massiah*, [he continued,] "is that once adversary proceedings have commenced against an individual, he has a right to legal representation *whether or not* the government 'interrogates' him."

following the filing of formal charges.[83]

A. *The Sixth Amendment: Hawaii Case Law*

In *State v. Brezee*,[84] neither the majority nor the dissenting opinions relied directly on Hawaii case law. Although the court has ruled on the admissibility of confessions arising out of the pre-charge, pre-appointment of counsel setting,[85] there was little in the way of precedent to provide guidance on the facts as presented in *Brezee*. The right-to-counsel cases in the pretrial setting have centered largely on two fact patterns: the jail plant[86] and the waiver prior to plea bargaining.[87]

For example, in *State v. Krause*,[88] the Hawaii Supreme Court applied the principles of *Massiah*[89] and *United States v. Henry*[90] to post-indictment communications between a suspect and the authorities in the "secret informant" context. In *Krause*,[91] the Hawaii court found no sixth amendment violation when incriminating statements reported by Krause's cellmate to the authorities were used against Krause at trial.[92] The court distinguished *Krause* from *Mas-*

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[83] 430 U.S. at 404. Williams was retried and convicted of first-degree murder. The United States Supreme Court ultimately upheld Williams' conviction on the ground that the victim's body would inevitably have been discovered even if Williams' rights had not been violated. *See* Nix v. Williams, 52 U.S.L.W. 4732 (U.S. June 11, 1984), *rev'g* 700 F.2d 1164 (8th Cir. 1983)

[84] 66 Hawaii 162, 657 P.2d 1044 (1983).

[85] *See, e.g.*, State v. Amorin, 61 Hawaii 356, 604 P.2d 45 (1979) (arresting officer's on-the-scene inquiry as to who owned detained car, without first having given *Miranda* warnings rendered statements inadmissible); State v. Kalai, 56 Hawaii 366, 537 P.2d 8 (1975) (individual being subjected to custodial interrogation may not ask questions prior to *Miranda* warnings being given).

[86] *See* State v. Krause, 64 Hawaii 522, 644 P.2d 964 (1982). For detailed discussion, *see infra* notes 89-94 and accompanying text.

[87] *See* State v. Dicks, 57 Hawaii 46, 549 P.2d 727 (1976). For detailed discussion, *see infra* notes 95-101 and accompanying text.

[88] 64 Hawaii 522, 644 P.2d 964 (1982).

[89] 377 U.S. 201 (1964).

[90] 447 U.S. 264 (1980). Henry had been indicted for armed robbery and was held in the city jail pending trial. Shortly after he was incarcerated, government agents contacted an informant, who also happened to be confined in the same cellblock as Henry. Agents told the informant to listen for statements made by Henry, but not to initiate any questioning. Statements obtained by the informant then were used at Henry's trial. *Id.* at 265-67. The Court held that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274.

[91] 64 Hawaii 522, 644 P.2d 964 (1982).

[92] *Id.* Krause had been indicted in Hawaii for murder and was subsequently arrested and jailed by the F.B.I. in Alaska. While in jail, Krause confided details of the murder to a jailmate,

siah and *Henry* on the ground that the latter cases involved informants who had been promised benefits in exchange for information.[93] Although *Krause* differed factually from *Brezee*, the *Krause* court emphasized that the accused and not the informant had initiated the incriminating conversations.[94]

In *State v. Dicks*,[95] where the defendants waived their right to court-appointed counsel and pled guilty to theft,[96] the Hawaii Supreme Court established that the sixth amendment had an independent source in the state constitution.[97] In *Dicks*, the court set forth the traditional *Johnson v. Zerbst*[98] totality of circumstances test as the standard for determining whether waiver of the right to counsel was "voluntarily and intelligently undertaken."[99] *Zerbst* suggested that the courts consider the "age, education and mental capacity of the defendant, his background and experience, and his conduct at the time of the alleged waiver."[100] Although the sixth amendment right to counsel has an in-

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who then took it upon himself to report the inculpatory conversation to the authorities.

[93] The Hawaii Supreme Court distinguished *Krause* from *Henry*, 477 U.S. 264 (1980) on the grounds that no agency relationship existed between informant and government, and if any agreement existed, it was made "after the informant had the information, and the informant was to receive his freedom for testifying instead of eliciting information." 64 Hawaii at 526, 644 P.2d at 968.

[94] 64 Hawaii at 526, 644 P.2d at 967.

[95] 57 Hawaii 46, 549 P.2d 727 (1976).

[96] *Id.* at 46, 47. Dicks and Hedgepath had been arrested at a Maui restaurant and charged with burglary. At their plea and arraignment hearing, both defendants waived counsel and waived indictment and then signed and entered guilty pleas. After a motion to set aside their guilty pleas was later denied, Dicks and Hedgepath appealed, claiming that the trial judge had erred in accepting their waiver of counsel.

[97] *Id.* at 47. Article I, Section 11 of the Hawaii State Constitution, the section cited by the *Dicks* court, was subsequently amended and renumbered in 1978 to become Article I, Section 14. This section now states:

> Section 14. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

[98] 304 U.S. 458 (1938).

[99] *Dicks*, 57 Hawaii at 48, 549 P.2d at 729 (quoting *Zerbst*, *supra* note 98).

[100] *See, e.g.*, Carvalho v. Olim, 55 Hawaii 336, 519 P.2d 892 (1974) (guilty plea invalid where government failed to show that defendant was fully aware of ramifications of refusing counsel and testimony does not indicate trial judge adequately explained what waiver of counsel entailed); *cf.* Reponte v. State, 57 Hawaii 354, 556 P.2d 577 (1976) (waiver of counsel was valid when unconfined 19-year-old refused an offer by the court to provide him with an attorney and when prosecutor had explained the charge and the defendant affirmed his understanding).

dependent source within the Hawaii Constitution, the court has not yet expanded constitutional protection beyond the standard set by the United States Supreme Court.[101]

V. THE DECISION

In *State v. Brezee*,[102] the Hawaii Supreme Court confronted two critical issues:

(A) Whether *Brezee* was a fifth amendment case controlled by *Edwards v. Arizona*[103] or a sixth amendment case controlled by *Brewer v. Williams*,[104] and

(B) Whether Keith Brezee's fifth amendment right against compelled self-incrimination was violated by the taking of his inculpatory statement.[105]

The dissenting opinion raised a third issue, namely, whether Detective Lum violated Keith Brezee's sixth amendment right to the assistance of counsel by deliberately eliciting a confession.[106]

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[101] In State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971), the Hawaii Supreme Court used the Hawaii Constitution to extend *Miranda* protections to exclude use of improperly obtained confessions for impeachment.

[102] 66 Hawaii 162, 657 P.2d 1044 (1983).

[103] 451 U.S. 477 (1981). In *Edwards*, the Court expressly based its holding on *Miranda*. *Id.* at 480-81.

[104] 430 U.S. 387 (1977). Although *Edwards* was expressly decided on fifth amendment *Miranda* grounds, 451 U.S. at 480, Edwards' attorney also had argued that his client's sixth amendment right to counsel was violated. However, under Arizona rules, a prosecution begins by indictment or complaint. In Edwards' case, police had filed a complaint with the magistrate at the time of the interrogation, but the magistrate had not yet filed the complaint in the court of general jurisdiction. *See Edwards*, 451 U.S. at 480 n.7. This footnote is particularly important in terms of analyzing *Brezee*, 66 Hawaii 162, 657 P.2d 1044 (1983), inasmuch as it clearly shows that the Supreme Court recognizes a demarcation between rights that attach before and after formal charge. *See also Edwards*, 451 U.S. at 484 n.8, where the Court held that "[i]n Brewer v. Williams, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977), where, as in Massiah v. United States, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information."

[105] 66 Hawaii 162, 657 P.2d 1044 (1983). The court framed the issue in terms of whether the defendant's right to counsel was violated by the state in the statements taken from him. *Id.*

[106] *Id.* at 167, 657 P.2d at 1047 (Nakamura, J., dissenting). Unlike the majority, which decided *Brezee* in terms of an accused who first invoked his *Miranda* rights and then changed his mind, 66 Hawaii at 166, 657 P.2d at 1046, the dissenting opinion applied the "deliberate elicitation" standard of *Massiah* and *Henry*, 66 Hawaii at 168, 657 P.2d at 1047-48 (Nakamura, J., dissenting).

A. Edwards *or* Brewer: *Which Case Controlled?*

Brezee[107] gave the Hawaii Supreme Court an opportunity to expound on how it will apply fifth and sixth amendment principles to future right to counsel cases. While the court adopted *Edwards v. Arizona*[108] and rejected *Brewer v. Williams*[109] as the applicable case law, it did so by resolving a factual, rather than a constitutional,[110] question, namely: whether the accused or the police initiated the confession-producing conversation.[111] Nevertheless, despite the missing constitutional analysis—or perhaps because of it—*Brezee* provides important insights into how the Hawaii Supreme Court actually will decide right to counsel cases within the jailhouse setting.

The Hawaii Supreme Court's application of the *Edwards* rule[112] to the *Brezee* facts signals an intention to create a bright line rule[113]—one standard for all custodial interrogations regardless of the "critical stage,"[114] the reason for cus-

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[107] 66 Hawaii at 162, 657 P.2d at 1044 (1983).

[108] 451 U.S. 477 (1981).

[109] 430 U.S. 387 (1977).

[110] *See generally*, State v. Brezee, 66 Hawaii 162, 657 P.2d 1044 (1983). The court decided *Brezee* on the basis of a generic right to counsel, without ever stating specifically whether it was deciding a fifth or sixth amendment issue, or both.

[111] The Hawaii Supreme Court found *Brezee* to be completely unlike *Brewer*, 430 U.S. 387 (1977), inasmuch as *Brewer* "dealt with the initiation of further contact by the police rather than the defendant, and clearly violated the right to counsel." 66 Hawaii at 165, 657 P.2d at 1046. By implication, the Hawaii Supreme Court appears to be taking an initiation-based standard without regard to whether a case articulates fifth or sixth amendment principles within the custodial setting.

[112] 451 U.S. at 482. The "initiates further communication" rule of *Edwards* was an effort on the part of the Hawaii Supreme Court to resolve the issue left unanswered in *Miranda*, namely when, and under what circumstances, custodial interrogation could resume after *Miranda* warnings are given and right to counsel is invoked.

[113] The Hawaii Supreme Court has expressly rejected bright line rules in other jurisdictional issues. *See, e.g.*, State v. Elliott, 61 Hawaii 492, 605 P.2d 930 (1980) (validity of warrantless searches must be determined on a case-by-case basis).

[114] United States v. Ash, 413 U.S. 300, 321 (1973) (Stewart, J., concurring) (defendant entitled to assistance of counsel not only at trial but at all "critical stages" of his prosecution). *See also* Kirby v. Illinois, 406 U.S. 682, 690 (1972) (plurality opinion) (right to counsel does not apply to identification procedures that take place before start of adverse judiciary proceedings). In *Ash*, 413 U.S. 300, Justice Stewart explained "critical stage" as follows:

> The requirement that there be a "prosecution" means that this constitutional "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [the defendant]. . . ." It is this point . . . that marks the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 321-22 (1973) (Stewart, J., concurring) (quoting from his plurality opinion in *Kirby*, 406 U.S. 682, 688-90 (1972)).

tody[115] or the ongoing involvement of retained or appointed counsel.[116] In this regard, the court's pointed avoidance of either the fifth or sixth amendments or to the constitutional values underlying *Edwards* and *Brewer* is particularly telling.[117] It strongly suggests that the future admissibility of uncounseled custodial confessions will turn less on knotty technical distinctions between the rights guaranteed under the fifth and sixth amendments and more on the actual words and deeds of the accused.

Edwards v. Arizona[118] established a two-part test to determine whether an accused has waived his right to counsel under the standards set forth in *Miranda v. Arizona*.[119] The first part of the test is the "initiates further communication" standard relied upon by the Hawaii Supreme Court in its *Brezee* decision.[120] The second part was first set out in a footnote in *Edwards*[121] and later embodied into the text of *Oregon v. Bradshaw*,[122] the United States Supreme Court's 1983 sequel to *Edwards*. It calls for a separate inquiry into whether the claimed waiver of the rights to silence and counsel was "knowing and intelligent and found to be so under the totality of circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."[123]

This section will look at *Brezee*[124] in the context of the first prong of the *Edwards* test. It will then examine the future application of *Brezee* in light of the more recent *Bradshaw* case.

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[115] 66 Hawaii at 163, 657 P.2d at 1044. The crime for which Brezee was arrested on June 22, 1980 was unrelated to the Damas murder.

[116] Several state courts, including those of New York and Oregon have developed special rules that guide police-accused interactions once counsel has been either retained or appointed. *See, e.g.*, People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). For fuller discussion of *Hobson* and the other New York and Oregon cases, *see infra* notes 194 to 203 and accompanying text.

[117] *See Brezee*, 66 Hawaii at 165, 657 P.2d at 1046.

[118] 451 U.S. 477 (1981).

[119] 384 U.S. 436 (1966).

[120] *See supra* note 6.

[121] 451 U.S. at 486 n.9. The Court noted that in the event an officer, during the course of an accused-initiated conversation, does or says something that clearly would be interrogation, "the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with authorities." *Id.*

[122] 103 S. Ct. 2830 (1983).

[123] *Bradshaw*, 103 S. Ct. 2834 (quoting *Edwards*, 451 U.S. at 486 n.9) (emphasis omitted).

[124] 66 Hawaii 162, 657 P.2d 1044 (1983).

1. *The* Edwards *Rule Part 1: Who Speaks First?*

Robert Edwards, charged with robbery, burglary and murder, cut off custodial questioning by requesting an attorney to help him "make a deal."[125] The following day, Edwards was told he "had to" talk to detectives who had come to interview him in his cell.[126] After receiving his *Miranda* warnings and listening to a tape of his co-defendant's confession, Edwards agreed to discuss his own involvement in the crimes.[127]

Keith Brezee, indicted for murder and attempted rape, refused to talk with a police detective who had come to interview him in his cell and instead asked for his attorney.[128] Before the attorney could be found, Brezee changed his mind and offered to discuss his involvement in the crimes.[129]

The United States Supreme Court reversed Edwards' conviction on the ground that the initiation of further dialogue by the police violated Edwards' fifth and fourteenth amendment rights.[130] On the other hand, the Hawaii Supreme Court affirmed Brezee's conviction on the ground that Brezee, and not the police, had initiated the discussion.[131]

Although the factual similarities between the two cases are clear, the question remains as to what difference, if any, Brezee's status as an indictee should make in the application of *Edwards*.[132] The *Edwards* Court considered the actual formal charge process as an important line of demarcation in the attachment of constitutional rights.[133] The Court affirmed that a separate sixth amendment right to counsel attaches "whenever an accused has been indicted or adversary criminal proceedings have otherwise begun and that this right is violated when admissions are subsequently elicited from the accused in the absence of counsel."[134] The Court further recognized that the source of this sixth amendment right lies in the *Massiah*, rather than the *Miranda*, line of cases.[135]

In *Brezee*, the Hawaii Supreme Court looked only to the *Edwards-Miranda*

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[125] Edwards v. Arizona, 451 U.S. at 477 (1981). After Edwards had been given his *Miranda* rights, he denied involvement in the crimes and then asked to make a deal. He was given the number of the county attorney but then stated he wanted an attorney before dealing. *Id.* at 478.

[126] *Id.* at 478-79.

[127] *Id.* at 479.

[128] *Brezee*, 66 Hawaii at 163, 657 P.2d at 1045.

[129] *Id.*

[130] *Edwards*, 451 U.S. at 480.

[131] *Brezee*, 66 Hawaii at 164, 657 P.2d at 1046.

[132] 451 U.S. 477 (1981). In *Edwards*, the incriminating statements were obtained after the accused's warrant arrest, but prior to the filing of formal charges. *Id.* at 480 n.7.

[133] *Id.* The *Edwards* Court declined to decide whether the defendant's right to counsel under the sixth and fourteenth amendments was violated.

[134] *Id.*

[135] *Id.*

line of cases,[136] suggesting that the court considers these protections sufficient to safeguard the rights of an accused in custody regardless of whether formal charges have been filed.[137] This issue has not been directly addressed by the United States Supreme Court or by the courts of other federal and state jurisdictions which have tended to analyze post-formal charge custodial interrogation cases in terms of *Massiah*[138] and pre-charge cases in terms of *Miranda*.[139] Nevertheless, to the extent that the *Edwards* "initiates further communication" rule was intended to be a shield rather than a sword,[140] the Hawaii Supreme Court deserves commendation for embracing the standard and applying it as a generalized umbrella of protection over custodial communications.

In *Brezee*,[141] the defendant's words and deeds were unequivocal: he invited the police detective to return to his jail cell and then offered to make a statement.[142] The *Brezee* case thus leaves unanswered the question of how broadly or narrowly the Hawaii Supreme Court will define "initiation of further communication" in future cases. In this regard, Justice Powell's criticism of the *Edwards* rule as being "undue and undefined"[143] is well taken, particularly in light of

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[136] 66 Hawaii at 164, 165, 657 P.2d at 1045. The Hawaii court, while acknowledging that Brezee was in custody for an unrelated offense, made no mention of the fact that Brezee had been indicted for the Damas murder months earlier. The earlier indictment and Brezee's refusal to make a statement at that time were central to the dissent's concentration on the lurking sixth amendment issue that was left unexplored by the majority. 66 Hawaii at 169, 657 P.2d at 1048 (Nakamura, J., dissenting).

[137] *Id.*

[138] *See, e.g.*, United States v. Moschiano, 695 F.2d 236 (7th Cir. 1982) (where there is investigation into ongoing or separate criminal activity, *Massiah* does not prohibit the use of uncounseled post-indictment statements constituting criminal acts unto themselves); United States v. Capo, 693 F.2d 1330 (11th Cir. 1982) (defendant's arrest and indictment on marijuana possession did not lower a sixth amendment right to counsel obstacle to prevent government from using informants to gather information on defendant's criminal involvement in larger conspiracy). In In re Michael B., 125 Cal. App. 3d 790, 178 Cal. Rptr. 291 (1981), the California court drew a distinction between the questioning about charged and uncharged offenses. It held that in some situations, police may lawfully question an accused in custody who has been formally charged and given counsel about uncharged offenses out of the attorney's presence. However, the court noted that the lawfulness of such interrogation depends on how closely related the uncharged offenses are to the charged offenses for purposes of *Massiah* protection.

[139] *See* United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) (statements obtained by F.B.I. during brief background interview after assassination attempt on President Reagan were inadmissible). *See also* State v. Beaupre, 459 A.2d 233 (N.H. 1983) (police inquiry as to whether defendant wanted to talk was custodial interrogation under *Edwards*). Significantly, in *Beaupre*, the court further found a violation of the right to counsel when a police officer remained in the room during an attorney-client consultation.

[140] *See* Oregon v. Bradshaw, 103 S. Ct. at 2834. (*Edwards* rule meant to be prophylactic).

[141] 66 Hawaii 162, 657 P.2d 1044 (1983).

[142] *Id.* at 163, 657 P.2d at 1045.

[143] *See* Edwards v. Arizona, 451 U.S. 477, 491 (1981) (Powell, J., concurring). In his concur-

the United States Supreme Court's subsequent holding in *Oregon v. Bradshaw*,[144] a case commentators have viewed as the most important *Miranda*-based decision since *Edwards*.[145]

2. Oregon v. Bradshaw:[146] Edwards *Tested*

James Edward Bradshaw, a suspect in a police criminal investigation, cut off custodial interrogation by invoking his right to counsel.[147] Later, while being transferred from the police station to jail, Bradshaw asked a police officer, "Well, what is going to happen to me now?"[148] After telling Bradshaw that he did not have to talk, the officer discussed where Bradshaw was going and what charges were pending.[149] The officer then suggested that Bradshaw take a polygraph examination and Bradshaw agreed.[150] After receiving his *Miranda* warnings, Bradshaw took the polygraph test the following day.[151] When the examiner suggested Bradshaw was lying, Bradshaw confessed his involvement in the crime.[152]

An Oregon trial court subsequently convicted Bradshaw of manslaughter after finding a valid waiver of his *Miranda* rights.[153] However, the Oregon Court of Appeals reversed, holding that inquiring "[w]ell, what is going to happen to me now?" did not constitute a valid waiver of the right to counsel and subsequent statements arising out of this conversation should have been excluded under the *Edwards* rule.[154]

The United States Supreme Court disagreed, holding that the Oregon Court of Appeals had misapplied *Edwards*.[155] Justice Rehnquist, writing for a four-

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ring opinion, Justice Powell noted that while he agreed with the principles of the decision, "I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: 'initiation.' " *Id.*

[144] 103 S. Ct. 2830 (1983) (an accused who asked police officer, "well, what is going to happen to me now?" and accepting an offer to take a polygraph examination was held to have initiated further contact under the *Edwards* rule).

[145] *Bradshaw* was the subject of an address by Professor Kamisar before the Fifth Annual Supreme Court Review and Constitutional Law Symposium. For fuller discussion, see 34 CRIM. L. REP. 2101-02 (1983).

[146] 103 S. Ct. 2830.

[147] *Id.* at 2833.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* In criticizing the Oregon Court of Appeals for misapplying the *Edwards* rule, the Court

justice plurality,[156] held that Bradshaw's inquiry "evinced a willingness and a desire for a generalized discussion about the investigation and was not merely a necessary inquiry arising out of the incidents of the custodial relationship."[157] Justice Rehnquist pointed out that some inquiries, "such as a request for a drink of water or a request to use the telephone . . . are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation."[158]

Justice Powell, who agreed with the ends but opposed the means in *Edwards*,[159] found himself in the same position in *Bradshaw*.[160] By requiring a threshold "who spoke first" inquiry, Justice Powell argued that the Court was simply creating confusion for the lower courts.[161] He argued that detained defendants frequently converse with many different persons, including guards, police officers and other prisoners and "[r]arely can a Court properly focus on a particular conversation, and intelligently base a judgment on the simplistic inquiry as to who spoke first."[162]

Significantly, *Brezee* was cited in Justice Marshall's strongly worded dissent,[163] which argued that the *Edwards* Court intended initiation to mean "communication or dialogue about the subject matter of the criminal investigation" and not just a generalized discussion.[164] Justice Marshall then went on to note that "[t]he safeguards identified in *Edwards* hardly pose an insurmountable obstacle to an accused who truly wishes to waive his rights after invoking his right to counsel."[165] He then concluded that a waiver can be established "only when the accused himself reopens the dialogue about the subject matter of the criminal investigation," and he cited *Brezee* as one of the several cases in

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stated: "[w]e did not there hold that the 'initiation' of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place unless the accused himself initiates further communication, exchanges, or conversations with the police."

[156] Oregon v. Bradshaw, 103 S. Ct. 2830, 2836 (Powell, J., concurring) (Rehnquist, J., with Burger, C.J., White and O'Connor, J.J.).

[157] *Id.* at 2835.

[158] *Id.*

[159] *Id.* at 2836 (Powell, J., concurring).

[160] *Id.* at 2837 (Powell, J., concurring). Justice Powell argued that bifurcating the confession process into a two-step "initiation" and "voluntariness of waiver" inquiry was not mandated either by *Edwards* or by any other Supreme Court decision. *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 2839 (Marshall, J., dissenting, with Brennan, Blackmun and Stevens, J.J.).

[164] *Id.* at 2840.

[165] *Id.* at 2839.

which the "lower courts have had no difficulty in identifying this standard."[166]

Thus if the Hawaii Supreme Court in *Brezee* is indeed setting a bright line rule, its clarity well may depend on the extent to which the court embraces *Bradshaw*. Applying the *Bradshaw* interpretation of the *Edwards* rule to situations where formal proceedings have begun and counsel has been either retained or appointed could unwittingly eliminate the protections created by *Edwards* and produce unwelcome and undesirable consequences. Conceivably, a *Bradshaw* waiver could be held valid in a situation where the defendant has never talked to his attorney and never offered to make a statement.[167]

For example, what if Brezee, after asking to speak with his attorney, had recalled the detective to his cell and asked, "When am I going to be released?" Suppose, after a general discussion of bail and trial dates, the detective had said, "Look, Brezee, you'll feel a lot better if you get it off your chest." Brezee then agrees without ever talking to his attorney and waives his *Miranda* rights both orally and in writing. While such a scenario could conceivably meet the *Bradshaw* standard for waiver of the fifth amendment right against self-incrimination, it is questionable whether it would rise to the level of knowledge and intelligence required to effect a waiver of the sixth amendment right to the assistance of counsel.[168]

B. The Court Addresses the Waiver Issue

The Hawaii Supreme Court had little difficulty deciding that Keith Brezee had initiated further communication with the police, and that in doing so, he had opened the door to further questioning.[169] The remaining issue before the

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[166] *Id.* Justice Marshall's citation of *Brezee* as the proper application of the *Edwards* standard is interesting in light of the fact that Keith Brezee had been formally charged several months earlier. The *Edwards* Court made it clear that the institution of formal charges triggered a separate sixth amendment inquiry of which *Edwards* itself was not a part. *See* Edwards v. Arizona, 451 U.S. 471, 480-84, nn. 7 & 8 (1981).

[167] In *Brezee*, the Hawaii Supreme Court hinted that Brezee's confession might have been held valid even if efforts to reach the attorney had been unsuccessful. At one point in its opinion, the court stated, "[i]n this case, the record is clear that the police scrupulously honored the [*Edwards* principles] and that it was the appellant who initiated further communications with the police by asking that Detective Lum come back to his cell and by informing him that he wished to make a statement. Even then, before interrogating the appellant as to the crime, Detective Lum made further and successful efforts to contact appellant's attorney." 66 Hawaii at 164, 657 P.2d at 1046.

[168] *See* Brewer v. Williams, *supra*, notes 78 & 79 (once sixth amendment right to counsel has accrued, statements deliberately elicited in the absence of counsel are inadmissible). *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (statements elicited by police after indictment inadmissible even though counsel has not yet been appointed).

[169] 66 Hawaii 162, 164, 657 P.2d 1044, 1046 (1983).

court was whether Brezee's actions also constituted a valid waiver of his right to have an attorney present during questioning.

The Hawaii Supreme Court had equally little difficulty resolving the waiver issue. According to the evidence, Brezee had done more than agree to talk: he waived his *Miranda* rights orally and twice in writing,[170] and he did so minutes after his attorney had advised him to remain silent.[171] On these facts, the court concluded that Brezee had effectively waived his right against self-incrimination and that any claimed violation of his right to counsel was meritless.[172] The court further held that under these circumstances, the detective was not obligated to honor the attorney's request that the interrogation be delayed until he could be present.[173]

Significantly, the Hawaii Supreme Court concluded that Brezee had waived his right against self-incrimination without stating the standard it used to measure the validity of the waiver.[174] While the court applied the *Edwards* "initiates further communication" rule to justify the reopened dialogue between the detective and Brezee, it did not expressly apply the second half of the *Edwards* test, namely that the government still bears the burden of proving that the "purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."[175] The following section will examine Keith Brezee's waiver in light of the second prong of the *Edwards* test.

1. *The* Edwards *Rule, Part 2: Knowing and Intelligent Waiver*

The Hawaii Supreme Court in *State v. Santiago*[176] held that the protections which the United States Supreme Court enumerated in *Miranda v. Arizona*[177] have an independent source in the Hawaii Constitution's privilege against self-

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[170] *Id.* at 163, 657 P.2d at 1045.

[171] *Id.* The fact that Keith Brezee spoke with his attorney and then proceeded to disregard the attorney's advice undoubtedly weighed heavily in the mind of the court. At one point in its opinion, the court stated that "[t]he attorney, when contacted, spoke to the appellant and advised him not to make a statement. The appellant nevertheless elected to make such a statement." *Id.* at 164, 657 P.2d at 1046.

[172] *Id.* at 165, 657 P.2d at 1046.

[173] *Id.*

[174] *Id.* The court concluded only that "[a]fter requesting an attorney, appellant not only initiated further contact regarding a statement, but was actually advised by his attorney not to make such a statement and nevertheless proceeded. His contention that his right to counsel was violated is meritless."

[175] *Edwards*, 451 U.S. at 486 n.9.

[176] 53 Hawaii 254, 492 P.2d 657 (1971).

[177] 384 U.S. 436 (1966).

incrimination. In so holding, the court articulated a belief "that the privilege against self-incrimination bestows upon every accused the right to choose whether or not to confess to the commission of a crime."[178] In *Brezee*, the Hawaii Supreme Court embraces this concept of freedom of choice by holding the accused more strictly accountable for his or her acts.

While other Hawaii cases have clearly recognized the heavy burden the government must bear to establish an effective waiver of both fifth and sixth amendment rights,[179] *Brezee* signals an intent to shift part of that burden to defendants by holding them more strictly accountable for their acts. This shift deviates from the principle expressed in *Edwards* and *Bradshaw* that the government and not the accused must bear the burden of proving that the rights to silence and counsel were waived knowingly and intelligently according to the totality of the circumstances.[180] While never referring directly to the totality of the circumstances test, the Hawaii court's emphasis on Brezee's telephone conversation with his attorney and his subsequent disregard of his attorney's advice[181] suggest that the court implicitly took the second step necessary to establish a valid fifth amendment waiver under *Edwards* and *Bradshaw*.

VI. Dissenting View: Violation of the Right to the Assistance of Counsel

Despite the oral and written waivers and the rejection of the attorney's advice, Justice Nakamura argued that Keith Brezee's conviction should have been reversed on sixth amendment grounds.[182] He sharply criticized the court for relying solely on *Edwards v. Arizona*,[183] a fifth amendment case involving the privilege against self-incrimination,[184] and for failing to recognize that Brezee's sixth amendment right to the assistance of counsel had "unquestionably accrued" upon the filing of formal charges against him.[185]

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[178] *Santiago*, 53 Hawaii at 266.

[179] *See* State v. Tarumoto, 62 Hawaii 298, 300, 614 P.2d 397 (1980) (record must reflect that accused was offered counsel, but intelligently and understandingly rejected the offer; anything less is not a waiver); Wong v. Among, 52 Hawaii 420, 424, 477 P.2d 630 (1970) (courts are "most solicitous" to assure adequate legal representation and "grudgingly indulge in a strong presumption against waiver"). *But see* State v. Green, 51 Hawaii 260, 265, 457 P.2d 505 (1969) ("a court would be hard put to find that it is 'wise' or 'intelligent' (meaning 'smart') for a defendant to waive any of his rights in any case. If all unwise waivers were held void, there could never be an effective waiver.").

[180] *See, e.g., Bradshaw*, 103 S. Ct. 2830, 2834, *citing Edwards*, 451 U.S. at 486 n.9.

[181] *Brezee*, 66 Hawaii at 165, 657 P.2d at 1046.

[182] *Id.* at 168, 657 P.2d at 1047 (Nakamura, J., dissenting).

[183] 451 U.S. 477 (1981).

[184] *Brezee*, 66 Hawaii at 168, 657 P.2d at 1047 (Nakamura, J., dissenting).

[185] *Id.*

The dissent argued that Detective Lum, by approaching Brezee for a statement without first notifying his attorney,[186] by remaining at Brezee's side while he spoke on the telephone with his attorney,[187] and by refusing to postpone the taking of Brezee's statement until the attorney could be present,[188] interfered with Brezee's right to counsel in a constitutionally impermissible way. Under these circumstances, coupled with the inherently coercive surroundings of the homicide office, he argued that the record did not reflect a proper waiver of the sixth amendment right to counsel under the "stringent standards first enunciated in *Johnson v. Zerbst* and often reiterated thereafter."[189]

The following section will look at the dissenting opinion in light of both its philosophical underpinnings and the standards applied in other state and federal court jurisdictions.

A. *The Effective Assistance of Counsel*

According to Justice Nakamura, the signing of two waiver forms did not, as the majority suggested, constitute a valid waiver of the sixth amendment right to the assistance of counsel.[190] Waiver of the right to counsel under fifth amendment principles was not, he contended, a "dispositive factor" in a sixth amendment case.[191]

Embodied in the *Brezee* dissent is the traditional notion that an accused is entitled to an advocate who not only has legal training, but who will zealously defend his interests against equally zealous forces working to convict him.[192]

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[186] *Id.* at 172, 657 P.2d at 1050 (Nakamura, J., dissenting). In a footnote, Justice Nakamura cited DR 7-104 of the Hawaii Code of Professional Responsibility, which states:

> (A) During the course of his representation of a client a lawyer shall not:
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> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id. at n.6. Justice Nakamura argued that although the code applies only to lawyers, the conduct of the detective nevertheless violated the spirit of the disciplinary rule. Moreover, he argued, "a deputy prosecuting attorney was later implicated in the matter, and he aided and abetted the officer's successful attempt to obtain self-incriminating evidence from the defendant over the objections of appointed counsel. This was clearly a violation of the disciplinary rule." *Id.*

[187] *Id.* at 172-73, 657 P.2d at 1050-51 (Nakamura, J., dissenting).

[188] *Id.* at 169-70, 657 P.2d at 1049 (Nakamura, J., dissenting).

[189] *Id.* at 174, 657 P.2d at 1052 (Nakamura, J., dissenting).

[190] *Id.* at 173, 657 P.2d at 1051 (Nakamura, J., dissenting).

[191] *Id.*

[192] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (sixth amendment guarantees indigents appointed counsel for crimes punishable by imprisonment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth and fourteenth amendments require appointment of counsel for indigents in state felony prosecutions); Powell v. Alabama, 287 U.S. 45 (1932) (due process violated by trial court failure to appoint counsel in capital case).

Nowhere has the United States Supreme Court better articulated the philosophy underlying the sixth amendment right to the assistance of counsel than in *Powell v. Alabama*.[193] Clearly, the courts have recognized the absurdity of forcing an uncounseled and untrained defendant into a contest for his personal freedom when he doesn't even know the rules of the game.[194]

The dissent's analysis mirrors the more liberal sixth amendment philosophies of such jurisdictions as the New York Court of Appeals[195] and the United States Circuit Courts for the Second[196] and Tenth Circuits.[197] In New York, the state courts have formulated the *Donovan-Arthur-Hobson* rule,[198] named after three right-to-counsel cases. It holds that once an attorney has entered the picture, police are no longer free to question the suspect unless there has been an affirmative waiver of the right to counsel made in the physical presence of the attorney.[199] Significantly, this rule applies regardless of whether formal pro-

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[193] 287 U.S. 45 (1932). The *Powell* Court observed "[d]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.* at 57.

[194] *See* United States v. Harris, 683 F.2d 322 (9th Cir. 1982) (self-representation and waiver of counsel deemed lawful only where record clearly shows court informed accused about the dangers and disadvantages of going forward alone); *but see* United States v. Wilson, 690 F.2d 1267 (9th Cir. 1982) (right of self-representation does not include right of access to legal materials and facilities).

[195] *See, e.g.*, People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (once attorney enters proceedings, detainee may validly waive assistance of counsel only in the physical presence of attorney). *See also* People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (confessions taken from detainee after attorney has been requested and been denied access violate privilege against silence and right to counsel).

[196] *See* United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976) (statements deemed voluntary for *Miranda* purposes were involuntary with regard to higher standard that applies when sixth amendment *Massiah* rights attach); United States v. Callabrass, 458 F. Supp. 964 (S.D.N.Y. 1978) (defendant must be advised of significance of indictment and must understand benefits of having advice of counsel in these circumstances).

[197] *See* United States v. Thomas, 474 F.2d 110 (10th Cir. 1973), *cert. denied* 412 U.S. 932 (1973).

[198] *See* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Donovan, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963) (confessions taken from an accused in custody after an attorney has been requested and denied access violate privileges against silence and right to counsel).

[199] In People v. Mealer, 57 N.Y.2d 214, 441 N.E.2d 1080, 455 N.Y.S.2d 552 (1982), the New York Court of Appeals carved an exception to the *Hobson* rule. In *Mealer*, a defendant in custody for murder also was accused of witness tampering. Police learned that defendant's wife had offered to "help out" this witness. Police then arranged for the witness to visit the defendant in jail and feign cooperation. The defendant's statements to the witness were held admissible in the murder trial because the police conduct was part of an investigation into a new offense.

ceedings have begun.[200] It reflects the philosophy of the New York Court of Appeals that any lesser standard of waiver is inadequate to protect an accused's privilege against self-incrimination.[201] Some courts, while not adopting the *Donovan-Arthur-Hobson* rule of New York,[202] have held that defendants must be informed of the specific advantages and disadvantages of waiving assistance of counsel.[203] Others require that the accused be advised of the serious implications of indictment.[204]

At the federal level, there is wide disagreement among the circuits as to what the term "effective assistance of counsel" actually means.[205] The United States Court of Appeals for the Tenth Circuit articulated a per se rule[206] that parallels the arguments set forth in the *Brezee* dissent and captures the philosophy of advocacy underlying the sixth amendment. The essence of the rule is that

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[200] *See* People v. Pinzon, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 725, 406 N.Y.S.2d 268, 271 (1978) (*Donovan* rule came into play when attorney phoned police switchboard and told operator he wanted to speak with client and did not want him questioned).

[201] In *Hobson*, the court expressed its policy considerations as follows:

> Of course, it would not be rational, logical, moral or realistic to make any distinction between a lawyer acting for the state who [by seeking waiver of accused's right to counsel without notification to or presence of the attorney] violates the [Code of Professional Responsibility] directly and one who indirectly uses the admissions improperly obtained by a police officer, who is the badged and uniformed representative of the State.

39 N.Y.2d at 485, 348 N.E.2d at 898, 384 N.Y.S.2d at 423 (Breitel, C.J.).

[202] The Oregon courts have devised a modified New York rule, which mandates that suspects who waive their *Miranda* rights must be told that counsel wishes to consult with them before any further statements can be taken. *See* State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979). In *Haynes*, the Oregon Supreme Court based its holding on the state constitution as well as the fifth and fourteenth amendments. 602 P.2d at 279. The court also held that police interference with attorney-client consultations violated the sixth amendment. *Id.*

[203] *See* United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980) (informing an accused of indictment and giving *Miranda* warnings are insufficient to constitute valid waiver of the sixth amendment right to counsel).

[204] The United States Court of Appeals for the Fourth Circuit recently held that courts should apply a stricter standard of review to prosecution claims that counsel was waived in sixth amendment cases than is required in *Miranda* cases. United States v. Clements, 712 F.2d 1030 (4th Cir. 1983). In *Clements*, the court stated, "[t]he *Miranda* and sixth amendment rights to counsel are not fungible; waiver of *Miranda* safeguards does not imply necessarily that the individual is willing to forego a lawyer's assistance during questioning if a criminal prosecution has already commenced." *Id.* at 1036.

[205] *See, e.g.*, United States v. Springer, 460 F.2d 1344, 1354-55 (7th Cir. 1972) (Stevens, J., dissenting) (F.B.I. agents referred to as "agents of the prosecutor," and their attempts to obtain statements from one already represented by counsel without notifying counsel held "unethical and unfair" in civil case and violative of due process in criminal case). *See also* People v. Patterson, 39 Mich. App. 467, 478, 198 N.W.2d 175, 181 (1971) (Levin, J., dissenting) (custodial police interrogation without consent of attorney is "so notorious" that prosecutors must be "deemed to have authorized" it).

[206] United States v. Thomas, 474 F.2d 110 (10th Cir. 1973), *cert. denied*, 412 U.S. 932.

"[o]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given an opportunity to be present."[207] Similarly, several other federal circuits have also concluded recently that courts should "apply a stricter standard of review to prosecution claims that counsel was waived in sixth amendment cases than is required in *Miranda*."[208]

However, other jurisdictions have found no constitutional impropriety or breach of legal ethics when government agents solicit statements from formally charged defendants with retained or appointed attorneys. For example, in *United States v. Cobbs*,[209] a case factually similar to *Brezee*,[210] the United States Court of Appeals for the Third Circuit found no impropriety when an F.B.I. agent solicited and received a jailhouse confession from an indictee whose court-appointed attorney did not learn of the interview until it was over.[211] Like Brezee, Cobbs had waived his *Miranda* rights both orally and in writing.[212] The court noted that "[t]he fact that a defendant has an attorney does not mean that law enforcement officials cannot procure a statement of any kind from the defendant without prior notification to, if not the consent of, the attorney."[213] In a similar case,[214] the District of Columbia Court of Appeals,

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[207] *Id.* at 112.

[208] *See, e.g.*, Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979). Here the court held that once adverse judicial proceedings have begun, a valid waiver of sixth amendment right to counsel "requires the clearest and most explicit explanation and understandings of what is being given up." *Id.* at 22 n.1 (*quoting* United States *ex rel.* Lopez v. Zelker, 344 F. Supp. 1050, 1054 (S.D.N.Y. 1972)). The *Carvey* court concluded that perfunctory reading of *Miranda* is insufficient once formal proceedings have begun. 611 F.2d at 22. *See also* United States v. Brown, 569 F.2d 236 (5th Cir. 1978) (Simpson, J., dissenting). In State v. Satterfield, 417 F. Supp. 293 (S.D.N.Y. 1976) (Knapp, J.), Judge Knapp wrote that "[u]nder our interpretation of *Massiah*, after indictment the advice of counsel can be waived only after such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial." *Id.* at 296. The New York decisions both at the state and federal court levels, are among the most liberal interpretations of right to counsel issues in the nation and in general are not widely followed. *See, e.g.*, United States v. Clements, 713 F.2d 1030 (4th Cir. 1983), where Fourth Circuit declined to adopt full Second Circuit rule.

[209] 481 F.2d 196 (3d Cir. 1973).

[210] Cobbs was indicted for bank robbery, and 19 days later, while still in custody, he was visited in his jail cell by an F.B.I. agent who, without notifying Cobbs' attorney, sought an uncounseled statement. *Id.* at 199. After the agent read the *Miranda* warnings and obtained a written waiver, the accused confessed. *Id.* The key distinction between *Cobbs* and *Brezee* is that Cobbs offered to confess immediately while Brezee first requested his lawyer and then changed his mind. *See* State v. Brezee, 66 Hawaii 163, 657 P.2d 1044 (1983).

[211] 481 F.2d at 199.

[212] *Id.*

[213] *Id.*

relying on *Brewer v. Williams*, found no sixth amendment violation when a police detective conducted a jailhouse interrogation without notifying the defendant's court-appointed attorney.[215]

While upholding the admissibility of confessions obtained under circumstances such as the ones described above, courts have been mindful of the policy considerations cutting against the solicitation of statements and the conducting of interviews with defendants in the absence of their attorneys.[216] In *Cobbs*,[217] for example, the Third Circuit noted that "[a]lthough the practice of custodial interrogation in the absence of and without the permission of retained or appointed counsel is technically permissible, the practice is not commendable."[218]

In *State v. Brezee*,[219] the Hawaii Supreme Court missed an opportunity to clarify its views on the appropriate role of the police officer and the defense attorney in the custodial setting. The court has not fully addressed this issue in previous opinions. While *Brezee* clearly suggests a willingness to grant police officers broad latitude in communicating with defendants within the custodial setting, a fuller discussion of the *Edwards-Brewer* dichotomy would have provided defense attorneys and defendants with much needed guidance. A fuller discussion also would have shed more light on why the court embraced *Edwards* and rejected *Brewer*.

VII. RAMIFICATIONS OF *Brezee*

The distinctions between the fifth amendment privilege against self-incrimination and the sixth amendment right to the effective assistance of counsel have been an endless source of confusion to law enforcement agents, attorneys and courts.[220] Much of this confusion has arisen out of seemingly arbitrary determi-

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[214] *See* Shreeves v. United States, 395 A.2d 774, 781 (1978) (defendant in custody may waive sixth amendment right to counsel without prior notice to or consultation with his attorney).

[215] *Id.*

[216] *See* United States v. Wedra, 343 F. Supp. 1183, 1188 (D.C. 1972); Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968).

[217] 481 F.2d 196 (1979).

[218] *Id.* at 200.

[219] 66 Hawaii 162, 657 P.2d 1044 (1983).

[220] *See, e.g.*, United States v. Brown, 569 F.2d 236 (5th Cir. 1978) (Simpson, J., dissenting) (although decided on fifth amendment grounds, a stinging dissent argued that the case properly should have been decided on sixth amendment grounds); *see generally* Kamisar, *supra* note 64. *See also* Rhode Island v. Innis, 446 U.S. 291 (1980), where the United States Supreme Court provided an explanation of what the fifth and sixth amendments are about. In footnote 4, the *Innis* Court states:

> There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of 'interrogation' under *Miranda* is informed by this Court's decision in Brewer v. Williams, 430 U.S. 387, 120 R.I. __, __, 391 A.2d 1158, 1161-62.

nations as to when and under what circumstances the sixth amendment right to counsel attaches and what extra benefits accrue as a result of its attachment. The outcome has been inconsistent decision-making at the state and federal levels,[221] a barrage of sharply worded dissenting opinions[222] and a proliferation of law journal articles.[223]

In *Brezee*, the Hawaii Supreme Court found a practical way to keep confusion out of future fifth and sixth amendment cases, particularly within the custodial setting. The *Edwards* "initiates further communication" test,[224] as applied in *Brezee*, articulates a straightforward standard of conduct that can be easily followed by all law enforcement agents. Under this standard, law enforcers are free to approach all cellblock detainees regardless of the reason for custody and regardless of whether counsel has been retained or appointed. However, if the accused asks for counsel, the conversation must cease until (1) counsel is appointed[225] or (2) the accused himself reopens the dialogue.[226]

Uniformly applied, the *Edwards* standard eliminates the need for law enforcement officers to grapple with two separate sets of constitutional standards or to fear suppression of a statement—or outright reversal of a conviction—for failure to master knotty distinctions between *Miranda* and *Massiah*. Moreover, applying *Edwards* as an across-the-board standard meets the growing public

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> This suggestion is erroneous. Our decision in *Brewer* rests solely on the Sixth and Fourteenth Amendment right to counsel, 430 U.S. at 397-99. That right, as we held in Massiah v. United States, 377 U.S. 201, 206, prohibits law enforcement officers from 'deliberately elicit[ing]' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in that case is not controlling; indeed the petitioner in *Massiah* was not in custody. By contrast, the right to counsel in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.

See 446 U.S. at 300 n.4 (citing Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 41-55 (1978)).

[221] *See* Edwards v. Arizona, 451 U.S. 477 (1981).

[222] *Id.*

[223] *Compare, e.g.*, Shreeves v. United States, 395 A.2d 774 (D.C. 1978) (detainee may waive sixth amendment right to counsel without prior notice to or conference with attorney) *with* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (once counsel has been retained or appointed, waiver of right to counsel can be validly made only in attorney's presence).

[224] *See* United States v. Brown, 569 F.2d 236 (5th Cir. 1978).

[225] *See* Costantino, Cannavo & Goldstein, *A New Wave of Sixth Amendment Waivers: The Use of Judicial Officers as Advisors*, 49 FORDHAM L. REV. 329 (1980). *See also* Kamisar, *supra*, note 64; Note, Edwards v. Arizona: *The Burger Court Breathes New Life into Miranda*, 69 CALIF. L. REV. 1734 (1981); Enker & Elsen, *Counsel for the Suspect*: Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964).

[226] 451 U.S. 477 (1981).

concern that procedure-wise defendants have been able to manipulate constitutional safeguards and thus slip through the fingers of justice. The standard is also consistent with public policy that now appears to favor broader latitude for police officers in the conduct of criminal investigations.

While a uniform standard has the potential to bring harmony to fifth and sixth amendment case law, it also poses several dangers. One particularly serious danger might be the ease with which procedure-wise agents could manipulate the standard and establish a defendant-initiated contact. Under *Bradshaw*,[227] this could be done simply by posting an officer within earshot of the accused. Another danger is that the *Brezee* decision may serve to encourage police to vigorously solicit uncounseled confessions on the premise that there is nothing to lose by trying. If the officer's conduct is acceptable under a *Bradshaw-Brezee* standard, any incriminating statements obtained as a result would be admissible at trial. If the officer's conduct falls short of the standard, the worst result for the prosecutor would be remand upon appellate review. By retrying the case with the unlawfully obtained statements omitted, the prosecutor is in no worse position than if the statements had not been obtained initially.

One way to ensure that the *Edwards* standard remains uncorrupted is for the Hawaii Supreme Court to embrace the dissenting, rather than the plurality view in *Bradshaw*. Under the dissenting version, initiation of further communications could occur only when the subject matter of the communication is the subject matter of the criminal investigation.[228] Since *Bradshaw* established only the minimum standards, the Hawaii Supreme Court can use the state constitution to expand protection in the right to counsel area. Another way is to hold *Brezee* to its facts, and in the future (1) undertake a separate sixth amendment/*Massiah* inquiry whenever statements are taken from a formally charged accused in the absence of counsel and (2) require that police obtain the prior approval of the accused's retained or appointed attorney before approaching the accused for any information regarding his or her case.

While the *Brezee* decision provides needed guidance to law enforcement officers, it leaves many unanswered questions about the role of the defense attorney in the custodial setting. For example, while the court approved of Detective Lum's decision not to postpone taking Brezee's statement until his attorney could be present two and a half hours later, it left unsettled whether the result would have been the same if the attorney could have been present in, say, fifteen minutes. The decision implies that once the defendant rejected the attorney's advice, the detective would have been under no obligation to wait even if the attorney were in the next room. Also unsettled is whether an opposite result

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[227] 103 S. Ct. 2830 (1983).

[228] 66 Hawaii 163, 657 P.2d 1044 (1983). *See, e.g.*, State v. Elliott, 61 Hawaii 492, 605 P.2d 930 (1980). *See also* State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

would have been obtained if Brezee had waived his rights orally and twice in writing without ever having spoken with his attorney. The implication is that the defendant's unequivocal recall of the detective, coupled with a good faith effort to reach the attorney, were sufficient to meet the *Edwards* standard.

The United States Supreme Court has traditionally placed importance on the constitutional right to the assistance of counsel and disastrous consequences at trial may well stem from incriminating pretrial statements. For these reasons, it is important that the Hawaii Supreme Court clarify the bounds of the attorney-client relationship in the pretrial setting. This is particularly critical in light of the unsettling impression left by *Brezee* that an attorney's ability to protect his client's interests within the custodial setting depends on his availability at the moment the telephone rings.

VIII. CONCLUSION

State v. Brezee is a clear signal that the Hawaii Supreme Court intends to hold accused individuals increasingly responsible for protecting their own rights to a fair trial under the fifth and sixth amendments. While the court has been willing to provide additional safeguards under the Hawaii State Constitution to protect citizens from overzealous law enforcement officers, *Brezee* indicates an unwillingness to use either the federal or state constitutions to protect defendants from themselves.

Whether the *Brezee* decision marks a philosophical shift in the new supreme court under the administration of Chief Justice Herman Lum remains to be seen. However, the adoption of a bright line rule in itself would be a shift for a court that traditionally has rejected bright lines in favor of case-by-case analysis.

Janice Wolf

LAND USE: County Application of CZMA — *Mahuiki v. Planning Commission of the County of Kauai*, 65 Hawaii 506, 654 P.2d 874 (1982)

I. STATEMENT OF DECISION

In *Mahuiki v. Planning Commission of the County of Kauai*,[1] the Hawaii Supreme Court held that a special management area use permit was invalid because the Kauai Planning Commission failed to follow the permit procedures mandated in HAWAII REV. STAT. chapter 205A.[2] In so holding, the court made it clear that county authorities must not only follow their own administrative rules and regulations, they must also adhere to guidelines in state statutes. The case focuses on how the Federal Coastal Zone Management Act[3] [hereinafter "FCZMA"] and the Hawaii Coastal Zone Management Act [hereinafter "HCZMA" or "the Act"] affect procedures for obtaining development permits at the county level.[4] In addition, the decision shows how the federal and state acts affect intergovernmental relations and land use controls.

II. STATEMENT OF CASE

In August of 1978, Haena, Ltd.[5] applied for development permits from the

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[1] 65 Hawaii 506, 654 P.2d 874 (1982).

[2] HAWAII REV. STAT. ch. 205A is Hawaii's Coastal Zone Management Act.

[3] Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1982).

[4] *Id.* In deciding *Mahuiki*, the Hawaii Supreme Court also addressed a standing question. Although that issue will not be discussed in detail here, it should be noted that the court first held that there was a final decision and order in a contested case from which an appeal could be taken; second, that appellants did participate in the public hearing; and third, that the results were injurious to appellants' interests. Appellants thus were entitled to request a review of the agency determination.

In holding that this was a contested case, the court affirmed its holding in Chang v. Planning Commission of the County of Maui, 64 Hawaii 431, 643 P.2d 55 (1982), that special management area use permit application proceedings are contested cases within the meaning of HAWAII REV. STAT. ch. 91. *Mahuiki*, 65 Hawaii at 513, 654 P.2d at 879. For a more thorough discussion of contested case requirements, *see* R. Schmitt, The Hawaii Coastal Zone Management Act: Consistency Monitoring and Enforcement 9 (May 13, 1983) (unpublished manuscript) (copy on file in University of Hawaii Law Review office).

[5] Haena, Ltd. was a California limited partnership, represented throughout the proceedings by

Kauai Planning Commission,[6] pursuant to the County of Kauai's Comprehensive Zoning Ordinance.[7] Since the real property involved was situated within a special management area,[8] the partnership also applied for the requisite special management area use permits. The Planning Commission scheduled a public hearing and published notices.[9] Interested parties were notified by mail.[10]

At the hearing, several persons raised objections to the development based on its adverse environmental effects.[11] The Commission postponed its decision on the permits pending an evaluation and recommendation by the Planning Director[12] because of these concerns and some misgivings on the part of several commissioners. On completing his evaluation, the Planning Director gave a qualified endorsement of the project, finding that the project could meet Special Management Area Use Permit criteria. However, he also found that the development would have some impact on the environmental character of the area and that the cumulative impact of the development could adversely affect the

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Dr. Ferreira, its general partner. Its proposed development consisted of seventeen condominium units and four single-family residences on a 5.277 acre site. *Mahuiki*, 65 Hawaii at 508, 654 P.2d at 876.

[6] The Kauai Planning Commission, under the County of Kauai's Comprehensive Zoning Ordinance and Environmental Shoreline Protection Rules and Regulations, has the authority to grant development permits, zoning permits, and special management area [hereinafter "SMA"] use permits.

[7] KAUAI COUNTY, HAWAII, REV. CODE OF ORDINANCES ch. 8 (1976) (Supp. 1978).

[8] Each county has the authority to define "special management areas" within its jurisdiction. *See* HAWAII REV. STAT. § 205A-22(4) (1983). In the County of Kauai, "special management area" refers to the land area extending not less than 100 yards inland from the shoreline, and also includes lands within 100 yards from any salt water or tidal waters. These areas are delineated on maps filed with the Kauai County Clerk's office and the State Department of Planning and Economic Development. Section 1.4(S), Rules and Regulations Relating to Environmental Shoreline Protection of the County of Kauai (1975) [hereinafter cited as Kauai County Rules].

[9] HAWAII REV. STAT. § 205A-29 grants authority to the counties to establish SMA use permit application procedures, HAWAII REV. STAT. § 205A-29(a), and prohibits issuance of such permits unless approval is first received in accordance with the adopted procedures, HAWAII REV. STAT. § 205A-29(b). The County of Kauai requires that a public hearing be held no less than 21 nor more than 90 calendar days after the permit application is filed. Published notice must also be given at least 20 calendar days prior to the hearing date. Kauai County Rules, *supra* note 8, § 9.0.

[10] *Mahuiki*, 65 Hawaii at 508, 654 P.2d at 876. Notices of the hearing must be mailed to no less than two-thirds of the owners or lessees holding under recorded leases, of real estate situated within "three hundred feet from the nearest point of the premises involved in the application to the nearest point of such real estate." The notices must be sent no later than 14 days prior to the date set for the hearing. Kauai County Rules, *supra* note 8, § 9.0.

[11] In addition, eight letters received in response to the public notices were entered into the record. One of the letters was from adjacent landowners who were deemed to have the requisite standing to contest this case. *Mahuiki*, 65 Hawaii at 509, 654 P.2d at 876-77.

[12] *Id.*

environment. The director therefore recommended discussing this concern with the developer or conditionally approving the permits.[13]

The Commission subsequently granted conditional approval of the permits although several commissioners still had serious misgivings about the development.[14] However, the Commission did not make the statutorily required finding that the project would "not have any substantial adverse environmental or ecological effect" or that any adverse effect was "clearly outweighed by public health and safety."[15]

On November 22, 1978, the case was appealed to the Circuit Court challenging the Commission's approval of the permits pursuant to HAWAII REV. STAT. §§ 91-14,[16] 205A-6,[17] and 603-21.5.[18] The appeal was subsequently dismissed on the ground that appellants had not participated in the public hearings and had not exhausted their administrative remedies.[19] An appeal to the Hawaii Supreme Court followed.

The court, recognizing Hawaii's long-standing concern for its coastal zone,

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[13] The Director's evaluation concluded: "The density of development and the nature of use (visitor oriented/resort residential function) are the main factors that are judged to cause the more significant effects to the environment of Haena." He suggested that the cumulative impact of the project could be lessened if the developers voluntarily did not build to the maximum density allowed and utilized the units as permanent residences rather than commercial or resort type use. He also expressed the possibility of downzoning the area. *Id.* at 510, 654 P.2d at 877.

[14] The SMA use permit was granted on the condition that the applicant modify the development to provide for detached dwellings, duplex units, parking and landscaping. *Id.* at 511, 654 P.2d at 877.

[15] *Id.* at 511, 654 P.2d at 878. When the application was filed, HAWAII REV. STAT. § 205A-26 provided, in part, that:

> No development shall be approved unless the authority has first found:
>
> (A) That the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is clearly outweighed by public health and safety. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options; and
>
> (B) That the development is consistent with the findings and policies set forth in this part.

HAWAII REV. STAT. § 205A-26(2) (1976). This section has since been amended. *See* HAWAII REV. STAT. § 205A-22(2) (1979). The above requirements are also set forth in Kauai County Rules, *supra* note 8, § 4.0.

[16] HAWAII REV. STAT. § 91-14 provides for judicial review of "a final decision and order in a contested case" before an administrative agency. HAWAII REV. STAT. § 91-14(a) (1974).

[17] Any person or agency can bring a civil cause of action against any agency which has failed to perform any act or duty required by Chapter 205A. HAWAII REV. STAT. § 205A-6(2) (1979).

[18] Hawaii circuit courts have jurisdiction, unless otherwise expressly provided by statute, of appeals from administrative agencies. HAWAII REV. STAT. § 603-21.5 (1972).

[19] *Mahuiki*, 65 Hawaii at 512, 654 P.2d at 878.

held that the permits granted by the Kauai Planning Commission were invalid.[20] The court found that although the counties have much responsibility for implementing the HCZMA, state primacy has been retained.[21] Thus, all actions taken by county authorities pursuant to their respective zoning ordinances must also comply with the guidelines in state statutes.[22] Where county zoning ordinances conflict with the HCZMA, the latter must prevail.[23] The court thus decided that the permits were improperly granted because the Commission had not made the required findings.[24]

III. THE COASTAL ZONE MANAGEMENT SYSTEM

The FCZMA[25] is a federal grant-in-aid program[26] which assists and encour-

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[20] *Mahuiki*, 65 Hawaii at 517, 654 P.2d at 881 (citing 1970 Hawaii Sess. Laws Act 136); HAWAII REV. STAT. §§ 205-31 to 205-37. *See also infra* note 43.

In order to rule on the validity of the permit, the court first had to hold that Appellants satisfied standing requirements of contested case proceedings. The court initially noted that in the area of environmental concerns, "we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements" and that "standing requirements should not be barriers to justice." *Mahuiki*, 65 Hawaii at 512, 654 P.2d at 878 (quoting Life of the Land v. Land Use Comm'n, 63 Hawaii 166, 171, 174, 623 P.2d 431, 438, 439 (1981)).

[21] *Mahuiki*, 65 Hawaii at 517, 654 P.2d at 881. The objectives and policies of the HCZMA are binding upon county actions within coastal zone management areas. HAWAII REV. STAT. § 205A-4(b) (1979). *See also* HAWAII REV. STAT. § 205A-28 (1979) (prohibiting development within special management areas unless permits are first obtained in accordance with Chapter 205A).

In order to assure that State objectives are adhered to, HAWAII REV. STAT. § 205A-26 provides appropriate guidelines for county review of SMA permit applications. *See supra* note 15.

[22] The court noted that:

> Permits required under this act supersede all others, including any permits required from state agencies such as the Land Use Commission in conservation and agricultural districts along the coast, so that the 1975 shoreline protection legislation for the first time supersedes state controls in an important area of environmental concerns. [footnote omitted]

Mahuiki, 65 Hawaii at 520 n.14, 654 P.2d at 882 n.14. (quoting D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 317-318 (1976)).

[23] *Mahuiki*, 65 Hawaii at 519, 654 P.2d at 882. The Commission apparently took the mistaken view that it was bound to grant the SMA use permits because prior zoning decisions had designated the area for developments higher than single-family residential use. *See Mahuiki*, 65 Hawaii at 519 n.13, 654 P.2d at 882 n.13 (1982).

[24] *Id. See supra* note 13 and accompanying text.

[25] 16 U.S.C. §§ 1451-1464 (1982).

[26] The FCZMA was enacted in 1972 and is administered by the Secretary of Commerce through the National Oceanic and Atmospheric Administration's (NOAA) Office of Coastal Zone Management.

ages states to develop coastal management programs.[27] States bordering oceans or other saltwater bodies and also those on the Great Lakes are eligible to participate.[28]

The FCZMA has four major features. First, it is a voluntary program. No sanctions may be imposed for a state's non-participation. However, if states do decide to participate, they must adopt and obtain approval of certain land development controls in order to receive federal money.[29] Second, the act is procedural rather than substantive. It leaves substantive land use decisions to states which choose to participate. Third, the FCZMA primarily focuses on management of coastal waters, referring to shoreland only to the extent that it affects coastal waters. Finally, it gives equal consideration to both economic development and conservation.[30]

In order for a state to receive federal funding under this program,[31] it must first develop comprehensive, long-range coastal management plans which meet the broad criteria set out in § 1454.[32] The FCZMA requires state plans to have three main parts: (1) the management plan/program; (2) implementation regulations; and (3) consistency regulations.[33] The management plan must contain nine planning elements,[34] including identification of special management areas.[35] State implementation regulations must contain an approved method of controlling land and water uses within the coastal zone.[36] Consistency regula-

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[27] OFFICE OF COASTAL ZONE MANAGEMENT, NOAA AND DEPT. OF PLAN. AND ECON. DEV., STATE OF HAWAII, FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED COASTAL ZONE MANAGEMENT PROGRAM FOR THE STATE OF HAWAII 1 [hereinafter cited as FINAL EIS].

[28] The Act also applies to Puerto Rico, the Virgin Islands, Guam, and American Samoa. NATURAL RESOURCES DEFENSE COUNCIL, INC., LAND USE CONTROLS IN THE UNITED STATES 101 (E. Moss ed. 1978) [hereinafter cited as LAND USE CONTROLS].

[29] D. MANDELKER, *supra* note 22, at 223.

[30] *Id.* at 224 (citing Knecht, *Setting the Perspective* in COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF THE CONFERENCE ON ORGANIZING AND MANAGING THE COASTAL ZONE 9 (June 13-14, 1973)).

[31] States may receive funding for up to 80% of their program development costs, 16 U.S.C. §1454(c) (1982), and 80% of their initial implementation costs, 16 U.S.C. § 1454(d) (1982). In addition, once federal approval is obtained, states may receive up to 80% of their costs of administering the program. 16 U.S.C. §1455(a) (1982).

[32] In addition, the Secretary of Commerce must approve the plans before they are implemented. LAND USE CONTROLS, *supra* note 28, at 100.

[33] D. Callies, Land Use Controls in Hawaii: A Survey VI-4 (1981) (unpublished manuscript) (available in University of Hawaii Richardson School of Law Library).

[34] D. Callies, *supra* note 33, at VI-4. *See* 16 U.S.C. § 1454(b) (1982).

[35] 16 U.S.C. § 1454(b)(3) (1982). Two other important elements are identification of coastal zone boundaries, 16 U.S.C. § 1454(b)(1) (1982), and identification of permissible land and water uses, 16 U.S.C. § 1454(b)(2) (1982).

[36] States may choose from three approved control methods. The first calls for establishing state criteria and standards for local criteria and standards for local governments to follow. 16 U.S.C. § 1455(e)(1)(A) (1982). One alternative permits states to directly regulate land and water use

tions[37] require federal agencies to act, to the maximum extent practicable, in accordance with the objectives and policies of approved state programs.[38]

Although consistency requirements might seem to give states some control over federal activities, certain federal lands are excluded from the scope of the Act.[39] In addition, the federal agency involved makes the initial consistency determination subject to state review.[40] Disagreements are ultimately resolved by the Secretary of Commerce,[41] but judicial review of the Secretary's decisions is possible.[42]

The HCZMA[43] was developed within the FCZMA requirements and was designed to deal with the loss of coastal resources such as living marine sources, special scenic and cultural values, wildlife and marine habitats, beaches, and open space.[44] The HCZMA was implemented to coordinate or "network"[45]

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planning. 16 U.S.C. § 1455(e)(1)(B) (1982). The third method allows states to adopt administrative procedures for reviewing all proposed development plans. 16 U.S.C. § 1455(e)(1)(C) (1982).

[37] *Id.*, 16 U.S.C. § 1456 (1982).

[38] D. Callies, *supra* note 33, at VI-16. Federal activities which are inconsistent will not be approved unless they are necessary to national security. D. HAGMAN, URBAN PLANNING AND DEVELOPMENT CONTROL LAW 585 (1975). This requirement means that approval of federal projects can be obtained only after consultation between state and federal agencies. D. Callies, *supra* note 33, at VI-13.

"Federal activities," as used in the Act, refers not only to direct federal activities, 16 U.S.C. § 1456(c)(1) (1982), and developments, 16 U.S.C. § 1456(c)(2) (1982), but also to activities requiring Federal licenses or permits, 16 U.S.C. § 1456(c)(3)(B) (1982), and federal assistance to state and local governments, 16 U.S.C. § 1456(d) (1982).

[39] Lands which by law are subject solely to the discretion of or which are held in trust by the federal government are excluded. 16 U.S.C. § 1453(1) (1982). Consistency provisions will apply to activities conducted on excluded federal lands only if such activities have spillover impacts that significantly affect uses or resources in the state's coastal area. FINAL EIS, *supra* note 27, at 64.

[40] 15 C.F.R. § 930.42.

[41] 16 U.S.C. § 1456(h) (1982); 15 C.F.R. § 930.36 and § 930.116.

[42] For further discussion of the FCZMA, *see generally* D. MANDELKER, *supra* note 22; F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK (1981); Finnell, *The Federal Regulatory Role in Coastal Zone Management*, 1978 AM. BAR FOUND. RES. J. 173; Greenberg, *Federal Consistency Under the Coastal Zone Management Act: An Emerging Focus of Environmental Controversy in the 1980's*, 11 ENVTL. L. REP. 50001 (1981); Mandelker & Sherry, *The National Coastal Zone Management Act of 1972*, 7 URB. L. ANN. 119 (1974); D. Callies, *supra* note 33.

[43] HAWAII REV. STAT. ch. 205A. The State Land Use Law of 1961 preceded the HCZMA in developing Hawaii's land use policies. In 1975, the legislature enacted the Shoreline Protection Act to provide interim development control. The HCZMA was passed in 1977. In 1978, the federal government approved Hawaii's act. *See* FINAL EIS, *supra* note 27, at 21; D. Callies, *supra* note 33, at VI-3.

[44] Planning of coastal area development is especially important in Hawaii because almost one-half of the State's total land area is within five miles of the shoreline. Most of the State's development also occurs within this area. FINAL EIS, *supra* note 27, at 3.

[45] "Networking" refers to the combination of existing powers and authorities into a compre-

existing authorities, not to create new ones.[46] Federal financial assistance helped state and county agencies implement the comprehensive program.[47] Hawaii's plan provides for direct state coordination of all land use activities within the coastal zone.[48] This network requires counties to amend their existing shoreline management regulations to conform to the federally approved State policies.[49]

IV. ANALYSIS

There have been few judicial interpretations of the HCZMA.[50] This case is significant because it helps illuminate the requirements of the Act. The court's strict adherence to statutory permit application review guidelines reflects the extent of the Act's federal and state influence on county-level procedures. By offering funding and consistency incentives in exchange for state participation, the federal government can exert significant control over county land use matters. At first glance, the consistency requirements would seem to give state and county governments leverage in controlling federal actions.

There are, however, several escape provisions. The first, and probably most important, of these provisions focuses on the "directly affecting" language in the FCZMA. A federal activity must directly affect the coastal zone for consistency requirements to be actuated.[51] Recently, the United States Supreme Court exempted federal sales of oil and gas leases from complying with the FCZMA

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hensive scheme for planning and regulating development within the coastal zone. Callies, *supra* note 33, at VI-28. *See* 15 C.F.R. § 923.43(c) setting out requirements for approval of state and local plan networks.

[46] The counties had set up authorities to oversee and coordinate land use in Hawaii prior to enactment of the Hawaii act. However, there was little coordination between them. The Hawaii act "filled the gaps" and provided an umbrella of guidelines to be followed by all counties. Telephone interview with Doug Tom, State Planner with the Department of Planning and Economic Development (January 19, 1984).

[47] State agencies involved with administering the HCZMA include: the Land Use Commission, the Department of Planning and Economic Development, the Department of Health, the Office of Environmental Quality Control, the Department of Transportation, and the Department of Land and Natural Resources. FINAL EIS, *supra* note 27, at 7. On the county level, the Kauai, Maui and Hawaii County Councils delegate the power to grant permits to their respective Planning Commissions. The City Council exercises that power in the City and County of Honolulu. *Id.* at 10; D. Callies, *supra* note 33.

[48] D. Callies, *supra* note 33, at VI-12. HAWAII REV. STAT., § 205A-1(2) states that the coastal zone management area includes the special management areas as defined by the counties, *see supra* note 8, and the waters from the shoreline to the seaward limit of the State's jurisdiction.

[49] FINAL EIS, *supra* note 27, at 6.

[50] Since the HCZMA was passed in 1977 and has only been in effect in its present form since 1979, few opportunities for judicial review have arisen until now.

[51] 16 U.S.C. § 1456(c)(1) (1982).

by strictly construing this provision.[52] A second method of exempting federal activities would involve declaring them to be in the national interest or vital to national security.[53] Finally, certain lands are specifically excluded from complying with the Act.[54]

The court's decision also focuses counties' attention on permit application procedures mandated by the state. This case, along with *Chang v. Planning Commission of the County of Maui*,[55] seems to indicate that the Hawaii courts will look closely at state and county permit procedures. If an agency's actions do not conform with mandated procedures, the permit will be declared invalid. In *Chang*, however, the court refused to invalidate the permit because the failure to provide timely mailed notice of a rescheduled hearing violated neither the state statute nor county rules. In addition, Chang had suffered no prejudice to his participation rights. Although the Maui Planning Commission did violate other rules, the permit was allowed to stand because Chang failed to show that his rights had been prejudiced.[56] In *Mahuiki*, the Kauai Planning Commission's actions would have allowed a development which could significantly affect the coastal zone. The action, therefore, was injurious to the rights of the people in the area.[57]

V. CONCLUSION

Thus, it seems that Hawaii courts will make a two step evaluation of county actions, looking first for any procedural defects. Not only must county administrative rules and regulations be followed, county actions must also comply with state statutory guidelines. In *Mahuiki*, neither guideline was followed.

If an incorrect process has been followed in granting a permit, the next ques-

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[52] *See* Secretary of the Interior v. California, 104 S. Ct. 656 (1984) (holding that the Department of the Interior's sale of oil and gas leases was not an activity which "directly affected" the coastal zone. The Court held that the activities which "directly affected" the coastal zone were the post-sale oil and gas developments. However, since such activities were not conducted by the federal government, consistency review was not required). This case could have a significant impact in Hawaii since one of the State's arguments against the sale of excess federal lands, such as Fort DeRussy, is based on the consistency provisions of the FCZMA. However, if sales generally are exempt activities which do not directly affect the coastal area, the State's argument would be severely weakened. Telephone interview with Doug Tom, State Planner with the Department of Planning and Economic Development (January 19, 1984).

[53] D. HAGMAN, *supra* note 38, at 585 (1975). Lands excluded in the interest of national security are important to Hawaii because of the high number of defense installations located here.

[54] *See* 16 U.S.C. § 1456(1) (1982) (excluding lands subject to the discretion of or which are held in trust by the federal government).

[55] 64 Hawaii 431, 643 P.2d 55 (1982).

[56] *Id.*

[57] *Mahuiki*, 65 Hawaii at 514, 654 P.2d at 879-80.

tion is whether any rights have been prejudiced by such actions. In *Mahuiki*, the Planning Commission's failure to make the requisite findings would have resulted in development of a project which could have had adverse environmental effects. Such a development would have affected property rights of neighboring landowners. Granting the permit was therefore improper. Thus, if both of the above inquiries can be answered in the affirmative, a permit granted under such conditions will be declared invalid.

Stanley Ching

HANDBILLING IN WAIKIKI: The Right of Commercial Speech In Hawaii—*State v. Bloss*, 64 Hawaii 148, 637 P.2d 1117 (1981), *cert. denied*, 459 U.S. 824 (1982).

INTRODUCTION

In *State v. Bloss*,[1] the Hawaii Supreme Court held unconstitutional a Honolulu city ordinance prohibiting the distribution of advertising handbills in Waikiki.[2] While recognizing the government's legitimate and substantial interests, the court nevertheless found that the ordinance, as amended, violated the first amendment and the due process clause of the United States Constitution and the corresponding sections of the Hawaii State Constitution.[3] On December 1, 1982, the City and County of Honolulu passed a revised ordinance, aimed at more carefully regulating handbilling in Waikiki. The new ordinance permits the distribution of advertising handbills only from State-approved dispensing racks.

THE CASE

Hawaii is famous as a tourist destination throughout the world.[4] People who visit Hawaii expect white beaches, sunny skies, gentle trade winds, and a unique culture.[5] Intent on preserving this image, the City of Honolulu passed a regulation prohibiting the distribution of handbills in Waikiki.[6] The city's alleged goal was to prevent the detrimental nuisance, including litter, that

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[1] 64 Hawaii 148, 637 P.2d 1117 (1981), *cert. denied*, 459 U.S. 824 (1982).

[2] *Id.* at 166, 637 P.2d at 1130. In a subsequent case, State v. Hawkins, 64 Hawaii 499, 643 P.2d 1058 (1982), the Hawaii Supreme Court affirmed the dismissal of the prosecution of a handbiller engaged in *personal* solicitation. The factor of personal contact with the public was insufficient to save the ordinance struck in *Bloss*.

[3] 64 Hawaii at 166, 637 P.2d at 1130.

[4] DEPT. OF GEOGRAPHY, UNIV. OF HAWAII, ATLAS OF HAWAII 161 (1973).

[5] FARRELL, BRYAN H., HAWAII, THE LEGEND THAT SELLS 28-29 (1982) ("The climate is warm, seldom too hot, and cooling trade winds make life extremely pleasant. Volcanoes and torrential mountain streams have etched startling mountain landscapes. Dramatic black basaltic coastlines are dotted with postcard-perfect golden yellow sand beaches. . . .")

[6] Honolulu Rev. Ordinances § 26-6.2(b)(7) (1978).

handbilling and related activities create.[7]

The original Honolulu ordinance precluded any peddling in Waikiki of property or services, except newspapers.[8] In 1974, the ordinance was amended to specifically prohibit distribution of commercial handbills.[9] At that time, the scope of first amendment protection had not been held to include commercial speech.[10]

In 1979, "Gun Club of Hawaii" handbills, printed in the Japanese language, were made available to passersby from pockets attached to a van legally parked in a metered stall.[11] Floyd Bloss placed the handbills in the pockets to quietly and innocuously advertise his gun club. He was arrested and charged with "attempted prohibited peddling."[12] In his defense, he challenged the ordi-

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[7] 64 Hawaii at 159, 637 P.2d at 1126. The then existing amended ordinance did not state its purposes.

[8] "Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services except newspapers of general circulation and by duly authorized concessions in public places, in the following areas . . . ." 64 Hawaii at 167, n.18, 637 P.2d at 1130, n.18.

[9] *Id.* at 149, 637 P.2d at 1119-20, *citing* Honolulu Rev. Ordinance 26-6.2(b)(7) which states:

> Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to sell or offer for sale, *solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly*, goods, wares, merchandise, food stuffs, refreshments or other kinds of property or services, *or to distribute commercial handbills, or to carry on or conduct any commercial promotional scheme, advertising program or similar activity* in the following areas:
>
> . . . .

(Amended portions indicated by underscoring.)

[10] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding that there is no first amendment protection for commercial speech). *See infra* text accompanying notes 26-30. A compilation of previous definitions of commercial speech notes:

> "Commercial speech" has been variously defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience," or "speech proposing a commercial transaction," . . . . ("speech which does 'no more than propose a commercial transaction' "). Commentators have recognized the difficulty in arriving at a satisfactory definition, . . . and the above-mentioned formulations have been criticized as too broad and apt to embrace more valuable forms of speech. . . . In practice, however, the court has had little difficulty in making what it essentially considers to be a "common sense distinction" . . . and it has scarcely hesitated to apply the "commercial speech" label in a variety of contexts where the communication tended to promote the sales of goods or services.

American Future Sys. v. State Univ. of N.Y., Cortland, 565 F. Supp. 754, 761-62 (N.D.N.Y. 1983) (citations omitted).

[11] 64 Hawaii at 148, 150, 637 P.2d at 1120.

[12] *Id.* The opinion at n.3 reads:

> The amended charge read:
>
> On or about the 1st day of February, 1979, in the City and County of Honolulu, State of Hawaii, FLOYD BLOSS did attempt to distribute commercial handbills, upon a public

nance as an unconstitutional violation of both the right of free speech and the right of due process under the laws.[13]

In *Bloss*, the Hawaii Supreme Court struck down the 1974 Waikiki handbill ordinance as an unconstitutional infringement of commercial speech.[14] Waikiki's commercial and urban nature played a substantial role in the invalidation because commercial handbills blend well with Waikiki's retail commercial activities.[15] Another factor considered by the court was whether Bloss had adequate alternative channels for his communication. The State argued that Bloss could still advertise through newspapers, tourist magazines, radio spots, and key rings. These alternative modes of advertising were, however, both more expensive and less effective than handbills. The City's absolute prohibition was held to be an unconstitutional infringement of free speech.[16]

The substantial government interest in preventing a detrimental nuisance which adversely affects tourism did not outweigh the individual interest in free speech.[17] The ordinance was held to impinge unnecessarily on free speech because it was more extensive than necessary to serve the government interest.[18]

In its alternative holding, the *Bloss* court found the ordinance unconstitutionally vague.[19] First, a person could not know whether his activity was unlawful because the terms of the statute, such as "commercial handbills," are ambiguous.[20] Additionally, the lack of fixed standards for determining guilt could al-

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street within the Waikiki peninsula, by parking a Volkswagen van, State of Hawaii License No. 6E-7356, with commercial handbills displayed for distribution on Royal Hawaiian Avenue, an act which constitutes a substantial step in a course of conduct intended to culminate in the commission of the offense of Prohibited Peddling in violation of Section 705-500 of the Hawaii Revised Statutes and Section 26-6.2(b)(7) of the Revised Ordinances of the City and County of Honolulu, 1969, as amended by Ordinances 3609 and 4302.

[13] *Id.* at 150, 637 P.2d at 1120.

[14] *Id.* at 161, 637 P.2d at 1127 (1981) ("[B]y its terms, the ordinance prohibits commercial speech at all time [sic] and in any manner in Waikiki. As such, the ordinance cannot be considered a proper regulation as to time or manner.").

[15] "The trial court found that since Waikiki has a high concentration of retail commercial activity, the commercial speech involved here is not incompatible with the activities of this district." *Id.*

[16] *Id.* at 162, 637 P.2d at 1128 ("[T]hese alternative forms of communication asserted by the City [sic] are far from satisfactory since they may involve greater expense and may be a less effective means for communicating messages.").

[17] *Id.* at 159, 637 P.2d at 1126.

[18] *Id.* at 160, 637 P.2d at 1127.

[19] *Id.* at 165, 637 P.2d at 1130.

[20] *Id.* Note 15 of the court's opinion states:

Other portions of this ordinance are also unduly vague. The ordinance does not make clear what is meant by the phrase 'solicit orders for, or invite attention to or promote in any manner whatsoever, directly or indirectly.' Nor does the ordinance explain what is meant by 'to carry on or conduct any commercial promotional scheme, advertising program or

low discriminatory or capricious enforcement.[21] Because of this vagueness, the ordinance was held to violate the due process clause of the fourteenth amendment of the United States Constitution, and article I, section 4 of the Hawaii State Constitution.[22]

THE COMMERCIAL SPEECH DOCTRINE

Commercial speech has been defined as having a combination of factors which include advertisements, references to specific products, and an economic motivation behind the speech. The first Supreme Court decision to give commercial speech definite but limited protection was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*[23] A group of consumers challenged a law which prohibited price advertising by pharmacists, arguing that commercial speech had value in the marketplace of ideas.[24] The Court agreed, and explicitly held that commercial speech deserved some first amendment protection.[25]

The protection given to once unprotected commercial speech is substantial. Yet, the exact combination of factors necessary to constitute commercial speech is unclear. The United States Supreme Court, in its most recent commercial speech decision, stated that while each factor alone was insufficient to compel a conclusion that speech was commercial speech, the combination of an advertisement, a reference to specific products, and an economic motivation strongly supported a conclusion that speech was commercial.[26]

Speech held to be commercial speech includes "for sale" signs on the front lawn of a home,[27] handbills advertising a duty free business and its prices,[28]

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similar activity.' These phrases require a person of common intelligence to guess at the scope of the ordinance. Additionally, these provisions do not provide guidance to law enforcement officials on whether certain conduct is lawful or unlawful.

[21] *Id.* (The ordinance "fails to provide explicit standards for determining guilt.")

[22] *Id.* at 167, 637 P.2d at 1130.

[23] 425 U.S. 748 (1976).

[24] *Id.* at 762.

[25] The Court stated:

Our question is whether speech which does 'no more than propose a commercial transaction', is so removed from any 'exposition of ideas' and from 'truth, science, morality, and arts in general, *in its diffusion of liberal sentiments on the administration of Government*,' that it lacks all protection. Our answer is that it is not.

Id. (emphasis added) (citations omitted).

[26] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2880 (1983) (a unanimous decision with Justices Rehnquist and O'Connor concurring together, and Justice Stevens concurring separately).

[27] Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 92 (1977).

[28] Commodities Export Co. v. City of Detroit, 321 N.W.2d 842, 843 (Mich. App. 1982).

and handbills advertising an opportunity to work as a masseuse in area hotels.[29] The operation of attention attracting searchlights may also fall into a commercial speech category.[30] Deciding whether speech is commercial, however, is only the beginning of a first amendment analysis.

Any governmental regulation of commercial speech must pass a four-part test, espoused in *Central Hudson Gas and Electric Corp. v. Public Service Commission*.[31] First, the speech must be lawful and not misleading.[32] This test explicitly encourages state regulation of illegal or misleading activities.[33] This would allow furtherance of state policies without undue restriction. For example, the United States Supreme Court upheld a law prohibiting a newspaper from separating help wanted ads by sex.[34] Although the law infringed free speech, it only affected *illegal* sex discrimination and not editorial or political argument.[35] The Court also upheld regulation of sales of drug paraphernalia, stating that a state may ban, if it wants, "commercial activity promoting or encouraging illegal drug use."[36] In contrast, activities which are not misleading or illegal include advertising for contraceptives[37] and advertising to promote the use of electricity.[38]

While the first test defines the areas of speech where government power is plenary, the remaining tests limit governmental power. The second test requires a substantial government interest.[39] Substantial government interests have included preventing disruption of schools,[40] protecting the privacy of the home,[41] ensuring orderly movement of crowds,[42] ensuring fair and efficient utility rates,[43] and encouraging conservation of energy.[44] The government does not, however, have a substantial interest in shielding recipients of mail from materials they are likely to find offensive.[45]

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[29] O'Brien v. United States, 444 A.2d 946, 947 (D.C. App. 1982).

[30] Robert L. Rieke Bldg. v. City of Overland Park, 657 P.2d 1121, 1129 (Kan. 1983) (the court assumed *arguendo* that searchlights constituted commercial speech).

[31] 447 U.S. 557, 566 (1980).

[32] *Id.*

[33] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2881 (1983).

[34] Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973).

[35] *Id.* at 391.

[36] Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 496 (1982).

[37] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2881 (1983).

[38] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 568 (1980).

[39] *Id.* at 566.

[40] Carey v. Brown, 447 U.S. 455, 464 (1980).

[41] *Id.*

[42] Heffron v. Intl. Soc. for Krishna Consciousness, 452 U.S. 640 (1981).

[43] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980).

[44] *Id.* at 568.

[45] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2883 (1983).

Once the government interest is found to be substantial, it must pass the next inquiry. The third test demands that the regulation directly advance the governmental interest.[46] The government easily passes this test, for it needs a mere rational basis for a lawmaker's conclusion that the government's interest is advanced.[47] For example, regulation of electricity advertising was held to directly advance the government interest in conserving energy.[48] Prohibiting all free speech activity within fifteen feet of an escalator directly advances the interest in the orderly flow of pedestrian traffic.[49] Additionally, regulating the use of searchlights directly advances traffic safety, aesthetics, and the preservation of property values.[50] If the direct advancement of the government interest is tenuous or marginal, the regulation simply becomes predisposed to failure in the fourth test.[51]

The fourth test requires that the regulation be no more extensive than necessary to further the governmental interest. Therefore, a government must narrowly tailor the statute to attain its desired end.[52] An example of a regulation, sufficiently tailored for safety purposes, is one which prohibited speech only within fifteen feet of an escalator.[53] When a government regulated the use of attention attracting searchlights by special use permits, the court held the requirement to be narrowly tailored in furtherance of traffic safety and property values.[54] An example of a regulation held to be too extensive to protect sex education of children was one which purged all mailboxes of contraceptive advertising suitable for adults.[55] A prohibition of all electricity advertisements,

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[46] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[47] Metromedia Inc. v. City of San Diego, 453 U.S. 490, 508 (1981). *See* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2884 (1983).

[48] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980).

[49] O'Brien v. United States, 444 A.2d 946, 949 (D.C. App. 1982).

[50] Robert L. Rieke v. City of Overland Park, 657 P.2d 1121, 1128 (Kan. 1983). The court held that requiring a special use permit for searchlights at a cost of one hundred dollars was sufficiently narrow to serve the government interests.

[51] *See* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2884 (1983) (holding that while a prohibition of all contraceptive mail marginally promotes the governmental interest in having parents teach their children about sex education, the regulation was too extensive), and Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) (holding that a prohibition of advertising electricity, at most, tenuously advances the government interest in regulating the utility's rate structure. The court struck the regulation because a total ban on advertising was too extensive).

[52] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2884-85 (1983).

[53] O'Brien v. United States, 444 A.2d 946, 949 (D.C. App. 1982).

[54] Robert L. Rieke v. City of Overland Park, 657 P.2d 1121, 1124 (Kan. 1983).

[55] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2884 (1983). *But see* FCC v. Pacifica Foundation, 438 U.S. 726, 750-51 (1978) (holding that a record, characterized as indecent but not obscene, could be banned from the radio waves during times when children would be listening).

including those which would inform the public of energy saving devices or services, was too extensive in promoting energy conservation.[56]

Proper tailoring of a regulation requires a consideration of the nature of the forum where speech is conducted. If the government wishes to exclude certain speech from a certain place, it must consider both the nature of the place and availability of other places. An ordinance which regulates commercial speech must leave open alternative channels for communication.[57] When a government regulates commercial speech in the streets it should consider the normal activity of the particular street at given times.[58] This helps to ensure that the government will not intrude unnecessarily on protected speech.

The statute at issue in the *Bloss* case was held to be more extensive than necessary to further the governmental interest.[59] In reviewing the constitutionality of an ordinance regulating commercial speech, the *Bloss* court demands a finding that the ordinance is a reasonable time, place, and manner restriction.[60] This requires that the regulation not be content-based and leave open ample alternative channels for communication of the information.[61]

THE DUE PROCESS STANDARD

The *Bloss* court alternatively held that the vagueness of the ordinance violated due process. The standard necessary to satisfy due process requires that a law provide both fair warning to the actor of any illegality, and specific standards to the police for enforcement.[62] The supreme court reasoned that when a vague regulation curtails a first amendment right, citizens are forced to steer wider of the unlawful zone than if the boundaries of illegality were clearly marked.[63] Such laws trigger a stricter scrutiny for vagueness.[64]

As the *Bloss* court noted, the protection against vagueness in an ordinance

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[56] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980).

[57] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc., 425 U.S. 748, 771 (1976).

[58] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[59] State v. Bloss, 64 Hawaii 148, 162, 637 P.2d 1117, 1128 (1981).

[60] *Id.* at 162, 637 P.2d at 1127. The court incorporated the reasonableness finding into the fourth test under *Central Hudson*: whether the regulation is more extensive than necessary to further the government interest. *Id.* at 160-62, 637 P.2d at 1126-27.

[61] *Id.* The ordinance in *Bloss* failed this test for several reasons: the prohibition was absolute, thus improper as to time or manner; the speech prohibited was compatible with the place, thus an impermissible place regulation; only commercial speech was singled out, thus an impermissible content-based regulation; and alternative forms of communication were more expensive and less effective, precluding a finding of ample alternative channels of communication.

[62] Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 498 (1982).

[63] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

[64] Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620 (1976).

depends, in part, on the nature of the speech infringed.[65] An ordinance also must have more specificity if the threatened penalty is criminal rather than civil.[66]

An example of insufficient specificity was illustrated when the Supreme Court struck a statute in *Hynes v. Mayor and Council of Oradell*.[67] The statute required advance notice to police of any intent to solicit in neighborhoods for charity or politics. The Court found the terms "recognized" charitable cause and political "cause" vague.[68] Additionally, it held that directions for compliance with the statute were unclear: the citizen neither knew what identification nor what sort of notice was required.[69]

The Supreme Court in *Village of Hoffman Estates v. Flipside Hoffman Estates*[70] upheld an ordinance which required a business license for sales of any items designed or marketed for use with illegal cannabis or drugs. Although the plaintiff businessman alleged that the statute infringed a first amendment right of commercial speech, the Court held that the speech was not protected because it proposed an illegal transaction.[71] The plaintiff's vagueness challenge evoked a very low level of scrutiny; the speech was not protected speech and the threatened penalty was civil and not criminal. His vagueness challenge failed because the potentially vague terms clearly applied to some of the plaintiff's products.[72] Additionally, the mere *potential* for arbitrary enforcement was insufficient to hold the ordinance unconstitutional.[73]

REGULATING WAIKIKI HANDBILLING

Since Honolulu's handbill ordinance regulates constitutionally protected

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[65] State v. Bloss, 64 Hawaii 148, 164, 637 P.2d 1117 (1981) ("[W]hen First Amendment rights are not implicated, a lesser degree of specificity in a statute is acceptable.").

[66] Whisenhunt v. Spradlin, 104 S. Ct. 404, 408 (1983). In dissent from denial of certiorari, Justice Brennan, joined by Justices Blackmun and Marshall, stated: "[W]e have frequently entertained claims that regulations of economic and professional activity are unconstitutionally vague, even when the law at issue depends on civil enforcement and has no effect on first amendment rights."

[67] 425 U.S. 610, 620 (1976).

[68] *Id.* at 621.

[69] *Id.*

[70] 455 U.S. 489 (1982) (Justice White, concurring, stated that the overbreadth issue need not have been discussed).

[71] *Id.* at 496. Plaintiff's store sold all kinds of drug paraphernalia, and books such as *A Child's Garden of Grass* which encouraged marijuana cultivation.

[72] *Id.* at 500.

[73] *Id.* at 503 (since the ordinance had not yet been enforced, the City still had time to formulate guidelines for enforcement).

speech in Waikiki,[74] it is subject to a more in-depth review than if the speech were unprotected. Additionally, the ordinance imposes a criminal rather than civil penalty, which demands of the statute a higher standard of clarity.[75]

After the ordinance in *Bloss* was struck as unconstitutional, the City proposed and passed an amended ordinance.[76] The City appears to have followed the mandates of the *Bloss* decision. The amended ordinance included, for the first time, a purpose and intent clause.[77] It also added a specific clause which prohibits false, deceptive, or misleading speech.[78] The new clause would allow the City to prosecute handbillers for issuing fraudulent advertisements.

The City then added a new article which prohibits all promotional activity in

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[74] *See infra* note 79.

[75] *See supra* note 66. Honolulu Rev. Ordinances, § 26-10.5 (1982), which allows cumulative penalties, states that any violation of the ordinance:

> [S]hall upon conviction be punished by a fine not exceeding $300 or by imprisonment not exceeding thirty days, or by both. *Each day* such violation is committed or permitted to continue, *and each dispensing rack* maintained, kept or used without a valid permit, *shall constitute a separate offense* and shall be punishable as such hereunder.

(Emphasis added).

[76] Ordinance No. 82-50 (Dec. 2, 1982).

[77] Honolulu Rev. Ordinances § 26-10.1 (1982), "Waikiki Business District," states in pertinent part:

> The City Council finds a compelling interest in regulating promotional activity in this district to preserve and protect the natural beauty and charm valued by the people. . . . [T]he district is hindered by heavy pedestrian and vehicular traffic and congestion at all times of the day. . . . The City Council finds a compelling interest in preserving the beauty of this unique area, protecting the visitor industry in this State and the people of the City and County of Honolulu and all visitors to this unique area.
>
> The regulations hereby set out are declared to be necessary for the accomplishment of the following purposes:
>
> (1) To insure that persons desiring to engage in promotional activities in the Waikiki Business District have adequate exposure to the public;
> (2) To minimize the disturbance of persons by repeated communications or encounters which might constitute harassment or intimidation;
> (3) To protect the natural beauty and charm of the Waikiki Business District;
> (4) To protect the visitor industry in the State, the heart of which is the Waikiki Business District;
> (5) To control litter on the streets, alleys, sidewalks, beaches, parks and other public places within the Waikiki Business District; and
> (6) To insure the safe, free and orderly flow of vehicular and pedestrian traffic through the Waikiki Business District.

[78] This is in response to the first sentence of footnote 16 in *Bloss*, 64 Hawaii 148, 165, 637 P.2d at 1117, 1129 (1981), which states that "Speech that is false, deceptive, misleading and relates to illegal activity is not protected. Therefore, the new § 26-6.3 (1982) reads: "It shall be unlawful for any person to engage in an unfair, deceptive, fraudulent or misleading act, practice or representation while promoting any goods, products, services, or property of any kind, upon streets, alleys, sidewalks, parks, beaches and other public places."

the Waikiki business district. The Waikiki business district includes all public areas within designated boundaries of Waikiki; promotional activity is defined as a distribution to the public of any publication which "advertises, promotes, or otherwise directs attention to a product, service or business."[79] The ordinance thus precludes all promotional activity, except dispensing handbills through government licensed racks and selling newspapers.[80]

The City's dispensing rack scheme is fairly complicated. To promote traffic safety and to preserve Waikiki beauty, both the Department of Transportation Services and the Department of Land Utilization determine the number and location of the Waikiki handbill dispensing racks.[81] A potential handbiller would apply to the Building Department giving his name, his business, the design of the handbill rack, and official consent to impoundment of a rack which violates the ordinance.[82] The permits for solicitation from racks cost $10 per month,[83] and require affixing a decal of approval to the dispensing rack.[84] Insurance for any injury or damage caused by a dispensing rack is prerequisite to granting of a permit, and must be maintained as long as the rack is in place.[85]

To allocate dispensing rack locations to various businesses, the Building Department, City and County of Honolulu, held a lottery to allocate the 359 dispensing rack locations in the Waikiki business district.[86] Subsequently, a group of Waikiki businesses went to federal court to challenge the City's new

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[79] Honolulu Rev. Ordinances § 26-10.2(1) (1982).

[80] This appears to provide an inexpensive and effective alternative mode of commercial speech. *See supra* note 16. Honolulu Rev. Ordinances § 26-10.3 (1982) restricts the promotional activity as follows:

> Notwithstanding any ordinance to the contrary, it shall be unlawful for any person to carry on or conduct any promotional activity upon the streets, alleys, sidewalks, parks, beaches and other public places within the Waikiki Business District, except as provided in Section 26-10.4 relating to dispensing racks.
>
> The provisions of this section shall not apply to the sale or offer for sale of newspapers of general circulation and to duly authorized concessions in public places. For purposes of this article, 'newspaper of general circulation' means a publication published at regular intervals, primarily for the dissemination of news, intelligence and opinions on recent events or newsworthy items of a general character, and reaching all classes of the public.

[81] Honolulu Rev. Ordinances § 26-10.4(b) (1982).

[82] *Id.*, § 26-10.4(d).

[83] *Id.*, § 26-10.4(h).

[84] *Id.*, § 26-10.4(i).

[85] *Id.*, § 26-10.4(k).

[86] This occurred on August 2, 1983. Twenty-seven participants chose 273 of the 359 available locations. As of August 23, 1983, sixteen persons received permits for 184 locations in the Waikiki Business District. Waikiki Small Bus. Ass'n. v. Anderson, Civil No. 83-0806 (D. Hawaii Aug. 24, 1983) (Defendant's pre-hearing memorandum for preliminary injunction at 2).

handbill ordinance.[87] Although no plaintiffs had been arrested, the federal magistrate granted a preliminary injunction against the City,[88] pending a decision on the constitutionality of the handbill ordinance. The major issues discussed in the decision[89] include: whether handbills of commercial speech, on public sidewalks, were entitled to any protection from government regulation; the degree of deference which should be given to the city council when regulating commercial speech on public sidewalks; whether the *Central Hudson* test[90] is applicable when the government seeks not to censor speech, but to regulate conduct; assuming *Central Hudson* is applicable, whether the government interests in the promotion of tourism and safety outweigh the handbiller's primarily economic interest in distributing handbills; and whether the statute is either overbroad or vague.

The new Waikiki handbill ordinance must be a reasonable time, place, and manner restriction on speech.[91] The nature of the place should be considered in addition to the interests of the government and of the handbillers. Since Waikiki is a highly commercial area[92] and handbillers are working on public streets, the traditional forum for disseminating information,[93] commercial speech in Waikiki clearly deserves some protection. The state interests in traffic safety, aesthetics, and orderly movement and control of large crowds are substantial. Yet, these interests must be measured against the interests of the handbillers. Handbills are inexpensive and reach an audience which may not be looking for that particular product or service.[94] Therefore, an alternative form of advertising may be difficult to find.

The city council weighed its own balance of the government interests with the individual speech interests. Because this involved commercial speech, which

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[87] *Id.*

[88] Waikiki Small Bus. Ass'n v. Anderson, Civ. No. 83-0806 (D. Hawaii Sept. 23, 1983) (order granting preliminary injunction).

[89] *Id.* (D. Hawaii May 14, 1984) (judgment for defendant City). Notice of Appeal to a federal judge was filed June 8, 1984. The federal magistrate, on June 15, 1984, imposed a preliminary injunction pending appeal to preclude enforcement of the ordinance.

[90] *See supra* text accompanying notes 31-56.

[91] United States v. Grace, 103 S. Ct. 1702, 1707 (1983) ("[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content neutral, are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.' ") (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Both the above cases, however, dealt with protected non-commercial speech.

[92] State v. Bloss, 64 Hawaii 148, 159, 637 P.2d 1117, 1126 (1981), (citing Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981) and Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981)).

[93] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 954-55 (1983) for a discussion of three categories of public forums which concludes that speech in the streets tolerates the least amount of regulation.

[94] Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2880 (1983).

is afforded less protection, a court might be justified in deferring, to some degree, to a city council's findings. Yet, weighing against such deference is the commercial speech's location in its ideal niche, sidewalks of a retail business center. Deference also may be precluded by the presence of a criminal penalty for exercising first amendment rights.

Assuming that deference to the city's own balancing would be improper, a court should balance the opposing interests under the *Central Hudson* test. First, it must decide whether this is the sort of commercial speech which deserves any protection. The government could argue that proper commercial speech cases dealt with censorship of certain commercial statements, and that here, preclusion of commercial speech is merely incidental to a regulation of conduct.[95] The handbillers, on the other hand, would argue that the government censored commercial handbills and not political handbills. Therefore, this content-based distinction required the commercial speech protection.

Applying this protection to the facts of handbilling in Waikiki, a delicate balance is met. The City's interest is substantial, it seeks to preserve the natural beauty of Waikiki, to protect tourism, and to ensure the safety of people in Waikiki.[96] In contrast, the people who distribute handbills disseminate information which can be educational. Therefore, their rights should not be arbitrarily or capriciously infringed. In-person distribution may also more effectively influence disinterested passersby, and cost much less than building, maintaining and insuring distribution boxes. This potential harm to the commercial speaker must be balanced against the degree to which the ordinance furthers the state interests in protecting Waikiki's charm and protecting vehicular and pedestrian traffic from harm.[97]

The cost burdens of building, acquiring permits for, and insuring dispensing racks imposed on the handbill distributors should be considered when viewing the alternative modes of communication.[98] The resolution of this difficult balance appears to depend on opposing counsel's effectiveness in proving the actual benefits and burdens created by the ordinance.

Even assuming that the City's interests outweigh the handbillers' interests, the ordinance must not be overbroad or unduly vague. It appears clear that only sales-related activities were precluded.[99] A vagueness challenge would entail

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[95] *See supra* text accompanying notes 89-90.

[96] *See supra* note 77. *See* Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) (aesthetic concerns are substantial), and Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981) (ensuring safe and orderly movement of crowds is a substantial state interest).

[97] *See supra* note 77.

[98] *See* E. Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1056-57 (2nd Cir. 1983) (when constitutional rights are involved, fee and insurance conditions require strict scrutiny).

[99] *See supra* notes 79 and 80.

close scrutiny of the wording of the statute. The lengthy purposes clause[100] would help resolve any ambiguity. The City appears to have carefully drafted the ordinance to preclude a finding of vagueness.[101]

CONCLUSION

Since 1974, the City of Honolulu has tried to prevent commercial handbilling. Its attempt to fold its regulation into the peddling ordinance failed under the scrutiny of the *Bloss* court. Shortly after passage of the 1974 ordinance, commercial speech was given limited protection. This protection requires that the ordinance be a reasonable time, place, and manner restriction, and that it pass the *Central Hudson* four-part test.

Under the *Central Hudson* test, the speech must relate to a legal activity. If it promotes illegal matters, any government regulation would be valid. To regulate legal commercial speech, the ordinance must be no more extensive than necessary to further a substantial government interest.

Waikiki's new handbill ordinance clearly directly advances the government's substantial interests in tourism and safety. The difficulty comes in construing *Central Hudson's* "no more extensive than necessary" test. Questions left unanswered are: who has the burden of proof, and what, if anything, might shift the burden. The commercial speech doctrine was developed to open lines of communication and to encourage enlightened decisionmaking by consumers. Yet it seems to require a scrutiny of the speech's substantive content before it can be properly balanced against a substantial government interest.

A speaker needs more cases delineating guidelines for regulating commercial speech before making a strategic business guess as to the most effective mode for his advertising. In a society that is bombarded daily with commercial speech, governments also need to know the degree to which they can regulate the commercial speech. At this point, the *Central Hudson* guidelines prove insufficient.

Jodie D. Roeca

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[100] *See supra* note 77.

[101] *See supra* notes 79-85.

ATTORNEY CONFLICT OF INTEREST IN CRIMINAL DEFENSE CASES: *State v. Reis*, 4 Hawaii App. 327, 666 P.2d 612 (1983)

In a case of first impression, the Hawaii Intermediate Court of Appeals reversed a conviction of attempted murder because of the defense counsel's conflict of interest.[1] The court ruled that when a defense attorney has an ongoing professional relationship with an important prosecution witness, a conflict of interest exists as a matter of law.[2] There is also a conflict of interest when an adverse witness is a stockholder and corporate officer of a business incorporated and advised by the same attorney's law firm.[3] The decision strictly upholds the sixth amendment[4] right to effective counsel, which necessitates conflict-free representation. The court further identified various types of conflict and delineated relevant factors used for determining whether an untenable conflict of interest exists.

On September 17, 1981, Jerry Reis was indicted by a Kauai Grand Jury for attempted murder. The indictment was based on an incident in which Reis and

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[1] State v. Reis, 4 Hawaii App. 327, 666 P.2d 612 (1983).

[2] *Id.* at 333, 666 P.2d at 617. The defendant raised three other issues on appeal: (1) that the trial court erred in admitting into evidence a photograph of the scene of the offense; (2) that the trial court erred in constructing the jury instructions; and (3) that the trial court erred in denying his motion for acquittal. *Id.* at 328, 666 P.2d at 614.

[3] 4 Hawaii App. at 332, 666 P.2d at 617.

[4] The sixth amendment of the U.S. Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, Section 11 of the Hawaii Constitution contains essentially identical language:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days.

his companion were driving on the island of Kauai and shooting at random targets along the road. At one point, two bullets struck the home of Floro Villabrille Senior, (Villabrille Sr.) and one bullet struck the shoulder of Waikichi Kondo, who was in the Villabrille residence. At trial, Villabrille Sr. testified for the State. Floro Villabrille Junior, (Villabrille Jr.) testified for the prosecution as a rebuttal witness. Reis was convicted by jury and filed timely motions for acquittal or a new trial.[5] Before a hearing on the motions, Reis discovered that his attorney, Clinton Shiraishi, had previously represented Villabrille Sr. in a separate and unrelated action.[6] It was further discovered that Villabrille Jr. was a stockholder and officer of a company advised by Shiraishi's law firm.[7] Reis subsequently retained new counsel who argued for a new trial on the basis of Shiraishi's conflict of interest as well as the motions for acquittal or a new trial. The trial court held that Reis failed to prove conflict of interest or show specific prejudice and denied both motions.

On appeal, the court focused on the conflict of interest issue. The court recognized that a criminal defendant has a sixth amendment right to effective counsel,[8] whether the attorney is appointed or privately retained.[9] This right is safeguarded by the requirement that "representation be conflict free."[10]

Relying on precedent, the court identified two general situations in which conflict of interest arises: joint representation and dual representation. Joint representation occurs when an attorney represents co-defendants.[11] Dual representation occurs when an attorney represents or has represented an adverse party or hostile witness.[12]

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[5] 4 Hawaii App. at 328-29, 666 P.2d at 614-15.

[6] *Id.* The opinion does not specify Villabrille Sr.'s role in the State's case against Reis. The court refers to Villabrille Sr. only as an "important prosecution witness." 4 Hawaii App. at 332, 666 P.2d at 617.

[7] *Id.*

[8] The UNITED STATES CONSTITUTION and the HAWAII CONSTITUTION guarantee a criminal defendant's right to effective counsel. *See supra* note 4. This right was expressly recognized by the Hawaii Supreme Court in State v. Kane, 52 Hawaii 484, 486, 479 P.2d 207, 208 (1971).

[9] *See, e.g.*, U.S. v. Martinez, 630 F.2d 361 (5th Cir. 1980); U.S. v. Jeffers, 520 F.2d 1256 (7th Cir. 1975).

[10] The requirement of conflict-free representation is well established. Where the relationship between an attorney and her client is active, adverse representation is prima facie improper. Wong v. Fong, 60 Hawaii 610, 593 P.2d 386 (1979). *See also* U.S. v. DiCarlo, 575 F.2d 952 (1st Cir. 1978), *cert. denied*, 439 U.S. 834 (1978); U.S. v. Martinez, 630 F.2d 361 (5th Cir. 1980); U.S. v. Jeffers, 520 F.2d 1256 (7th Cir. 1975).

[11] For a discussion of joint representation, see Gary, *The Right of One's Choice: Joint Representation of Criminal Defendants*, 58 NOTRE DAME L. REV. 793 (1983).

[12] The Hawaii court has commented on dual representation in the civil context. *See* Wong v. Fong, 60 Hawaii 610, 593 P.2d 386 (1979), where, in a case concerning prior representation of an adverse witness, the court held that in order to warrant judicial sanctions, a specific instance of prejudice must be shown. *See also* Lau v. Valubilt Homes, 59 Hawaii 283, 582 P.2d 195 (1978)

The court found dual representation in the present case,[13] and attempted to clarify the factors that indicate when this type of conflict exists. In order to maintain a claim of ineffective assistance of counsel based on dual representation, the defendant must show a "real conflict of interest," or a "specific instance of prejudice."[14] Dual representation consists of concurrent and/or prior representation.[15] The court first analyzed each type of dual representation and then applied them to the facts of *Reis*.

Concurrent representation exists when the defendant's attorney is simultaneously representing an adverse party or hostile witness.[16] The court recognized this type of conflict as being especially suspect because the attorney must weigh his loyalties between two clients.[17] The court stated that concurrent representation is "inherently conducive to divided loyalties" and that in such cases a real conflict of interest exists as a matter of law. Unless the defendant has knowledge of the conflict and intelligently waives his right, a conviction cannot be upheld.[18]

Prior representation involves a defense attorney's prior representation of an adverse party or hostile witness. The court in *Reis* relied on factors delineated in *State v. Jeffers*[19] to determine whether a real conflict of interest existed. According to *Jeffers*, under a "prior representation" test, cross-examination of the witness is scrutinized to determine whether the attorney's pecuniary interest caused him to avoid embarrassing or tenacious questioning.[20] Another factor consid-

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(knowledge of a conflict without subsequent action constitutes a waiver). For a discussion of dual representation, see Comment, *Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); WISE, LEGAL ETHICS 156 (2d Ed.); Sullivan, *The Client's Right to Consent to Potential Conflicts of Interest*, 11 CAP. U.L. REV. 625 (1982).

[13] 4 Hawaii App. at 332, 666 P.2d at 617.

[14] "Real" conflict is also referred to as "actual" conflict. U.S. v. Martinez, 630 F.2d 361 (5th Cir. 1980).

[15] 4 Hawaii App. at 331, 666 P.2d at 616.

[16] *Id.*

[17] *See, e.g.*, Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974). In *Castillo*, the court emphasized the litigation aspect of conflict of interest situations. The CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 5-15 states in part, "A lawyer should never represent in litigation multiple clients with differing interests." The distinction in cases involving litigation is discussed in Sullivan, *The Client's Right to Consent to Potential Conflicts*, 11 CAP. U.L. REV. 625, 628 (1982).

In *Reis*, the Intermediate Court of Appeals recognized that there is an increased potential for conflict in matters involving litigation. The Hawaii Supreme Court recognized the litigation aspect of conflict of interest situations in City Council v. Sakai, 58 Hawaii 390, 570 P.2d 565 (1977).

[18] *See also* Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979); Cinema v. Cinerama, 529 F.2d 1384 (2nd Cir. 1976).

[19] 529 F.2d 1256 (7th Cir. 1975).

[20] *Id.* at 1264.

ered by the court was whether confidential information was deliberately not used to impeach the witness in order to protect attorney-client confidences.[21]

The court in *Reis* held that Shiraishi and his law firm concurrently represented two "important prosecution witnesses" and that there was sufficient prejudice under a prior representation test.[22] The court noted that the holding is consistent with the rules promulgated by the Code of Professional Responsibility and the Canons of Ethics, which require an attorney representing multiple clients to fully disclose the situation to his clients and obtain their consent.[23] Reis was unaware of the conflict and therefore did not waive his constitutional right to effective counsel.

The rules adopted by the court are consistent with the general case law on the issue of attorney conflict. The impact is twofold. First, although the State of Hawaii has a significant number of attorneys, the great majority of the bar resides on the island of Oahu.[24] The geographic nature of the island state requires travel by air to reach the other six inhabited islands. In smaller rural communities it is not uncommon for an attorney to represent a significant number of the population. Further, although *Reis* is a criminal case, the court referred to the standards of legal conduct promulgated by the Code of Professional Responsibility in Disciplinary Rule 5-105(c)[25] and its counterpart in the Canons of Ethics, Canon 9.[26] These standards apply to all practices of the law,

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[21] *Id.* at 1265.

[22] *Reis*, 4 Hawaii App. at 332, 666 P.2d at 617. It should be noted that the majority of jurisdictions, including Hawaii, uses the "substantial relationship" test in ascertaining whether an attorney's prior representation of an adverse party or witness warrants his disqualification. *See* Wong v. Fong, 60 Hawaii 601, 593 P.2d 386 (1979). In *Wong*, the court stated that under the substantial relationship test, the propriety of disqualification of counsel is determined by the degree to which the counsel's prior representation is similar in terms of subject matter, possible confidences and other factors. *See also* Trone v. Smith, 621 F.2d 994 (9th Cir. 1980); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 9 (1983).

The conspicuous absence of the use of the substantial relation test by the court in *Reis* may be an indication that in a criminal context, the standards which constitute attorney conflict are higher due to the textual guarantee of conflict-free representation in the sixth amendment.

[23] 4 Hawaii App. at 332, 666 P.2d at 617.

[24] According to the Hawaii State Bar Association, in 1983, of the 2,787 members of the state bar (not including judges and district court practitioners), 190 occupy the outer islands: ninety-seven on the island of Hawaii; sixty-two on Maui; thirty on Kauai; one on Molokai.

[25] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1983) states:

> In the situation covered by DR 5-105(A) and (B), a lawyer may represent multiple clients *if it is obvious* that he can adequately represent the interests of each and if each consents to the representation after *full disclosure* of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. (emphasis added).

[26] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983) states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

including civil litigation and business matters. Conceivably, outer island residents will be forced to incur additional expenses to hire attorneys from another island.

Second, although the court adopts the rule of full disclosure and consent in multiple representation situations, exactly what constitutes full disclosure[27] and knowledgeable waiver remains unanswered. The opinion suggests that had Reis been aware of the conflict and waived his right to effective counsel, the conflict would not have been an issue.[28] However, the court did not reach the question of whether full disclosure might have necessitated a breach of attorney-client confidences. Nor did the court discuss the rule in some jurisdictions that certain conflicts are so blatant that they cannot be waived.[29]

This decision demonstrates the court's desire to insure that a criminal defendant's right to conflict-free representation be maintained. In doing so the court has defined the applicable tests for the various kinds of attorney-client conflict of interest. The opinion indicates that the sixth amendment textual requirement of conflict-free representation is so fundamental that situations of concurrent representation are inherently conducive to divided loyalties.

Further, the court applied the prior representation test without actual knowledge of whether Shiraishi had confidential information which would prevent him from adequately representing his client. Forcing Shiraishi to reveal to the court the extent and nature of his professional relationship with either of the Villabrilles possibly would have resulted in a breach of the attorney-client privilege.[30]

In the future, the Hawaii courts must further define the parameters of full disclosure and knowledgeable waiver. In addition, the court should clarify whether it will apply a stricter standard in analyzing conflict of interest in crimi-

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[27] *See* International Business Machines Corp. v. Levin, 579 F.2d 271 (3rd Cir. 1978) (full disclosure means that all relevant facts must be disclosed, including facts that are peculiarly within knowledge of the attorney bearing the burden of making the disclosure); Turner v. Gilbreath, 3 Kansas App. 613, 599 P.2d 323 (1979) (full disclosure requires that available alternatives be discussed with the client).

[28] 4 Hawaii App. at 332, 666 P.2d at 616.

[29] *See* Unified Sewerage Agency of Washington County v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981) (an attorney's mere showing of consent of client after full disclosure is insufficient; it must be "obvious" that the attorney can adequately represent the interests of the client); *accord* Greene v. Greene, 418 N.Y.S.2d 379, 391 N.E.2d 1355 (1979).

[30] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) states in pertinent part:

> Preservation of Confidences and the Secrets of a Client.
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and secret refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1983).

nal cases under the guarantees of the sixth amendment, in contrast with civil cases. Without this clarification it is difficult to ascertain under what circumstances an impermissible conflict of interest exists.

Judy Sasaki

INSURANCE DEFENSE: The Use of a Declaratory Action to Preserve the Insurer's Right to Deny Coverage Under Policy Exclusions — *Great Southwest Fire Insurance Co. v. H. V. Corporation*, 3 Hawaii App. 664, 658 P.2d 337 (1983)

The Hawaii Intermediate Court of Appeals in *Great Southwest* held that the liability insurer's assumption of its insured's defense, when the latter has refused to sign a non-waiver of rights agreement (also called a "reservation of rights agreement"), is not a waiver of the insurer's right to bring a declaratory action to determine coverage and the insurer's duty to defend. This rule requires that the insurer file the declaratory action soon after commencing the insured's defense.[1] The decision allows Hawaii insurance companies to fulfill their duty to defend while preserving their right to challenge coverage based on policy exclusions.

I. FACTS

Great Southwest arose out of the stabbing of Appellant Su Duk Kim by Nam Soo Kim during a fight that took place in Yun Hee Lounge.[2] Su Duk Kim filed suit on November 1, 1978 against Yun Hee Im, sole stockholder of H.V. Corporation; H.V. Corporation, doing business as Yun Hee Lounge; and Nam Soo Kim. H.V. Corporation and Yun Hee Im were insured by Appellee Great Southwest Fire Insurance Company under an "Owners', Landlords' and Tenants' Liability Insurance" policy.[3] Great Southwest, believing it could deny coverage by relying on exclusions in the policy, presented Yun Hee Im with a non-waiver of rights agreement on November 8, 1975. Yun Hee Im refused to sign the agreement. Thereafter, Great Southwest began its defense of Yun Hee

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[1] *See generally* Annot., 38 A.L.R.2d 1148 (1954 & Supp.); 44 Am. Jur. 2d *Insurance* §§ 1426, 1440 (1982); 45 C.J.S. *Insurance* § 714 (1946).

[2] Great Southwest Fire Ins. Co. v. H.V. Corp., 3 Hawaii App. 664, 666, 658 P.2d 337, 339 (1983).

[3] *Id.* at 665, 658 P.2d at 339. Great Southwest originally issued a policy to C.B.Y. Lum, Inc., Lessor & H.V. Corporation dba Bonanza, Lessee. In 1977, Yun Hee Im became the sole stockholder, president, and general manager of H.V. Corporation. In 1978, Great Southwest issued a second policy on the premises substituting Yun Hee Im for Bonanza.

Im and H.V. Corporation, and on November 28, 1978, filed a declaratory action against Yun Hee Im, H.V. Corporation and Su Duk Kim, denying policy coverage.[4] Great Southwest then moved for summary judgment based on the policy exclusions, contending it had no duty to defend nor an obligation to pay any judgment that may be awarded against the insured.[5] H.V. Corporation and Yun Hee Im filed a cross-motion for summary judgment which Su Duk Kim later joined.[6] The trial court granted Appellee's motion for summary judgment.[7]

The appellants contended that Great Southwest waived its right to deny coverage either by assuming the insured's defense,[8] or by breaching their duty to inform the insured of the policy exclusions.[9] Great Southwest countered by again contending that the insureds were denied coverage by policy exclusions.[10]

The Intermediate Court of Appeals ruled that Great Southwest had not waived its right to rely on the policy exclusions by commencing the insured's defense in the underlying action. The court distinguished an earlier Hawaii case, *Yuen v. London Guarantee & Accident Co.*[11] In *Yuen*, the insurer intended to deny coverage because of the insured's alleged breach of its contractual duty to cooperate with the insurer. The insured, having been notified of its insurer's intention to deny coverage, refused to sign a non-waiver of rights agreement.[12] Thereafter, the insurer did not seek a judicial determination of policy coverage until after it had defended the insured to judgment.[13] The *Yuen* court held that the insurer had waived its right to deny coverage by conducting the insured's defense.[14]

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[4] *Id.* at 666, 658 P.2d at 339.

[5] *Id.* at 666-67, 658 P.2d at 339-40. The fight occurred between customer Su Duk Kim and Nam Soo Kim, husband of a lounge employee, at approximately the lounge's 2:00 a.m. closing time. Great Southwest contended that the suit by Su Duk Kim was excluded from coverage either under the alcoholic beverage exclusion or the assault and battery exclusion. The applicable section of the alcoholic beverage exclusion excluded coverage for claims of bodily injury because of a violation of any statute, ordinance or regulation dealing with the distribution of alcoholic beverages. Great Southwest also contended that punitive damages were excluded by the policy.

[6] *Id.* at 667, 658 P.2d at 340.

[7] *Id.*

[8] *Id.* at 668, 658 P.2d at 340.

[9] *Id.* at 670-72, 658 P.2d at 341-42.

[10] Punitive damages exclusion, 3 Hawaii App. at 669, 658 P.2d at 341; alcoholic beverage exclusion, 3 Hawaii App. at 672, 658 P.2d at 342-43; assault and battery exclusion, 3 Hawaii App. at 672, 658 P.2d at 342.

[11] 40 Hawaii 213 (1953).

[12] *Id.* at 219.

[13] *Id.*

[14] The *Yuen* court stated:

> We believe the preferable view to be that an insurer in a situation such as here presented is required to elect either to rely upon the policy provisions or, in the alternative,

The court in *Great Southwest* distinguished *Yuen* in two respects: (1) Great Southwest denied coverage based on coverage exclusions rather than a breach of the duty to cooperate; and (2) Great Southwest filed its declaratory action "almost simultaneously" with the commencement of the insured's defense rather than waiting until after a judgment was rendered.[15] However, the case was remanded as the intermediate court found material issues of fact regarding the applicability of the alcoholic beverage exclusion clause and the assault and battery exclusion clause.[16] The court also declined to decide whether in this case Great Southwest had a duty to call its insured's attention to the exclusions. The court stated it would be premature to decide this issue as the case was appealed in the pre-trial stage.[17]

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to unqualifiedly waive any alleged breach thereof and continue to defend the action unless the assured unqualifiedly consents to a reservation of the assurer's rights under the co-operation clause while continuing in defense of the action.

40 Hawaii at 229. The *Yuen* court further stated:

> When confronted with this situation, assuming that the alleged defense was valid, the defendant was put to an election. It could stand on its defense and refuse to go on, or it could abandon such defense and conduct the insured's side of the action. *It could not do both.* The choice of the latter course was inconsistent with the maintenance of a claim of no liability [and authorities cited].

40 Hawaii at 231 (emphasis added) (quoting Miller v. Union Indem. Co., 209 App. Div. 455, 204 N.Y.S. 730, 732 (1924)).

[15] 3 Hawaii App. at 668, 658 P.2d at 340. Also, the court affirmed the lower court's ruling that the policy excluded coverage for punitive damages. *Id.* at 669, 658 P.2d at 341.

[16] The court questioned whether any of the acts complained of violated the liquor commission rules and regulations. Thus, genuine issues of material fact existed as to the applicability of the alcoholic beverage exclusion. 3 Hawaii App. at 669-70, 658 P.2d at 341.

The court could not discern from the record whether Nam Soo Kim was convicted of an assault and battery. Material issues of fact existed as to the assault and battery exclusion. Several cases pertaining to the applicability of assault and battery or intentional harm exclusions have held that a criminal conviction is admissible in a civil suit to determine policy coverage. The convictions present a rebuttable presumption that the injury was intentionally inflicted. Thornton v. Paul, 74 Ill. 2d 132, 23 Ill. Dec. 541, 384 N.E.2d 335, 343 (1979); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842, 848 (1975); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7, 14 (1970).

[17] 3 Hawaii App. at 670-72, 658 P.2d at 341-42. Appellants relied on Logan v. John Hancock Mut. Life Ins. Co., 41 Cal. App. 3d 988, 116 Cal. Rptr. 528 (1974), which stated, "In the case of standardized insurance contracts, exceptions and limitations on coverage that the insured could *reasonably expect . . . must be called to his attention, clearly and plainly* before the exclusions will be interpreted to relieve the insurer of liability or performance. 41 Cal. App. 3d at 994-95, 116 Cal. Rptr. 528." 3 Hawaii App. at 671, 658 P.2d at 342 (emphasis in original). The intermediate court stated that this rule must be reconciled with the more relevant rule in State Farm Mut. Auto Ins. Co. v. Bailey, 58 Hawaii 284, 568 P.2d 1185 that "[a]n insured is bound by a policy which is not so complex that it should mislead a reasonably literate person who takes the trouble to read it." 3 Hawaii App. at 671 n.4, 658 P.2d at 342 n.4. The court noted that the issue is discussed in Crawford v. Ranger Ins. Co., 653 F.2d 1248 (9th Cir. 1981). In essence,

II. ANALYSIS

A. *Use of a Declaratory Action to Preserve Policy Rights*

The nature of the insurer's duty to defend its insured is purely contractual and primarily depends on the language of the contract.[18] Most liability insurance contracts require the insurer to defend "even if all of the allegations of the suit are groundless, false, or fraudulent."[19] The insurer must defend when the complaint raises a potential for indemnification liability of the insurer under the terms of the policy.[20] Thus, an insurer will often have a contractual duty to defend although indemnification liability is not found; the insurer's duty to defend is broader than the duty to indemnify.[21] However, a liability insurer who conducts the insured's defense with knowledge of facts which may take the suit outside of policy coverage, and without in some manner reserving its rights under the policy, is estopped thereafter from denying coverage based on policy exclusions.[22] Further, if the insurer breaches its contractual duty by wrongfully refusing to defend, it is estopped from later denying coverage.[23]

Crawford held that the reasonable expectation rule only applies when the exclusion clauses are ambiguous or inconspicuous.

[18] First Ins. Co. of Hawaii v. State, 66 Hawaii 413, 417, 665 P.2d 648, 651 (1983).

[19] *Id.* at 417, 665 P.2d at 652.

[20] Standard Oil Co. of California v. Hawaiian Ins. and Guar. Co., 65 Hawaii 521, 525, 654 P.2d 1345, 1348 (1982).

[21] *First Insurance*, 66 Hawaii at 417, 665 P.2d at 652. Where a complaint contains a single claim for intentional injury the Oregon courts will imply a negligence claim. The Oregon courts view this situation as analogous to the criminal law "lesser included offense" doctrine. Ferguson v. Birmingham Fire Ins. Co., 254 Or. 496, 460 P.2d 342, 347 (1969).

The New Jersey courts view the intentional injury claim as unique. Most coverage issues involve questions of time, status, place, identity of instrumentality and the like. The intentional injury situation involves the defendant's frame of mind, which is not part of the plaintiff's prima facie case (unless punitive damages are sought). Thus, the New Jersey courts hold a complaint alleging intentional injury is both within the covenant to pay and the intentional injury exclusion. Burd v. Mutual Ins. Co., 56 N.J. 383, 396, 267 A.2d 7, 12 (1970).

[22] *See supra* note 1. The insurer's assumption of the defense allows the insured to rely upon the insurer to protect the insured's interest and pay any judgment or settlement. The insured's reliance is justified by the insurer's contractual right to control the defense. Griggs v. Bertram, 88 N.J. 347, 443 A.2d 163, 167 (1982).

Some courts require the insured to show that she has been prejudiced by the insurer's assumption of the defense. Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24, 29 (1976). *See generally* Annot., 38 A.L.R.2d 1148 at § 5.

Prejudice to the insured will be found when the insurer's actions constitute taking control of the case. *Peppers*, 355 N.E.2d at 29; *cf.* Sussex Mut. Ins. Co. v. Hala Cleaners, 75 N.J. 117, 380 A.2d 693, 697-98 (1977).

[23] *Thornton*, 384 N.E.2d at 340, *citing* Palmer v. Sunberg, 71 Ill. App. 2d 22, 217 N.E.2d 463 (1966); Sims v. Illinois Nat'l Casualty Co., 43 Ill. App. 2d 184, 193 N.E.2d 123; G.

Great Southwest allows an insurer to fulfill its contractual duty to defend while preserving its right to rely on policy exclusions, if the insured refuses to sign a reservation of rights agreement, by filing a declaratory action to determine coverage.[24] In contrast, in *Yuen* the insurer was forced to either defend the insured and unqualifiedly waive the breach of cooperation defense or refuse to defend an insured who refused to sign a non-waiver of rights agreement.[25]

On the other hand, *Great Southwest* poses two questions. First, the court noted that it was not deciding whether *Yuen* was distinguishable because Great Southwest filed a declaratory action soon after commencing the insured's defense, or because Great Southwest's intention to deny coverage was based on policy exclusions rather than on the insured's failure to cooperate.[26] Thus it remains to be seen whether an insurer's action to deny coverage based on exclusions will be treated differently from an action based on the insured's cooperation.[27]

Second, it is unclear how promptly the declaratory action must be filed. The declaratory action in *Great Southwest* was filed four weeks after the filing of the initial suit, three weeks after the insured refused to sign the non-waiver agreement, and "almost simultaneously" with the assumption of the insured's defense.[28] Perhaps this issue will be decided on a case-to-case basis. The factors the court may consider are: (1) at what point did the insurer have knowledge of facts that could bring the suit within the policy exclusion;[29] (2) the insured's

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COUCH, INSURANCE §§ 51:66-69 (2d ed. 1965).

If the insurer wrongfully refuses to defend it is liable to the insured for breach of contract. The measure of damages for this breach is usually any judgment or settlement plus expenses incurred. *Thornton*, 384 N.E.2d at 340. *See generally* Annot., 49 A.L.R.2d 694 (1956 & Supp.); G. COUCH, INSURANCE §§ 51:54-56 (2nd ed. 1965).

[24] There is similar case law in other jurisdictions. *See, e.g., Hala Cleaners*, 75 N.J. 117, 380 A.2d 693 (1977); Boode v. Allied Mut. Ins. Co., 458 P.2d 653 (Ala. 1969). *See generally* Annot., 38 A.L.R.2d 1148 at §§ 4, 6.

[25] A possible reason for the difference between a policy exclusion defense and the co-operation clause defense is that the latter alleges the insured has breached the insurance contract. Thus, continued performance by the insurer may be a waiver of the insured's breach. On the other hand, where the insurer is relying on coverage exclusions in the policy, no breach of contract claim exists. Therefore, the insurer may fulfill its contractual duty to defend while reserving its exclusions. *See* Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281 (Ala. 1980). *Contra* Apex Mut. Ins. Co. v. Christner, 99 Ill. App. 2d 153, 240 N.E.2d 742 (1968) (filing of a declaratory action preserved insurer's right to deny policy coverage due to insured's failure to cooperate).

[26] 3 Hawaii App. at 668 n.1, 658 P.2d at 340 n.1.

[27] *See supra* note 25. For a general discussion on an automobile liability insurer's waiver of its right to deny coverage due to the insured's failure to cooperate, see Annot., 70 A.L.R.2d 1197 (1960 & Supp.).

[28] 3 Hawaii App. at 668, 658 P.2d at 340.

[29] The rule is stated in Annot., 38 A.L.R.2d 1148 § 8[d]:

diligence in investigating the claim to determine coverage;[30] (3) prior notice to the insured of the insurer's intent to deny coverage or manifestations that there was coverage;[31] and (4) the prejudice, if any, suffered by the insured due to the insurer's assumption of the insured's defense.[32]

B. Conflict of Interest

A corollary to the rule that an insurer must defend any claim which is potentially covered, is the proposition that where a suit raises several claims, the insurer has a duty to defend the entire suit as long as one claim is potentially covered.[33] This proposition can cause conflict of interest problems for the insured. For example, in *Thornton v. Paul*[34] the insured, a bar owner, was found guilty of battery arising out of an incident in his bar. The injured party subsequently filed suit against the insured claiming the injuries were intentionally, or in the alternative, negligently inflicted. The insured's liability insurance policy did not apply to bodily injury arising out of an assault and battery.[35] The Illinois court held there was a direct conflict of interest between the insurer's interest and the insured's. If the insurer was allowed to control the defense of the personal injury suit, its interest would be served by a finding that the insured was liable solely on the intentional tort claim.[36] Such a finding would leave the insured without coverage.

Similarly in *Great Southwest*, the insurer is faced with a possible conflict of interest problem on remand. Great Southwest's interest will be served by a finding that H.V. Corporation and Im are liable on a theory which will fall within the assault and battery or the alcoholic beverage exclusion. On the other hand, H.V. Corporation's and Im's interests will be served if liability is based, if at all, on a negligence or other theory falling within the policy.

Several cases have dealt with this conflict of interest problem, however these cases are not in accord. In *Thornton*, the Illinois court held that where the in-

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It seems that the most important fact to be considered in determining the timeliness of an insurer's notice of nonwaiver of defenses against the insured is the knowledge of the insurer as to such defenses. Delay in absence of knowledge will not result in estoppel of the insurer if the insurer acts promptly upon obtaining knowledge.

[30] Failure to investigate the claim promptly for the insured's benefit rendered a reservation of rights agreement unenforceable by the insurer in Hanover Ins. Group v. Cameron, 122 N.J. Super. 51, 298 A.2d 715, 723-24 (1973); *see also* Griggs v. Bertram, 88 N.J. 347, 443 A.2d 163 (1982).

[31] *See* Annot., 38 A.L.R.2d 1148 §§ 6, 7, 8.

[32] *See infra* note 27. *See generally* Annot., 38 A.L.R.2d 1148 § 5.

[33] *First Ins. Co. v. State*, 66 Hawaii 413, 417, 665 P.2d 648, 652 (1983).

[34] 384 N.E.2d 335.

[35] 384 N.E.2d at 337.

[36] 384 N.E.2d at 343.

surer's interests are in conflict with the insured's, the insurer should not be permitted to participate in the insured's defense.[37] Instead, the duty to defend requires the insurer to reimburse the insured for the cost of the defense.[38]

In *Burd v. Sussex Mutual Insurance Company*,[39] the New Jersey Supreme Court held that the conflict of interest problem transforms the insurer's duty to defend into a duty *to reimburse the insured if coverage is later found.*[40] Under this interpretation the duty to defend is narrowed by the conflict of interest as the duty exists only if the claim is within coverage.[41]

In *Brohawn v. Transamerica Insurance Company*,[42] the court held that the intentional/negligent personal injury conflict of interest gave the insured an option. Under *Brohawn* the insurer must inform the insured of the conflict of interest and allow the insured to either accept an independent attorney selected by the insurer or to select an attorney herself.[43] If the insured chooses the latter, the insurer must reimburse the insured the reasonable cost of the defense provided.[44]

In California and Oregon the conflict of interest problem is solved by holding that the judgment in the liability action has no collateral estoppel effect on a proceeding to determine coverage.[45] In this way the insurer can defend the insured with complete fidelity in the liability suit.

The conflict of interest problem also raises an issue regarding the timing of

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[37] *Id.*

[38] *Id.*; *accord* Murphy v. Urso, 88 Ill. 2d 244, 430 N.E.2d 1079, 58 Ill. Dec. 828 (1981); Aetna Casualty & Surety Co. v. Dichtl, 78 Ill. App. 3d 970, 398 N.E.2d 582, 34 Ill. Dec. 759 (1980); United States Fidelity & Guar. Co. v. Louis Roser Co., 585 F.2d 932 (8th Cir. 1978); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

In both *Roser* and *Peppers* the courts cited the Code of Professional Responsibility; in particular EC's 1, 2, 5-14, 15, 17 and 22. *Roser*, 585 F.2d at 932; *Peppers*, 355 N.E.2d at 30. The two authorities take the view that in the situation where the insurance company retains independent counsel to represent the insured, the retained counsel owes its sole duty to the insured. The retained counsel cannot aid the insurer in discovering and forming coverage defenses, nor can retained counsel participate in drafting a non-waiver agreement or bring a declaratory action to determine coverage. Tribler, *Insurance Counsel: Avoiding Conflict of Interest*, 23 FOR THE DEFENSE 19, 19 (No. 4 1981); Weithers, *The Coverage Role of Defense Counsel*, 48 INS. COUNS. J. 156, 156 (1981); *see* Grain Dealers Mut. Ins. Co. v. Tasaka, Hawaii Legal Rptr. 78-1253 (1978).

[39] 56 N.J. 383, 267 A.2d 7 (1970).

[40] *Id.* at 390, 267 A.2d at 10.

[41] The court also pointed out that if the insured was adjudged free of liability, she could recover her defense costs under the covenant binding the insured to defend "groundless, false or fraudulent" claims. 56 N.J. at 393, 267 A.2d at 12.

[42] 276 Md. 396, 347 A.2d 842 (1975).

[43] *Id.* at 414, 347 A.2d at 854.

[44] *Id.*

[45] Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 49 Cal. Rptr. 104 (1966); Ferguson v. Birmingham Fire Ins. Co., 254 Or. 496, 460 P.2d 342 (1969).

the action to determine coverage. The holdings in California and Oregon affording no collateral estoppel effect to the liability judgment imply that coverage will be decided after the liability trial. In this way the insured is provided with the defense she contracted for with the insurer.

In *Sussex Mutual Insurance Company v. Hala Cleaners, Inc.*,[46] the court noted that the declaratory action was ideally suited to decide insurance coverage. In *Hala* the insured was sued for property damage due to a fire he negligently or deliberately set. Sussex filed suit claiming it had no duty to defend or indemnify Hala Cleaners in that the fire was intentionally set. The New Jersey appellate court decided in Sussex's favor, finding it had no duty to defend or indemnify Hala *before* resolution of the underlying liability suit.[47]

In *Thornton v. Paul*, however, the Illinois court noted that the question of whether the insured negligently or intentionally caused plaintiff's injuries would be decided in the underlying suit. In this situation the Illinois court held that a declaratory action by the insurer to determine coverage prior to adjudication of the liability suit was improper.[48] The declaratory action would allow the insurer to take control of the litigation of the intent issue.[49] This would also deny the plaintiff her choice of forum.

III. CONCLUSION

Great Southwest brings a degree of certainty to insurance defense practice in Hawaii. By filing a declaratory action, the insurer has preserved its right to raise the policy exclusion as a defense to payment. The insurer also has notified the insured that there has been no waiver of policy rights in assuming the insured's defense. It remains to be seen what procedural or policy issues will arise from Hawaii's adoption of the dual litigation model, and how the Hawaii courts will respond.

Craig Shikuma

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[46] 75 N.J. 117, 380 A.2d 693 (1977).

[47] *Id.* at 127, 380 A.2d at 698.

[48] 384 N.E.2d at 345.

[49] *Id.* at 346 (citing Note, *Use of the Declaratory Judgment To Determine A Liability Insurer's Duty to Defend—Conflict of Interests*, 41 IND. L.J. 87 (1965)); *accord Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24; *Brohawn*, 276 Md. 396, 347 A.2d 842.

DUTY TO DEFEND: The Judicial Construction of Insurance Contracts — *Crawford v. Ranger Insurance*, 653 F.2d 1248 (9th Cir. 1981); *Standard Oil v. Hawaiian Insurance Guaranty*, 65 Hawaii 521, 654 P.2d 1345 (1982); *First Insurance v. State*, 66 Hawaii 413, 665 P.2d 648 (1983)

Three recent Hawaii cases clarify the contours of the insurer's duty to defend claims against the insured. *Crawford v. Ranger Insurance*[1] discussed the application of insurance policy exclusion clauses and the insurer's use of a reservation of rights notice to contest coverage of the insured in another action. *Standard Oil v. Hawaiian Insurance Guaranty*[2] construed an insurance contract provision requiring timely notice of claims in favor of the insured and articulated the test for determining when the duty to defend arises under the terms of an insurance contract. *First Insurance v. State*[3] distinguished the absolute duty to defend from the contingent duty to indemnify the insured.

CASES IN BRIEF

Crawford v. Ranger Insurance

Crawford owned an airplane insured by the defendant, Ranger Insurance. Crawford leased the airplane to C.A. McCluney Co., Inc. and Aeromarine, Inc.[4] The action stemmed from a plane crash in which a Mr. Lang, the pilot who had rented the plane from McCluney, died along with one of his children. Mrs. Lang and another child survived the crash. Mrs. Lang filed suit against Crawford, McCluney and Aeromarine.[5] Ranger informed Crawford that a defense would be provided for the death of the Lang child but that pilot death was excluded from policy coverage. Ranger told Crawford that if he wished, he

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[1] 653 F.2d 1248 (9th Cir. 1981).

[2] 65 Hawaii 521, 654 P.2d 1345 (1982).

[3] 66 Hawaii 413, 665 P.2d 648 (1983).

[4] 653 F.2d at 1250. While Crawford was the named insured, coverage was extended to McCluney and Aeromarine by an endorsement. McCluney and Aeromarine were also plaintiffs; however, for the sake of brevity reference to Crawford as the plaintiff includes McCluney and Aeromarine.

[5] *Id.*

could hire his own counsel to cover the claim for pilot death. Plaintiffs thereupon brought a declaratory judgment action to determine whether Ranger's liability policy covered pilot death. The district court ruled that it did not and Crawford appealed.[6] On appeal, Crawford argued that the policy as a whole was ambiguous and that Ranger had waived its right to rely on the pilot exclusion clause.[7]

The U.S. Court of Appeals construed the policy liberally in favor of the insured, and, reading the contract under the plain meaning principle, found the policy unambiguous.[8] The exclusions section was neither ambiguous nor inconsistent with the declarations section which merely acted as a condition precedent to policy coverage.

Finally, the court ruled that Ranger had not waived its right to assert the pilot exclusion clause as a defense.[9] The court distinguished *Yuen v. London Guarantee*[10] from the instant case in concluding that there was no inconsistency in Ranger providing a defense and disclaiming coverage for the pilot's death.[11]

Standard Oil v. Hawaiian Insurance Guaranty

The plaintiffs-appellees[12] sued defendant-appellant Hawaiian Insurance Guaranty (HIG) to recover damages allegedly sustained when HIG refused to defend actions brought against them by the heirs and executors of the pilot and the passengers of a plane that crashed on May 20, 1973.[13] HIG raised the defense that notice, as required by the policy, was not given. The trial court disposed of this contention by ruling that HIG had waived notice.[14] On appeal,

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[6] *Id.*

[7] *Id.* Crawford also argued that he had a reasonable expectation that the policy provided coverage for pilot death. He contended further that the district court erred by failing to give the decision in *Mathews v. Ranger Ins.*, 281 So.2d 345 (Fla. 1973), collateral estoppel effect on the issue of whether the policy covered pilot death. *See* 653 F.2d at 1251.

[8] 653 F.2d at 1251.

[9] *Id.* at 1253.

[10] 40 Hawaii 213 (1953).

[11] The *Yuen* court adopted the view that the insurer must obtain the insured's unqualified consent to a reservation of rights if the insurer is to defend the action while disclaiming liability.

[12] Standard Oil Company of California (SOCAL), Air Service Corporation (ASC) and Universal Enterprises d/b/a Associated Aviation Activities (AAA).

[13] 65 Hawaii 521, 522, 654 P.2d 1345, 1346 (1982). The plane crashed and killed the pilot, Dr. Chung, and his passengers George and Myrtle Chappell, Duane, Tamarah Sue and Marcia Lynn Archer. The malfunction of the left engine of the airplane caused the accident. Investigation identified contaminants in the fuel strainer of the left engine as a possible reason for the engine failure. The tanks feeding the engine had been fueled from an aviation refueler truck covered by a liability insurance policy issued by HIG for the benefit of SOCAL, ASC and AAA.

[14] *Id.*

the Intermediate Court of Appeals held that it was unnecessary to reach the question of waiver since the court concluded that HIG had been given notice as required by the insurance contract.[15] Certiorari was granted to determine whether the appeals court erred in holding as a matter of law that HIG had been properly and seasonably notified.[16]

The Hawaii Supreme Court found that HIG was notified when it received the complaints of the heirs and executors of the pilot and passengers[17] filed against the Defendants, ASC and AAA.[18] The allegations in those complaints should have alerted HIG to the possibility that the refueler truck, which was covered by the policy HIG had issued to SOCAL, ASC and AAA, might be involved.[19]

The court said that specificity in the pleadings establishing the refueler truck

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[15] 2 Hawaii App. 451, 634 P.2d 123 (1981).

[16] 65 Hawaii at 522, 654 P.2d at 1346.

[17] The actions leading up to the instant suit involved three suits which were eventually consolidated. Civil suit numbers 40848 and 40849 were filed in circuit court on December 3, 1973 by the heirs and executors of the Chappells and Archers against Dr. Chung's estate and unnamed Doe defendants. The complaints stated various theories of negligence and products liability. On February 22, 1974, ASC was brought in by the Chung estate as a third party defendant in Civil Nos. 40848 and 40849. ASC transmitted process to HIG requesting legal representation. HIG took no action and Southern Marine thereafter undertook the defense of the suits against ASC and AAA. ASC, AAA and SOCAL were respectively identified as Doe defendants in Civil Nos. 40848 and 40849 on September 13, 1974, February 20, 1975 and June 30, 1975.

On February 27, 1975, the Chung estate filed Civil No. 44402 and ASC and AAA were made party defendants. ASC and AAA forwarded the complaints to HIG, who sent them to Southern Marine. Southern Marine also defended this action. The three cases—40848, 40849 and 44402—were consolidated and on June 27, 1975, SOCAL was brought in as a third party defendant in all three cases by ASC and AAA. The third party complaint filed by ASC and AAA was the first time the refueler truck was specifically linked to the cause of the accident. SOCAL received the complaint on June 30, 1975 but did not tender the defense of the actions to HIG as SOCAL's insurer until January 13, 1976. HIG refused to defend, contending that the case was strictly a products liability case and that their policy only covered comprehensive automobile liability. Southern Marine defended SOCAL.

SOCAL, ASC and AAA ultimately settled with the Chungs, Chappells and Archers. SOCAL, ASC, AAA and Southern Marine sued HIG in circuit court for damages sustained as a result of HIG's refusal to defend. The circuit court held that because of HIG's refusal to defend ASC and SOCAL on the grounds of non-coverage, HIG waived and could not assert as a defense that SOCAL and/or ASC failed to give HIG timely notice of the wrongful death claims.

[18] 65 Hawaii at 526, 654 P.2d at 1348.

[19] 65 Hawaii at 526-27, 654 P.2d at 1348-49. The allegation stated:

> [D]efendants Air Service and Does IV through VI, their agents, servants and employees, [were negligent] in inspecting, *servicing*, maintaining and repairing the subject aircraft, *and in failing to detect and remove blockages and obstructions to the flow of fuel into the engines*, and said defendants Air Service and Does IV through VI were otherwise negligent and careless[.]

(Court's emphasis).

as the cause of the accident or just clearly mentioning the refueler truck was not required.[20] An insurer's duty to defend arises whenever there is a potential for indemnification liability of the insurer to the insured under the terms of the policy.[21] The court did not limit the insurer's obligation to determine its duty to defend to a reading of the pleadings. The insurer must undertake a good faith investigation of all information known to the insured or all information reasonably ascertainable to determine whether the insured is entitled to defense representation.[22]

First Insurance v. State

The State was an additional insured under a general comprehensive liability policy issued by First Insurance to M. Sonomura Contracting Co.[23] Sonomura contracted with the State to build a two-lane highway on the island of Hawaii. Sonomura obtained the policy as a condition to receiving the contract.[24]

The day after the two new lanes were opened to traffic, a two-car accident occurred in which one person died and others were injured.[25] First Insurance defended the State in the subsequent lawsuit[26] and paid the judgment rendered against the State. First Insurance then brought a declaratory judgment action to seek reimbursement for the expenses it incurred in its defense and its indemnification of the State.[27]

First Insurance acknowledged coverage for the State as an insured to the extent a judgment was held against it because of Sonomura's negligence. The insurer, however, denied owing a duty to defend and a duty to indemnify the State for its own negligence.[28] Nevertheless, First Insurance did defend the State under a reservation of rights agreement.[29] The circuit court held that the policy did not require First Insurance to defend the State for the State's own negli-

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[20] 65 Hawaii at 527, 654 P.2d at 1349 (1982).

[21] *Id.*

[22] *Id.*

[23] 66 Hawaii 413, 415, 665 P.2d 648, 650 (1983).

[24] *Id.*

[25] *Id.* Mr. Murata, the driver of one car, was killed. Robert and May Kamelamela, the driver and passenger in the other car, were injured. The heirs of Murata filed suit against Sonomura, the State, and the County of Hawaii. The Kamelamelas filed suit as intervenors and third party plaintiffs against Murata's estate, Sonomura, the State, and the County, seeking damages for personal injuries.

[26] Furukado v. M. Sonomura Contracting Co. (3rd Cir. Civ. No. 4756).

[27] 66 Hawaii at 416, 665 P.2d at 651.

[28] *Id.* at 415, 665 P.2d at 653.

[29] A reservation of rights agreement is a notice by the insurer to the insured that the insurer will defend the insured but that the insurer is not waiving any defense . . . it may have under the policy. *See* 7C J. APPLEMAN, INSURANCE LAW & PRACTICE § 4694, at 336 (Berdal ed. 1979).

gence or to pay damages.

The Supreme Court found that First Insurance had an obligation to defend the State. The *Furukado* pleadings had raised the possibility for indemnification liability of the insurer to the insured.[30] First Insurance acknowledged potential liability by recognizing the State as an insured for any judgment rendered against it due to Sonomura's negligence. First Insurance in its answering brief had also recognized a limited duty to defend the State as a result of Sonomura's negligence but not as a result of the State's own negligence.[31]

The court also determined that First Insurance was not relieved of its duty to defend because the allegations of the complaint were not cast solely within the policy exclusion. Nor was the duty to defend relieved by the fact that the action raised claims which arguably were outside of the policy's coverage.[32] Covered claims were acknowledged by First Insurance and this was enough to trigger the duty.[33]

The court dispensed with First Insurance's arguments that it discharged its duty to defend by accepting the State's tender of defense under a reservation of rights agreement and by retaining counsel to defend Sonomura. The reservation of rights agreement does not free the insurer from the costs it incurs in defending an insured that it has an obligation to defend. First Insurance's retention of counsel for Sonomura did not release the insurer from its responsibility to defend the State. The interests of Sonomura and the State were in conflict and therefore First Insurance was obligated to provide separate counsel for each defendant.[34]

The court interpreted the policy provision extending coverage[35] to the State and a limiting provision[36] to conclude that First Insurance was not required to

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[30] 66 Hawaii at 421, 665 P.2d at 654.

[31] *Id.*

[32] *Id.*

[33] This acknowledgment was in First Insurance's response of August 15, 1977 to the tender of the defense of the *Furukado* case by the State.

[34] *Id.* The court noted that although it was in the common interest of the State and Sonomura to prevent plaintiffs from securing any recovery, a potential conflict between the interests of the State and Sonomura was apparent. The court then quoted from 14 COUCH ON INSURANCE § 51:79 at 569 (Rhodes 1982):

> A conflict of interest may arise when the insurer covers different parties who are codefendants in a suit which triggers the insurer's duty to defend. Where the interests of such codefendants do not coincide, the insurer is required to provide separate counsel by selecting independent outside counsel for each insured.

[35] The provision provides the State with coverage "but only with respect to liability arising out of (1) operations performed for the additional insured by the named insured at the location designated above or (2) acts or omission of the additional insured in connection with his general supervision of such operations." 66 Hawaii at 424, 665 P.2d at 655.

[36] Exclusion 3b provides that "[t]his insurance does not apply . . . (b) to bodily injury or property damage arising out of any act or omission of the additional insured or any of his em-

indemnify the State. The exclusion clause limited coverage to liability incurred by the State which resulted from Sonomura's negligence or from an act or omission of the State in its general supervision of Sonomura's work.[37] The *Furukado* jury found Sonomura free of negligence and in doing so effectively concluded that the State was negligent in failing to warn the public of the changed road conditions. Since Sonomura was found not guilty of negligence and since the State's negligence did not hinge on a failure to supervise Sonomura, First Insurance had no duty to indemnify the State.[38]

Duty to Defend

The duty to defend an insured is only one part of a correlative duty.[39] The insurer maintains exclusive control, to the exclusion of the insured, over litigation against the insured to permit an orderly disbursement of monies accumulated from premiums and to minimize bogus claims.[40] In return, the insurer is obligated to defend the insured against suits alleging circumstances covered by the policy. The insurer must defend when there is the potential for indemnification.[41]

The general rule that a liability insurance company's obligation to defend the insured against third party actions is determined by the allegations of the complaint seems to be a well settled proposition of law in most states.[42] The federal courts also have generally acknowledged this rule.[43]

The first Hawaii case, *Yuen v. London Guarantee*,[44] to discuss the duty to defend did so in the context of a breach by the insured of a cooperation clause in the policy. Since the insured breached a provision of the insurance contract, the insurer refused to discharge a judgment entered against the insured.[45] The court concluded that the insurer could not disclaim liability under the policy

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ployees, other than general supervision of work performed for the additional insured by the named insured." 66 Hawaii at 424, 665 P.2d at 655.

[37] 66 Hawaii at 424, 665 P.2d at 655-56.

[38] *Id.*

[39] J. Appleman, *supra* note 29, §§ 4681-82.

[40] *Id.* § 4681 at 2.

[41] *Id.* § 4682 at 16.

[42] *See* Annot., 50 A.L.R.2d 465 (1956).

[43] *See, e.g.*, Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983); Scarborough v. Northern Assur. Co. of America, 718 F.2d 130 (5th Cir. 1983); Centennial Ins. Co. v. Applied Health Care Systems, Inc., 710 F.2d 1288 (7th Cir. 1983); Ezell v. Hayes Oilfield Const. Co., 693 F.2d 489 (5th Cir. 1982); Sherman v. Ambassador Ins. Co., 670 F.2d 251 (D.C. Cir. 1983). *See generally* Annot. 50 A.L.R.2d 465 (1956).

[44] 40 Hawaii 213 (1953).

[45] *Id.* at 216.

while continuing to defend successive suits against the insured.[46] The insurer could elect to do either but could not do both. If the insurer continued to defend without securing a disclaimer of liability from the insured, it would be adjudged as having waived its defense under the cooperation clause.[47]

In each recent Hawaii case—*Crawford*, *Standard Oil*, and *First Insurance*—the issue of the duty to defend is not raised until an injured party files a complaint against the insured. Once the complaint is forwarded, the insurer is on notice that a possible duty to defend exists and a number of steps must be taken by the insurer. The insurer must first assess the contract language of the policy.[48] This contract analysis is, however, tempered by concerns of judicial policy. As the court points out in *Standard Oil* in dicta, contract provisions, such as the requirement for immediate notice, cannot be used by the insurer, in the absence of prejudice, to provide technical escape hatches to deny the insured coverage.[49] The court wishes to safeguard the fundamental protective purpose of the insurance contract to assure the public and the insured that liability claims will be paid.[50]

Accordingly, the *Standard Oil* court found no prejudice to HIG even though SOCAL was not brought in as a third-party defendant until three months later and delayed the forwarding of its papers to HIG.[51] HIG had received notice with regard to the potential of liability for the insured risk and the joinder of an additional insured did not change HIG's potential liability.[52]

Contract terms of the policy are not necessarily definitive in fixing the insurer's duty to defend. While the terms are the source of the duty, courts also will consider equity in their determination of the insurance contract's meaning.[53] The insurer must first look to the language of the insurance contract when determining its duty to defend the insured. Whenever there is the potential for indemnification liability of the insurer to the insured under the terms of the policy, the insurer must defend.[54] The duty to defend extends to the entire suit even though other claims of the complaint are not covered by the policy.[55]

In *Crawford*, the insurer was required to defend the claims for pilot death

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[46] *Id.* at 233.

[47] *Id.*

[48] 66 Hawaii at 417, 665 P.2d at 651.

[49] *Id.* at 526 n.4, 654 P.2d at 1348 n.4.

[50] *Id. See also* Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168 (1966) (doctrine of the adhesion contract applied to insurance policy because of the unequal bargaining status of the parties; thus the meaning of the contract which the insured reasonably might have expected must be ascertained).

[51] 65 Hawaii at 526 n.4, 654 P.2d at 1348 n.4.

[52] *Id.*

[53] *See* 1 LONG, THE LAW OF LIABILITY INSURANCE § 5.02, at 5-7.

[54] 66 Hawaii at 417, 665 P.2d at 651.

[55] *Id.*

and passenger death even though pilot death was clearly excluded by the policy.[56] Similarly, in *First Insurance*, the State was covered for any judgment rendered against it due to Sonomura's negligence, but it was not covered for its own negligence.[57] Nevertheless, since the insurer could not ascertain which defendant would ultimately be found liable, three possibilities were raised by the complaint.[58] First Insurance undertook the defense of all claims under a reservation of rights agreement. When a complaint alleges multiple claims, the insurer cannot safely refuse to defend based upon a claim which appears to be outside coverage since the insurer cannot be positive it will not become liable at a later date.[59]

The court in *Standard Oil*, however, did not necessarily find the pleadings dispositive. The insurer must look to the allegations of the complaint first but must also conduct an independent investigation.[60] The insurer must undertake a good faith analysis of all information known to the insured or all information reasonably ascertainable to assess whether the possibility of coverage exists.[61]

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[56] 653 F.2d at 1251.

[57] 66 Hawaii at 421, 665 P.2d at 654.

[58] *Id.* The State could have been held liable for its own negligence, for negligence in connection with its general supervision of Sonomura's operations or for Sonomura's negligence.

[59] LONG, *supra* note 53, § 5.02, at 5-6. Judge Hand explained the multiple claim theory in Lee v. Aetna Casualty, 378 F.2d 750, 752-53 (2d Cir. 1949):

> [T]he injured party might conceivably recover on a claim, which, as he had alleged it, was outside the policy; but which, as it turned out, the insurer was bound to pay. Such is the plasticity of modern pleading that no one can be positive that that could not happen. In such a case of course the insurer would not have to defend; yet even then, as soon as, during the course of the trial, the changed character of the claim appeared, we need not say that the insured might not insist that the insurer take over the defence. When, however, as here, the complaint comprehends an injury which may be within the policy, we hold that the promise to defend includes it . . . . It follows that, if the plaintiff's complaint against the insured alleged facts which would have supported a recovery covered by the policy, it was the duty of the defendant to undertake the defence, until it could confine the claim to a recovery that the policy did not cover.

See also, e.g., Babcock & Wilson Co. v. Parsons Corp., 430 F.2d 531, 537. *Contra*, Marston v. Merchant Mut. Ins. Co., 319 A.2d 111, 114 (Me. 1974) (insurer bound to defend with respect to those claims which if proved are within the coverage); Waite v. Aetna Casualty & Sur. Co., 77 Wash. 2d 850, 855, 467 P.2d 847, 852-53 (1970) (insurer only liable for cost of defending claims which were potentially within coverage of policy). *See generally* J. APPLEMAN, *supra* note 29, § 4684.01, at 102, 106.

[60] 65 Hawaii at 527, 654 P.2d at 1349.

[61] *Id.* (quoting Spruill Motors, Inc. v. Universal Under. Ins. Co., 212 Kan. 681, 686, 512 P.2d 403, 407 (1973)). *Spruill* overruled two prior cases in which the duty to defend was determined from the allegations of the complaint alone. In doing so, the *Spruill* court took into consideration the new code of civil procedure, which had been adopted in Kansas, and a federal court decision ruling on an action which arose in Kansas, holding that the insurer in determining its duty to defend could not rely on the allegations of the complaint. *See* Milliken v. Fidelity and

Even if the potential of coverage is remote, if it exists, the insurer must defend.[62]

Coverage, which is related to the duty to defend, and liability, which is not, are distinguished in *First Insurance*.[63] Coverage is a matter of contract interpretation as it relates to a set of facts, while liability is concerned with an analysis of the applicable law to the same set of facts.[64] The obligation of the insurer to defend its insured is separate and distinct from an insurer's obligation to pay a judgment against the insured.[65] The court assessed the insurer's duty to indemnify by construing the policy provisions with regard to coverage and by recognizing the results of the trial outcome. The jury found Sonomura free of negligence while assigning negligence to the State for failing to adequately warn the public. This type of negligence was not covered by the policy and therefore First Insurance had no duty to indemnify the State.

In *Crawford*, the insurer clearly had no duty to indemnify because the claim for pilot death was unambiguously excluded from policy coverage. The *Standard Oil* court did not address whether HIG had a duty to indemnify.

Even if a policy contains an exclusion, this does not necessarily relieve the insurer of its duty to defend. The *Crawford* policy excluded pilot death and the court found this exclusion to be unambiguous.[66] Nevertheless, the insurer was

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Casualty Co., 338 F.2d 35 (10th Cir. 1964). The *Spruill* court adopted the rule that an insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. If those facts give rise to a potential of liability under the policy, the insurer bears a duty to defend. *Spruill*, 212 Kan. at 686, 512 P.2d at 407.

[62] 65 Hawaii at 527, 654 P.2d at 1349. The court, on the specific facts in *Standard Oil*, compels the insurer to reasonably investigate its duty to defend beyond the allegations of the complaint. *See* LONG, *supra* note 53, at 5-37-40.

The court in *Standard Oil* is not clear in its application of this rule. The rule's application seems to be triggered when the insured has knowledge of facts outside the allegations of the complaint which would require it to defend the insured. In *Standard Oil*, there is no indication that the insured had knowledge of outside facts which would compel its defense of the insured. On the other hand, lack of clarity in the allegations of the complaint perhaps influenced the court to impose a broader rule upon the insurer. *First Insurance* does not clarify the application of the reasonable investigation requirement, since the court did not have to go beyond the pleadings to determine the duty to defend.

[63] 66 Hawaii at 416, 665 P.2d at 651.

[64] *Id.* (quoting J. APPLEMAN, *supra* note 29, § 4682, at 23).

[65] 66 Hawaii at 416-17, 665 P.2d at 651. *See* St. Paul Fire & Marine Ins. Co. v. Thompson, 433 P.2d 795, 799 (Mont. 1967):

> The agreement to defend is not a covenant subordinate to or dependent on the agreement to indemnify; it is distinct from, different from, independent of, and broader than the insurer's promise to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury.

[66] 653 P.2d at 1250.

required to defend the pilot death claim because the allegations of the complaint had also raised a claim for passenger death which was covered by the policy.[67] Furthermore, if the allegations of the complaint are not cast solely within the policy exclusion, the insurer must defend. The exclusion in the endorsement which added the State as an insured to the Sonomura policy stated that coverage would not apply to bodily injury or property damage occurring after completion of all work on the project, or after the portion of Sonomura's work out of which injury or damage occurred was put to its intended use.[68]

Arguably, the exclusion applied since the accident from which the complaint arose occurred after the completion of work and after the highway was put to its intended use. Since, however, the allegations of the complaint did not completely include all aspects of the exclusion, First Insurance still had a duty to defend.[69]

Two of the cases, *Crawford* and *First Insurance*, raise the issue of reservation of rights agreements and when they are effective in duty to defend cases. A reservation of rights agreement is a notice by the insurer to the insured that the insurer will defend the insured but that the insurer is not waiving any defenses it may have under the policy.[70] Typically, an insurer who defends an insured waives its rights to assert policy defenses unless it first notifies the insured that it is disclaiming liability under the policy.[71]

In both *Ranger* and *First Insurance*, the insurers, upon notification of plaintiffs' allegations against the insureds, disclaimed liability for certain claims while agreeing to defend under a reservation of rights agreement. The insured in *Ranger* was told by the insurer that a defense would be provided but that it was disclaiming liability for the pilot's death. In *First Insurance*, the insurer dis-

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[67] *Id.* at 1253.

[68] 66 Hawaii at 419 n.3, 665 P.2d 654 n.3.

[69] The court's reasoning is clarified by its reliance upon Kincaid v. Simmons, 66 A.D.2d 428, 414 N.Y.S.2d 407, (App. Div. 1979). Suit was brought against the defendant subcontractor for injuries sustained by plaintiff on the construction premises. The subcontractor brought a third party declaratory judgment action against his insurer seeking indemnification and reimbursement of legal expenses incurred in his defense. *Kincaid* held that even though the subcontractor's portion of the construction was completed at the time the accident happened, the "completed operations hazard exclusion" in the policy did not excuse the insured from its duty to defend the subcontractor. The *Kincaid* court reasoned that the complaint clearly stated that an act of the insured might have been the proximate cause of the injuries to the plaintiff. This claim required the insurer to defend regardless of the ultimate outcome with respect to liability. Whether or not the insured completed operations, while relevant on the ultimate issue, was not determinative of the insurer's duty to defend. Since the insured's right to a defense is a contractual one and is a consideration upon which premiums are in part predicated, the insurer may only be relieved of its duty to defend when it can show that the allegations of the complaint cast the pleadings solely and entirely within the policy exclusion.

[70] 653 F.2d at 1253 (quoting J. APPLEMAN, *supra* note 29 § 4694, at 336).

[71] *Id.*

claimed liability for the State's own negligence, but since it did not know at the time against whom liability would be found, it agreed to defend the State under a reservation of rights agreement.

The insured in *Crawford* claimed that since he did not consent to the insurer's reservation of rights agreement and since the insurer provided him with a defense in the state court, the insurer's notice was insufficient to reserve Ranger's rights to assert policy defenses. The court held that Ranger did not waive its right to assert the pilot exclusion because, unlike *Yuen*,[72] there was no inconsistency in *Ranger* of providing a defense and disclaiming coverage for the pilot's death.[73]

First Insurance further clarified the scope of a reservation of rights agreement when the court concluded that such an agreement does not relieve the insurer of costs incurred in defending its insured where the insurer was obligated initially to provide a defense.[74]

An insurer, once it undertakes the defense of an insured, may be obligated to provide separate counsel for multiple insureds if their interests are in conflict. The court in *First Insurance* determined that the insurer did not discharge its duty to defend the State when it hired counsel for Sonomura. Sonomura and the State held the mutual interest of preventing the plaintiff from recovery. On the other hand, the potential conflict between their interests was obvious.[75]

In a situation like *Crawford*, however, where the complaint gives rise to a covered claim and an uncovered claim, it is unclear as to whether the insurer must provide counsel for the uncovered claim. The court uses ambiguous language in dicta implying that the insured could have obtained his own counsel for the uncovered claim of pilot death.

CONCLUSION

The trilogy of recent Hawaii cases addressing coverage and the duty to defend establishes a broad responsibility for insurance companies. Clearly, the burden is upon the insurer to assess the contractual language of its policy and the plaintiff's allegations to initially determine its duty to defend. The insurer's duty continues beyond an assessment of policy language and complaint allega-

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[72] *Yuen* involved an insurer who attempted to reserve its rights by orally notifying the insured just prior to trial that it did not consider itself liable under the policy. The insurer had known the facts which formed the basis of its disclaimer of liability far in advance of the trial date. The court held in *Yuen* the insurer was obligated to obtain the insured's unqualified consent to a reservation of rights if the insurer was to defend the action while disclaiming liability. *See* 653 F.2d at 1253.

[73] 653 F.2d at 1253.

[74] 66 Hawaii at 423, 665 P.2d at 655.

[75] 653 F.2d at 1250, 1253.

tions to an investigation of available facts or information to determine whether the possibility of coverage exists. The obligation to defend extends to uncovered claims pleaded in a complaint with covered claims. Exclusions in a policy will not necessarily relieve the insurer of its duty to defend. The duty to defend is broader than the duty to indemnify and each are distinct responsibilities.

The effect of reservation of rights agreements on the duty to defend can only be assessed on a limited basis given the lesser emphasis the courts have placed on this issue. Reservation of rights agreements obviously are useful to the insurer in protecting its future use of policy defenses. The insurer must, however, notify the insured of its disclaimer of liability. Given the courts' propensity for distinguishing *Yuen*, that case's holding requiring the insured's consent to a reservation of rights agreement seems to be limited to its facts.

The responsibility of the insurer to provide counsel to the insured occurs when there are conflicts of interest between multiple insureds. Whether the insured has an option of retaining counsel for uncovered claims is less clear. Issues of whether or not counsel hired by the insurer can effectively defend an insured against claims for which the insurance company has renounced liability are yet to be answered by the court.

Donna Gaetano

MOTOR VEHICLE LIABILITY INSURANCE: Uncertainty in the Hawaii Uninsured Motorist Insurance Law—*Yamamoto v. Premier Insurance Company*, 4 Hawaii App. 429, 668 P.2d 42 (1983)

The Hawaii Intermediate Court of Appeals has held that when a tortfeasor's insurance is the minimum required under financial responsibility law, and the combined damages of an injured party and his spouse claiming loss of consortium exceed that amount, the tortfeasor is considered uninsured as to both claims.[1] *Yamamoto v. Premier Insurance Company*,[2] if limited to its facts, appears to be consistent with previous case law. Nonetheless, the implications of the decision have resulted in some uncertainty as to when an injured policy holder is entitled to uninsured motorist benefits.

Mitsuo Yamamoto (Mr. Yamamoto) and Kimiye Yamamoto (Mrs. Yamamoto) had an automobile insurance policy from Premier Insurance Company (Premier), which insured their three vehicles. The policy covered uninsured motorist risk in the amount of $25,000.[3] Mr. Yamamoto suffered severe injuries in an automobile collision.[4] The other driver, Mr. Makuaole, was insured against risk for liability for $25,000, which is the minimum amount required by the no-fault statute.[5] Mr. Yamamoto filed a personal injury suit against Mr. Makuaole. Mrs. Yamamoto was also a party to the suit, claiming loss of consortium. The Yamamotos also sued Premier for wrongfully withholding uninsured motorists benefits and filed a motion for partial summary judgment. In response, Premier filed a motion for summary judgment. The trial court granted Premier's motion, from which the Yamamotos appealed.[6]

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[1] Yamamoto v. Premier Ins. Co., 4 Hawaii App. 429, 436-37, 668 P.2d 42, 49 (1983).

[2] 4 Hawaii App. 429, 668 P.2d 42 (1983).

[3] *Id.* at 430, 668 P.2d at 45.

[4] *Id.* at 436, 668 P.2d at 48.

[5] HAWAII REV. STAT. § 294-10 (1980) establishes the required policy coverage which an insurance policy for a motor vehicle must provide. The statute states in pertinent part: "(1) Liability coverage of not less than $25,000 for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm arising out of ownership, maintenance, use, loading or unloading, of the insured vehicle; . . . ."

[6] *Id.* at 430-31, 668 P.2d at 45.

Applying the applicable standard of review from a summary judgment,[7] the intermediate court held that the trial court erred in granting Premier's motion. The court found that when the facts were viewed in a light most favorable to the plaintiffs, there was a discernible theory of law under which the Yamamotos could have recovered.[8]

The court examined two Hawaii cases dealing with uninsured motorist coverage. First, in *Palisbo v. Hawaiian Insurance & Guaranty Co.*,[9] the plaintiff was one of four passengers injured in an automobile accident. The plaintiff received a judgment for $30,000. Due to the multiplicity of claims the trial court prorated the tortfeasor's policy limit among the four passengers entitled to benefits.[10] Thus, plaintiff's share of the award was less than the minimum policy limit required by the financial responsibility law.[11] The Hawaii Supreme Court held that because the tortfeasor was uninsured his policy could not provide minimum coverage to the plaintiff. Plaintiff could therefore recover from his own uninsured motorists benefits the difference between the minimum policy limit required by statute and his pro rata share.

Second, in *Allstate Insurance Co. v. Morgan*,[12] the Hawaii Supreme Court held that when a single insurance policy covers more than one automobile, a separate uninsured motorist coverage is created for each vehicle and the insured may recover the aggregate sum of coverage provided.[13] In other words, the insured may "stack"[14] his coverage.

The court assumed that Mr. Yamamoto was entitled to recover in excess of the statutory minimum and that Mrs. Yamamoto's claim for loss of consortium

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[7] According to the opinion, summary judgment is appropriate when there are no genuine issues of material fact, Costa v. Able Distributors, 3 Hawaii App. 486, 653 P.2d 101 (1982), and when considered in a light most favorable to the non-moving party, there is no discernible theory under which the plaintiff could recover. Gealon v. Keala, 60 Hawaii 513, 592 P.2d 621 (1979). *See also* Lau v. Bautista, 61 Hawaii 144, 598 P.2d 161 (1979); State v. Midkiff, 49 Hawaii 456, 421 P.2d 550 (1966); Mossman v. Hawaiian Trust Co., 45 Hawaii 1, 361 P.2d 374 (1961).

[8] 4 Hawaii App. at 438, 668 P.2d at 45.

[9] 57 Hawaii 10, 547 P.2d at 1350 (1976).

[10] *Id.* at 11, 547 P.2d at 1352 (1976). The tortfeasor was covered by liability insurance within policy limits of $1,000 per person and $20,000 per accident as required by the financial responsibility law. *Id.* at 13, 547 P.2d at 1353; *see* HAWAII REV. STAT. ch. 287.

[11] *Id.* at 15, 547 P.2d at 1354.

[12] 59 Hawaii 44, 575 P.2d 477 (1978). In *Allstate*, the plaintiff was injured in an automobile accident and the other driver did not have any insurance coverage. The plaintiff's insurance policy covered three cars. The court noted that a separate uninsured motorist coverage is, in effect, created for each vehicle insured under the policy. The court stated, stacking is allowed under the theory that the uninsured coverage is available to the insured, "regardless of whether or not she [plaintiff] was injured while in one of the insured vehicles." *Id.*

[13] *Id.* at 48-49, 575 P.2d at 480.

[14] *Yamamoto*, 4 Hawaii App. at 433, 668 P.2d at 47.

enabled her to recover at least one dollar in damages.[15] Based on these assumptions it was conceivable to the court that neither of the Yamamotos would recover the minimum amount guaranteed by the no-fault statute.[16] Applying these assumptions and the foregoing case law the court concluded that Mr. Makuaole was "uninsured" to both Yamamotos, and that they would recover uninsured motorists benefits.[17] Further, the Yamamotos could stack their benefits and recover the difference between their total uninsured motorist coverage ($75,000) and the amount recoverable from Mr. Makuaole ($25,000).[18]

The conclusion of the court appears to be consistent with the case law used in its analysis. Nevertheless the court's decision opens new areas of uncertainty. Two issues raised are: (1) whether a claim for loss of consortium must meet the threshold limits established in the no-fault statute before uninsured motorist benefits can be claimed;[19] and (2) whether loss of consortium is "accidental harm."[20]

The requirements which an injured person must meet in order to bring a tort action arising out of an automobile accident are delineated in Hawaii Revised Statutes section 294-16. This provision states: "No claim may be made for benefits under the uninsured motorist coverage by an injured person against an insurer . . . unless such claim meets the requirements of . . . [Hawaii Revised Statutes sections 294-10] (a)(1), (2) or (3)."[21] A plain reading of the statute indicates that Mrs. Yamamoto would have had to independently meet the threshold requirements before she could recover uninsured motorists benefits. However, in reaching its conclusion the court did not explicitly state that Mrs. Yamamoto had to meet the threshold. In fact, the court held that in order to be entitled to uninsured benefits, Mrs. Yamamoto's derivative claim would only have to be worth one dollar.

The opinion indicates that Mrs. Yamamoto's derivative claim did not have to meet the threshold. The court cites authority which holds that a claim for loss of consortium is derivative of the action for damages by the injured

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[15] 4 Hawaii App. at 436, 668 P.2d at 48.

[16] *Id.* at 436-37, 668 P.2d at 48-49.

[17] *Id.* Another court has allowed stacking of uninsured motorist protection based on the language of the policy. General Mutual Ins. Co. v. Gilmore, 319 So. 2d 675 (1975). In this case, the decedent was driving a company vehicle insured under a liability policy also covering seven other company cars. The decedent's spouse was allowed to stack the uninsured motorist coverage for all seven vehicles.

For a survey of case law concerning recovering uninsured motorist benefits when the tortfeasor liability insurance cannot provide full compensation, see Annot., 24 A.L.R. 4th 13 (1983).

[18] 4 Hawaii App. at 438, 668 P.2d at 49. *See generally* 23 A.L.R. 4th 12 (1983).

[19] *See infra* notes 21 to 23 and accompanying text.

[20] *See infra* notes 24 to 33 and accompanying text.

[21] HAWAII REV. STAT. § 294-6(b) (1983 Supp.).

spouse.[22] Thus, it could be argued that when Mr. Yamamoto satisfied the tort liability threshold, his claim for damages and the derivative action therefrom could be brought in civil suit. In other words, once the abolition on tort liability is removed, the civil liability laws apply, and the derivative action which arises from the injury can be brought against the tortfeasor.[23]

Further, the court held that although Mrs. Yamamoto's action is derivative from her husband's, she has an independent claim for damages.[24] Thus, if Mr. Yamamoto proved damages in excess of the minimum amount required by the financial responsibility law, and Mrs. Yamamoto proved damages of at least one dollar, Makuaole would be uninsured as to both Mr. and Mrs. Yamamoto.[25] Mr. Makuaole's $25,000 policy (which is equivalent to the statutory minimum) could not compensate the Yamamotos for at least the statutory minimum amount.[26] Thus, under *Yamamoto*, when an injured party is allowed to sue the tortfeasor for damages, the injured's spouse claiming loss of consortium has an independent statutory right to recover her damages up to the minimum amount required by the financial responsibility law.

Yamamoto relied on *Palisbo* in concluding that Mrs. Yamamoto was an injured party entitled to recover the statutory amount.[27] In *Palisbo*, Michael and Carole Ramos, parents of the decedent killed in the accident, sued for the death of their son.[28] The *Yamamoto* court reasoned that Mrs. Yamamoto's claim, like the Ramos' claim, was a derivative action and thus Mrs. Yamamoto was an injured party protected by the financial responibility law.[29] Therefore, it appears that the intermediate court has expanded *Palisbo* to include loss of consortium as a derivative action which gives the complainant a right to recover up to the statutory minimum required by the financial responsibility law.

The financial responsibility law requires an automobile liability policy to provide coverage not less than the minimum coverage required by the no-fault statute.[30] The no-fault statute requires "[l]iability coverage of not less than $25,000 for all damages arising out of accidental harm . . . . applicable to

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[22] 4 Hawaii App. at 435, 668 P.2d at 48 (*citing* Towse v. State, 64 Hawaii 624, 647 P.2d 696 (1982)). In *Towse*, the Hawaii Supreme Court stated: "It is generally accepted that the action for loss of consortium is a derivative action, *i.e.*, the action by the spouse for loss of consortium is derivative of the action for damages by the injured spouse." 64 Hawaii at 637, 647 P.2d at 705 (citations omitted).

[23] In Faulkner v. Allstate Ins. Co., 367 So. 2d 214 (1979), the court held that the husband's failure to meet the no-fault threshold for tort liability bars his wife's claim for loss of consortium.

[24] 4 Hawaii App. at 435, 668 P.2d at 48.

[25] *Id.* at 436-37, 668 P.2d at 48-49.

[26] *Id.*

[27] 4 Hawaii App. at 435, 668 P.2d at 48.

[28] 57 Hawaii at 11, 547 P.2d at 1352.

[29] 4 Hawaii App. at 435 n.6, 668 P.2d at 48 n.6.

[30] *See* HAWAII REV. STAT. §§ 287-1, -7 (1983 Supp.).

each person sustaining accidental harm. . . ."[31] Therefore, Mrs. Yamamoto, who has an independent claim to recover the statutory minimum amount, must be a person suffering "accidental harm." The no-fault statute defines "accidental harm" as "bodily injury, death, sickness, or disease caused by a motor vehicle accident to a person."[32] From the above stated definition one must conclude that the court's holding in *Yamamoto* implies an expansive interpretation of "accidental harm."

Judy Sasaki
Craig Shikuma

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[31] HAWAII REV. STAT. § 294-10(a)(1) (1983 Supp.).
[32] HAWAII REV. STAT. § 294-2(1) (1976).