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RECENT DEVELOPMENTS

Legal Aspects of U.S.-Korea Trade

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What follows is a presentation for Americans of a Korean point of view concerning many of the issues that arise in the course of international commerce between the United States and Korea.[1] It is a tenet of the American legal system that the trier of fact can best determine the truth by listening carefully to the proponents of the opposing positions as each tries to present its own side of an issue as persuasively as possible. The American position on many of the following issues has been frequently expressed[2] and, besides being more familiar, it is also the position that most Americans are initially inclined to accept. It is not the purpose of this article to aggressively debate that position, nor to restate it in a show of even-handedness. Although every attempt will be made to accurately present American concerns, this article is written from a Korean perspective. Regardless of whether the reader accepts these arguments, it is hoped that he or she will try to understand them.

The analysis will proceed in the following order: first, some general remarks on the history of the Korean economy over the past twenty years; second, a discussion contrasting the ways Koreans and Americans do business and practice law; third, a description of the main features of Korean governmental economic regulation and policy in areas such as licensing and foreign exchange controls; fourth, a description of the differences in Korean and American economic regulation and policies; and fifth, the problems for United States-Korean trade which these differing interests and policies generate. This article will deal only with general problems which affect all transactions in United States-Korean

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[1] In this paper the unofficial names "South Korea" or simply "Korea" will be used to refer to the Republic of Korea. When the intent is to refer to the Democratic Peoples Republic of Korea, the unofficial name "North Korea" will be used.

[2] Official statements of the U.S. position on many of the following issues can be found in the publications of the Office of the U.S. Trade Representative and the U.S. Department of Commerce, International Trade Administration.

trade. More specific problems involving only a single industry; for example, the anti-dumping controversy involving certain steel products, or the consumer electronics industry, or the "voluntary" reductions in the export of other goods, are beyond the scope of this article.

I. Some Recent Korean Economic History

The Korean civil war which ended in 1953 left South Korea an impoverished country.[3] Agriculture was devastated. In most of the country, hardly a tree was left standing due to the combined effects of fighting and severe fuel shortages. The industry that existed in the south before the war was destroyed, and the economic infrastructure, including roads, railroads, and facilities for the generation of electricity, were demolished. Millions of refugees fled to South Korea from the communist regime in North Korea, leaving South Korea one of the most densely populated countries in the world. These problems were exacerbated by the residual legacy of Japanese colonialism which had suppressed indigenous leadership since 1910, and the on-going necessity of maintaining a very large defense force against the North Korean threat.

By 1961, despite vast amounts of American aid, the process of economic recovery had scarcely begun.[4] However, when the form of foreign aid shifted from the gratuitous provision of commodities to meet emergency needs to loans that could be used to develop Korea's own productive resources,[5] and when the Syngman Rhee government's (1948-1960) emphasis upon political objectives gave way to the Park Chung-Hee government's (1961-1979) determination to promote economic development,[6] a prolonged period of rapid economic growth began. Thereafter, the economy grew dramatically.

Despite the "oil shocks" of the 1970's and several world-wide economic recessions, the Korean economy grew at an average annual rate of 8.7% from

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[3] Technically the war has never ended. There is still only a cease-fire, and not a peace treaty, in effect.

[4] Modern statistics on Korean economic growth normally cite 1961 or 1962 as the base year. The rate of economic growth through the late 1950's barely kept ahead of the population growth rate.

[5] The shift in the form of foreign aid and in the development policies of the Korean government is described by D.C. Cole & P.N. Lyman, *Korean Development* (1971).

President Park criticized the earlier form of aid, claiming: "American aid during this period (1955-1959) was extremely tight fisted toward productive facilities which we desired and generous with regard to consumer goods which we did not require." Park Chung Hee, *The Country, the Revolution and I*, at 31, 37-80 (2nd ed. 1970).

[6] The change in government policies and practices is described in detail by L.P. Jones & I. Sakong, *Government, Business and Entrepreneurship in Economic Development: The Korean Case* (1980).

1961-1971, 10.8% from 1972-1978 and 4.5% from 1979-1983.[7] The rate of sustained growth over that period is one of the highest in the world. Per capita Gross National Product in 1980 constant prices rose from $395 in 1962 to $1,880 in 1983.[8] As a result, since 1961 Korea has been transformed from one of the poorest countries in the world to one of the wealthiest of the developing nations.

The transformation of any country from a totally agrarian society into an industrialized member of an integrated global economy in less than 100 years places considerable strain on the social order. In Korea, the strain was compounded by 35 years of subjection to the brutal colonial policies of Japan (1910-1945), the devastating civil war, and the arbitrary division of the nation between North and South. The process of urbanization is still continuing. The proportion of the population living in cities increased from 28% in 1962 to 57% in 1980,[9] and the population of Seoul is now almost nine million.

A system of strong social controls was made possible by a consensus among both the elites and the vast majority of the population that hard work and discipline were necessary for survival. Without that, the rapid growth could have led to hopeless chaos. Nonetheless, the social philosophy which has played such a crucial role in Korean development was not manufactured *de novo*. It had its roots in Korea's neo-Confucian traditions[10] concerning the proper role and function of government,[11] the proper relationship between the individual and society[12] and a lifestyle characterized by low individual consumption.[13]

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[7] These statistics are taken from KIM KI-HWAN, *The Korean Economy: Past Performance, Current Reforms, and Future Prospects* (1984) (Korea Development Institute) [hereinafter cited as "KDI"]. A table of the annual growth of the Gross National Product [hereinafter cited as GNP] in 1980 constant prices is located at page 41 of that book.

[8] See *id.* for a table of the annual growth of the GNP in 1980 constant prices. For statistics on annual per capita GNP see Korea Development Institute, *The Fifth Five-Year Economic and Social Development Plan* 176 (1982); *Economic Bulletin* (S. Korea) (Jan. 1984). Other sources list the 1962 per capita GNP in the then-current prices at $87.

[9] *See* Koo Sung-Yeal, *A Demographic-Economic Model for Korea*, KDI working paper, at 6 (1982).

[10] The form of Confucianism which prevailed in traditional Korea was that which was taught by Chu Hsi (1139-1200) and his predecessors of the Sung period of China. The teachings of Chu Hsi, commonly referred to as Neo-Confucianism, stressed a centralized form of government with the monarch as the fountainhead of benevolent and moral government. Subsequent developments in Confucianism in China were resisted by the established orthodoxy in Korea. *See* HAHM PYONG CHOON, THE KOREAN POLITICAL TRADITION AND LAW 9 (1971).

[11] The most important attribute of a ruler was thought to be virtue, which was attainable through reason. A ruler with virtue could fulfill his role at the top of the social hierarchy and provide an example for the people. *Id.* at 15-30.

[12] Confucian society was arranged hierarchically, and an individual's role was determined on the basis of his relationships with others. As understood in a Western sense, the concepts of liberty, equality, and justice were totally foreign to traditional Korea. *Id.* at 30-45.

The way that Korea has built upon its traditional neo-Confucian system of values conflicts with conventional wisdom concerning economic development. It was commonly believed that traditional values would have to be replaced with modern attitudes and practices if growth was to occur. Modernization was equated with the Western mode; those who advocated westernization assumed that a developing country must undergo the successive stages undergone in the course of Western development if the Korean economy was to achieve balanced growth. Probably the most thoughtful and readable statement in English on this position is contained in *The Korean Political Tradition and Law* by Hahm. Professor Hahm wrote:

> What we must do in Asia is to live through all the stages of historical development step by step. This does not mean that we must take precisely 360 odd years to catch up with the modern world. The way to shorten the length of time . . . is not to skip intervening centuries but to shorten the length of time in each stage of development. We could do this by taking advantage of the experiences of the West.

The point made by Professor Hahm, is that free enterprise and individual entrepreneurial skills, which can only be acquired through *laissez-faire* capitalism, are necessary to establish a solid foundation before it is possible to go on to the next stage of a mixed economy or a welfare state. Professor Hahm wrote that such a foundation was important because it would provide an antidote for Confucian authoritarianism.[14]

Despite the claims of those who advocated the necessity of western style modernization, Korea's developmental plan has retained elements that are distinctly traditional in character. Extensive government-led economic planning and regulation contributed to the nature and success of Korea's developmental plan.[15] At the level of individual socialization, the curriculum prescribed by the Ministry of Education for all students through the high school level, and the ideals expressed in the publicly controlled mass media, all stress continuity between the traditional Confucian heritage and the values which are presently

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[13] The accumulation of wealth was not considered a virtue or an indication of social status. If large amounts of wealth were acquired, it was considered illicit wealth. *Id.* at 78-79. The style of traditional Korean houses, for example, shows that conspicuous consumption was not a characteristic of even the wealthiest class.

[14] *Id.* at 166, 167.

[15] "The government of Park Chung Hee . . . in no sense pursued a laissez-faire strategy towards the economy; rather, it has been heavily interventionist in attempting to influence the microeconomic decisions of productive units either through direct government participation in public enterprise or through stimulating, forcing, or cajoling private enterprises." L. P. JONES & I. SAKONG, *supra* note 6, at 288.

advocated.[16] The superiority of diligence and cooperation over Western-style individualism is also an important theme of the government-supported New Village and New Mind movement.

The results have been impressive. While some Western countries are suffering economic decline, the Koreans, with their Confucian heritage, are forging ahead with one of the highest rates of economic growth in the world. The former one-way flow of Asian students looking to the West to learn the most modern management techniques has now become a two-way dialogue as Westerners now look for what they can learn from the East.[17] Though it is sometimes concluded that Eastern, particularly Japanese, management techniques cannot be easily transplanted to the West because of the distinctive cultural backgrounds,[18] the converse may be equally true. In any case, traditional Korean values, modified to meet present needs,[19] have proven not to be an obstacle but rather an asset which has contributed to the economic miracle.

Growth in international trade has also played a major role in Korea's economic growth. In 1961, total exports from Korea amounted to only $41 million,[20] but by 1983 the value of exports had multiplied to $24.5 billion.[21] The total value of imports grew from $316 million in 1961[22] to $26.2 billion in 1983.[23] Exports to the United States amounted to $11.1 million in 1960[24] and grew to $8.25 billion in 1983.[25] Almost without notice, Korea has become an

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[16] Choi Jang Jip, *Interest Conflict and Political Control: The Case of the Labor Movement in Korea* (1983) (unpublished Ph.D. dissertation, University of Chicago), described how the Federation of Korean Trade Unions, the only legal labor confederation in Korea, is required to conduct "New Village Movement" training programs for workers. The training programs stress diligence and cooperation with the employer over employees' individual interests.

[17] Two books which advocate the adoption of certain Japanese management practices by Western business are E.F. VOGEL, *Japan as Number One* (1979) and W.G. OUCHI, *Theory Z* (1981).

[18] *See Japan: A Paper Tiger?*, Newsweek (International ed.) July 2, 1984 (where the fascination of the West with Japanese-style management is giving way to a realization that many of the Japanese practices cannot be easily transferred to the West).

[19] The modification has been substantial. Those characteristics of the New-Confucian tradition which are contrary to the new economic development policies, such as a disdain for commercial activity, a strictly isolationist foreign policy, and a rigid conservatism, have now completely disappeared. The preference in education for literature over science and the all-surpassing importance of filial piety in the large extended family have also changed radically. Only the traditional roots remain to give legitimacy to what is really a new social structure tailor-made for economic growth.

[20] KIM KI-HWAN, *supra* note 7, at 23. *See also* Bank of Korea, *Economic Statistics Yearbook* 210 (1984).

[21] Bank of Korea, *supra* note 20.

[22] *Id.*

[23] *Id.*

[24] Bank of Korea, *Economic Statistics Yearbook 1964.*

[25] Bank of Korea, *supra* note 20, at 212.

important trading partner of the United States. In 1980, Korea ranked eighth of all nations in two way trade with the United States, and among developing countries it ranked third in such trade, surpassed only by Saudi Arabia and Mexico. In 1983, Korea realized a surplus in its trade with the United States of $1.08 billion.[26]

There have been a number of other developments in United States-Korean trade, apart from the spectacular growth in volume. The most important of these has been a substantial shift in the kinds of goods traded in both directions. In the post-war days, Korea was heavily dependent on food shipments from the United States. Today food is still the United States' largest export category to Korea; however, its importance as a percentage of total trade has been steadily declining. Far more sophisticated goods increasingly dominate the trade. Korea is a major consumer of American heavy and precision machinery, which has been necessary for industrial expansion. It has also acquired advanced American products in such fields as nuclear energy, telecommunications, and data processing.

Similarly, in the early days Korean exports to the United States consisted largely of handicrafts and other light consumer goods. While these have grown, particularly textiles and finished clothing, Korea's exports are increasingly in the areas of steel, electronics, chemicals, precision parts for a wide variety of industries, and ships. All indications are that this trend toward the trading of progressively more sophisticated goods between the United States and Korea is likely to continue into the foreseeable future as Korea's economy becomes more technologically advanced.[27]

Korea is dependent on trade to a degree found virtually nowhere else in the world. Over seventy percent of its land is too mountainous to permit any kind of agriculture, and in recent years there have been repeated droughts. With one of the highest population densities in the world, Korea cannot produce enough food for its entire population, despite substantial strides in agriculture. Further, though significant progress has been made in re-forestation of the mountains

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[26] Korea Development Institute, *Renewing the U.S. GSP Program: A Korean View of the Graduation Issue* (1984), lists Bank of Korea statistics on Korea's balance of payments with the United States as follows:

		(in $ million)		
1979	1980	1981	1982	1983
-354.2	-1,357.6	-1,849.9	-1,283.2	1,079.4

Others sources set the figure for Korea's 1983 surplus at $1.7 billion.

[27] Korea Development Institute, *Fifth Five-Year Economic and Social Development Plan* (1982) describes the shift in the patterns of imports and exports from the early 1960's to the present. The Fifth Five-Year Plan aims at a slight expansion of light industries but a greater emphasis on high technology manufacturing, commercial electronics, and machinery. *See also* KIM KI-HWAN, *supra* note 7.

after their wartime destruction, Korea still must import nearly all the wood and paper it uses. With respect to non-renewable resources, the situation is even worse. Korea is not a major producer of any minerals or metals, and in the vast majority of those categories, it produces nothing. In 1981, total mining production amounted to approximately one billion dollars.[28] Korea has some coal, but no oil and essentially no natural gas. In fact, in 1981, its oil imports alone were equal to almost eight times its total mining production.[29] Thus, Korea must import a substantial portion of its food and essentially all of its energy needs.

In addition, because Korea embarked upon its course of industrialization with very limited supplies of domestic capital, it had to borrow large amounts of foreign capital to finance its development. In 1983, the foreign debt totalled approximately $40 billion.[30] Though Korea is considered a very good risk and no danger of default on the loans is foreseen,[31] the need to service the debt and repay the loans still places a heavy demand on Korea's supply of foreign exchange. To meet these obligations, Korea exports nearly one third of its gross national product (hereinafter referred to as "GNP"). Even that is insufficient, however, since Korea imports goods worth substantially more than one third of its GNP.[32] There is no country of its size or larger that is as dependent on foreign trade as Korea.[33]

It cannot be over-emphasized that for Korea, trade is a national necessity. With it, she has been able to create a rapidly improving standard of living for her people and to eliminate the need for continued gratuitous economic aid from the United States. Korea has also been able to maintain the heaviest defense burden of any of America's allies, in that it matches the United States in the percentage of GNP devoted to defense, and maintains a standing military

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[28] Bank of Korea, *supra* note 22, lists the gross output of all mining activity for 1981 at 765 billion won, which equals approximately one billion dollars.

[29] Korea's importation of mineral fuels in 1981 amounted to $7.76 billion. *Id.*

[30] The debt has been set at $40 billion. *See* Yuosang Yun, *Korean Debt Burden: Growing Too Great?*, BUSINESS KOREA, at 31 (Mar. 1984).

[31] The debt service-to-export ratio in 1983 was 19%. That figure is far lower than the ratio in many other developing nations, and is below the 20% level which, according to the International Monetary Fund, distinguishes a "reasonable" from a "heavy" debt burden). See *Banking on Asia*, NEWSWEEK (International ed.), at 31 (July 2, 1984) for an explanation on how the perceived stability of the Korean economy has caused Western banks to compete to lend money there at terms favorable to Korea.

[32] *Economic Bulletin* (S. Korea) (Jan. 1984) lists the 1982 GNP (in 1980 prices) at $70.8 billion. Exports for 1982 were almost $22 billion, and imports were $24.3 billion.

[33] Barone, *Dependency, Marxist Theory, and Salvaging the Idea of Capitalism in South Korea*, 15 REV. RAD. POL. ECON. 43 (1983) argues that certain industrialized European nations are dependent on trade to a comparable degree. However, the advantages that those countries enjoy as advanced economies with high levels of capital formation and with trade dominated by capital and technology-intensive products, as well as their position in the European Common Market, effectively results in a lower level of dependency on trade than that of Korea.

force which is substantially larger per capita than that of the United States.[84] Any impediments to trade thus strike at the heart of Korea's economic and political well being. Korea must trade, which means it must export, or it will die.

II. Some Contrasts between the Korean and American Legal and Business Cultures

A. Language

Language poses the single greatest difficulty in United States-Korean trade relations. Unfortunately, Koreans find themselves carrying nearly all the burden of this problem. Americans often do not appreciate either the extent or impact of the problem.

The starting point for appreciating the depth of the problem is to recall that English and Korean, unlike English and European languages, have virtually no overlap in vocabulary. Words which bear a resemblance to one another in English and German, or English and Italian, often have the same meanings. This is not so with English and Korean. Furthermore, the grammar of Korean and English are radically different. The syntax of English, for instance, is almost completely the opposite of Korean. This total reversal of word order creates severe difficulties in listening comprehension for Koreans, even Koreans with considerable skill in English. Thus, in business discussions and face-to-face negotiations, the Koreans often cannot comprehend precisely what the Americans are saying. Although all Koreans study conversational English, even through private lessons, which many Koreans undertake at great expense, this cannot completely remove the language barrier.

The use of interpreters could ease the burden for Koreans. However, competent interpreters familiar with legal or business technicalities are not easily found and are very expensive. Further the use of interpreters more than doubles the time required for discussions and negotiations. They add a feeling of formality and remoteness, when informality and close personal contact are required. Moreover, some Koreans are too proud and stubborn to admit either to themselves or to others that their own English is inadequate for the job at hand. Therefore, they often refuse the use of interpreters even when it would clearly be in their own best interests.

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[84] All men in Korea, unless exempted because of physical disabilities or exceptionally pressing family needs, must undergo three years of compulsory military service, and then remain in the reserves until they are 35 years old. The standing army is 650,000 out of a total population of 40 million. The cost of diverting these men away from production must be borne by the rest of society.

Partly as a result of these linguistic problems, Korean-American business discussions waste a great deal of time and often generate as much mutual misunderstanding as understanding. For example, the Americans will often write up the day's discussions (in English) and present it to the Koreans. The Koreans will take the write-up home and laboriously read it and, realizing only then the extent to which what has been said (or at any rate what the Americans think has been said) is not what they wanted to say, will try to retract it at the next session, much to the anger and frustration of the Americans. It is worse when the realization that there has not been a full meeting of the minds comes not at the next negotiating session, but after the contract is signed and performance is under way.

Even when Koreans comprehend what is being said in discussions and negotiations, they inevitably encounter difficulty in replying. To some extent, this is due to cultural inhibitions (as discussed below) against personal confrontation. But this recalcitrance is also partly due to the disadvantage of having to speak in a language as foreign as English. As a result of the Koreans' inability to formulate an adequate reply, Americans often do not understand the Korean positions, or misinterpret silence as assent. Thus, Koreans often find themselves helpless to negotiate finer points and, in order to simply close the deal, they accept contracts which do not clearly state their intentions.

B. Attitudes Toward Confrontation and the Sanctity of Contract

To compound the linguistic difficulties described above, differences in cultural background are often insufficiently appreciated by the parties themselves. Two businessmen, one Korean and one American, wearing the same Western business suits and familiar with the same international industry, are apt to assume that they are much more similar to one another than is actually the case.

The largest difference existing between them is the attitude toward direct personal confrontation. Americans tend to be direct and to the point. When they are not, they are usually being deliberately indirect or vague for tactical reasons. Although the Korean language itself is, as a mechanical matter, perfectly capable of being used in a direct and precise way, Koreans in fact seldom use it in this manner. Even when Koreans speak English, they tend to do so in an indirect manner. This indirectness is not the result of a carefully thought-out strategy aimed at hiding something or trapping someone. Rather, it is an instinctive way of speaking fostered by a cultural attitude which discourages personal confrontation.

This attitude is often translated into English as "saving face." The less clearly and directly something is said, the less it can be contradicted or shown to be wrong. Koreans instinctively do not want to lose face by being contradicted or shown to have been wrong. As a corollary, it is generally not considered a fault

to be vague or evasive in speaking or writing. More than one's own face is almost always at risk. One does not wish to cause another to lose face. Therefore, even when one is right, one hesitates to point out to the other that he is wrong, and if one must do so, it is done in as indirect a manner as possible.

Another aspect of "saving face" is concern and respect for one's colleagues, a concern and respect which one expects to be reciprocated.[35] Koreans want business to be pleasant as well as profitable, and therefore strive for "harmony" and "good relations" with business colleagues. In business transactions, this leads to avoidance of attempts to forsee and provide for all the possible disagreeable contigencies, such as termination or default. Rather, Koreans instinctively rely on a step-by-step approach to a business relationship where problems are resolved as they come up, if they come up at all. If problems do not arise, then the time and agony of trying to provide for them prospectively in the contract, as in the American legal style, will be avoided altogether. The American approach often involves needless front-end hashing-out of all kinds of hair-raising scenarios which still often fails to anticipate the problems which actually do develop.

A corollary of the Korean's reluctance to anticipate all unpleasant eventualities is his willingness to address problems as they arise, to change course accordingly, and to put in the necessary time and effort to make things work. Sometimes, it is precisely this apparent flexibility that frustrates Americans. Americans assume that a signed contract is a final contract and that any changes, once performance is underway, are not to be automatically understood and accepted by the other party but rather are bargained for in exchange for concessions in other areas.[36] In contrast, Koreans often change course precisely because they have not planned carefully in advance, and they assume that the other side will understand their request for unilateral changes when the need becomes clear. For Koreans, the spirit of a contract is much more important than the letter, hence the importance of harmony and good relations from the start. This difference in attitude toward both confrontation and the sanctity of contracts must be considered by both parties to a Korean-United States contract in order to avoid misunderstanding in both the present and the future.

C. The Role of Lawyers

Law and lawyers do not play a major role in Korean society. Korea has less

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[35] A word frequently used in Korean is *kibun*, which may be roughly translated as mood, or feelings. Koreans consider it important not to damage another person's *kibun*.

[36] The American attitude is reflected in the principle of American contract law which requires that for changes in a contract to be binding there should be "consideration" granted by both parties as the basis for the change.

than two percent of the number of lawyers per capita than one finds in the United States.[37] More significant than the number of lawyers is the importance of law in American culture. For a nation of immigrants, the common ideology embodied in the United States Constitution and system of government; that is that the rule of law must prevail over the rule of men, provides an essential sense of identity. In contrast, to be a Korean is to be a member of a Confucian tribe which has occupied its ancestral lands for centuries and where daily life is governed by family obligation and social custom. In Korea, resort to litigation is taken only as a last resort and is considered shameful for all involved.[38] Lawyers are simply not part of a Korean businessman's daily life.

The frequent absence of lawyers on the Korean side of business negotiations exacerbates the linguistic and cultural differences discussed above. Most of the documents in Korean-United States business transactions are drafted by American lawyers for the American party. By the time the Korean party enters the negotiation process, American style documentation already forms the basis from which negotiations may proceed. If a Korean lawyer is brought into the matter, it is often only as a result of pressure from the American party (or rather the lawyer for the American party). In such cases, the Korean lawyer's role is often little more than that of a rubber stamp.

Even if the Korean businessman seeks to obtain a lawyer's advice, cultural limitations inhibit effective face-to-face detailed consultation. Such face-to-face consultation may lead to the embarrassing revelation that the Korean businessman has not adequately assessed his needs and wants, or that the Korean lawyer is generally inexperienced in that area of business.

Furthermore, Korean lawyers are not inclined to become involved in detailed negotiations. Such discussions are essentially Socratic. An American lawyer finds himself at home with them. In contrast, a Korean lawyer's training follows the continental European civil law tradition: studying, listening to lectures, and preparing analyses based upon review of written information. A Korean lawyer is not trained to search out facts from his client, but rather will rely soley on those facts which the client chooses to present.

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[37] Many Korean students choose law as their undergraduate major in college, but very few of them succeed in passing the Korean version of the bar exam. Most of the others use their undergraduate legal training in various jobs in business and industry, or public service. Many of the functions performed by lawyers in America are also performed by judicial scriveners in Korea. Thus, the scarcity of lawyers is not as extreme as statistics might suggest, but the fact remains that the legal profession is small and undeveloped.

[38] Traditionally, Korean formal law devoted itself primarily to the regulation of crime. The complaining party and witnesses, as well as the defendant, were liable to be detained and tortured in the course of litigation. It was felt that resort to litigation indicated that both parties had failed to maintain proper relations or to resolve their differences by proper means. *See generally*, HAHM PYONG CHOON, *supra* note 10. *See also* B.D. CHUN, W. SHAW & D. CHOI, TRADITIONAL KOREAN LEGAL ATTITUDES (1980) (Korea Research Monograph No. 2).

These same features manifest themselves even when a lawyer must be consulted, as for example in litigation. In some cases, Korean companies now approach a lawyer when a dispute arises even if it has not yet reached formal litigation. They are learning. But the lawyer's role is often still limited to offering abstract advice based on documents selected by the client. Face-to-face discussions, the searching out of facts, and strategy sessions are simply not in the repertoire of most Korean lawyers or Korean clients.

In Seoul there are less than ten Korean lawyers who have received legal training in both Korea and the United States and are members of both the Korean bar and the bars of one or more of the American states. It would be good policy for Korean businesses to request their services more extensively, and for the Korean government to fund or sponsor programs designed to increase the number of lawyers with such training as rapidly as possible.

Americans may prefer the *status quo*, characterized by a predominance of American lawyers and English language negotiations and contracts. However, the imbalance or misunderstanding created thereby negates any long term advantage for both parties, because it impairs harmonious relations. It would facilitate international trade if American corporations were to hire United States trained Korean lawyers to represent them in Korea. The more radical step of allowing the Korean version of a contract to be controlling would also provide a good check on negotiations carried out in English, and would ensure that the contract embodies the shared intentions of both parties.

When Americans are unable or unwilling to deal on an equal basis with Koreans by using the Korean language and the Korean style of negotiation, all the accomodations must be made by the Korean party. Normally, however, the issues that arise in negotiations are traded off against each other. By yielding on formal or procedural issues, such as language or the controlling version of the contract, it might be possible for the American party to reach a more desirable agreement on substantive issues. The good will and harmony that would be generated by an American company's willingness to have the controlling version of a contract be the Korean version cannot be overestimated.

D. Litigation in an Unfamiliar Forum of Arbitration

One of the most threatening problems that can arise in connection with international business transactions is a dispute which leads to litigation in an unfamiliar forum. This situation is especially threatening when the forum is as unfamiliar as the Korean legal system is to Americans or as the American legal system is to Koreans.

Korea has a civil law system received from Japan. The commercial code is

based essentially on the French and German codes.[39] However, Korea applies these codes in a relatively uncertain manner due to her mere thirty-five year history as an independent state, and the consequent scarcity of accumulated treaties and case law.

When the outcome of a case depends upon the application of regulatory laws, the uncertainty is still greater. Unlike the formal codes which comprise a more or less complete, unified, and internally consistent whole, Korea's regulatory laws are a hodgepodge: some laws are original while some are borrowed from all over the globe, although most derive from Japan and the United States. They are internally inconsistent and do not form a complete, coherent whole.[40] While uncertainty about the laws may seem difficult enough, it is the bureaucratic administration of the laws and regulations that causes the greatest difficulties for Americans. At the higher administrative levels there are frequently American educated personnel who are willing and able to arrange solutions acceptable to both parties. However, it is normally lower level personnel (less trained with less ability to make accomodations for foreigners) who develop the details of policy and apply them to actual cases. From an American perspective, these results seem narrow or somewhat xenophobic.[41]

At this point, the American reader may be resolving that he will never allow any contract he negotiates to contain a clause stating that Korean law should control the interpretation of that contract. One should consider, however, the American legal system from the point of view of a Korean businessman. The stereotype held by Koreans is that to Americans, law is a national pastime and a spectator sport. Obviously, the sheer volume and diversity of American law is simply overwhelming. With fifty separate sovereign states, the federal government, an independent judiciary handing down decisions in line with the latest trends in social and economic theory,[42] and a plethora of federal and state regulatory bodies, the American legal system has no peer in complexity and unpredictability.

In contrast, traditional Korean law was limited to penal codes that were ap-

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[39] For a general description of the civil law system, see J.H. MERRYMAN, *The Civil Law Tradition* (1969).

[40] For example, the labor laws of Korea were modeled after the laws in the United States, despite differences in labor conditions and the orientation of labor movements in the two countries. When the American-style laws are applied in Korea, the result is very different from what an American might expect.

[41] An unpublished survey conducted by the Korean Traders Association of foreign businessmen in Korea concerning administrative obstacles they encountered in the course of their business uncovered much frustration over what the businessmen perceived as both inflexible and inconsistent application of regulations by lower level officials.

[42] The extent to which social and economic theory influences judicial decisions is debatable, but to Koreans with their typical civil law distrust of judicial legislation, it certainly seems undesirable.

plied only when moral training had failed. Legal processes did not provide an effective remedy for private commercial disputes. Instead of litigation, a form of mediation, in which a third party would urge the disputants out of their respect for him, to come to an amicable solution, was the normal means of handling disputes. Consistent with this tradition, it remains difficult for Koreans to conceive of a conflict requiring litigation while the business relationship is on-going. Few Korean businessmen would agree to allow American law to control a contract if they believed that litigation was a serious possibility. American lawyers should realize that when a contract is negotiated in a manner that contemplates litigation, a serious constraint is imposed on their Korean counterparts.

In view of the difficulties for either party involved in litigation in a foreign jurisdiction, and the greater compatibility with Korean values and traditions of alternative dispute resolution procedures, it is not surprising that the law of arbitration is relatively highly developed in Korea. Korea acknowledged American arbitration awards in the 1957 Friendship Commerce and Navigation Treaty with the United States (Art. 511). In addition, Korea and the United States are both signatories of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*[43] Since 1966, Korea has had a detailed Arbitration Act which not only permits parties to set their own terms for arbitration, but fills in the terms not specifically agreed upon by the parties as well.[44]

The atmosphere surrounding the negotiation of any United States-Korean contract will be improved if the parties agree to a fairly detailed arbitration clause. The general advantages of arbitration over litigation are well-known. They include understandable, flexible and informal procedures, confidentiality, reduced costs, and the possibility of a compromise not available in a court of law.[45] If the arbitration clause in a contract is carefully drawn, the parties can assure themselves of knowledgeable arbitrators in whom both parties have confidence.[46]

American lawyers invariably over-negotiate a contract when dealing with Koreans. Their enthusiasm for working out all contingencies in advance, however, would be better directed at careful drafting of an arbitration clause. Also important are provisions for partial arbitration which provide the means for

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[43] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

[44] For more discussions, see SONG KUN LIEW, *Commercial Arbitration in Korea with Special Reference to the UNCITRAL RULES*, 5 KOREAN J. COMP. L. 69 (1971), *reprinted in* SONG SANG HYUN, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA (1983).

[45] *See* McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211 (1979).

[46] See McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83, 92-95 (1978) for details on drafting.

settlement of controversial points in the contract while the parties continue performance. This type of careful attention to an arbitration clause should help to channel lawyers' efforts into designing procedures in the contracts by which the parties can reconcile differences and preserve their business relations in spite of unexpected contingencies.

E. Contrasts in the Organization of Business and the Relation of Business to Government

Koreans and Americans have very different views regarding the nature and place of business in society. An important value in the American heritage is the concept of free enterprise as undertaken by the industrious individual entrepreneur. The archetypal, mythical American is the small entrepreneur. Although achievements of the most successful entrepreneurs may be admired or envied, the exercise of concentrated economic power is often viewed with distrust.

In contrast, Korean tradition does not glorify the small entrepreneur struggling against competitors on his way to the top. Historically, commercial or financial activities directed toward the objective of gaining wealth were scorned as non-productive and unworthy of a person of respectable social standing. On the other hand, there exists a long tradition in Korea of government monopolies over commodities such as salt, silk, and luxury manufactured goods. According to the Confucian world view, the formula for peace and prosperity was for government leaders, in their proper role as "benevolent fathers," to lead the masses along the path of right behavior. Building upon the tradition of the people looking to the government for guidance the government has occupied the field as the dominant actor directing economic planning and development. Therefore, it is not surprising that Korea's economic growth is regarded as the outcome of disciplined cooperation, rather than individual competition. Economic advancement is an accomplishment of the entire nation, requiring everyone to subordinate individual advantage for the common good.

Further, the Korean has no aversion to concentrated economic power. Coming from a traditionally fatalistic, hierarchical society, he does not consider the great wealth and power of others to be an affront to his sense of justice or his self esteem.[47] He would like to be higher in whatever hierarchy he finds himself, and is often very ambitious; but he does not challenge the existence of the hierarchy itself.[48]

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[47] The acceptance of a hierarchy is consistent with the old traditions, but the fact that the acquisition of wealth has now become a socially acceptable goal and economic success has become a determinant of social status contrasts with traditional values. This is another example of selective adherence to traditional values.

[48] There is virtual unanimity among scholars familiar with Korea that South Korean society is

These attitudes have encouraged a concentration of economic power in Korea to an extent unknown in the United States. Much of Korean industry is organized into major groups or loosely structured conglomerates which are licensed and receive special benefits as General Trading Companies.[49] One of the largest, Hyundai,[50] is still under the control of the man who started it. Hyundai's 1982 sales totalled $2.67 billion.[51] Hyundai is the largest of ten similar groups which, taken together, sold over 50% of the nation's total exports in 1983.[52] These companies have cooperated closely with successive governments and have received administrative support. However, the personal power of the leaders of these groups is not restrained by the need for consensus among top management as for example, in Japan. Korean organizations of any size, be they corporations, law firms, or universities, usually have a top man who can make quick decisions and expect others to fall in line.

One reason for the government's support of these conglomerates is that channeling economic resources through businesses which have proven themselves increases efficiency. This has the practical effect of preventing many commercial disputes in United States-Korean trade, since the large conglomerates are more concerned about quality control and more responsive to the need for informal and expedited dispute resolution. Each of the ten largest conglomerates has its own trading company which markets the full range of goods produced by the companies in that group. These trading companies are generally sophisticated in international commercial and legal matters. They are able to conduct their international business in a way that avoids disputes. However, it is true that these large conglomerates, and the degree of industrial concentration in Korea, is also a cause of current and potential problems. These arise largely in the areas of dumping and anti-trust, and will be discussed below in Sections IV-A-2 and IV-B-2.

The history of international commercial transactions around the world demonstrates the unequal bargaining power between local businesses in developing nations, and multinational corporations, trading companies, and financial institutions. The Korean government has a vital interest in the success of Korean businesses since national economic survival hinges on their ability to export and earn foreign exchange. Therefore, through regulations and the requirement of

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not faced with a pronounced class struggle.

[49] See *infra* note 58 below for an explanation of the requirements for classification as a GTC, and the benefits that follow from being so classified.

[50] The Hyundai conglomerate consists of a group of companies which manufacture such diverse items as cars, ships, electric and electronic appliances, heavy equipment, chemicals and other items.

[51] *Seeking a Profit Breakthrough*, BUSINESS KOREA, at 36 (Nov. 1983) (citing figures provided by the Ministry of Commerce and Industry).

[52] *Id.*

governmental approval of many international contracts, the government indirectly sides with the Korean party to equalize the bargaining power.

Americans must expect the Korean government to be a *de facto* third party to any international trade agreement. Successful business negotiations with Korean companies thus requires an understanding of Korean governmental, economic and social policies. One final note illustrates this point. A recent report of the Fair Trade Commission of the Economic Planning Board concluded that of the 697 contracts negotiated between Korean companies and foreign companies between April, 1981 and February, 1983, 271 were unfavorable to the Korean company. The response of the Korean government was to order the 271 Korean contractors to correct the terms of the contracts.[53] Especially frowned upon were total restrictions on export of commodities produced in Korea with licensed foreign technologies.

III. Supervision of Trade by the Korean Government

Before proceeding to a discussion of specific problem areas in United States-Korean trade, attention should be focused on some of the key devices employed by the Korean government to help regulate, stabilize, and expand the economy. Awareness of these measures will provide a background for understanding the specific examples discussed in Section IV.

A. Foreign Exchange Control

Under the Foreign Exchange Control Act and related enforcement decree,[54] strict and comprehensive controls are imposed on all foreign exchange transactions involving South Korean currency (Won) and all import or export of foreign currency to and from Korea. These restrictions affect every international business transaction.[55] Their purpose is to stabilize the value of domestic cur-

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[53] *Economic Bulletin* (S. Korea) (Apr. 7, 1983). The report states that in the majority of cases the changes demanded by the government had been made. Only six contractors were relieved from their obligation to comply with the government order.

[54] Foreign Exchange Control Act (S. Korea), Law No. 933 (Dec. 31, 1961), *as amended by* Law No. 1562 (Dec. 16, 1963), Law No. 1799 (July 28, 1966) and Law No. 1920 (Mar. 30, 1967).

[55] For example, art. 5, subsection 1 of the Act states that the Minister of Finance shall decide the basic exchange rate between the domestic currency and foreign currencies, but subsection 3 of the same article allows a different exchange rate to be set by the Minister of Finance (with the approval of the President following consideration by the State Council) for particular transactions when it is considered necessary. Chapter II of the Act deals with the issuance of permits which are necessary for all foreign exchange transactions. See generally the Foreign Exchange Control Act, arts. 5-13, 17-20 for an overview of the numerous restrictions placed on foreign exchange

rency and to ensure effective utilization of all foreign exchange funds. As a practical matter, the necessity of obtaining foreign exchange approval for any business transaction allows the government to review and withhold approval of any commercial transaction it deems contrary to Korean interests.[56]

B. *Licensing Requirements*

1. *General Licenses*

Under the Korean Foreign Trade Act,[57] any corporation or person intending to engage in the business of export/import must obtain a license[58] from the Ministry of Trade and Industry (hereinafter referred to as "MTI").[59] If a foreigner wishes to engage in trade in Korea he must apply to the MTI which then refers the matter to the Foreign Trade Committee for "deliberation."[60] In effect, this allows the government to exclude foreigners from the export/import business in Korea, although a few have been issued licenses. The decision as to the issuance of licenses is discretionary, and cannot effectively be challenged.

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transactions.

[56] *See* Lee & Callaway, *Foreign Exchange Controls in Korea, and their Impact upon International Commercial Transactions, in* BUSINESS LAWS IN KOREA: INVESTMENT, TAXATION, AND INDUSTRIAL PROPERTY 246 (K. Chan-Jin ed. 1982).

[57] International Trade Act (S. Korea), Law No. 1878 (Jan. 16, 1967), *as amended by* Law No. 2266 (Dec. 31, 1970), Law No. 2407 (Dec. 30, 1972) and Law No. 2781 (July 25, 1975).

[58] Another aspect of this license requirement is that the law provides for the licensing of "General Trading Companies" (GTCs) which are granted special benefits not bestowed upon other Korean trading companies, such as permission to have extra personnel in overseas offices, the use of revolving letters of credit, the right to stockpile finished goods for export, relaxed regulations on certain imports, and preferential treatment in international bidding.

In order to be designated a GTC, a trading company must export more than 2% of Korea's gross exports, have its shares publicly traded, and meet certain other requirements. The substantial benefits of being designated a GTC make it reasonable for companies, in order to be so classified, to compete to raise their level of exports above what might otherwise be profitable for the particular corporation, but in a way that is perfectly consistent with the needs of the nation as a whole to increase its aggregate level of exports. The companies also comply with other government requirements in order to retain their status. The result is that GTCs, from their positions of dominance, are able to conduct their foreign trade business with a high degree of competence and professionalism so as to minimize misunderstandings and avoid disputes.

[59] The name was recently changed from Ministry of Commerce and Industry to Ministry of Trade and Industry. Most authorities still use the old name, but in this article the new name is used to reflect the present terminology.

[60] Korean Foreign Trade Act, *supra* note 58, art. 3 subsection (3) provides: "The Minister of Commerce and Industry shall, when intending to grant a permission of export/import business to a foreigner . . . refer this matter to the Foreign Trade Committee for its deliberation."

2. *Licenses for Particular Transactions*

A manufacturer who wishes to export his products from Korea may only do so under the authority of a license. He may use a licensed trading company or he may apply for a special license. The latter is granted only to entities which export products that they have produced themselves. Whether an exporter uses the first or second method, he must obtain a separate license describing the basic terms such as subject matter, quantity and price for each individual transaction. By the same token, a business that wishes to import must obtain a specific license for each separate transaction. The license may be obtained by a trading company or a special license may be obtained directly by the company desiring to import provided that the imported material is strictly for the company's own use. If a Korean manufacturer conducts his business through a trading company, the question may arise as to whether the manufacturer or the trading company would be liable in the event of non-performance of a contract with a foreign buyer.

3. *Classification of Goods for Licensing Purposes*

The MTI is required to classify export and import goods into three categories: goods for export or import which are automatically approved, goods which may be imported or exported subject to approval, and goods the export or import of which are prohibited.[61] This serves the purpose of protecting both fledgling domestic industries and the health and welfare of the Korean people. The classification is made annually or biannually, with at least thirty days notice of any change. However, the classification can be changed without notice if a letter of credit has been opened, or if the export or import of goods which has been approved is not affected by the change.[62] If a contract has been signed but no letter of credit has been opened or approval obtained, a change in classification of the type of product in question, may prevent either party from performing on a contract. All contracts in United States-Korean trade should contain a *force majeure* clause in contemplation of this possibility. *Force Majeure* clauses describe, *inter alia*, procedures to be followed in the event that governmental action makes compliance with the contract impossible, and are a common fea-

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[61] *Id.* art. 9.

> The Minister of Commerce and Industry shall formulate comprehensively the following matters with respect to exportation or importation of commodities for a duration of each trade year or half-year and make it public not later than thirty days prior to the implementing date:
>
> 1. Matters related to the classification of commodities requiring approval of importing commodities.

[62] *Id.* art. 9, subsection (2).

ture of international contracts. It is inconsistent for American parties to plan for all other eventualities in advance and at the same time refuse to include a *force majeure* clause which would facilitate orderly adjustments if they become necessary.

In the case of goods which may be traded subject to approval, the MTI has delegated the issuance of separate export or import licenses to Foreign Exchange Banks.[63] These licenses may be issued upon the recommendation of the relevant government authority or the relevant manufacturer's association.

4. Export Inspection

In order to minimize the quantity of sub-par goods exported by Korean companies, the government often requires a quality inspection of the goods before an export license is issued. When Korean industries have proven their ability to manufacture a particular item with consistently high quality, the inspection requirement is removed.

C. Price Setting and Adjustments of Orderly Markets

As the number of nations and companies involved in direct competition increases, the potential margins of profit decrease. Although this result cannot be avoided, the MTI does have the authority to limit price competition among Korean manufacturers. The conflicts which the exercise of such authority can create in Korean-American trade relations will be discussed in greater detail in Section IV below. First, the Korean law and practice should be briefly described.

The most direct way by which the MTI limits price competition is by setting minimum export prices. The equivalent effect is achieved with regard to the prices of imported goods by the imposition of tarriffs or the restriction of imports of certain items.[64] In addition, the MTI has the power to make other "adjustments" to ensure the maintenance of order in the export and import of goods.[65] This includes the power to regulate the conduct, number and condition of Korean companies bidding for international contracts overseas and to modify the quantity of imports or exports or contract terms.

One manner in which the MTI regulates exporters is through direct intervention and the partitioning of markets in situations where competition has driven

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[63] *Id.* arts. 23, 24.

[64] *Id.* art. 10, subsection (1) provides: "(1) The Minister of Commerce and Industry shall, when considered necessary, determine and announce the base prices or the highest and lowest prices of a certain commodity to be exported or imported."

[65] *Id.*

prices unprofitably low. The MTI may use its authority to promote Korean exports or to limit exports to particular countries when failure to do so would threaten trade relations. Recent examples of this type of intervention occurred in the export of shoes and steel to the United States.

In practice the MTI has delegated some of its power to determine prices and regulate markets to the relevant trade associations. Conversely, action taken by the MTI is frequently at the request of the trade associations. Regardless of whether regulations are issued directly from the MTI or from trade associations, however, their effect may be to force individual parties to readjust their contract prices subsequent to a change in the mandatory price limits.

D. Summary of Government Policy

The government's involvement in the development of the Korean economy and in the regulation of foreign trade is far more pervasive than in the West. This is because more than the success of a particular company is at stake. As explained above, the economic and social health of the nation as a whole depends on the success of its trade policies.

Therefore, particular aspects of exporting, such as quality control, minimization of excess competition and export incentives, are of fundamental interest to the Korean government. The flow of imports must be controlled by preventing uncontrolled outflow of foreign currency in order to protect fledgling industries and to ensure the financial stability of the economy. Imports unnecessary for national development are luxuries which cannot be afforded. The controls discussed above comprise the legal superstructure which embodies Korea's central economic policy of rapid growth through export promotion. An understanding and awareness of this policy and its legal ramifications can be of immeasurable value to the foreign businessman who wishes to deal with the Korean business community.

IV. Problem Areas in United States-Korean Trade

With the foregoing information concerning cultural contrasts and economic regulation serving as a background, we can now deal with several problem areas which are of particular concern to lawyers and businessmen dealing with United States-Korean trade. These areas include current developments in the United States Generalized System of Preferences as well as the imposition of antidumping and countervailing duties, and the application to foreign businesses of United States laws regarding products liability and antitrust.

A. Protectionism

The first and most serious group of problems in United States-Korean trade arises from the fact that Korea and the United States are in the same world economy, and their workers are in the same global labor pool. Frequently the technology employed in manufacturing in both countries is very similar, and worker productivity may be almost identical.[66] Most young Korean workers have received almost as much education as their counterparts in the United States, and they have earned a worldwide reputation for discipline and efficiency.[67] However, the labor costs are very different. In Korea, the average worker employed in manufacturing earned around $1.33 per hour in 1983 and worked 51 hours per week.[68] Though such wages would be very low by American standards, in Korea they do not inspire feelings of discontent or labor unrest.[69] In most cases the physical necessities are adequately met, and almost every family has a television and other electrical appliances. The whole population has experienced a steadily rising standard of living, and the general feeling is that improvements will continue.

The lower labor costs in Korea more than offset the transportation costs of exporting the products to American markets. American industries often cannot match that competitive advantage, and consequently they may decline or be phased out altogether. Of course, this gives rise to protectionist sentiments.

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[66] Landsberg, *Export-Led Industrialization in the Third World: Manufacturing Imperialism*, 11 REV. OF RAD. POL. ECON. 50 (1979) reports that given the same technology, the productivity of Korean workers exceeds that of American workers. Park Se-Il (unpublished Ph.D. dissertation, Cornell University) (1980) explains that in the modern sector of the Korean economy the technology used is identical to that used in Japan or the United States. A study by the Korean Employers' Federation shows that in the years 1971-1983 productivity increases exceeded real wage increases at an average annual rate of 2.2 percent. INDUSTRIAL RELATIONS IN KOREA 7 (1984).

[67] N.F. MCGINN, D.R. SNODGRASS, Y.B. KIM, S. KIM & Q. KIM, EDUCATION AND DEVELOPMENT IN KOREA 47 (1980), provide statistics on school enrollment in Korea in 1975. Out of the total population at the relevant ages, middle school attendance was 74%, high school was 40.5% and college was 8.6%. Illiteracy in Korea is virtually non-existent.

[68] Bank of Korea, *supra* note 22, at 274 lists the average monthly wage in manufacturing in 1983 as 226,790 Korean won. The INTERNATIONAL LABOR ORGANIZATION, STATISTICAL YEARBOOK 1982 (1982) sets the hours per week worked in Korea among workers in manufacturing at over 51. That number has been very steady over time. Dividing the monthly wage by the hours worked and converting to dollar values gives the hourly wage.

[69] The Ministry of Labor, *quoted in* the KOREA EMPLOYERS FEDERATION, INDUSTRIAL RELATIONS IN KOREA (1984) set the total number of labor disputes for 1982 and 1983 at less than 100 for each year.

1. *Korea's Place in the United States Generalized System of Preferences*

One of the current stress points in United States-Korean trade relations concerns Korea's place in the United States Generalized System of Preferences (GSP). The GSP was created by the United States Trade Act of 1974 and was put into effect in 1976.[70] In brief, the GSP authorizes the President of the United States to exempt from import duties certain eligible products imported into the United States from designated developing countries.[71] Currently, the United States GSP Program grants duty-free treatment to over 3,053 products from 140 developing countries and territories. Since the program's implementation in 1976, the value of imports receiving GSP treatment has risen from $3.2 billion to $10.8 billion in 1983. GSP imports account for 4% of the total imports of the United States.[72]

As a practical matter, the GSP has been particularly advantageous to the five countries which have received seventy percent of the total benefit of the program between 1976 and 1983. These countries—South Korea, Taiwan, Hong Kong, Brazil, and Mexico—[73] have profited most because their industrial development in the late seventies was sufficient to support production for large-scale export.

Under the original GSP program, a country lost its preference if over fifty percent of a particular item imported into the United States came from that country. A *de minimus* provision added in 1979 currently allows the President of the United States to waive the fifty percent limit if the total import of an item into the United States does not exceed a certain monetary amount.[74] A country also lost its preference if its total export to the United States of that particular item exceeded an amount calculated in relation to the United States gross national product. In 1983, the ceiling on any item exported from any single country was set at $57.7 million.[75]

The current administration in Washington is ideologically committed to free trade and free market competition. Nonetheless, it is also unusually responsive to the complaints of American businessmen vulnerable to foreign competition. Under pressure from American business and labor, the new administration has,

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[70] *See* Trade Act of 1974, Pub. L. No. 93-618, subsections 501-05, 88 Stat. 1978, 2066-71 (1975) (codified at 19 U.S.C. subsections 2461-65 (1982)); 501-505, 88 Stat. 1978, 2066-2071 (1975).

[71] *See* Young, *The Generalized System of Preferences: Nations More Favored Than Most*, 8 L. & POL. IN INT'L BUS. 783 (1976).

[72] Office of U.S. Trade Representative, Press Release, Mar. 27, 1984, at 3.

[73] *Id.*

[74] For 1981, that amount was $1,371,017.

[75] *See* Trade Act of 1974, *supra* note 70, at subsection 504(c), 88 Stat. 1978, 2070 (1975) (codified at 19 U.S.C. subsection 2464(c) (1982)); Press Release, *supra* note 72.

by Executive Order, instituted a policy of discretionary removal or "graduation" of a country from the benefits of the GSP. In 1982 and 1983, significant quantities of Korean goods lost duty-free treatment in this manner. For the year beginning March 30, 1984, under discretionary graduation by the President, duty-free treatment was eliminated for goods which in 1982-1983 constituted almost $32 million of Korean exports to the United States.[76]

The new system of discretionary graduation by the President supplants the older, more certain criteria for removing a country's preferences on items exported to the United States. The rapid pace at which Korea's exports to the United States are being graduated from the GSP by executive decree can be regarded as indicative of an attitude in Congress and the Administration that the GSP program should not be available for countries that present a serious challenge to United States industries. In the recent words of Trade Ambassador William Brock, "[W]e are progressively restricting the eligibility of the more competitive developing countries both on our own initiative and at the request of United States producers and workers."[77]

The substantive question of whether Korean exports should be awarded duty-free status by the United States raises two major issues. The first issue concerns the potential for improper influence and arbitrariness in the decision-making process. In contrast to the quasi-judicial process for determining whether countervailing or anti-dumping duties should be imposed,[78] the procedure for seeking relief from duties under the GSP, and for determining whether such relief should be denied, is very informal.[79]

This informal nature of GSP review has several drawbacks. First, it politicizes the process of graduation since, as the Office of the United States Trade Representative concedes, the graduation of products is done primarily in response to petitions filed by American producers or labor unions.[80] Granting these petitions confers benefits on the American labor unions or producers in that industry, but does not give equal weight to the vital interests of developing countries which, under the traditional objective criteria, would be eligible to receive these preferences.

It is natural for the administration to seek to maintain flexibility, but the effect of the present system is that it invites protectionist pressures from narrow interest groups and the trading-off of political debts to Congressmen at the expense of developing nations and international trade relations. A more just and

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[76] Exec. Order No. 12,354, 47 Fed. Reg. 13,477 (1982). *See* Press Release, *supra* note 72, Annex I, Table I.

[77] Press Release, *supra* note 72.

[78] See *infra* text accompanying notes 85-89 for a discussion of the procedures required for an investigation into dumping.

[79] See 15 C.F.R. § 2007 (1981) for regulations concerning GSP review.

[80] Office of U.S. Trade Representative Press Release, Mar. 19, 1982, at 4.

manageable system would result if the administration would limit its discretion and remove a country's duty preferences only when the country's exports to the United States exceed a definite percentage of all the United States' imports of that item.

The second major problem of the relative informality of graduation from GSP benefits is the uncertainty it causes within the infant industries of developing nations. Under the definite standard of percentage of dollar volume of total imports, a company or government can calculate with reasonable certainty when it will lose its duty-free treatment on a certain item and decide, on that basis, whether the increased business makes increased production and export worthwhile. Under the current decision-making framework, however, scenarios like the following can easily occur: a nation exceeds the statutory limit, cuts back its exports to be within the limit, and the President then refuses to redesignate the item for GSP treatment, which he has the discretionary authority to do. With preferential treatment turning not on clear criteria but on uncertain review by the Office of the United States Trade Representative, it is difficult for developing countries such as Korea to plan business expansion or make intelligent decisions on the allocation of scarce manufacturing resources.

Regardless of one's views on how much duty-free treatment South Korean products should enjoy, it is clear that the criteria for duty-free treatment should be as concise and certain as possible, yet within guidelines flexible enough to allow application within a variety of situations. Certainty will inhibit corruption and encourage national business planning in both Korea and the United States.

At this point it is necessary to take a look at the true purpose of the GSP program. Korea, and the other major beneficiaries under the GSP, have been able to take effective advantage of the program because they are not as poor as most other beneficiaries. Indeed they are now so productive that their exports are beginning to harm some industries and workers in the United States. Does the policy underlying the GSP dictate that as soon as any segment of American industry is adversely affected then the GSP beneficiary no longer needs help? Conversely, is the policy to encourage economic achievement in underdeveloped countries by counteracting the disadvantages of distance and lower levels of capital and technology regardless of the impact on industries and workers in the United States?

There is a disingenuous argument to the effect that graduation of nations benefiting from the GSP is necessary because otherwise, nations such as Korea will succeed in the American markets at the expense of poorer nations.[81] However, the GSP should not be regarded simply as a subsidy extended by America to poorer countries by virtue of their poverty. Rather, it should be seen as a

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[81] A form of that argument appears in the 1980 President's report: *First Five Years of the GSP*.

system of promoting competition for the benefit of the whole world economy, and of American consumers in particular.

An analogy may make the point more clear. A small enterprise challenging a huge corporation may need a "non-competitive advantage" until it can compete on equal terms, but through the grant of that short-term advantage, the whole industry eventually can become more competitive. On the other hand, if the advantage is granted only to the challenger least able to survive on its own, it will take longer for the industry to be effectively opened up to competition. In the same way, Korean industries are nearing the point in international trade where they can present effective competition to industries in the United States and other advanced industrialized nations. Competition will naturally lead to better products at lower prices. Nonetheless, if more restrictive trade policies are imposed before the Korean industries are able to successfully compete on equal terms, these potential benefits will be lost.[82]

The best way for the United States to help nations poorer than Korea would not be by restricting Korean access to United States markets, but rather by insisting that Korea, and the other richer developing nations, keep their own markets open to the products of the poorer developing nations. If, for example, Indonesia, China, or India could sell textiles in Korea more cheaply than Korean manufacturers, the United States should insist, as the price of completely opening American markets to Korea, that the poorer nations not be kept out of the Korean market. The per capita GNP of Korea, while less than 20% of the United States per capita GNP, is still more than 300% of the per capita GNP of Indonesia. The same arguments of distributive justice and world-wide economic efficiency which should lead the United States to extend duty-free treatment to Korean exports would also require Korea to extend duty-free treatment to imports from Indonesia. But it is for the United States, the richest, largest and most powerful trading nation, to set the example by extending duty-free treatment to the exports of poorer nations.

Perhaps an answer to the question, "When is a nation sufficiently developed to lose duty-free treatment?" can be given in relative terms. It depends on who is asking whom for duty-free treatment. I suggest what could be called the Rule of Three: Any nation A should extend duty-free treatment to all of the exports of any nation B if the per capita gross national product of A is more than three times that of nation B.

General acceptance of such a rule would go a long way toward solving the

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[82] It was noted earlier that Korean manufacturers enjoy a competitive advantage in certain industries because of lower labor costs, but economists agree that economic efficiency is advanced by allowing such natural comparative advantages to have their full effect, so that entrepreneurs in each country will concentrate on what they can do best. Also, looking at the issue in terms of distributive justice, it would be unreasonable to put countervailing duties on manufacturers who employ low wage labor because the effect would be to lower the wages still further.

"North-South" problem, and would encourage the Third World to help itself. It would have no impact on trade between the major developed nations, none of which has a per capita income three times greater than any of the others. As a developing nation becomes richer, it would gradually lose its advantage under the "Rule of Three" to all but the very advanced nations. The Rule has the virtue of being both very general and yet specifically tailored to the relative position of any two nations who happen to be trading. It provides an unambiguous answer in every instance, and the answer can be strongly supported by arguments of distributive justice and economic efficiency.

If the "Rule of Three" can help answer the question of when a nation no longer needs duty-free treatment for its exports, can it help with the reciprocal question of whether the advanced nations should be free to export to the developing nations? The arguments usually go as follows: If the United States lowers tariff barriers for Korean goods and American domestic industry thereby suffers injury, do considerations of fairness and economic efficiency also dictate duty-free treatment in Korea for products which the United States can make and sell in Korea more cheaply than Korean manufacturers? Or, at least, should not the United States be freely admitted to Korean markets so long as it pays duty?

The answer to these questions must be no. Although a demand for reciprocal treatment has an intuitive appeal, one must remember that the American and Korean economies are not comparable, and similar treatment for dissimilar economic environments is not the formula for equity. Protection of Korean industries against the superior economic resources of industries in the more developed nations is necessary if they are to survive. It is also necessary to limit wasteful consumption in Korea in order to conserve foreign exchange and encourage capital accumulation. Even a nation as relatively wealthy as Korea could not open herself up to the full temptations of the consumer economies of Japan and the United States without disastrous results.

As a general rule, if Korea can make a product domestically, that product may not be imported.[83] I have said that I do not believe this policy is justified with respect to nations much poorer than Korea; but what about nations much richer, such as the United States? From the standpoint of distributive justice, it would be unreasonable to require a poorer country such as Korea to adopt a policy that would benefit the much richer American workers over her own workers. Short-term economic efficiency would seem to dictate that if the United States could produce goods of higher quality at lower cost, such goods should be allowed to be imported into Korea. However, if the issue is considered from a long term perspective, it can be seen that there may be valid rea-

[83] The necessity of gaining approval by the MTI for all imported goods serves, as a practical matter, as an automatic restriction on the nature of goods which may be imported. *See supra* text accompanying notes 61-63.

sons for imposing restrictions. Restrictions are necessary for a short while to allow smaller domestic industries to develop to the point where they can compete. A general preference for free trade over protectionism would justify stricter standards before the imposition of restrictive tariffs is approved. Instead of a "Rule of Three," a "Rule of Four or Five" may be appropriate. Only a nation four or five times poorer than another (in terms of per capita GNP) would, under such a rule, be justified in levying tariffs on the other's goods for purely protectionist reasons. Under this "Rule of Four or Five," even Korea would qualify *vis-a-vis* the United States.

Denial of GSP preference for a Korean export item such as caulking guns or steel-strand woven rope is reported on the back pages of the *Wall Street Journal*, but this news makes the front page of every daily newspaper in Korea. This is because, although it may make little difference to the American economy, it often spells the difference between success and failure for the affected Korean industry. The economic viability of even relatively minor industries involved in production for export greatly affects the ability of the economy as a whole to import necessary commodities and to service international loans. From a global perspective, the denial of GSP preferences might not appear very important when it involves only an isolated industry in a single country; however, it seems to be a harbinger of what is to come. Korea is in the vanguard of those nations strong enough to compete with segments of American industry, yet still in need of assistance. How Korea is treated under the United States' GSP system is perhaps reflective of how America will respond to the economic advancement of all other developing nations. The United States could use her economic power to help build an economic world order that would contribute to long-term global prosperity, or she could withdraw into short-sighted and selfish protectionism.

Thus far I have focussed primarily on the trade of goods. To understand the global economy, however, it is also necessary to consider the flow of capital. Korea has an external debt of $40 billion. In 1984, Korea will have to make payments of $6 billion on the principal and interest of her foreign debts.[84] The debt is so large that creditor nations, including the United States, have an economic interest in the health of the Korean economy as it affects her ability to continue making payments. In addition, capital-exporting nations must be able to continue lending out money to safe, stable borrowers to earn interest. At this time Korea is able to utilize capital safely and effectively. In contrast to many other developing nations, Korea provides a good investment opportunity. However, if Korean industries are undermined by a premature exposure to competition, or if its ability to export is restricted, the interests of those who have loaned capital to Korea will be threatened.

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[84] Yuosang Yun, *supra* note 30.

2. *Anti-dumping and Countervailing Duties*

Another point of stress in United States-Korea trade relations is the problem of dumping. Dumping occurs when imports are sold in the United States at a price which is lower than the Korean market price, that is, "less than fair value" (LTFV).[85] The President of the United States may impose an additional duty to correct for dumping if the International Trade Commission (ITC), an independent agency, determines that the alleged dumping is a substantial cause of material injury to a domestic industry. The Department of Commerce must also make an independent determination that dumping has occurred.[86] A key factor in this determination is the domestic price of the product in the developing nation.[87] If it is higher than the United States price, then according to American law, a dumping violation has been committed.[88]

The problems surrounding dumping are more complex than the problems that arise when relief from duties under the United States' GSP is sought. In the latter case, Korea simply wants to compete freely in the American market without the burden of a duty; that is on the same basis as American businessmen. Although the competition may cut into the profits of American manufacturers, it advances world-wide economic efficiency. In contrast, dumping is seen by Americans as an unfair trade practice and prohibiting its occurance is viewed simply as holding foreign businessmen who compete in the American markets to American standards of fairness. The evil to be avoided by the prohibition of dumping is predatory pricing; a weapon used to unfairly drive competitors out of business and then raise prices higher than otherwise possible had firms survived and continued to compete. Thus, not only the victimized competitor but all the consumers as well are ultimately hurt by predatory pricing. From the standpoint of an American businessman, it may appear that there is no reason other than predatory pricing that can explain why a Korean company would be willing to sell its products abroad for less than its prices at home.

Nonetheless, Korea has gambled her future on an economic strategy in which exports play the pre-eminent role. When a factory is built in Korea, the major-

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[85] Trade Agreements Act of 1979, Pub. L. No. 96-39 § 731, 93 Stat. 144, 162 (1979) (codified at 19 U.S.C. § 1673 (1982)).

[86] See generally Barringer and Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 JOURNAL OF INT'L LAW AND ECON. 1 (1979) for an overview of anti-dumping investigation procedures.

[87] If the goods in question are not sold in the domestic markets in sufficient quantities to reasonably determine the domestic market price, a "constructed value" will be calculated by adding the production costs plus general expenses plus a normal rate of profit. A sale at prices below the constructed value would constitute dumping.

[88] *See generally* Takacs, *Impediments to International Trade*, in HANDBOOK OF INTERNATIONAL BUSINESS 10-11 (I. Walter & T. Murray 1982).

ity of its capacity is designated for the export market. Thus, the factory may realize an optimum economy of scale and become eligible for substantial benefits provided to exporters. In order for Korea to sell its products and develop a reputation in the world markets, goods must be exported at low prices. In the domestic markets, however, the government may purposely set higher prices to encourage exports rather than domestic consumption. The good will associated with brand names may be a valuable asset on the domestic market, making the consumers willing to pay higher prices. Prices may be set higher in Korea to offset the costs of breaking into the foreign markets. All this would constitute dumping under the American law. Should it be forbidden?

The best economic argument supporting the United States' anti-dumping policies is that although the reduced prices of "dumped" goods provide a temporary benefit to the consumer, that benefit cannot continue because the goods are being sold at prices which cannot yield the manufacturer a profit over time. Therefore, prices will inevitably be raised. The evil of predatory pricing or dumping, as seen through American eyes, is that it really does not represent a lower price, but merely a temporarily lower price designed to drive out competition.

Suppose, however, that Korea is willing to continue to export a certain product at the same low price for a number of years, or that there is other foreign competition that will keep the price down. What, then, is the objection to dumping except a desire to protect American workers from severe competition? Rather than base dumping duties to domestic prices in the Korean market, it might make more sense to ask if the low prices are only temporary, or if they represent probable long-term delivery of the product at the same low or negative profit margin.

The salient issue is whether the low dumping price (that is, a foreign price lower than the domestic price in Korea) constitutes long-term benefit to American consumers or a temporary expediency to the Korean manufacturer. If other foreign competition or easy re-entry into the market by American companies would inhibit a subsequent price increase (long-term benefit), or if the Korean government or particular company is willing to guarantee the low price for a suitable time (long-term benefit) any objection to dumping can only be based upon raw protectionism.[89]

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[89] This argument can likewise be applied to countervailing duty cases where the triggering factor is subsidization of the foreign competitor by its government. Another view of the problem of dumping can be seen if the government, rather than the exporter, is viewed as the offending party. The exporter might not be able to make a profit on the goods exported at the low export price, but the higher prices in the protected domestic markets may be sufficient to make the whole operation profitable. Thus, the high profits on the domestic markets may be seen as the reward for maintaining a high level of exports. With over-all profits resulting from governmental protection of the domestic markets, the exporters are able to compete on very unequal terms in

Countries like Korea, which rely almost exclusively upon the export of manufactured goods for the accumulation of foreign currency, generally have a much less predatory purpose behind their so-called dumping activities. Accordingly, Koreans often express regret that the United States will not negotiate special arrangements that would insure long-term benefit to the American consumer. It is understandable, even if one-sided, that this refusal is characterized by many Koreans as protectionist.

B. *United States Laws Benefitting Consumers*

1. *American Products Liability Law*

The final part of this article discusses issues that may soon become major problems for United States-Korean trade, although at this time they are only potential in nature. The list includes products liability and antitrust law. It is unclear how these issues will ultimately be resolved, but at the present time Korean parties are faced with considerable risks with little certainty about what they can do or what liability they may face.[90]

The first issue is products liability. It may come as a major shock to Korean companies, especially smaller ones not associated with the large GTC's, if they are named as defendants in products liability lawsuits.

The American law of products liability is unique in several respects. First, in reality it is law made not by government bureaucrats or by legislatures, but by judges and juries. Indeed, it may be one of the last major flowerings of the common law.

Second, products liability awards are premised on a western sense of responsibility. Some American courts and academic specialists see products liability as a departure from notions of individual fault.[91] One of the major criticisms of products liability law is that often fault is not the main issue.[92] However,

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the export markets. This is an accurate view of the situation for certain industries in Korea, but the government's right to implement such policies to encourage exports must be recognized in the light of Korea's vital need for foreign exchange.

[90] Since Korean parties must necessarily conduct their businesses primarily pursuant to Korean law and only incidentally pursuant to American law, it is more difficult for them to arrange their transactions so as to avoid liability under American law. This is especially true because it is so unclear how American law will actually be applied to them.

[91] For the view that products liability judgments are essentially risk-spreading equivalent of insurance unrelated to questions of fault, see the classic opinion of Justice Traynor in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, 13 ALR3d 1049 (1962).

[92] *See, e.g.*, Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978).

American plaintiffs' attorneys assure me that unless the jury blames the corporate defendant, there is no chance of an award of considerable size. The notion of a powerful company paying millions to an unfortunate individual damaged by one of its products, and having the amount set by twelve people pulled in off the street, is as incomprehensible to a Korean as the Korean attitude that a lawsuit is a shameful way to settle a dispute is incomprehensible to an American.

Americans define themselves as bearers of legal rights, and use law to order their society. Korean society, in contrast, is ordered by custom and tradition, and law is used only to remedy disputes that can be handled in no other way. Koreans would not blame the corporation in the same way as would an American jury.

An accident is seen in Korea as bad luck or ill fortune and is something which Koreans accept more readily than do Americans. For Koreans, accident and ill fortune are not something that God or General Motors must justify to the suffering individual. They are simply part of the natural order of things.

Third, under American law, trading companies and dealers are usually just as liable as the manufacturer. The Korean party cannot depend on the inability of an American court to secure jurisdiction over the Korean defendant. The long-arm statutes of most of the American states and current interpretation of the due process clause of the fourteenth amendment of the United States Constitution would normally allow jurisdiction over any Korean company involved in exporting to the United States.[93] Even if the Korean company worked through independent agents in the United States, the actions of its agent may be deemed as those of the manufacturer.[94]

With regard to enforcement of a judgment in the United States, an American court's willingness to seize assets will surprise Korean businessmen. In Korea, a respectable company would carry a case through to actual litigation only with the utmost reluctance. If it loses in court, the company would almost certainly pay voluntarily if it possibly could. Attachment is not a customary procedure in Korea, unlike in the United States, where courts may be willing to seize broad classes of assets.

The enforcement of United States' judgments in Korean courts is virgin territory, and the potential for serious conflict is great. For example, under Korean

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[93] See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), where the Court stated, "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *See generally* Sutterfield, *In Personam Jurisdiction—How Long is the "Long Arm" in Products Liability?*, 1980 INS. L.J. 447.

[94] *See, e.g.*, Coons v. Honda Motor Co., Ltd., 176 N.J. Super. 575, 424 A.2d 446 (1980), *rev'd on other grounds*, 97 N.J. 307, 463 A.2d 921 (1983).

law, a final judgment of a foreign court is valid only if the judgment of the foreign court is not incompatible with public order or good morals in Korea.[95] Given the highly unfavorable and uncongenial conflict between American products liability law and the Korean legal mind, public order and good morals might be thought by a Korean court to be incompatible with a million dollar judgment for damage done to one person by a defective product, however grave the damage.[96]

2. *American Antitrust Law*

American attitudes and policies regarding competition have been modified by antitrust legislation. Agreements to restrain competition by agreeing on prices or market divisions are per se illegal.[97] A violator of this law can be subject to treble damages payable to the injured private parties.[98] Conceivably Korean parties whose actions occured only in Korea could be liable for anti-competitive behavior which has an effect on United States' markets.[99]

In contrast to American policy, the Korean government often takes action aimed at reducing what it considers to be excessive competition in both domestic and overseas markets. This action may take the form of jaw-boning, as in meetings of the Minister of Trade and Industry with the leaders of industry, or it may entail specific directives which can limit the number of companies which may compete in a certain field.[100]

In addition to government agencies, there are "private" associations such as the Korean Chamber of Commerce and Industry (with which every business operating in Korea must be affiliated) and the Federation of Korean Industries, as well as specialized associations for certain industries. One purpose of these associations is to coordinate the activites of their members to prevent excess competition leading to unprofitable export prices. A related purpose is to counteract, or to coordinate a response to, restrictions imposed on Korean exports by foreign countries and to promote the products of association members.

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[95] Code of Civ. Proc. (S. Korea), Law No. 547 (Apr. 4, 1960), *as amended by* Law No. 706 (Sept. 1, 1961) and Law No. 1499 (Dec. 13, 1963), art. 203, 476-77; Kong Woong Choe, *Jurisdiction in Korean Conflict of Laws, in* BUSINESS LAWS IN KOREA: INVESTMENT, TAXATION, AND INDUSTRIAL PROPERTY 108 (Kim Chan-Jin ed. 1982).

[96] *See* Kwang Ha Ko, *The Enforcement of Foreign Money Judgments in Korea* (unpublished paper at the firm of Lee and Ko, Seoul, Korea).

[97] 15 U.S.C. § 1; Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958).

[98] 15 U.S.C. § 15(a) (1982).

[99] *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). *See also* J. TOWNSEND, EXTRATERRITORIAL ANTI-TRUST: THE SHERMAN ACT AND U.S. BUSINESSES ABROAD 40-81 (1980).

[100] *See supra* text accompanying notes 64-65.

In effect, the associations play, at a lower level, the role of the MTI in trying to ensure the orderly exploitation of markets. The MTI carefully considers the views and formal requests of the associations when it sets its policies and issues regulations, and the associations help to carry out MTI directives. Nonetheless, although they are an inherent part of Korean business, the internal regulatory activities of these associations, the MTI directives that originate in associations' requests, and the informal agreements among manufacturers may all be vulnerable to attack under American antitrust law.

Antitrust is thus an area of potential hazard for Koreans trading with the United States. At this time, no antitrust proceedings against Korean companies have been brought alleging anti-competitive activity. However, there is little doubt that many practices of Korean companies are per se violations of the American antitrust laws. Many such companies could utilize the defense that their behavior was ordered by the Korean government. Others who acted pursuant to strategy planned by private associations however, would not have that defense.[101]

In the area of antitrust, it is incumbent upon the United States to rethink its position as it relates to foreign businesses. As in the area of products liability, the uncertainty that follows from potential but unrealized liability makes it difficult for Koreans to conduct their businesses effectively. The unwillingness of the United States to face completely free and open competition is demonstrated by the existence of tariffs, the negotiations for "voluntary" restrictions on exports to the United States, and by rising protectionist attitudes. In light of that tendency, it appears inconsistent for the United States to enforce antitrust laws against anti-competitive agreements between companies from developing countries on the grounds of economic efficiency and benefit to the consumer.

CONCLUSION

Despite the problems discussed in this article, it is important to emphasize how relatively free from difficulty United States-Korean trade relations have been, as evidenced by the explosive growth in that trade over the past two decades. This enormous progress has been achieved despite the aftershock of

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[101] If what appears to be a government regulation is actually merely a codification, by a government agency, of an anti-competitive agreement among members of a trade association, the defense that it was ordered by the government might not be available. The complexity of these issues under U.S. law can be seen in Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973) *aff'd sub. nom.*, Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *See also* United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. National Lead Co., 332 U.S. 319 (1947); United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70600 (S.D.N.Y. Dec. 20, 1962).

thirty-five years of Japanese occupation, the devastation of the Korean War and the on-going difficulties Koreans experience in their international business relationships due to the language barrier and the different manner in which Westerners utilize law and lawyers. Korea has achieved this growth, in part by rigorously enforcing its foreign exchange controls, by a review of licenses and contracts involving foreign investment, and by advising companies which export as to their quality control and price and market division decisions.

Recently however, the Korean government has been accelerating the rate at which it is relinquishing control over the Korean economy. This is occurring not because freedom of enterprise is seen as a good in itself, as it is in the United States, but rather because the Korean government realizes that efficiency and superior allocation of resources result when responsible businessmen are not second-guessed by the government. As the Korean economy rapidly grows larger, the Korean bureaucracy has not grown with it. The net of review and approval has instead consciously become looser in weave so that smaller transactions are less rigorously scrutinized.

In contrast, the United States has recently made it more difficult for Korean and other export-oriented countries to compete in the United States' marketplace with their exports. This trend can be noted in the graduation from the GSP, imposition of anti-dumping and countervailing duties, the development of products liability law and the extraterritorial application of the antitrust laws.

Korea's economic success could be more easily emulated by other developing countries if the United States reviewed these restrictions with a global policy in mind. The stakes are enormous. The Far East, particularly the Confucian Far East of China, Korea, and Japan, will be the cutting edge of the world economy for at least the next fifty years. The continued prosperity of the United States depends upon its being in full partnership with that cutting edge. The partnership could be enhanced, and protectionism discouraged worldwide by a variety of United States Policy Adaptations. For example, using the Rule of Three, the United States can condition Korea's continued eligibility for GSP benefits on parallel treatment by Korea of other countries whose per capita gross national product amounts to less than one-third that of Korea. For convenience, I have termed this the "Rule of Three."

By geography, by history, and by temperament, the United States is the natural economic ally of the Confucian Far East. The problems discussed in this article may be resolved if this larger picture is kept in mind. The possibilities and opportunities presented by United States-Korea trade are a major part of that picture.

Appellate Standards of Review in Hawaii*

by Michael J. Yoshii**

Standard of review, a critical issue in every appeal, is an often misunderstood and overlooked aspect of appellate practice that has not received the attention it deserves from the bar and appellate courts. Hawaii Rules of Appellate Procedure 28(b)(5) and 28(c),[1] however, require a separate section in each opening

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* The author is indebted to the Honorable James Burns, Chief Judge of the Hawaii Intermediate Court of Appeals, for his persistent encouragement and critique in the preparation of this article.

This article is an attempt to assist the Hawaii appellate practitioner, and is subject to criticism by academics that it is simplistic and formalistic. For example, this article ignores the informed opinion that there are in practice only two standards of review: a broad standard for legal decisions and a narrower standard for factual or procedural decisions. This article also glosses over the adage that an appellate court's standard of review will vary with the reputation of the deciding judge or administrative agency.

Although such approaches may explain some appellate decisions, they add little to a practitioner's understanding of standard of review law or policy. The present article's formalism and simplicity may grate the scholar, but it is hoped it will clarify a troublesome area of Hawaii law.

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[1] The standard of review requirements were added in 1982. Hawaii Rule of Appellate Procedure 28(b) reads:

> Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief containing . . .5 [a] brief separate section entitled "Standard of Review," setting forth the applicable standard or standards of review to be applied in reviewing the respective orders or decisions of the trial court or agency alleged to be erroneous.

Hawaii Rule of Appellate Procedure 28(c) provides "The answering brief shall contain a counterstatement of each section except points, unless the appellee is satisfied with the section included in the appellant's brief." Hawaii's standard of review requirement was adopted because Hawaii appellate judges became more attentive to standard of review issues and concerned with the lack of attention given to standard of review by appellate practitioners. *See Interview with the Judges of Hawaii Intermediate Court of Appeals*, 16 HAWAII B.J. 83, 90 (1981).

The author's personal observation as law clerk to Associate Justice Yoshimi Hayashi during 1983 and 1984 is that at least three-fourths of appellate briefs fail to include a standard of review section, state incorrect standards, or otherwise demonstrate some ignorance of standard of review law.

and answering brief which states the applicable standard or standards of review. This article identifies and defines the four most common standards of review and explains their application.

"Standard of review" is the standard by which an appellate court reviews a decision by a lower tribunal.[2] It is a threshold issue which determines the burden of persuasion before the appellate court and therefore greatly affects an appellant's chance of success. The court applies the appropriate standard to ascertain what the appellant must show to win a reversal.

Four standards are most commonly applied by appellate courts: (1) abuse of discretion, (2) no substantial evidence, (3) clearly erroneous, and (4) *de novo* or free review.[3] Uniform definitions of these standards are desirable;[4] therefore,

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The heightened interest in appellate standards of review is also no doubt due to the litigation avalanche. Broader review results in more reversals, which require further proceedings and add to the case load. Standards of review, in contrast, limit appellate review, consonant with a conservative view of the appellate courts' role in reviewing decisions; they support the idea that the primary decision makers should usually be upheld unless a question of law is involved.

[2] It is important to distinguish appellate standards of review from other legal standards used by courts. This article does not address trial standards, though they are sometimes adopted by the appellate courts upon *de novo* review. For example, the constitutional tests of strict scrutiny and rational relationship are trial court questions of law reviewed by the *de novo* standard on appeal; though they are sometimes called "standards of review," *see* Nagle v. Board of Education, 63 Hawaii 389, 392-93, 629 P.2d 109, 111 (1981), they are not appellate standards within the meaning of Hawaii Rules of Appellate Procedure 28(b)(5). Likewise, this article does not deal with the "harmless error" standard which protects an erroneous decision from reversal if the error is harmless. *See* HAWAII R. CIV. P. 61; Kekua v. Kaiser Foundation Hospital, 61 Hawaii 208, 218, 601 P.2d 364, 371 (1979). The issue of "harmless error" does not arise until after the initial determination of whether, under the appropriate standard of review, the decision is reversible as made.

[3] An important fifth standard, applicable primarily to administrative law, is the arbitrary and capricious standard applied to informal adjudication and rulemaking where there is no record. *See* HAWAII REV. STAT. § 91-14(g)(6). *See also* Treloar v. Swinerton & Walberg Co., 65 Hawaii 415, 424, 653 P.2d 420, 426 (1982). Judicial review of arbitration decisions is limited by HAWAII REV. STAT. § 658-10 (1976) "to the strictest possible limits," Morrison-Knudsen Co., Inc. v. Makahuena Corp., 66 Hawaii 663, 675 P.2d 760 (1983). Further, administrative law courts will sometimes defer to the legal determinations of agencies, especially when the question is novel. When the choice of legal rule requires familiarity with the problem, the ruling court gives greater deference.

[4] Judge John F. Nangle, United States District Court Judge of the Eastern District of Missouri has aptly noted that varying formulations of the clearly erroneous rule by Eighth Circuit judges have resulted in subtle substantive changes in the rule itself: "Although mere rewording of the Rule would not be a cause for concern, it is this writer's belief that the various formulations expressed also alter the substance of the Rule's application. Furthermore, these casual reformulations reflect a basic disrespect for the essence of the Rule. It is as if the appellate court feels that it is free to do whatever it wishes after stating the proper talismanic words. The meaning of the words is overlooked." Nangle, *The Ever Widening Scope of Review in Federal Appellate Courts—is the "Clearly Erroneous Rule" Being Omitted?* 59 WASH. U.L.Q. 409, 418 (1981).

this article states the author's preferred definition of each standard.

Appellate attorneys make several common standard of review mistakes. First, those who frame their arguments around the wrong standard self-impose an overly difficult burden of persuasion or, conversely, leave themselves unprepared to meet a higher burden. Even worse are those who fail to include a standard of review section in their brief, which can result in rejection of the brief, a fine, or dismissal of the appeal.[5]

Others fail to recognize that the lower tribunal has made several different rulings, each subject to different standards of review. For example, attorneys often fail to differentiate the lower tribunal's findings of fact from its conclusions of law and treat both as subject to a single standard. Hawaii Rule of Appellate Procedure 28(b)(5) requires attorneys to state the appropriate standard of review of each order or decision complained of in the points of appeal.

Finally, attorneys often confuse the appellate standard of review with the legal test or burden of proof employed by the lower tribunal. For example, whereas each element of a criminal charge must be proven beyond a reasonable doubt at trial, an appellate court will only determine whether the jury's verdict is supported by substantial evidence.[6] Likewise, in civil cases a new trial may be granted if the jury's verdict is against the manifest weight of the evidence,[7] but if a new trial is denied, the issue on appeal is whether the trial court abused its discretion.[8] A final example is the motion for summary judgment, which is reviewed by the *de novo* standard. The familiar litany of "no genuine issue of

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[5] Although the Supreme Court has not yet dismissed an appeal for failure to include a standard of review section, it has dismissed an appeal because the brief's statement of points as required by former Supreme Court Rule 3(b)(5) was inadequate. Teixeira v. Koga Eng'g and Constr., Inc., 66 Hawaii 676 (1983) (memorandum opinion). The court has also fined a law firm for submitting a brief which failed to comply with former Rule 3(b):

> Hawaii Supreme Court Rule (HSCR) 3(b) is designed so that briefs filed in compliance therewith will show clearly that there is appellate jurisdiction, what the rulings being appealed are, what the questions of law presented are, what the standard or standards of review are, and what the record reflects. It is a source of continuing vexation to the court that many, if not a majority of the briefs filed, do not even approximate compliance with the rule. We take the opportunity by this opinion to inform the Bar that henceforth in all cases of substantial non-compliance with HSCR Rule 3(b), whether by appellants or appellees, sanctions up to and including dismissal of the appeals will be levied.

Hong v. Kong, 67 Hawaii ____, 675 P.2d 769 (1984).

[6] State v. Kekanalua, 50 Hawaii 130, 132, 433 P.2d 131, 133 (1967).

[7] In any civil case or in any criminal case wherein a verdict of guilty has been rendered, the Court may set aside the verdict when it appears to be so manifestly against the weight of the evidence has to indicate bias, prejudice, passion, or misunderstanding of the charge of the Court on the part of the jury; or the Court may in any civil or criminal case grant a new trial for any legal cause.

HAWAII REV. STAT. § 635-56 (1976).

[8] *See infra* note 104.

material fact and entitled to judgment as a matter of law" is a trial court standard which the appellate court also applies upon *de novo* review.[9]

Generally, two questions must be answered to determine which standard of review applies: (1) what type of decision is being reviewed, and (2) who made it? The first four sections of this article deal with the four principal types of decisions reviewed: law, fact, mixed fact and law, and discretion. Each section is subdivided to discuss the standard(s) applicable to decisions made by a jury, judge, or administrative agency. An appended chart summarizes these points. The article closes with a discussion of secondary review issues.

I. Decisions of Law

Legal decisions include, but are not limited to, legal rulings and conclusions of law, summary judgments, directed verdicts, and judgments notwithstanding the verdict.

Decisions of law are reviewed *de novo* by appellate courts.[10] This is true even when a conclusion of law is incorrectly labelled a finding of fact.[11] In *de novo* review, the appellate court steps into the position of the lower tribunal and redecides the issue.[12] If the appellate court's decision is the same, it affirms; if different, it reverses. In short, the appellate court simply decides whether the lower tribunal was right or wrong.[13]

Summary judgments, directed verdicts, and judgments notwithstanding the verdict are reviewed *de novo* because they are decisions of law: the moving party must show it is entitled to a favorable decision as a matter of law.[14] Putting itself into the trial court's position, the appellate court will review the entire record presented to the lower tribunal[15] in the non-movant's light and decide

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[9] Beamer v. Nishiki, 66 Hawaii 572, 577, 670 P.2d 1264, 1270-71 (1983); Fernandes v. Tenbruggencate, 65 Hawaii 226, 228, 649 P.2d 1144, 1147 (1982); Miller v. First Hawaiian Bank, 61 Hawaii 346, 349, 604 P.2d 39, 41 (1979).

[10] Molokoa Village Dev. Co., Ltd. v. Kauai Elec. Co., 60 Hawaii 582, 595, 593 P.2d 375, 384 (1979); Friedrich v. Dep't of Transp., 60 Hawaii 32, 35, 586 P.2d 1037, 1039 (1978); Jendrusch v. Jendrusch, 1 Hawaii App. 605, 609, 623 P.2d 893, 897 (1981); American Sec. Bank v. Read Realty Co., 1 Hawaii App. 161, 165, 616 P.2d 237, 241 (1980); Hawaii Rev. Stat. § 91-14(g)(1), (4) (1976).

[11] Molokoa Village Dev. Co., 60 Hawaii at 596, 593 P.2d at 384.

[12] Davis v. Davis, 3 Hawaii App. 501, 506 n.5, 653 P.2d 1167, 1171 n.5 (1982).

[13] State v. Miller, 4 Hawaii App. 603, 606, 671 P.2d 1037, 1040 (1983); Davis v. Davis, 3 Hawaii App. at 506 n.5, 653 P.2d at 1171 n.5.

[14] Hawaii R. Civ. P. 56(c) (summary judgment); Technicolor, Inc. v. Traeger, 57 Hawaii 113, 119, 551 P.2d 163, (summary judgment); Kawaihae v. Hawaiian Ins. Co., 1 Hawaii App. 355, 362, 619 P.2d 1086, 1091 (1980) (directed verdict); Shishido v. State, 4 Hawaii App. 321, 324, 666 P.2d 608, 612 (1983) (judgment notwithstanding the verdict).

[15] The appellate court will not look beyond what was brought to the attention of the lower

on its own whether the moving party is entitled to judgment as a matter of law.[16]

De novo review of legal conclusions is proper because the appellate court judges are experts in the law and should have the power to overrule lower legal decisions without reservation. Unlike facts, which are peculiar to the particular case, the law in theory applies universally. The appellate courts are therefore entitled to make their own legal decisions without deferring to previous legal rulings. Appellants who successfully present their claims as errors of law therefore ensure the widest scope of review and the greatest chance of reversal on appeal.

II. Decisions of Fact

Factual decisions are reviewed by the no substantial evidence standard if made by a jury, or by the clearly erroneous standard if made by a judge or administrative agency. The two standards are interrelated but in theory the no substantial evidence standard is the more difficult for an appellant to overcome.

A. Jury Verdicts

Jury decisions in both criminal[17] and civil cases[18] are reviewed in Hawaii by

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tribunal. For example, in Munoz v. Yuen, 66 Hawaii 603, 606, 670 P.2d 825, 827 (1983), the supreme court held that on a motion for summary judgment the moving party must notice depositions to the trial court or they will be ignored by the appellate court on appeal. Similarly, references to depositions filed after a summary judgment motion is decided will not be considered by the appellate court. Freitas v. City & County, 58 Hawaii 587, 589 n.1, 574 P.2d 529, 531 n.1 (1978).

[16] Beamer v. Nishiki, 66 Hawaii at 577, 670 P.2d at 1270; Gealon v. Keala, 60 Hawaii 513, 518, 591 P.2d 621, 625; Technicolor, Inc. v. Traeger, 57 Hawaii at 118, 551 P.2d at 168.

[17] State v. Tamura, 63 Hawaii 636, 637, 633 P.2d 1115, 1117 (1981); State v. Summers, 62 Hawaii 325, 331-32, 614 P.2d 925, 930 (1980); State v. Hernandez, 61 Hawaii 475, 477, 605 P.2d 75, 77 (1980); State v. Hopkins, 60 Hawaii 540, 542, 592 P.2d 810, 811 (1979).

[18] Adair v. Hustace, 64 Hawaii 314, 325, 640 P.2d 294, 302 (1982); State Savings & Loan Ass'n v. Corey, 53 Hawaii 132, 141, 488 P.2d 703, 710 (1971); Ashford v. Thomas Cook and Son (Bankers), Ltd., 52 Hawaii 113, 122-23, 471 P.2d 530, 536 (1970); Lopez v. Wigwam Dep't Stores, 49 Hawaii 416, 421-22, 421 P.2d 289, 294 (1966).

Hawaii courts have shown a special deference to jury damage awards:

> [F]inding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against the rules of law or suffered their passions or prejudices to mislead them.

Brown v. Clark Equip. Co., 62 Hawaii 530, 536, 618 P.2d 267, 271-72 (1980) quoting Vasconcellos v. Juarez, 37 Hawaii 364, 366 (1946); Orso v. City and County, 56 Hawaii 241, 249,

the no substantial evidence standard. In applying this standard, the appellate court views the evidence in the light most favorable to the appellee and decides whether a reasonable person would find sufficient credible evidence to reach the jury's conclusion.[19] The reasonable person test is the same test used to determine whether a question of fact existed for the jury initially. For example, this test is used by trial judges in deciding whether a motion for directed verdict or judgment notwithstanding the verdict should be granted.[20] In short, the no substantial evidence test asks whether the issue is one of fact or law. If the

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534 P.2d 489, 494 (1975).

[19] MPM Hawaiian, Inc. v. Amigos, Inc., 63 Hawaii 485, 486-87, 630 P.2d 1075, 1077 (1981); Shinn v. Yee, Ltd., 57 Hawaii 215, 219, 553 P.2d 733, 737 (1976); Edison Co. v. Labor Bd., 305 U.S. 197, 229 (1939). This substantial evidence standard should be distinguished from the substantial evidence standard of HAWAII REV. STAT. § 386-85 applicable in worker's compensation cases. HAWAII REV. STAT. § 386-85 places on the employer the burden to adduce substantial evidence to overcome certain presumptions in favor of the employee. Acoustic, Insulation and Drywall, Inc. v. Labor and Industrial Relations Appeals Bd., 51 Hawaii 312, 316-17, 459 P.2d 541, 543-44 (1969). In light of the humanitarian purposes of the worker's compensation law, the Hawaii Supreme Court has liberally interpreted this language to create a "heavy burden on the employer." DeFries v. Ass'n of Owners, 999 Wilder, 57 Hawaii 296, 304, 555 P.2d 855, 861 (1976). Specifically, the court has held that the "substantial evidence" required by the statute is "a high quantum of evidence." 57 Hawaii at 304, 555 P.2d at 860.

Although in worker's compensation cases the court has given lip service to the traditional measure of substantial evidence, *see* Akamine v. Hawaiian Packing & Crating Co., 53 Hawaii 406, 408, 495 P.2d 1164, 1166 (1972), the substantial evidence required of worker's compensation employers is actually much higher than the "more than a scintilla" measure used to review jury verdicts. For example, in *Akamine* the employer presented expert medical testimony that the employee's heart attack was not work-related. The Appeals Board was convinced by this testimony, as were two supreme court justices. Yet, the majority held the "net weight" of the evidence was not credible and relevant enough "to justify a conclusion by a reasonable man that [the employee's] injury or death [was] not work-connected." 53 Hawaii at 408-10. Taken at face value, the majority's conclusion is that the two supreme court justices, three members of the appeals board, and two expert medical doctors were not reasonable men. The outcome of cases like *Akamine* is better explained by the statutory presumptions favoring the employee, the rule that all reasonable doubts are resolved in the employee's favor, *DeFries*, 57 Hawaii at 304, 555 P.2d at 860, and the liberal purpose of the worker's compensation law.

[20] *Compare* the language of Estate of Heeb, 26 Hawaii 538, 539 (1922) (jury verdict must stand if supported by substantial evidence) *with* Waterhouse v. Rawlins, 33 Hawaii 876, 884 (1936) (directed verdict must be denied if substantial evidence creates a jury question).

In both instances the test is whether the issue is factual or legal. A fact is in question if, considering the evidence in a light favoring the opposing party, "reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue." Collins v. Greenstein, 61 Hawaii 26, 38, 595 P.2d 275, 282 (1979) quoting Farrior v. Payton, 57 Hawaii 620, 626, 562 P.2d 779, 784 (1977) and Young v. Price, 47 Hawaii 309, 313, 388 P.2d 203, 206 (1963). If the issue is factual, then the judge denies the motion and sends the question to the jury. If the issue is legal, the judge makes the decision. *Collins*, 61 Hawaii at 38, 595 P.2d at 282; Thomas v. State, 55 Hawaii 30, 33, 514 P.2d 572, 575 (1973); Waterhouse v. Rawlins, 33 Hawaii 876, 884 (1936).

evidence created a fact question, the appellate court will not second-guess the jury's determination of the issue.[21]

Thus, when a jury verdict is appealed, the appellate court steps into the shoes of the trial judge and decides whether the judge should have directed a verdict instead of sending the question to the jury.[22] In one respect, however, it is not true *de novo* review. If a plaintiff moves for a directed verdict or judgment notwithstanding the verdict the trial judge must view the evidence in the defendant's favor;[23] in contrast, if the plaintiff loses the motion but wins the verdict, on the defendant's appeal the evidence is viewed in plaintiff's favor.[24]

The Hawaii Supreme Court has not precisely defined "substantial evidence," other than to say it is "more than a scintilla" of evidence:

> Neither the trial court nor this court is authorized to set aside a verdict on the sole ground that the verdict is against the preponderance of the evidence. When the verdict is supported by substantial evidence, and in this jurisdiction the word "substantial" has been defined as "more than a mere scintilla of evidence," the verdict must stand. Any other rule would mean an invasion of the right of trial by jury and judges, and not juries, would be the ultimate arbiters of the facts.[25]

The court has defined a "scintilla" as "slight testimony" with "probative force . . . so weak that it only raises a mere surmise or suspicion of the existence of

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[21] As the Hawaii Supreme Court has noted:

> Under the provisions of the Seventh Amendment to the Constitution of the United States, verdicts may be reviewed on exceptions at common law only in the following cases: (1) granting or refusing a motion for a directed verdict; (2) a motion for a new trial; (3) a demurrer to the evidence; or (4) granting or refusing of a nonsuit. . . . Thus, the actions of an appellate court are limited to the rulings of *law* of the trial judge in granting or refusing instructions or the granting or overruling of motions referred to.

Territory v. Pierce, 43 Hawaii 246, 249 (1959) (original emphasis).

[22] State v. Yoshimoto, 64 Hawaii 1, 3, 635 P.2d 560, 561 (1981); State v. Tamura, 63 Hawaii at 637, 663 P.2d at 1117; State v. Summers, 62 Hawaii at 332, 614 P.2d at 930; State v. Hernandez, 61 Hawaii at 477, 605 P.2d at 77; State v. Smith, 59 Hawaii 456, 464, 583 P.2d 337, 343 (1978); Lovell Enterprises, Inc. v. Campbell-Burns Wood Products, Inc., 3 Hawaii App. 531, 541, 654 P.2d 1361, 1368 (1982); *see also* 5A C.J.S. *Appeal & Error* § 1647 (1958).

[23] *See, e.g., Collins*, 61 Hawaii at 38, 595 P.2d at 282; *Waterhouse*, 33 Hawaii at 884.

[24] *See supra* note 16.

[25] Estate of Heeb, 26 Hawaii at 539. *See also* Harkins v. Ikeda, 57 Hawaii 378, 557 P.2d 788 (1976); Striker v. Nakamura, 50 Hawaii 590, 446 P.2d 35 (1968); Johnson v. Sartain, 46 Hawaii 112, 113, 373 P.2d 229, 230 (1962) (plurality opinion); Waterhouse v. Rawlins, 33 Hawaii at 884 (quoting Bishop & Co. v. Hawaii Silver Co., 28 Hawaii 180, 181 (1925)); Ross v. Preferred Accident Ins. Co., 28 Hawaii 404, 407 (1925). The decision whether substantial evidence exists to create a jury question is a question of law for the court. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2522 (1971).

the facts sought to be established."[26] "More than a scintilla," the court has stated, means "the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced."[27] These definitions, however, beg the real question of how much evidence is required to support a verdict. In practice, given the degree of judgment involved in assessing the evidence, each case turns on its own facts.[28]

Very few jury verdicts are reversed by Hawaii appellate courts.[29] The reluctance to overrule a jury verdict is deeply rooted in American law. The seventh amendment to the federal constitution precludes judicial review of jury verdicts.[30] Although the Hawaii constitution merely states that "in suits at common law . . . the right of trial by jury shall be preserved,"[31] the Hawaii Supreme Court has held that this provision was patterned after the seventh amendment to the federal constitution,[32] and requires "respect for the jury's assessment of the evidence."[33] Moreover, Hawaii Rules of Civil Procedure 38(a) provides "the right of trial by jury as given by the Constitution or a statute of the state or the United States shall be preserved to the parties inviolate,"[34] confirming that Hawaii jury decisions are to be given great deference.

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[26] Makainai v. Lalakea, 25 Hawaii 470, 477 (1920).

[27] Holstein v. Benedict, 22 Hawaii 441, 445 (1915).

[28] *Id.*

[29] One example where a jury verdict was reversed was Lopez v. Wigwam Dep't Stores, 49 Hawaii 416, 421 P.2d 289 (1966). The plaintiff, a shopper at the defendant's store, sued for malicious prosecution and false imprisonment after being arrested by a store employee for shoplifting. The employee thought she saw the plaintiff take a jacket from a store rack and leave the store without paying for it. At her criminal trial the plaintiff produced a receipt for the jacket and was found not guilty. In her civil suit against the store, the jury found the store liable for both malicious prosecution and false imprisonment. On appeal, the supreme court reversed the malicious prosecution verdict because in its view the plaintiff never proved the store manager lacked probable cause to arrest her, a necessary element of plaintiff's malicious prosecution claim. As the plaintiff had not profferred substantial evidence to prove lack of probable cause, the court found there was no question for the jury and the trial judge should have granted the defendant's motion for a directed verdict. *Id.* at 423, 421 P.2d at 294.

[30] The seventh amendment to the United States Constitution provides as follows: "In suits at common law . . . no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

[31] HAWAII CONST. art. I, § 13.

[32] Harada v. Burns, 50 Hawaii 528, 532 n.1, 445 P.2d 376, 379-80 n.1 (1968).

[33] Harkins v. Ikeda, 57 Hawaii 378, 381, 557 P.2d 788, 791 (1976).

[34] HAWAII R. CIV. P. 38(a).

B. *Judicial Findings of Fact*

Judicial findings of fact in both civil[35] and criminal[36] cases are reviewed by the clearly erroneous standard. Findings by a special master are similarly reviewed.[37]

The clearly erroneous standard was formulated by the United States Supreme Court in *United States v. United States Gypsum Co.*,[38] where the court held that "a finding of fact is clearly erroneous when although there is substantial evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[39] Hawaii courts have cited this formulation innumerable times.[40]

A less desirable formulation of the clearly erroneous standard was stated by the Hawaii Supreme Court in *Low v. Honolulu Rapid Transit*,[41] where the court held that "a finding is not 'clearly erroneous' unless the reviewing court is driven irrefragably to the conclusion that all objective appraisals of the evidence would result in a different finding."[42] This definition has resulted in confusion and should not be followed. Hawaii courts have interpreted the *Low* standard as authority for the incorrect proposition that the clearly erroneous, substantial evidence, and abuse of discretion standards are the same.[43] Therefore the "definite and firm conviction of mistake" standard should be the only standard used to ascertain whether a judicial finding of fact is clearly erroneous.

In applying the clearly erroneous standard the appellate court may review the entire record.[44] The appellant has both the burden of identifying the allegedly

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[35] HAWAII R. CIV. P. 52(a).

[36] State v. Patterson, 58 Hawaii 462, 468-69, 571 P.2d 745, 749 (1977).

[37] Estate of Baker, 34 Hawaii 263, 267-68 (1937).

[38] 333 U.S. 364 (1948).

[39] *Id.* at 395.

[40] *See, e.g.*, Waugh v. University of Hawaii, 63 Hawaii 117, 133, 621 P.2d 957, 969 (1980); Kim v. State, 62 Hawaii 483, 493, 616 P.2d 1376, 1382 (1980); Kauai Elec. Div. of Citizens Util. Co., 60 Hawaii 166, 186, 590 P.2d 524, 538; De Fries v. Ass'n of Owners, 57 Hawaii 296, 303, 555 P.2d 855, 859 (1976).

[41] 50 Hawaii 582, 445 P.2d 372 (1968).

[42] *Id.* at 586, 445 P.2d at 376. Many opinions have adopted this formulation of the clearly erroneous standard. *See, e.g.*, Haines, Jones, Farrell, White, Gima Architects Ltd. v. Maalaea Land Corp., 62 Hawaii 13, 16, 608 P.2d 405, 407 (1980); Pacheco v. Hilo Elec. Light Co., 55 Hawaii 375, 384, 520 P.2d 62, 68 (1974); Title Guar. Escrow Serv., Inc. v. Powley, 2 Hawaii App. 265, 630 P.2d 642 (1981); State v. Kauai Kai Inc., 2 Hawaii App. 118, 627 P.2d 284 (1981); Jessmon v. Correa, 1 Hawaii App. 529, 621 P.2d 982 (1981).

[43] *See, e.g.*, Lennen & Newell, Inc. v. Clark Enterprises, Inc., 51 Hawaii 233, 235, 456 P.2d 231, 233; Imperial Fin. Corp. v. Finance Factors, 53 Hawaii 203, 207, 490 P.2d 662, 664 (1971).

[44] C. WRIGHT & A. MILLER, *supra* note 25, § 2585 at 731.

erroneous finding(s) of fact[45] and overcoming the presumption of correctness which attends all lower court decisions.[46] It is not enough that the appellate court might construe the facts or resolve ambiguities differently.[47]

Appellate courts are reluctant to overrule findings of facts because, unlike questions of law, the tribunal which receives the evidence initially has a much greater expertise in the factual circumstances of the particular case than an appellate court can have after reading the record. Transcripts are poor histories of live testimony because the appellate court cannot judge the witness' demeanor, conviction, or veracity. If a factual issue turns on the credibility of the witnesses or the weight of the evidence, the appellate court will not disturb the lower court's judgment.[48]

This is not to say, however, that a decision subject to the clearly erroneous standard is not reversible. The *United States Gypsum* formulation creates a two-part clearly erroneous test. First, is the finding supported by substantial evidence?[49] Second, even if the finding is supported by substantial evidence and a reasonable person could agree with it, does the appellate court nevertheless have a firm conviction of mistake? If so, the appellate court will reverse.[50]

The origins of the distinction between the clearly erroneous and substantial evidence standards are rooted in the ancient dichotomy of law and equity. In the eighteenth and early nineteenth centuries, federal appellate courts reviewing

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[45] HAWAII R. APP. P. 28(b)(4)(C) reads "[w]hen the point involves findings or conclusions of the court below, those urged as error shall be quoted in their entirety and there shall be included a statement explaining why the findings of fact or conclusions of law are alleged to be erroneous." *See also* MPM Hawaiian, Inc., 63 Hawaii at 486, 630 P.2d at 1076-77; Sandstrom v. Larsen, 59 Hawaii 491, 583 P.2d 971 (1978); Campbell v. DePonte, 57 Hawaii 510, 513, 559 P.2d 739, 741, *reh'g denied*, 57 Hawaii 564, 560 P.2d 1303 (1977); Rogers v. Pedro, 3 Hawaii App. 136, 139, 642 P.2d 549, 552 (1982).

[46] Au-Hoy v. Au-Hoy, 60 Hawaii 354, 358, 590 P.2d 80, 83 (1979).

[47] *See supra* note 45.

[48] Molokoa Village Co., Ltd., 60 Hawaii at 592, 593 P.2d at 382; Keller v. La Rissa, Inc., 60 Hawaii 1, 3-4, 586 P.2d 1017, 1019 (1978); Kam Oi Lee v. Fong Wong, 57 Hawaii 137, 143, 552 P.2d 635, 640 (1976); Ed Klein, Inc. v. Hotel Kaimana, Inc., 51 Hawaii 268, 269, 457 P.2d 210, 210-11 (1969). In some federal courts, fact findings based on documentary or circumstantial evidence were more broadly reviewed because here the trial court had no advantage. This is the minority rule, however, and is disappearing. *See* Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 4317 (U.S. Mar. 19, 1985).

[49] The rule states "[a] finding of fact is clearly erroneous when *although there is substantial evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" *United States Gypsum*, 333 U.S. at 395.

[50] Application of Hawaii Elec. Light Co., 60 Hawaii 625, 629, 594 P.2d 612, 617 (1979); DeFries v. Ass'n of Owners, 57 Hawaii at 303, 555 P.2d at 859; Krohnert v. Yacht Systems Hawaii, 4 Hawaii App. 190, 197, 664 P.2d 730, 743 (1983); Henmi Apartments, Inc. v. Sawyer, 3 Hawaii App. 555, 560, 655 P.2d 881, 885 (1982); Haworth v. State, 3 Hawaii App. 281, 285, 650 P.2d 583, 586 (1982); Doe v. Roe, 3 Hawaii App. 241, 242, 648 P.2d 199, 201 (1982).

writs of error from the courts of law only had jurisdiction to consider legal errors.[51] Appellate review of factual matters in cases arising from the law courts was foreclosed by the common law and the seventh amendment.[52] When an appeal derived from the chancery court, however, an appellate court traditionally could review the facts, as well as the law, *de novo*.[53] Gradually, however, appellate courts began to give deference to equity judges' findings of fact, though they were never considered conclusive.[54]

In 1865, Congress provided that a jury could be waived and that judicial findings of fact in a jury-waived case were subject to the same standard of review as jury verdicts.[55] Thus, prior to the 1930's when the Federal Rules of Civil Procedure were drafted, judicial findings of fact at law were viewed on appeal as the equivalent of a jury verdict while judicial findings of fact in equity were not given as much deference.[56] Subsequently, when the federal rules merged law and equity, a considerable debate arose as to whether judicial findings of fact should be treated as they had been at law or in equity. Ultimately the supporters of the equity rule prevailed and the drafters of the federal rules adopted the greater scope of review, the clearly erroneous standard.[57]

Until 1954, Hawaii courts also observed the law/equity dichotomy. At law, Hawaii appellate courts reviewed judicial findings of fact with the same deference shown to a jury verdict.[58] In equity, however, identical findings could be reversed:

> As has been frequently held by this court upon appeal in equity cases, the findings of fact of the trial judge upon conflicting testimony are entitled to great weight; but they are not binding upon this court as, upon exceptions in an action at law, the verdict of a jury and the findings of a judge, jury waived, when supported by more than a scintilla of evidence, have been held to be. An appeal from a final decree in equity brings up the full case for review, in which event this court may weigh the evidence and make its own findings of fact as well as

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[51] For excellent discussions of the history behind the clearly erroneous standard, *see* Clark and Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937), Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUDICATURE SOC., 68-69 (1936), and Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 511-16 (1963).

[52] *See supra* note 50.

[53] The San Pedro, 15 U.S. (2 Wheat.) 202 (1817). The Federal Judiciary Act of 1789 did proscribe appellate review of chancery factual decisions until its repeal in 1803. Blume, *supra* note 50, at 68.

[54] *United States Gypsum*, 333 U.S. at 395.

[55] Blume, *supra* note 50, at 70.

[56] *Id. See* C. WRIGHT & A. MILLER, *supra* note 25, § 2571 at 681.

[57] *United States Gypsum*, 333 U.S. at 394-95.

[58] *See* Kong Kee v. Kahalelou, 5 Hawaii 548, 549 (1886).

rulings of law.[59]

In 1954, the law/equity distinction was abolished when the Hawaii Rules of Civil Procedure were promulgated and Rule 52(a) imposed the clearly erroneous standard on all judicial findings of fact.[60] Historically, then, it is clear the clearly erroneous standard is meant to allow easier reversal of judicial findings of fact than the no substantial evidence standard allows in reversing jury verdicts.

Unfortunately, some Hawaii opinions have incorrectly suggested that substantial evidence alone will prevent a judicial finding of fact from being reversed.[61] If this were true, the clearly erroneous and substantial evidence standards would be identical, contrary to better authority and the historical development of the two standards.

Should the appellate courts continue to defer more to juries than to judges? There are good reasons, aside from the doctrine's historical development, to maintain the dichotomy. First, a jury is twelve, but a judge acts alone. Giving greater deference to a decision reached by consensus is consistent with American distrust of arbitrary action or individual tyranny. Second, judicial findings of fact are often drafted by the winning party with the subjective intent of protecting the lower court's decision from reversal rather than objectively stating the facts of the case.[62] The clearly erroneous standard gives the appellate court

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[59] Pinheiro v. Pinheiro, 32 Hawaii 659, 664 (1933); *see generally*, I. CHAMBERLIN, APPELLATE REVIEW IN HAWAII 36 (1952).

[60] *See* Foreword to Hawaii Rules of Civil Procedure (1954).

[61] "It is simply wrong to say . . . that the [judge's] 'findings will be given the force and effect of a jury verdict.' " C. WRIGHT & A. MILLER, *supra* note 25, § 2585 at 730. There appear to be two sources for the mistake. The initial case to state this proposition was Imperial Fin. Corp. v. Finance Factors, Ltd., 53 Hawaii 203, 490 P.2d 662 (1971), which cited as authority Low v. Honolulu Rapid Transit, 50 Hawaii 582, 445 P.2d 372 (1968), and Lennen & Newell, Inc. v. Clark Enterprises, Inc., 51 Hawaii 233, 456 P.2d 231 (1969). Both had used the "driven irrefragably" formulation of the clearly erroneous standard, which led the court in *Imperial Finance* to conclude incorrectly that the substantial evidence and clearly erroneous standards were identical. The standard has been applied in subsequent cases. Shinn v. Yee, Ltd., 57 Hawaii at 219, 553 P.2d at 737; *MPM Hawaiian, Inc.*, 63 Hawaii at 486, 630 P.2d at 1076-77.

The second source of mistake was In re Charley's Tour & Transp., Inc., 55 Hawaii 463, 522 P.2d 1272 (1974), which involved review of a Public Utilities Commission (hereinafter referred to as "PUC") decision. While recognizing that the Hawaii Administrative Procedure Act, HAWAII REV. STAT. §§ 91-1 to 91-17, applied, the court failed to apply the standards of review articulated in § 91-14(g) and instead mistakenly suggested that the PUC's findings were subject to the substantial evidence standard. *Id.* at 467, 522 P.2d at 1277. In Wright v. Chatman, 2 Hawaii App. 74, 625 P.2d 1060 (1981), the Intermediate Court of Appeals followed *Charley's Tour* in holding incorrectly that its review was "confined to a determination whether the trial court's findings are supported by substantial evidence." *Id.* at 75, 625 P.2d at 1061.

[62] This, of course, is not to imply that trial judges sign findings of fact they do not agree with, or that findings drafted by a party do not carry judicial weight. Trial court findings do carry judicial weight even though they are prepared by counsel. *Molokoa Village Dev. Co.*, 60 Hawaii

greater leeway to reverse an erroneous decision notwithstanding careful draftsmanship designed to insulate the lower decision from review. Finally, while judicial findings may be quite detailed, a jury verdict is often a yes or no answer. An appellate court usually can determine a judge's rationale but often can only speculate as to the jury's basis for its verdict. Thus, the reasonableness standard is more appropriate in reviewing a jury verdict than a standard of clear error.

C. *Administrative Agency Findings of Fact*

Factual findings by administrative agencies are also reviewed in Hawaii by the clearly erroneous standard, as provided by statute.[63] Although the legislative history to this statute is silent,[64] the commissioner's comment to the Model State Administrative Procedure Act, on which Hawaii's Act was based,[65] clarifies that the clearly erroneous standard of subsection (5) applies to findings of fact.[66]

III. Decisions of Mixed Fact and Law

Hawaii appellate courts have recognized the existence of mixed questions of fact and law,[67] but have never carefully analyzed their standards of review. In practice, the courts have applied three different standards (no substantial evidence, clearly erroneous, and *de novo*) to mixed questions, depending on upon the type of decision and who made it.

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at 592, 593 P.2d at 382; Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 4316 (Mar. 19, 1985). The point here is that findings prepared by the winning party should not be reviewed by the narrower no substantial evidence standard of review.

[63] Hawaii Rev. Stat. § 91-14(g)(5)(1976).

[64] *See* H.R. Stand. Comm. Rep. No. 8, 1st Hawaii Leg., 1961 House J. 653; S. Stand. Comm. Rep. No. 713, 1st Hawaii Leg., 1961 Sen. J. 925.

[65] DeVictoria v. H & K Contractors, 56 Hawaii 552, 557, 545 P.2d 692, 697 (1976).

[66] The Commissioner's comment notes that "the 'substantial evidence rule' has been replaced by the 'clearly erroneous rule,' . . . . This change places court review of administrative decisions on fact questions under the same principle as that applied under the Federal Rules of Civil Procedure in connection with review of trial court decisions. See Rule 52(a)." Unif. State Administrative Procedure Act § 15, 14 U.L.A. 431 commissioner's comment (1980).

The Federal Administrative Procedure Act, 5 U.S.C. §§ 551-612, provides in contrast that administrative fact decisions shall not be reversed unless "unsupported by substantial evidence." 5 U.S.C. § 706 (1977).

[67] Pratt v. Kondo, 53 Hawaii 435, 439, 496 P.2d 1, 4 (1972); Carson v. Saito, 53 Hawaii 178, 179, 489 P.2d 636, 637 (1972).

Hawaii Rev. Stat. § 602-5 (Supp. 1984) gives the supreme court jurisdiction "to hear and determine all questions of law, or of mixed law and fact. . . ."

Distinguishing between questions of pure fact or law and mixed questions is a difficult task which has perplexed judges and scholars for years.[68] Some issues are clearly factual; for example, did the defendant drive into the intersection when the light was red? Others are clearly legal; for example, did the defendant owe a legal duty to conform his driving to the motor vehicle code? When the issue involves the application of facts to law, or the application of a legal definition to a set of facts, however, it is a mixed question; for example, did the defendant breach a legal duty owed to a foreseeable plaintiff (i.e., was the defendant negligent)?[69]

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[68] *See infra* discussion at note 76 regarding Baumgartner v. United States, 322 U.S. 665 (1944); Stern, *Review of Findings of Administrators, Judges and Juries: a Comparative Analysis*, 58 HARV. L. REV. 70 (1944); Paul, *Dobson vs. Commissioner: the Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 810-31 (1944); Brown, *Fact and Law and Judicial Review*, 56 HARV. L. REV. 899 (1943).

The problem has not abated. In Pullman-Standard v. Swint, 456 U.S. 273 (1982), the U.S. Supreme Court held that a finding of discriminatory intent was a finding of pure fact and therefore reversed a court of appeals' decision because it had not properly applied the clearly erroneous rule to the district court's finding of no discriminatory intent. The court of appeals had mentioned the clearly erroneous rule in passing but, according to the Supreme Court majority, had actually reviewed the district court's finding on a *de novo* basis because it considered the finding to be one of "ultimate fact," or, in other words, of mixed law and fact. *Id.* at 286 n.16; *see infra* note 75. The Supreme Court held (1) the question of discriminatory intent is a question of pure fact, not mixed fact and law, *id.* at 287-88; and (2) Rule 52(a) applies the clearly erroneous standard to all findings of fact, whether "ultimate" or "subsidiary." *Id.* at 287.

Pullman-Standard provides two important lessons. First, the Supreme Court recognized that ascertaining the nature of the decision below is necessary to deciding the proper standard of review, yet is often a difficult task:

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. . . . Rule 52 does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.

Id. at 288. Second, while the Court stated that it was not addressing the proper standard of review for mixed questions of law and fact, and indeed cited circuit cases which had reached contrary results, the Court strongly suggested that such questions are freely reviewable. *Id.* at 289-90 n.19.

[69] A finding of negligence requires a determination of what a reasonable person would do in the situation and whether the defendant's conduct breached that standard, proximately causing the plaintiff's injury. Thus, it is a decision which involves both fact and law:

> Although this [negligence] determination is often described as "factual," it does not consist merely of deciding, even by inference, what acts occurred. It requires in addition, the exercise of judgment as to whether the conduct which the jury finds to have occurred came within a general rule of law. The mental process required of the jury is the same as that of the administrative body or judge in determining the applicability of a statute to a particular state of facts.

Stern, *supra* note 68, at 110. For an in-depth discussion of the mixed character of a negligence decision, see Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1876-94 (1966).

As simple as this analysis may seem, it has proven troublesome for appellate courts. When faced with an issue which involves the application of facts to a statute or rule of law, courts have often side-stepped the mixed question problem by declaring the issue to be one of "ultimate fact."[70] Hawaii courts have found negligence,[71] scope of apparent authority,[72] promissory estoppel,[73] and a reasonable utility rate structure[74] to be questions of "ultimate fact." The result is that on appeal these decisions have not been consistently reviewed.[75]

"Ultimate fact" is a misnomer which should be avoided by Hawaii courts.[76] Rather than use the term "ultimate fact" to describe what is actually a mixed question of fact and law, it is better to acknowledge that while all mixed questions involve a proportion of fact and law, they should not all be reviewed by the same standard of review. Which standard should apply to a mixed decision is determined by three factors: (1) Who made the decision below? (2) Is the decision factually or legally oriented? (3) As a matter of policy, how deferentially should the appellate court review the decision?

A. Jury Verdicts

Jury verdicts are often the answers to mixed questions of fact and law, and when reviewed by the appellate court the no substantial evidence standard applies as discussed above.[77]

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[70] Hawaii Pub. Employment Relations Bd. v. UPW, Local 646, 66 Hawaii 461, 472, 667 P.2d 783, 791 (1983); *Kauai Electric*, 60 Hawaii at 184, 590 P.2d at 537; *Hawaii Elec. Light Co.*, 60 Hawaii 625, 642 n.10, 594 P.2d 612, 623 n.10 (1979); State v. Dwyer, 57 Hawaii 526, 529, 560 P.2d 110, 112 (1977).

[71] Cafarella v. Char, 1 Hawaii App. 142, 146, 615 P.2d 763, 767 (1980).

[72] *Molokoa Village Dev. Co.*, 60 Hawaii at 597, 593 P.2d at 384.

[73] *Id.* at 595, 593 P.2d at 383.

[74] *Hawaii Elec. Light Co.*, 60 Hawaii at 642, 594 P.2d at 623.

[75] *See, e.g.*, *Molokoa*, 60 Hawaii 582, 593 P.2d 375; *Kauai Electric*, 60 Hawaii 166, 590 P.2d 524.

[76] The term "ultimate fact" is ambiguous because it is sometimes used to refer to pure facts (as in *Pullman-Standard*) and at other times to refer to mixed questions of fact and law. For example, "ultimate fact" was used by Justice Frankfurter in Baumgartner v. United States, 322 U.S. 665 (1944), to describe the application of a legal standard to a general conclusion derived from numerous underlying facts, in particular that the government had not proven by clear and convincing proof that the defendant had become a naturalized citizen by fraudulently swearing his allegiance. *Id.* at 671.

Thus, *Baumgartner* involved an assessment of whether certain facts met a burden of proof involving a classic mixed question of law and fact, as the Supreme Court itself has since noted. Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n.16 (1982).

[77] *See supra* notes 17-20 and accompanying text.

B. Judicial Decisions of Mixed Fact and Law

When a trial judge addresses a mixed question, any one of three standards of review may apply: no substantial evidence, clearly erroneous, or free review. Which standard applies to a given decision is a function of historical precedent and policy.

A criminal conviction entered by a judge following a non-jury trial is reviewed in Hawaii under the no substantial evidence standard,[78] even though a conviction necessarily involves the application of facts to a statutory standard. Although the rule may not have been created by design, the result makes sense because a conviction by a judge or jury has equal weight on appeal. Waiver of a jury therefore does not give the defendant any tactical advantage in his appeal. Furthermore, because a trial judge must find each element of a crime beyond a reasonable doubt, it is logical that the appellate court should review the judges' decision deferentially.[79]

In contrast, Hawaii appellate courts have applied the clearly erroneous standard when reviewing judicial findings on mixed but factually-oriented issues. Judicial findings of negligence, for instance, are reviewed in Hawaii under the clearly erroneous standard of Hawaii Rules of Civil Procedure 52(a),[80] even though questions of duty and proximate cause involve legal considerations.[81] In *Pacheco v. Hilo Electric Light Co., Ltd.*,[82] for example, the trial judge found that the plaintiff had been contributorily negligent when a tractor lawnmower he was driving caused a roadside sign to fall on him. The supreme court reviewed the trial judge's finding of contributory negligence under the clearly erroneous standard because it considered it to be a highly factual determination:

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[78] State v. Smith, 59 Hawaii 456, 464, 583 P.2d 337, 341 (1978); State v. Cummings, 49 Hawaii 522, 533, 423 P.2d 438, 445 (1967); State v. Tamanaha, 46 Hawaii 245, 251, 377 P.2d 688, 692 (1962); Territory v. Kinoshita, 38 Hawaii 335, 345 (1949).

[79] Observe that while a criminal conviction by a judge is governed by the no substantial evidence standard, a judicial finding of fact in a criminal case is reviewed by the clearly erroneous test. *See supra* note 36. The disparity is probably due to separate evolution of the rules but may be justified by the difference in case posture (judicial findings of fact in criminal cases are usually made at the pretrial stage) and the desire for consistency (judicial and jury convictions have the same weight and judicial findings of fact in criminal and civil cases have the same weight).

[80] *Pacheco*, 55 Hawaii at 384, 520 P.2d at 68-69; Geldert v. State, 3 Hawaii App. 259, 266, 649 P.2d 1165, 1170-71 (1982); Harris v. State, 1 Hawaii App. 554, 559, 623 P.2d 446, 449 (1981); Okada v. State, 1 Hawaii App. 101, 102, 614 P.2d 407, 408 (1980); *accord*, McCallister v. United States, 348 U.S. 19 (1954).

[81] *See* Bidar v. Amfac, Inc., 66 Hawaii 547, 669 P.2d 154 (1983) (breach and causation are fact issues, duty is a legal issue, and foreseeability is both a factual and legal issue); Ajirogi v. State, 59 Hawaii 515, 527, 583 P.2d 980, 988 (1978) (foreseeability is question of law freely reviewable by supreme court).

[82] 55 Hawaii 375, 520 P.2d 62 (1974).

> Cast adrift from the mooring of particular factual circumstances, the idea of "negligence," either primary or contributory, quickly becomes an elusive conceptual derelict . . . . "[I]n the last analysis what is negligence depends upon the facts and circumstances of each individual case, tested by the hypothetical ordinarily prudent man."
>
> Precisely because a plaintiff's adherence or nonadherence to the required standard of self-care is generally tied intimately to the facts of his case, appellate courts should exercise considerable restraint in reviewing the conclusion of the fact-finder on this subject. Whether Pacheco acted as an ordinarily prudent man in the particular circumstances attending the accident, this court must treat as a question of fact in the sense that "men of reasonable intelligence may differ as to the conclusion to be drawn" from the evidence of Pacheco's actual conduct.[83]

It might be asked why the no substantial evidence standard did not apply in *Pacheco* as it would if the jury were not waived. There is some authority for this rule elsewhere,[84] but it has not been adopted by the Hawaii or federal courts. There is also some federal authority for reviewing judicial negligence decisions *de novo*,[85] but it too has not been adopted in Hawaii. In light of the differences of opinion on this issue, the clearly erroneous standard appears to be an adequate compromise. It recognizes the factual nature of a negligence decision, yet allows the appellate court to disagree with the trial court's conclusion. More importantly, the controversy demonstrates that in mixed question situations the proper standard of review often depends on policy factors, not whether the issue is a question of law, fact or mixed.[86]

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[83] *Id.* at 383-84, 520 P.2d at 68 (citations omitted). Observe that the court did not state that negligence was a question of fact, but rather that it should be treated as such because of its quasi-factual nature.

[84] 5A C.J.S. *Appeal and Error* § 1656(1) at 429-31 (1958). The no substantial evidence standard would allow consistent review of negligence decisions by judge or jury, but might contravene the appellate court's duty to review judicial decisions more carefully than jury decisions.

[85] The Second Circuit has held that a judicial finding of negligence should be freely reviewed on appeal. Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, 776-78 (2d Cir. 1966), *cert. denied*, 385 U.S. 835 (1967). The court's rationale is that the appellate court must freely review a trial court's negligence decision in order to decide whether its determination of the standard of conduct (a question of law) was correct. Romero v. Garcia & Diaz, Inc., 286 F.2d 347, 355-56 (2d Cir. 1961), *cert. denied*, 365 U.S. 869 (1961). A second reason is that free review of judicial negligence decisions facilitates consistency within the circuit:

> It would be shocking if contrary decisions of two district judges in this circuit on exactly the same facts had to be left standing, although there would be no similar shock if such a divergence should happen as a result of the deliberation of two different juries. . . . Yet uniformity within a circuit or among circuits can be achieved only if appellate review of the application of a legal standard is free of the shackles of the "unless clearly erroneous" rule.

Mamiye Bros., 360 F.2d at 777.

[86] *See* Stern, *supra* note 68, at 120.

Finally, Hawaii courts have held that certain mixed law and fact decisions are freely reviewable if the legal portion of the fact/law mix is erroneous,[87] or if the factual finding is induced by an error of law.[88] Free review is especially appropriate where the legal side of the fact/law mix predominates, or where the appellate courts have a strong interest in supervising the issue. For example, contract interpretation, though it involves factual issues of intent, is generally considered a question of law for the court and reviewed *de novo*.[89] This is because legal document interpretation lends itself to judicial opinion that may affect a large number of contracts, despite the relevance of factual issues of intent.[90]

C. *Administrative Decisions of Mixed Fact and Law*

Administrative agency decisions of mixed fact and law have not been reviewed consistently by Hawaii appellate courts. Section 14(g) of the Hawaii Administrative Procedure Act provides six different standards of review for administrative agency decisions on appeal to the circuit court:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evi-

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[87] Kipahulu Inv. Co. v. Seltzer Partnership, 4 Hawaii App. 625, 631, 675 P.2d 779, 783 (1983); State v. Miller, 4 Hawaii App. 603, 605-06, 671 P.2d 1037, 1040 (1983). The United States Supreme Court noted in a footnote to New York Times v. Sullivan, 376 U.S. 254, 285 n.26 (1964) that it "will review the finding of facts by a state court . . . or if a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question, to analyze the facts." *Id.* (quoting Fiske v. Kansas, 274 U.S. 380, 385-86); *accord*, Commissioner v. Heininger, 320 U.S. 467, 475 (1943).

[88] *In re* 711 Motors, Inc., 56 Hawaii 644, 653, 547 P.2d 1343, 1349 (1976); *see also Pullman-Standard*, 456 U.S. at 287 ("if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis"); *Inwood Laboratories*, 456 U.S. 884, 855 n.15 ("Of course, if the trial court bases its findings [of fact] upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.").

[89] MPM Hawaiian, Inc. v. World Square, 4 Hawaii App. 341, 344, 666 P.2d 622, 625 (1983); Reed & Martin, Inc. v. City and County, 50 Hawaii 347, 348-49, 440 P.2d 526, 527 (1968).

[90] Stern, *supra* note 67, at 111.

dence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[91]

A facial reading of the statute implies that subsections (1) through (4) apply to various rulings of law, subsection (5) to findings of fact, and subsection (6) to discretionary decisions.

A long line of Hawaii Supreme Court cases, however, expanded the application of the clearly erroneous standard of subsection (5) to administrative decisions of mixed fact and law. For example, the supreme court applied the clearly erroneous standard to findings of fact and conclusions of law by the Hawaii Public Employment Relations Board;[92] to an Employment Security Appeals Referee's determination that an applicant met the statutory definition of "unemployed";[93] to an unemployment compensation referee's determination that supervisory employees did not qualify for a trade readjustment allowance;[94] to a finding by the Bureau of Land and Natural Resources that proposed construction did not require an environmental impact statement;[95] and to findings by the Public Utilities Commission that a particular rate of return was reasonable.[96] These decisions involved various mixtures of fact and law, yet the court applied the clearly erroneous standard to them all.

Recently, however, the court has overruled this line of authority. In *Camara v. Agsalud*,[97] the supreme court noted that the clearly erroneous standard of Hawaii Revised Statutes section 91-14(g)(5) was meant to apply to factual decisions only, not mixed questions. Thus, the court held that an administrative agency's mixed fact and law decision could be reversed if "affected by an error of law."[98] Nevertheless, the court noted that judges should generally defer to the agency's expertise in its particular field if the agency's ruling is "consistent with the legislative purpose" of the statute, especially when the agency interprets its own regulations.[99]

Judicial deference to administrative decisions of mixed fact and law makes sense. Administrative agencies make many mixed fact and law decisions because the legislature has assigned the responsibility to them. In fact, close judicial review of administrative decisions would probably be an unwarranted and ille-

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[91] HAWAII REV. STAT. § 91-14(g) (1976).

[92] Aio v. Hamada, 66 Hawaii 401, 406, 664 P.2d 727, 730-31 (1983).

[93] Agsalud v. Lee, 66 Hawaii 425, 428, 664 P.2d 734, 737 (1983).

[94] Wailuku Sugar Co. v. Agsalud, 65 Hawaii 146, 148, 648 P.2d 1107, 1110 (1982).

[95] McGlone v. Inaba, 64 Hawaii 27, 34, 636 P.2d 158, 163 (1981).

[96] In re Hawaii Elec. Light Co., 60 Hawaii 625, 629, 594 P.2d 612, 616-17 (1979); *In re* Kauai Elec. Div. of Citizens Util. Co., 60 Hawaii 166, 186, 590 P.2d 524, 538 (1978).

[97] 67 Hawaii ____, 685 P.2d 794 (1984).

[98] *Id.* at ____, 685 P.2d at 797.

[99] *Id.*

gal intrusion on the executive function.[100] Second, agencies usually work within a narrow sphere of law and their staffs obtain a legal familiarity and expertise which judges often cannot match. Application of the clearly erroneous standard to mixed fact and law decisions is recognition of this expertise. Third, appellate court concern for legal uniformity is not endangered by a narrower scope of review because often the agency will be the only body to interpret a particular statute and it will do so again and again. Finally, agencies can usually resolve matters more quickly than courts; extensive appellate review would slow their function. For these reasons, appellate courts may properly defer to administrative decisions of mixed fact and law,[101] but, as noted in *Camara*, should not hesitate to correct subsumed errors of law.

IV. DISCRETIONARY DECISIONS

The abuse of discretion standard applies to all discretionary decisions of lower tribunals.[102] Discretion is a flexible concept:

> [w]hen invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.[103]

Matters within a trial judge's or other decision-maker's discretion are too many to number, but generally include procedural decisions such as whether to

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[100] The United States Supreme Court has stated that it is not the judicial role to usurp the administrative function by second guessing the agencies. Dobson v. Comm'r, 320 U.S. 489, 501 (1943); *see also* Gray v. Powell, 314 U.S. 402, 412-13 (1941).

[101] Stern, *supra* note 68 at 120-23. In *Dobson*, 320 U.S. 489, the United States Supreme Court indicated that the administrative decision must be upheld "when the court cannot separate the elements of the decision so as to identify a clear cut mistake of law." *Id.* at 502. However, the Court has not always followed its own precedent. In a number of cases the court has substituted its own judgment for an agency's on a mixed question, *see, e.g.*, Barlow v. Collins, 397 U.S. 159, 166 (1970), and has been criticized for its hypocrisy. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 45 (2d Cir. 1976) (Friendly, J.), *aff'd. sub. nom.*, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.00 (Supp. 1982). Other mainland jurisdictions have adopted the opposite approach and allow free review of mixed questions. *See, e.g.*, Daly Herald Co. v. Employment Security Dep't, 91 Wash. 2d 559, 561-62, 588 P.2d 1157, 1159 (1979) (agency decision whether newspaper deliverers performed "personal services" within the meaning of the unemployment statute was a mixed question of law and fact and reviewable *de novo* under the error of law standard of review.)

[102] State v. Sacoco, 45 Hawaii 288, 292, 367 P.2d 11, 13 (1961); HAWAII REV. STAT. § 91-14(g)(6) (1976).

[103] Booker v. Midpac Lumber Co., 65 Hawaii 166, 172, 649 P.2d 376, 380 (1982) (quoting Langnes v. Green, 282 U.S. 531, 541 (1931)).

grant a new trial,[104] family court matters,[105] dismissal of indictments for pre-indictment delay,[106] attorney's fee awards,[107] admission of expert testimony,[108] and granting or denying a continuance.[109]

A strong showing is required to establish an abuse,[110] and each case must be decided on its own facts.[111] An abuse "may be found where the trial court lacked jurisdiction to grant the relief . . . or where the trial court based its decision on an unsound proposition of law."[112] The most commonly repeated definition was first articulated in *State v. Sacoco*:[113] "[G]enerally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant."[114] This definition is appropriate because it highlights the great

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[104] There is some confusion as to whether the abuse of discretion standard applies to appellate review of new trial decisions. Many Hawaii cases state that the abuse of discretion standard is appropriate. Stahl v. Balsara, 60 Hawaii 144, 152, 587 P.2d 1210 (1978); Harkins v. Ikeda, 57 Hawaii 378, 380, 557 P.2d 788, 790 (1976); Struzik v. City & County, 50 Hawaii 241, 246, 437 P.2d 880 (1968); Johnson v. Sartain, 46 Hawaii 112, 114, 375 P.2d 229, 230 (1962).

In Petersen v. City & County, 53 Hawaii 440, 496 P.2d 4 (1972), however, the supreme court held it had "the power and the duty to order a new trial either where the evidence is insufficient to support a verdict or a verdict is clearly against the manifest weight of the evidence." Inasmuch as the trial court's standard for granting a new trial motion is also whether the verdict is against the manifest weight of the evidence (*id.* at 442, 496 P.2d at 7; HAWAII R. CIV. P. Rule 59(a)), *Petersen* uses the trial court standard to review the denial of a motion for a new trial on appeal. *Accord*, Hoopii v. City and County, 53 Hawaii 564, 565-66, 498 P.2d 630, 631 (1972). The federal courts have also confused the correct standard of review of new trial decisions. "There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial." C. WRIGHT & A. MILLER, *supra* note 25, § 2818 at 118 (1971). The *Petersen* case is an anomaly, however, and the better authority is that the correct standard of review for new trial decisions is abuse of discretion.

[105] Wright v. Wright, 1 Hawaii App. 581, 584, 623 P.2d 96, 100 (1981).

[106] Territory v. Shito, 43 Hawaii 203, 204 (1959).

[107] Booker v. Midpac Lumber Co., Ltd., 65 Hawaii 166, 172, 649 P.2d 376, 380 (1982); Harada v. Ellis, 60 Hawaii 467, 482, 591 P.2d 1060, 1069 (1979); Smothers v. Renander, 2 Hawaii App. 400, 408-09, 633 P.2d 556, 563 (1981).

[108] Title Guar. Escrow Servs., Inc. v. Powley, 2 Hawaii App. 265, 270, 630 P.2d 642, 645 (1981).

[109] Sapp v. Wong, 62 Hawaii 34, 41, 609 P.2d 137, 142 (1980).

[110] State v. Estencion, 63 Hawaii 264, 267, 625 P.2d 1040, 1043 (1981).

[111] State v. Sacoco, 45 Hawaii at 292, 367 P.2d at 13.

[112] Hawaii Pub. Employment Relations Bd. v. United Pub. Workers, Local 646, 66 Hawaii 461, 467-68, 667 P.2d 783, 788 (1983).

[113] 45 Hawaii 288, 367 P.2d 11 (1961).

[114] *Id.* at 292, 367 P.2d at 13, *cited in* Sapp v. Wong, 62 Hawaii at 41, 609 P.2d at 142; Scotella v. Osgood, 4 Hawaii App. 20, 25 n.6, 659 P.2d 73, 76 n.6 (1983); Clarkin v. Reimann, 2 Hawaii App. 618, 624, 638 P.2d 857, 861 (1981); *Powley*, 2 Hawaii App. at 270, 630 P.2d at 645.

deference appellate courts generally give to discretionary decisions, and conveys the high burden of arbitrariness or caprice which an appellant must meet to overcome that deference.[115]

Several Hawaii cases have posited different formulations of the abuse of discretion standard but should not be followed. In *First Hawaiian Bank v. Smith*,[116] the court stated that "an abuse [of discretion] will be found only when the reviewing court is driven 'irrefragably to the conclusion that all objective appraisals of the evidence would result in a different finding.' "[117] This is another example of the confusion the "driven irrefragably" formulation has engendered.

The supreme court has also suggested that an abuse of discretion exists when the lower decision is "manifestly against the clear weight of the evidence."[118] This is also inaccurate. The rule apparently was derived from the "driven irrefragably" language of *First Hawaiian Bank v. Smith*,[119] which, as discussed above, is misleading. It also confuses the appellate abuse of discretion standard with the trial court standard for deciding whether a new trial is warranted, which is whether the verdict is "manifestly against the clear weight of the evidence."[120]

Finally, in *Hawaii Automotive Retail Gasoline Dealers Association v. Brodie*,[121] the Intermediate Court of Appeals, citing the Ninth Circuit Court of

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[115] In Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980), the United States Supreme Court discussed the abuse of discretion standard in reviewing a district court's treatment of a multiple judgment under FED. R. CIV. P. 54(b). The court of appeals had reversed the district court's decision to direct entry of judgment on one of the plaintiff's multiple claims because in its view the defendant deserved to retain the amount awarded until all claims were resolved. *Id.* at 7. The Supreme Court reversed, holding that the court of appeals' difference of opinion did not amount to a finding of an abuse of discretion. *Id.* at 11-12.

The Court noted that Rule 54(b) made the district court's decision discretionary. *Id.* at 10. Thus, "the proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those hearings and assessments are juridically sound and supported by the record." *Id.* at 10. Once the appellate court is satisfied that the trial court's decision is juridically sound, "the discretionary judgment of the district court should be given substantial deference . . . the reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable." *Id.*

[116] 52 Hawaii 591, 483 P.2d 185 (1971).

[117] *Id.* at 593, 483 P.2d at 186, citing Low v. Honolulu Rapid Transit Co., 50 Hawaii 582, 586, 445 P.2d 372, 376 (1968) (a case which involved a finding of fact, not discretion); *see also* Clarkin v. Reimann, 2 Hawaii App. at 623 n.11, 638 P.2d at 861 n.11.

[118] Food Pantry v. Waikiki Business Plaza, Inc., 58 Hawaii 606, 614, 575 P.2d 869, 876 (1978); Jenkins v. Wise, 58 Hawaii 592, 598, 574 P.2d 1337, 1342 (1978).

[119] 52 Hawaii 591, 403 P.2d 185. *See* Jenkins v. Wise, 58 Hawaii at 598, 574 P.2d at 1342.

[120] *See supra* note 103.

[121] 2 Hawaii App. 99, 626 P.2d 1173 (1981).

Appeals, stated:

> To constitute an abuse . . . this court must be left with a definite and firm conviction that a clear error of judgment was committed by the trial court upon a weighing of the relevant factors.[122]

Hawaii courts, however, should not adopt this formula.[123] All told, the *Sacoco* test is preferable.

V. SECONDARY REVIEW

Although identifying the decision-maker is usually an easy task, secondary review cases raise problems Hawaii courts are currently wrestling with. Secondary review occurs when a decision is reviewed twice, first by an intermediate appellate court and then by a higher appellate court. The most common examples involve factual decisions by administrative agencies.[124]

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[122] *Id.* at 101, 626 P.2d at 1174, citing Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976).

[123] The rule was created without supporting authority by the First Circuit in *In re* Josephson, 218 F.2d 174 (1st Cir. 1954):

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. One is reminded of the "clearly erroneous" standard in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.

Id. at 182. As the quote indicates, it is a parody of the classic "definite and firm conviction of mistake" formulation of the clearly erroneous rule stated in *United States Gypsum*, discussed *infra*. As such it can only foster confusion between the abuse of discretion and clearly erroneous standards: how does a "definite and firm conviction of a clear error of judgment" differ from a "definite and firm conviction of mistake" of fact? The United States Supreme Court, to the contrary, has been careful to distinguish the clearly erroneous and abuse of discretion standards. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975).

Furthermore, the *Josephson* formula allows too wide a scope of appellate review of discretionary decisions. It suggests that a discretionary decision may be overturned if, in the court of appeals' eyes, the lower court made a clear error of judgment. The United States Supreme Court, however, has recently noted that a court of appeals is not entitled to overturn a discretionary decision merely because its judgment differs. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Indeed, the Supreme Court did not adopt the *Josephson* formulation in its *Curtiss-Wright* opinion, discussed *supra* at note 111, but instead imposed a narrower standard of clear unreasonableness. 446 U.S. at 10.

[124] Cases reviewed by the supreme court on certiorari to the intermediate court of appeals also involve bi-level appeals and present secondary review issues. So far, the supreme court has tacitly reviewed the original trial level decision directly. For example, in Booker v. Midpac Lumber Co., Ltd., 65 Hawaii 166, 649 P.2d 376 (1982), the supreme court by a 3 to 2 vote reversed an

In administrative law cases, Hawaii Revised Statutes section 91-14(g)[125] describes the standards of review which the circuit court, sitting as an appellate court may use in reviewing agency decisions. When the circuit court's decision is further appealed to the supreme or intermediate court, however, the question arises whether the secondary appellate court reviews the circuit court's decision or the administrative agency's decision. The question is important because the standard of review varies greatly depending on whose decision is being reviewed.

As an example, consider the standard of review of an agency finding of fact appealed to a circuit court and then to the supreme court. If the supreme court reviews the agency's decision, the review is direct: the circuit court's decision is set aside and on appeal to the supreme court the sole question is whether the agency was clearly erroneous. If, on the other hand, the supreme court reviews the circuit court's decision, then its review of the agency decision is once-removed: the appellant must persuade the supreme court that the circuit court was clearly erroneous in finding the agency was not clearly erroneous, which may be an impossible burden of persuasion.[126]

Intermediate Court of Appeals opinion which had found an abuse of discretion by the trial court. The case involved the proper amount of attorney's fees due a discharged lawyer. The Intermediate Court of Appeals found the trial court abused its fee-setting discretion by refusing to consider that a contingency contract existed. 2 Hawaii App. 569, 570, 636 P.2d 1359, 1361 (1981). The supreme court majority reversed because it read the transcript to indicate the trial judge had considered the contract. Thus, the majority did not feel bound by the Intermediate Court of Appeals' determination of fact and reviewed the underlying record *de novo*. 65 Hawaii at 171, 649 P.2d at 380. The dissent, written by now Chief Justice Lum, pointed out that the majority had not reversed on a legal ground but only because "the majority's perception of the facts is different from the court of appeals." 65 Hawaii at 173, 649 P.2d at 381. The dissent, however, did not conclude that *de novo* review of the record was wrong; it merely disagreed with the majority's factual conclusion.

Given the nature of review by writ of certiorari, there seems to be no good reason for the supreme court to defer to the Intermediate Court of Appeals' review of a lower court's factual conclusions. Other jurisdictions in which the supreme court does review the intermediate court's decision have statutes requiring that procedure. *See* Huikari v. Eastman, 362 Mass. 867, 285 N.E.2d 114 (1972); Eisenzimmer v. Contos, 379 Mich. 656, 154 N.W.2d 432 (1967); Beach v. Sweeney, 167 Ohio St. 477, 150 N.E.2d 42 (1958); Sahnow v. Fireman's Fund Ins. Co., 260 Or. 564, 491 P.2d 297; Copeland v. American Ry. Express Co., 146 S.E. 609 (S. C. 1924); Goodwin Bros. Leasing, Inc. v. HNB Inc., 597 S.W.2d 303 (Tenn. 1980); TEX. CONST. art. V, § 6; Watson v. Prewitt, 159 Tex. 305, 320 S.W.2d 815 (1959).

Legal rulings do not present secondary review problems because they are freely reviewable no matter how many levels of review they pass through.

[125] *See infra* text accompanying note 90. Some administrative appeals (e.g., worker's compensation cases) are made directly to the supreme court, bypassing the circuit court. HAWAII REV. STAT. § 386-73, § 386-88 (Supp. 1983).

[126] By the same token, if the agency decision is appealed to the circuit court, then to the intermediate court of appeals and then to the supreme court, is the supreme court's review twice-

Whether administrative agency decisions are reviewed directly or once-removed is currently an open question in Hawaii. The only guidance the Hawaii Administrative Procedures Act gives regarding secondary review of administrative cases is that "review of any final judgment of the circuit court under this chapter shall be governed by chapter 602."[127] This language implies that the appellate court reviews the circuit court decision, not the original agency decision. However, section 602 of the Hawaii Revised Statutes, the appellate jurisdiction statute, does not clearly address the proper standard of review on secondary appeal.

Many supreme court cases have tacitly reviewed administrative decisions directly, asking whether the agency rather than the circuit court was clearly erroneous,[128] but none has made direct review a rule of law. In *Outdoor Circle v. Harold K. L. Castle Trust*,[129] the supreme court had the opportunity to address the issue but chose not to; instead, it refused to adopt the Intermediate Court of Appeals' conclusion that administrative appeals should be reviewed directly and left the issue for another day.[130]

Specifically, the Intermediate Court of Appeals had concluded that its review of the circuit court's review of an administrative decision should be *de novo*, applying the standards of review listed in Hawaii Revised Statutes section 91-14(g)(1)-(5) directly to the agency decision and deciding whether the circuit court was right or wrong.[131] In doing so the court partially overruled two of its prior opinions in which the secondary appellate court reviewed the circuit court decision, not the agency decision.[132] With the same record before it as the circuit court, the court found there was no reason to defer to the circuit court's opinion.[133] Despite the supreme court's opinion in *Outdoor Circle*, the Interme-

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removed? Would an appellant have to show the Intermediate Court of Appeals was clearly erroneous in not finding the circuit court was clearly erroneous in not finding the agency was clearly erroneous?

[127] HAWAII REV. STAT. § 91-15 (Supp. 1984).

[128] Camara v. Agsalud, 67 Hawaii ____, 685 P.2d 794 (1984); Aio v. Hamada, 66 Hawaii 401, 406, 664 P.2d 727, 728 (1983); Cariaga v. Del Monte Corp., 65 Hawaii 404, 652 P.2d 1143 (1982), *reversing* 2 Hawaii App. 672, 642 P.2d 537 (1982); Wailuku Sugar Co. v. Agsalud, 65 Hawaii 146, 148, 648 P.2d 1107, 1110 (1982); McGlone v. Inaba, 64 Hawaii 27, 34, 636 P.2d 158, 163 (1981); *In re* Hawaii Elec. Light Co., 60 Hawaii 625, 629, 594 P.2d 612, 616-17 (1979).

[129] 67 Hawaii ____, 677 P.2d 965 (1984).

[130] *Id.*

[131] *Outdoor Circle*, 4 Hawaii App. 633, 638-39, 675 P.2d 784, 790 (1983).

[132] Foodland Supermarket v. Agsalud, 3 Hawaii App. 569, 573 n.6, 655 P.2d 891 n.6 (1982); Homes Consultant Co. v. Agsalud, 2 Hawaii App. 421, 425, 633 P.2d 564, 567 (1981); *see also* Santos v. State, 64 Hawaii 648, 651 n.6, 646 P.2d 962, 964 n.6 (1982).

[133] *Outdoor Circle*, 4 Hawaii App. at 639-40, 675 P.2d at 790.

diate Court of Appeals has continued to review agency appeals directly.[134]

What standard of review should apply on secondary appeal? Direct review of the original findings of fact allows the secondary appellate court to reach the facts of a meritorious appeal without circumventing the extremely high hurdle of the once-removed standard of review. As the Intermediate Court of Appeals noted in *Outdoor Circle*, if the intermediate appellate court takes no new evidence then its review of the facts is based on the record, which is just as available to the secondary appellate court.[135] If the intermediate appellate court has no greater expertise in the facts than the higher court why should the higher court defer at all to the intermediate court's conclusions, legal or factual?

On the other hand, direct review duplicates effort. It requires the higher appellate court to reexamine the facts a second time. It also gives the intermediate appellate court decision no weight on appeal and provides the appellant with an extra opportunity for reversal.

All considered, the Intermediate Court of Appeals decision in *Outdoor Circle* is the better answer. The only real virtue of the once-removed standard of review is that it saves the higher appellate court the time required to master the record.[136] As a practical matter the Hawaii appellate courts generally do master the factual record of every appeal anyway. No other policy reasons exist to require the higher appellate courts to defer to the intermediate courts. The once-removed standard would only be a roadblock to appellate decision-making and would probably be honored by the higher courts more in its breach than in its observance.[137]

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[134] *See* Chock v. Bitterman, 5 Hawaii App. ____, 678 P.2d 576, 580 (1984); Vasconcelles v. Sunn, No. 9368 (Mar. 15, 1984) (memorandum opinion).

[135] *Outdoor Circle*, 4 Hawaii App. at 640, 675 P.2d at 790. HAWAII REV. STAT. § 91-14(f) (Supp. 1982) confines circuit review to the administrative record except where trial *de novo* is provided by law, or where agency procedural irregularities require new testimony.

[136] The U.S. Supreme Court has adopted the direct review standard. Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 4318 (U.S. Mar. 19, 1985). *See* Stern, *supra* note 68, at 90.

[137] The U.S. Supreme Court once stated that it would not review an administrative board's findings of fact directly, but instead would defer to the court of appeal's review. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502-03 (1951). Nevertheless, the Court has since reviewed an administrative decision directly. Dickenson v. United States, 346 U.S. 389 (1953). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 2904 at 531 (3d ed. 1972). Other state courts have not reached a consensus on this issue. The majority of state supreme courts which have dealt with the issue have decided in favor of direct review, that is, reviewing administrative agency decisions *de novo*, using the same standard of review as used by the intermediate appellate court. *See, e.g.*, Arkansas Real Estate Comm'n v. Harrison, 585 S.W.2d 34 (Ark. 1979); Rados, Inc. v. Occupational Safety and Health Appeals Bd., 89 Cal. App.3d 590, 152 Cal. Rptr. 570 (1979); Cook v. Iowa Dep't of Job Serv., 299 N.W.2d 698 (Iowa 1980); Matter of Pautz, 295 N.W.2d 635 (Minn. 1980); Ingram v. Civil Serv. Comm'n of the City of Saint Louis, 584 S.W.2d 633 (Mo. App. 1979); Southwest Gas v. Public Serv. Comm'n, 614 P.2d 1080 (Nev. 1980); Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash. 2d 267, 552 P.2d 674

VI. CONCLUSION

Standard of review is a concept every appellate attorney must master. Too often appellants approach the appellate courts crying for relief, ignorant of the court's limited power to review and correct.

The four main standards of review are easy to define but often difficult to apply. Knowing which standard to apply is simplified greatly, however, by ascertaining the decision maker below and the type of decision which is being appealed.

Finally, legal technicians should also recognize that, as crucial as the standard of review may be, it is almost never the sole basis for resolution of an appeal. Moreover, the four different narrow view standards, (1) abuse of discretion, (2) substantial evidence, (3) clearly erroneous, and (4) arbitrary and capricious, are so close (especially when all allow free review for error of law and the first is augmented by the new trial power) that the distinctions may be more semantic than real. The Hawaii appellate courts have not and should not allow technical procedure to dictate their sense of justice. For the most part standard of review is a matter of voluntary deference by the appellate judges and it should remain a flexible concept.

(1976); Sanitary Transfer and Landfill, Inc. v. Department of Natural Resources, 85 Wis. 2d 1, 270 N.W.2d 144, 149 (1978) (controlling statute); Scharping v. Johnson, 32 Wis. 2d 383, 145 N.W.2d 691, 695 (1966); *cf.* Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 429 A.2d 341 (1981). The rare state supreme courts which apply the once-removed standard of reviewing agency decisions do so because of controlling statutes. The Oregon Supreme Court, for example, is precluded by statute from reviewing an agency decision directly. Sahnow v. Fireman's Fund Ins. Co., 260 Or. 564, 491 P.2d 997 (1971); *see also* CF Industries v. Tennessee Pub. Serv. Comm'n, 599 S.W.2d 536 (Tenn. 1980).

HAWAII STANDARDS OF REVIEW CHART

TYPE OF DECISION BELOW	DECISION MAKER	STANDARD OF REVIEW
Pure Law	Judge or Administrative Agency	Free review, aka *de novo* review, right/wrong
Pure Fact	Jury	No substantial evidence
	Judge	Clearly erroneous
	Administrative Agency	Clearly erroneous
Mixed Fact and Law	Jury	No substantial evidence
	Judge	Various: No substantial evidence (criminal conviction) Clearly erroneous (e.g., negligence) Free review (contract interpretation)
	Administrative Agency	Clearly erroneous
Discretion	Judge or Administrative Agency	Abuse of Discretion

The Conservation and Protection of Marine Mammals

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I. INTRODUCTION

Among the most unique, intelligent, and, unfortunately, vulnerable of the earth's creatures are the sea mammals. Though taxonomically diverse,[1] these animals share an interest in the marine environment, and their fate is inextricably dependent upon mankind's use of that environment. With the exponential growth of the earth's population and growing affluence in many countries, pressure on all marine resources has increased exponentially.[2] It has been estimated that overall marine mammalian life declined by forty percent during the past few decades[3] from such factors as pollution, overfishing, and human encroachment upon marine habitats. Many marine mammal species have suffered even greater declines and are nearly extinct or are seriously depleted.[4]

Conservation of certain marine mammal species has been a concern of international and domestic decision-makers for many years. However, the growth of the environmental movement in the late 1960's and 1970's resulted in increased attention to marine mammals. A basic premise of this movement was

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[1] *See* Table I, *infra*.

[2] *See* F. BELL, FOOD FROM THE SEA: THE ECONOMICS AND POLITICS OF OCEAN FISHERIES 79 (1978).

[3] Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549, 550 (1979).

[4] In past centuries two species—Stellar's sea cow and the sea mink—are known to have become extinct because of human activities. Travalio & Clement, *International Protection of Marine Mammals*, 5 COLUM. J. ENVTL. L. 199, 199 n.1 (1979).

the realization that existing institutions were inadequate to ensure the well-being of marine mammals. Accompanying this realization was a subtle shift in thinking from "conservationist" goals—focusing on the continued, efficient use of resources—to "protectionist" goals, which concentrate on ecological, aesthetic, and ethical considerations.[5]

Despite commendable efforts by several countries[6] and a great deal of attention by the media and by academicians, the conservation and protection of marine mammals during the 1980's is dependent upon a loosely organized regime of treaties, domestic legislation, and international administrative actions. What law exists has yet to prove itself capable of protecting or conserving these resources. The most recent expression of official international concern for marine mammal protection is contained in the Convention on the Law of the Sea (LOS Convention).[7] The management of fish stocks and the conservation of anadromous, catadromous, and highly migratory species receive detailed consideration in the LOS Convention, but, the problem of marine mammals is addressed directly in only three articles.[8] Certainly, varying political and economic interests impede negotiation of a comprehensive international protective regime; however, the provisions of the LOS Convention are grossly inadequate. Without more attention to this area, the law and organization of marine mammal protection will remain confused, and the depletion of marine mammal stocks will increase.

Apart from the economic, aesthetic, ecological, and ethical interests related to the animals themselves, effective protection of marine mammals also serves more general goals such as the maintenance of a favorable legal order. For example, the plight of marine mammals has engendered not only popular and professional interest, but paramilitary action as well by some of the more militant environmental groups.[9] The potential for conflict and the possibility for harm to perceived national security interests demand a reasoned and effective solution to the problem. Similarly, the goal of "protection and conservation" has come into conflict with the economic, social, and cultural interests of native populations and has contributed to friction with their governments.[10] An effective, negotiated accommodation of conflicting interests is in the interest of diverse elements of the international community and probably of all mankind.

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[5] For a discussion of non-economic justifications for marine mammal protection, focusing on cetaceans, see *id.* at 205-07.

[6] *See infra* note 428 and accompanying text. For an examination of U.S. legislation affecting marine mammals, see *infra* notes 429-65 and accompanying text.

[7] *Done* Dec. 10, 1982, ____ U.N.T.S. ____, *reprinted in* 21 I.L.M. 1261, U.N. Doc. A/CONF. 62/122 (1982) [hereinafter cited as LOS Convention].

[8] *See id.* arts. 64, 65, 120.

[9] *See Hairy Adventure*, TIME, Aug. 1, 1983, at 17, 17.

[10] *See infra* notes 284-304 and accompanying text.

This analysis will explore the conflicting interests involved in the debate over marine mammal protection. There will also be a review of efforts to accommodate differing common and special interests via legislation, to incorporate historical lessons into potential solutions, and to establish some direction for future policy debate on marine mammal issues.

II. Issues and Regulatory Efforts

A. Wildlife Management and the Economics of Exploitation

Though participants on both sides of the "protection versus exploitation" of the marine mammals debate acknowledge a desire to prevent the extinction of any species, there is often serious and sometimes emotional disagreement over the likelihood that some species are seriously depleted. Unfortunately, proponents of continued hunting often have economic interests to protect and have manipulated scientific theory and data to support their positions. Conversely, opponents of hunting may have moral and aesthetic reasons for their opposition but have not always understood the scientific bases of the hunters' arguments. It is extremely difficult to make a definite determination of the merits of this dispute, but some knowledge of the ecology and economics of the hunt is essential to understand the "protection versus exploitation" debate and to formulate legal and organizational responses that effectively achieve a satisfactory accommodation of interests.

A non-renewable resource—for example, an oil or gas deposit—will eventually be exhausted if utilization continues. The main factors affecting the rate of depletion are the size of the resource, the consumer demand for the resource, and the cost of utilization (*i.e.*, the cost of extracting the resource, which is determined largely by the available technology). By comparison, a renewable resource may be utilized indefinitely if managed correctly. Of course, a renewable resource will be exhausted if the rate of utilization exceeds the rate of renewal. The rate of utilization is determined by the same factors affecting utilization of non-renewable resources—resource size, cost of extracting, and demand. These are basically economic factors, and calculating the rate of utilization is a problem in microeconomics.

The rate of replenishment of a renewable resource, at least a biological resource, is a problem in the field of population dynamics. The most popular model for describing animal populations under exploitation is the *dynamic-pool* model, often called the Beverton-Holt model.[11] According to this model, the usable stock for any population is the proportion of that population's total biomass which is available for exploitation. Not all individuals in a population are

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[11] *See* F. Bell, *supra* note 2, at 100.

always available to the hunter; for example, young fish may be so small that they are not caught by standard nets. The size of the usable stock will change as the population's individuals are *recruited* (for example, as young fish become large enough to be caught in nets) and as individuals die of natural causes or are caught. Though originally developed to describe fin fisheries, the dynamic-pool model is theoretically applicable to marine mammal populations, and it has often been used in the marine mammal context—perhaps because it is well-known and relatively easy to use.

The dynamic-pool model assumes that prior to exploitation a population is in equilibrium, which means that in the long run natural mortality equals the recruitment rate. Some animals can be taken without causing eventual exhaustion of the stock because hunting the species necessarily causes the natural mortality rate to fall (fewer individuals survive to die naturally). The recruitment rate also increases because there is less competition for food due to the fact that there are fewer older animals. In addition, hunting may trigger enzymatic and hormonal changes as well as changes in behavior which raise the rate of reproduction.[12] Wild animal populations are said to exhibit an "inverse density-dependent response" to exogenous decreases in stock size.[13] The exact size of this response differs from species to species and is determined by biological and ecological factors.

Due to this density-dependent response, a resource that is exploited to some extent, and yet in population equilibrium, will have a population less than the initial, unexploited size. If exploitation is increased beyond the equilibrium amount, the stock will then become depleted. The point at which recruitment exactly equals combined natural and hunting mortality is the *maximum sustainable yield* (MSY). At MSY, the long term productivity of the resource is being maximized. Applying the MSY concept to the management of marine mammals assumes that some marine mammals are not in danger of extinction and can be exploited. The policy considerations involved in this assumption will be reviewed in subsequent analyses, but to understand the "conservation" versus "exploitation" issues, the exploitability of animal species must be examined.

By examining species which have become extinct as a result of over-exploitation, many, if not most, biologists have concluded that a "critical minimum population size" exists, beyond which there is little hope for a species' continued survival. If a species is hunted beyond the maximum sustainable yield level, the stock will become depleted, but the stock may be able to recover if the hunting stops or is severely cut back. However, if hunting drives a population below the critical minimum size, even a total halt in exploitation will not

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[12] *See* Levin, *supra* note 3, at 578.

[13] Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (Part One), 6 ECOLOGY L.Q. 323, 408 (1977) [hereinafter cited as Scarff I].

lead to a recovery. While temporary signs of recovery may occur, the ultimate fate of the stock is sealed and extinction will ultimately result.[14] This critical population size may be anywhere from tens of animals to tens of thousands of animals, depending on the biological and ecological characteristics of the species. The critical population is thought to be relatively high in the case of social animals.[15] The danger of reaching the critical population size is heightened by the fact that the critical population size cannot be accurately determined until a population drops below it.[16]

A number of theoretical and practical criticisms have been leveled against the dynamic-pool model. For example, the assumption of initial populations in stable equilibrium may not be true for many species. Environmental parameters such as water temperature, salinity, oxygen content, ultraviolet radiation, and ocean currents change, altering the ocean environment on a seasonal or even daily basis and causing quick and unpredictable effects on marine animal populations. For example, the well-publicized El Niño phenomenon, which involves incursion of warm tropical water into the eastern Pacific, has drastically reduced the stock of anchoveta at least ten or twelve times during the twentieth century.[17] In addition, the dynamic-pool model's application to marine mammals has been questioned.[18] The breeding and other characteristics of some marine mammals are not well understood,[19] causing uncertainty in the model's assumptions as applied to marine mammals.

The most persistent criticism of the dynamic-pool model as applied to marine mammals is the difficulty of getting accurate estimates of the required parameters—recruitment rate, natural mortality, and even population size. Some animals, such as seals and polar bears, can be counted directly in many cases, and their reproductive behavior can also be observed. However, other marine mammals spend most or all of their lives in the water, and they are effectively hidden from the view of scientists. Since in these instances the recruitment rate and its relation to population size cannot be observed directly, an estimate is calculated based on observed present population and initial population size (the size prior to exploitation).[20] Some attempts have been made to estimate population sizes directly from scientific sighting cruises and mark-recapture experiments. Even so, it is difficult to obtain a statistically sufficient sample due to the non-random nature of most searches and the infrequency of

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[14] *Id.* at 389.

[15] *Id.* at 389-90.

[16] *Id.* at 390.

[17] F. BELL, *supra* note 2, at 93.

[18] Levin, *supra* note 3, at 577-78.

[19] *Id.*

[20] Scarff I, *supra* note 13, at 408.

expeditions.[21] For exploited species, the initial populations are determined from historical catch statistics, while current populations are usually calculated from catch data.

To determine current population size from catch data, the number of individuals caught per unit effort (CPUE) is calculated. The CPUE most often equals the number of individuals caught per time spent searching for and killing the animals. The CPUE is assumed to be directly related to the relative abundance of animals, which means that the more effort it takes to catch one animal, the lower the total number of animals which must exist.[22] In fishing for fin species, most effort is directed at actually catching the fish—setting the nets, trawling, and hauling the nets back in. In contrast, most of the effort in catching whales is spent in simply finding whales to kill, and a relatively small amount of time is actually required to chase down and harpoon them. Searching efficiency is probably more difficult to quantify accurately than catching efficiency, and the effect of such technical improvements as ASDIC and sonar on whaling efficiency has been vigorously debated and has resulted in dramatic differences in population estimates and official catch quotas.[23] If an increase in efficiency is not recognized or given adequate consideration, it might appear that a population has increased when in fact it has not. In addition, the proportion of total effort expended on a particular species may change, masking a rise or decline in the population size.[24] All of these variables create more than a little uncertainty, at least on the part of many scholars. These variables have also provided environmentalists with potent ammunition in their fight against exploitation of marine mammals.

The difficulty of accurately estimating MSY for most wild populations has generated problems for resource managers. These problems have been compounded by those theoretical criticisms of the dynamic-pool model which were directed against: (1) the model's failure to consider adequately the whole ecosystem, (2) its questionable assumption that carrying capacity of a habitat remains relatively constant, and (3) its failure to consider economic, social, and ethical factors. These criticisms and problems generated new proposals for resource management goals. Variously called optimum sustainable yield (OSY), optimum sustainable population, optimal utilization, or optimum ecological resource management, these alternative management standards are directed at designating a socially and ecologically optimal level of exploitation rather than the narrow, technically prescribed MSY level. Such standards are an improve-

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[21] *Id.* at 409 n.468.

[22] *See* F. BELL, *supra* note 2, at 103-06.

[23] M'Gonigle, *The "Economizing" of Ecology: Why Big, Rare Whales Still Die*, 9 ECOLOGY L.Q. 119, 152-53 (1980).

[24] Scarff I, *supra* note 13, at 409 n.471.

ment over MSY because they take into account the significance of a species to the ecosystem as well as social values, but they suffer from some vagueness and definitional ambiguity.[25]

The attractiveness of the dynamic-pool model is partially due to the fact that a population can theoretically be fine-tuned to MSY levels by controlling fishing effort, for example, through gear restrictions and official catch quotas or recruitment—by mandating a specific mesh size of fishing nets for fin species, which prohibits the landing of young animals of other marine species.[26] However, without an adequate understanding of a species' biological and ecological characteristics, no one can guarantee that specific management efforts will lead to MSY population levels. Quotas may be difficult to enforce, especially when the catch is processed at sea, such as in the whaling industry.[27] In addition, gear restrictions, which may limit the size of boats or the type of equipment they may carry, are directed at reducing efficiency. Such "regulated inefficiency" seems foreign to the capitalist economic system since it invariably results in a net loss to the economy.

According to the historical theory in the area of population dynamics, it was unlikely that a given species would ever be hunted to extinction, because as the population of the species was depleted, the cost of catching additional animals would rise, and eventually continued exploitation would become unprofitable.[28] In economic terms, the "marginal cost" rose rapidly as a population became depleted, and, therefore, commercial extinction would occur only at population levels safely above a critical minimum population (the point of biological extinction). For species of relatively low economic value and high reproductive potential, this economic model may be valid, but for species such as whales, which reproduce slowly and which can be quite valuable, a hunter may have incentive to deplete a species to biological extinction.[29] In technical terms, extinction of a species is possible and even probable if the marginal revenue from catching an individual animal at critical minimum population size exceeds the marginal operating cost of making the catch (that is, the hunter makes a profit from killing the animal), and if the discount rate is sufficiently greater than the "net recruitment rate," which means that the present consumptive value of the animal is greater than the discounted future value of the animal and its progeny.[30] The net recruitment rate of whales is generally thought to be low, *i.e.*, approximately five or ten percent a year. A discount rate above this level could

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[25] *Id.* at 390-94.

[26] F. BELL, *supra* note 2, at 102-03.

[27] Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (Part Two), 6 ECOLOGY L.Q. 571, 606 (1977) [hereinafter cited as Scarff II].

[28] *Id.* at 582; 10 LEAGUE OF NATIONS O.J. 1594 (1929).

[29] Scarff II, *supra* note 27, at 582.

[30] *Id.* at 582-83.

create an incentive to deplete the resource.[31] Uncertainty about whale biology and population dynamics may actually increase this incentive, since present profitability is fairly certain, while a single hunter cannot be sure that whales will be around to be caught in the future.[32]

This subordination of long-range problems to short-run gain is a symptom of what has been called "the tragedy of the commons."[33] The legal principle of freedom of the seas has historically made the resources of the ocean common property—open to exploitation by anyone with the means to do so. The cost of depleting an ocean resource is not borne by any individual hunter or fisherman alone but by the industry as a whole. Thus, the cost of depletion is not internalized in the planning of any one firm.[34] Because this depletion goes unrecognized, individual firms adopt a strategy of intensive capitalization. In the whaling industry where the total catch size for the industry remains constant despite an increase in capitalization, the productivity of one firm is determined not only by its own actions, but also by the actions of every other firm. For example, if new firms enter the industry or if the existing firms increase their fishing efforts, fewer whales will be available to be caught by others. Firms exploiting a common property resource are subject to a *technological externality*, which means that "efficiency" is determined in part by factors beyond each firm's individual control.[35] Each firm will increase investment to maintain or improve its competitive position, resulting in an overcapitalized industry.[36]

The tragedy of the commons is clearly observable in the history of commercial whaling. Especially during the 1950's, when whaling nations were unable to agree on a division of the official International Whaling Commission (IWC) quota, whaling ships raced to the hunting grounds as soon as the official whaling season opened and rushed to catch whales as quickly as possible. Companies built bigger and faster whaling ships, or they sent out more ships. The end result was not a greater total catch for the industry, but uneconomic overcapitalization, making it difficult to impose small and more rational quotas. This period has been aptly termed the "whaling Olympics" due to the hectic and exhausting rate at which the hunt proceeded.[37]

Most management schemes and tools are designed to preserve the common property nature of marine resources. The "regulated inefficiency" of gear restrictions and officially mandated quotas may be of limited use in conserving re-

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[31] *Id.*

[32] M'Gonigle, *supra* note 23, at 123.

[33] *See* Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[34] Scarff II, *supra* note 27, at 580.

[35] F. BELL, *supra* note 2, at 138.

[36] Scarff II, *supra* note 27, at 580.

[37] G. SMALL, THE BLUE WHALE 79-81 (paper ed. 1971), *cited in* Scarff I, *supra* note 13, at 359-60.

sources.[38] Many scholars have advocated converting fisheries to private property resources in order to internalize depletion costs; for example, by auctioning off the right to fish or otherwise limit entry,[39] or by asserting national jurisdiction over wider areas of the ocean. The latter solution is unlikely to work well for many species, especially for whales which migrate through the coastal regions of a number of countries.[40]

B. Seals, Sea Lions, and Walruses

More is probably known about the pinnipeds—the seals, sea lions, and walruses—than about any other marine mammals.[41] While these animals are basically ocean-oriented, they cannot live completely independent of land,[42] and thus, they can be more easily studied and observed. Historically, a number of pinniped species have been subjected to exploitation, generally for their fur, and many more were caught incidentally to commercial fishing operations. Many species have been severely depleted,[43] although some species have made dramatic comebacks as a result of timely regulation. For example, elephant seals were approaching extinction at the end of the nineteenth century, but in 1911 the Mexican government provided them with protection in their last sanctuary, Guadalupe Island near Baja California, and their numbers have since increased.[44] In addition, the Pacific walrus was overhunted during the eighteenth and nineteenth centuries, but it has recovered somewhat during this century despite the continuing problem involving the illegal hunting of walrus ivory.[45] Similarly, concern over the depletion of the stocks of north Pacific fur seals during the nineteenth century resulted in one of history's most successful international conservation efforts, the North Pacific Fur Seal Convention.[46] Even so,

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[38] *See* F. BELL, *supra* note 2, at 152-55.

[39] *See id.* at 161-70.

[40] Scarff II, *supra* note 27, at 581, n.586.

[41] Travalio & Clement, *supra* note 4, at 217.

[42] Coggins, *Legal Protection For Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 6 (1975).

[43] The monk seals, in particular, are in great danger of extinction. The Caribbean species is probably already extinct. *See* MARINE MAMMAL COMM'N, ANNUAL REPORT OF THE MARINE MAMMAL COMMISSION, CALENDAR YEAR 1982: A REPORT TO CONGRESS 54-56 (1982) [hereinafter cited as MMC 1982 REP.]; MARINE MAMMAL COMM'N, ANNUAL REPORT OF THE MARINE MAMMAL COMMISSION, CALENDAR YEAR 1981: A REPORT TO CONGRESS 56-61 (1981) [hereinafter cited as MMC 1981 REP.].

[44] Coggins, *supra* note 42, at 7.

[45] *Tusk Bust*, OCEANS, May 1981, at 58, 58. *See* Rytkheu, *People of the Long Spring*, 163 NAT'L GEOGRAPHIC 206, 220-22 (1983).

[46] *See infra* notes 107-17 and accompanying text.

too many north Pacific fur seals may have been killed in recent years.[47]

1. *A Case Study in Exploitation: The Harp Seal Hunt*

In recent years, the harp seal hunt has been the object of much public attention. In this case, at least, protectionist pressure has apparently succeeded in ending the yearly clubbing; no commercial kills of harp seals were reported in 1983, and none were expected in 1984. Since the harp seal technically was not an endangered species, the need for a total ban on the harp seal hunt has never been clearly established. Aesthetic and moral factors seem to be the primary forces which *de facto* stopped the commercial hunt.

The harp seals are among the most numerous of the pinnipeds. Their migration routes carry them as far west as the Mackenzie River in Canada, as far east as the Severnaya Zemlya in the Soviet Arctic, and from 75°N to 80°N latitude to as far south as 50°N.[48] Harp seals breed on ice floes in the early part of the year in three distinct breeding areas: (1) off the northeast coast of Newfoundland and in the Gulf of St. Lawrence; (2) in the Greenland Sea between Iceland and Spitzbergen; and (3) in the White Sea off the Soviet Arctic coast.[49] Whelping occurs between January and April in the White Sea, and in early March in the Canadian breeding grounds.[50] The female normally gives birth to a single, white-coated pup. Weaning occurs in ten to twelve days, after which the mother mates once more and begins another annual swim northward.[51]

Although adult seals are sometimes hunted for blubber, meat, and oil, it is the snow-white pelt of the infant pup, which has appealed both to furriers and to public sentiment.[52] The Canadian hunt usually began within seven to fourteen days after the pups were born.[53] In an apparently brutal and inhumane manner, sealers utilized wooden clubs to crush the skulls of the newborn pups.[54]

The Canadian seal hunt was once unrestricted, but the pressure on the seal population in the late 1950's—from an estimated 3.3 million to 1.25 million—led to the establishment of annual quotas on the number of seals which

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[47] Travalio & Clement, *supra* note 4, at 217 n.133.

[48] 2 E. WALKER, MAMMALS OF THE WORLD 1306 (3d ed. 1975).

[49] R. HARRISON & J. KING, MARINE MAMMALS 106 (2d ed. 1980); V. SCHEFFER, SEALS, SEA LIONS AND WALRUSES: A REVIEW OF THE PINNIPEDIA 105 (1958).

[50] Harrison, *Reproduction and Reproductive Organs*, in THE BIOLOGY OF MARINE MAMMALS 253, 302-03 (H. Andersen ed. 1969).

[51] E. WALKER, *supra* note 48.

[52] *See* Lavigne, *Life or Death for the Harp Seal*, 156 NAT'L GEOGRAPHIC, Jan. 1976, at 128, 129.

[53] *See* Raloff, *Bloody Harvest*, SCI. NEWS, Mar. 31, 1979, at 202, 202.

[54] *See* Lavigne, *supra* note 52, at 129.

may be killed.[55] The first quota, set in 1969, limited the hunt to 50,000 animals in the Gulf of St. Lawrence and to 200,000 animals in the Newfoundland and Labrador waters. Large sealing vessels were banned from the Gulf, and the use of spotting planes was forbidden. Thereafter the quota was reduced to 150,000, where it remained until 1976, when it was further reduced to 127,000 (although about 41,000 more seals were taken). The quota was raised to 170,000 in 1977.[56] In 1979, the quota stood at 180,000, rose to 183,000 in 1981, and increased to 186,000 for 1982 and 1983—although in 1982 approximately 162,000 seals were taken and in 1983 the number taken decreased to 56,000.[57] These totals do not include unregulated catches by Canadian Eskimos (from 2,000 to 14,000 during the early 1980's) and by Greenlanders (approximately 13,000 catches per year).[58] The precipitous decline in the number of seals caught is due largely to the decision of the Council of the European Economic Community to ban the import of seal pup skins effective October 1, 1983. Nearly eighty percent of the killed seals were pups, most younger than twenty-one days old, which are prized for their downy soft, white fur. The timing of the kill was important, since the pups begin to lose their valuable baby fur after three weeks.[59]

The debate over the harp seal kill revolves around three basic issues: (1) whether the hunt is necessary for the maintenance of a stable seal population, (2) the extent to which the hunt benefits the region's economy, and (3) whether the kill is humane.

Proponents of the harp seal hunt allege that a reduction in the size of the harp seal herd is necessary to maintain the population within limits which the environment can support.[60] In addition, the hunt supposedly provides needed

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[55] Raloff, *supra* note 53, at 202. *See* Lavigne, *supra* note 52, at 130. The other harp seal herds may have fared even worse than Canada's herds. The White Sea population, once numbering four million animals, may have been reduced to as few as 220,000. Once numbering one million, the Greenland Sea group may be closer to 100,000, according to estimates made during the late 1970's. *See* R. MCCLUNG, HUNTED MAMMALS OF THE SEA 136 (1978).

[56] Letter to Charles Wintheiser from D. Goodman, Senior Policy/Program Advisor, Marine Mammals Resource Research Board, Canadian Department of Fisheries and Oceans (Apr. 27, 1984) (citing Northwest Atlantic Fisheries Organization Statistics) [hereinafter cited as NAFO Statistics]. *Contra* R. MCCLUNG, *supra* note 55, at 140 (160,000 quota for 1977).

[57] NAFO Statistics, *supra* note 56.

[58] *Id.*

[59] Raloff, *supra* note 53, at 202. *See* E. WALKER, *supra* note 48; McCloskey, *Bitter Fight Still Rages Over the Seal Killing in Canada*, SMITHSONIAN, Nov. 1979, at 54, 56; *More Than A Numbers Game*, CLOSE-UP REP., Feb. 1980, at 3, 3 (stating 180,000 pups killed from an estimated pup population of 250,000 to 358,000); Elson, *Weather Interrupts Harp Seal Hunters*, Chi. Tribune, Mar. 14, 1979, § 1, at 1, col. 2.

[60] *Seals still Sacrificed for Furs*, THE HUMANE SOCIETY UNITED STATES NEWS, Winter 1980, at 4, 5 [hereinafter cited as *Sacrificed*]. *See* Raloff, *supra* note 53, at 203.

income and food to an economically depressed region.[61] Proponents note that the Canadian government has issued regulations to ensure that the pups are killed as humanely as possible and has conducted extensive research to ensure the continued existence of the species.[62] However, opponents of the kill contend that the hunt has no relevance to any wildlife management need. Opponents claim that unless a moratorium on the killing of baby harp seals is declared, the species faces ultimate extinction.[63] They also claim that the money the Canadian government spends supporting the hunt exceeds the income it generates.[64] Accordingly, the brutal killing of harp seals for garments and trinkets should be halted, and pressure should be exerted on other countries to ban the import of seal furs and other seal products.[65] These claims and counterclaims are examined in the following analysis.

The population management issue is difficult to resolve due to the unavailability of clear and accurate data. While sources seem to agree that the harp seal herd diminished "substantially" between 1950 and 1970,[66] no one seems to know how the seals have fared during the past decade. Animal welfare groups charge that the harp seal stock in the North Atlantic has declined to the point that, unless the hunt is stopped during the 1980's, the population may not be vital enough or large enough to maintain itself against the threats of disease, predation, and increasing pollution.[67]

On the other hand, the Canadian government contends that the harp seal quota is consistently set below the maximum sustainable yield, and that the number left after the annual kill is more than sufficient to maintain the population.[68] Government publications cite studies by the International Council for the Exploration of the Sea (ICES) and the Northwest Atlantic Fisheries Organization (NAFO) estimating the population of adult seals at 1.5 to 2.0 million and setting probable pup production at 350,000 to 500,000 per year.[69]

It is unlikely that these figures will be accepted by environmentalists, but while the need for better data is obvious, factors other than the hunt may be seriously affecting the seal population. For example, the seal population is also pressured by pollution, overfishing, and commercial development in the habitat

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[61] *See* Raloff, *supra* note 53, at 203.

[62] *Id.* at 202-04. *See False Claims*, CLOSE-UP REP., Feb. 1980, at 4, 4.

[63] *See* Lavigne, *supra* note 52, at 129; Raloff, *supra* note 53, at 202.

[64] Raloff, *supra* note 53, at 203. *See The Economics of the Hunt*, CLOSE-UP REP., Feb. 1980, at 3 [hereinafter cited as *Economics*].

[65] *See* Raloff, *supra* note 53, at 204.

[66] *Id.* at 202. *See also* R. MCCLUNG, *supra* note 55, at 136; Lavigne, *supra* note 52, at 130; Travalio & Clement, *supra* note 4, at 202 n.22.

[67] *See* Raloff, *supra* note 53, at 202.

[68] *Id.*

[69] GOV'T OF CAN., THE ATLANTIC SEAL HUNT: A CANADIAN PERSPECTIVE 5.

areas. In the long run these other factors may present a greater danger to the seals' continued existence, and thus, those concerned could more profitably direct their attention to these factors. Unfortunately, proponents of the hunt fail to realize that the hunt quotas alone may not be enough, while opponents lay the entire blame on the seal hunters.

The Canadian government and the private supporters of the hunt defend it as a source of income in a region with no industry, agriculture, mining, or forestry to employ the human population, especially during the winter months.[70] The hunt allegedly provides not only monetary income, but also food and oil as well. Concomitantly, the Canadian government and the local fishermen argue that the seals' voracious appetite for fish and crustaceans has severely depleted the area's commercial fisheries.[71]

Each of these conclusions is questionable. Estimates of the hunt's value to the Atlantic regional economy exceed $5 million.[72] However, half of the hunters make $100 or less from the hunt[73] (although a few make as much as $4000).[74] For most participants, therefore, the hunt represents a relatively modest component of their yearly income. Some opponents of the hunt also argue that much of the money which the hunt generates does not go to the region's inhabitants, but instead goes to the factory ships, which then pay meager wages to their local workers.[75]

Claims about meat and oil may also be questioned. Officials maintain that no part of the seal is wasted, but environmentalists charge that the bulk of the seal carcasses are left on the ice, although there may be a growing tendency to use more.[76] If those products were really important, it would appear reasonable that hunters would kill more adult seals.[77] Adult seals would provide more meat and oil than the pups. Obviously, it is not the meat, but the snow-white pelt which is important; it is the sealskin jackets and frivolous toy seals which sustain the hunt.[78]

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[70] Raloff, *supra* note 53, at 203.

[71] *Id. See Sacrificed*, *supra* note 60, at 5.

[72] *Economics*, *supra* note 64, at 3 (stating $6.5 million); Raloff, *supra* note 53, at 204 (stating $5.5 million); *Seal Hunt Confrontations Lessen*, Christian Sci. Monitor, Mar. 10, 1980, at 2, cols. 5-6 (stating more than $5.0 million).

[73] *Economics*, *supra* note 64, at 3.

[74] McCloskey, *supra* note 59, at 62.

[75] Raloff, *supra* note 53, at 203.

[76] *Id.* Elson, *Blood on Ice Heralds New Seal Hunt*, Chi. Tribune, Mar. 13, 1979, § 1, at 2, col. 1 [hereinafter cited as *Blood*]. *See Economics*, *supra* note 64, at 3. The Canadian government, without much success, has even encouraged people to eat seal flippers. *See* Raloff, *supra* note 53, at 203.

[77] *Economics*, *supra* note 64.

[78] *See id.* at 3; Raloff, *supra* note 53, at 202; *Sacrificed*, *supra* note 60, at 4; McCloskey, *supra* note 59, at 55.

The Canadian government, along with commercial fishermen, contend that the appetite of harp seals has seriously depleted fish stocks.[79] Unquestionably, seals do eat food suitable for human consumption, including herring, haddock, polar cod, and small crustaceans.[80] Except for the seals, these living resources might otherwise be harvested by fishermen. One estimate places harp seal consumption of fish and crustaceans at 2 million tons per year.[81] In reality, however, this is probably an insignificant factor in the decline of fish stocks when compared with such factors as human pollution and overfishing. The argument is largely specious, and it is primarily the invention of frustrated concern over human mismanagement; indeed, it is probably the fishermen who threaten the seal, rather than the reverse.[82]

A further argument against the hunt is that, whatever the precise value of the hunt, it does not justify the massive amount spent by the government to support it. The Canadian government pays public relations firms around the world to tell people the benefits of the hunt. It provides sealing vessels with ice breakers to get them through the ice floes. It flies scientists back and forth to assess herd size.[83] Added to these costs are the cost of information booklets published by the government and the expense of enforcement measures at the hunt sites.[84] Evaluating the inputs and outputs of the industry, it is doubtful that the hunt turns a significant profit. Furthermore, a number of countries have banned the import of harp seal pelts, which, with additional forms of economic pressure (for example, tourist boycotts), could turn whatever small profit exists into a net loss.[85]

The cruelty issue is more complicated. The Humane Society of the United States, as well as other associations (Greenpeace, Fund for Animals, and the Animal Protection Institute), have actively fought the hunting of harp seals, "questioning the humaneness of the killing methods and condemning the very idea of killing animals for decorative garments or trinkets."[86] The Canadian government found after extensive research that the traditional method of clubbing, quickly followed by bleeding out was more humane than captive bolt,

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[79] *See* Raloff, *supra* note 53, at 203; *Sacrificed*, *supra* note 60, at 5.

[80] D. COFFEY, THE ENCYCLOPEDIA OF SEA MAMMALS 193 (1977); SCHEFFER, *supra* note 49, at 105.

[81] Raloff, *supra* note 53, at 203. *See also Sacrificed*, *supra* note 60, at 5 (stating 1.5 million tons).

[82] *Sacrificed*, *supra* note 60, at 5. *See* Raloff, *supra* note 53, at 203; Travalio & Clement, *supra* note 4, at 201.

[83] Raloff, *supra* note 53, at 203. *See Economics*, *supra* note 64, at 3; Elson, *supra* note 59, at 1, col. 2.

[84] Raloff, *supra* note 53, at 203. *See Economics*, *supra* note 64, at 3.

[85] *See* Raloff, *supra* note 53, at 203-04.

[86] *Sacrificed*, *supra* note 60, at 4. *See* McCloskey, *supra* note 59, at 55; Raloff, *supra* note 53, at 204.

electrocution, gunshot, and carbon dioxide asphyxia.[87] These findings were substantiated by six veterinarians of the American Veterinary Medical Association.[88] Using this traditional method, the sealer attempts to smash the skull of the baby seal with one blow of his *hakapik* (wooden club). He then punctures the throat of the seal with a knife, causing it to bleed to death, and peels off the pelt and blubber, often leaving the carcass on the ice.[89]

Though humane in theory, this method may not be so humane in practice. The pups exhibit two types of behavior. One is a stance similar to the stance of an opossum. The pups essentially "play dead"; that is, they stop breathing and draw their heads back into the fat which encircles their shoulders. When this occurs, it is difficult to kill a pup because of the layer of blubber covering the head. The other, more aggressive behavior, is to snap at the hunter—a difficult, moving target to hit.[90] The skull must be crushed by the club blows to insure instant brain death, otherwise, the animals will feel pain when the skinning occurs. In practice, it often takes two or three blows to knock the pup out. Towards the end of the day, the sealers are tired, and the icy conditions and unpredictable movements of the pups increase the difficulty of landing a stunning blow.[91] It should also be noted that the sealers are probably more careful when observed by conservationists or government groups.

Organizations such as the International Fund for Animal Welfare, Greenpeace, and the Royal Society for the Prevention of Cruelty to Animals have organized campaigns to stop the killing of harp seals. Some groups in previous years have sprayed paint or dye on the seals' fur, rendering their pelts useless to furriers,[92] but the paint also increases the vulnerability of the pups to natural predators. The protesters pay little attention to the landsmen's hunt and concentrate on the commercial hunt from the larger ships. Some members of Greenpeace have even chained themselves to the decks of sealing vessels preparing to participate in the hunt.[93] Demonstrations have taken place throughout the world to protest the hunt, and Canadian officials have received innumerable letters and postcards calling for its halt.[94]

When carefully scrutinized and stripped of its scientific facade, the animal

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[87] Raloff, *supra* note 53, at 204. *See* McCloskey, *supra* note 59, at 55.

[88] Raloff, *supra* note 53, at 204. *See* McCloskey, *supra* note 59, at 55.

[89] R. MCCLUNG, *supra* note 55, at 139; *Blood*, *supra* note 76, at 2, col. 2. *See* McCloskey, *supra* note 59, at 59; Raloff, *supra* note 53, at 203; *Sacrificed*, *supra* note 60, at 4.

[90] *See* Raloff, *supra* note 53, at 204.

[91] *Sacrificed*, *supra* note 60, at 5. *See* McCloskey, *supra* note 59, at 59; Raloff, *supra* note 53, at 204.

[92] *Red Seals in the Sunset*, MACLEANS, Mar. 19, 1979, at 20, 20. *See* McCloskey, *supra* note 59, at 55; Raloff, *supra* note 53, at 204.

[93] Raloff, *supra* note 53, at 204.

[94] *See* McCloskey, *supra* note 59, at 56; Raloff, *supra* note 53, at 204.

welfare issue dissolves into a conflict between humanistic concern and economic interests. Between the Canadian government and environmental groups there is little room for compromise. Both sides have locked themselves into their positions, marshalling a barrage of facts and justifications to support their opposing points of view.[95] However, one conclusion is clear: without the international concern that has been aroused, the seal hunt would probably not be as regulated or supervised as it is. In view of all that has occurred, it has probably cost the Canadian government dearly, and all of these funds would probably have been better directed toward establishing alternate employment opportunities for the residents of the sealing areas.[96]

2. *International Efforts at Pinniped Protection*

Harp seals come under the jurisdiction of the Convention for the Regulation of Northwest Atlantic Fisheries[97] and its successor, the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.[98] Neither seems to have had much effect on the harp seal debate.

A more effective international regime is contained in the Interim Convention on the Conservation of North Pacific Fur Seals (Fur Seal Convention).[99] In the area of the Bering Sea, the north Pacific fur seals inhabit a number of islands owned by Japan, the USSR, and the United States. The largest herd breeds on the Pribilof Islands, owned by the United States since 1867. Soon after their purchase Congress banned the hunting of pelagic seals in the surrounding territorial sea and limited the hunting on land to 100,000 fully mature "bachelor" males.[100] Since north Pacific fur seals are polygamous, with one male mating with several females, a number of younger males can be taken without seriously affecting the breeding rate.[101] However, in pelagic sealing it is impossible to differentiate these young males from the females or even the older males.[102] Since pelagic sealing during the 1870's was not very intensive, these regulations were sufficient, but after 1878 pelagic sealing intensified. The United States reduced its land quota in an attempt to compensate for increased pelagic takes,

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[95] McCloskey, *supra* note 59, at 56.

[96] *See* Raloff, *supra* note 53, at 204.

[97] *Done* Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089. *See also* Protocol to the Convention for the Regulation of Northwest Atlantic Fisheries, *done* July 15, 1963, 17 U.S.T. 635, T.I.A.S. No. 6011, 590 U.N.T.S. 292.

[98] *Done* Oct. 24, 1978, *reprinted in* 19 I.L.M. 830 (1980).

[99] *Done* Feb. 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105 (entered into force Oct. 14, 1957) [hereinafter cited as Fur Seal Convention].

[100] Travalio & Clement, *supra* note 4, at 214.

[101] *Id.* at 214 n.104.

[102] *Id.*

but this served only to increase the number available to pelagic sealers, who were largely foreign sealers. In 1881, the United States government declared all waters east of the United States-Russian boundary to be Alaskan territory, and in 1886 three Canadian vessels were taken in this high seas area.[103] While these seizures were upheld by United States courts, which found that the Bering Sea constituted a mare clausum, the United Kingdom protested vigorously, and an international arbitral tribunal decided the case against the United States.[104] Despite this dispute, the United States and the United Kingdom did agree to limitations on pelagic sealing, including closed seasons, licensing of sealers, required recordkeeping, and a sixty-mile protective belt around the Pribilofs.[105] Similar agreements were reached with Russia.[106]

These treaties failed to stop the depletion of fur seal stocks, and in 1911 talks between Japan, Russia, the United Kingdom, and the United States culminated in the Convention for the Preservation and Protection of Fur Seals (Seal 1911 Convention).[107] The Seal 1911 Convention prohibited pelagic sealing in the region with a limited exception for scientific research, and it gave the United States the right to regulate or even prohibit sealing on the Pribilofs. In return, the United States agreed to give fifteen percent of the hunted seals to Japan and Canada (with a minimum annual harvest of 1,000 animals), or if all sealing were prohibited, the United States would give $10,000 to each country.[108] Similar provisions applied to harvests by Russia on the Commander Islands.[109] Shortly afterwards, the United States Congress prohibited sealing entirely, and the herd began to recover. The Japanese abrogated the treaty in 1941, but by that time the herd contained about 2.3 million animals, which was an increase from 125,000 seals in 1911.[110] Pelagic sealing continued to be prohibited by informal agreements until 1957, when the present convention was signed.

The 1957 Fur Seal Convention continued most provisions of the earlier treaty,[111] prohibited the import of seals taken contrary to its provisions,[112] and established the North Pacific Fur Seal Commission,[113] which under a 1963

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[103] *Id.* at 214.

[104] *Id.* at 214-15.

[105] *Id.* at 215.

[106] *Id.* at 215 n.114.

[107] *Done* July 7, 1911, 37 Stat. 1542, T.S. No. 564 [hereinafter cited as Seal 1911 Convention].

[108] *Id.* art. 11. *See* Travalio & Clement, *supra* note 4, at 215-16.

[109] Seal 1911 Convention, *supra* note 107, art. 12. *See* Travalio & Clement, *supra* note 4, at 216 n.118.

[110] Travalio & Clement, *supra* note 4, at 216 n.119.

[111] *Id.* at 216.

[112] Fur Seal Convention, *supra* note 99, art. 8.

[113] *Id.* art. 5.

protocol[114] was granted the authority to prescribe limits to the harvest in addition to its original authority to recommend and coordinate research.[115] A 1976 protocol[116] authorized the Commission to study the relationship between seals and other marine organisms and mandated that the killing of seals be done by humane methods.[117]

Seals remain largely unexploited in the Antarctic, although several species are in danger. The 1959 Antarctic Treaty[118] governs the exploitation of indigenous species on the continent (including seals) but not in the surrounding waters. Even so, the treaty signatories agreed in 1966 to voluntary guidelines on pelagic sealing in the Antarctic.[119] Finally, in 1972, the Convention for the Conservation of Antarctic Seals (Antarctic Seals Convention)[120] was signed, and it applies to all waters south of 60°S latitude.

Under the Antarctic Seals Convention, the Ross seals, the southern elephant seals, and the southern fur seals are accorded full protection, and quotas are set for the crabeater, leopard, and Weddell seals.[121] The Antarctic Seals Convention also: (1) establishes closed seasons[122] and protected zones,[123] (2) requires input from the Scientific Committee for Antarctic Research, an agency of the International Council of Scientific Unions,[124] and (3) mandates humane methods of killing.[125] More significant, the Antarctic Seals Convention calls for maintaining a healthy balance in the Antarctic ecosystem.[126] The Antarctic Seals Convention

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[114] Protocol Amending the Interim Convention on Conservation of North Pacific Fur Seals, *done* Oct. 8, 1963, 14 U.S.T. 316, T.I.A.S. No. 5558, 494 U.N.T.S. 303 (entered into force Apr. 10, 1964).

[115] *See* Travalio & Clement, *supra* note 4, at 216.

[116] Protocol Amending the Interim Convention on Conservation of North Pacific Fur Seals, *done* May 7, 1976, 4 U.S.T. 3371, T.I.A.S. No. 8368 (entered into force Oct. 12, 1976).

[117] *Id.* arts. 2, 10. *See* Travalio & Clement, *supra* note 4, at 217, 228 n.212.

[118] *Signed* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961).

[119] Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, *adopted* July 24, 1961, 13 U.S.T. 1349, T.I.A.S. No. 5094; *adopted* July 28, 1962, 14 U.S.T. 99, T.I.A.S. No. 5274; *adopted* June 2-13, 1964, 17 U.S.T. 991, T.I.A.S. No. 6058; *adopted* Nov. 3-18, 1966, 20 U.S.T. 614, T.I.A.S. No. 6668. The United States has not adopted all of the measures. *See* Travalio & Clement, *supra* note 4, at 218.

[120] *Done* June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826 (entered into force Mar. 11, 1978) [hereinafter cited as Antarctic Seals Convention].

[121] *Id.* annex, ¶ 2. *See* Travalio & Clement, *supra* note 4, at 220 nn.158-59. *See also* Nafziger, *Global Conservation and Management of Marine Mammals*, 17 SAN DIEGO L. REV. 591, 597 n.23 (1980) [hereinafter cited as Nafziger].

[122] Antarctic Seals Convention, *supra* note 120, annex, ¶ 3.

[123] *Id.* annex, ¶¶ 3-4.

[124] *Id.* annex, ¶ 6.

[125] *Id.* annex, ¶ 7.

[126] *Id.* Preamble. For a general review of the provisions of the Antarctic Seals Convention, see Travalio & Clement, *supra* note 4, at 219-20.

represents perhaps the only instance of an international agreement designed to protect animal species *before* commercial exploitation had seriously depleted their numbers.[127]

C. Whales

The cetaceans constitute two biological orders, ten families, thirty-nine genera, and perhaps seventy-five species.[128] They include not only the great whales and small cetaceans but also the dolphins and porpoises.[129] The mysticeti include the baleen whales, and the odontoceti (or toothed whales) include the sperm whale.

Whales are truly remarkable animals because of their size (a blue whale may weigh over 150 tons—the largest creature ever to live on the Earth)[130] and because of their acknowledged intelligence and rich social behavior.[131] The baleen whales are so-called because of the strong, flexible baleen plates which are used to filter krill and other zooplankton from the ocean. Sperm whales feed somewhat higher on the trophic pyramid, most commonly consuming fish and cephalopods (squid),[132] and they are equipped with strong, powerful teeth.[133]

It is the difference in feeding behavior which largely determines the observed distribution of whales. Not surprisingly, baleen whales congregate in regions of high zooplankton production, which are generally cold waters of high nutrient content and with long hours of sunlight. These areas occur where cold, polar seas meet warmer waters, causing currents which carry nutrients from the sea bottom.[134] The densest krill concentrations are found between 60°S and 70°S latitude, and many baleen species spend the summer months feeding in this region.[135] Fewer baleen whales are found in the Northern Hemisphere, where the seas are shallower[136] and where the krill production is not as high. However, the cold polar seas are not suitable for bearing young, and baleen whales migrate to tropical and subtropical waters during the winter. Since concentrations of zooplankton are low in these waters, baleens eat little, surviving off the

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[127] Travalio & Clement, *supra* note 4, at 220.

[128] *See* Table I, *infra*; Scarff I, *supra* note 13, at 329.

[129] For an analysis of the small cetaceans, see *infra* notes 322-96 and accompanying text.

[130] Levin, *supra* note 3, at 555-56.

[131] Scarff I, *supra* note 13, at 338; Travalio & Clement, *supra* note 4, at 206-07. *See* Levin, *supra* note 3, at 556-58.

[132] McHugh, *The Whale Problem: A Status Report*, 3 OCEAN DEV. & INT'L L.J. 389, 395 (1976); Scarff I, *supra* note 13, at 340.

[133] Levin, *supra* note 3, at 554.

[134] Scarff I, *supra* note 13, at 339 n.47.

[135] *Id.* at 339.

[136] *Id.*

blubber from their summer feed. Due to this behavior, baleen whales are larger and have more commercial value at the end of summer.[137]

Toothed whales, because of their dependence on squid for food, do not have the same distribution pattern as baleens, are found in more temperate latitudes,[138] and migrate over shorter routes.[139] Unlike baleen whales, sperm whales are polygamous, forming herds of one large male, ten to sixteen females, and calves.[140] Nonbreeding males travel alone or in groups when in the higher latitudes,[141] and this behavior is due perhaps to the fact that the larger whales cannot dissipate heat as rapidly as the smaller females.[142]

Although most whale species are found in all the major seas,[143] they occur, like most wild animals, in distinct *stocks*, *i.e.*, reproductively independent, genetically distinct populations of the same species which arise from geographic or behavioral isolation.[144] For example, when whales in the Northern Hemisphere are traveling into tropical waters to breed, whales in the Southern Hemisphere are migrating to cool waters to feed because winter and summer are reversed in the Southern Hemisphere. Hence, groups of the same species will seldom, if ever, meet, and each group will develop its own characteristics.[145] Through mark-recovery studies, blood tests, sightings, and other methods, scientists have discovered at least ten distinct sperm whale stocks.[146] Thus, while the worldwide population of a species may lead one to believe a species is viable, the isolation of stocks may mean that critical population levels have been reached.[147] Once a given stock is extinct, biogeographical barriers may prevent migration into the region from other stocks of the same species, and it will take hundreds or thousands of years to reinhabit the range.[148]

1. *Whaling and the Possibility of Extinction*

Since commercial whaling began with the Basques in the eleventh and

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[137] *Id.*

[138] McHugh, *supra* note 132, at 399.

[139] Scarff I, *supra* note 13, at 340.

[140] *Id.* at 334. Baleens travel in small, mixed-sex pods. *Id.*

[141] McHugh, *supra* note 132, at 399; Scarff I, *supra* note 13, at 340.

[142] McHugh, *supra* note 132, at 396.

[143] Scarff I, *supra* note 13, at 338. Bowhead and gray whales are found only in the Northern Hemisphere. Probably as a result of whaling activities, the gray whales became extinct in the North Atlantic in the early eighteenth century. *Id.*

[144] *Id.* at 334-35.

[145] Levin, *supra* note 3, at 555.

[146] McHugh, *supra* note 132, at 398-99.

[147] Levin, *supra* note 3, at 555.

[148] Scarff I, *supra* note 13, at 335.

twelfth centuries,[149] the industry has followed an increasing course of hunting stocks in one area to depletion and then moving elsewhere to deplete stocks there. By the thirteenth century, the Basques had nearly extinguished the right whale in the Bay of Biscay. The Basques and the whalers from other countries moved further from home, and by the seventeenth century right whales were extremely scarce throughout the North Atlantic.[150] The industry continued to move further west, establishing itself in America, but, within less than a century, local stocks were depleted and the industry was on the verge of collapse. Only the discovery that sperm whales could be exploited for their oil revived the industry.[151]

The eighteenth and nineteenth centuries were the heyday of commercial whaling, and Yankee whalers circled the globe via 729 ships during the industry's peak in 1846.[152] However, the East Coast industry declined with: (1) the destruction of the United States whaling fleet during the American Civil War, (2) the continued depletion of whale stocks, and (3) the discovery of petroleum and the incandescent lamp.[153] On the West Coast of the United States a whaling industry developed during the last half of the nineteenth century, and it was based on the California grays and on the bowheads in the Bering Sea. However, the California gray whale was near extinction by 1890, and by 1900 the entire industry appeared doomed.[154]

Surprisingly, several new technological developments at this time not only saved the whaling industry but also led to a new boom and the beginning of the modern era of whaling. The invention of the harpoon gun, exploding harpoons, and fast "catcher boats" permitted the hunting of strong and swift baleens such as the fin whale.[155] The development of compressed air pumps also allowed the exploitation of species that sank when harpooned, and efficiency was enhanced by the development of factory ships, each one serving as a mother ship to a dozen or more catchers.[156] After depleting baleen stocks in the North Atlantic by the second decade of the twentieth century, whalers were forced to the Antarctic, with its vast number of whales.[157] The development of the stern shipway in 1925 allowed whales to be hauled aboard in all but the roughest seas—a distinct advantage in the Antarctic—meaning even greater effi-

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[149] *Id.* at 344. *See* Levin, *supra* note 3, at 558.

[150] Levin, *supra* note 3, at 559; Scarff I, *supra* note 13, at 344.

[151] Scarff I, *supra* note 13, at 345.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 345-46.

[155] *Id.* at 346. *See* Levin, *supra* note 3, at 559.

[156] Levin, *supra* note 3, at 559-60; Scarff I, *supra* note 13, at 346.

[157] Scarff I, *supra* note 13, at 346. *See* Levin, *supra* note 3, at 560.

ciency.[158] Oil production from whales reached a peak in 1931, but thereafter it declined even though the number of whales killed increased because the species richest in oil (the humpback, right, and blue whales) were sadly depleted.[159] The history of whaling since the 1930's demonstrates that the whalers concentrated their catch by switching to respectively smaller species as the larger species declined. There was a resulting decrease in productivity, and the whalers eventually moved away from the Antarctic to exploit the North Pacific sperm.[160]

There is considerable disagreement among cetologists regarding the exact number of individuals of each species still existing in the ocean and regarding the possibility of any one species becoming extinct. The total whale population is estimated to hover at approximately two million out of an estimated preexploitation population of approximately four million,[161] but because larger whales have suffered disproportionately from whaling, the total reduction in biomass (the total weight of all whales) has been on the order of eighty-five percent.[162] In addition, some stocks and species face a greater danger of extinction than others, as the following species-by-species review indicates.

a. Blue Whales

Blue whales, the largest of the great whales, were also one of the most relentlessly hunted. From an initial population on the order of 200,000,[163] blue whales were hunted at a rate of 30,000 per year in the 1930's[164] and ceased to be an economic resource by the late 1960's.[165] Estimates during the late 1970's placed the number of blue whales at between 600[166] and approximately 10,000.[167] Some environmentalists claim the blue whale has reached critical minimum population size and is doomed to extinction within the next century.[168] This prediction may be overly pessimistic, at least for Antarctic

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[158] Scarff I, *supra* note 13, at 347 n.109.

[159] *Id.* at 347.

[160] *Id.* at 366.

[161] *Id.* at 330.

[162] *Id.* at 332.

[163] *Id.*

[164] *Id.* at 364 n.211.

[165] Christol, Schmidhauser & Totton, *The Law and the Whale: Current Developments in the International Whaling Controversy*, 8 CASE W. RES. J. INT'L L. 149, 153 (1976) [hereinafter cited as Christol].

[166] Levin, *supra* note 3, at 549. This estimate is undoubtedly too low.

[167] Scarff I, *supra* note 13, at 332, 405.

[168] Mullen, *Death Knell for Whale Hunting*, Chi. Tribune, July 15, 1979, § 1, at 12, col. 1 [hereinafter cited as *Death Knell*].

blues;[169] however, the North Atlantic and North Pacific stocks are in greater trouble.[170]

b. Fin Whales

Once the most abundant species, numbering perhaps half a million,[171] the fin whale has been overhunted to the point that only twenty percent of the initial population size survives.[172] Most of those fins remaining are found in the Southern Hemisphere, although an estimated 14,000 to 19,000 remain in the North Pacific and 31,000 or more remain in the North Atlantic.[173]

c. Humpback Whales

The so-called "singing" whale may once have numbered over 100,000.[174] Only about seven percent of this number remain with a distribution of: (1) 2,000 to 3,000 humpbacks in the Antarctic, (2) perhaps 2,000 humpbacks in the North Pacific, and (3) fewer than 2,000 humpbacks in the North Atlantic.[175] Some environmentalists see little hope of long-term survival,[176] although there are some signs that stocks, especially in the North Atlantic, are increasing.[177]

d. Sei Whales

Sei whales have been exploited extensively only since the 1950's, when larger species became too scarce to catch economically. From an initial population of about 200,000,[178] perhaps 75,000 remain,[179] mostly in the Antarctic and in the North Atlantic. During the late 1970's, the sei whales might have actually

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[169] Scarff estimates the number of blue whales at 7,000 to 8,000. Scarff I, *supra* note 13, at 332.

[170] *Id.* at 332.

[171] *Id.*

[172] *Id. See also id.* at 364 n.211. *See generally* Levin, *supra* note 3, at 550.

[173] Scarff I, *supra* note 13, at 332.

[174] *Id. See* Note, *Commercial Whaling and Ocean Resource Management*, 3 LOY. L.A. INT'L & COMP. L. ANN. 67, 68 (1980) [hereinafter cited as *Commercial Whaling*]. *See also* Levin, *supra* note 3, at 550.

[175] Scarff I, *supra* note 13, at 332. *See* Kutner, *The Genocide of Whales: A Crime Against Humanity*, 10 LAW. AM. 784, 786 (1978).

[176] *Death Knell*, *supra* note 168, at 12, col. 1.

[177] McHugh, *supra* note 132, at 397.

[178] Scarff I, *supra* note 13, at 332.

[179] *Id.*

increased in number due to the reduction in the numbers of other baleen whales and the resultant decrease in competition for food.[180]

e. Bryde's Whales

At one time, these whales were thought to be the same as sei whales. These whales have been only moderately harvested, and over 10,000 Bryde's survive in the Antarctic. There are perhaps 20,000 or 30,000 Bryde's in the North Pacific, and an unknown number exist in the Atlantic.[181]

f. Gray Whales

Gray whale stocks in the Atlantic were extinguished by the eighteenth century,[182] and stocks in the eastern Pacific barely survive today.[183] The California gray whale was once thought to be biologically extinct[184] but has made a remarkable recovery. Estimates vary considerably, and the number of California grays may be between 10,000[185] and 11,000, or it may be 12,000[186] or even 18,000.[187] This latter estimate of 18,000 is close to the initial level of California grays. One reason for the success of the California gray is the fact that, unlike other species, it breeds in small coastal lagoons and does not face the problem of finding a mate in the open seas.[188]

g. Right Whales

Right whales were the first species to be exploited commercially and the first whales to be depleted.[189] During the late 1970's and the early 1980's, estimates of right whales ranged from 250[190] to a more reliable 3,000 to 4,500.[191] By any estimate, right whales are in serious trouble, and some scholars suggest that competition from other whale species is retarding the recovery of right

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[180] *Id.* at 406 n.450.

[181] *Id.* at 332. *See also* Scarff II, *supra* note 27, at 617.

[182] Payne, *Status of the Whales*, LIVING WILDERNESS, Dec. 1979, at 16, 17.

[183] *Id.* at 17.

[184] Scarff I, *supra* note 13, at 346.

[185] Levin, *supra* note 3, at 550.

[186] Scarff I, *supra* note 13, at 332.

[187] Payne, *supra* note 182, at 17.

[188] Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. INT'L L. & POL. 211, 220 (1975) [hereinafter cited as *Whaling Controversy*].

[189] Scarff I, *supra* note 13, at 344.

[190] Levin, *supra* note 3, at 550.

[191] Scarff I, *supra* note 13, at 332.

whales.[192] By comparison, other scholars maintain that some improvement in stock levels has occurred off Australia and in the North Atlantic.[193]

h. Bowhead Whales

The bowhead has been called the most endangered whale species.[194] Also called the Greenland right whale, the bowhead was once common in the North Atlantic, and it was one of the first species to be hunted extensively.[195] Sadly, less than a thousand bowheads still survive there.[196] In the North Pacific the bowhead was commercially extinct by the early twentieth century.[197] The Pacific bowheads are variously estimated to number between 1,000 and 2,800.[198] Despite its endangered condition, the bowhead is still hunted by Eskimos,[199] specifically the Inuits. Under United States policy, the Inuits as a native population may still hunt the bowheads by native methods because the culture of the Inuits is inextricably linked to the hunting of bowheads.

i. Minke Whales

The small minke whale has been heavily exploited during the last few decades as larger species became scarce. At the beginning of the 1980's, estimates of the minke population ranged from 130,000[200] to 300,000.[201]

j. Sperm Whales

The sperm whale is the most numerous of all the whale species, and the global population of sperm whales exceeds all the other whale species combined.[202] Its population is estimated at over 600,000.[203] Many authorities con-

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[192] Gambell, *The Unendangered Whale*, 250 NATURE 454 (1974), *cited in* Scarff I, *supra* note 13, at 406 n.450.

[193] McHugh, *supra* note 132, at 397.

[194] Scarff I, *supra* note 13, at 405. *See* Kutner, *supra* note 175, at 784; M'Gonigle, *supra* note 23, at 153; Note, *International Whaling Commission Regulations and the Alaskan Eskimo*, 19 NAT. RESOURCES J. 943, 944 (1979) [hereinafter cited as *IWC Regulations*].

[195] Scarff I, *supra* note 13, at 344.

[196] *Id.* at 332.

[197] *IWC Regulations*, *supra* note 194, at 944.

[198] Scarff I, *supra* note 13, at 332; Verges & McClendon, *Inuiat Eskimos, Bowhead Whales, and Oil: Competing Federal Interests in the Beaufort Sea*, 10 U.C.L.A.-ALASKA L. REV. 1, 4 (1980).

[199] *See infra* notes 284-304 and accompanying text.

[200] Scarff I, *supra* note 13, at 332.

[201] Payne, *supra* note 182, at 17.

[202] Storro-Patterson, *Wheeling and Dealing in Whales*, OCEANS, Mar. 1978, at 62.

sider sperm stocks to be relatively healthy, possibly above optimum sustainable population levels in some areas.[204] At least one scientist has questioned whether the North Pacific sperm whale should have been listed as an endangered species under the United States Endangered Species Act.[205] However, sperm whales are sexually dimorphic (males are much larger than females), which causes males to be hunted more intensively than females. Male sperm whales have been depleted to a significantly greater extent than females.[206] Some studies have indicated that too few males remain in the North Pacific and in the Southern Hemisphere,[207] and that the pregnancy rate has dropped to the point where the total population is likely to continue to decline for many years after all hunting is discontinued.[208]

2. *The International Whaling Commission*

The debate over the international protection of whales has raged for over sixty years—ever since warnings about the plight of the whales were first raised in the early twentieth century.[209] The issue was considered by the League of Nations, although at first there was little substantive effect.[210] Historically, the whaling states preferred domestic controls to international regulation. However, such unilateral actions proved inadequate, and several nations met under League auspices in 1931 to discuss the problem.[211] The result was the Convention for the Regulation of Whaling (Whaling 1931 Convention).[212] The Whaling 1931 Convention has been much maligned, and it has even been called a "whitewash" of the problem.[213] Undoubtedly, it was inadequate to provide much protection to depleted whale stocks, but it was remarkable that any agreement was reached at all, and many of its provisions were included in subsequent conventions. The Whaling 1931 Convention applied to both the high seas and

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[203] *Id. See* Scarff I, *supra* note 13, at 332.

[204] Scarff II, *supra* note 27, at 617.

[205] McCloskey, *Counting the Whales*, ATLANTIC, Apr. 1982, at 16, 18 [hereinafter cited as *Counting Whales*]. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976 & Supp. V 1981).

[206] Scarff I, *supra* note 13, at 332.

[207] M'Gonigle, *supra* note 23, at 161.

[208] *Id.* at 168.

[209] *See* Scarff I, *supra* note 13, at 349.

[210] Christol, *supra* note 165, at 149-50; Levin, *supra* note 3, at 566; Travalio & Clement, *supra* note 4, at 207-08. *See* Dobra, *Cetaceans: A Litany of Cain*, 7 B.C. ENVTL. AFF. L. REV. 165, 171 (1978).

[211] Scarff I, *supra* note 13, at 349 n.114.

[212] *Concluded* Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 3 Bevans 26, 155 L.N.T.S. 349 (entered into force Jan. 16, 1935).

[213] Scarff I, *supra* note 13, at 349.

the territorial seas of signatory states. The taking of right whales was prohibited, as was the taking of calves, suckling, or immature whales, females accompanied by calves or suckling whales. Unfortunately, terms such as "immature whales" were not defined. Catches were to be reported to the Bureau of International Whaling Statistics, and each signatory state was required to license or certify whaling vessels. The Convention prescribed no quotas for whale species and no other limits on whaling efforts. Perhaps most disappointing, some of the major whaling countries did not participate in the Convention.[214]

In 1936, Norway and the United Kingdom, which at the time represented most of the world's catch of whales, reached an agreement regulating their whaling industries and rectifying some of the deficiencies of the Whaling 1931 Convention.[215] The next year several additional whaling countries acceded to this agreement,[216] which, with a 1938 protocol,[217] established a whaling season, prescribed minimum lengths for certain species, closed certain areas to whaling for some species, and required that government inspectors be carried on factory ships.[218] These restrictions on whaling, like those in the Whaling 1931 Convention, were significant to the development of international regulation, but they were of little substantive value, providing only marginal and ineffective protection to some seriously depleted stocks. Once again, some important whaling countries did not participate in this initiative.[219]

Whaling virtually stopped during World War II, but the prospect of resumed whaling after the war led the United Kingdom to convene a conference to discuss the issue. The resulting protocol[220] set, for the first time, specific quotas for catches in the Antarctic which were to be applied during the 1945-46 season. In spite of the six-year hiatus on hunting due to World War II, the reports from the first post-war season made it apparent that the whaling stocks

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[214] *Id.* at 349-50. *See* Christol, *supra* note 165, at 150-51; Kutner, *supra* note 175, at 790; Travalio & Clement, *supra* note 4, at 208-09. *See also Commercial Whaling*, *supra* note 174, at 70-71.

[215] 10 INT'L WHALING STATISTICS 1 (1937). *See* Scarff I, *supra* note 13, at 350.

[216] Agreement for the Regulation of Whaling and Final Act, *done* June 8, 1937, 52 Stat. 1460, T.S. No. 933, 190 L.N.T.S. 131.

[217] Protocol Amending the International Agreement and Final Act, *done* June 24, 1938, 53 Stat. 1794, T.S. No. 944, 196 L.N.T.S. 131.

[218] *See* Leonard, *Recent Negotiations Toward the International Regulation of Whaling*, 35 AM. J INT'L L. 90 (1941); Scarff I, *supra* note 13, at 350. *See also* Christol, *supra* note 165, at 151; Levin, *supra* note 3, at 566; Travalio & Clement, *supra* note 4, at 209.

[219] Chile, Japan, and the USSR were among the major whaling nations which did not sign the 1937 Agreement. Japan did promise to abide by the Agreement without signing, although Japan's proportion of the worldwide catch increased dramatically in the two years after 1937. Travalio & Clement, *supra* note 4, at 209 n.70.

[220] *Done* Feb. 7, 1944, G.B.T.S. 61.

had not recovered.[221] Motivated partly by a concern for the conservation of whales, partly by a desire to retain a voice in whaling affairs in the face of a dwindling domestic industry, and partly by a post-war enthusiasm for international cooperation, the United States called an international conference in Washington, D.C. to discuss the problems involving whales and the whaling industry.[222] The result was the Convention for the Regulation of Whaling with Schedule of Whaling Regulations (Whaling 1946 Convention),[223] which for the post-war era has constituted the primary framework for regulating the whaling industry. The Whaling 1946 Convention established the International Whaling Commission (IWC) which was charged with the twin goals of achieving the "optimum" level of whale stocks and promoting the orderly development of the whaling industry.[224] Many authors have commented on the incompatibility of these objectives,[225] but apparently no one at the Conference perceived any contradiction, perhaps because it seemed obvious that conservation was in the interest of the whaling industry. Like the pre-war agreements, the Whaling 1946 Convention was seen in economic terms; the concept of protecting whales for their own sake or for aesthetic or ethical reasons was foreign to the consciousness of the conferees. It would be difficult to argue that either the protection of whales or the long-range interests of the whaling industry were served by most IWC actions during the first three decades of the IWC's existence.[226]

One reason that the whale stocks continued to decline after the establishment of the IWC was the blue whale unit (b.w.u.) system of setting kill quotas, which until the 1970's comprised the cornerstone of the IWC's conservation program. The blue whale unit was originally formulated in a 1932 industry agreement designed to reduce production in the face of falling prices.[227] The oil content of one blue whale was deemed to be equal to the oil content of three humpback whales or five sei whales. Oil prices failed to revive,[228] but the blue whale unit was adopted in the 1944 protocol, which prescribed Antarctic baleen

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[221] Scarff I, *supra* note 13, at 352.

[222] *See* M'Gonigle, *supra* note 23, at 132; Scarff I, *supra* note 13, at 352; Travalio & Clement, *supra* note 4, at 209.

[223] *Signed* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 4 Bevans 248, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter cited as Whaling 1946 Convention]. The Whaling 1946 Convention became effective for the United States via the Whaling Convention Act of 1949, 16 U.S.C. § 916 (1976 & Supp. V 1981).

[224] Whaling 1946 Convention, *supra* note 223, Preamble.

[225] Scarff I, *supra* note 13, at 353-54; Travalio & Clement, *supra* note 4, at 211. *See* Christol, *supra* note 5, at 154; Levin, *supra* note 3, at 579.

[226] For a history of whaling under IWC regulations and the politics of decision-making, see M'Gonigle, *supra* note 23, at 137-202; Scarff I, *supra* note 13, at 358-72.

[227] Scarff I, *supra* note 13, at 350. *See* M'Gonigle, *supra* note 13, at 132-33.

[228] Scarff I, *supra* note 13, at 350 n.121.

quotas—although in a revised ratio of one b.w.u. equals two fin whales, two and one-half humpback whales, or six sei whales. The b.w.u. system was adopted in the first IWC quota.[229] Since it represents relative oil contents of different species, it was also thought to correspond to relative values. It was thought that the distribution of the hunt would follow the b.w.u. values, *i.e.*, two fin whales, two and one-half humpback whales, and six sei whales would be caught for every blue whale. However, whalers concentrated on the larger, easier to catch species, and, as the main use of whales became meat rather than oil, the relative value of larger whales became even greater. Predictably, the blue, fin, and humpback whales were depleted at a greater rate than the smaller species.[230]

Under the Whaling 1946 Convention, the IWC has the authority to: (1) protect particular species; (2) designate whaling seasons; (3) delineate waters open and closed to whaling, including the creation of sanctuaries; (4) prescribe size and age limits; (5) set the time, methods, and intensity of whaling, including setting quotas; (6) specify gear; and (7) require the submission of catch returns and records.[231] Particular regulations are contained in the Schedule of Regulations, which is amended from time to time as the IWC deems necessary.[232] Regulations must be utilized to foster the objectives of the Whaling 1946 Convention, which include the conservation, development, and optimum utilization of whales. The regulations must be based on scientific findings, and they can neither restrict the number or nationality of factory ships or land stations, nor allocate quotas to particular ships or stations. These regulations must consider the interests of both the consumers and the whaling industry.[233]

Composed of one representative from each member state, the IWC meets once a year to review the previous season's catch and to discuss new regulations.[234] The schedule is amended by a three-fourths vote of the IWC.[235] The IWC has created a Scientific Committee to review data and research studies and to make recommendations on quotas. A Technical Committee has also been established to draft schedule changes and to study and report on infractions of the regulations.[236]

The organic provisions of the Whaling 1946 Convention fill a significant void in the pre-war agreements by theoretically providing for whaling regula-

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[229] *Id.* at 351; Dobra, *supra* note 210, at 172-73.

[230] Scarff I, *supra* note 13, at 352. *See also Whaling Controversy*, *supra* note 188, at 218 n.39; Dobra, *supra* note 210, at 172-73.

[231] Whaling 1946 Convention, *supra* note 223, art. V(1).

[232] *Id.* art. V(2).

[233] *Id.*

[234] *Id.* art. III(1).

[235] *Id.* art. III(2).

[236] *See* Scarff I, *supra* note 13, at 355.

tions which respond to changing circumstances and new knowledge. In practice, however, achieving rationality and consistency has been difficult. Too often, members have lobbied for short-term economic gains and high quotas rather than for conservation.[237]

There are a number of ways a member state can pressure the IWC to adopt a more desirable position or to avoid the consequences of a regulation that is passed. The most obvious method is through invocation of the Convention's objection or "opt out" clause,[238] by which a member state may file an objection within ninety days of the adoption of a regulation and not be bound by its provisions. It was thought that the organization should neither force an objecting country to withdraw completely, nor risk total inaction with a rule requiring consensus. Similar provisions appear in many fisheries' treaties.[239] The IWC members have not hesitated to invoke the objection clause, usually to avoid particular quotas. A number of objections have been taken with regard to those IWC decisions made during the 1970's and 1980's,[240] and this trend is caused by the increasing environmentalist majority, whose decisions affect whaling interests more adversely.

A more drastic method of avoiding the application of IWC measures is withdrawal from the organization,[241] although it does not appear that any member state has ever withdrawn over a single regulation. Japan, the Netherlands, and Norway withdrew in 1958 because of IWC's inability to adopt national quotas. Japan rescinded its withdrawal before it became effective, and Norway and the Netherlands eventually rejoined.[242] More recently, Canada[243] and Dominca[244] have withdrawn. Japan has raised the threat of withdrawal on occasion to try to coerce the IWC into higher quotas. Other forms of pressure may be used to influence members' votes. For example, Japan was accused in 1978 of threatening to cancel a $10 million sugar deal with Panama in retaliation for placing an antiwhaling proposal on the IWC's agenda.[245] Conversely, the United States almost routinely threatens sanctions against individual members to persuade them not to make an objection.[246]

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[237] Christol, *supra* note 165, at 155; *Whaling Controversy*, *supra* note 188, at 216-17.

[238] Whaling 1946 Convention, *supra* note 223, art. V(3).

[239] M'Gonigle, *supra* note 23, at 135 n.67.

[240] *See* MMC 1982 REP., *supra* note 43, at 27; MMC 1981 REP., *supra* note 43, at 28-29.

[241] Whaling 1946 Convention, *supra* note 223, art. IX.

[242] Scarff I, *supra* note 13, at 361 & n.196.

[243] MMC 1981 REP., *supra* note 43, at 26; Can. Dep't External Aff., Communiqué No. 62, at 1-2 (June 26, 1981) [hereinafter cited as Communiqué].

[244] MMC 1982 REP., *supra* note 43, at 23.

[245] M'Gonigle, *supra* note 23, at 160-61. The charge was denied at the 1978 IWC meeting. However, the environmentalist Panamanian Commissioner was dismissed, and the proposal was withdrawn. *Id.*

[246] *See infra* notes 452-65 and accompanying text.

Due to such institutional and political roadblocks, the IWC has been able to protect stocks only after they were severely depleted, and quotas seem to have had little effect in halting population declines. However, it is worth noting that quotas have declined steadily, and the most endangered stocks are now officially protected. The IWC approved a ban on pelagic whaling for all species but Antarctic minke in 1969, and the IWC declared the Red Sea, the Arabian Sea, and the Indian Ocean north of 55°S latitude to constitute a whale sanctuary.[247] In 1982, after ten years of environmentalist pressure, the IWC voted for a ban on all pelagic and coastal whaling with the exception of aboriginal and scientific catches (effective in the 1985-86 season).[248] Several nations have filed objections, however,[249] and without the compliance of these nations, the ban will have little effect. Unlike the Northwest Pacific Fur Seal Convention,[250] the Whaling 1946 Convention does not require that whales be taken humanely, but laudably, the IWC has grappled with the humaneness issue in the past.[251] Finally, in 1981 the IWC voted to prohibit the use of the nonexplosive or "cold" harpoon,[252] which does less damage to the meat of small whales but which does not immediately kill the whales. Unfortunately, three member states objected to this rule.[253]

3. *Continuing Problems*

a. The Decision-Making Process

A number of difficult problems continue to face the IWC and to inhibit effective whale protection measures. While good, reliable information on whale stocks may be difficult and expensive to gather, the IWC has exhibited a chronic inability to ensure that decisions are made on the best scientific evidence which *is* available. Political and economic factors have constantly intruded upon the decision-making process, making rational management difficult.

On numerous occasions the full IWC has ignored the considered advice of its own experts. For example, in 1960 the IWC appointed a committee of three scientists to evaluate the status of Antarctic stocks and to make specific recommendations. The IWC agreed to abide by the committee's recommendations.

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[247] Storro-Patterson, *Sperm Whales 7,000: U.S. Conservation Zero*, OCEANS, Sept. 1979, at 2, 2. *See Commercial Whaling*, *supra* note 174, at 81; Travalio & Clement, *supra* note 4, at 234.

[248] MMC 1982 REP., *supra* note 43, at 23-24. *See* McCloskey, *At Last—The IWC Bans Whaling*, SIERRA, Nov.-Dec. 1982, at 17-19.

[249] MMC 1982 REP., *supra* note 43, at 27.

[250] *See supra* notes 113-17 and accompanying text.

[251] Scarff I, *supra* note 13, at 381-83.

[252] MMC 1981 REP., *supra* note 43, at 26-27.

[253] The three countries which objected were Iceland, Japan, and Norway. *Id.* at 28-29.

The committee's final report, issued in 1963, recommended: (1) a total ban on hunting of blue and humpback whales, (2) the elimination of the b.w.u. system, and (3) a halving of the number of fin whales caught. Humpbacks were accorded protection, and blues were partially protected, but the committee's other recommendations were rejected.[254]

The Scientific Committee has been faced with political and institutional impediments to the making of sound scientific judgments. Member states have not provided the Scientific Committee with sufficient data from whaling operations,[255] and questions have been raised concerning the accuracy of the data supplied.[256] The Scientific Committee's estimates of population size and other parameters have often constituted a political compromise.[257] For example, in 1977 the Scientific Committee's experts computed, on the basis of figures from the Antarctic, that sonar and ASDIC had improved hunting efficiency by twenty-eight percent. After inserting this figure into its sustainable yield models, the Scientific Committee recommended a North Pacific sperm whale quota of 763 whales. At the December meeting of the Scientific Committee, the Japanese representative supplied an estimate of a five percent increase in efficiency. Instead of discussing the merits of both figures and reaching an estimate based on scientific evidence, the Scientific Committee averaged the two figures and decided on sixteen percent as its "best estimate." Unfortunately, the efficiency factor affects the sustained yield estimate in a non-linear way in the Scientific Committee's model; a decrease in the efficiency factor to sixteen increased the recommended quota to 6,444.[258]

Among the other causes of the Scientific Committee's inability to make rational, scientific decisions, there are two problems which are plainly evident. First, there is a chronic lack of staff and resources, although the situation improved greatly during the 1970's,[259] and second, the short lead time between the receipt of data and promulgation of regulations allows little time for review or outside consultation.[260] On the plus side, the Scientific Committee has made some effort to open its decision-making process to public scrutiny and to in-

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[254] Levin, *supra* note 3, at 568; McHugh, *supra* note 132, at 394; Scarff I, *supra* note 13, at 362-64.

[255] *Fish and Wildlife Miscellaneous—Part 1: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*; 96th Cong., 1st Sess. 333 (1979) (statement of Patricia Forkan) [hereinafter cited as *Fisheries 1979 Hearings*].

[256] Scarff I, *supra* note 13, at 417.

[257] *See id.* at 418-19.

[258] Storro-Patterson, *supra* note 202, at 62-63; *see* M'Gonigle, *supra* note 23, at 158.

[259] *See Fisheries 1979 Hearings*, *supra* note 255, at 333 (statement of Patricia Forkan); *Whaling Controversy*, *supra* note 188, at 218.

[260] Scarff II, *supra* note 27, at 629.

crease the flow of information between outside experts and the IWC.[261]

To help improve the quality of IWC decision-making and to ensure that stocks are managed on a sustainable basis, the IWC voted in 1974 on a "New Management Procedure" (NMP). The NMP gave the Scientific Committee a more formal role, requiring the IWC to classify all stocks into one of three categories, pursuant to the advice of the Scientific Committee: (1) initial management stocks, which are those stocks currently above optimum levels; (2) sustained management stocks, which are stocks already at optimum levels; or (3) protection stocks, which are stocks currently below optimum levels. Exploitation is allowed for initial and sustained management stocks but not for "protection stocks."[262] By giving primary responsibility for classifying stocks and for regulating their exploitation to the Scientific Committee, the IWC sought to avoid the stalemate which had occurred nearly every time quota reductions were discussed. While the member states still had the right to object to particular quotas, they would have to attack the scientific judgment of the Scientific Committee, a generally credible group.[263]

The IWC meetings did seem to proceed more smoothly after the NMP, and the quotas were adopted with little opposition. For example, the Scientific Committee's 1977 recommendation for a sperm whale quota of 6,444 "caused scarcely a ripple" when discussed by the full IWC, and the recommendation passed with only a single negative vote.[264] Despite this apparent success, the debate along with the political maneuvering had merely shifted *de facto* to the Scientific Committee. Serious questions about the recommendation did exist but were never voiced before the IWC. The procedures are insufficient to insulate the Scientific Committee from political pressures and to ensure that all relevant information is considered.

b. Environmental Degradation

Several factors over which the IWC has little control also threaten whales, and they threaten the other marine mammals as well. The depleted status of many whale stocks make them particularly vulnerable to vessel-source pollution, land-based pollution, and pollution from offshore installations. The possibilities of oil spills from an expanding use of supertankers and the increasing number of offshore oil wells have generally caused a great deal of concern.[265] Proposed sales of oil leases on the United States outer continental shelf have been chal-

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[261] Scarff I, *supra* note 13, at 420.

[262] *See* Christol, *supra* note 165, at 157-58.

[263] *See Whaling Controversy*, *supra* note 188, at 224.

[264] M'Gonigle, *supra* note 23, at 158.

[265] Scarff I, *supra* note 13, at 415.

lenged as detrimental to the health of whale stocks.[266] With regard to whales, an oil spill could cause: (1) starvation due to the contamination of food supplies and the fouling of the sensitive organs of baleen whales, (2) pneumonia from the penetration of their lungs by oil, and (3) suffocation from the clogging of their blow holes.[267] It is also feared that noise from drilling rigs, increased marine traffic, and the presence of man-made islands could disorient migrating whales.[268] Some species are particularly vulnerable to pollution since they breed in small, ecologically sensitive areas. For example, the coastal lagoons of Baja California serve as calving grounds to gray whales, and right whales use the lagoons of the Peninsula Valdes in Argentina.[269] These areas need special attention,[270] and they should be maintained as "international marine sanctuaries," similar to United States "wilderness areas."

Another set of problems involves competition between whales and other species (including man) for marine resources. As some whale species became depleted, other whale species and other animals (such as seals) expanded in numbers so that, even with an end to hunting, recovery is difficult. Some scientists have recommended that some species (such as the minke whales) will have to be thinned to allow endangered species (such as the blue whales) to expand.[271] Human exploitation of those marine species which serve as food for the whales has probably not yet had a serious effect on whale stocks, but the prospect of large-scale krill fishing[272] has caused concern.[273] The NMP recognizes that successful whale management requires consideration of inter-species interactions,[274] but the emphasis has been on MSY.[275] Admittedly, the management of entire ecosystems is a difficult goal to achieve, and the theoretical bases for a system-wide management scheme have not been laid. Even so, the attempt at such a scheme must be made if the endangered whale stocks are to revive.

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[266] *See* Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979); North Slope Borough v. Andrus, 486 F. Supp. 326 (D.D.C. 1979), 486 F. Supp. 332 (D.D.C. 1979), *aff'd in part and rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980).

[267] Verges & McClendon, *supra* note 198, at 5.

[268] *Id. See also* MMC 1981 REP., *supra* note 43, at 73-81; MMC 1982 REP., *supra* note 43, at 68-77; Scarff I, *supra* note 13, at 416.

[269] Scarff I, *supra* note 13, at 416.

[270] The United States and Mexico have discussed the problem of preserving the habitats of marine mammals, and they have reached an agreement on principles of conservation. *See* Nafziger, *supra* note 121, at 597.

[271] *See Fisheries 1979 Hearings*, *supra* note 255, at 382 (statement of Alan Macnow).

[272] *See* F. BELL, *supra* note 2, at 300.

[273] Nafziger, *supra* note 121, at 600.

[274] Christol, *supra* note 165, at 157.

[275] *Id.* at 158.

c. *Unregulated Whaling*

Of course, the Whaling 1946 Convention does not apply to nonsignatory states, and not all whaling nations are members of the IWC (*e.g.*, Canada, North Korea, Portugal, and Taiwan). Other whaling has been carried out under flags of convenience, issued by nonsignatory states, such as the Bahamas, Cyprus, and Somalia.[276] Whaling by nonmembers probably constitutes only a small portion of all whaling, but many of the whales caught may be from highly endangered stocks and may be killed with the inhumane "cold harpoon."

The IWC has made some efforts to regulate nonmember whaling, including investigations of whaling by nonmembers.[277] Portugal has attended IWC meetings as an observer,[278] and Taiwan has deposited its instrument of ratification, although it is unlikely that Taiwan will be allowed to join.[279]

The problem of unregulated whaling under flags of convenience has also lessened. One so-called "pirate whaler," the notorious *Sierra*, killed thousands of whales until 1979 when it was rammed by the *Sea Shepherd*, a ship financed by the Fund for Animals.[280] South Africa seized two ships in 1979 as they were being converted to whalers by the owners of the *Sierra*,[281] and Taiwan seized four whalers in 1980 and removed their harpoons after the United States threatened to deny Taiwanese fishing rights in United States waters.[282] Unfortunately, as more and more whalers go out of business, the price of whale meat will probably rise, and whalers will have added incentive to circumvent international and domestic regulations.[283]

d. *Whaling by Native Populations: "Aboriginal Whaling"*

Perhaps the most troublesome issue in the protection debate over whales involves the taking of highly endangered species by native populations which

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[276] McHugh, *supra* note 132, at 397-98; Nicholson, *Saving Whales*, NEWSWEEK, July 23, 1979, at 64, 64.

[277] MMC 1981 REP., *supra* note 43, at 28.

[278] Current Development, *The Thirty-second International Whaling Commission*, 75 AM. J. INT'L L. 165, 165 (1981) [hereinafter cited as *Thirty-second IWC*].

[279] *Id.* at 168.

[280] Broad, *A Blow for the Whales*, SCI., Aug. 10, 1979, at 565, 565 (1979); Frizell, *The Pirate Whalers*, OCEANS, Mar. 1981, at 25. Although they are termed "pirates," because their flag states are not parties to the Whaling 1946 Convention, these flag-of-convenience operations do not technically violate international law. Frizell, *supra*, at 26.

[281] Frizell, *supra* note 280, at 28.

[282] *Id.*

[283] *See Fisheries 1979 Hearings*, *supra* note 255, at 384 (statement of Alan Macnow).

claim economic, cultural, and social necessity. Alaskan Eskimos, the Inuits, have hunted the bowhead whale for centuries.[284] Similarly, Greenlanders take a small number of humpback, fin, and minke whales,[285] and a few humpback whales are taken by the natives of Bequia in the West Indies.[286] In addition, Siberian natives kill as many as 160 gray whales per year in the Northeast Pacific,[287] and Canadian Eskimos hunt bowhead whales in the North Atlantic.[288]

The bowhead hunt by the Alaskan Inuits has received the most attention due to the depleted state of the Pacific bowhead stock. The United States has estimated the bowhead population at 2,264,[289] and the Scientific Committee agrees with this figure.[290] On a number of occasions, the Scientific Committee has recommended a zero quota on Pacific bowhead whales, maintaining that the population will continue to decline for a number of years even in the absence of a hunt.[291] Under United States pressure, however, the IWC has continued to allow the Alaskan Eskimo hunt. In 1982, the IWC attempted to create a uniform scheme for the regulation of "aboriginal whaling" by setting up a standing subcommittee on aboriginal subsistence needs within the Technical Committee. Along with the Scientific Committee, the Technical Committee was to establish a minimum level for stocks and a rate at which stocks should be allowed to increase. For stocks below MSY levels, aboriginal subsistence catches would be permitted as long as quotas would allow stocks to increase gradually to MSY levels.[292]

These procedures suffered from some of the same problems which occurred under the NMP—a concentration on MSY as the relevant management standard and the potential for political interference in the decision-making process. Under these procedures, "aboriginal hunting" was allowed for "subsistence purposes." The meat provided by the bowhead hunt allows the Alaskan Eskimos to adopt a relatively settled, affluent lifestyle which is unlike their nomadic eastern neighbors.[293] In addition to the whale meat and blubber, the Eskimos

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[284] Bockstoce, *Battle of the Bowheads*, NAT. HIST., May 1980, at 52, 53-54. *See* MMC 1981 REP., *supra* note 43, at 65.

[285] MMC 1982 REP., *supra* note 43, at 27.

[286] MMC 1981 REP., *supra* note 43, at 70.

[287] Int'l Whaling Comm'n, Amendments to the Schedule ¶ 7 (1975), *quoted in* Scarff I, *supra* note 13, at 403 n.429.

[288] *Id.* at 401.

[289] M'Gonigle, *supra* note 23, at 163.

[290] *IWC Regulations*, *supra* note 194, at 955. The Scientific Committee had earlier estimated the Bering Sea population of bowhead whales at 1,000 to 1,600. *Id.* at 947.

[291] Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?*, 10 OCEAN DEV. & INT'L L.J. 41, 45 (1981); M'Gonigle, *supra* note 23, at 163-64, 166; *IWC Regulations*, *supra* note 194, at 955 n.83.

[292] MMC 1982 REP., *supra* note 43, at 26-27.

[293] Bockstoce, *supra* note 284, at 54.

use the whale bones to produce artwork, which provides a substantial income.[294] Alternate food is available to Alaskan Eskimos today although an IWC panel has noted that the health of the Eskimos has deteriorated after a modern, western diet was imposed.[295]

The main justification for continuing the bowhead hunt is the social and cultural dependence of the Eskimos on the hunt. With increasing pressures from western civilization impinging upon their traditional way of life, the results have been violence, alcohol and drug dependence, and a rising suicide rate.[296] The whale hunt provides a focus for village life, reinforcing community ties. It is claimed that ending the hunt would have catastrophic effects, causing irreparable socio-cultural damage.[297]

Assuming the need for continuing the hunt and assuming that these cultural needs come within the definition of subsistence as used in the new IWC aboriginal procedures, there are still a few problems that need to be addressed. Between the 1920's and the 1960's, Eskimo whalers took an average of ten to fifteen bowheads every year, but during the 1970's the hunt increased dramatically, reaching a high of forty-eight in 1976. The increase was due largely to increased Eskimo wealth from the Alaskan oil boom and the Alaskan Natives Land Claims Settlement Act, which allowed many more Eskimo men to equip themselves for the prestigious vocation of whaling.[298] The IWC first set aboriginal quotas in 1977,[299] and the kill quota has remained below twenty during each subsequent year. By all reports, the Eskimos have respected the quotas.

Assuming a four to seven percent recruitment rate,[300] the bowhead population might be able to support the current Eskimo hunt. However, there is some evidence that the whales killed by Eskimo hunters are often immature, and recent population surveys have indicated bowhead populations may contain a very low number of calves.[301] This data suggests that the Eskimo kills do not compensate for natural mortality, but rather add to it; that is, total mortality is higher than if only fully mature whales were caught and the net increase in population is lower.[302]

Many of the whales which are struck by the Eskimo hunters are not landed. Undoubtedly, some struck whales survive, but many certainly die, and the

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[294] *IWC Regulations*, *supra* note 194, at 947.

[295] Verges & McClendon, *supra* note 198, at 6.

[296] *Id.* at 6-7; Vesilind, *Hunters of the Lost Spirit*, 163 NAT'L GEOGRAPHIC 150, 166-72 (1983).

[297] Verges & McClendon, *supra* note 198, at 6. *See* Bockstoce, *supra* note 284, at 54.

[298] Bockstoce, *supra* note 284, at 56-57. *See* M'Gonigle, *supra* note 23, at 153.

[299] *IWC Regulations*, *supra* note 194, at 946-47.

[300] Scarff I, *supra* note 13, at 402 n.427. *See* Levin, *supra* note 3, at 584.

[301] *IWC Regulations*, *supra* note 194, at 955 n.83; Scarff I, *supra* note 13, at 402 n.427.

[302] Scarff I, *supra* note 13, at 402 n.427.

IWC quotas have specified the maximum permissible numbers for those whales which are struck but lost. The percentage of whales struck but lost may actually have increased with the use of modern weapons, particularly the bomb lance shoulder gun, which the Scientific Committee has recommended banning.[303] Some Eskimo elders have also blamed this trend toward losing struck whales on the erosion of hunting skills among the young Eskimos.[304]

e. Enforcement of Whaling Standards

Ensuring compliance with international agreements is always a difficult proposition, and enforcing the Whaling 1946 Convention and the IWC regulations constitutes no exception. There have been persistent reports that the Soviets in particular have killed not only underage whales but also females with calves.[305] The Soviets have hunted sperm whales in the North Pacific from factory ships in defiance of the IWC's ban on pelagic whales.[306] The USSR has also been charged with using gray whales, which are taken under the guise of the Siberian aboriginal hunt,[307] as feed on mink and sable farms.

Similarly, there are vague accusations that Japan has hunted endangered stocks.[308] In 1976, Japan caught 240 Bryde's whales after the IWC voted a zero quota. The Japanese claimed an exemption under the "scientific purpose" exception,[309] but this Japanese action violated the spirit, if not the letter, of the law. By comparison, Peru has been accused of ignoring the IWC's closed season and of hunting protected species,[310] and Spain apparently exceeded its quota by a significant number in 1980, shortly after joining the IWC.[311]

It is fairly easy for a whaler to conceal any violation, especially when the catch is processed at sea.[312] The Whaling 1946 Convention envisions a scheme of "national enforcement with international supervision,"[313] and historically, most of the IWC's enforcement power was delegated to inspectors assigned to each factory ship by the flag state.[314] Since the inspectors were invariably from the

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[303] Scarff II, *supra* note 27, at 632.

[304] Vesilind, *supra* note 296, at 167.

[305] M'Gonigle, *supra* note 23, at 165-66.

[306] *Id.* at 178.

[307] *Counting Whales*, *supra* note 205, at 19; *Hairy Adventure*, *supra* note 9, at 17.

[308] Levin, *supra* note 3, at 584.

[309] Scarff II, *supra* note 27, at 634. *See* M'Gonigle, *supra* note 23, at 155.

[310] Frizell, *supra* note 280, at 26.

[311] *Id.*

[312] Scarff II, *supra* note 27, at 606.

[313] Hayashi, *Soviet Policy on International Regulation of High Seas Fisheries*, 5 CORNELL INT'L L.J. 131 (1972), *quoted in* Scarff I, *supra* note 13, at 357 & nn. 162-63.

[314] *Id.* at 358.

same country as the whalers and since they were often assigned to the same ship for several voyages, the appearance of a conflict of interest was created.[315] Realizing that flag-state enforcement alone was insufficient, in 1956 the IWC members signed a protocol to the Whaling 1946 Convention and thereby established an international observer scheme (IOS).[316] However, due to the disagreements in the IWC over allocation of quotas among members, the IOS was not implemented until 1972.[317] Under the IOS, member states exchange observers according to separate agreements. Observers are nominated and paid by their own governments, but they report directly to the IWC.[318] Unfortunately, only three such bilateral agreements have had any success: (1) Japan and the USSR exchange observers for their pelagic operations; (2) Canada, Iceland, and Norway monitor each other's minke operations; and (3) the United States sends one observer to Japan.[319] The failure to make the IOS mandatory is definitely a deficiency in the IWC's protective regime.

The Whaling 1946 Convention mandates that its members make annual reports of infractions to the Technical Committee.[320] The Technical Committee also investigates reported infractions, but prosecution of violators is left to the flag state.[321] This system was still utilized, even after initiation of the IOS system.

D. Small Cetaceans

There is no taxonomic distinction between "whales" and "small cetaceans," and the difference is largely a matter of convenience and history. The term "small cetacean" will include those animals of the order Odontoceti (the toothed whales) other than the sperm whales (family Physeteridae).[322] The small cetaceans include: (1) the dolphins, killer and pilot whales, and porpoises (family Delphinidae);[323] (2) the bottlenose and beaked whales (family Ziphidae), (3) narwhals and belugas (family Monodontidae), and (4) various

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[315] Scarff II, *supra* note 27, at 606-07.

[316] Protocol to the Convention for the Regulation of Whaling Signed Under Date of Dec. 2, 1946, *done* Nov. 19, 1956, 10 U.S.T. 952, T.I.A.S. No. 4228, 338 U.N.T.S. 366 (entered into force May 4, 1959). *See* Scarff I, *supra* note 13, at 365.

[317] Scarff I, *supra* note 13, at 365-67.

[318] Scarff II, *supra* note 27, at 607; Bonker, *supra* note 291, at 53.

[319] Bonker, *supra* note 291, at 53.

[320] Whaling 1946 Convention, *supra* note 223, art. IX(4).

[321] *Id.* art. IX(3).

[322] *See infra* Table I; Scarff I, *supra* note 13, at 376.

[323] Some taxonomists consider porpoises a separate family (Phocoenidae). D. RICE, NAT'L OCEANIC & ATMOSPHERIC AD., A LIST OF THE MARINE MAMMALS OF THE WORLD 7 (1977); Comment, *Dolphin Conservation In The Tuna Industry: The United States' Role In An International Problem*, 16 SAN DIEGO L. REV. 665, 665 n.2 (1979) [hereinafter cited as *Dolphin Conservation*].

freshwater and coastal species (family Platanistidae).

With a few exceptions, these species are all biologically similar to whales. Like sperm whales, small cetacean species feed higher on the trophic pyramid (consuming fish and squid), and therefore they are generally distributed in tropical and temperate waters.[324] Many species migrate like whales, but they tend to migrate over shorter distances.[325] In addition, the small cetaceans probably have a greater proportion of coastal species.[326] Generally, less is known about small cetaceans than about the larger whales.[327] Even so, the small cetaceans apparently possess the same intelligence, strong family bonds, and rich social life as the other cetaceans.[328] The small cetaceans are also subject to the same problems as the whales—hunting, pollution, habitat degradation[329]—and many species are depleted, threatened, or endangered.

1. *Direct Fishing for Small Cetaceans*

The small cetaceans are hunted in many parts of the world for food and oil, and with the decline of the large whale stocks, exploitation of the small cetaceans may increase. For example, the bottlenose whales were hunted extensively during the nineteenth century when the right whale stocks decreased,[330] and during the 1970's the killer whales and bottlenose whales were being taken commercially in the North Atlantic.[331] Harbor porpoises have also been taken for food and oil, especially during World Wars I and II to meet protein needs.[332] The USSR has been reported to take dolphins in the Black Sea[333] although it has also been reported that this hunt was halted.[334] The Japanese fish for Dall's porpoises and striped dolphins in coastal waters.[335] On their way to the minke grounds in the Antarctic in 1980, Soviet whalers killed over 900 killer whales in the North Pacific,[336] and this action generated concern at the 1980 IWC meeting.[337]

Small cetacean management has been discussed in the Scientific Committee

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[324] Scarff I, *supra* note 13, at 375.

[325] *Id.*; Travalio & Clement, *supra* note 4, at 201.

[326] Travalio & Clement, *supra* note 4, at 201. *See* Scarff I, *supra* note 13, at 375.

[327] Scarff I, *supra* note 13, at 374, 426.

[328] Levin, *supra* note 3, at 552.

[329] Scarff I, *supra* note 13, at 415-16.

[330] Van Note, *Japan, Soviet Union Under Whaling Gun*, AUDOBON, Sept. 1976, at 123-24.

[331] Scarff I, *supra* note 13, at 378. *See* Levin, *supra* note 3, at 561.

[332] Van Note, *supra* note 330, at 124.

[333] Scarff I, *supra* note 13, at 378.

[334] *Id.* at 384 n.342.

[335] *Id.* at 378. *See also* Levin, *supra* note 3, at 561.

[336] Bonker, *supra* note 291, at 49; M'Gonigle, *supra* note 23, at 178 & n.280.

[337] *Id.* at 49-50.

since the late 1960's,[338] but the jurisdiction of the IWC over small cetacean fisheries is unclear. The Whaling 1946 Convention speaks of "whales" and not "cetaceans," which during the IWC's early history was defined in practice as the mysticeti plus the sperm whales.[339] Since the small cetaceans were of little economic importance and caused little international concern, no attention was paid to them. However, in 1975 the Scientific Committee proposed that the IWC consider directly managing small cetacean fisheries,[340] and in 1976 the Scientific Commission amended the IWC Schedule to require the collection and reporting of catch and effort data on "small-type whaling" operations, including the commercial catch of bottlenose, pilot, and killer whales.[341] In 1976, the Scientific Commission took active management responsibility over the small cetaceans by declaring all North Atlantic bottlenose stocks to be "protective stocks," and by expanding the reporting requirements to include all small cetacean stocks.[342] The issue involving the small cetaceans was placed on the agenda of the 1980 IWC meeting. Unfortunately, it was hindered by being linked with a recommendation by the Scientific Committee that the Eskimo hunt of beluga and narwhals be restricted. Even so, during the Technical Committee debates on Southern Ocean quotas, the United States raised the issue of the killer whale catches by the USSR, and the United States tried to include the killer whales in the existing pelagic moratorium. Fortunately, this United States proposal eventually passed.[343]

It has become apparent that the aboriginal hunting of the small cetaceans may be more difficult to regulate than the aboriginal hunting of whales. Canadian natives take about forty belugas per year, despite the fact that during the early 1980's the Scientific Committee estimated that the total beluga population was approximately 400.[344] Canada hopes to avoid the type of controversy which has surrounded the Alaskan Eskimo bowhead hunt. For example, when the native beluga hunt was raised at the 1980 IWC meeting, Canada quickly questioned whether IWC authority extended to the exclusive economic zone (EEZ, more properly termed the "economic zone"). The IWC member states were quickly misdirected and began to voice support for the EEZ concept. As a result, the aboriginal hunting issue was lost in the EEZ discussion, and a weak resolution requiring the reporting of stocks was passed.[345] While Canada justi-

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[338] Scarff I, *supra* note 13, at 373.

[339] *Id.* at 374.

[340] *Id.*

[341] *Id.* at 374-75. There is some question as to which species the requirement covers. *Id.* at 375 n.292.

[342] Scarff II, *supra* note 27, at 633-34.

[343] Bonker, *supra* note 291, at 49-50.

[344] *Id.* at 50.

[345] *Id.* at 50-51; *Thirty-second IWC*, *supra* note 278, at 167-68. Since the rights of a coastal-

fied its withdrawal from the IWC on the grounds that it no longer has any direct interest in the whaling industry (having outlawed commercial whaling in 1972),[346] Canada has also conveniently escaped close international scrutiny of the beluga and narwhal hunts and the charges of hypocrisy which the United States has endured. Henceforth the beluga hunt will remain subject to domestic regulation only.

2. *Small Cetacean Interference with Fisheries*

Small cetacean kills are often justified on the grounds that they interfere with fin fisheries. For example, in February of 1978 approximately 1,000 bottleneck dolphins were slaughtered on the small Japanese island of Iki.[347] Then two years later, the Iki islanders, with the help of natives from the nearby Goto Islands killed between 1,000 and 2,000 dolphins.[348] The islanders claim that the dolphins cost them over $2.5 million each year in lost income from yellowtail and squid, and they have vowed to exterminate the dolphins.[349] Undeniably, dolphins do eat these species, but many fisheries scientists maintain that the decline in human catch is the result of pollution and human overfishing, not competition from dolphins.[350] It has also been reported that the hunt expanded in 1980 due to the construction of a dolphin processing facility, and this development casts doubts upon the sincerity of the claims made by these Japanese islanders. In any event, during the early 1980's the dolphins began avoiding Iki, and the focus of the dolphin hunt of 30,000 to 40,000 dolphins per year has shifted to the Japanese islands of Taiji, Futo, and Kawana as well as the Goto Islands.[351]

During the 1950's, Icelandic fishermen made similar claims that killer whales seriously interfered with the Icelandic fin fisheries. As a "goodwill gesture," the United States Navy killed thousands of killer whales with machine guns and depth charges.[352] Off Florida, bottlenose dolphin reportedly interfere with fishing for Spanish mackerel, bluefish, pots, pompano, and king mackerel, causing an approximate $440,000 annual loss from damaged gear, lost time,

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state in its exclusive economic zone are not "exclusive," the better terminology is merely "economic zone."

[346] Communiqué, *supra* note 243, at 1-2.

[347] Whymant, *Can the Japanese Dolphins Survive the Fishing War?*, OCEANS, July 1978, at 55.

[348] *Many More Dolphins Die*, Chi. Tribune, Mar. 3, 1980, § 1, at 2, col. 6.

[349] *Battle Resumes Over Dolphin Kill*, Chi. Tribune, Mar. 2, 1980, § 1, at 2, cols. 1-3.

[350] M'Gonigle, *supra* note 23, at 178 n.281; Frizell, *Saving Dolphins, Saving Face*, OCEANS, Jan. 1983, at 65, 65 [hereinafter cited as *Saving Dolphins*].

[351] *Saving Dolphins*, *supra* note 350, at 66.

[352] Scarff I, *supra* note 13, at 414-15.

and decreased efficiency.[353] Interference by the common dolphin is reported to be a widespread problem in the Mediterranean, and similarly, killer whales may interfere with tuna and billfish fishing in the Pacific and Indian Oceans.[354]

Since the IWC has not accepted general jurisdiction over the management of the small cetaceans, it has no authority to stop kills justified on the basis of interference with fin fisheries. However, the IWC does require the reporting of kills, and the IWC can study the effects of the small cetaceans on fish stocks. Perhaps more importantly, the IWC should also examine the effect of marine pollution and human interference on the levels of the small cetacean stocks.

3. *The Incidental Catch of Small Cetaceans*

During the 1970's and 1980's, a policy battle raged between conservationists and the tuna industry centering around the accidental catch of dolphins and porpoises in nets.[355] Tuna fishermen have been using nets since 1916, although bait-fishing was the principal method of fishing until the late 1950's, when nylon nets were introduced.[356] This development allowed the tuna fishermen to utilize purse seines to a greater degree than had been possible before.[357] Use of the purse seines also allowed the fishermen to take advantage of the "tuna/dolphin phenomenon." For some as yet unknown reason yellowfin tuna and dolphins are often found together.[358] When tuna fishermen sight dolphins, a skiff is launched with a seine attached. The skiff circles the dolphins along with the tuna, and the net is closed around them. The net is drawn together at the bottom, trapping both the tuna and dolphins.[359] Inevitably, many dolphins become entangled in the net, or the net itself may roll up, trapping the dolphins inside. Being mammals, the dolphins may drown. The Japanese kill a large number of Dall's porpoises each year by catching them incidentally while fishing the gill net salmon fishery in the North Pacific.[360] New England trawlermen may be incidentally catching harbor porpoises,[361] and the La Plata

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[353] *Id.* at 415.

[354] *Id.*

[355] Jordan, *Porpoises and Purse Seines*, OCEANS, May 1974, at 6, 6.

[356] Comment, *International Aspects of the Tuna-Porpoise Association Phenomenon: How Much Protection for Poseidon's Sacred Messengers?*, 7 CAL. W. INT'L L.J. 639, 641-42 (1977) [hereinafter cited as *International Aspects*].

[357] Jordan, *supra* note 355, at 6.

[358] *International Aspects*, *supra* note 356, at 643.

[359] *Id.* at 644.

[360] Levin, *supra* note 3, at 561; Nafziger, *supra* note 121, at 598; Scarff I, *supra* note 13, at 379-80; Travalio & Clement, *supra* note 4, at 202.

[361] Van Note, *supra* note 330, at 124.

dolphin is caught in the shark net fishery off Uruguay.[362]

The IWC's 1977 regulation requiring the reporting of biological data on small cetaceans includes data on indirect fisheries,[363] but the IWC has generally left the issue to other organizations and to domestic regulation. One such organization is the Inter-American Tropical Tuna Commission (IATTC), which was established in 1950 by the United States and Costa Rica to protect marine resources and to regulate fishing.[364] Seven other countries subsequently joined, although two countries (Ecuador and Mexico) later withdrew.[365] The purpose of the IATTC is to conduct scientific studies of tuna, billfish, and baitfish and to make recommendations to its member states.[366] In June of 1977, the IATTC took specific steps to study the tuna/dolphin phenomenon, and it has placed observers on a few vessels since 1979.[367] Also, the Convention for the High Seas Fisheries of the North Pacific Ocean,[368] of which the United States is a signatory, has established an *ad hoc* committee on marine mammals to address in particular the incidental taking of Dall's porpoises in gill nets.[369]

A number of possible solutions to the incidental catch problem have been proposed, and the most radical solution is a total ban on purse-seining. However, such a ban would be economically impractical and impossible to enforce, because purse-seining is the only practical means of harvesting tuna.[370] A ban on seining would significantly decrease the catch[371] and send tuna prices soaring.[372] If such a ban were unilaterally instituted by the United States, other countries with less efficient technology and less concern for the small cetaceans would probably fill the gap.[373] Since few cetaceans are taken in connection with the harvest of "white" tuna (albacore and skipjack), it has been suggested that a tax be placed on the lower-priced "light" tuna (yellowfin) to encourage greater use of white tuna.[374]

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[362] *Id.*

[363] Scarff II, *supra* note 27, at 634.

[364] Convention for the Establishment of an Inter-American Tropical Tuna Commission, *signed* May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (entered into force Mar. 3, 1950).

[365] *See International Aspects, supra* note 356, at 653-54. *See also* U.S. DEP'T OF STATE, TREATIES IN FORCE 300 (1978) (notification of denunciation).

[366] *International Aspects, supra* note 356, at 654.

[367] MMC 1982 REP., *supra* note 43, at 42.

[368] *Signed* May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65 (entered into force June 12, 1953).

[369] Nafziger, *supra* note 121, at 598 n.30.

[370] *Dolphin Conservation, supra* note 323, at 690.

[371] Leeper, *Major Research Effort Probes Tuna-Porpoise Bond*, 26 BIOSCIENCE 533, 534 (1976).

[372] *Fishermen Appeal Ruling*, NAT'L PARKS & CONSERVATION MAG., Aug. 1976, at 25, 25.

[373] *See* F. BELL, *supra* note 2, at 352.

[374] Levin, *supra* note 3, at 592.

The United States has attempted to reduce dolphin mortality via domestic regulation, namely the Marine Mammal Protection Act of 1972 (MMPA).[375] The MMPA requires that each species which may be exploited under the provisions of the MMPA must also be maintained at an optimum sustainable population (OSP) level.[376] With regard to the incidental catch of the small cetaceans, the goal of the MMPA is to reduce such takings to insignificant levels approaching zero mortality. Under the 1981 amendments to the MMPA, this goal requires that for the purse-seine fishery for yellowfin tuna, there must be the "continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable."[377]

The National Marine Fisheries Service (NMFS) sets the annual quota for incidental takes (established at 20,500 animals per year for the period 1981 through 1985).[378] The NMFS has issued a general permit (which allows the incidental taking of animals up to the quota limit) to the American Tunaboat Association, whose members may set their purse-seines around dolphin and porpoise schools as long as they abide by other regulations.[379] Incidental takings have decreased dramatically under the MMPA—from 368,600 in 1972 to 22,736 in 1982.[380] However, over 2,000 of those animals killed in 1982 were eastern spinners, which have been delimited as a depleted species.[381]

Under the MMPA, and in accordance with an agreement between Japan and the United States, the NMFS also issued a permit allowing the taking of 5,500 Dall's porpoises. Even so, the NMFS required the tuna fishermen to accept United States government observers on board their fishing vessels and to assist in research programs sponsored by the two governments.[382] The United States Congress has voted to require Japanese vessels, fishing in Alaskan coastal waters, to adopt fishing gear and techniques which reduce the incidental taking of the Dall's porpoise.[383] In 1982, an estimated 4,187 Dall's porpoises were taken by Japanese fishermen within United States waters, and approximately 5,903 more were taken by other fishermen within and outside United States waters.[384]

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[375] 16 U.S.C. §§ 1361-1407 (1976 & Supp. V 1981) [hereinafter cited as MMPA]. *See Dolphin Conservation, supra* note 323, at 668.

[376] MMPA, *supra* note 375, § 1371(a)(2). *See Dolphin Conservation, supra* note 323, at 668.

[377] MMPA, *supra* note 375, § 1371(a)(2). *See* MMC 1981 REP., *supra* note 43, at 15.

[378] MMC 1982 REP., *supra* note 43, at 39.

[379] *Id.*

[380] *Id.* The 1982 porpoise mortality was higher than any since 1977, apparently due to a shift in fishing effort to areas where porpoise stocks are unaccustomed to encirclement and therefore suffer greater mortality during release procedures. *Id.*

[381] *Id.*

[382] *Id.* at 43.

[383] *Id.* at 45-46.

[384] *Id.* at 45.

These figures constitute an increase from 1981,[385] but they are down considerably from an estimated 20,000 kills which were made during the later 1970's.[386]

The United States has also encouraged the development of new methods for catching tuna and the improvement of existing seining techniques to reduce small cetacean mortality. However, the NMFS has unfortunately terminated its gear research program.[387] Such conservation efforts have been primarily responsible for the significant decline in incidental takes during the 1970's and early 1980's.[388] It is probable that other methods will also be developed to further reduce mortality.[389]

Unfortunately, foreign fleets have not been quick to adopt these technical advances, although United States control of the yellowfin market coupled with the MMPA's import restrictions on fish caught without adherence to its guidelines should encourage other countries to implement their own conservation programs.[390] To some degree, this implementation has in fact occurred; several countries including the Congo, New Zealand, Senegal, and Spain have directed their fleets to follow United States procedures for releasing dolphins.[391] This situation constitutes one of those rare cases in which unilateral action encouraged individual countries to provide complete protection. However, continued reliance on unilateral action by the United States or by any other country is dangerous. For one reason, a growing number of nations have become involved in tuna fishing. In 1971, the foreign tuna fleet accounted for two percent of the tuna taken. This percentage had increased to twenty-six percent in 1975,[392] and since then, it has grown to nearly fifty percent.[393] The problem is international in scope and it cannot be remedied by unilateral action,[394] because unilateral action may hinder joint efforts to decrease dolphin mortality.[395] Unilateral measures could easily result in irreconcilable conflicts between tuna fishing nations,[396] and unilateral actions could encourage domestic fishing fleets to reregister under foreign flags, enabling them to circumvent an individual coun-

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[385] *Id.*

[386] Scarff I, *supra* note 13, at 379-80.

[387] MMC 1982 REP., *supra* note 43, at 42.

[388] For a description of some of these techniques, see *Gear Innovations Aid Porpoise Escape*, 26 BIOSCIENCE 535, 535 (1976); Levin, *supra* note 3, at 575-77.

[389] *See* Levin, *supra* note 3, at 588; Leeper, *supra* note 371, at 583; Scarff II, *supra* note 27, at 607.

[390] *Dolphin Conservation*, *supra* note 323, at 690-91.

[391] *Id.* at 692.

[392] *Id.* at 685.

[393] MMC 1982 REP., *supra* note 43, at 42.

[394] *Dolphin Conservation*, *supra* note 323, at 686.

[395] *See International Aspects*, *supra* note 356, at 659.

[396] *Dolphin Conservation*, *supra* note 323, at 692.

try's domestic regulation.

E. *Other Marine Mammals*

Other species of marine mammals are also generally depleted, and they have been the subject of official and popular concern. These marine mammals include: (1) the polar bear (*Ursus maritimus*), (2) the sea otter (*Enhydra lutris*),[397] and (3) the sirenians (order Sirenia), a group containing four of the world's most unique creatures.

1. *Polar Bears*

Probably the most familiar of all the marine mammals, the polar bear is also the most land-based. It is found over a vast area, but only a few nations govern its range—Canada, Greenland, (and Denmark, which has authority for Greenland's foreign affairs), Norway, the United States, and the USSR. The USSR has prohibited the hunting of polar bears since 1956,[398] but the other countries were slow to follow this lead. Concerned by the rapidly dwindling population (estimated at 8,000 to 10,000 in the mid-1970's), those countries which had polar bears roaming their territories met in Oslo in 1973 and drafted the Agreement on the Conservation of Polar Bears (Polar Bear Agreement).[399] The Polar Bear Agreement prohibits the killing, hunting, or capturing of polar bears and obligates the member states to protect the polar bear ecosystem.[400] The import of any product derived from polar bears is forbidden,[401] and the member countries may adopt more restrictive regulations if they wish.[402] There are four exceptions to the prohibition on killing, hunting, and capture. Polar bears may be taken: (1) for *bona fide* scientific purposes, (2) for conservation purposes, (3) for prevention of serious disturbance to the management of other living resources, and (4) by local people utilizing traditional methods in the exercise of their traditional rights or "wherever polar bears might have been

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[397] Although several species of the river otters feed extensively in salt water, only *Enhydra lutris* is generally regarded as a marine species. D. RICE, *supra* note 323, at 3.

[398] Coggins, *supra* note 42, at 10. *See* Larsen, *Progress in Polar Bear Research and Conservation in the Arctic Nations*, 4 ENVTL. AFF. 295, 297 (1975); Travalio & Clement, *supra* note 4, at 221 n.167.

[399] *Done* Nov. 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8409 (entered into force Nov. 1, 1976) [hereinafter cited as Polar Bear Agreement]. In fact, these nations had been discussing polar bear conservation since the First International Scientific Meeting on the Polar Bear in 1965. Larsen, *supra* note 398, at 295.

[400] Polar Bear Agreement, *supra* note 399, arts. 1-3.

[401] *Id.* art. 5.

[402] *Id.* art. 6.

subject to taking by local people."[403] Hunting from aircraft or motor vehicles is specially precluded.[404]

The greatest threat to polar bears is probably pollution, particularly such toxic chemicals in the Arctic environment as polychlorinated hydrocarbons (PCB's), heavy metals, and DDT. These substances have all been found in polar bear tissue, sometimes in surprisingly high concentrations. This is particularly disturbing, since the habitat of the polar bears is as far from significant sources of toxic pollution as any place on earth.[405]

2. *Sea Otters*

Like polar bears, sea otters are generally found in coastal waters and are subject to coastal-state sovereignty. Sea otters are threatened by land-based pollution although they have made a comeback since the nineteenth century when the demand for their pelts drove them to near extinction.[406] The increase in the number of sea otters occurred primarily as the result of a 1910 United States ban on hunting in the Aleutians and a 1911 treaty with Japan, Russia, and the United Kingdom.[407] United States domestic legislation protects the sea otters, but there is a threat to the otters from abalone fishermen who claim that the otters disrupt the abalone fishery.[408] Estimates during the 1970's placed the otter population at above 100,000,[409] and plans are underway to translocate some California sea otters to Oregon or Washington in order to avoid the danger that an oil spill might exterminate the species.[410] Accordingly, there seems to be little threat of extinction in the near future.

3. *Sirenians*

Along with such species as the bowhead and right whales and the monk seals, the dugongs and manatees are among the most endangered of the marine mammals.[411] While never venturing onto land themselves, the sirenians are de-

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[403] *Id.* arts. 1-5, 7.

[404] *Id.* art. 4. For an analysis of the Polar Bear Agreement, see Travalio & Clement, *supra* note 4, at 221.

[405] Larsen, *supra* note 398, at 305. *See* Coggins, *supra* note 42, at 11; Dep't Interior, *Status Report on Marine Mammals*, 39 Fed. Reg. 27,922, 27,924 (1974).

[406] *See* Coggins, *supra* note 42, at 8.

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] MMC 1982 REP., *supra* note 43, at 9.

[411] *Id.* at 50.

pendent on land—inextricably linked to the coastal ecosystem[412]—and like the freshwater dolphins,[413] they are almost exclusively found within internal waters on territorial seas. Dugongs range throughout the Indian Ocean from the east coast of Africa to the Malaysian Archipelago. Dugongs also range along the northern coast of Australia, in the Gulf of Carpentaria, and in the Torres Strait.[414] The closely related manatee inhabits the warm waters along the east coast of the Americas, ranging from Florida to Guyana and Brazil.[415] One marine species is found off the west coast of Africa.[416]

Dugongs are hunted by Australian aborigines, and manatees are sometimes taken by natives of Central America and South America.[417] The West Indian manatee has been driven to perilously low levels, first by commercial hunting (which was banned in 1887), and then by sport hunting.[418] Most recently, the West Indian manatee has been further endangered by modern problems: (1) collisions with boats, (2) entrapment in automatic flood control gates and navigation locks, (3) entanglement in fishing gear, (4) vandalism poaching, and (5) loss of habitat from the development of coastal areas.[419] In addition, manatees are particularly sensitive to environmental changes,[420] and cold winters during the 1970's and 1980's have caused a high mortality rate.[421] In addition, the death of a number of animals in Florida has been attributed to red tide and a variety of diseases.[422] Land-based pollution has taken a toll, especially since manatees like to congregate near warm effluent discharges.[423]

Since sirenian populations are badly depleted (the Florida manatee population is estimated at somewhat above 1,000 animals),[424] and, since the mortality rate is high (117 Florida manatees died in 1982),[425] strong protective measures are essential. Several federal agencies and the Florida state government have responded admirably by: (1) designating sanctuaries, (2) specifying speed limits for boats, (3) conducting research on manatee biology, (4) designing safer flood control gates, and (5) initiating a stringent review of coastal development

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[412] *See* Coggins, *supra* note 42, at 9.

[413] *See* Scarff I, *supra* note 13, at 406-07.

[414] R. HARRISON & J. KING, *supra* note 49, at 169-70.

[415] *Id.* at 152-53.

[416] *Id.* at 153.

[417] Coggins, *supra* note 42, at 9.

[418] Levin, *Protection of the Florida Manatee—Part I*, 55 FLA. B.J. 57, 60 (1981) [hereinafter cited as *Florida Manatee I*].

[419] MMC 1982 REP., *supra* note 43, at 48; *Florida Manatee I*, *supra* note 418, at 60-62.

[420] *Florida Manatee I*, *supra* note 418, at 58-59.

[421] *Id.* at 58. *See* MMC 1982 REP., *supra* note 43, at 47.

[422] MMC 1982 REP., *supra* note 43, at 47, 50-51.

[423] *Florida Manatee I*, *supra* note 418, at 59.

[424] MMC 1982 REP., *supra* note 43, at 47.

[425] *Id.*

projects.[426] Even the National Aeronautics and Space Administration (NASA) has done its part by equipping those NASA boats that recover the solid rocket boosters from the space shuttles with water-jet propulsion for traveling through the coastal and inland waters which are heavily populated with manatees.[427] As with many other protective efforts for marine mammals, these measures may be too little and too late. Even more unfortunately, many other countries lack not only the environmental values of the United States but also the commitment to afford adequate protection to these unique animals.

III. UNITED STATES LEGISLATION AND MARINE MAMMALS

A number of nations have promulgated municipal regulations for the conservation of marine mammals. For example, several countries have specific legislation limiting or regulating whaling (*e.g.*, Australia, the Bahamas, Brazil, Canada, New Zealand, and the United Kingdom), while many other countries regulate whaling incidentally with fisheries. Argentina, Canada, the United Kingdom, the USSR, and Uruguay have legislation protecting seals. Exploitation of marine mammals in the Antarctic is subject to legislation in France. Legislation in New Zealand and the United Kingdom (as well as in France) specifically regulates the importation of whale products. Argentina and Mexico have laws establishing marine sanctuaries.[428] Domestic legislation has increased in importance with the widespread establishment of economic zones, thus expanding coastal-state jurisdiction. In addition, the deficiencies and weaknesses of international protective regimes mean that domestic legislation may offer the only effective protection for some species.

The United States has instituted perhaps the most comprehensive regime for protecting marine mammals. The effect of the Marine Mammal Protection Act upon the incidental catch of small cetaceans has already been mentioned.[429] The MMPA prohibits the taking of any marine mammal by any person or vessel subject to United States jurisdiction unless a permit is obtained from either the Secretary of Commerce or the Secretary of the Interior, depending on the species involved.[430] The MMPA exempts the Alaskan Eskimos who hunt for subsistence or for creating and selling authentic native handicrafts or clothing.[431]

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[426] *Id.* at 48-53; Levin, *Protection of the Florida Manatee—Part II*, 55 FLA. B.J. 165, 166-68 (1981).

[427] MMC 1982 REP., *supra* note 43, at 52.

[428] Nafziger, *supra* note 121, at 592 n.1.

[429] *See supra* notes 375-96 and accompanying text.

[430] MMPA, *supra* note 375, § 1371. The U.S. Department of Commerce has jurisdiction over all cetaceans and pinnipeds, except for the walrus; the Department of the Interior is responsible for all other marine mammals. *Id.* § 1362(11).

[431] MMPA, *supra* note 375, § 1371(b).

"Taking" is defined as any hunting, capture, killing, or harassment.[432] Permits may be issued for the purposes of scientific research, public display, or takings incidental to commercial fishing operations.[433] Before issuing a permit, the appropriate Secretary must estimate the current stock size of the species in question and make findings on the impact of the proposed taking on the optimum sustainable population.[434] A permit may not be issued if the proposed catch would bring the stock below the OSP level or if the stock is depleted (*i.e.*, currently below OSP or categorized specifically as "depleted").[435] However, a limited number of depleted stocks may be taken "accidentally" in connection with commercial fishing operations.[436]The MMPA created the Marine Mammal Commission: (1) to review permit applications and recommend appropriate action to the Secretary involved; and (2) to develop, review, and make recommendations on the actions and policies of all federal agencies with respect to marine mammals.[437] The Commission is advised in its work by a Committee of Scientific Advisors. To ensure that federal actions affecting marine mammals adequately consider scientific advice, the Commission has a built-in safeguard. When the Commission decides not to accept the recommendations of its scientific advisors, it must forward the recommendations to the federal agencies involved and to Congress—along with a detailed explanation of its reasons for not accepting them.[438] Similarly, when a federal agency fails to accept a Commission recommendation, it must give a detailed explanation.[439]

Although the MMPA does not have any international legal effect, it does obligate the United States to promote the policies and goals of the MMPA during international negotiations.[440] This requirement prompted United States negotiators to lobby the IWC for a moratorium.[441] Even so, the MMPA exempts from the permits process "takings" pursuant to international treaties to which the United States is a party.[442] For example, the hunting of fur seals under the Fur Seal Convention is not affected.[443]

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[432] *Id.* § 1362(12).

[433] *Id.* § 1371(a).

[434] *Id.* § 1373(d).

[435] *Id.* § 1371(a)(3)(B).

[436] Regulation Governing the Taking and Importing of Marine Mammals, 50 C.F.R. § 216.24(d)(2)(C) (1984). For a description of the process for obtaining permits, see MMC 1982 REP., *supra* note 43, at 80-81.

[437] MMPA, *supra* note 375, § 1401.

[438] *Id.* § 1403(c).

[439] *Id.* § 1402(d).

[440] *Id.* § 1378(a).

[441] *Fisheries 1979 Hearings*, *supra* note 255, at 336 (statement of Patricia Forkan).

[442] MMPA, *supra* note 375, § 1372(a)(2). *See also id.* § 1383; Regulation Governing the Taking and Importing of Marine Mammals, 50 C.F.R. §§ 216, 216.21 (1982).

[443] Scarff II, *supra* note 27, at 615-16.

The extension of United States jurisdiction to 200 miles increased the possibilities for conflicts with other international obligations. For example, the large number of Dall's porpoises taken incidentally by Japanese fishermen were now within United States jurisdiction, leading to possible conflict with the Convention for the High Seas Fisheries of the North Pacific Ocean.[444] In 1978 this Convention was renegotiated, allowing Japanese fishermen to catch salmon both inside and outside the United States 200-mile zone (the Fishery Conservation Zone), but incidental catches after June 1981 were subjected to the permit requirements and to other requirements of the MMPA.[445] Pursuant to the Protocol and a Memorandum of Understanding between the United States and Japan, a three-year permit allowing Japanese fishermen to take annually up to 5,500 Dall's porpoises, 450 northern fur seals, and 25 northern sea lions was issued.[446]

The United States formally prohibited foreign whaling in the 200-mile zone in 1977, causing strong protests by Japan. The Whaling 1946 Convention applies to waters within the jurisdiction of signatory states, even in the territorial seas. It would also be difficult to conclude that the Whaling 1946 Convention creates an obligation to allow foreign whaling, although this is implied in the legislative history of the Fishery Conservation and Management Act of 1976 (FCMA or MFCMA).[447] The United States maintains that it has a right to take actions, within its jurisdictions, more restrictive than those which the IWC requires.[448]

The MMPA not only prohibits the taking of marine mammals but also prohibits the importation of marine mammals or marine mammal products taken in contravention of the MMPA.[449] In addition, the MMPA requires letters of compliance with United States standards from those foreign governments whose nationals wish to export tuna into the United States.[450] Since the United States is not a large importer of marine mammal products,[451] import restrictions alone are unlikely to achieve much protection. However, two federal laws incorporated some legislative power into the United States and international protective efforts. The Pelly Amendment to the Fisherman's Protective Act of 1967[452] al-

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[444] *See supra* note 368 and accompanying text.

[445] Protocol to the Convention for the High Seas Fisheries of the North Pacific Ocean, *done* Apr. 25, 1978, 30 U.S.T. 1095, T.I.A.S. No. 9242 (entered into force June 3, 1981).

[446] Memorandum of Understanding, June 3, 1981, T.I.A.S. No. 10,164. *See* MMC 1981 REP., *supra* note 43, at 45-47.

[447] 16 U.S.C. § 1801 *et seq.* (1976 & Supp. V 1981).

[448] Scarff II, *supra* note 27, at 615-18.

[449] MMPA, *supra* note 375, § 1372(b)-(c).

[450] *Id.* § 1371(a)(2).

[451] Levin, *supra* note 3, at 585.

[452] 22 U.S.C. § 1978 (1976 & Supp. V 1981).

lows the President to ban all imports of fishery products from a country which conducts fishing operations in a manner or under circumstances which diminish the effectiveness of international conservation programs.[453] Originally designed to bolster efforts to conserve Atlantic salmon,[454] the Pelly Amendment applies equally to whaling operations.[455] In addition, the 1979 Packwood-Magnuson Amendment to the FCMA requires that the Secretary of State reduce by at least fifty percent the amount of fish which a nation certified under the Pelly Amendment may catch in the United States 200-mile zone.[456]

Unfortunately, the sanctions of the Pelly Amendment are not mandatory. Once the Secretary of Commerce certifies that certain fishing operations diminish the effectiveness of an international conservation scheme, the President is not required to restrict imports, although he must inform Congress of his reasons.[457] An offending nation need *not* be a party to any conservation treaty, however,[458] and an objection to IWC regulations may trigger the certification process even though the Whaling 1946 Convention is not violated by that objection.[459]

Certification has occurred only twice—in 1973 when Japan and the USSR exceeded the minke whale quota of the IWC and in 1978 when Chile, Peru, and South Korea exceeded the IWC whale quotas.[460] In both cases the President did not embargo fishery products. Even so, the threat of such sanctions has led several countries to adopt more conciliatory attitudes in the IWC,[461] and the sanctions may have induced some countries to join the IWC.[462] Each of these cases involving certification occurred before the Packwood-Magnuson Amendment came into effect, but the threats generated by both amendments reportedly caused South Korea to withdraw its objection to the IWC's cold harpoon ban.[463]

A number of foreign actions probably qualify for certification and the application of sanctions, but they have escaped the full impact of the law due to political reasons. One example is Taiwanese whaling which ignores IWC guidelines. In addition, objections to the cold harpoon ban by Brazil, Iceland, Japan, Norway, and the USSR,[464] diminish the effectiveness of the IWC's conserva-

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[453] *Id.* § 1978(a).

[454] Levin, *supra* note 3, at 570.

[455] 22 U.S.C. § 1978(h)(4) (Supp. V 1981).

[456] 16 U.S.C. § 1821(e)(2) (Supp. V 1981).

[457] 22 U.S.C. § 1978(b) (Supp. V 1981).

[458] Scarff II, *supra* note 27, at 604-05.

[459] *Id.*

[460] Bonker, *supra* note 291, at 52; *Whaling Controversy*, *supra* note 188, at 232.

[461] Scarff II, *supra* note 27, at 604.

[462] M'Gonigle, *supra* note 23, at 186.

[463] MMC 1981 REP., *supra* note 43, at 29.

[464] *See id.* at 25.

tion activities. The failure to impose sanctions uniformly could damage the credibility of both the Pelly Amendment and the Packwood-Magnuson Amendment.[465] Although political factors will inevitably be considered and although a negotiated settlement of outstanding problems is preferable to the imposition of sanctions, a consistent and nonpolitical application of the law is essential if it is to remain an effective mechanism for marine mammal protection.

IV. TOWARD AN INTERNATIONAL PROTECTIVE REGIME

A. *International Organizations and Conservation Treaties*

The development and strengthening of regional and municipal regulations protecting marine mammals is essential because the range of many marine mammals is primarily within the coastal zones of one or a few countries and because large international conventions often get sidetracked by extraneous issues. Conversely, many other species of marine mammals migrate over long distances or occur in many areas, and many countries either lack the will or the resources to protect adequately animals near their coasts. Therefore, some global regulatory framework is necessary.

A number of international agencies have expressed interest in the problems of marine mammals, including the United Nations Food and Agriculture Organization (FAO), the United Nations Environmental Programme (UNEP) and Environmental Fund, and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[466] The FAO has provided technical assistance to the IWC since 1963, and in 1973 the FAO formed an Advisory Committee on Marine Resources Research with working groups on: (1) the large cetaceans, (2) the small cetaceans and sirenians, and (3) seals and sea otters.[467] With limited funding and with increased problems involving food fishery conservation and development, the FAO's ability to contribute to marine mammal protection will probably decrease.

Two global conservation agreements evince some promise of aiding marine mammal conservation efforts. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[468] regulates trade in animal or

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[465] *See* Bonker, *supra* note 291, at 52-53.

[466] Nafziger, *supra* note 121, at 602.

[467] Scarff II, *supra* note 27, at 627. *See* U.N. FOOD AND AGRICULTURE ORGANIZATION, MAMMALS IN THE SEA (1978); U.N. FOOD AND AGRICULTURE ORGANIZATION, SUMMARIES OF REPORTS OF THE BERGEN MEETING OF 1976 ON CONSERVATION AND MANAGEMENT OF LARGE WHALES, SMALL CETACEANS, PINNIPEDS, SIRENIANS, AND MARINE OTTERS, U.N. Doc. FAO/ACMRR/MM/SC (Sept. 1976).

[468] *Done* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (entered into force July 1, 1975) [hereinafter cited as CITES].

plant species which are or may become threatened with extinction. All stocks of great whales except the Bryde's and minke whales are listed as threatened with extinction. Other species of marine mammals which are so listed include: (1) the Ganges River dolphin; (2) the Caribbean,[469] Hawaiian, and Mediterranean monk seals; (3) the northern elephant seal, and (4) the southern seal otter.[470] Trade in these species is limited to primarily noncommercial purposes.[471] Species which may become threatened with extinction if strict controls are not instituted include (1) the southern elephant seal, (2) the Amsterdam Island fur seal, (3) the Galapagos fur seal, (4) the Guadalupe fur seal, (5) the southern fur seal, and (6) the polar bear.[472] These species may not be traded without prior permission.[473]

The Convention on the Conservation of Migratory Species of Wild Animals (Migratory Species Convention)[474] seeks to protect those species that inhabit international waters or which migrate through the territory of more than one country. The United States has not become a party to the Migratory Species Convention for fear that superimposing a new treaty on existing agreements would be counter-productive and confusing. In addition, the United States believes that the Migratory Species Convention might conflict with coastal-state jurisdiction in coastal waters,[475] and it is feared that the Convention's emphasis on "range-state agreements" could justify nonparticipation in other international agreements, particularly the Whaling 1946 Convention.[476]

B. The United Nations Conferences on the Law of the Sea

Under customary international law, the living resources of the high seas are *res nullius*, and they may be appropriated by anyone in the absence of definitive law to the contrary. Despite some sentiment to the contrary,[477] no definite customary law has developed which requires nations to conserve living resources or to prevent their extinction. Although a number of treaties do impose such duties on signatories and although the resolutions of various international bodies have consistently called for protective efforts,[478] even the most environmentalist-

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[469] This species is probably extinct. *See* D. RICE, *supra* note 323, at 5.

[470] CITES, *supra* note 468, appendix I.

[471] *Id.* art. III.

[472] *Id.* appendix II.

[473] *Id.* art. IV.

[474] *Done* June 21, 1979, *reprinted in* 19 I.L.M. 15 (1980).

[475] Nafziger, *supra* note 121, at 606.

[476] *See Fisheries 1979 Hearings*, *supra* note 255, at 338 (statement of Patricia Forkan).

[477] *See* Nafziger, *supra* note 121, at 601.

[478] For example, the 1972 U.N. Conference on the Human Environment (Stockholm Conference) recommended that countries adopt international conventions protecting species which in-

minded countries have not acted from any belief of legal necessity; the required *opinio juris sive necessitatis* is lacking. The progress which has been made has occurred because countries have consciously ceded legal rights via international agreements.

Some limitations on the principle involving the unlimited freedom of fishing the high seas were accepted by the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958. The Convention on the High Seas (High Seas Convention),[479] one of four negotiated by UNCLOS I,[480] reaffirms the principle of freedom of fishing, although this freedom must be exercised "with reasonable regard to the interests of other States,"[481] which presumably prohibits a selfish disregard of the interests of other countries in resource conservation.[482] Similarly, the Convention on Fishing and Conservation of the Living Resources of the High Seas (Fishing Convention)[483] obligates countries to adopt or cooperate with other countries in adopting necessary conservation measures. A coastal state is recognized to have a special interest in the living resources near its shores and may participate in any conservation regime for species in this area, or the coastal state may introduce unilateral, *nondiscriminatory* measures if negotiations prove to be fruitless and if such measures are justified by scientific evidence.[484] Even a noncoastal state may call for conservation measures in an area where it does not fish itself—if exploitation in that area might affect fishing elsewhere, as in the case of migratory stocks.[485] In addition to the four conventions, UNCLOS I resolved that countries should adopt provisions for the

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habit international waters and which migrate from one country to another. The Stockholm Conference also called for a moratorium on the hunting of cetaceans. *See* Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (revised ed. 1972), *reprinted in* 11 I.L.M. 1416, 1434 (1972). The Stockholm Declaration is not binding, but some scholars have determined that it constitutes evidence of an emerging international consensus. *See* Nafziger, *supra* note 121, at 601. However, the Stockholm Conference was not attended by either the USSR or the eastern European countries, thereby diminishing its value as evidence of any consensus.

[479] *Done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter cited as High Seas Convention].

[480] The other three conventions were the Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966) [hereinafter cited as Fishing Convention]; Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964); Convention on the Territorial Sea and the Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

[481] High Seas Convention, *supra* note 479, art. 2.

[482] *See* J. BRIERLY, THE LAW OF NATIONS 309-10 (6th ed. 1963).

[483] Fishing Convention, *supra* note 480, arts. 3-4. *See* BRIERLY, *supra* note 482, at 314-15.

[484] Fishing Convention, *supra* note 480, arts. 6-7. *See* BRIERLY, *supra* note 482, at 315-16.

[485] Fishing Convention, *supra* note 480, art. 8. *See* BRIERLY, *supra* note 482, at 316.

humane killing and capture of marine life, particularly seals and whales.[486]

Although UNCLOS I moved international law away from legal precedent (by imposing a positive obligation on countries to conserve marine resources), as a practical matter, UNCLOS I failed, at least with regard to marine mammals. A number of important exploiters of marine mammals never ratified the four conventions. The major whaling states, Japan and the USSR (as well as the lesser exploiters of whales), never ratified the Fishing Convention[487] along with such minor whaling states as Chile, Peru, and South Korea.[488] In addition, conservation was defined in the Fishing Convention as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."[489] This definition clearly emphasizes utilization and leaves little room for aesthetic and moral values. The only positive duty in the Fishing Convention is to adopt or negotiate conservation measures for high seas fisheries. A nation would not breach the Fishing Convention by refusing to negotiate with another country which was seeking to lower or eliminate the catch of marine mammals for aesthetic or moral reasons, or even if the catch threatened the general ecological balance. Similarly, a country could have no right to impose regulations for these purposes in its conservation zone. Finally, the Fishing Convention applies only to fishing on the high seas. It does not provide a framework to protect species from nonfishing pressures. Clearly, the Fishing Convention does not apply to species caught incidentally, and it does not require the conservation of species occurring within territorial seas or internal waters.

It was hoped that the deficiencies found in the four 1958 conventions and in the other marine mammal conservation and management efforts would be corrected by the Third United Nations Conference on the Law of the Sea (UNCLOS III). While the Convention on the Law of the Sea (LOS Convention),[490] which was negotiated at UNCLOS III, discusses marine mammals explicitly, the protective regime it establishes contains serious deficiencies. The LOS Convention is unlikely to improve significantly the plight of marine mammals.

Under the LOS Convention, all countries continue to have the right to fish the high seas,[491] but they have a duty to cooperate in the conservation and management of high seas resources, and where more than one country fishes the same species or different species in the same area, countries are required to negotiate with a view to adopting necessary conservation measures and estab-

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[486] U.N. Doc. A/CONF.13/L.56 (1958). *See* Christol, *supra* note 165, at 156; Scarff I, *supra* note 13, at 382 n.333.

[487] *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 231 (1983).

[488] *Id.*

[489] Fishing Convention, *supra* note 480, art. 2.

[490] LOS Convention, *supra* note 7.

[491] *Id.* arts. 87, 116.

lishing appropriate international organizations.[492] Within the economic zone, the coastal state has a right to exploit living resources,[493] although this right must be exercised with due regard for the rights of other countries.[494] The coastal state must also ensure, on the basis of the best scientific evidence available, that the living resources within its economic zone are not endangered by over-exploitation. The coastal state must cooperate to this end through the appropriate subregional, regional, and global organizations.[495]

Where the same species or where the stocks of associated species occur within the economic zones of two or more coastal states, these countries must coordinate their conservation efforts through direct agreement or through appropriate international organizations.[496] Similarly, where species or stocks of associated species occur within, as well as beyond, the economic zone, the coastal state and the other countries fishing those stocks are required to agree either directly or through the appropriate organization on measures necessary for conservation.[497]

Catch limits are determined by the coastal state for species within the economic zone,[498] while limits for high seas stocks are determined by international agreements between countries.[499] In both cases, catch limits and other conservation measures shall be designed to maintain or restore populations to maximum sustainable population levels "as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing states, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional, or global."[500] Conservation efforts must also take into account effects on associated and dependent species with a view to maintaining or restoring populations of such species above levels where their reproduction may become seriously threatened.[501] Scientific information on fisheries and "catch and effort" data must be exchanged among concerned countries.[502] Under the LOS Convention, a coastal state is obligated to promote optimum utilization of the stocks within its economic zone, and it must allow access to other countries if *per se* it "does not have the

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[492] *Id.* art. 117.
[493] *Id.* art. 56, ¶ 1(a).
[494] *Id.* ¶ 2.
[495] *Id.* art. 61, ¶ 2.
[496] *Id.* art. 63, ¶ 1.
[497] *Id.* ¶ 2.
[498] *Id.* art. 61, ¶ 1.
[499] *Id.* arts. 117, 119.
[500] *Id.* art. 61, ¶ 3. Article 119, paragraph 1(a) applies the same standard to fishing on the high seas but deletes the language "the economic needs of coastal fishing communities and." *Compare id.* art. 61, ¶ 3, *with id.* art. 119, ¶ 1(a).
[501] *Compare id.* art. 61, ¶ 4, *with id.* art. 119, ¶ 1(b).
[502] *Compare id.* art. 61, ¶ 5, *with id.* art. 119, ¶ 2.

capacity to harvest the entire allowable catch. . . ."[503] All disputes relating to the interpretation or application of these provisions are subject to the dispute settlement procedures of the LOS Convention.[504]

These provisions appear to apply equally both to fin fish and to marine mammal fisheries, although two articles deal specifically with marine mammals. Under article 64, countries which fish for the highly migratory species listed in annex I are obligated to cooperate to ensure conservation and optimum utilization. Where no appropriate international organization exists, coastal states and fishing states shall cooperate to establish such an organization and participate in its work.[505] The marine mammals listed in annex I include the dolphin species, *Coryphaena hippurus* and *Coryphaena equiselis*, and the cetacean families, Physeterida, Balaenopteridae, Belaenidae, Eschrichtiidae, Monodontidae, Ziphidae, and Delphinidae.[506] Article 65 allows coastal states and appropriate international organizations to regulate, prohibit, or limit the exploitation of marine mammals more strictly than required by other provisions of the LOS Convention. Countries are obligated to cooperate with a view to conserving marine mammals. In the case of cetaceans, countries shall work through "the appropriate international organizations"[507] to study, manage, and conserve them.

Unfortunately, these provisions are confusing and poorly drafted, and they ignore important needs, at least as they apply to marine mammals. For example, annex I listing highly migratory species (to which article 64 applies) does not specify which of many rival taxonomic schemes the drafters relied upon. Particularly, with regard to odontocetes (toothed whales), there is no generally accepted classification.[508] By some classifications, annex I would include all cetacean families with the exception of the Platanistidae, all freshwater or estuarine species.[509] Since the family Delphinidae (dolphins) is included in annex I, there should be no need to include separately the two species *Coryphaena hippurus* and *Coryphaena equiselis*. More importantly, porpoises may or may not be included in annex I, depending on differing taxonomic interpretations. While some species of porpoises are coastal, the Dall's porpoise is migratory and subject to incidental catch by Pacific salmon fishermen.[510] Although some experts list the porpoises (Phocoenidae) as a subfamily of Delphinidae, this is a disputed viewpoint. A better approach would have been to specify the particular

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[503] *Id.* art. 62, ¶ 2.

[504] *Id.* arts. 279-299.

[505] *Id.* art. 64, ¶ 1.

[506] *Id.* annex I.

[507] *Id.* art. 65.

[508] *See* D. RICE, *supra* note 323, at 7-12.

[509] *Id.*

[510] *See supra* notes 369, 382-86 and accompanying text.

taxonomy being used or to include the Phocoenidae (or at least Dall's porpoise) in annex I.

The inclusion of any cetaceans in annex I may be unfortunate, however, since by listing dolphins and whales along with such species as tuna, they are subject to the requirement of optimum utilization. While it can be argued that until cetacean populations increase, any catch is suboptimal, protection should have been assured with a more specific provision.

As a general rule, dolphins are not killed as an economic resource *per se*, but rather because they inconveniently become entrapped in fishing nets. "Optimum utilization" of dolphins would seem to require that they be utilized for tracking fin fish and then released to locate more. Otherwise, the incidental catch of cetaceans is regulated by articles 61 and 119, which only require that countries consider the effects of fishing on associated and dependent species with a view to maintaining or restoring such species above levels where their reproduction may become seriously threatened.[511] This requirement could be interpreted to justify a stock size below even MSY levels.

The emphasis of article 64 is on encouraging cooperation through regional organizations, and including whales in this provision could be misinterpreted as placing whales under the jurisdiction of regional organizations—rather than under a global organization like the IWC.[512] Unlike the other species in annex I, whales are migratory on a global basis, traversing long distances in their annual journeys, and their protection can and should be best achieved through a global IWC approach.

As an alternative to removing all cetaceans from annex I, the small cetaceans could remain with the unambiguous addition of the Dall's porpoise. This change would be part of a "dual management" system in which regional organizations would manage small cetaceans in the first instance under article 64, with overriding jurisdiction in the international organizations envisioned in article 65.

Article 65 of the LOS Convention is an improvement over some of the UNCLOS III negotiating texts,[513] which seemed to allow coastal states to prescribe looser regulations for the catch of marine mammals in the economic zone than those regulations required by article 61. Even so, other problems remain. For

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[511] *Compare* LOS Convention, *supra* note 7, art. 61, ¶ 4, *with id.* art. 119, ¶1(b).

[512] *See* Pijanowski, *Comments on Fisheries and the Law of the Sea*, MARINE TECH. SOC'Y J., July-Aug. 1977, at 34-35 [hereinafter cited as Pijanowski].

[513] *Compare* LOS Convention, *supra* note 7, art. 65, *with* Informal Composite Negotiating Text/Revision 1, U.N. Doc. A/CONF.62/WP.10/Rev.1 (1979) art. 65, *and* Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP.10, 8 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1 (1977) art. 65, *and* Revised Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/Rev.1/Parts I, II, III, 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 125 (1976) art. 54.

example, unless an international organization exists with competence to manage marine mammals in the economic zone, regulation is left solely to the coastal state. Coastal states may choose the inadequate, modified-MSY management standard of article 61.[814]

Another potential problem found in article 65 is the utilization of the plural "international organizations"—through which countries are to work for the conservation of cetaceans. By failing to recognize one international organization (*i.e.*, the IWC or a successor organization), the LOS Convention invites disruptive coastal states, seeking the exploitation rather than the conservation of marine mammals, to form competing organizations with looser management standards.

C. Policy Alternatives and Recommendations

Since the UNCLOS III negotiators ignored criticisms of the LOS Convention's marine mammal protection regime, the creation of an adequate, consistent, global approach to marine mammal protection will require extra efforts by the governments and organizations concerned. Although the developing countries tend to fear encroachment upon their new-found sovereignty over the resources of their economic zones, few of these countries have direct interests in marine mammal fisheries, and it should be emphasized that strong conservation measures enhance rather than diminish the concept of the economic zone. Some developing countries have recognized their interest in protecting marine mammals, and they have emerged as strong voices in the IWC. These voices should be enlisted in the movement for a Protocol to the LOS Convention which amends article 65 to provide as follows:

> *Article 65*
> *Cetaceans and Other Marine Mammals*
>
> 1. Nothing in this convention restricts the rights of a coastal state or the competence of an international organization, as appropriate, to prohibit or more strictly regulate or limit the exploitation of marine mammals.
>
> 2. States shall co-operate with a view to ensuring conservation of marine mammals and shall in particular work through the competent international organization for the conservation, protection and study of cetaceans, both within and beyond the exclusive economic zone.
>
> 3. States shall establish regulations, measures and procedures for the conservation and protection of cetaceans applicable to vessels flying their flag and activities within the exclusive economic zone subject to their jurisdiction. Such laws, regulations and measures shall at least have the same effect as that of generally accepted international regulations, methods and procedures established through the

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[814] *See* Pijanowski, *supra* note 512, at 35.

competent international organization.

In addition, the category "cetaceans" should be deleted from annex I except for the family Delphinidae, and Dall's porpoise should be explicitly included as part of a dual management system. Article 64 should be amended to apply explicitly to incidental as well as direct catches of marine mammals.

These changes are designed to: (1) ensure that the IWC or a successor organization will have exclusive competence to set minimum standards for conservation of the great whales in the economic zone as well as on the high seas; (2) require that all vessels flying under the flags of signatory states operate under international conservation standards; and (3) subject incidental as well as direct takes of highly migratory small cetaceans to a "dual management" regime, with jurisdiction shared by the IWC (or a successor organization) and regional fisheries commissions.

These modifications, and in fact the LOS Convention's 1982 provisions, will mean little without a strong IWC. Many proposals have been put forward to modify the IWC or to eliminate it in favor of a new organization.[515] During the early 1980's, the prospects for an entirely new organization were minimal, because the general trend in the international community did not favor any new organization, and it was doubtful that the whaling nations would approve it.[516] Since adequate protection requires continuous, positive action, some global organization is imperative to gather and collate data, to discuss and prescribe regulations, and to enforce the protective measures already in place. Unfortunately, given the history of the IWC, some skepticism is probably warranted, and it is apparent that substantive and concrete results will come neither easily nor quickly without a strong commitment by all of the IWC member states to the ideals of conservation. Even so, by slowly remedying the deficiencies of the IWC over the long term, some progress can be made.

Since for the foreseeable future the IWC will be the only international organization with management authority over the large cetaceans, signatories of the LOS Convention are bound to work through the IWC, if not to join it. While this trend toward IWC membership constitutes a positive development, it may aggravate the polarization of the IWC members which has already resulted from its increased membership. Too often in recent years, strong conservationist measures have been adopted by the IWC, only to become the cause for "objections" by whaling members. Of course, the ultimate solution is abolition of the Whaling 1946 Convention's "objection clause," but this solution is beyond the realm of even the most unflagging optimists. The question of whether a consistent objection to reasonable regulations constitutes a violation of the LOS Con-

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[515] *See* Christol, *supra* note 165, at 160; Kutner, *supra* note 175, at 795-96.

[516] *See* Scarff II, *supra* note 27, at 628.

vention's "working through" requirement is presumably subject to the dispute settlement procedures of the LOS Convention. Adjudication may hold that a violation exists even though objections are explicitly allowed by the Whaling 1946 Convention—similar to the way in which "objections" may diminish the effectiveness of the IWC and thereby fall within the purview of the Pelly Amendment.[517] Even so, these objections are probably inevitable as long as whaling continues, and the most an international organization can do is to publicize the objections and mobilize international public opinion against those countries which exercise the objection option.

In order to maximize the value of the adverse publicity incurred by objecting members and to increase the cost of objecting, decisions should be based on the best available scientific evidence. The politicization of the scientific decision-making process has been mentioned,[518] and a number of solutions have been proposed.[519] One of the best ways to ensure against politicization is to require that decisions be based on a written record, perhaps developed through a notice and comment procedure modeled after the United States Administrative Procedure Act.[520] Pursuant to this recommendation, the Scientific Committee would be required to publish proposed regulations before they went into effect and to accept comments from all interested parties. Any final regulation would have to meet objections or explain why objections are inappropriate. The full IWC would be empowered to negate a regulation of the Scientific Committee only if the given regulation constituted an abuse of discretion; that is, if it was not based on the record or if implementation was beyond the authority of the IWC. Any negation of a regulation would be accompanied by a written explanation. Perhaps an appeal to some higher body could be arranged in the event a dispute arose over the IWC's action, and a possible appellate body could be the Law of the Sea Tribunal established by the LOS Convention.[521] Unlike the New Management Procedure,[522] this proposal would affect the actual way in which decisions are made, rather than merely restraining the types of decisions over which the Scientific Committee has jurisdiction. Implementation of this recommendation would not eliminate political pressure but would ensure that all sides were heard. In a similar way, procedures for adjudicating claimed violations of regulations should be clearly articulated, require open hearings, and allow interested parties to present their viewpoints.

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[517] *See supra* notes 452-55, 458-59 and accompanying text.

[518] *See supra* notes 254-61 and accompanying text.

[519] *See* Levin, *supra* note 3, at 589; M'Gonigle, *supra* note 23, at 214-15; Scarff I, *supra* note 13, at 417-22; Scarff II, *supra* note 27, at 629.

[520] 5 U.S.C. § 501 (1976 & Supp. V 1981).

[521] LOS Convention, *supra* note 7, annex VI. Article 22 of annex VI specifically allows the Tribunal to accept disputes where another agreement so provides.

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

Certain substantive actions should be taken by the IWC as well. A statute on aboriginal whaling should be promulgated, and it should require, by analogy to the Polar Bear Convention,[523] that the "taking of whales" must be by traditional methods and in the exercise of traditional rights. In addition, the IWC must have the authority to limit entry to whale fisheries in order to prevent over-capitalization of the whaling industry, and this recommendation could probably be implemented via a licensing fee arrangement.[524] Of course, some preference should be given to existing firms. Perhaps most importantly, the IWC should promote scientific research on cetaceans, and perhaps sponsor an agreement among member states allowing research on cetaceans in economic zones without coastal-state consent.[525] Finally, liaison should be established with regional organizations having jurisdiction over the incidental takes of the small cetaceans to ensure that research efforts are not duplicated unnecessarily and that quotas are based on the best scientific evidence available.

V. CONCLUSION

Undoubtedly, a number of other measures could be taken to improve marine mammal conservation. A great deal has been accomplished during the 1970's and early 1980's, but further work is essential to keep the marine mammal issue before the international public and to ensure that marine mammal stocks remain viable. These creatures are truly unique and worth saving for their own sake, having value beyond the meat, oil, and fur they provide. However, their continued existence requires more than rhetoric, more than demonstrations, and more than environmental activists in rubber boats. What is necessary is an honest appraisal of all points of view and a creative accommodation of competing interests.

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[523] *See supra* note 403 and accompanying text.

[524] *See* F. BELL, *supra* note 2, at 161-70.

[525] Article 246 of the LOS Convention requires coastal state consent prior to conducting marine scientific research in the economic zone. LOS Convention, *supra* note 7, art. 246.

TABLE I

Taxonomy of Marine Mammals*
(Class Mammalia)

Order	Family[a]	Genus	Species	Common Names	Range
Carnivora	Ursidac	Ursus	maritimus	Polar bear	Ice-covered regions of Arctic and adjacent coasts
	Odobenidae[b,c]	Odobenus	rosmarus	Walrus	Shallow waters near ice in Arctic Ocean and adjacent seas
	Otarildae	Phocarctos	hookeri	Auckland sea lion New Zealand sea lion	Subantarctic islands south of New Zealand
		Otaria	flavescens	South American sea lion	Coastal waters, Brazil and Peru to Str. of Magellan and Falklands
		Zalophus	californianus	Black sea lion, Calif., Japanese, Galapagos sea lion	Vancouver to Mexico; Sea of Japan (unconfirmed, probably extinct); Galapagos Islands
		Neophoca	cinerea	Australian sea lion	Coastal waters, southern to western Austraila
		Eumetopias	jubatus	Northern sea lion	California to Bering Sea, Aleutians, Kurils, Kamchatka
		Callorhinus	ursinus	Northern fur seal	California to Bering, Okhotak Seas
		Arctocephalus	pusillus	Giant fur seal, Victorian, Tasmanian, South African, Cape fur seal	Angola to South Africa, and southern, southeastern Austraila
			gazella	Antarctic fur seal	Southern ocean, south of Antarctic convergence
			forsteri	Antipodean, Western Australian, New Zealand fur seal	Southern island N.Z., nearby islands, south to western Australia
			tropicalis	Subantarctic fur seal	Atlantic, Indian Oceans, north of Antarctic convergence

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
			australis	South American fur seal	Brazil, Peru to Tierra del Fuego, Falkland Islands
			galapagoensis	Galapagos fur seal	Galapagos Islands
			philippii	Juan Fernandez fur seal	Chile
			townsendi	Guadalupe fur seal	Baja California
	Hustelidae	Enhydra	lutris	Sea otter	Formerly Baja California to Alaskan Peninsula and Aleutians to Hokkaido
	Phocidae	Phoca	vitulina	harbor seal	Shores of N. America and Eurasia from Hokkaido to Baja California and from N. Carolina to Spain
			largha	Spotted seal; largha seal	Chukchi, western Beaufort, northern Bering, Okhotak and Japan Seas, south to Shantung
			hispida	Ringed seal	Artic Ocean and adjacent seas, several Finnish Lakes
			sibirica	Baikal seal	Lake Baikal, USSR
			caspica	Caspian seal	Northern Caspian Sea
			groenlandica	Harp seal	North Atlantic Ocean
			fasciata	Ribbon seal	North Pacific, northern Hokkaido to Alaska
		Halichoerus	grypus	Gray seal	North Atlantic: Newfoundland to Massachusetts, British Isles and Iceland to White Sea, Baltic Sea
		Erigrathus	barbatus	Bearded seal	Northern coasts and islands of Eurasia a N. America
		Cystophora	cristata	Hooded seal, bladdernose seal	North Atlantic, Novaya Zemlya to eastern Canada

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
		Monachus	monachus	Mediterranean monk seal	Originally from Black Sea to Mauritania, Madiera and Canary Islands. Now very rare.
			tropicalis	Caribbean, West Indian monk seal	Formerly western Caribbean to Florida Keys and Yucatan. Now extinct.
			schauinslandi	Hawaiian monk seal	Leaward chain of Hawaiian Islands, rarely south to Hawaii and Johnston Island
		Lohodon	carcinophagus	Crabeater seal	Southern Sea from New Zealand, Australia, and Tasmania to S. Africa and S. America
		Ommatophoca	rossii	Bigeye, Ross seal	Circumpolar in pack ice of Southern Ocean
		Hydrurga	leptonyx	Leopard seal	Circumpolar in Southern Ocean, as far north as New Zealand, Australia, S. Africa, and S. America
		Leptonychotes	weddelli	Weddell seal	Circumpolar in Southern Ocean, as far north as Uruguay
		Mirounga	loenina	Southern elephant seal	Circumpolar in Southern Ocean, as far north as Argentina
			augustirostris	Northern elephant seal	Baja California to southwest Alaska

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
Sirenia	Dogongidae	Dugong	dugon	Dugong	Indian and western Pacific Oceans from Mozambique to Australia, Ryukus, Palau, Solomons, New Hebrides, New Caledonia, and Fiji. Rare except in northern Australia.
		Hydrodamalis	gigas	Great northern sea cow, Stellar's sea cow	Formerly islands in Bering Sea, now extinct.
	Trichechidae	Trichechus	manatus	Caribbean, West Indian manatee	Atlantic and Gulf coast from N. Carolina to northeastern S. America and Caribbean islands
			senegalensis	West African manatee	Coastal lagoons and rivers from Senegal to Angola
			inunguis	Amazon manatee	Rivers of northeastern S. America
Mysticeti[d]	Eschrichtiiae	Eschrichtius	robustus	Gray whale	Shallow coastal waters of north Pacific, from Gulf of California to Chukchi and Beaufort Seas and from Korea and Japan to Okhotsk Sea
	Balaenopteridae	Balaenoptera	acutorostrata	Minke whale	Widely distributed in all oceans
			edeni	Bryde whale	Tropical and warm temperate waters of Atlantic, Pacific, and Indian Oceans
			borealis	Sei whale	All oceans except tropical and polar seas
			physalus	Fin whale	All oceans but rarely tropical waters or in pack ice
			musculus	Blue whale	All oceans
		Megaptera	novaengliae	Humpback whale	Nearly worldwide from subpolar to tropical waters
	Balaenidae	Balaena	glacialis	Right whale, black right whale	Temperate waters of north Atlantic, north Pacific, and Southern Hemisphere
			mysticetus	Bowhead, Arctic right whale	Arctic waters
		Caperea	marginata	Pygmy right whale	Temperate waters of Southern Ocean

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
Odontoceti	Platanistidae	Inia	geoffrensis	Amazon dolphin, bouto	Amazon and Orinoco basins
		Lipotes	vexillifer	Pei ch'i, whitefin dolphin	Yangtze River and tributaries
		Pontoporia	blainvillei	La Plata dolphin, franciscana	Coastal waters and estuaries of eastern S. America
		Platanista[e]	gangetica	Ganges susu, Ganges dolphin	Ganges River system
			minor	Indus susu, Indus dolphin	Indus River system
	Delphinidae	Steno	bredanensis	Rough-toothed dolphin	All tropical and warm temperate seas
		Sousa	chinensis	Indo-Pacific humpback dolphin, white dolphin	Coastal waters of Indian and western Pacific from S. Africa to southern China, Borneo, and Australia
			tenszil	Atlantic humpback dolphin	Coastal waters of west Africa from Mauritania to Cameroon
		Sotalia	fluviatills	Tueuxi, tookashee	Coastal waters and rivers of northeastern S. America, Amazon River system
		Gursiops	truncatus	Bottlenose dolphin	Widely distributed in tropical and temperate waters, mostly near shore
		Stenella	longirostris	Spinner dolphin	Tropical oceans
			attenuata	Bridled dolphin, pan-tropical spotted dolphin	Tropical oceans

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
			plagiodon	Spotted dolphin, Atlantic spotted dolphin	Tropical and warm temperate waters of Atlantic
			coeruleoalba	Stripped dolphin	Temperate and tropical waters worldwide
		Delphinus	delphis	Saddleback dolphin	Tropical and warm temperate waters worldwide
		Lagenodelphis	hosci	Shortsnouted whitebelly dolphin	Tropical and warm temperate waters of Indian and Pacific Ocean
		Lagenorphynchus	albirostris	Whiteback dolphin	North Atlantic from Davis Strait and Newfoundland to Berents and North Seas
			acutus	Atlantic whiteside dolphin	North Atlantic from Massachusetts and southern Greenland to Norway and Britain
			obliquidens	Pacific whiteside dolphin, hookfin dolphin	Coastal waters from Baja California to Alaska and from Kurils to Japan
			obscurus	Dusky dolphin	Temperate coastal waters off S. America, S. Africa, Kerguelen Is., Australia, and New Zealand
			australis	Blackchin dolphin	Temperate waters off S. America and Falklands
			Cruciger	Hourglass dolphin	Temperate waters of Southern Ocean
		Cephalorhynchus	commersonii	Piebald dolphin, Jacobite	Atlantic coast of S. America, Falklands, South Georgia, Kerguelen Islands
			eutropia	Black, Chilean dolphin	Coast of Chile
			heavisidii		Coastal waters of South Africa and Namibia
			hectori	Pied, whitefront dolphin	Coastal waters of New Zealand

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
		Lissodelphis	borealis	Northern right-whale dolphin	Temperate waters from Japan and Kurils to British Columbia and California
			peronil	Southern right-whale dolphin	Temperate waters of Southern Ocean
		Grampus	griseus	Whitehead grampus, gray grampus	All temperate and tropical seas
		Peponocephala	electra	Little blackfish, many-toothed or melon-head blackfish	Tropical Atlantic, Pacific, and Indian Oceans
		Feresa	attenuata	Pygmy killer whale	Tropical and warm temperate waters
		Pseudorca	crassidens	False killer whale	All temperate and tropical waters
		Globicephala	melaena	Longfin pilot whale	Cool temperate waters of north Atlantic and Southern Hemisphere
			macrohynchus	Shortfin pilot whale	Tropical and warm temperate waters of Atlantic, Pacific, and Indian Oceans
		Orcinus	orca	Killer whale	All oceans, chiefly cool, coastal waters
		Orcaella	brevirostris	Irrawaddy dolphin, Iumbalumba	Coastal waters from Bay of Bengal to New Guinea and northern Australia
		Phocoena[f]	phocoena	Harbor porpoise	Coastal waters of north Atlantic, north Pacific, and Black Sea
			sinus	Gulf of California porpoise, vaquita, cochita	Upper Gulf of California
			dioptrica	Spectacled porpoise	Coasts of Argentina and Uruguay, Falklands and South Georgia
			spinipinnis	Black porpoise	S. American coasts: Uruguay to Patagonia, Peru to Chile

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
		Neophocaena[g]	phocaenoides	Finless porpoise	Coastal waters and rivers from Pakistan to Korea, Japan, Borneo, and Java
		Phocoenoides[h]	dalli	Dall porpoise, white flank porpoise, True's porpoise	Offshore waters from California and Japan to Bering Sea
	Monodontidae[i]	Delphinapterus	leucas	Beluga, belukha, white whale	Arctic Ocean and adjacent seas, Cook Inlet, Alaska and Gulf of St. Lawrence
		Monodon	monoceros	Narwhal	North polar seas, mainly in deep waters
	Physeteridae	Physeter	macrocephalus	Sperm whale	All oceans except polar ice fields
		Kogia	breviceps	Pygmy sperm whale	Worldwide in tropical and warm temperate waters
			simus	Dward sperm whale	Seas adjacent to S. Africa, India, Ceylon, Japan, Hawaii, California, Baja California and eastern U.S.
	Ziphidae	Barardius	arnuxii	Southern giant bottlenose whale	Southern Ocean as far north as Argentina, south Australia, S. Africa
			bairdii	North Pacific giant bottlenose whale	North Pacific, from California and Japan to Bering Sea
		Ziphius	cavirostris	Goosebeak whale	All temperate and tropical seas
		Tasmacetus	shepherdi		Known only from a few specimens stranded in New Zealand, Chile, and Argentina
		Indopacetus	pacificus	Indo-Pacific beaked whale	Known from only two specimens stranded in Australia and Somalia
		Hyperoodon	ampullatus	North Atlantic bottlenose whale	North Atlantic from Davis Strait and Novaya Zemlya to Rhode Island and English Channel, possibly Mediterranean Sea
			planifrons	Flathead bottlenose whale	Southern Ocean, from Australia, S. Africa, and Argentina to Pacific and Indian Ocean coasts of Antarctica

TABLE I (continued)

Order	Family[a]	Genus	Species	Common Names	Range
		Mesoplodon	hectori		Known only from Taxmania, New Zealand, Falklands, and S. Africa
			mirus		North Atlantic from Florida and Nova Scotia to British Isles; temperate waters off S. Africa
			europaeus	Antillean, Gulf Stream beaked whale	Western north Atlantic and Gulf of Mexico from Trinidad to Long Island; possibly English Channel
			grayi	Scamperdown whale	S. Africa, south Australia, New Zealand, Chatham Islands, and Argentina
			ginkgodens	Ginkgo-tooth whale	Ceylon, Taiwan, Japan and California
			carlhubbsi	Archbeak whale	North Pacific temperate waters, Japan to British Columbia and California
			bowdoini	Deepcrest whale	Known only from New Zealand, Tasmania, western Australia, Victoria, and Kerguelen Island
			stejnegeri	Sabertooth whale, Bering Sea beaked whale	Subarctic waters of North Pacific from Bering Sea to Japan and Oregon
			bidens	North Sea beaked whale	Cool waters of north Atlantic, from Newfoundland and Massachusetts to Norway and Bay of Biscay
			layardii	Straptooth whale	S. Africa, southern Australia, New Zealand, and Falklands
			densirostris	Dense-beak whale, tropical beaked whale	Tropical and warm temperate waters of all oceans

Table I: Notes

* Source: D. RICE, NAT'L OCEANIC & ATMOSPHERIC AD., A LIST OF THE MARINE MAMMALS OF THE WORLD (1977).

a. *Compare* Convention on the Law of the Sea, annex I, *done* Dec. 10, 1982, *reprinted in* 21 I.L.M. 1261, U.N. Doc. A/CONF.62/122 (1982).

b. Some taxonomists consider Odobenidae a subfamily of Otariidae.

c. Seals, sea lions, and walruses have usually been separated from terrestrial carnivores in a separate order or suborder Pinnipedia, but it is clear they share a common ancestry with bears, racoons, dogs, and weasels.

d. Mysticeti and Odontoceti have usually been considered suborders of the order Cetacea, but it is questionable whether they are monophyletic.

e. *Platanista gangetica* and *Platanista minor* are sometimes considered subspecies of the sam species.

f, g, h. *Phocoena, Neophocaena* and *Phocoenoides* are often accorded family rank (*Phocoenidae*).

i. Some authors consider the two species of Monodontidae to be members of the family Delphinidae.

Hawaii's Inclusion of Deposit Accounts in Article 9: A Statutory Analysis

I. INTRODUCTION

Hawaii and California are the only two states to include deposit accounts[1] within their versions of Article 9 of the Uniform Commercial Code.[2] In Hawaii, they have been under the umbrella of Article 9 since 1978, when the Hawaii State Legislature bucked the nationwide trend and boldly amended the existing statute to specifically include deposit accounts.[3] The legislature deleted the provision that expressly excluded deposit accounts from Article 9[4] and replaced it with one that allows creditors to perfect security interests in these accounts.[5] Amending Hawaii's version of Article 9 to include deposit accounts has impacted most directly upon the bank's[6] common law right of set-off.[7] The

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[1] " 'Deposit account' means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization . . . ." HAWAII REV. STAT. § 490:9-105(e) (Supp. 1984).

[2] Hawaii's version of the Uniform Commercial Code is found in HAWAII REV. STAT. ch. 490 (1976 & Supp. 1984).

[3] Act 155, 1978 Hawaii Sess. Laws 293 (codified at HAWAII REV. STAT. ch. 490 (Supp. 1979)).

[4] The section pertinent to the exclusion of deposit accounts from the scope of Article (g) provided that "[t]his Article does not apply . . . (k) to a transfer of an interest in any deposit account." HAWAII REV. STAT. § 490:9-104(k) (1978).

[5] HAWAII REV. STAT. § 490:9-302(1)(h) (Supp. 1984) provides that:

> (1) A financing statement must be filed to perfect all security interests except the following: . . .
>
> (h) A security interest in a deposit account. Such a security interest is perfected:
>
> (i) As to a deposit account maintained with the secured party, when the security agreement is executed.
>
> (ii) As to a deposit account maintained with any organization other than the secured party, when notice thereof is given in writing to the organization with whom the deposit account is maintained. . . .

[6] For purposes of this comment, "bank" will be used interchangeably with bank, savings and loan association, credit union or other depositary institution.

[7] A bank may exercise its common law right of set-off when the following elements are present:

result has been both positive and negative.

On the positive side, the amended statute helps resolve the traditional priority conflict that arises whenever a bank exercises its right of set-off against proceeds deposited after the sale of collateral in which a perfected security interest exists.[8] The beneficial effect is that a creditor who perfects a security interest in a deposit account should prevail over the bank that attempts to exercise its common law right of set-off instead of perfecting its own security interest in the same deposit account.[9] As a result, a bank with an interest in a deposit account must itself perfect that interest, and the balance of power between banks and outside secured creditors is thus equalized.

At the same time, problems largely due to drafting oversights still exist. The amendment that brought deposit accounts within the scope of Article 9 was only a small part of a bill which provided for major revisions to all of Hawaii's Uniform Commercial Code.[10] It is thus likely that the legislature did not fully consider either the ramifications of including deposit accounts within Article 9 or the potential inconsistencies among the various sections.[11]

This comment will identify and examine three problem areas in the statute where revision is needed in order to bring the present inconsistencies and ambiguities into alignment with the rest of Article 9.

First, a priority problem exists between a bank as an unsecured creditor and

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1) The account maintained with the bank must be a general one in which a debtor-creditor relationship exists between the bank and the depositor;

2) The debt which is owed to the bank must have matured; and

3) An amount greater than the debt may not be set off.

10 AM. JUR. 2D *Banks* § 666 (1963).

[8] HAWAII REV. STAT. § 490:9-306(4)(d)(i) (Supp. 1984) permits the bank to exercise its common law right of set-off against a deposit account in which proceeds have been commingled:

> (4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds: . . .
>
> (d) In all cash and deposit accounts of the debtor, in which proceeds have been commingled but the perfected security interest under this paragraph (d) is (i) subject to any right to set-off. . . .

For a discussion of this classic priority clash between the secured creditor's claim to proceeds and the bank's right of set-off, see B. CLARK, THE LAW OF SECURED TRANSACTIONS § 3.11 (Supp. 1984).

[9] Since a security interest may now be taken in a deposit account, the priority rules of Article 9 are applicable. Generally, the party that is first to perfect its security interest in a particular item of collateral has first priority to such collateral. HAWAII REV. STAT. § 490:9-312(5) (1976 & Supp. 1984).

[10] Act 155, 1978 Hawaii Sess. Laws 293 (codified at HAWAII REV. STAT. ch. 490 (Supp. 1979)).

[11] It is, of course, impossible for the legislature to consider *all* of the ramifications of a pending bill.

a non-bank creditor with a perfected security interest in a particular deposit account. In the event of insolvency proceedings, the amended statute still permits the bank to exercise its right of set-off against proceeds commingled in a deposit account.[12] Allowing a set-off is inconsistent with allowing a perfected security interest in a deposit account.[13] A perfected security interest in the deposit account should prevail over the bank's exercise of any set-off simply because the bank is in the position of an unsecured creditor.[14] However, the language of the statute gives the bank's common law claim priority over the perfected security interest.[15]

Second, the amended statute requires the party perfecting a security interest in a deposit account to give notice to the bank maintaining the account.[16] However, the statute fails to indicate which party, if any, has the burden of giving notice to inquiring *potential* creditors.[17]

Finally, the amended statute provides that a security interest in a deposit account maintained with the secured party is perfected when the security agreement is "executed."[18] Normally, the automatic perfection of a security interest occurs upon "attachment" and not "execution."[19]

II. A Partial Resolution of a Traditional Priority Conflict

Including deposit accounts within the scope of Article 9 helps resolve the traditional priority conflict between a bank exercising its right of set-off against a debtor's deposit account maintained at the bank and a secured creditor with a perfected security interest in the proceeds deposited in that account.[20] Because

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[12] Hawaii Rev. Stat. § 490:9-306(4)(d)(i) (Supp. 1984).

[13] *See supra* note 9.

[14] *Id.*

[15] *See supra* note 8.

[16] Hawaii Rev. Stat. § 490:9-302(1)(h)(ii) (Supp. 1984) provides that " . . . a security interest is perfected: . . . (ii) as to a deposit account maintained with any organization other than the secured party, when notice thereof is given in writing to the organization with whom the deposit account is maintained."

[17] *See infra* text accompanying notes 47-51.

[18] Hawaii Rev. Stat. § 490:9-302(1)(h)(i) (Supp. 1984).

[19] Hawaii Rev. Stat. § 490:9-303(1) (1976) provides that "[a] security interest is perfected when it has *attached* and when all of the applicable steps required for perfection have been taken." (emphasis added) Requirements for attachment are set forth in Hawaii Rev. Stat. § 490:9-203 (Supp. 1984).

[20] The law as to this particular issue is not yet settled. However, the secured party has prevailed in the majority of cases. The leading cases in which the secured party has prevailed include Brown & Williamson Tobacco Corp. v. First Nat'l Bank, 504 F.2d 998 (7th Cir. 1974); Universal C.I.T. Credit Corp. v. Farmers Bank of Portageville, 358 F. Supp. 317 (E.D. Mo. 1973); Citizens Nat'l Bank v. Mid-States Dev. Co., 177 Ind. App. 548, 380 N.E.2d 1243 (1978);

deposit accounts are now governed by Article 9, they also are subject to the formalities of the Article 9 priority rules.[21]

While banks traditionally have exercised their rights of set-off against deposit accounts maintained at their institutions,[22] they are not allowed to set-off against an account that has been deemed special. A deposit account is "special" when the funds in the account are earmarked for a particular purpose.[23] Not allowing a bank to exercise its right of set-off against these accounts may be justified on the ground of either public policy or of the fiduciary relationship of the bank to its customer.

A bank has an unfair advantage when it can exercise a common law right of set-off against a deposit account containing proceeds in which a perfected security interest has been taken. Why should the bank, as a general creditor that has done nothing to actively "secure" its interest, have priority over a secured creditor with a perfected security interest, especially in light of the fact that the secured creditor has made an affirmative effort to protect its interest? The inclusion of deposit accounts within the scope of Hawaii's amended Article 9 partially alleviates this unfairness.

The inclusion of deposit accounts within the scope of Article 9 places banks and secured creditors on equal footing, thereby reducing the power of banks for two reasons. First, banks must now comply with Article 9 priority rules with respect to deposit accounts. Under section 9-312(5), the first party to file or perfect a security interest in a collateral has priority to the collateral to satisfy its debt.[24] Because banks are now subject to this priority rule, they also must act to

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Morrison Steel Co. v. Gurtman, 113 N.J. Super. 474, 274 A.2d 306 (1971); Associates Discount Corp. v. Fidelity Union Trust Co., 111 N.J. Super. 353, 268 A.2d 330 (1970); Commercial Discount Corp. v. Milwaukee W. Bank, 61 Wis. 671, 214 N.W.2d 33 (1974). A case in which the bank prevailed is Citizens & Southern Nat'l Bank v. Weyerhauser Co., 152 Ga. App. 176, 262 S.E.2d 485 (1979). For a discussion of this traditional priority conflict see B. CLARK, *supra* note 8 at § 3.11.

[21] Priorities among conflicting security interests in the same collateral are generally governed by U.C.C. § 9-312 (1978).

[22] *See supra* note 7.

[23] An example of a special account is an individual retirement account. First National Bank of Blue Island v. Estate of Philp, 106 Ill. App. 3d 360, 436 N.E.2d 15 (1982).

[24] Generally, priority is governed by the "first to file" rule. U.C.C. § 9-312(5) provides as follows:

> (5) In all cases not governed by other rules stated in this section . . . priority between conflicting security interests in the same collateral shall be determined according to the following rules:
>
> (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
>
> (b) So long as conflicting security interests are unperfected, the first to attach has

perfect security interests in deposit accounts maintained with them or risk being relegated to the status of unsecured creditors.[25] As unsecured creditors, banks may not set-off against the deposit account until the secured creditor's interest has been satisfied.

Second, the secured creditor must give the bank written notice of its security interest in the debtor's deposit account.[26] The bank is now precluded from exercising its common law right of set-off against the deposit account because it has been put on notice that the deposit account is a "special" one.[27]

Unfortunately, the Hawaii amendment only partially resolved the priority conflict problem.[28] The legislature clearly needs to re-examine the amended statute and make further revisions.

III. PROBLEM AREAS IN HAWAII'S PRESENT ARTICLE 9

A. *Set-off Should be Completely Excluded*

Hawaii's present Article 9 inexplicably allows a right of set-off against deposit accounts in the course of insolvency proceedings[29] at the same time it expressly excludes set-off from its scope.[30] This inconsistency has been the source of much litigation[31] and is reason enough for the legislature to consider amending the statute again. Now that security interests can be taken in deposit accounts, there is ample reason for the legislature to amend Hawaii's Article 9 to eliminate the right of set-off from its statutory scheme. Such an amendment is important in order to facilitate the use of deposit accounts as collateral.

Under Hawaii's current Article 9, banks have the best of both worlds: not only may they take a security interest in a deposit account as original collateral,[32] but they also may exercise their common law right of set-off against proceeds commingled in the deposit account in the event of insolvency proceedings.[33] Moreover, banks apparently may exercise this right even when a prior

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priority.

U.C.C. § 9-312(5) (1978).

[25] *Id.*

[26] HAWAII REV. STAT. § 490:9-302(1)(h)(ii) (Supp. 1984).

[27] Zubrow, *Integration of Deposit Account Financing into Article 9 of the Uniform Commercial Code: A Proposal for Legislative Reform*, 68 MINN. L. REV. 899, 961 n.250 (1984).

[28] *See infra* text accompanying notes 29-37.

[29] HAWAII REV. STAT. § 490:9-306(4)(d)(i) (Supp. 1984).

[30] HAWAII REV. STAT. § 490:9-104(i) (1976).

[31] *See supra* note 20.

[32] *See supra* notes 1-5 and accompanying text.

[33] HAWAII REV. STAT. § 490:9-306(4)(d)(i) (Supp. 1984).

perfected security interest exists in the deposit account.[34] This is unfair to the secured creditor who has perfected a security interest in the deposit account. Indeed, such a result seems to have the effect of increasing the secured creditor's risk in extending credit.[35] This increased risk will, in turn, inhibit the use of deposit accounts as collateral.[36]

The Hawaii Legislature can solve the problem equitably and reasonably simply by deleting section 9-306(4)(d)(i),[37] which permits the exercise of set-off during insolvency proceedings. This solution is fair to a bank because it will still be able to perfect a security interest in a deposit account and thus insure its priority to the account. Moreover, this solution will place secured creditors on a par with the banks and will facilitate the use of deposit accounts as collateral.

B. "Execution" Is Not Consistent With "Attachment"

Article 9 security interests generally are required to "attach" in order to perfect.[38] However, rather than requiring attachment, the statute[39] merely states that when the secured party maintains the deposit account, perfection occurs upon the *execution* of the security agreement.[40]

For a security interest to attach, there must be an agreement, collateral, and value.[41] The agreement must be a signed[42] writing that contains a description

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[34] *Id.*

[35] Zubrow, *supra* note 27, at 928-29.

[36] *Id.*

[37] One commentator, Professor Luize E. Zubrow, of George Washington University Law Center, has suggested the following:

> Given the functional equivalence of the right to set-off and the article 9 security interest in a deposit account as original collateral, section 9-306(4)(d) should be revised to treat depositary banks and outside creditors equally, imposing the same statutory penalty on all, however measured. . . . One approach, which would minimize the change to this section, would provide that the outside secured creditor's restricted security interest in proceeds is "subject to" any article 9 security interest in the deposit account as original collateral taken by the depositary bank. The phrase "subject to" would refer to other article 9 priority rules.

Id. at 987, 989.

[38] *See supra* note 19.

[39] *See supra* note 18 and accompanying text.

[40] " 'Security agreement' means an agreement which creates or provides for a security interest." HAWAII REV. STAT. § 490:9-105(1)(m) (Supp. 1984).

[41] HAWAII REV. STAT. § 490:9-203(1), (2). The Official Comment to U.C.C. § 9-203 provides that "subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party . . . . When all of these elements exist, the security agreement becomes enforceable between the parties and is said to 'attach.' " U.C.C. § 9-203 comment 1 (1978).

of the collateral.[43] The Hawaii provision governing deposit accounts does not indicate which party must execute the security agreement: the debtor only, the secured party only, or both parties. An amendment to section 9-302(1)(h)(i) requiring attachment rather than mere execution will clear up this minor ambiguity.

More importantly, the deposit accounts provision is silent as to whether the debtor must receive rights in the collateral[44] and whether the secured party must give value.[45] The definition of "security agreement," "an agreement which creates or provides for a security interest,"[46] arguably includes the requirement of attachment. However, section 9-302(1)(h)(i) should be amended to expressly require attachment in order to be consistent with the Article 9 policy of proper perfection.

C. *Who Must Provide Notice?*

The Uniform Commercial Code's notice requirements alert potential creditors of the fact that a debtor's property may be encumbered[47] without specifying exactly what is encumbered. A potential creditor must inquire further in order to determine whether there is risk involved in extending credit.[48]

Section 490:9-302(1)(h)(ii) of the Hawaii Revised Statutes provides that "a deposit account maintained with any organization other than the secured party perfects a security interest in a deposit account when notice thereof is given in

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[43] HAWAII REV. STAT. § 490:9-203(1)(a) (Supp. 1984).

[44] Professor Zubrow suggests that a precise description be required in the security agreement when the collateral is a deposit account.

> A somewhat more stringent description requirement should be enacted for deposit account collateral. Additional information is necessary to enable the depositor and its creditors to allocate the value represented by the balance in the account in a manner that will neither invite subsequent disagreements between the parties nor mislead third parties. Specifically, article 9 should require that the security agreement's "description" of deposit account collateral include, at a minimum, the name of the depositary institution, that institution's identifying number for the account hypothecated, and the sum within the account allocated to secure the particular loan.

Zubrow, *supra* note 26, at 933-34.

[45] HAWAII REV. STAT. § 490:9-203(1)(c) (Supp. 1984).

[46] HAWAII REV. STAT. § 490:9-203(1)(b) (Supp. 1984). For the U.C.C. definition of "value," see HAWAII REV. STAT. § 490:1-201(44) (1976).

[47] HAWAII REV. STAT. § 490:9-105(1)(m) (Supp. 1984).

[48] "The policy underlying the perfection and recordation of security interests is to provide notice to interested parties." *In re* Hembree, 635 P.2d 601, 603 (Okla. 1981).

[49] U.C.C. § 9-402 comment 2 (1978). It is vital that notice reach the potential creditor because he will find himself in the back of the priority line if he extends credit on collateral in which there is a prior perfected security interest.

writing to the organization with whom the deposit account is maintained."[49] However, the statute does not specify whether, once the organization maintaining the deposit account receives notice, it is then required to provide notice to future inquirers.

A rule requiring the bank with whom the deposit account is maintained to provide notice to others who inquire would be consistent with the Uniform Commercial Code's notice policies. The likelihood of the potential creditor being misled and extending credit that he would not have otherwise extended is small. Unfortunately, section 9-302(1)(h)(ii) is silent, and the bank has no incentive to comply with such a rule.

In addition, keeping track of security interests in a deposit account is potentially inconvenient and costly. A notation of the security interest would have to be entered on the appropriate record and made available to the organization maintaining the account. Keeping such notations current has the potential of being extremely burdensome on the organization maintaining the deposit account.

The situation may also arise where a bank receives written notice of a security interest, and several moments later, before it can note the security interest on its records, a potential creditor inquires as to whether the same deposit account is encumbered. Although it would be physically impossible for the bank to record the notice of the security interest in the deposit account in such a situation, it might nevertheless be held liable for losses suffered by an inquiring creditor who extends credit in reliance on the the bank's word that the account was not encumbered.

There are several ways in which the Hawaii Legislature could amend the statute to clarify the notice problem. One solution is to explicitly require the bank maintaining the account to keep records and give inquiring persons notice of any security interest in a particular deposit account. Such a rule would provide a certain and definite means of giving notice. However, this method is potentially costly and may impose an arguably unreasonable risk of loss on the institution maintaining the deposit account.

Another possible method of giving notice to inquiring parties is to require the secured party to file a financing statement.[50] Such a requirement would be

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[49] HAWAII REV. STAT. § 490:9-302(1)(h)(ii) (Supp. 1984).

[50] Professor Zubrow advocates filing as the appropriate method of giving notice to potential creditors of a security interest in a deposit account. She notes the following:

> The article 9 public filing system provides "concrete and trustworthy" information which creditors may use to supplement knowledge gained through private sources. Certain factors suggest that the costs would not be excessive. The article 9 filing system is already in place for other types of collateral—there are detailed rules concerning the requirements for the financing statement, where it must be filed, how it should be indexed, the consequences of errors, and how the statement can be amended, terminated, or continued. State offices are

less burdensome than requiring the bank to maintain current records and give inquiring parties notice of any security interests in the debtor's deposit account. Additionally, a filing requirement would avoid situations where a bank may be held liable for losses suffered by an inquiring creditor who receives incorrect information. However, the requirement that the secured party give notice to the bank as a step in the perfection process should be retained in order to avoid set-off conflicts.[51]

IV. CONCLUSION

Hawaii's current Article 9, as it relates to the taking of a security interest in a deposit account, contains several inconsistent and ambiguous provisions. These inconsistent and ambiguous provisions have the potential to produce litigation. If litigation ensues, the courts will have to decide the legislative intent of these provisions. It will be necessary for the courts to interpret these provisions in a way that produces consistent yet equitable results. However, because of existing cloudy areas, achieving consistency and equity will at best be difficult. It is thus vital that the Hawaii Legislature re-examine Hawaii's Article 9 as it relates to deposit accounts and amend the statute so that its provisions are consistent and unambiguous.

Richard W. Carlile

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established, indexing systems exist, and creditors have developed the necessary forms. A creditor retaining a security interest in more traditional collateral as well as deposit accounts could prepare a single financing statement, describing all the collateral, and would pay only one, minimal filing fee.

Zubrow, *supra* note 27, at 966-67.

[51] HAWAII REV. STAT. § 490:9-302(1)(h)(ii) (Supp. 1984).

The Constitutionality of the Hawaii Liquor Tax Statute: *Bacchus Imports, Ltd. v. Dias*

I. INTRODUCTION

In *Bacchus Imports, Ltd. v. Dias*,[1] the United States Supreme Court invalidated the Hawaii liquor tax exemptions for two local products.[2] Liquor wholesalers who paid approximately $45 million in taxes under protest initiated the challenge to the exemptions.[3] The Court held the exemptions discriminated in favor of locally produced liquor in violation of the commerce clause of the United States Constitution.[4] The Court further held the twenty-first amendment failed to save the exemptions from a commerce clause challenge.[5]

The Court's treatment of the commerce clause issue was not surprising since there exists a generally recognized rule that a state may not provide a commercial advantage for local interests at the expense of out-of-state interests.[6] What was unique, however, was the Court's reliance on prior cases involving state regulatory, rather than taxation, laws in reaching its conclusion that the exemp-

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[1] 104 S. Ct. 3049 (1984).

[2] The Hawaii liquor tax was codified at HAWAII REV. STAT. § 244-4 (1976) (repealed 1984, for current provision see HAWAII REV. STAT. § 244D (Supp. 1984)) which stated:

> Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty per cent of the wholesale price of the liquor so sold or used; provided, that the tax shall be paid only once upon the same liquor; provided, further, that the tax shall not apply to:
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> . . . .
>
> (6) Okolehao [a brandy distilled from the root of the "ti" plant indigenous to Hawaii] manufactured in the State for the period May 17, 1971 to June 30, 1981; or
>
> (7) Any fruit wine manufactured in the State from products grown in the State for the period May 17, 1976 to June 30, 1981.

[3] 104 S. Ct. at 3053.

[4] *Id.* at 3057.

[5] *Id.* at 3058-59.

[6] Maryland v. Louisiana, 451 U.S. 725 (1981); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Walling v. Michigan, 116 U.S. 446 (1886); Welton v. Missouri, 91 U.S. 275 (1875).

tions were per se unconstitutional.[7]

The Court stood divided on the twenty-first amendment issue. The majority opinion concluded that the amendment was not intended to usurp the precepts of the commerce clause.[8] To the contrary, the dissenting opinion expressed the view that the twenty-first amendment explicitly grants plenary power to the states to regulate liquor. Thus, the tax exemptions as an exercise of that power, could not be challenged under the commerce clause.[9]

The case was ultimately remanded to the state court to determine the proper remedy.[10] Determination of the remedy hinges on whether the invalid exemption rendered the entire tax statute unconstitutional or whether the exemptions are severable. If the exemptions are severable, the statute will remain valid and enforceable. Unfortunately, the Court's decision was ambiguous as to whether it invalidated the entire liquor tax or merely the exemptions. The issue now stands in the domain of the state court.

This note first addresses the commerce clause issue, placing particular emphasis on the various tests derived from prior case law as compared with the test ultimately utilized by the Court. This note contends that the decision comports with prior case law in principle but not in its method of analysis.[11]

Second, the note addresses the question whether the twenty-first amendment remains a viable exception to the traditional commerce clause analysis. This note contends that the decision marks a shift away from the judicial trend of broadening state powers under the amendment.[12]

The note concludes by examining the question of severability. Statutory construction, case law, and the general history of the liquor tax support the severance of the unconstitutional exemptions from the liquor tax statute.[13] However, it is uncertain whether the Court rejected the severance argument in its decision.[14] Thus, the disposition of the $45 million in state liquor taxes remains in limbo.

II. Facts of the Case

Appellants, Bacchus Imports, Ltd. and Eagle Distributors, Inc., are liquor

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[7] *See infra* notes 136-47 and accompanying text.

[8] 104 S. Ct. at 3058-59. The majority apparently adopted the view that the central purpose of the twenty-first amendment was to "combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 3058.

[9] *Id.* at 3064 (Stevens, J., dissenting).

[10] *Id.* at 3059.

[11] *See infra* notes 121-47 and accompanying text.

[12] *See infra* notes 208-36 and accompanying text.

[13] *See infra* notes 239-56 and accompanying text.

[14] *See infra* text accompanying note 242.

wholesalers licensed to import and sell alcoholic beverages to licensed retailers in Hawaii.[15] Appellant-wholesalers (wholesalers) challenged the constitutionality of the Hawaii liquor tax exemptions and filed complaints seeking refunds of the taxes paid.[16]

The Hawaii liquor tax is an excise tax on the sale or use of alcoholic beverages amounting to twenty percent of the wholesale price of the liquor sold or used in the state.[17] In 1939, the legislature enacted the liquor tax to defray the costs of police and other governmental services that the legislature concluded had increased due to the consumption of liquor.[18] Initially, the tax contained no exemptions.[19] However, the legislature subsequently enacted exemptions to encourage development of the state's liquor industry.[20] From 1971 to 1981, okolehao, a brandy distilled from the root of a "ti" plant indigenous to Hawaii, was exempted from the tax.[21] The legislature also enacted exemptions for fruit wine from 1976 to 1981.[22] During the relevant time period, pineapple wine comprised the only fruit wine manufactured in Hawaii.[23] No other locally produced liquors were exempt from the tax during this period.[24]

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[15] 104 S. Ct. at 3053 n.2. Foremost-McKesson, Inc. and Paradise Beverages, Inc. were appellants in the consolidated suit in the Hawaii Supreme Court. Pursuant to Rule 10.4 of the United States Supreme Court Rules they are considered appellees because they did not appeal to the United States Supreme Court. For the sake of clarity, both appellant and appellee wholesalers will be referred to as "wholesalers."

[16] HAWAII REV. STAT. § 40-35 (1976) authorizes a taxpayer to pay taxes under protest and commence action in the State Tax Appeal Court for the recovery of the disputed sums.

[17] HAWAII REV. STAT. § 244-4.

[18] As originally enacted in 1939, the liquor tax was levied on retail liquor sales. The 1949 amendment changed it to a tax on the wholesale liquor sales. *See* Act of May 21, 1949, ch. 104, 1949 Hawaii Sess. Laws 302.

[19] *See* Act of May 13, 1939, ch. 66A, 1939 Hawaii Sess. Laws 83.

[20] S. STAND. COMM. REP. NO. 87, 1st Leg., Reg. Sess., 1960 SEN. J. 224; H.R. STAND. COMM. REP. NO. 246, 6th Leg., Reg. Sess., 1971 HOUSE J. 793; S. STAND. COMM. REP. NO. 408, 8th Leg., Reg. Sess., 1976 SEN. J. 1056.

[21] Act of May 11, 1960, Act 26, 1960 Hawaii Sess. Laws 64. The legislature initially exempted okolehao for only five years from 1960 to 1965. The legislature then reenacted the five-year exemption in 1971. Act of May 17, 1971, Act 62, 1971 Hawaii Sess. Laws 60. In 1976, the legislature extended the exemption for five more years until 1981. Act of May 3, 1976, Act 39, 1976 Hawaii Sess. Laws 48.

[22] Act of May 3, 1976, Act 39, 1976 Hawaii Sess. Laws 48. The five-year exemption for fruit wine expired in 1981.

[23] In re Bacchus Imports, Ltd., 65 Hawaii 566, 570 n.8, 656 P.2d 724, 727 n.8 (1982).

[24] Locally produced "sake," Japanese rice wine, and locally produced fruit liqueurs were not exempted from the tax. However, in 1981, after the present challenge had been initiated, the legislature enacted a new exemption for "rum manufactured in the State for the period May 17, 1981 to June 30, 1986." *See* Act of June 18, 1981, Act 182, 1981 Hawaii Sess. Laws 350.

Wholesalers sell liquor[25] at their wholesale price[26] plus the twenty percent excise tax imposed by the liquor tax. The excise tax is assessed on the monthly gross sales reported to the state, and is payable by the wholesaler whether or not collected from the purchaser.[27]

The wholesalers' complaint alleged the Hawaii liquor tax with its exemptions was unconstitutional because it violated the import-export clause,[28] the equal protection clause,[29] and the commerce clause[30] of the United States Constitution. Pursuant to section 40-35 of the Hawaii Revised Statutes, which authorizes a taxpayer to pay taxes under protest and to commence an action in the State Tax Appeal Court for the recovery of disputed sums, the wholesalers initiated protest proceedings and sought refunds of approximately $45 million in taxes paid during the years in question.[31] The Tax Appeal Court rejected the claims and, on the wholesalers' appeal, the Hawaii Supreme Court unanimously affirmed that decision.[32]

The Hawaii Supreme Court held the tax did not violate the import-export clause because there was no evidence that it was applied selectively to discourage imports in a manner inconsistent with foreign policy, or that it had the effect of a protective tariff, or that it had any substantial indirect effect on the

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[25] HAWAII REV. STAT. § 281-1 (1976) defines "liquor" or "intoxicating liquor" as: "alcohol, brandy, whiskey, rum, gin, okolehao, sake, beer, ale porter, and wine; and also includes (other compounds) . . . containing one-half of one percent or more of alcohol by volume, which are fit for use or may be used or readily converted for use for beverage purposes."

[26] The wholesale price for imported liquors is determined by adding a percentage markup to its "landed cost" for such liquor. Landed cost is determined by adding the following costs to the original cost (F.O.B) of the liquor:

(1) U.S. customs duties
(2) U.S. I.R.S. gallonage tax
(3) Customs brokerage fees
(4) Inland freight to port of shipment to Honolulu
(5) Ocean/air freight to Honolulu
(6) Wharfage fees at Honolulu
(7) Drayage charges for transportation to the warehouse
(8) Warehouse handling charges.

See Joint Appendix at 22, Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984).

[27] *Id.* at 8-9.

[28] U.S. CONST. art. I, § 10, cl. 2, provides in part: "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports . . . ."

[29] U.S. CONST. amend. XIV, § 1, provides in part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[30] U.S. CONST. art. I, § 8, cl. 3, provides in part: "Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . ."

[31] Bacchus Imports filed for a refund of $775,060.22, Eagle Distributors filed for $10,744,047, Foremost-McKesson filed for over $26 million, and Paradise Beverages filed for $8,716,727.23. 104 S. Ct. at 3053 n.6.

[32] In re Bacchus Imports, Ltd., 65 Hawaii 566, 656 P.2d 724 (1982).

demand for imported liquor.[33] The court also rejected the equal protection challenge and held that the exemptions were rationally related to the state's legitimate interest in promoting domestic industry.[34] Finally, the court rejected the commerce clause challenge concluding that there was no discrimination between in-state and out-of-state taxpayers since an out-of-state corporation could also engage in the wholesaling of okolehao and fruit wine and enjoy the tax benefit.[35] The court noted that consumers in Hawaii bore the ultimate burden of the tax.[36]

Bacchus Imports and Eagle Distributors appealed the Hawaii court's decision to the Supreme Court of the United States.[37] At issue again were challenges that the liquor tax exemptions violated the import-export, equal protection and commerce clauses. In addition, the state, for the first time, argued that the twenty-first amendment would save the liquor tax from a discrimination challenge under the commerce clause.[38]

The United States Supreme Court, in a five to three decision,[39] held the tax exemptions violated the commerce clause because they had the purpose and effect of discriminating in favor of local products.[40] The Court also held the twenty-first amendment failed to save the tax exemptions. According to the Court, the amendment did not empower states to favor the local liquor industry by erecting barriers to competition.[41] The dissent, however, supported the view

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[33] *Id.* at 578, 656 P.2d at 732-33.

[34] *Id.* at 574, 656 P.2d at 730.

[35] *Id.* at 579, 656 P.2d at 733. In reviewing the commerce clause challenge, the court utilized the four-part test described in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Under that test a state tax does not offend the commerce clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." *Id.* at 279. *See infra* text accompanying notes 56-61.

The Hawaii court noted the liquor tax was challenged on the grounds that it failed to meet two conditions of the *Complete Auto* test because it was discriminatory and not fairly apportioned. 65 Hawaii at 579, 656 P.2d at 733. The court summarily dismissed the issue of apportionment because the wholesalers agreed that the tax was assessed only on intrastate sales and uses of liquor. *Id.*

[36] 65 Hawaii at 581, 656 P.2d at 734.

[37] Foremost-McKesson and Paradise Beverages did not appeal the decision. However, Foremost-McKesson filed a brief in support of the wholesalers. *See* Brief for Appellee in Support of Appellants, Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984).

[38] 104 S. Ct. at 3057 n.12. *See also* Brief for Appellees at 36, Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) [hereinafter cited as Brief for Appellee].

[39] Justice Brennan did not take part in the consideration or decision of the case.

[40] 104 S. Ct. at 3057. The Court noted that because of its disposition of the commerce clause issue, it was not necessary to address the wholesalers' arguments based on the equal protection clause and the import-export clause. *Id.* at 3057 n.11.

[41] *Id.* at 3058.

that the wholesalers' commerce clause claim was foreclosed by the twenty-first amendment and thus would affirm the Hawaii Supreme Court's decision.[42]

III. COMMERCE CLAUSE AND DISCRIMINATORY TAXES

The commerce clause of the United States Constitution states "Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . ."[43] While the Constitution thus vests in Congress the power to regulate interstate commerce, it does not state whether the states may or may not regulate or tax interstate commerce in the absence of congressional action. The Supreme Court has taken upon itself the task of giving meaning to the vast silences of the Constitution.

A. History of the Law

The basic principle in the Supreme Court's analysis of state power under the commerce clause lies in the following statement by Justice Frankfurter: "The very purpose of the Commerce Clause was to create an area of free trade among the several States."[44] As a corollary to this principle, the Court has stated:

> [T]he Commerce Clause [is] not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force [it] create[s] an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. A State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the states.[45]

In determining the limitation on a state's power to tax interstate commerce, the Court has engaged in a case-by-case analysis which has involved balancing the national interest in free and open trade against the state's interest in exercising its taxing power. The Court has admitted that this approach leaves "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."[46]

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[42] *Id.* at 3060 (Stevens, J., dissenting).

[43] U.S. CONST. art. I, § 8, cl. 3.

[44] McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944); *accord* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

[45] Freeman v. Hewit, 329 U.S. 249, 252 (1946); *see also* Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

[46] Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). *See also* L. TRIBE,

Out of the quagmire emerged at least three grounds for the invalidation of state taxes affecting interstate commerce.[47] Historically, the Court invalidated state taxes due to the risk of double taxation on interstate commerce not borne by comparable local commerce,[48] the absence of jurisdiction to tax,[49] and the inhibiting effect of the tax on interstate commerce.[50]

In an apparent effort to simplify and unify previous decisions, the Court, in 1951, adopted the following rule in *Spector Motor Service v. O'Connor*.[51] A state may not tax the privilege or business of engaging exclusively in interstate commerce.[52] This rule, while simple and predictable, soon became no more than a rule of "formalism" as the Court began to focus merely on the language of a statute and not its substance or practical effect.[53] Applied broadly, the original *Spector* rule would severely limit state power to tax interstate commerce. As a result, multistate businesses would enjoy immunity from tax liabilities even if their activities within a state were functionally no different from those of intra-

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AMERICAN CONSTITUTIONAL LAW § 6-13 (1978).

[47] Lockhart, *A Revolution in State Taxation of Commerce?* 65 MINN. L. REV. 1025, 1029 (1981).

[48] *See, e.g.*, J.D. Adams Mfg. v. Storen, 304 U.S. 307 (1938). The Court stated:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate Commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

Id. at 311.

[49] *See, e.g.*, McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1940). The Court stated:

> [F]or Arkansas to impose a tax on [sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas] would be to project its powers beyond its boundaries and to tax an interstate transaction. . . . [This] involves an assumption of power by a State which the Commerce Clause was meant to end.

Id. at 330.

[50] *See, e.g.*, Walling v. Michigan, 116 U.S. 446 (1886). The Court noted:

> [A] discriminating tax imposed by a State operating to the disadvantage of the products of other states when introduced into the first mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

Id. at 455.

[51] 340 U.S. 602 (1951).

[52] *See also* Lockhart, *supra* at note 47; Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 EMORY L.J. 89 (1983).

[53] *Compare*, Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1951) (statute is invalid where tax measured by gross receipts was on the "privilege of doing business") *with* Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959) (statute upheld when tax measured by gross receipts was labeled "franchise tax" on "intangible property" in the form of "going concern value").

state businesses which were subject to the tax. The Court thus narrowly interpreted the rule to invalidate only those tax statutes that explicitly taxed the privilege of doing business in the state.[54]

In light of the unsatisfactory operation of the *Spector* rule[55] the Court in 1977 rejected that rule in favor of what appeared to be the more pragmatic rule of *Complete Auto Transit, Inc. v. Brady*.[56] At issue in *Complete Auto* was the Mississippi sales tax[57] assessed on interstate commerce for the privilege of doing business in the state.[58]

Under the *Spector* rule, the state tax would be held unconstitutional per se because it clearly taxed the privilege of engaging in an activity in the state. However, the Court in *Complete Auto* noted the incongruity of the cases decided as a result of the *Spector* rule and stated that if Mississippi had labeled its tax as

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[54] *See, e.g.*, Colonial Pipeline v. Traigle, 421 U.S. 100 (1975). In *Colonial Pipeline*, when the Louisiana Court of Appeals held the Louisiana Franchise Tax Act unconstitutional because the tax was imposed directly upon the privilege of carrying on or doing interstate business, the state legislature amended the statute so that the tax was imposed on the qualification to carry on or do business in the state in a *corporate form*. The U.S. Supreme Court upheld the validity of the tax statute in the amended form. *Id.* at 113-14.

[55] *See* Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline*, 62 VA. L. REV. 149 (1976). Hellerstein asserts, "After reading *Colonial*, only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing business is immune from state taxation." *Id.* at 188.

See also Comment, *Pipelines, Privileges and Labels: Colonial Pipeline Co. v. Traigle*, 70 NW. U.L. REV. 835 (1975). The comment concludes, "In light of the expanding scope of the state taxing power over interstate commerce, *Spector* is an anachronism. . . . Continued adherence to *Spector* especially after *Northwestern States Portland Cement*, cannot be justified." *Id.* at 854.

[56] 430 U.S. 274 (1977). *See generally* Note, *State Taxation on the Privilege of Doing Interstate Business: Complete Auto Transit, Inc. v. Brady*, 19 B.C.L. REV. 312 (1978) [hereinafter cited as Note, *State Taxation*]; Note, *Taxation-Constitutional Law-Application and Rejection of Per Se Unconstitutional Rule as Applied to State Taxation of Interstate Commerce-Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)*, 9 SETON HALL L. REV. 910 (1978).

[57] The Mississippi statute stated in part:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five percent of the gross income of such business . . . .

MISS. CODE ANN. § 10109(2) (1942), *quoted in* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 275 (1977).

[58] Complete Auto Transit transported automobiles for General Motors, which assembled the vehicles outside of Mississippi and shipped them by rail into the state. 430 U.S. at 276. These vehicles were then loaded onto Complete Auto Transit's trucks for transportation to dealers elsewhere in the state. *Id.* The state tax equalled five percent of the gross income for this transportation. *Id.* at 275. For the purpose of its analysis, the Court assumed that the transportation was in interstate commerce. *Id.* at 276 n.4.

something other than a privilege tax, the *Spector* rule could not invalidate it.[59]

The Court thus overruled *Spector* and stated: "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."[60] In place of the old rule, the Court implemented a four-part test that took into consideration not the formal language of the statute but rather its practical effect: (1) Is the tax applied to an activity with a substantial nexus to the taxing state? (2) Is the tax fairly apportioned? (3) Is the tax fairly related to the services provided by the state? (4) Is the tax nondiscriminatory?[61] The standards reflected the Court's desire to focus on the practical economic consequences of state taxation by striking a balance between state and national interests.

The first three tests reflect due process concerns for fairness and jurisdiction.[62] The Court has allowed increased state taxing power to provide for state revenue needs as long as adequate jurisdiction and fairness safeguards are maintained.[63]

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[59] *Id.* at 283-88.

[60] *Id.* at 288.

[61] *Id.* at 279.

[62] See Shaffer v. Heitner, 433 U.S. 186 (1977), where a shareholder brought an action against nonresident corporate officers and directors for breach of fiduciary duties and sequestered defendants' property in the state. Plaintiff argued that the statutory situs of the property in the state provided a basis for the quasi-in-rem jurisdiction of the state court. The Supreme Court held that property unrelated to plaintiff's cause of action cannot alone support state court jurisdiction; the minimum contacts rule of International Shoe Co. v. Washington, 326 U.S. 310 (1945), must be met. The Court also held that the state's assertion of jurisdiction based solely on the statutory presence of defendants' property in the state violated the due process clause of the fourteenth amendment.

[63] *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977).

In *National Geographic*, the Court held that the continuous presence in California of two Society officers provided a sufficient nexus between the Society and the state to justify imposition of a tax on the Society's mail-order sales from the District of Columbia to California residents. The fact that the officers' activities were unrelated to the Society's mail-order business initiated entirely in Washington, D.C., did not persuade the Court that the nexus was too thin.

In *Mobil Oil*, the Court upheld a Vermont corporate income tax levied on the substantial dividend income of a corporation's subsidiaries and affiliates, most of which were foreign to the state. Mobil questioned whether the tax could apply to income earned in activities that had no connection with the taxing state. The Court said that the due process clause was not violated because Mobil's marketing and sales in Vermont constituted a sufficient nexus and Mobil failed to prove that its foreign sources of income were not business activities related to its in-state income. The Court went on to say that the commerce clause was also not violated because the tax bore a relationship to the benefits conferred to Mobil by the taxing statute. Citing Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444-45 (1940), the Court said:

What remained as a firm limitation against the state's power to tax was the Court's willingness to invalidate any such tax that discriminated against interstate commerce. In the same 1976-77 term in which the Court decided *Complete Auto*, the Court reaffirmed the nondiscrimination principle by invalidating a discriminatory tax.[64] While the Court has stated that the antidiscrimination principle followed "inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution,[65] the determination of what constitutes discrimination has involved a continuing process of definition.

The early cases of the nineteenth century struck down state taxes imposed only on out-of-state businesses.[66] For example, in the seminal case of *Welton v. Missouri*,[67] the Court invalidated a Missouri license tax which applied only to peddlers of out-of-state produced goods.[68] The Court based its ruling on the

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> The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business" within the State; and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

445 U.S. at 437.

In *Exxon*, the Court refused to accept Exxon's argument that its three functional units, which were essentially in competition with each other, should have separate tax liability allocations. The Court stated that the sufficient basis for the fair apportionment requirement was a rational relationship between income attributed to the state and the interest values of the enterprise.

In *Commonwealth Edison*, the Court upheld Montana's tax imposed on the contract sales price of coal severed from the land. The tax varied, but could reach a rate as high as thirty percent of the sales price. The Court defined the "reasonably related" prong of the *Complete Auto* test by stating that "[b]ecause it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to appellant's activities within the state and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded.' " 453 U.S. at 626 (quoting General Motors Corp. v. Washington, 377 U.S. 436, 441 (1964)). The Court thus appeared to adopt a per se rule that any tax that is determined as a percentage of the value of the taxpayer's activities in the state is "fairly related to the services provided by the state."

[64] Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

[65] Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

[66] Walling v. Michigan, 116 U.S. 446 (1886); Welton v. Missouri, 91 U.S. 275 (1875).

[67] 91 U.S. 275 (1875).

[68] See also Walling v. Michigan, 116 U.S. 446 (1886), where the unanimous Court invalidated a statute which imposed a tax on wholesalers of liquor manufactured in other states but did not impose a similar tax on wholesalers of liquor manufactured in the state. The Court concluded that the violation of the commerce clause was beyond reasonable dispute:

> [I]t is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating.

need to prevent an economic Balkanization of the nation:

> [If the state had the power] to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interest of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.[69]

Discrimination in these cases was apparent on the face of the taxing statute. However, the Court also recognized that a taxing statute that nominally treats all trade alike might discriminate in practical operation against interstate commerce by providing local business with a competitive advantage.[70] For example, in 1940, the Court in *Best & Co. v. Maxwell*[71] examined a North Carolina statute that imposed a $250 annual privilege tax on persons soliciting sales by display of samples in a hotel room.[72] In comparison, the local retail merchant

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Id. at 454.

See also Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939), where a Florida statute which imposed a fee for the inspection of all imported cement while exempting locally produced cement from all inspection and inspection fee requirements was held to be unconstitutional. The justification presented for the statute was that public safety demanded certain standards in the quality of cement. The Court pointed out the fallacy of the public safety justification—only 30% of the cement market was imported, therefore 70% of the market was domestic cement that was not inspected to determine if it met the certain standards. The Court stated, "That no Florida cement needs any inspection while all foreign cement requires inspection . . . is too violent an assumption to justify the discrimination here disclosed. . . . [I]t would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce Clause forbids." *Id.* at 380-81.

[69] 91 U.S. at 281.

[70] See, e.g., Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887), in which the Court invalidated the state "drummer" statutes that imposed a license tax on all salesmen soliciting orders for the purchase of goods to be shipped interstate. The Court found the statute put salesmen doing business interstate at a disadvantage when competing with local retail merchants making untaxed sales and thus held this type of discrimination would not be tolerated. *Id.* at 498. *See also* Best & Co. v. Maxwell, 311 U.S. 454 (1940).

[71] 311 U.S. 454 (1940).

[72] The 1937 North Carolina statute read:

> Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or

paid a privilege tax of one dollar.[73] The Court recognized that the tax, on its face, nominally applied to all who were not regular retailers, both residents and nonresidents. However, the Court reasoned that the local merchant would naturally have retail stores in the state as outlets for their merchandise and would hardly resort to solicitation by samples in a rented hotel room. Therefore, the tax in its practical operation aimed at and discriminated against out-of-state itinerant salesmen, in favor of local retail merchants.[74]

A recent case involved the discrimination issue in the context of state taxation of securities transactions. In the 1977 case of *Boston Stock Exchange v. State Tax Commission*,[75] six regional stock exchanges challenged an amendment to New York's transfer tax on the sale of securities.[76] Under the amendment, the taxpayer is entitled to a transfer tax reduction if he conducts his sale within New York.[77] Since most stock is transferred in New York and thus subject to the transfer tax, the tax reduction for transactions involving New York sales operated to give the investor a financial incentive to sell on the New York Stock Exchange. A unanimous Court struck down the amended tax statute and relied on the fundamental principle that no state could discriminate against interstate commerce.[78] The Court's finding of discrimination appeared sufficient to justify

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> corporation to display such samples, goods, wares, or merchandise in any county in this State.

N.C. GEN. STAT. § 127-121(e) (1937), *quoted in* Best & Co. v. Maxwell, 311 U.S. 454, 455 n.1 (1940).

[73] 311 U.S. at 456.

[74] *Id.* The Court stated, "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Id.* at 457.

[75] 429 U.S. 318 (1977).

[76] As originally enacted, the statute provided that " 'all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock' in any foreign or domestic corporation are subject to the transfer tax." *Id.* at 321.

[77] The amendment provided a 50% reduction in the tax rate for nonresidents conducting transactions in the state and limited the total tax liability of any taxpayer for a single transaction when it involved a New York sale. For an out-of-state sale which involved an in-state transfer, the tax applied without limitations on liability. *Id.* at 324.

[78] The state attempted to defend the tax amendment on the ground that the exemption did not discriminate against interstate commerce in favor of intrastate commerce, rather it discriminated between two kinds of interstate transactions. *Id.* at 333-34. The Court rejected this argument and stated:

> The fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce . . . does not save [the tax] from the restrictions of the Commerce Clause. A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce.

Id. at 334-35.

invalidation of the tax statute. It did not proceed to balance state and national interests at all.[79]

The *Boston Stock Exchange* opinion, written by Justice White, suggested that the only mitigating argument the Court would seriously consider was that the discriminatory tax was not unconstitutional, either because the tax was compensatory in nature and therefore analogous to a "use" tax,[80] or because the effect on commerce would be insignificant.[81]

In the 1981 decision of *Maryland v. Louisiana*,[82] again penned by Justice White, the Court implied that it would no longer entertain the argument that a tax was not unconstitutionally discriminatory because of its de minimis effect on interstate commerce.[83] At issue was the Louisiana First-Use Tax[84] owed by

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[79] *Id.* at 336. In cases involving state regulations affecting interstate commerce, the Court, upon a finding of discrimination by the state regulation, has continued its inquiry into the balance of state and national interests. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). In *Hunt*, the Court reaffirmed a general rule for determining the validity of state statutes affecting interstate commerce. Under that rule, the court must inquire (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Id.* at 353. *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Hunt involved the North Carolina apple-labeling statute that required all closed containers of apples sold in the state to bear "no grade other than the applicable U.S. grade or standard." The statute was found to have an impermissibly discriminatory effect on interstate commerce. 432 U.S. at 339. The burden then fell on North Carolina to justify the discrimination both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. The Court found that North Carolina failed to sustain its burden and held the statute unconstitutional. *Id.* at 353.

[80] 429 U.S. 318, 331-32 (1977). A compensating use tax is levied on the use of goods purchased outside the state, which if purchased within the state would have been subjected to the sales tax. *See Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 994-1000 (1962) [hereinafter cited as *Developments*]. See also Alaska v. Arctic Maid, 366 U.S. 199 (1961), where the Court found no unconstitutional discrimination against out-of-state fish-freezing ships subject to a four percent occupation tax while local fish processors were subject to a one percent tax. The Court looked beyond the statute to what the competing businesses were. The Court found that the freezer ships did not compete with local fish processors but with local canners since the fish taken aboard the ships were taken elsewhere to be canned. Local canners paid a six percent tax on the value of salmon obtained for canning, a higher burden than that imposed on the out-of-state taxpayers. Thus, there was no unconstitutional discrimination found.

[81] 429 U.S. at 333-34.

[82] 451 U.S. 725 (1981).

[83] *Id.* at 759-60.

[84] The tax was on the first use of any natural gas brought into the state which had not been previously subjected to taxation by another state or the United States. Since most states impose their own severance tax, the primary effect of the First-Use Tax was on gas produced in the

owners[85] of natural gas imported into the state, primarily from the outer continental shelf, for certain uses.[86] The tax statute also provided a number of exemptions and credits for Louisiana consumers only.[87] Thus, the tax did not burden in-state consumers whereas it applied uniformly to gas moving out of the state.[88] The Court held the First-Use Tax unconstitutional as a violation of the commerce clause.[89] The Court found that as a result of the various exemptions and credits, the tax discriminated against interstate commerce in favor of local interests.[90] The Court appeared to have dismissed the de minimis argument when it summarily stated:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.[91]

Although *Boston Stock Exchange* and *Maryland v. Louisiana* established the limitation on a state's power to tax in a manner that discriminates against interstate commerce, two issues remained unsettled. First, dicta in *Boston Stock Ex-*

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federal outer continental shelf area and then piped to processing plants located within Louisiana. *Id.* at 731.

[85] Approximately 85% of the outer continental gas brought ashore was owned by the pipeline companies, the rest by the producers. *Id.*

[86] Taxable uses included the sale, processing, transportation, use in manufacturing, treatment, or "other ascertainable action at a point within the state." *Id.* at 732.

[87] A taxpayer subject to the First-Use Tax was entitled to a direct tax credit on any Louisiana severance tax owed in connection with the extraction of natural resources within the state. Tax credits on other Louisiana taxes were also provided to municipal or state-regulated electric generating plants and natural gas distributing services located within Louisiana, as well as any direct purchaser or gas used for consumption directly by that purchaser. Imported natural gas used for drilling oil or gas within the state was exempted from the First-Use Tax. *Id.* at 733.

[88] *Id.* at 733. The First-Use Tax had two stated purposes. One was to reimburse the people of Louisiana for damages to state coastal areas resulting from the introduction of natural gas from areas not subject to state severance taxes and to compensate for the state's costs in protecting the area. The second purpose was to equalize competition between gas produced in Louisiana and subject to the state severance tax and gas produced elsewhere not subject to a severance tax, such as outer continental shelf gas. *Id.* at 732.

[89] The Court also held the tax in violation of the supremacy clause. The tax interfered with the authority of the Federal Energy Regulating Commission to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers. *Id.* at 746-52.

[90] *Id.* at 756. The Special Master suggested that the First-Use Tax might be a proper compensating tax. *Id.* at 758. However, the Court held this view was not justified because the principal notion running through the cases upholding compensatory taxes—that of equality of treatment between local and interstate commerce—was seriously lacking in the present case. *Id.* at 759.

[91] *Id.* at 759-60.

change that suggested mitigating factors for a discriminatory tax[92] had yet to be expressly repudiated or followed.[93] Second, since the Court in *Boston Stock Exchange* and *Maryland v. Louisiana* did not consider balancing state and national interests,[94] it is unclear whether a new per se rule of unconstitutionality has been established upon a finding of discrimination against interstate commerce.

B. *Analysis*

In *Bacchus*, the United States Supreme Court held the liquor tax exemptions discriminated against interstate commerce by providing a commercial advantage to locally produced okolehao and pineapple wine.[95] Thus, the Court found the exemptions constituted economic protectionism since they had a discriminatory purpose and effect.[96] The Court noted a discrimination that violates the commerce clause may exist not only as between in-state and out-of-state taxpayers, but also as between in-state and out-of-state goods.[97]

1. Methods for Determining Whether a Tax Discriminates Against Interstate Commerce

The Court has used at least three tests to determine what constitutes discrimination against interstate commerce. The first test examines the language of a tax statute to determine whether the state tax on its face is imposed only on out-of-state businesses.[98] Such a tax scheme explicitly singles out interstate commerce for taxation while leaving intrastate businesses tax free. For example, in *Welton v. Missouri*,[99] the nineteenth-century state statute required payment of a license tax by peddlers of goods produced out-of-state, but required no payment by peddlers of goods produced within the state.[100] That discrimina-

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[92] *See supra* text accompanying notes 80-81.

[93] Dicta in Maryland v. Louisiana, 451 U.S. 725 (1981), implied a tendency toward repudiation of the de minimis argument. *See supra* text accompanying notes 82-91.

[94] *See supra* text accompanying note 79.

[95] 104 S. Ct. at 3049.

[96] The Court stated:

> [W]e need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products.

Id. at 3056.

[97] *Id.* at 3054 n.8.

[98] *See* Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939); Walling v. Michigan, 116 U.S. 446 (1886); Welton v. Missouri, 91 U.S. 275 (1876).

[99] 91 U.S. 275 (1876).

[100] *Id.* at 278. *See also* Walling v. Michigan, 116 U.S. 446 (1886) (state taxed wholesalers of

tion exists in such a case is obvious. However, few modern taxing schemes are as simplistic.[101] The Hawaii liquor tax does not single out interstate commerce for taxation. Rather, the twenty percent liquor tax burdens liquor wholesalers of both in-state and out-of-state produced liquor.[102] Exceptions are provided for two locally produced alcoholic beverages, okolehao and fruit wine.[103] However, not all locally produced liquor is exempt from the tax, thus it cannot be said that the tax is imposed solely on out-of-state businesses.[104]

A second test for discrimination is derived from the *Boston Stock Exchange* case.[105] Under this test, if an individual confronted with a choice between an in-state and an out-of-state transaction would make his decision without being influenced by the state tax consequences, the tax is nondiscriminatory.[106] Clearly, this test was designed to evaluate use-sales-tax structures.[107] Since the Hawaii liquor tax was not characterized as such,[108] the *Bacchus* Court did not use this standard. However, the principle of the *Boston Stock Exchange* test, which is the foreclosure of tax neutral decisions,[109] may have influenced the *Bacchus* Court. The Court noted that as a result of the liquor tax exemptions for local products "drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the

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liquor produced in other states but did not tax wholesalers of locally produced liquor).

[101] *But see* Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64 (1963) (statute imposed a higher tax on out-of-state manufacturer than on in-state manufacturer, and there was no showing of adequate justification for such disparate tax treatment).

[102] HAWAII REV. STAT. § 244-4.

[103] HAWAII REV. STAT. § 244-4(6)-(7).

[104] Locally produced "sake" and fruit liqueurs are not exempt from the tax. 104 S. Ct. at 3053.

[105] 429 U.S. 318 (1977).

[106] *Id.* at 332.

[107] In use-sales tax structures, the taxpayer is faced with the tax consequences of an in-state or out-of-state purchase. If he purchases the item within the state, he pays a sales tax. If he purchases outside the state but carries the item back for use within the state, he pays a use tax. *Id.* at 332. Use tax is defined as a "tax on the use of certain goods which are not subject to a sales tax. It is commonly designed to discourage people from going out of state and purchasing goods which are not subject to sales tax at the point of purchase." BLACK'S LAW DICTIONARY 1309 (5th ed. 1979).

[108] The Hawaii tax is an excise tax on the sale of liquor within the state. HAWAII REV. STAT. § 244-4. Excise tax is defined as a "[t]ax laid on manufacture, sale, or consumption of commodities or upon licenses to pursue certain occupations or upon corporate privileges." BLACK'S LAW DICTIONARY 506 (5th ed. 1979).

[109] The Court in *Boston Stock Exchange* stated that in all use-tax cases, an individual faced with the choice of an in-state or out-of-state purchase should be able to make that choice without regard to the tax consequences. The New York statute foreclosed tax-neutral decisions because it provided a tax reduction for selling securities on the New York Stock Exchange. *See supra* text accompanying notes 75-78.

price differential that the exemption will permit."[110]

The third test derived from the line of cases requires a determination of whether the tax provided local business with a commercial advantage.[111] For example, in *Best & Co. v. Maxwell*,[112] the statute imposing the tax appeared to be neutral on its face in that it applied to in-state as well as out-of-state businesses.[113] The Court in this case looked beyond the neutral language of the statute to consider the actual effect of the tax in question.[114] Thus, when the Court found discrimination against out-of-state businesses in favor of local businesses as the practical effect of the tax in question, the Court invalidated the tax.[115]

A variation of the "hidden local favoritism" tax in *Best & Co.*[116] is a tax that gives local business a commercial advantage through exemptions and credits. For example, the Louisiana First-Use Tax in *Maryland v. Louisiana*[117] was imposed on certain uses of natural gas brought into the state. However, it also provided exemptions and credits for Louisiana consumers and none for out-of-state consumers.[118] Technically, the tax alone without the exemptions and credits provisions appeared neutral on its face and thus subject to the practical effects inquiry of *Best & Co.* Indeed, the Court itself took note of the need for such analysis,[119] thus implying that the Louisiana tax lay in the classification of facially neutral taxes. However, without conducting the practical effects inquiry, the Court found discrimination in the favoritism given local interests over inter-

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[110] 104 S. Ct. at 3055. The Court, however, did not cite any proof of this result. In fact, testimony elicited from the state's attorney attested that okolehao is sold only in "tourist traps" and not in local bars or liquor stores. Sheppard, *Hawaiian Punch: Are the State Liquor Taxes Discriminatory?*, 22 TAX NOTES 168 (January 16, 1984). Sheppard also noted that Justice Marshall added that in his experience of visiting Hawaii, he had not seen or heard of okolehao. *Id.*

[111] *See* Maryland v. Louisiana, 451 U.S. 725 (1981); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1889).

[112] 311 U.S. 454 (1940).

[113] The tax was an annual privilege tax of $250 on anyone "not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." *Id.* at 455. *See supra* text accompanying notes 71-74.

[114] The Court noted, "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." 311 U.S. at 455-56. *See also* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1889) (state statute imposed a tax on soliciters operating without a regularly licensed place of business in the state).

[115] 311 U.S. at 456-57.

[116] *See supra* text accompanying notes 111-15.

[117] 451 U.S. 725 (1981).

[118] *Id.* at 732-33.

[119] The Court noted, "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Id.* at 756.

state commerce by the tax credits and exclusions.[120] Therefore, *Maryland v. Louisiana* suggests that while the provision imposing the tax may be neutral, if the provision for exemptions furnishes an advantage to local interests, such is held discriminatory on its face.

The Hawaii liquor tax is analogous to the Louisiana First-Use Tax. The provision that imposes the tax stands patently neutral since it applies to out-of-state as well as in-state interests.[121] However, the tax statute also provides exceptions for two local products, okolehao and fruit wine.[122] Thus the Hawaii tax should have been tested as the Louisiana tax for commercial advantage to local businesses.[123]

2. *The Bacchus Decision*

The *Bacchus* Court experienced no difficulty in determining that the Hawaii tax discriminated against interstate commerce. However, the method used by the Court in reaching this determination is not clear. It may be contended that the Court arrived at the correct decision but traveled the wrong path.

Although the Court's finding of discrimination was couched in the language of *Maryland v. Louisiana*,[124] the Court did not utilize the same method of analysis. Indeed, the *Bacchus* Court did not even refer to the *Maryland v. Louisiana* decision except to dispel the de minimis argument.[125] Perhaps Justice White, who also wrote the *Maryland v. Louisiana* decision, did not recognize the congruity between the two state taxes. The Hawaii Supreme Court in an attempt to distinguish the two tax structures, concluded that the Louisiana tax resulted in disparate treatment between in-state and out-of-state taxpayers,

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[120] The Court declared, "In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. No further hearings are necessary to sustain this conclusion." *Id.*

[121] The statute read:

> Every person who sells or uses any liquor not taxable under this chapter in respect of the transaction by which such person or his vendor acquired such liquor, shall pay an excise tax which is hereby imposed, equal to twenty percent of the wholesale price of the liquor so sold or used . . . .

HAWAII REV. STAT. § 244-4.

[122] HAWAII REV. STAT. § 244-4(6)-(7).

[123] *See* Maryland v. Louisiana, 451 U.S. 725, 756 (1981) (Court held that as a result of tax credits and exclusions, the Louisiana tax discriminated against interstate commerce in favor of local businesses).

[124] The Court found that the tax exemption at issue "seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao and pineapple wine." 104 S. Ct. at 3054.

[125] *Id.* at 3055.

whereas the Hawaii tax did not discriminate between taxpayers.[126] Although Justice White dismissed this distinction as frivolous,[127] it is not clear why he did not then seize upon the opportunity to decide the case in light of his earlier opinion.

The precedents of the *Bacchus* Court suggest that the Court used the *Welton* test mentioned above: the determination of whether the state tax, on its face, is imposed exclusively on out-of-state business.[128] Perhaps the Court misapplied this test since the Hawaii tax, on its face, was not imposed exclusively on out-of-state business. Locally produced "sake" and fruit liqueurs were still subject to the tax.[129] Nevertheless, the Court's conclusion that the exemptions for some local products constituted discrimination against interstate commerce comports with the *Welton* principle of antidiscrimination.[130]

Having found that the Hawaii tax discriminated against interstate commerce, the Court then dealt with arguments raised by the state that the tax did not violate the commerce clause.[131] First, the state argued that discrimination, if any, was de minimis and thus not improper. The tax-exempt products did not compete with the non-exempt products and in fact, okolehao and pineapple wine sales constituted less than one percent of the total liquor sales in Hawaii.[132] However, in *Maryland v. Louisiana*,[133] the Court suggested that it would no longer entertain the de minimis argument as a basis for not invalidating a discriminatory tax.[134] The *Bacchus* Court agreed with the prior decision and rejected the de minimis argument stating:

> [N]either the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead they only go to the extent of such competition. It is well settled that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."[135]

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[126] In re Bacchus Imports, Ltd., 65 Hawaii 566, 581, 656 P.2d 724, 734 (1982).

[127] 104 S. Ct. at 3054 n.8.

[128] *See* Welton v. Missouri, 91 U.S. 275 (1876). *See also supra* text accompanying note 98.

[129] *See* 104 S. Ct. at 3053.

[130] *See supra* notes 98-100 and accompanying text.

[131] 104 S. Ct. at 3054-57.

[132] *Id.* at 3054. The Court noted the statistics provided by the state showed that the percentage of exempted liquor sales steadily increased from .2221% of total liquor sales in 1976 to .7739% in 1981. *Id.* at 3054 n.9.

[133] 451 U.S. 725 (1981).

[134] *Id.* at 759-60.

[135] 104 S. Ct. at 3055 (quoting Maryland v. Louisiana, 451 U.S. 725, 760 (1981)).

In accordance with dicta from Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977), another mitigating argument available to the state was that the tax in question was a compensating use tax. *Id.* at 331-32. In that case, the Court evaluated whether the tax in ques-

The state raised a second argument that upon a finding of discrimination, the Court must still balance the local benefits against the relative burdens on interstate commerce before concluding that the tax was a discrimination in violation of the commerce clause.[136] The Court recognized the validity of such a balance but stated that if the state legislation constituted "economic protectionism," a virtually per se rule of invalidity would be applied.[137] The Court then concluded the tax exemptions in question constituted such economic protectionism for two reasons. First, the state's express purpose in enacting the exemptions was to help the local industry.[138] Second, the exemptions had a discriminatory effect since they only applied to local products.[139]

In its discussion of economic protectionism and the virtual per se rule of invalidity, the Court relied not on cases involving state taxation, but on cases involving state regulations which ostensibly evoked the state's police power to protect public health, safety, and welfare.[140] In these regulation cases, the Court

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tion was a valid compensatory tax and thus not unconstitutionally discriminatory. In *Bacchus*, however, the state tax was not a compensatory tax and could not be "saved" as such. *See supra* notes 107-08.

[136] 104 S. Ct. at 3055.

[137] *Id.*

[138] *Id.* at 3055-56. The Court noted the legislative purpose for the exemption as described in the Hawaii Supreme Court opinion:

> The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "Fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.

Id. See also In re Bacchus Imports, Ltd., 65 Hawaii at 573-74, 656 P.2d at 730.

[139] 104 S. Ct. at 3056. The Court did note again at this point that the exemption did not apply to all local products. However, as long as there was *some* competition between the exempt local products and non-exempt out-of-state products, the Court stated, "there is a discriminatory effect." *Id.*

[140] See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977), where a North Carolina regulation required all closed containers of apples sold or shipped into the state bear only applicable federal grade or designations of unclassified. The Court held that a finding of economic protectionist purpose was not necessary because there clearly was a discriminatory effect as display of Washington State grades were prohibited. *See also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (state regulation banning retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers was held not to have any discriminatory purpose or effect); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (Florida regulation prohibiting out of state banks, trusts, and bank holding companies from owning businesses within the state which provided investment advising services was held to have a discriminatory effect because it overtly prevented foreign enterprises from competing in local markets); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey regulation prohibiting import of most solid or liquid waste had a discriminatory effect because it imposed on out-of-state businesses the full burden of conserving the state's landfill space).

uniformly asserted that state statutes with discriminatory means or ends run contrary to the federal interest in maintaining free and open trade among the states. Indeed, Justice Jackson eloquently stated the principle underlying the commerce clause in *H.P. Hood & Sons v. DuMond*:[141]

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulation exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.[142]

Thus, the free trade unit can be maintained only if states are barred from enacting laws designed to raise the prices of or decrease the local market share of out-of-state goods.

In its analysis, the *Bacchus* Court did adhere to the principle of the commerce clause because the Hawaii liquor tax was enacted to encourage and foster two products of the local industry.[143] Therefore, the Court's holding of the tax as per se unconstitutional, without effecting any balance between state and federal interests, comports with prior case law.

A question arises, however, as to why the *Bacchus* Court resorted to the economic protectionism doctrine of the regulation cases. Precedent existed for a holding of per se unconstitutionality under the tax cases of *Boston Stock Exchange*[144] and *Maryland v. Louisiana*.[145] In both cases, upon a finding of discrimination, the Court undertook no further analysis and entertained no assertion of a legitimate state interest or lack of alternative means. Indeed, the Court in *Maryland v. Louisiana* stated: "It may be true that further hearing would be required to provide a precise determination of the extent of discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination."[146] The Court used this per se analysis in two tax cases decided just prior to *Bacchus*.[147] It is unclear why the

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[141] 336 U.S. 525 (1949).

[142] *Id.* at 539.

[143] 104 S. Ct. at 3055-56. *See supra* note 138.

[144] 429 U.S. 318 (1977).

[145] 451 U.S. 725 (1981).

[146] *Id.* at 759-60.

[147] Westinghouse Elec. Corp. v. Tully, 104 S. Ct. 1856 (1984) (In a unanimous decision written by Justice Blackmun, the Court held the New York franchise tax credit for certain income of Domestic International Sales Corporations discriminated against export shipping from other states in violation of the commerce clause.); Armco Inc. v. Hardesty, 104 S. Ct. 2620 (1984) (Justice Powell delivered the opinion of the Court in an 8-1 decision. The Court held the West Virginia wholesale gross receipts tax which exempted local manufacturers discriminated

Bacchus Court did not follow those tax cases.

Nevertheless, the *Bacchus* Court does establish that a per se rule of unconstitutionality will be triggered by a finding of discrimination against interstate commerce. It could be maintained that the establishment of a per se rule in *Bacchus* is inconsistent with the *Complete Auto* decision which overruled the per se rule of *Spector*.[148] Consideration of this argument depends on one's understanding of the *Complete Auto* decision.

One commentator viewed *Complete Auto* as representing the need for courts to consider the practical effect of the state tax, as well as its language, before ruling on its constitutionality.[149] If *Complete Auto* emphasized the necessity for courts to evaluate the practical operation of a tax, the *Bacchus* per se rule consistently maintains this evaluation. The *Bacchus* Court stated: "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory *purpose* or discriminatory *effect*."[150] Thus under *Bacchus*, courts will have to consider whether the practical effects or the purpose of the statute is discriminatory before applying a per se rule of unconstitutionality.

Another view characterized *Complete Auto* as suggesting the need for the court to effect the balance between competing state and federal interests.[151] Under this view, the economic protectionism doctrine contradicts *Complete Auto* because any rule of per se unconstitutionality preempts the balancing analysis.

Arguably, in taxation cases, a finding of discrimination renders unnecessary the balancing of competing interests because the federal interest in maintaining free and open trade among the states will always outweigh the state's interest in raising revenue.[152] This federal interest, while not expressly stated in the Constitution, lies at the very root of the commerce clause. Indeed, the elimination of interstate trade barriers and economic warfare between the states comprised one of the main reasons for the abandonment of the Articles of Confederation and

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against interstate commerce in violation of the commerce clause.).

[148] *See supra* notes 51-61 and accompanying text.

[149] *See* Lockhart, *supra* note 47. Lockhart suggests the revolution in the area of state taxation is the consideration for the practical economic effect of a tax:

> The determination of the validity of taxes on interstate business will require, much more often than in the past, realistic, detailed analysis of the particular tax and others like it affecting both interstate and local commerce, and their practical effect on the taxpayer's business and its capacity to compete with local business.

Id. at 1059.

[150] 104 S. Ct. at 3055 (emphasis added).

[151] *See* Note, *State Taxation*, *supra* note 56. The note contends the impact of *Complete Auto* is that "[t]he conception of constitutional federalism that underlies the present extension to the states of the power to tax the privilege of engaging in interstate commerce is one which evinces a greater sensitivity to the legislative interests of the state governments." *Id.* at 326.

[152] *See* L. TRIBE, *supra* note 46, at § 6-14.

the adoption of the federal Constitution which granted to Congress the power to control interstate commerce.[153]

In comparison, the ultimate state purpose in exercising its power of taxation is the raising of revenue.[154] Since this goal may conceivably be accomplished in other ways that would not discriminate against interstate commerce, the state will be deemed to have failed to sustain the burden of justifying the discriminating tax.[155]

In summary, the *Bacchus* Court could have reached a simple decision finding the Hawaii liquor tax exemptions unconstitutionally discriminated against interstate commerce under *Maryland v. Louisiana*.[156] Instead, the Court resorted to an analysis of the state tax under the economic protectionism doctrine traditionally utilized in state regulatory cases.[157] Although the principle of antidiscrimination is sustained under either analysis, use of the tax cases would have been more expedient. It is now uncertain what impact the economic protectionism doctrine of state regulatory cases will have on the analysis of future state taxation cases.[158]

IV. THE TWENTY-FIRST AMENDMENT

After the *Bacchus* Court found that the tax exemptions discriminated against interstate commerce in violation of the commerce clause, the Court faced the state's argument that the tax may yet be saved by the twenty-first amendment.[159] While the majority of the Court held that the twenty-first amendment would not save the tax in question, the dissent believed that the commerce clause claim was squarely foreclosed by the twenty-first amendment.[160]

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[153] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10-11 (1824). *See also Developments*, *supra* note 80, at 956-57 (1962). Expounding on the Constitution, Alexander Hamilton wrote, "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective products, not only for the supply of reciprocal want at home, but for the exportation to foreign markets." The Federalist No. 11, at 52 (A. Hamilton) (J. Cooke ed. 1961), *quoted in Developments*, *supra* note 80, at 956 n.8.

[154] *See* Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959).

[155] *See* L. TRIBE, *supra* note 46, at § 6-14.

[156] *See supra* text accompanying notes 117-23.

[157] *See supra* text accompanying notes 136-43.

[158] The Court has had a tendency to separate cases involving state regulation of interstate activities and cases involving state taxation of interstate activities. One commentator found that in cases involving state regulations, the Court has been less willing to recognize state sovereignty as a fundamental value than it had in state taxation cases. *See* Hunter, *supra* note 52, at 91-93. The merging of state regulatory case analysis in the state taxation case of *Bacchus* would then suggest that state sovereignty as a fundamental value will likewise be diminished in taxation cases.

[159] 104 S. Ct. at 3057.

[160] *Id.* at 3059 (Stevens, J., dissenting).

Adopted in 1933, the twenty-first amendment serves a two-fold purpose. The first section of the amendment repeals the eighteenth amendment of the Constitution, which imposed national prohibition of alcohol. The second section creates the present framework of the states' constitutional power over alcoholic beverages: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[161] This second section raises controversial issues surrounding the scope of power granted to the states to regulate intoxicating liquors within their borders.

Specifically at issue in *Bacchus* were first, whether the scope of state power granted by the twenty-first amendment is sufficiently broad to bypass the traditional commerce clause discrimination analysis,[162] and second, whether the purpose of the twenty-first amendment is limited to the objectives of temperance and public health, safety and welfare. It is instructive to review the legislative history, case law and acts before prohibition to understand the framers' intent behind the scope of state power granted.

A. Legislative History

The legislative history and congressional debates on the amendment reveal two competing theories on the scope of state power. The two theories are the "absolutist viewpoint"[163] and the "federalist position."[164]

The absolutist view is that states have broad power to control and regulate liquor within their borders. The absolutists contend that Congress conferred state regulatory power with the intention of placing the control of liquor entirely within the states' authority.[165] Proponents of this viewpoint submit that section 2 purports to grant the state plenary power to protect their citizens from the "evils" of liquor within their borders.[166] Senator Wagner, a principal sponsor of

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[161] U.S. CONST. amend. XXI, § 2.

[162] There are three tests under traditional commerce clause analysis to determine whether a tax discriminates against interstate commerce: (1) *Welton* test—examine the language of a tax statute to determine whether the tax on its face is imposed only on out-of-state businesses (while ignoring intrastate businesses); (2) *Boston Stock Exchange* test—determine whether an individual confronted with a choice between an in-state and an out-of-state transaction would make his decision without being influenced by state tax consequences; (3) A determination whether the tax provided local businesses with a commercial advantage in its practical effect or by means of exemptions and credits. *See supra* text accompanying notes 98-120.

[163] *See infra* notes 165-70 and accompanying text.

[164] Note, *Federal District Court Exempts Interstate Rail Carrier from State Open Saloon Prohibition*, 6 CREIGHTON L. REV. 249 (1972) (which used the term "federalist").

[165] Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1579 (1975).

[166] *Id.*

the amendment, opposed delegation of any regulatory power to the national government because any federal authority over liquor would prohibit restoring to the states "responsibility for their local liquor problems."[167] The basis for the absolutist theory lies in a congressional deletion of a proposed section, by a vote of thirty-three to thirty-two after a lengthy debate, which would have expressly endorsed concurrent state and federal regulation of liquor. The deleted section of the Senate Judiciary Committee proposal stated, "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."[168] That the issue of concurrent regulation was initially addressed and later discounted in the final outcome of the amendment supports the absolutist's argument that Congress intended to place control entirely within the states' hands.

The plain meaning of the amendment itself lends further support for the absolutist viewpoint. Specifically, the phrase "in violation of the laws thereof" makes no reference whatsoever to concurrent federal restrictions and instead supports state regulation of intoxicating liquors.[169] As one commentator stated: "It is fair to assume that if there had been an intent to limit more specifically the conditions under which state laws could apply to imported liquors, this purpose would have been indicated by an appropriate phrasing of the Amendment."[170] Thus, the absolutists contend that states should have broad regulatory power over liquor.

In contrast, the federalists contend that Congress conferred limited state regulatory power over liquor with the sole intention of allowing liquor-free states to remain "dry" by prohibiting liquors from entering their borders.[171] Proponents of this viewpoint emphasize the close duplication of the twenty-first amendment language to that of the Webb-Kenyon Act, which prohibited interstate transportation of liquor to be used or sold in violation of the laws of the destination state.[172] Thus, federalists argue that the amendment was enacted simply

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[167] *See* 76 Cong. Rec. 4138 (1933); 4143 (Senator Blaine); 4144-48 (Senator Wagner); and 4177-78 (Senator Black). *See also* Justice Black's dissent in Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 337 (1963).

[168] 76 Cong. Rec. 4149-79 (1933).

[169] *See* Note, *The Effect of the Twenty-first Amendment*, *supra* note 165, at 1580.

[170] Kallenbach, *Interstate Commerce in Intoxicating Liquors Under the Twenty-first Amendment*, 14 TEMPLE L.Q. 474, 479 (1940). Case law supporting the absolutist viewpoint include Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Trinier Corp., 304 U.S. 401 (1938); and State Bd. of Equalization v. Young's Mkt. Co., 229 U.S. 59 (1936).

[171] The phrase "dry states" is used to connote states without liquor within its borders.

[172] 37 Stat. 699 (1913), 27 U.S.C. § 122 (1970), reenacted, 49 Stat. 877 (1935). The Webb-Kenyon Act provides in part:

> The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which

to raise the Webb-Kenyon Act to constitutional status. As seen in Senator Borah's statement regarding the second section of the twenty-first amendment:

> [I]t has been said that the Webb-Kenyon Act is sufficient protection to the dry states. [However], the Webb-Kenyon Act was sustained by a . . . divided Court . . . we are turning the dry states over for protection to a law which is still of doubtful constitutionality and which, . . . might very well be held unconstitutional upon a re-presentation of it. [W]e are [now] asking the dry states to rely upon the Congress . . . to maintain indefinitely the Webb-Kenyon law.[173]

The fact that there is no clear consensus on the meaning of the amendment is displayed in the remarks of Senator Blaine, the Senate sponsor of the amendment. He stated that section 2 was designed only to ensure that dry states could not be forced to permit liquor sales.[174] However, he also made conflicting statements supporting the alternative viewpoint that section 2 purported "to restore to the States . . . absolute control over interstate commerce affecting intoxicating liquors."[175]

As seen in the legislative history, it is unclear whether the framers of the amendment intended to grant limited power to the states, consistent with the federalists' viewpoint, or whether the framers intended to grant broad state powers as contended by the absolutists. Case law supports both views.

Prior to 1919, when the passage of the eighteenth amendment brought national prohibition of alcohol, Congress and the Supreme Court struggled over the scope of state power to regulate liquor within its borders.[176] An analysis of the pre-prohibition history is significant in understanding the mindset of the legislators and the Court in meeting state prohibition efforts.

B. History of the Law

In 1890, the states' prohibition efforts suffered a major setback in the case of

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said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.

See Powell, *The Validity of State Regulations Under the Webb-Kenyon Law*, 2 So. L.Q. 112 (1917).

[173] 76 Cong. Rec. at 4170 (1933).

[174] *Id.* at 4140-41.

[175] *Id.* at 4143.

[176] *See generally*, Harris, *The Concept of State Power Under the Twenty-first Amendment*, 40 TENN. L. REV. 465 (1973); de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment*, 8 GEO. WASH. L. REV. 819 (1940); Comment, *State Power to Regulate Liquor: Section Two of the Twenty-first Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131 (1973) [hereinafter cited as Comment, *State Power*].

Leisy v. Hardin.[177] That case established the "original package doctrine" whereby liquor in its original package was deemed to remain in interstate commerce, and as such, immune from the control of state police power even after arriving in the state. The Court held that an item of interstate commerce becomes part of the common mass of property subject to state regulation only when removed from its original package or sold. Additionally, the Court noted that although Congress had exclusive power to regulate interstate commerce with respect to intoxicating liquors, the states could exercise this power if Congress consented.[178]

Leisy created a loophole in state prohibition efforts because a state ban on alcoholic beverages could easily be avoided as long as the interstate shippers were free to import and sell liquor in its original packages.[179] Within the same year, Congress responded by enacting the Wilson Act[180] which provided that all intoxicating liquors shipped into a state would "upon arrival" be subject to the laws of the state.[181] Thus, the Wilson Act granted and reinforced states' power to regulate liquor since liquor was no longer exempt by reason of being introduced in its original packages.

Eight years later, the Supreme Court in *Rhodes v. Iowa*[182] interpreted the "upon arrival" provision of the Wilson Act to mean the state lacked the power to attach liquor held in a freight warehouse, until its arrival at the point of destination and "delivery there to the consignee."[183] Consequently, the states could not prevent alcoholic beverages from being shipped into their state since mail-order sellers could circumvent the liquor regulations merely by shipping on direct consignment to the ultimate consumer.

Congress made another attempt to meet prohibition interests in 1913 with

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[177] 135 U.S. 100 (1890).

[178] *Id.* at 124-25 ("in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer").

[179] *See* Opening Brief for Appellants at 30, Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984).

[180] 26 Stat. 313 (1890), 27 U.S.C. § 121 (1934). The Wilson Act provides in part:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State . . . or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

The constitutionality of the Wilson Act was upheld in In re Rahrer, 140 U.S. 545 (1891).

[181] Comment, *State Power*, *supra* note 176, at 1131.

[182] 170 U.S. 412 (1898).

[183] *Id.* at 423, 426. *See* Louisville & Nashville R.R. v. F.W. Cook Brewing Co., 223 U.S. 70 (1912); Adams Express Co. v. Kentucky, 206 U.S. 129 (1907); American Express Co. v. Iowa, 196 U.S. 133 (1905).

the passage of the Webb-Kenyon Act[184] which prohibited interstate transportation of liquor to be used or sold in violation of the laws of the destination state.[185] In the 1917 case of *James Clark Distilling Co. v. Western Maryland Railway*,[186] the Court upheld the constitutionality of the Webb-Kenyon Act and stated that the Act purported "to prevent the immunity characteristic of interstate commerce from being used to permit receipt of liquor through such commerce in States contrary to their laws."[187]

In 1919, the passage of the eighteenth amendment[188] brought national prohibition of alcohol and temporarily put a hold on the struggle to define the scope of state power to regulate liquor. However, the issue surfaced again in 1933 with the enactment of the twenty-first amendment.

The cases decided immediately after the passage of the twenty-first amendment continued to uphold the broad powers of the states. For example, in the seminal case of *State Board of Equalization v. Young's Market Co.*,[189] decided in 1936, the Supreme Court upheld a California statute imposing a license fee for the privilege of importing beer within its borders. The plaintiff-wholesalers argued that the importer's license fee violated the commerce clause by discriminating against wholesalers of imported beer who had already paid a required fee for their wholesalers' licenses. The Court stated that prior to the twenty-first amendment the statute probably would have been deemed an undue burden on interstate commerce, but that the amendment abrogated the right to import free and conferred upon the state the power to forbid all importations that fail to comply with its prescribed conditions.[190]

The Court applied a "greater-lesser" rationale. It reasoned that since a state could entirely prohibit the importation of intoxicating liquors without violating the commerce clause,[191] "[s]urely the State may adopt a lesser degree of regulation than total prohibition."[192] Applying this reasoning, a lesser degree of prohibition is accomplished by subjecting foreign articles to a heavy importation

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[184] 37 Stat. 699 (1913), 27 U.S.C. § 122 (1970) (reenacted at 49 Stat. 877 (1935)).

[185] Comment, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment*, 72 HARV. L. REV. 1145, 1146 n.10 (1959) (the Reed Amendment, ch. 162, 5, 39 Stat. 1069 (1917), made violation of the Webb-Kenyon Act a federal crime).

[186] 242 U.S. 311 (1917).

[187] *Id.* at 324.

[188] The eighteenth amendment provides in part: "[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

[189] 299 U.S. 59 (1936).

[190] *Id.* at 62.

[191] The rationale for the entire prohibition is derived from the Webb-Kenyon Act. *See* Powell, *supra* note 172, at 127-39.

[192] 299 U.S. 59, 63 (1936).

fee.[193] Thus, the Court discounted the wholesalers' contention that the state may not regulate importations except for the purpose of protecting public health, safety, or morals.[194] Nor did the Court find any basis for the state court's holding that the state may prohibit the importation only if it establishes a monopoly in the liquor trade.[195]

Consistent with the Court's interpretation of the twenty-first amendment in *Young's Market*, subsequent case law followed the trend of giving states more power. The Court recognized that each state holds powers over the importation of liquor from other jurisdictions.[196] Moreover, the Court noted that to limit the power conferred on states by the amendment so as to forbid only those importations which, in the Court's opinion, violated a reasonable regulation of liquor traffic, would involve not only a construction of the amendment, but a rewriting of it.[197]

More recent case law has emphasized the need to consider federal interests along with state interests.[198] As seen in the 1964 case of *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[199] the Court acknowledged in dicta that the amendment did not entirely remove state regulation of alcoholic beverages from the

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[193] *Id.*

[194] *Id.*

[195] The Court stated, "There is no basis for holding that it may prohibit, or so limit, importation only if it establishes a monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors." *Id.*

[196] Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (the Court sustained the validity of a Michigan statute prohibiting local dealers in beer from selling any beer manufactured in Michigan). *See also* Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (retaliation statute barring imports from states that proscribed shipments of liquor from other states).

[197] Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938). In *Mahoney*, the Court upheld a Missouri statute prohibiting the importation of any brand of intoxicating liquors containing more than 25% alcohol unless such brand is registered with the United States Patent Office. The plaintiff contended that the statute discriminated in favor of liquor processed within the state as opposed to out-of-state, for locally processed liquor could be sold regardless of whether the brand had been registered. The Court held that to limit the power conferred on states by the amendment so that only those importations may be forbidden which, in the opinion of the Court, violated a reasonable regulation of liquor traffic, would involve not only a construction of the amendment, but a rewriting of it. *Id.* at 403, 404.

[198] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106-14 (1980) (the twenty-first amendment does not bar application of the Sherman Act to California's wine pricing system).

[199] 377 U.S. 324 (1964). In that case, the plaintiff's business, approved by the United States Bureau of Customs, involved selling tax-free bottled wines and liquors to departing passengers at the John F. Kennedy Airport. The bottles were transported onto the plane and handed to the purchaser as he disembarked at his foreign destination. The Court stated that the ultimate delivery and use was not in New York, but in a foreign country, and as such, the state unconstitutionally sought to regulate commerce with foreign nations.

ambit of the commerce clause. The Court observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are part of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[200] *Hostetter*, however, did not explicitly limit state power to regulate liquor for violation of the commerce clause.[201]

In analyzing the trend of the Court's twenty-first amendment decisions, the Court most recently appears to be reverting to its *Young's Market*[202] stance of granting broad state powers. In its 1972 decision in *California v. La Rue*,[203] the Court broadened the scope of the twenty-first amendment to include state power to regulate the type of entertainment in liquor establishments. The California Department of Alcoholic Beverage Control promulgated regulations prohibiting certain sexually explicit live entertainment or films in licensed bars and nightclubs.[204] The Court held that in view of the broad authority to control intoxicating liquors under the twenty-first amendment, the challenged regulations did not, on their face, violate the federal Constitution, notwithstanding that the regulations proscribed some acts which were not obscene and which were within the limits of the first and fourteenth amendments' protection of freedom of expression.[205] The Court further stated:

> [T]he broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals . . . [and] that wide latitude as to the choice of means to accomplish a permissible end must be accorded to the state agency which is itself the repository of the state's power under the amendment.[206]

Thus, case law leading up to *Bacchus* implicitly reveals the Court's concurrence with the absolutists' interpretation of the amendment that Congress intended to place liquor control in the hands of the states as opposed to the federal government. An analysis of *Bacchus* will disclose whether the Court maintains or shifts this trend in its interpretation of the states' twenty-first amendment power.

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[200] *Id.* at 332.

[201] The consideration of federal interests in conjunction with state liquor regulation since the ratification of the twenty-first amendment is visible in the following cases: Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (fourteenth amendment's due process requirement); Craig v. Boren, 429 U.S. 190, 204-09 (1976), *reh'g denied*, 429 U.S. 1124 (1977) (equal protection); and Department of Revenue v. James Beam Co., 377 U.S. 341 (1964) (import-export clause).

[202] 299 U.S. 59 (1936).

[203] 409 U.S. 109 (1972), *reh'g denied*, 410 U.S. 948 (1973).

[204] *Id.* at 111-12.

[205] *Id.* at 116-17.

[206] *Id.* at 114-16.

C. *Analysis of Bacchus*

The wholesalers appealed the Hawaii Supreme Court's decision affirming the constitutionality of the Hawaii liquor tax exemptions. On appeal, the state, for the first time, contended that the twenty-first amendment would save the liquor tax from a commerce clause discrimination challenge. The majority opinion of the United States Supreme Court focused on the central purpose of the twenty-first amendment and concluded that such purpose did not include the intent to usurp the precepts of the commerce clause.[207] The dissenting opinion emphasized that the twenty-first amendment was an express grant of power to the states.

The language of the amendment is broad and ambiguous. It does not specify the extent of state regulatory power actually conferred. As the majority in the *Bacchus* Court noted: "Despite the broad language in some of the opinions of this Court written shortly after enactment of the Amendment, more recently we have recognized the obscurity of the legislative history of section two."[208]

The *Bacchus* Court, while acknowledging the existence of state regulatory power over intoxicating liquors, followed the federalist position of limited state power.[209] The Court stated that Hawaii did not seek to justify its tax on the ground that regulation is designed to promote "temperance," or to "combat the perceived evils of an unrestricted traffic in liquor," or to "carry out any other purpose" of the twenty-first amendment.[210] The Court concluded that these above-mentioned purposes are entitled to more deference than state laws enacted "to promote a local industry."[211] Consequently, the *Bacchus* Court held the tax is not supported by any clear concern of the amendment and summarily rejected the state's twenty-first amendment claim.

However, as noted in the dissenting opinion, the weakness of the Court's analysis lies in its failure to articulate the purported "any other purpose of the twenty-first amendment."[212] Nor does the Court state what it perceives the proper scope of the twenty-first amendment's authorization to be. Instead, the Court leaps to the conclusion that whatever the unspecified scope or other possible purposes of the twenty-first amendment might be, those purposes do not include a state's promotion or protection of a local industry.

Despite the power conferred under the twenty-first amendment, the Court has prohibited state action in at least three situations that infringed on Con-

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[207] 104 S. Ct. at 3058-59.

[208] *Id.* at 3057-58.

[209] *See* notes 164, 171-75 and accompanying text.

[210] 104 S. Ct. at 3057-58.

[211] *Id.*

[212] *Id.* at 3064 (Stevens, J., dissenting).

gress' power to regulate interstate commerce.[213] First, a state cannot prevent liquor shipment through state territory where the destination for distribution is a distinct sovereignty, such as a federal enclave within the state.[214] Second, a state may not place an undue burden on interstate commerce by forcing brand owners to raise liquor prices outside of the state.[215] Finally, a state may not impair interstate commerce that merely passes through a state.[216]As noted in the dissenting opinion of Justice Stevens, none of the above-mentioned limitations was alleged by the wholesalers and thus did not apply in the present case.[217] Thus, the extent to which the twenty-first amendment may or may not have placed limits on Congress to regulate commerce in intoxicating beverages, as contended by the majority opinion in *Bacchus*, was simply not at issue. There was no claim that the Hawaii tax stood inconsistent with any exercise of power that the commerce clause conferred on Congress to regulate commerce among the several states.

Rather, as expressed by Justice Stevens, *Bacchus* concerned the question whether the tax provision in this case lay within a power expressly conferred upon the states by the Constitution. Justice Stevens succinctly answered, "It plainly is."[218]

The second section of the twenty-first amendment specifically refers to the transport or import of liquor into a state "for delivery or use therein." The Hawaii liquor tax applies to the sale of liquor presumably consumed in Hawaii.

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[213] The equal protection clause of the fourteenth amendment imposes a fourth limitation on state power under the twenty-first amendment. In Craig v. Boren, 429 U.S. 190 (1976), the Court held that despite the twenty-first amendment, it would invalidate Oklahoma's statute permitting the sale of 3.2% beer to females aged 18 and over, while restricting sales to males aged 21 and older. This discrimination against persons as opposed to goods violated the equal protection clause of the fourteenth amendment.

[214] Collins v. Yosemite Park Co., 304 U.S. 518 (1938). In *Collins*, the ultimate delivery and use therein was the national park, a distinct sovereignty, as opposed to delivery within the state itself. Accordingly, the Court held that the twenty-first amendment did not give states the power to prohibit the transportation of liquor through state territory.

[215] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) (the Court affirmed the constitutionality of the New York Alcoholic Beverage Control Law provision requiring that the monthly price schedules for sales to wholesalers and retailers must be accompanied by an affirmation that the bottle and case price of liquor is no higher than the lowest price at which sales were made anywhere in the United States during the preceding month).

[216] *See generally* Department of Revenue v. Beam Distilling Co., 377 U.S. 341 (1964), where an importer of whisky from Scotland claimed a refund of a Kentucky whisky tax of ten cents per proof gallon, collected while the whisky remained in unbroken packages in its hands, and before resale or use. The U.S. Supreme Court held that the importer was entitled to a refund because while goods retain their character as imports, a state tax on them violates the import-export clause which was not repealed by the twenty-first amendment regarding intoxicants.

[217] 104 S. Ct. at 3060-61 (Stevens, J., dissenting).

[218] *Id.* at 3064 (Stevens, J., dissenting).

Thus, since Hawaii is the state of destination for delivery or use therein, the Hawaii tax exemption falls within the purview of the twenty-first amendment. Since these above-mentioned limitations are not applicable in the present case, a determination must be made concerning the scope of powers granted to a state under the twenty-first amendment.

Prior cases have established that by virtue of the twenty-first amendment, a state may (1) absolutely prohibit intoxicating liquors within its borders;[219] (2) require a liquor permit or license and impose a license fee or a tax with regard to transporting, buying and selling intoxicating liquors within the state;[220] (3) prohibit the importation of intoxicating liquors of another state in retaliation against the laws of that state discriminating against liquor manufactured by the first state;[221] (4) impose retaliatory taxes on intoxicating liquors manufactured in other states and imported into the taxing state;[222] (5) regulate the price of liquor sold in the state;[223] and (6) regulate the containers and labels of intoxicating liquors.[224] It is unclear, however, whether the twenty-first amendment requires that the state's concerns, in liquor regulation, be tied to the traditional police power objectives of health, safety and morals. Specifically, at issue in *Bacchus* was whether state regulation of alcohol must necessarily be tied to the moral objective of temperance as opposed to the development and promotion of a local industry. The majority opinion in *Bacchus* said yes.

However, that conclusion does not necessarily follow from the prior case law. In the 1966 case of *Joseph E. Seagram & Sons v. Hostetter*,[225] the Court stated, "[N]othing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance."[226] Arguably, had the framers of the

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[219] Department of Revenue v. Beam Distilling Co., 377 U.S. 341 (1964); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).

[220] State ex rel Superior Distrib. Co. v. Davis, 132 Ohio 308, 7 N.E.2d 652 (1937) (Ohio statute authorizing the levy and collection of additional taxes on beer and other intoxicating malt beverages manufactured in another state and imported into the state); Texas Liquor Control Bd. v. Continental Distilling Sales Co., 203 S.W.2d 288 (Tex. Civ. App. 1947), *appeal dismissed*, 332 U.S. 747 (1947); State v. Payne, 183 Kan. 396, 327 P.2d 1071 (1958).

[221] Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939).

[222] Washington Brewers Inst. v. United States, 137 F.2d 964 (9th Cir. 1943); Ajax Distribs., Inc. v. Springer, 26 Del. Ch. 101, 22 A.2d 838, *aff'd per curiam* 26 Del. Ch. 445, 28 A.2d 309 (1941).

[223] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Krauss v. Sacramento, 314 F. Supp. 171 (D.C. Cal. 1970).

[224] Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954) (statute prohibiting the sale of beer and ale in non-returnable glass containers); Boller Beverages, Inc. v. Davis, 38 N.J. 138, 183 A.2d 64 (1962).

[225] 384 U.S. 35 (1966).

[226] *Id.* at 47.

twenty-first amendment intended temperance as the exclusive central tenet of the amendment, specific reference to that effect would have been enunciated. No such reference exists.

Moreover, the Court in *California v. La Rue*[227] extended the scope of the twenty-first amendment to encompass things only remotely associated with intoxicating beverages, including sexually explicit live entertainment in liquor establishments.[228] Thus, *La Rue* seems to indicate that the twenty-first amendment confers authority beyond public health, welfare and morals.[229]

That case may be distinguished from *Bacchus* because the challenged regulations in *La Rue* did not on their face violate the federal Constitution,[230] whereas the state regulations in *Bacchus* expressly discriminated in favor of local products.[231] However, this distinction based on facial discrimination is inapposite. Facial discrimination is a test utilized under the traditional commerce clause analysis. For example, in *Welton v. Missouri*,[232] the language of the tax statute was examined to determine whether the tax was imposed only on out-of-state business.[233] It is not an established test under the twenty-first amendment.

Bacchus stands in direct conflict with *La Rue*. *La Rue* exemplifies expansive state power under the twenty-first amendment extending to things only remotely related to liquor regulation.[234] In contrast, *Bacchus* curtails state power restricting things closely related to liquor regulation.[235] Either the Court's decision in *Bacchus* or *La Rue* is wrong. Thus, the question arises whether *La Rue* is incorrectly decided and should be reversed if *Bacchus* is good law. Or perhaps, *Bacchus* is the aberration.

In summary, in the *Bacchus* decision, the Supreme Court has pronounced yet another limitation on the states' power to regulate intoxicating liquors within their borders. The Court in essence construes the amendment as saying precisely what it rejected in *State Board of Equalization v. Young's Market Co.*[236] The *Young's Market* Court held that since the enactment of the twenty-first amendment, a state was not required to "let imported liquors compete with the do-

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[227] 409 U.S. 109 (1972).

[228] *Id.* at 114-19.

[229] *See generally* Note, *The Expansion of State Power Through the Twenty-first Amendment*, 27 U. MIAMI L. REV. 509 (1973).

[230] California v. La Rue, 409 U.S. 109, 116-18 (1972).

[231] 104 S. Ct. at 3054.

[232] 91 U.S. 275 (1876).

[233] See *supra* notes 99-104 and accompanying text.

[234] Things remotely related to liquor regulation refers to sexually explicit live acts in liquor regulation pursuant to *La Rue*.

[235] Things closely related to liquor regulation refers to liquor tax exemptions, pursuant to *Bacchus*, that have an impact on both in-state and out-of-state wholesale distributors.

[236] 229 U.S. 59 (1936).

mestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."[237] As a result of *Bacchus*, the implication for future cases is that discriminatory state action under the twenty-first amendment will now be subject to analysis under the traditional commerce clause doctrine of economic protectionism.[238] The decision renders to the states the power to prohibit or regulate intoxicating liquor for delivery or use therein, with the exception of regulation to promote a local industry.

V. THE INVALID EXEMPTIONS AND A PROPER REMEDY

Aside from the legal implications of *Bacchus* on the status of the twenty-first amendment in relation to the commerce clause, the decision generated the immediate practical need to determine a proper remedy. The Supreme Court declared the exemptions for okolehao and fruit wine unconstitutional and remanded the case to state court for that purpose.[239]

Determination of the remedy turns on whether the invalid exemptions rendered the entire statute unconstitutional or whether they are severable from the rest of the statute. If the entire statute is unconstitutional *ab initio*, then the state did not have the constitutional right to collect the taxes from the wholesalers.[240] However, if the exemptions are severable, they do not taint the statute. Thus, the state's power to collect the liquor tax and the wholesalers' obligation to pay the tax would remain unaltered.

The *Bacchus* decision is ambiguous as to whether it invalidated the entire tax statute or merely the exemptions. The text of the opinion explicitly invalidated

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[237] *Id.* at 62.

[238] *See supra* notes 137-58 and accompanying text.

[239] 104 S. Ct. at 3059.

[240] If the Hawaii Supreme Court rules that the invalid exemptions are not severable and thus the entire tax statute is also invalid, the issue of refunds for the taxes paid under that statute will arise. One of the issues that will have to be resolved is whether the state or the wholesalers are entitled to the taxes paid in protest. The state contended that the liquor taxes should not be refunded to the wholesalers because it would constitute unjust enrichment. The wholesalers passed the burden of the liquor taxes onto the purchasers of the liquor, the public. Thus the public should be entitled to the funds. Brief for Appellees, *supra* note 38, at 46-49.

In contrast, the wholesalers asserted that they are entitled to the refund for they assumed and were responsible for the liquor tax payments regardless of subsequent reimbursement from the consumers. Reply Brief for Appellants at 11-15, Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) [hereinafter cited as "Reply Brief for Appellants"].

The wholesalers also questioned whether the state could refuse to refund the taxes paid. In Ward v. Love County, 253 U.S. 17 (1920), the Court held despite lack of state authority to refund, a state that collects taxes in violation of a federal right must nevertheless refund the taxes. Thus, the wholesalers contended since the state collected taxes in violation of the commerce clause, the state must refund the taxes. Reply Brief of Appellants at 12-13.

the exemptions.[241] However, in an obscure footnote, the Court appears to have rejected any argument for severance, thus supporting the inference that the entire tax statute was invalidated. The Court noted:

> Appellee also would have us avoid the merits by holding that the exemptions are severable and should not invalidate the entire tax. The argument was not presented to the Supreme Court of Hawaii and that Court did not proceed on any such basis. Furthermore, the challenged exemptions have now expired and "severance" would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not.[242]

Reliance on that footnote by the wholesalers is questionable because the Court recognized that the severance issue had not been addressed by the state courts and thus was not a proper issue for the Court to decide.[243] It remains for the state court to determine the validity of the liquor tax statute vis-a-vis the invalid exemptions.

Statutory construction and case law support severance of the invalid exemptions. Although the Hawaii liquor tax does not itself contain a severance clause, the legislature has enacted a general severability statute. Section 1-23 of the Hawaii Revised Statutes states: "If any provision of the Hawaii Revised Statutes, or the application thereof to any person or circumstances, is held invalid, the remainder of the Hawaii Revised Statutes, or the application of the provision to other persons or circumstances, shall not be affected thereby." Therefore, if this general clause applies to the invalid exemptions, the remainder of the liquor tax should remain valid and enforceable.

Both the United States Supreme Court and state courts[244] have recognized a general rule of severability in statutory construction.[245] In *Buckley v. Valeo*,[246]

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[241] The Court stated, "We therefore conclude that the Hawaii Liquor Tax *exemptions* for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." 104 S. Ct. at 3057 (emphasis added).

[242] *Id.* at 3054 n.7.

[243] *See supra* text accompanying note 242. *See also* 104 S. Ct. at 3059.

[244] *See, e.g.*, Bradbury & Stamm Const. Co. v. Bureau of Revenue, 70 N.M. 226, 372 P.2d 808 (1962) (invalid exemption from payment of emergency school taxes held separable from remainder of statute and remainder of statute is constitutional and enforceable).

[245] The general severability rule in statutory construction is recognized as:

> If the legislature so intended, the valid parts of an act will be upheld, "unless all the provisions are connected in subject matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. . . . The test is whether or not the legislature would have passed the statute had it been presented with the invalid features removed.

the Court stated the general test for severability as follows: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[247] The Hawaii Supreme Court has stated a similar rule.[248] Thus, whether an unconstitutional provision is severable from the remainder of the statute depends on legislative intent.

The legislative history of the liquor tax is helpful in discerning legislative intent. Originally enacted in 1939, the liquor tax contained no exemptions.[249] In 1960, the legislature enacted a limited five-year exemption for okolehao.[250] The exemption expired in 1965, the same year the tax rate increased to twenty percent.[251] No further exemptions for local products appeared until 1971 when the exemption for okolehao was reenacted along with an exemption for fruit wine.[252] Therefore, when the legislature increased the tax rate to twenty percent, it intended that such rate apply to all alcoholic products. Clearly, the exemptions were not tied to the rate increase. These provisions of the liquor tax are not so interwoven that it would be impossible to separate them.[253] Thus, elimination of the invalid exemptions would not alter the statute's basic operation.

Wholesalers, however, contended in their briefs that the general rule of severability should not apply in this case because it fails to provide a timely adequate remedy.[254] The exemptions for okolehao and fruit wine expired in 1981. Thus, while the injury of discriminatory taxation had already taken its toll, no

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2 SUTHERLAND STATUTORY CONSTRUCTION § 44.04, at 341-42 (4th ed. C. Sands ed. 1973) (footnotes omitted).

[246] 424 U.S. 1 (1976).

[247] *Id.* at 108-09 (quoting Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)). *See also* Regan v. Time, Inc., 104 S. Ct. 3262 (1984); United States v. Jackson, 390 U.S. 570 (1968).

[248] The Hawaii Supreme Court has stated:

> The general rule of law concerning the concept of severability is that if any part of a statute is held invalid, and if the remainder is complete in itself and is capable of being executed in accordance with the apparent legislative intent, then the remainder must be upheld as constitutional.

State v. Bloss, 62 Hawaii 147, 153, 613 P.2d 354, 358 (1980). *See also* Territory v. Hoy Chang, 21 Hawaii 39 (1912).

[249] *See supra* note 19 and accompanying text.

[250] Act of May 11, 1960, § 1, HAWAII REV. STAT. ch. 244, § 244-4 (1976) (repealed Supp. 1984) .

[251] Act of June 21, 1965, § 8, HAWAII REV. STAT. ch. 244, § 244-4 (1976) (repealed Supp. 1984).

[252] *See supra* notes 21-22 and accompanying text.

[253] *Cf.* Nelson v. Miwa, 56 Hawaii 601, 546 P.2d 1005 (1976) (court held that if part of a statute is unconstitutional and that part is inseparable from the remainder, the whole statute is unconstitutional).

[254] Reply Brief for Appellants, *supra* note 225, at 15.

offending provisions remain to be severed. Moreover, such a remedy would be insufficient because wholesalers have suffered economic losses as a result of the discriminatory exemptions.[255] Also, even if the exemptions were severed, the wholesalers point out, the state would have great difficulty in attempting to collect the twenty percent tax from the wholesalers of okolehao and pineapple wine. Despite the lack of supporting authority, the wholesalers noted the possible defenses to the state's attempt to collect the tax: lack of authority to levy the tax, statute of limitations, and constitutional inhibition on retroactive taxes.[256]

Responsibility now rests with the Hawaii Supreme Court to determine the effect of the invalid exemptions on the remaining statute and on the issue of the proper remedy. While the wholesalers' concern about the inapplicability of the severability rule are valid, statutory construction, case law, and the general history of the liquor tax support the application of the rule.

VI. CONCLUSION

The principle of nondiscrimination in interstate commerce finds its roots in the commerce clause[257] and has been consistently upheld as a limitation on a state's power to tax interstate products.[258] The *Bacchus* decision, therefore, comports with prior case law in adhering to the nondiscrimination principle by invalidating the liquor tax exemptions for two local products.

However, while the Court reached the proper result in *Bacchus*, the reasoning of the Court has created uncertainties in two areas of the law. One such area is the commerce clause analysis of state taxation cases. The tax cases of *Boston Stock Exchange* and *Maryland v. Louisiana* established the proposition that a state tax exemption may unconstitutionally discriminate against interstate commerce. The Court relied on these precedents in two tax cases decided prior to *Bacchus*.[259] However, in *Bacchus*, the Court departed from this method of analysis and instead relied on the economic protectionism doctrine of state regulation cases. Whether future cases involving state taxation of interstate commerce will undergo economic protectionism analysis or the more expedient analysis of prior tax cases remains to be seen.

The second area of uncertainty created by *Bacchus* concerns the scope of the twenty-first amendment. In the recent decision of *California v. La Rue*, the United States Supreme Court implied in dicta, that the twenty-first amendment

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[255] Wholesalers allege the discriminatory taxes led wholesalers of out-of-state goods to reduce their margins on each sale and to sell less. *Id.* at 16.

[256] *Id.* at 15-16.

[257] *See supra* notes 44-45 and accompanying text.

[258] *See supra* note 64 and accompanying text.

[259] *See supra* note 147.

was not restricted to public health, welfare and morals. This illustrates the absolutist's viewpoint of expansive state powers granted under the twenty-first amendment. The *Bacchus* Court, however, has departed from the recent trend of expansive state powers by placing a limitation on a state's power to regulate intoxicating liquors in a way that protects a local industry. The Court implied that discrimination in liquor regulation under the twenty-first amendment is now subject to the economic protectionism doctrine of the commerce clause. Uncertainty exists as to whether the *Bacchus* decision unveils a shift in the Court's interpretation of state power granted under the twenty-first amendment, a trend of circumscribing a state's discretion in liquor regulation.

Jan M. L. Amii
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ABC v. Kenai: Admissibility of Evidence of Prior Accidents Clarified

I. INTRODUCTION

In *American Broadcasting v. Kenai Air of Hawaii*,[1] the Hawaii Supreme Court clarified whether evidence of prior accidents may be admitted to show the existence of a dangerous condition or defect. The court held that such evidence may be admitted if it is shown that the conditions under which the prior accidents occurred were the same or substantially similar.[2] This note will examine the factors the court used in deciding what constituted "substantial similarity" and the implications for future cases involving this type of evidence.

II. FACTS

Plaintiff-appellee, American Broadcasting Companies, Inc. (ABC), was the bailee of expensive video equipment used in the filming of scenic views for telecast during the 1976 Hula Bowl football game.[3] ABC hired a Bell 206B helicopter from the owner, Defendant-appellant Kenai Air Service, Inc. (Kenai).[4] On January 6, 1976, the helicopter crashed into waters off Waikiki during the filming and all the video equipment was lost.[5] The pilot was a Kenai employee. An official investigation resulted in no definitive conclusion about what caused the crash.[6]

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[1] 67 Hawaii ____, 686 P.2d 1 (1984).

[2] *Id.* at ____, 686 P.2d at 7. The court also ruled that (1) the trial court erred in not allowing evidence of subsequent remedial measures to be admitted and (2) the trial court properly excluded testimony from Kenai's mechanic regarding possible causes of the accident. *Id.* at ____, 686 P.2d at 1.

[3] 67 Hawaii ____, 686 P.2d at 3. ABC was filming "color" or "beauty" shots of Diamond Head and Waikiki. Tr. Trans., Vol. 1, at 4.

[4] 67 Hawaii at ____, 686 P.2d at 3.

[5] *Id.*

[6] *Id.* at ____, 686 P.2d at 6. Wayne Nutsch, helicopter specialist for the Federal Aviation Administration (FAA), was assigned by the National Transportation Safety Board to investigate the crash. The NTSB "is an organization of the Federal Government that's charged with the

ABC and its insurer, Appalachian Insurance Company, brought suit against Kenai in the First Circuit Court to recover the amounts paid to the owner of the video equipment.[7] ABC and Appalachian alleged that Kenai "negligently operated a helicopter" and "cause[d] it to crash and sink into the ocean off Waikiki."[8] They asked that ABC be awarded "not less than $50,000" in damages and Appalachian be awarded $88,748.94.[9]

Kenai denied all allegations and filed a third party complaint against Textron, Inc., the manufacturer of the Bell 206B helicopter; General Motors Corporation, manufacturer of the Detroit Allison engine; and Chandler Evans Company, the manufacturer of the fuel control system.[10] The plaintiffs eventually settled with these third party defendants and proceeded only against Kenai.[11]

As part of its defense, Kenai claimed that the accident was not caused by pilot error but, rather, by negligent manufacture of the helicopter or an inherent defect in the design of the fuel and power systems which caused the helicopter to lose power in mid-air.[12] Kenai sought to introduce evidence of similar incidents involving the same model of helicopter, as well as evidence of subsequent corrective changes to the same fuel system and engine models.[13] The evidence consisted of depositions of engineers employed by the manufacturers and of a former investigator from the National Traffic Safety Board.[14]

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responsibility of determining aircraft crash causes and making recommendation for prevention of an accident that is investigated by them or as delegated to the FAA . . . ." Tr. Trans., Vol. 2, at 46.

Although the report was not offered into evidence, Mr. Nutsch testified as to its contents. Mr. Nutsch said he found no evidence of structural component failure (whether any component failed prior to impact). He could not determine whether there was some form of engine failure, nor could he find any operational problem. *Id.* at 63, 96.

[7] 67 Hawaii at ____, 686 P.2d at 3. The equipment was leased from the Hawaii Public Broadcasting Association. Tr. Trans., Vol. 1, at 4.

[8] 67 Hawaii at ____, 686 P.2d at 3.

[9] *Id.* Under Appalachian's insurance policy, ABC was obliged to pay a $50,000 deductible. Appalachian then paid any amount over that. The total value of the lost video equipment was approximately $140,000. Tr. Trans., Vol. 1, at 4.

[10] 67 Hawaii at ____, 686 P.2d at 3. Subsequently the issues were joined and the defendants filed cross-claims and counterclaims. *Id.* at ____, 686 P.2d at 4. The third party defendants settled for a total of $70,000. Defendant's Opening Brief at 37. The claims against these defendants were dismissed at the close of trial. Tr. Trans., Vol. 5, at 58-59.

[11] 67 Hawaii at ____, 686 P.2d at 4.

[12] *Id.*

[13] *Id.*

[14] *Id.* The following people were to testify by deposition regarding loss of power accidents involving the Bell 206B helicopter, complaints that were made regarding this model, and meetings that were held which resulted in corrective action on the fuel system and engine: Harry Black, a former NTSB investigator who was retained as private investigator; Owen Kaiser, an engineer with Bell helicopter design; Frank Swingle, a Detroit Allison engineer; Morris Gill, chief project engineer for Bell Helicopter; Mr. Gallagher, engineer with Chandler Evans; Mr. Fleming,

The trial judge refused to admit the evidence, indicating that "a similarity in circumstances sufficient to ascribe notice of a defect to the manufacturers or to establish the existence of a flaw had not been shown."[15] The court determined that substantial similarity of the prior accident to this accident had not been shown. The judge also refused to admit evidence of subsequent remedial measures to show the existence of a defect.[16]

The trial judge further refused to admit the testimony of Kenai's mechanic. The judge ruled that the mechanic's anticipated testimony was in the nature of expert testimony but he had not been designated as an expert witness.[17] The jury found that the accident was caused by Kenai's negligence and awarded $148,163.81 to the plaintiffs. The trial judge then denied Kenai's motion to reduce the judgment by the $70,000 which the plaintiffs had received in settlement from the manufacturers.[18] On appeal, the Hawaii Supreme Court vacated and remanded for a new trial.[19]

III. HISTORICAL DEVELOPMENT

A. *Evidence of Prior Accidents*

Generally, "evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable."[20] Relevant evidence is admissible[21] unless the court determines that its probative value is outweighed by the

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engineer in Bell product support division; Mr. Cragun, fuel system engineer from Detroit Allison. Tr. Trans., Vol. 4, at 67-68.

[15] 67 Hawaii at ____, 686 P.2d at 4.

[16] *Id.*

[17] *Id.* Apparently Mr. Horita had not been designated as an expert witness within the allowable time. Mr. Conklin: "[H]e wasn't designated and enough time has elapsed. Counsel specifically is prohibited from trying to dredge off some kind of expert at the last minute he was given an extension of time." Tr. Trans., Vol. 5, at 32. "Sixty (60) days after the responsive pretrial statement is filed all parties must name all theretofore unnamed witnesses." Haw. Cir. Ct. Rule 12(a)(12).

[18] 67 Hawaii at ____, 686 P.2d at 4.

[19] *Id.* at ____, 686 P.2d at 8.

[20] State v. Smith, 59 Hawaii 565, 567, 583 P.2d 347, 349 (1978), now codified in Rule 401, HAWAII RULES OF EVIDENCE, HAWAII REV. STAT., ch. 626 (Supp. 1980) [hereinafter cited as HAWAII R. EVID.]. *Accord*, FED. R. EVID. 401, 28 U.S.C.A. (1984).

[21] HAWAII R. EVID. 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

This is a restatement of prior Hawaii law. See the commentary to Rule 402 which quotes the holding in *Smith*: "All relevant evidence is admissible unless some rule compels its exclusion. . . . Our laws give a [party] the right to introduce evidence of those relevant and material

risk of undue prejudice or confusion, or by the needless waste of time.[22]

The question of admissibility of evidence of prior accidents[23] has a long history.[24] Such evidence is generally offered[25] to show the presence of a defect or

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facts which logically tend to prove the issues involved and which is not otherwise excluded." (citations omitted).

[22] The primary exclusionary rule is HAWAII R. EVID. 403 which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

This rule is in accord with prior Hawaii law. *See, e.g.*, Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977). Contrary to the common law, the rule does not address itself to the problem of unfair surprise. "While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence." FED. R. EVID. 403 Advisory Committee's Note. (HAWAII R. EVID. 403 is identical to FED. R. EVID. 403. Commentary to HAWAII R. EVID. 403). *See also* C. MCCORMICK, THE LAW OF EVIDENCE § 185 (3d ed. 1984).

[23] The term "prior accidents" is used to signify accidents or events, including prior complaints, settlements, and judgments. Evidence of the absence of prior accidents is often excluded, particularly if the evidence is a very general safety history. *See generally* C. MCCORMICK, *supra* note 22, at § 200.

Generally, subsequent accidents are treated the same as prior accidents except when the evidence is offered to show notice. *Id.*

24 *Compare* Hudson v. Chicago & Northwestern Ry. Co., 59 Iowa 581, 13 N.W. 785 (1882) *and* Collins v. Inhabitants of Dorchester, 60 Mass. (6 Cush.) 396, 398 (1850) *with* Ringelheim v. Fidelity Trust Co., 330 Pa. 69, 70, 198 A. 628, 629 (1938) *and* North Texas Constr. Co. v. Crawford, 39 Tex. Civ. App. 56, 87 S.W. 223 (1905).

In *Hudson*, the court reviewed a long history of case law excluding such evidence as raising too many collateral issues. Similarly, in *Collins*, the court excluded evidence of a prior accident as "testimony concerning collateral facts which furnish no legal presumption as to the principal facts in dispute, and which defendants are not bound to be prepared to meet." 60 Mass. (6 Cush.) 396, 398.

In *Ringelheim*, however, the court stated:

> Authorities are almost unanimous in holding that evidence of the occurrence of similar accidents is admissible for the purpose of establishing the character of the place, where they occurred, their cause, and the imputation of notice, constructive at least, to the proprietors of the establishment of the defect, and the likelihood of injury.

330 Pa. at 70, 198 A. at 629. In *North Texas Construction*, the court admitted prior accident evidence to show dangerous condition.

25 *See generally* C. MCCORMICK, *supra* note 22, at § 200. Such evidence is also introduced to rebut testimony presented by the opposing party, *see, e.g.*, Denison v. Weise, 251 Iowa 770, 102 N.W.2d 671 (1960) (testimony regarding loose bar stools on prior occasions was used to refute defendant's claim that he exercised due care in maintenance); Gober v. Revlon, Inc., 317 F.2d 47 (5th Cir. 1963) (evidence of treatment by doctor of other persons suffering a similar allergic

dangerous condition,[26] the causation of an injury by such defect or condition,[27] the risk created by defendant's conduct,[28] or that the defendant had notice of the defect or danger.[29] The purpose for which the evidence is offered has been important in the determination of admissibility.[30]

Courts have addressed this issue by asking whether there is substantial similarity between the circumstances of the prior event and the dispute being litigated.[31] If there is not substantial similarity, then the assumption is that the evidence would not tend to prove or disprove any fact in controversy, or at least that its probative value would be outweighed by the danger of unfair prejudice, confusion of the issues or undue consumption of time.[32] What constitutes substantially similar circumstances has been determined on a case-by-case basis, but

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reaction was admitted when defendants claimed plaintiffs' reaction was caused by a special sensitivity).

26 *See, e.g.*, Brady v. Manhattan Ry. Co., 127 N.Y. 46, 27 N.E. 368, 370 (1891) ("proof of the happening of a prior accident in the same place has frequently been held to be competent upon the ground that it tends to show that, tested by actual uses, the place has been demonstrated to be unsafe and dangerous").

27 *See, e.g.*, Becher v. American Airlines, Inc., 200 F. Supp. 243 (S.D.N.Y. 1961); Long v. John Bruener Co., 36 Cal. App. 630, 172 P. 1132 (1918).

In *Becher*, the court admitted proof at trial of malfunctioning of altimeters identical to those involved in the crash in controversy. The court also admitted evidence of proper functioning. The court considered the evidence proper as the basis for an inference that the malfunctioning caused the crash or of proper functioning of the altimeters.

In *Long*, testimony of prior accidents was admissible to show a dangerous condition and causation.

28 *See, e.g.*, Rimer v. Rockwell Int'l Corp., 641 F.2d 450 (6th Cir. 1981) (evidence of other aircraft accidents allegedly caused by a defective fuel intake system was wrongfully excluded); Mitchell v. Freuhauf Corp., 568 F.2d 1139 (5th Cir. 1978) (design of refrigerated truck trailers with no restraining straps for the meat carried created the risk that the trucks would tip over when the meat swung against the sides of the trailer).

29 *See, e.g.*, Gardner v. Southern Ry. Sys., 675 F.2d 949 (7th Cir. 1982) (evidence of another fuel truck-train collision should have been admitted to show notice of a dangerous condition); New York Life Ins. Co. v. Seighman, 140 F.2d 930 (6th Cir. 1944) (evidence of conversation between custodian and supervisor admitted to show notice of prior accidents and knowledge of a generally safe condition).

30 C. MCCORMICK, *supra* note 22, at § 200.

31 Generally, the degree of similarity is discussed in relation to the degree of relevancy in the balancing test of the factors underlying Rule 403. *But see* Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394, 400 (5th Cir. 1965) ("The differences between the circumstances of the accidents could have been *developed to go to the weight to be given to such evidence.*") (emphasis added); Royal Mink Ranch v. Ralston Purina Co., 18 Mich. App. 695, ____, 172 N.W.2d 43, 46 (1969) (the court concluded that, absent a foundation of substantial similarity of conditions, the evidence was irrelevant and immaterial); North Texas Constr. Co. v. Crawford, 39 Tex. Civ. App. 56, 87 S.W. 223 (1905) (where the court saw similarity of detail as an element of sufficiency of the evidence, rather than relevance).

32 *See generally* C. MCCORMICK, *supra* note 22, at § 200.

included in the factors to be considered are proximity in time,[33] time of day,[34] location,[35] probable cause of the injury,[36] and physical condition of the accident site[37] and of the injured persons.[38]

In *Warshaw v. Rockresorts, Inc.*, the Hawaii Supreme Court recognized the general rule that evidence of prior accidents is admissible. It also recognized the general rule that a lower degree of similarity is required when the evidence is offered to show notice than when it is offered to show defect.[39] In *Warshaw* the court noted: "The strictness of this requirement of similarity of conditions is much relaxed, however, when the purpose of the offered evidence is to show notice, since all that is required here is that the previous [accident] . . . should be such as to attract the defendant's attention to the dangerous situation which resulted in the litigated accident."[40]

This distinction was apparent in *Collins v. Inhabitants of Dorchester*.[41] In *Collins*, the plaintiff was injured on a highway which was bordered by a row of posts. He drove his chaise against a post so that the wheel locked against it. Alleging that the city was negligent for not having a railing at the place of the accident, he contended that a railing was necessary to keep travellers from going into the marsh which ran alongside the highway, or, in the alternative, that the posts themselves were dangerous to travellers. The trial court excluded the evidence of a prior accident because it would have put the facts of that accident

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[33] *See, e.g.*, Mayor of Birmingham v. Staff, 112 Ala. 98, 20 So. 424 (1896) (evidence of another fall at "about" the same time and place was admissible, but evidence of falls with no indication of when they occurred were excluded).

[34] *See, e.g.*, Lindquist v. Des Moines Union Ry. Co., 239 Iowa 356, 30 N.W.2d 120 (1947) (both accidents took place on clear nights when vision was unobstructed).

[35] *See, e.g.*, Brady v. Manhattan Ry. Co., 127 N.Y. 46, 27 N.E. 368 (1891) (evidence of accidents at other train stations was not admissible absent a showing of similar conditions).

[36] *See, e.g.*, Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977) (in excluding the evidence, the court noted that plaintiffs failed to show similarity of location and causation).

[37] *See, e.g.*, Galveston, H. & S.A. Ry. v. Ford, 46 S.W. 77 (Tex. Civ. App. 1898) (the prior accident was at the exact same site but the evidence was not admitted because a difference in causation was controlling).

[38] *See, e.g.*, Robitaille v. Netoco Community Theatres, 305 Mass. 265, 25 N.E.2d 749 (1949) (in excluding the evidence for failure to show similarity, the court expressed its concern that the persons in other accidents may have been "defective in eyesight, feeble, or careless").

[39] "Before evidence of previous [accidents]. . . may be admitted on the issue of whether or not the condition as it existed was in fact a dangerous one, it must first be shown [by the proponent of the evidence] that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question." *Warshaw*, 57 Hawaii at 652, 562 P.2d at 434 (quoting from Laird v. T. W. Mather, Inc., 51 Cal. 2d 210, 220, 331 P.2d 617, 623 (1958) (citations omitted)).

[40] *Id.*

[41] "[T]he plaintiff might show that any inhabitant of Dorchester had known or heard of accidents upon the highway in question." 60 Mass. (6 Cush.) 396 (1850).

into dispute. The Massachusetts Supreme Court upheld the exclusion of testimony of prior accidents to show a defect in the highway. At the trial level, however, the judge had stated that the same evidence could have been admitted to prove notice. In order for the court to admit the evidence to prove notice, the plaintiff would only have had to show that any resident of the town knew of the prior accidents.[42]

This is not to say, however, that the requirements of similarity are not important even when the evidence is offered to show notice.[43] In *Horn v. Chicago, Rock Island Railway Co.*,[44] for example, the court refused to admit evidence to show notice because the incidents were too dissimilar. The prior accidents involved a train-car collision at the same location which had occurred thirteen days earlier when a car, approaching from the north, was struck by a train approaching from the southwest. In the accident before the court, the motorist approached from a different direction and after slowing down to negotiate a curve, saw the train and tried to beat it through the crossing.[45] Because the causes of the accidents were so clearly dissimilar, the court excluded the evidence.[46]

Regardless of the purpose for which the evidence is offered, the question of whether a prior accident was substantially similar is difficult. Courts have to deal with evidence which ranges from accidents under nearly identical circumstances[47] to situations which are clearly dissimilar.[48] In *John Gerber Co. v. Smith*,

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[42] *Id.* at 397. *See also* Chicago G.W. Ry. v. McDonouch, 161 F. 657 (8th Cir. 1908).

[43] *See* Gardner v. Southern Ry. Sys., 675 F.2d 949, 952 n.1 (7th Cir. 1982) ("In a number of jurisdictions, before evidence of prior accidents is admissible to show notice, it must be shown that a specific physical or structural condition of the crossing was a proximate or contributing cause of the present collision.").

[44] 187 Kan. 423, 357 P.2d 815 (1960).

[45] *Id.* at ____, 357 P.2d at 817.

[46] *See also* Lindquist v. Des Moines Union Ry. Co., 239 Iowa 356, 30 N.W.2d 120 (1947) (two accidents within five years were found to be similar as both involved cars from the south colliding into the side of an unlighted car on clear nights with unobstructed vision); Brady v. Manhattan Ry. Co., 127 N.Y. 46, 27 N.E. 368 (1891) (the court excluded evidence noting that details were not given as to whether the accidents all occurred in the day or night, light or dark, wet or dry weather, or if the distance between the car and the railroad platform was the same in each case).

[47] *See, e.g.*, Muller v. Kirschbaum Co., 298 Pa. 560, 148 A. 851 (1930) (evidence that the bottom of a coffee urn had blown out on three previous occasions due to excess steam was properly admitted).

[48] *See, e.g.*, Galveston, H. & S.A. Ry. v. Ford, 46 S.W. 77 (Tex. Civ. App. 1898) where plaintiff injured in a train derailment offered evidence of a prior derailment at the same location but which was caused by a collision with a bridge girder which had fallen onto the track and long before been removed, evidence was excluded as too dissimilar. *Cf.* Smith v. State Farm Fire & Cas. Co., 633 F.2d 401 (5th Cir. 1980) (evidence of four other fires destroying dwellings belonging to decedent excluded even though there was evidence that he had burned them to collect the

the Tennessee Supreme Court noted that while the burden of proof was on the plaintiff to show that conditions were similar, this did not mean he needed to show the plaintiff was identical to the other victims.[49] In *Gerber*, plaintiff's evidence of prior falls, which she offered to prove that the defendant was negligent in maintaining the floor, was rejected by the lower court because there was no showing that the other persons who fell wore the same kind of shoes and walked in the same way as the plaintiff did at the time she fell. In reversing the exclusion, the Tennessee Supreme Court noted, "We think this view is hypercritical, and, if sound, would result in the exclusion of such evidence in practically every case."[50] The court concluded that plaintiff need only show that the floor was in substantially the same condition.[51]

Courts have been willing to admit evidence of similar accidents even if they did not occur at exactly the same place so long as there is substantial similarity.[52] In *Cameron v. Small*,[53] the opponent objected to the evidence regarding prior falls on an allegedly slippery ramp because there was no showing that the persons fell in exactly the same spot. The Missouri Supreme Court found this to be too restrictive: "We cannot follow defendant's argument that, in order for the testimony to be admissible, it was necessary to make a showing that all of the persons, including plaintiff, slipped at precisely the same place on the ramp's surface."[54]

The complexity of the evidence itself may affect the court's ruling on admissibility. If the differences between the prior accident and the accident being litigated are obvious and the facts uncomplicated, the court may allow admission in the belief that the jury will note the differences and weigh the evidence

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insurance money—under Rule 404(b) as evidence of another criminal act); Mitchell v. Freuhauf Corp., 568 F.2d 1139 (5th Cir. 1978); P.B. Mutrie Motor Trans., Inc. v. Interchemical Corp., 378 F.2d 447, 450 (1st Cir. 1967) ("But 'substantial identity' does not mean absolute identity.").

[49] The plaintiff need not "negative any possible abnormality of other persons who fell on defendant's floor." 150 Tenn. 255, 263 S.W. 974, 977 (1924).

[50] *Id.*

[51] In North Texas Const. Co. v. Crawford, 39 Tex. Civ. App. 56, 87 S.W. 223 (1905), the court allowed admission of evidence of a prior accident which nearly happened when another wagon was being loaded. The wagons were different and were in slightly different positions, but the court allowed the evidence noting that the jury was capable of determining if the differences were significant.

[52] *See, e.g.*, Hecht Co. v. Jacobsen, 180 F.2d 13 (D.C. Cir. 1950) (evidence of similar accident with young child on an escalator permitted although the accident happened on a different floor some years before); Brady v. Manhattan Ry. Co., 127 N.Y. 46, 27 N.E. 368 (1891) (evidence of prior accidents at other train stations not allowed absent a showing of similar conditions).

[53] 182 S.W.2d 565 (Mo. 1944).

[54] *Id.* at 570-71.

accordingly.[55] In a more complicated situation, the court may still admit evidence when some specific conditions are dissimilar and expect that "[t]he differences between the circumstances of the accident could have been developed to go to the weight to be given to such evidence. . . . [Defendant] had ample opportunity to explore those differences upon cross examination or by its own witnesses."[56]

Decisions on this issue differ considerably in their approach. Some require a virtual identity in all details while others are willing to admit evidence with a much lower degree of similarity.[57] Generally, it is within the discretion of the court to determine admissibility of prior accidents.[58] Absent a finding of an abuse of discretion,[59] the evidentiary ruling will not be reversed.[60] The court's

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[55] *See supra* note 46.

[56] Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394, 401 (5th Cir. 1965).

[57] *See, e.g.*, Mitchell v. Freuhauf Corp., 568 F.2d 1139 (5th Cir. 1978) (the court said the requisite degree of similarity was "plainly not very high" and it admitted evidence of accidents involving other hanging meat trailers: the relevant similarity being the lack of restraints to prevent the hanging meat from swinging and the resulting lack of stability).

[58] *See, e.g.*, P.B. Mutrie Motor Trans., Inc. v. Interchemical Corp., 378 F.2d 447, 450 (1st Cir. 1967) ("But 'substantial identity' does not mean absolute identity."). *See also* Bailey v. Kawasaki-Kisen, K.K., 455 F.2d 392 (5th Cir. 1972) (if evidence is vital to a litigant's case, it should be admitted unless there is a sound, practicable reason for not admitting); Chicago G.W. Ry. v. McDonouch, 161 F. 657 (8th Cir. 1908) (where the court said sameness of detail is not necessary, only similarity of essential details). *See generally* Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205, 227 (1948) ("Most courts will not listen to arguments for exclusion based on picayunish dissimilarities, and several courts seem to recognize the statistical value of proof of many accidents in the same general class, even when the plaintiff does not establish detailed similarity.").

[59] "Whether to admit such evidence is a matter generally for the trial court to decide, keeping in mind the collateral nature of the proof, the danger that it may afford a basis for improper inferences, the likelihood that it may cause confusion or operate to unfairly prejudice the party against whom it is directed and that it may be cumulative, etc." Nelson v. Brunswick Corp., 503 F.2d 376 (9th Cir. 1974). *Cf.* Gulf States Util. Co. v. Ecodyn Corp., 635 F.2d 517, 519 (5th Cir. 1981), where, in a bench trial the judge excluded evidence of similar accidents because he would have excluded the evidence as prejudicial had there been a jury. The court reversed saying:

> This portion of Rule 403 has no logical application to bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of "unfair prejudice" is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly in a bench trial the same judge can also exclude those improper inferences from his mind in reaching a decision.

[60] "Even when substantial identity of the circumstances is proven, the admissibility of such evidence lies within the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue expenditure of time in the trial of collateral issues against the factors favoring admissibility." *Warshaw*, 57 Hawaii at 602, 562 P.2d at 434 (citations omitted). *See also*

determination must be a factual one based on the totality of the circumstances. No clear test has been formulated that would be equally applicable to slip-and-fall accidents, car-train collisions, golf carts overturning, and helicopters crashing into the ocean.[61]

B. Subsequent Remedial Measures

Under traditional rules, evidence of subsequent remedial repairs to products was not admissible.[62] The policy underlying exclusion is two-fold: (1) the subsequent measure may not be probative of whether the defendant's original behavior was improper,[63] and (2) the possibility that defendants would be deterred from making improvements.[64] This general policy has been codified in the Federal Rule of Evidence 407 and the Hawaii Rule of Evidence 407 which provide that "evidence of subsequent measures is not admissible to prove negligence or culpable conduct." Evidence may be admissible when offered as controverted proof of ownership, control, or feasibility of precautionary measures, or when offered to impeach.[65]

In addition, Hawaii Rule of Evidence 407 includes an exception for "proving a dangerous defect in products liability cases."[66] The commentary to Rule 407

Gardner v. Southern Ry. Sys., 675 F.2d 949, 952 (7th Cir. 1982) ("There is no abuse of discretion where it is possible for a reasonable person to conclude that the danger of prejudice and delay from admitting such evidence would substantially outweigh its probative value.").

[61] "Unfortunately, we cannot be more specific in stating exactly how great the similarity between two events must be before evidence of the collateral event is allowed in. This will vary from court to court, from case to case, and from issue to issue." R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 208 n.34 (2d ed. 1982).

[62] This general rule was not applicable to repairs made by third parties. *See generally* C. MCCORMICK, *supra* note 22, at § 275. *See also* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 166 (1980) (admissibility of evidence of subsequent repairs has increased greatly because of the enormous growth in products liability litigation).

[63] In Choctaw, D. & G. R. Co. v. McDade, 191 U.S. 64 (1903), the Court noted that testimony showing repairs is not allowable because of the danger the jury will use it improperly and construe it to be an admission of negligence.

[64] *See* R. EPSTEIN, *supra* note 62, at 166. *Compare* Schwartz, *The Exclusionary Rule in Subsequent Repairs: A Rule in Need of Repair*, 7 FORUM 1 (1971) which argues that the underlying policy basis of the rule is invalid even as to negligence cases.

[65] "When after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." FED. R. EVID. 407.

[66] HAWAII R. EVID. 407:

> Subsequent remedial repairs. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the

states that "[t]his codifies the result in *Ault v. International Harvester Co.*, where the court held that the rule barring evidence of subsequent repairs should not apply in a products liability case."[67]

Ault was injured when his International Harvester "Scout" plunged over a 500 foot cliff. Ault claimed that the gear box was defective as it was made of aluminum. In proving the defect, plaintiff submitted evidence that the defendant changed from aluminum to malleable iron in the production of gear boxes three years after the accident. The defendant objected to the admission of such evidence as a violation of section 1151 of the California Evidence Code.[68] The question which directly confronted the court was whether proof of a defect in a strict liability action was covered by the rule. The California Supreme Court held that section 1151 was intended to apply only to cases involving negligence or "culpable conduct."[69] The court also discussed the underlying policy of section 1151 and concluded that it did not apply to a products liability action.[70]

Although the *Ault* decision has been very influential,[71] federal courts have

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event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving dangerous defect in products liability cases, ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

[67] (citation omitted). *See also* Bowman, *The Hawaii Rules of Evidence*, 2 U. HAWAII L. REV. 431, 447-48 (1980-81).

[68] The California rule allows admission "when offered for another purpose, such as . . . ." The list is, presumably, not exclusive.

[69] Ault v. International Harvester Co., 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1974).

[70] The exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred.

> While the provisions of section 1151 may fulfill this anti-deterrent function in the typical negligence action, the provision plays no comparable role in the product liability field.
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> * * *
>
> It is manifestly unrealistic to suggest that such a producer [corporate mass manufacturer] will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. . . . In short, the purpose of the [traditional rule] is not applicable to a strict liability case and hence its exclusionary rule should not be extended to that field.

Ault, 13 Cal. 3d 113, 120-21, 528 P.2d 1148, 1151-52, 117 Cal. Rptr. 812, 815-16 (1974), cited with approval in HAWAII R. EVID. 407 Commentary.

[71] *See, e.g.*, Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983) (service bulletin issued by airplane manufacturer after accident, which instructed owners to modify plane, was admissible under Rule 407), *cert. denied*, 104 S.Ct. 2170 (1984); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977) (citing *Ault*, and noting that strict liability does not by its nature involve negligence or culpability and, therefore, it falls outside the exclu-

split on whether evidence of subsequent remedial measures offered in products liability cases should be excluded under Federal Rule of Evidence 407.[72] Some courts have drawn a distinction between whether the evidence was offered to prove a manufacturing flaw, in which case the exclusionary rule does not apply, or to prove a design defect, where evidence may be excluded.[73]

Evidence of remedial measures is also admissible[74] to show "ownership,[75] control,[76] or feasibility of precautionary measures,[77] if controverted, or impeach-

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sionary rule); Lavin v. Fauci, 170 N.J. Super. 403, 406 A.2d 978 (1979) (trial court erred in not admitting evidence of subsequent changes in design and manufacture of three-wheeled toy vehicle in products liability action); Manieri v. Volkswagenwerk, A.G., 151 N.J. Super. 422, 376 A.2d 1317 (1977) (manufacturer's letters recalling defective windshield wipers were admissible to show control); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976) (court agreed with *Ault* that evidence of post-accident safety measures are admissible in a products liability case particularly when the improvement is made pre-accident but post-marketing); Chart v. General Motors Corp., 80 Wis. 2d 91, 258 N.W.2d 680 (1978) (evidence of subsequent changes in the design of later model Corvair suspension system was admissible in products liability case). *See generally* R. EPSTEIN, *supra* note 62, at 167-71, for criticism of the exception for products liability.

[72] On its face, FED. R. EVID. 407 seems to be limited to negligence. Historically, post-accident changes were not admissible unless the defendant denied feasibility of the change or control over the product. 1 KREINDLER, AVIATION ACCIDENT LAW § 7.04[3] at 7-60 and n.16. *See also* Rainbow v. Albert Elia Bldg. Co., Inc., 79 A.D.2d 287, 436 N.Y.S.2d 480 (N.Y. App. Div. 1981), *aff'd*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982).

[73] 79 A.D.2d 287, 436 N.Y.S.2d 480. The *Rainbow* court explained the distinction this way. Due care is not a defense in a strict liability case involving manufacturing flaws. However, with a design defect, due care is a defense. In showing a lack of due care in the design, the plaintiff is dealing with issues of "fault." This would fall within the exclusionary rule, therefore, because it is offered to prove culpability.

[74] *See* HAWAII R. EVID. 407 and Commentary; R. EPSTEIN, *supra* note 62, at 169-71; C. MCCORMICK, *supra* note 22, at § 275.

[75] *See, e.g.*, Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964) (evidence that danger signs were posted after the accident was not admissible to show negligence, but was admissible "only as it tended to prove that this part of the highway was under the control of the defendant"), *cert. denied*, 377 U.S. 980 (1964); Sanderson v. Berkshire Hathaway, Inc., 245 F.2d 931 (2d Cir. 1957) (evidence that after plaintiff's accident on the steps, defendant, as part of his regular schedule, rebuilt and replaced all the steps was "relevant upon the question of whether the landlord or the tenant was in control of this portion of the premises").

[76] *See, e.g.*, Slattery v. Marra Bros., Inc., 186 F.2d 134 (2d Cir. 1951) (evidence that a superintendent sent a workman to repair rigging on a metal sliding door the day after the accident was admissible to show defendant's control over the rigging of the door), *cert. denied*, 34 U.S. 915 (1951).

[77] *See, e.g.*, Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961) (evidence of changes made after the plane crash was admissible "to show that it would have been feasible and practicable to incorporate those features in the design at the time the alternator drive . . . was built"); Manos v. Trans World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971) (evidence of post-accident modifications admissible solely to show feasibility of changes and not to show negligence); Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971) (evidence of a subsequent warning regarding possible effects of a drug was admissible to show that such a caution was not

ment."[78] The court retains the discretion, however, to exclude such evidence under an analysis of the factors underlying Rule 403.[79]

IV. Analysis and Commentary

The appellants in *ABC* alleged three errors on appeal: that the trial court abused its discretion in (1) excluding evidence of other alleged power failures and the subsequent remedial measures undertaken by the helicopter manufacturer, (2) refusing to admit opinion testimony by the defendant's mechanic, and (3) not reducing the judgment by the amount of settlements paid by the other defendants.[80] The Hawaii Supreme Court held that the trial court did abuse its discretion in excluding the evidence of similar accidents and remedial measures. It did not find error in the trial court's refusal to admit the mechanic's testimony. The court did not reach the question regarding damages.[81]

A. *Similar Accidents*

The *ABC* trial court based its exclusionary ruling[82] on *Warshaw v. Rockresorts, Inc.*[83] In *Warshaw*, the plaintiff had been injured in a golf cart accident at the Mauna Kea Beach Hotel when the brakes allegedly failed as Mrs. Warshaw and the driver tried to negotiate the last of three ninety degree turns on the golf path along the 18th hole. As a result, the cart hit a lava rock

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burdensome to the defendant in relation to the risk or danger involved).

[78] *See, e.g.*, Daggett v. Atchinson, T. & S.F Ry., 48 Cal. 2d 655, 313 P.2d 557 (1957) (evidence that, after the accident, the speed limit had been reduced and new signals had been installed at a railway crossing was admissible to impeach witness); Lombardi v. Yulinsky, 98 N.J.L. 332, 119 A. 873 (1923) (evidence that defendant put warning light on pile of bricks after the accident was admissible "for the purpose of affecting the credibility of the defendant as a witness").

[79] *See, e.g.*, Northwest Airlines v. Glenn L. Maring Co., 224 F.2d 120 (6th Cir. 1955) (a report regarding experiments subsequent to the accident was properly excluded; the court did not abuse its discretion in ruling that the danger of confusing the jury outweighed the report's relevance), *cert. denied*, 350 U.S. 937 (1966), *reh'g denied*, 350 U.S. 976 (1956). *See also* Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 n.3 (9th Cir. 1961), which held:

> Where the case is being tried to a jury the trial court is entitled to weigh the need for such evidence against the risk that the jury may improperly infer negligence therefrom. Hence, where the trial court excludes evidence of subsequent changes in a jury trial, its rulings will be upheld except upon a showing of an abuse of discretion.

[80] 67 Hawaii ____, 686 P.2d at 3.

[81] *Id.* at ____, 686 P.2d at 7.

[82] *Id.* at ____, 686 P.2d at 4.

[83] 57 Hawaii 645, 562 P.2d 428 (1977).

wall, and both women were thrown from the cart. The Warshaws attempted to offer sixty-two accident reports prepared by hotel employees over a period of five years from the verbal accounts of hotel guests. Sixty-one of the reports were excluded as hearsay,[84] and the court held the remaining report to be inadmissible to prove notice of the defect[85] because plaintiffs failed to show substantial similarity between the prior accident and the accident at issue.[86] The court suggested that the report would have been admissible if the proponent had proved similarity of location and causation.[87]

In *ABC*, Kenai defended against the charges that its pilot was negligent by trying to prove that the accident was caused by mechanical failure. It argued that this model of helicopter had been involved in a number of accidents which had also resulted from mid-air power failures[88] and attempted to introduce deposition testimony regarding accidents in 1976 caused by sudden loss of power in the same model helicopter with the same engine and fuel system.[89]

Kenai offered reports of these prior accidents, all of which involved the same model helicopter, engine, and fuel system as involved in the case at bar. Kenai argued that the prior accident evidence met even the most restrictive test of substantial similarity of location and causation.[90] In each accident the same model of helicopter was mid-air (location) when it experienced a sudden loss of power (causation).[91]

In *Warshaw*, the supreme court held that the plaintiffs, in order to offer evidence to show the hotel had notice that the golf cart was defective, had to show that the prior accident had also been caused by a brake failure. In fact, the court noted that the trial court had admitted complaints of prior brake failures in the hotel's golf carts.[92] Distinguishing *Warshaw*, Kenai argued that in proving the helicopter was defective, similarity was established by a showing that the prior accidents were caused by a power loss. The *ABC* trial court rejected Kenai's argument that *unexplained*[93] power failures are similar.[94]

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[84] *Id.* at 651, 562 P.2d at 433.

[85] Because the evidence did not meet the lower test of similarity required for notice, the court did not reach the issue of admissibility to show defect. *Id.* at 653, 562 P.2d at 435.

[86] *Id.* at 655, 562 P.2d at 435. The only points of similarity were that both accidents involved Viking golf carts on the Mauna Kea golf course.

[87] *Id.* at 653, 562 P.2d at 434.

[88] Plaintiffs' counsel conceded that a meeting was held by the helicopter manufacturer to discuss 100 unexplained helicopter crashes which were linked to contamination of the fuel system. Tr. Trans., Vol. 4, at 26-27.

[89] Tr. Trans., Vol. 3 at 178-79.

[90] Kenai argued that other factors of similarity were the proximity of the accidents, Tr. Trans., Vol. 4, at 4, and the fact that all involved certified pilots. *Id.* at 19-22.

[91] 67 Hawaii at ____ n.7, 686 P.2d at 7 n.7.

[92] 57 Hawaii at 655, 562 P.2d at 435.

[93] Wayne Nutsch, FAA inspector for this crash, did not examine the component parts of the

The Hawaii Supreme Court found that sufficient similarity was established to be "capable of 'yielding an inference that there was a defect which caused the accident.' "[95] The court pointed out that the instances of inexplicable power losses covered by the deposition testimony all involved a 206B helicopter with a Chandler Evans fuel system and a Detroit Allison engine,[96] the same equipment involved in the case at bar.[97] The court found the evidence to be relevant to Kenai's defense which was based on a claim that the helicopter was defective. Because there was no danger of surprise, prejudice, confusion, or waste of time, the trial court should have admitted the evidence.[98]

In *Warshaw*, the court reiterated the common law rule for admissibility of evidence of prior accidents: relevance must be established by proof that the prior accidents occurred under the same or substantially similar conditions.[99] The trial court in *ABC* read *Warshaw* to mean that the "fact situation" of the prior accidents had to be the *same* in order for the evidence to be admitted.[100] The supreme court found that this narrow interpretation of *Warshaw* was not correct:[101] "[i]mplicit in our conclusion was the rejection of a hard and fast rule excluding evidence of other accidents, for we realized '[a] blanket rule of irrelevance is manifestly incompatible with modern principles of evidence.' "[102]

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helicopter. He conducted an external, visual inspection of the engine and fuel system. Tr. Trans., Vol. 2, at 92. There is no evidence on the record to indicate what further investigation might have been conducted by the parties as to the cause of the alleged power failure.

[94] Although reports of brake failure in a fairly simple piece of machinery like a golf cart may constitute similarity of causation, *unexplained* power loss in such a complicated piece of machinery as a helicopter, is a rather low standard of similarity. ABC argued that other factors which should have been considered included whether the other helicopters were hovering, four to six feet over water, with the door removed, in a tailwind with variable gusty winds, at near maximum weight. Appellees' Answering Brief at 14-15.

[95] 67 Hawaii at ____, 686 P.2d at 7 (quoting Wakabayashi v. Hertz Corp., 66 Hawaii 265, 270, 660 P.2d 1309, 1313 (1983) which quotes Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 77, 470 P.2d 240, 244 (1970)). *See also* Note, *Wakabayashi v. Hertz: Circumstantial Evidence as Proof of Defect in Strict Products Liability*, 6 U. HAWAII L. REV. 335 (1984).

[96] 67 Hawaii at ____, 686 P.2d at 7.

[97] *Id.*

[98] *Id.*

[99] 57 Hawaii at 652, 562 P.2d at 434. The court notes that the degree of similarity need not be as great when the evidence is offered to show notice.

[100] Tr. Trans., Vol. 3, at 177.

[101] 67 Hawaii at ____, 686 P.2d at 7.

[102] 67 Hawaii at ____, 686 P.2d at 5 (citing Simon v. Town of Kennebunkport, 417 A.2d 982, 985 (Me. 1980). The court in *Simon* found an abuse of discretion in the exclusion of evidence of nearly a hundred accidents within two years where people fell or stumbled at the same location and under similar circumstances. Similarity consisted of similar weather conditions and "an uneven, inclined sidewalk [which] had not changed." *Id.* at 984. The court set forth the test for admissibility as a determination of relevancy under MAINE RULE OF EVIDENCE 401 (identical to HAWAII R. EVID. 401): "whether there is a *substantial similarity in the operative circum-*

In *ABC*, the supreme court held that the evidence of similar accidents was admissible to prove the existence of a defect and that the rigid requirement of "sameness" applied by the trial court was not appropriate.[103] Rather, the trial court should decide if the circumstances of the prior accidents were similar enough to the present dispute to be probative. Thus, in *Warshaw*, the similarities of location and causation were factors to be considered, but they were not rigid requirements. These factors were significant in *Warshaw* because the plaintiff was trying to prove that there was an inherent defect in the brake system of the golf cart.[104] In determining whether evidence of other accidents was probative on the issue of the defect or notice of the defect by the manufacturer, it is clear that it would be necessary to show the other accidents also involved a brake failure. An accident in which the steering mechanism failed would obviously not be probative on the issue of a defective brake system. Because the Warshaws were also arguing that the design of the golf course was defective,[105] it was necessary to show that the accidents all occurred at the specific place at which the course was allegedly poorly designed.

Under *ABC*, the requirement of substantial similarity is essentially a restatement of the more general test of admissibility under Hawaii Rule of Evidence 401: Does evidence of the other accidents make the existence of a defect in the helicopter's fuel system any more or less probable? In addressing this question, the court may consider certain factors. It is obviously important that the same type of helicopter and fuel system were involved in each accident. While it may not be necessary that each accident took place in Hawaii or over the ocean, an accident during take-off would probably not be relevant to this accident which occurred while the helicopter was hovering in mid-air. Causation is important to the extent that a crash resulting from a rotor falling off would not be probative on the issue of a fuel system defect. Since the cause of this accident was the primary question being litigated, however, the court could not require a showing that the prior accidents and this accident had the same cause—rather that because the prior accidents occurred under similar circumstances with different pilots, it was reasonable to infer that the cause of the accident was mechanical defect, not pilot error. A test requiring exact similarity of cause is not appropriate when the cause is a question of fact yet to be decided by the jury.

This analysis is consistent with the distinction which the court drew in *Warshaw* regarding evidence to show notice and the "stricter" standard for showing

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stances between the proffer and the case at bar and whether the evidence is probative on a material issue in the case." *Id.* at 986 (emphasis added). The evidence may be excluded under the balancing test of MAINE RULE OF EVIDENCE 403 (identical to HAWAII R. EVID. 403).

[103] The trial court read *Warshaw* as saying "[u]nless you got the same fact situation you don't consider it." Tr. Trans., Vol. 3, at 177.

[104] 57 Hawaii at 646, 562 P.2d at 429.

[105] *Id.* at 649, 562 P.2d at 432.

a defect.[106] In order to show the manufacturer was on notice regarding potential injury resulting from use of a product, the proponent would need to show that the prior accident was sufficient to draw attention to the defect or dangerous condition. In proving a defect, the *ABC* court notes that "[t]he nature and quality of evidence used in products liability cases to show the defect and the nexus between the defect and the accident naturally varies."[107] The evidence was admissible in *ABC* because the evidence was "capable of yielding 'an inference that there was a defective condition which caused the accident.' "[108] In other words, the evidence had a tendency to show that the existence of a defect was more probable.

The question of admissibility does not end with a finding of relevance. The court must then balance the degree of relevance against the factors set forth in Hawaii Rule of Evidence 403: prejudice, confusion of the issue, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. The degree of similarity will continue to be important as the court balances how strong the tendency is for the evidence to increase or decrease probability of a consequential fact with these Rule 403 factors. If the dangers of prejudice are high, for example, a high degree of relevance (and similarity) will be necessary for admissibility.[109] However, as is true in all considerations of relevancy, the question of sufficiency is a separate issue.[110] In order to be admissible, it is not necessary that the evidence conclusively prove the issue.[111] The opponent will, of course, have the opportunity to attack the sufficiency of the evidence through cross-examination[112] by focusing the jury's attention on the dissimilarities.

In *ABC*, the supreme court found that none of the Rule 403 factors were present and, therefore, the evidence should have been admitted. It apparently rejected the trial court's concern with the amount of time that would be required to inquire into the prior accidents and with the possibility that the evi-

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[106] *Id.* at 652, 562 P.2d at 435.

[107] 67 Hawaii at ____, 686 P.2d at 6 (quoting Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970)).

[108] 67 Hawaii at ____, 686 P.2d at 7 (quoting Wakabayashi v. Hertz Corp., 66 Hawaii 265, 660 P.2d 1309 (1983) which quotes Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970)).

[109] *See, e.g.*, Payne v. A. O. Smith Corp., 99 F.R.D. 534 (1983) (substantially similar evidence of prior accidents may be excluded if its probative value is substantially outweighed by prejudice, confusion of issues, etc.). *See also* J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE § 401[10] at 401-53 to -54 (1982) ("a greater degree of similarity and proximity will usually enhance the probative value of the evidence").

[110] *See generally* Bowman, *supra* note 67, at 442-44.

[111] *Id. See also* C. MCCORMICK, *supra* note 22, at § 185.

[112] *See supra* note 5.

dence would confuse the jury.[113]

ABC also raised a hearsay objection to the reports. Although both parties briefed the issue on appeal,[114] the supreme court did not address it. The court did not need to deal with the issue since the basis of the trial court's ruling was the lack of substantial similarity.[115] However, the trial court will, presumably, have to decide the issue on retrial.

The hearsay objection was also based on *Warshaw*. In *Warshaw*, the supreme court upheld an exclusion over a claim that the evidence should have been admitted under the Uniform Business Records as Evidence Act[116] because "none of the persons involved in the sixty-one golf cart accidents had a business duty to observe and report how the accidents occurred."[117] In its discussion of the hearsay question, the *Warshaw* court observed the importance of the facts being observed and reported by one with a business duty to do so. This "reasonably ensures the trustworthiness of the entry. We conclude that a trial court would abuse its discretion by ruling that an entry based on facts observed and reported by one without a business duty to observe and report such facts is admissible as proof of the facts."[118]

Warshaw was decided under the Uniform Business Records as Evidence Act, which allowed admission of business records if "the sources of information, methods, and time of preparation were *such as to justify its admission*."[119] This statute was repealed in 1980 and superseded by Hawaii Rule of Evidence 803(b)(6) which instead provides for admission "*unless the sources* of information or other circumstances *indicate lack of trustworthiness*."[120] *Warshaw* could be distinguished based on this shift in emphasis from a need to show trustworthiness to admission absent a finding of untrustworthiness. If so, then the reports in *ABC* could be admitted under the business records exception of Rule

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[113] Tr. Trans., Vol. 3, at 180, Vol. 5, at 16, 25. The trial court indicated it would be willing to accept a stipulation that the prior accidents had occurred, but it would not allow "evidence of what the accidents were." Tr. Trans., Vol. 5, at 5, 13.

[114] Appellants' Opening Brief at 27-29, Appellees' Answering Brief at 17.

[115] Tr. Trans., Vol. 4, at 16, 20, 31. Also on a motion to reconsider Vol. 5, at 7.

[116] HAWAII REV. STAT. § 621-5 (Supp. 1975), The Uniform Business Records as Evidence Act (modified).

[117] 57 Hawaii at 651, 562 P.2d at 433.

[118] *Id.* at 650, 562 P.2d at 432.

[119] HAWAII REV. STAT. § 621-5 (Supp. 1975), The Uniform Business Records as Evidence Act (modified) (emphasis added).

[120] HAWAII R. EVID. 803(b)(6) (emphasis added). The full text of the rule reads:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, or conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate a lack of trustworthiness.

803(b)(6).

Kenai argued that the evidence should be admitted under Rule 803(a)(1) and (2) as declaration against the interest of a party.[121] The trial court indicated it would not allow the evidence under this exception because the evidence was against the interest of a third party.[122] The trial court appears to be clearly correct under the rule, which limits the exception to evidence against the declarant or his agent.[123]

Finally, it is possible that the evidence should be admissible under Rule 803(b)(24)[124] which allows admission of particularly trustworthy hearsay provided the proponent makes the requisite showing under the rule.[125] It is possible that Kenai will overcome the hearsay problems concerning these reports of prior accidents; however, *Warshaw* will have to be distinguished.

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[121] Tr. Trans., Vol. 4, at 15, 18; Appellants' Opening Brief at 27-29.

[122] Tr. Trans., Vol. 4, at 15.

[123] HAWAII R. EVID. 803(a)(1), (2):

> Rule 803 Hearsay exceptions; availability of declarant material. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Admissions.
>
> (1) Admissions by party opponent. A statement that is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth;
>
> (2) Vicarious admissions. A statement that is offered against a party and was uttered by a person authorized by the party to make such a statement, (B) his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (C) a co-conspirator of the party during the course and in furtherance of the conspiracy.

Cf. Kekua v. Kaiser Found. Hosp., 61 Hawaii 208, 601 P.2d 364 (1979), *cited in* Rule 803 Commentary, which stated that "[t]he extrajudicial statements of a *party opponent*, when offered against the same, are universally deemed admissible at trial as substantive evidence of the fact or facts stated." *Id.* at 212, 601 P.2d at 371 (emphasis added).

[124] HAWAII R. EVID. 803(b)(24) provides:

> Other exceptions. A statement not specifically covered by any of the exceptions in this paragraph (b) but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

[125] *See, e.g.*, Debra P. by Irene P. v. Turlington, 730 F.2d 1405 (11th Cir. 1980), where the district court, exercising its discretion, ruled that state study on competency, although hearsay, was admissible because of steps taken during the study which ensured trustworthiness under 803 (24). *Cf.* U.S. v. Kim, 595 F.2d 755 (D.C. Cir. 1979) (Telex offered to exculpate defendant from bribery charges was properly excluded under 803(b)(24) due to lack of trustworthiness).

B. *Subsequent Remedial Measures*

Kenai's defense was based in part upon claims that the helicopter itself was defective and, therefore, the accident was caused by the defect and not pilot error as ABC had alleged.[126] Kenai offered evidence of subsequent measures by the manufacturer "to remedy the problem of unexpected power failures in the particular model of aircraft."[127]

The supreme court found an abuse of discretion in the trial court's exclusion of evidence of subsequent remedial measures.[128] The court relied upon Hawaii Rule of Evidence 407 which "does not require the exclusion of evidence of subsequent measures then offered for another purpose [other than showing negligence or culpable behavior], such as proving dangerous defects in products liability cases."[129] The problem in interpreting the provision is in determining what is a "products liability case." One view would be that products liability must be the cause of action. Yet, under that approach, *ABC* would not qualify. *ABC* is a negligence case against Kenai Helicopter which offered as a defense that the cause of the injury was not pilot negligence but an inherent defect in the helicopter and which named the manufacturer of the helicopter, Textron, Inc., and the manfacturer of the engine, General Motors, and the manfacturer of the fuel control system, Chandler Evans, as third party defendants.[130]

It is clear that Kenai was attempting to establish liability on the part of the various manufacturers under a products liability theory.[131] Admissions of evidence of subsequent measures which would have been admissible against the manufacturers to prove a defect were appropriately admissible as part of a defense incorporating a products liability theory.[132] Therefore, the court must have held that "products liability cases" means cases in which a products liability theory is either a cause of action *or* a defense.

C. *Mechanic's Testimony*

The defendant asserted that the opinion testimony of its mechanic as to the cause of the accident was admissible under Hawaii Rule of Evidence 701, which provides for opinion testimony of lay witnesses. The trial court had found that there was no showing that the mechanic's testimony would have

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[126] 67 Hawaii at ____, 686 P.2d at 6.
[127] *Id.* at ____, 686 P.2d at 7.
[128] *Id.* at ____, 686 P.2d at 8.
[129] *See supra* note 66 for the text of Rule 407.
[130] 67 Hawaii at ____, 686 P.2d at 3.
[131] *Id.* at ____, 686 P.2d at 6.
[132] *Id.* at ____, 686 P.2d at 8.

been based on first-hand knowledge[133] and, therefore, Rule 701 was not satisfied.[134]

The supreme court's ruling that the mechanic's testimony was properly excluded was consistent with prior Hawaii law.[135] Because Kenai failed to qualify him as an expert,[136] it attempted to admit his testimony as the opinion of a lay witness. Without a showing that the mechanic had first-hand knowledge of the crash or the condition of the components suspected of causing the accident, his opinion would not be "rationally based on the perceptions of the witness" as required by Rule 701.[137]

D. Joint Tortfeasors

Although the supreme court did not reach the issue of whether the judgment should have been reduced to account for the settlements ABC received from the other defendants, Justice Nakamura did remind the parties that there "shall be but one satisfaction for the same wrong."[138]

This is a straightforward reading of section 663-14 of the Hawaii Revised Statutes which states: "release by the injured person of one tortfeasor . . . reduces the claim against the other tortfeasors in the amount of consideration paid for the release. . . ."[139]

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[133] *Id. See also supra* note 17.

[134] The court stated that such evidence "is not necessarily excludable when offered in substantiation of the presence of a dangerous defect in a product." 67 Hawaii at ____, 686 P.2d at 7.

[135] *Id.* at ____, 686 P.2d at 8.

[136] *Id.*

[137] HAWAII R. EVID. 701:

> Opinion testimony by lay witnesses. If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

[138] 67 Hawaii at ____, 686 P.2d at 8. This issue has been resolved in Nobriga v. Raybestos Manhattan, Inc., 67 Hawaii ____, 683 P.2d 389, 393 (1984), where the Hawaii Supreme Court said that "release of one joint tortfeasor . . . merely reduces that claim by the amount paid for the release. . . ."

[139] Uniform Contribution Among Tortfeasors Act. HAWAII REV. STAT. §§ 663-11 through 663-17.

> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

HAWAII REV. STAT. § 663-14.

V. Conclusion

The Hawaii Supreme Court dealt with the admissibility of evidence of prior accidents for the first time in *Warshaw*. Because the court affirmed an exclusionary ruling, however, it was unclear what degree of similarity was actually required for admissibility. The *ABC* trial court understood *Warshaw* to require a "sameness" of circumstances. The supreme court rejected such a narrow reading of *Warshaw*, noting that it was "inconsistent with principles of modern evidence."

While in *Warshaw* the prior accident was not sufficiently similar to be admissible even on the issue of notice, the evidence in *ABC* met the higher standard necessary for admission on the issue of defect. Although Kenai did address similarity of location and causation, both of which were lacking in *Warshaw*, the degree of similarity was apparently quite low. This suggests that the court is adopting a liberal attitude toward evidence of prior accidents, and that much more evidence of prior accidents will be admissible.

Joyce E. McCarty
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Outdoor Circle v. Harold K.L. Castle Trust Estate: Judicial Review of Administrative Decisions

INTRODUCTION

In *Outdoor Circle v. Harold K.L. Castle Trust Estate*,[1] the Hawaii Intermediate Court of Appeals (ICA) upheld a circuit court's decision affirming a State Land Use Commission (LUC) order that changed the classification of 70.78 acres of Kawainui Marsh from urban to conservation. In reaching its decision, the ICA clarified both the standards that a circuit court must apply in reviewing an administrative decision[2] and the standards that an appellate court will apply on an appeal from a circuit court's decision.[3] The ICA reversed its previous decisions[4] by holding that an appellate court must apply the "right/wrong" standard[5] rather than the "clearly erroneous" standard in an appeal from a circuit court review of an administrative decision.[6] Applying the "right/wrong"

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[1] 4 Hawaii App. 633, 675 P.2d 784 (1983), *cert. denied per curiam*, 67 Hawaii ____, 677 P.2d 965 (1984).

[2] *Id.* at 638-39, 675 P.2d at 789. *See also infra* note 4 and accompanying text.

[3] *Id.* at 640, 675 P.2d at 790. The Intermediate Court of Appeals [hereinafter cited as ICA] decided that appellate courts must use the "right/wrong" standard on secondary appeals. *See infra* note 4.

[4] *Id.* at 640, 675 P.2d at 790. The ICA reversed its decisions in Homes Consultant Co. v. Agsalud, 2 Hawaii App. 421, 633 P.2d 564 (1981) and Foodland Super Market, Ltd. v. Agsalud, 3 Hawaii App. 569, 656 P.2d 100 (1982), which held that the "clearly erroneous" standard of HAWAII R. CIV. P. 52(a) governed secondary review.

[5] The "right/wrong" standard should not be confused with *de novo* review. Unlike *de novo* review, under the "right/wrong" standard, the appellate court does not hear new evidence. Under the "right/wrong" standard the appellate court examines the facts and answers the questions presented without giving any weight to the trial court's answer. State v. Miller, 4 Hawaii App. 603, 671 P.2d 1037 (1983); Davis v. Davis, 3 Hawaii App. 501, 653 P.2d 1167 (1980).

[6] 4 Hawaii App. at 640, 675 P.2d at 790. The court stated:

> In *Homes Consultant Co., Inc. v. Agsalud*, 2 Haw. App. 421, 633 P.2d 564 (1981), and *Foodland Super Market, Ltd., v. Agsalud*, 3 Haw. App. 569, 656 P.2d 100 (1982), we stated that our secondary review of the circuit court's initial review is governed by the clearly erroneous standard of Rule 52(a), Hawaii Rules of Civil Procedure. In light of our

standard of review, the court further held that the adoption of conclusions of law by the LUC at a closed meeting did not constitute a "willful" violation of the Hawaii Sunshine Law because the agency had erroneously considered the function a ministerial task and had afforded the parties a full hearing.[7]

This note first examines the ICA's clarification of the standards of review for administrative decisions on primary appeal. It next discusses the court's adoption of the "right/wrong" standard on secondary review. The note concludes with a discussion of the ICA's decision with regard to "willful" violations of the Sunshine Law and the adjudicatory functions of administrative agencies.

I. Facts of the Case

Kawainui Marsh is the largest natural marshland in Hawaii, comprising approximately eight hundred acres. The City and County of Honolulu (City) planned to develop a regional park for the area. At the inception of this case, the city owned 750 acres of conservation land that would be used for the proposed park.[8] In October 1976, the State of Hawaii Department of Planning and Economic Development (DPED) petitioned the LUC to change the classification of an adjacent 244.15 acres, the subject property of the suit, from urban to conservation.[9] The City Department of General Planning (DGP), the property owners, and various conservation and other "public interest" groups also became parties to the action.[10]

Between March and September 1977, the LUC held a pre-hearing conference and five full days of hearings at which all parties presented evidence. In January 1978, the LUC held three public action meetings at which it adopted specific findings of fact. At the final meeting the LUC denied the rezoning request by a five-to-two vote. The commission subsequently adopted its conclusions of law without a public meeting.[11]

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holding below, we believe we erred.

[7] *Id.* at 642, 675 P.2d at 791.

[8] *Id.* at 636 n.1, 675 P.2d at 788 n.1.

[9] *Id.* at 636, 675 P.2d at 788.

[10] The City Department of General Planning [hereinafter cited as DGP] was a mandatory party pursuant to Hawaii Rev. Stat. § 205-4(e)(1) (1976). The property owners, Harold K.L. Castle Trust Estate, Harold K.L. Castle, Henry H. Wong, and the Michael C. Baldwin Trust, intervened pursuant to Hawaii Rev. Stat. § 205-4(e)(3) (1976). The appellants, the Outdoor Circle, the Congress of Hawaiian People, the Kailua Neighborhood Board, the Kailua Community Council, the American Association of University Women, University Branch, the Social Concerns Committee of the Windward Coalition of Churches, the Lanikai Association, the Hawaii Federation of Garden Clubs, Inc., the Council of Presidents, Representative Faith Evans, Arthur R. Beaumont, and Hope Gray Miller, intervened pursuant to Hawaii Rev. Stat. § 205-4(e)(4) (1976).

[11] 4 Hawaii App. at 637, 675 P.2d at 788.

The DPED, DGP, and twelve other parties appealed the LUC's decision to the circuit court in two separate cases.[12] In April 1979, the circuit court affirmed the LUC except as its decision related to the marshland portions of the property, which it concluded should have been reclassified as conservation. The court remanded the matter to the LUC for determination of the marshland boundaries for the purpose of reclassification.[13]

The LUC held hearings on the remanded case and, in October 1979, filed its decision reclassifying 70.78 acres as conservation land. The appellants and the DGP appealed the LUC order. The circuit court affirmed the decision and order in November 1981.[14]

The April 1979 decision affirming the LUC's denial of the DPED petition and the November 1981 affirmance of the LUC's reclassification of the 70.78 acres as conservation land were then appealed to the ICA. The appellants alleged that the LUC had committed several procedural and substantive errors. The ICA summarily disposed of all of the appellants' contentions except for the allegation that the LUC had willfully violated the open meeting provision of the Hawaii Sunshine Law by adopting its conclusions of law at a closed meeting.[15]

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[12] The DPED appealed the LUC's decision denying the reclassification petition in Civil No. 54296. The appellants appealed the same decision in Civil No. 54303.

[13] 4 Hawaii App. at 638, 675 P.2d at 788.

[14] *Id.* at 637, 675 P.2d at 788.

[15] *Id.* at 642, 645, 675 P.2d at 791, 792.

The appellants alleged that the circuit court erred in upholding the LUC's decisions and orders because the commission committed four reversible procedural errors: it adopted its conclusions of law without a public meeting, in violation of the Hawaii Sunshine Law, HAWAII REV. STAT. §§ 92-3, 92-6(b) (1976); it precluded the appellants from presenting arguments on all issues, in violation of HAWAII REV. STAT. § 91-9(a), 91-9(c) (1976); it rejected certain of the appellants' proposed findings without a quorum of the commissioners present, in violation of HAWAII REV. STAT. § 92-15 (1976); and it failed to incorporate in its decision a ruling on each of the appellants proposed findings, in violation of HAWAII REV. STAT. § 91-12 (Supp. 1982). The appellants also alleged substantive error, claiming that the circuit court erred in upholding the LUC's denial of the petition because the findings of fact and the HAWAII REV. STAT. § 205-2 (1976 & Supp. 1982) land use criteria required reclassification of the subject property.

The ICA held that the LUC properly disallowed additional testimony and cross examination at its January 1978 action meeting because the testimony was unduly repetitious and the parties had conducted extensive cross examination during the five full days of hearings. The ICA also held that there was no reversible error with respect to the quorum issue. The court found no evidence in the record which supported the appellants' contention that the LUC lacked a quorum when it rejected certain of the appellants' proposed findings of fact. The ICA further found that the issue was not considered by the circuit court and that it was not obliged to review the question. Moreover, the ICA decided that even if it were to consider the issue, the appellants had admitted in their opening brief that none of the LUC's findings of fact were at issue.

With respect to the allegation that the LUC was required to make separate rulings on each of the appellants' proposed findings of fact, the ICA held that the circuit court did not err in upholding the commission's decision. The ICA ruled that the LUC was not required to make

The court discussed this issue at length, concluding that although the LUC had violated the open meeting provisions, its conclusions of law were not voidable because the violation was not "willful."

Before addressing the appellants' contentions, the ICA examined the applicable standard for secondary review of administrative decisions. The ICA applied the "right/wrong" standard rather than the "clearly erroneous" standard in reviewing the lower court's decision.[16] Using the "right/wrong" standard, the ICA gave no deference to the circuit court's decision and simply judged whether the lower court's decision was correct based on its own evaluation of the LUC's decision. In January 1984, the Hawaii Supreme Court denied the appellants' petition for certiorari, but expressly declined to rule on the "right/wrong" standard.[17]

II. STANDARD OF REVIEW

A. Background

Administrative agencies derive their authority from the legislature.[18] At common law, in order to preserve the functions of agencies in discharging their delegated duties, courts afforded a presumption of validity to administrative

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separate rulings because the incorporation of certain findings of fact in its decision made it reasonably clear that it had rejected all others.

Finally, the ICA found no substantive error. The court rejected the appellants' argument that the land use criteria of HAWAII REV. STAT. § 205-4 (1976) and the LUC's findings of fact required the reclassification of the subject property. The court decided that the findings to which the appellants referred were superfluous to the conclusions of law except to the extent that they related to the 70.78 acres reclassified from urban to conservation on remand. *Id.* at 645, 675 P.2d at 792-93 (1983).

[16] *Id.* at 640, 675 P.2d at 790.

[17] ____ Hawaii ____, 677 P.2d 965 (1984), *cert denied per curiam*. In denying certiorari, the court stated:

> [I]n the course of rendering its opinion, the Intermediate Court of Appeals adopted the "right/wrong" standard with respect to review of the circuit court's decision in affirming an administrative agency determination and expressly rejected the "clearly erroneous" standard in such a situation. Since the circuit court's affirmance of the action of the Land Use Commission was clearly on the record, supportable under either the right/wrong or clearly erroneous standard we do not reach the question of the correct standard of review to be applied with an appeal of this nature.

Id.

[18] *See* Hubbard, *Patterns of Judicial Review of Administrative Decisions*, 12 U. TOL. L. REV. 37 (1980); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944). *See generally*, K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.01 (3d ed. 1972).

decisions.[19] Therefore, findings of fact and mixed findings of fact and law made by an administrative agency were reviewed under the "substantial evidence" or the "clearly erroneous" standard.[20]

The Federal Administrative Procedure Act (APA),[21] enacted in 1946, codified the standards by which the federal judiciary should review administrative decisions.[22] The Act essentially adopted the common law standards of review. The Model State Administrative Procedure Act (MSAPA)[23] in force in thirty-one states,[24] including Hawaii, provides standards by which state courts should

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[19] Campisi v. Liquor Control Comm'n, 175 Conn. 295, 397 A.2d 1365 (1978) (courts are bound by the findings of fact and reasonable conclusions of law made by administrative agencies); Johnson v. United States, 395 A.2d 354 (D.C. App. 1979) (courts defer to administrative agencies' judgment because the legislature has delegated its power to the agencies); Hodges v. Board of Trustees City of Granite Police Pension Fund, 73 Ill. App. 3d 978, 392 N.E.2d 417 (1978) (administrative findings of fact are deemed prima facie true and correct); Commission of Baltimore Police Dep't v. Cason, 34 Md. App. 487, 368 A.2d 1067 (1977) (no matter how conflicting the evidence or how questionable the credibility of the source, the court has no power to substitute its judgment for that of the agency).

[20] *See supra* note 18.

[21] 5 U.S.C. § 706 (1982).

[22] Section 706 of the Act provides:

> Scope of Review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C.S. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or reviewed on the record of an agency hearing provided by statute;
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[23] MODEL STATE ADMIN. PROC. ACT, 14 U.L.A. 71 (1980).

[24] (Alabama) ALA. CODE §§ 41-22-1 to 41-22-47 (1982); (Arkansas) ARK. STAT. ANN. §§ 5-701 to 5-714 (1976); (Connecticut) CONN. GEN. STAT. ANN. §§ 4-166 to 4-189 (1958, West Supp. 1984); (District of Columbia) D.C. CODE ANN. §§ 1-1501 to 1-1511 (1981); (Georgia) GA. CODE ANN. §§ 50-13-1 to 50-13-22 (Michie 1982); (Hawaii) HAWAII REV. STAT. §§ 91-1 to 91-18 (1976 & 1984 Supp.); (Idaho) IDAHO CODE §§ 67-5201 to 67-5218 (Bobbs-Merrill 1980); (Illinois) ILL. ANN. STAT. ch. 127 §§ 1001 to 1021 (West 1981); (Iowa) IOWA CODE

review administrative decisions.

The Hawaii Administrative Procedure Act (HAPA),[25] enacted in 1961 and modeled after MSAPA,[26] governs administrative function and review in Hawaii. HAPA provides that, in a contested case, an aggrieved party may appeal the final decision or order of an agency to the circuit court.[27] The provision also allows further appeal from a circuit court to the Hawaii Supreme Court.[28] In certain situations, appeals may be made directly to the supreme court.[29] HAPA also sets forth the standards of review for administrative appeals.

ANN. §§ 17A.1 to 17A.23 (West 1978); (Louisiana) LA. REV. STAT. ANN. §§ 49:950 to 49:967 (West 1965 & Supp. 1984); (Maine) ME. REV. STAT. ANN. tit. 5 §§ 8001 to 11008 (West 1964 & Supp. 1984-85); (Maryland) MD. ANN. CODE art. 41 §§ 244 to 256A (1957); (Michigan) MICH. COMP. LAWS ANN. §§ 24.201 to 24.315 (West 1981); (Mississippi) MISS. CODE ANN. §§ 25-43-1 to 25-43-19 (1972); (Missouri) MO. ANN. STAT. §§ 536.010 to 536.150 (Vernon 1953 & West Supp. 1985); (Montana) MONT. CODE ANN. § 2-4-101 to 2-4-711 (1983); (Nebraska) NEB. REV. STAT. §§ 84-901 to 84-919 (1981); (Nevada) NEV. REV. STAT. §§ 233B.010 to 233B.150 (1977); (New Hampshire) N.H. REV. STAT. ANN. §§ 541-A:1 to 541-A:9 (1974); (New York) N.Y.A.P.A. § 100 (West 1984); (North Carolina) N.C. GEN. STAT. §§ 150A-1 to 150A-64 (1983); (Oklahoma) OKLA. STAT. ANN. tit. 75, §§ 301 to 326 (West 1976); (Oregon) OR. REV. STAT. §§ 183.310 et seq. (1981); (Rhode Island) R.I. GEN. LAWS §§ 42-35-1 to 42-35-18 (1956); (South Dakota) S.D. CODIFIED LAWS §§ 1-26-1 to 1-26-42 (1980); (Tennessee) TENN. CODE ANN. §§ 4-5-101 to 4-5-130 (1979); (Vermont) VT. STAT. ANN. tit. 3, §§ 801 to 847 (1972); (Washington) WASH. REV. CODE ANN. §§ 34.04.010 to 34.04.940 (West 1965 & Supp. 1985); (West Virginia) W. VA. CODE §§ 29A-1-1 to 29A-7-4 (Michie 1980); (Wisconsin) WIS. STAT. ANN. §§ 227.01 to 227.26 (West 1982); (Wyoming) WYO. STAT. §§ 9-4-101 to 9-4-115 (1977).

[25] HAWAII REV. STAT. ch. 91 (1976).

[26] H.R. COMM. REP. NO. 8, 1st Hawaii Leg., Reg. Sess., 1961 House J. 653. *See also* H.R. COMM. REP. NO. 83, 1st Hawaii Leg., Special Sess., 1959 H.J. 224-25.

[27] HAWAII REV. STAT. § 91-14(a) (1976) provides:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right to trial by jury, provided by law.

HAWAII REV. STAT. § 91-14(b) (Supp. 1983) provides:

> Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court . . . pursuant to the provisions of the Hawaii Rules of Civil Procedure, except where a statute provides for a direct appeal to the supreme court which shall be subject to chapter 602 . . . .

[28] HAWAII REV. STAT. § 91-15 (Supp. 1983).

[29] HAWAII REV. STAT. § 386-88 (Supp. 1983) provides for direct appeal from the decision of the Labor and Industrial Relations Board, and HAWAII REV. STAT. § 269-16(f) (Supp. 1983) provides for direct appeals from the Public Utilities Commission.

B. *Circuit Court's Review*

HAPA provides two standards of review for an administrative decision appealed to the circuit court:[30] the "clearly erroneous" standard and the "arbitrary and capricious" standard, which the statute characterizes as an abuse of discretion.[31] It also defines situations which constitute reversible error: decisions made in violation of a constitutional or statutory provision,[32] made in excess of the statutory authority of the agency,[33] made upon unlawful procedure,[34] or affected by other error of law.[35] The statute, however, provides neither the standards of review under which the four reversible error situations are to be judged nor cases in which the two standards of review are to be applied.

Prior to *Outdoor Circle*, it appeared that the "clearly erroneous" standard applied to all reviews of administrative decisions, regardless of whether the issue on appeal was a question of law, mixed question of law and fact, or a finding of

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[30] HAWAII REV. STAT. § 91-14(g) (1976) provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may modify the decision and order if the substantial rights of the petitioners may be prejudiced because the administrative findings, conclusions, decisions, or orders are:

1) In violation of constitutional or statutory provisions; or
2) In excess of the statutory authority or jurisdiction of the agency; or
3) Made upon unlawful procedure; or
4) Affected by other error of law; or
5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The "clearly erroneous" standard is considered more liberal than the "substantial evidence" test because under the "substantial evidence" test, the court need only look at the record to find such evidence as a reasonable mind might accept as adequate to support the conclusion. Washington Post Co. v. District Unemployment Compensation Bd., 377 A.2d 436 (D.C. 1977). Under the "clearly erroneous" standard, however, the reviewing court may reverse an administrative finding even though it is supported by substantial evidence if the court is left with a firm conviction that a mistake has been made. *In re* Kauai Elec. Div. of Citizens Util. Co., 60 Hawaii 166, 590 P.2d 524 (1978); De Fries v. Association of Apartment Owners, 57 Hawaii 296, 555 P.2d 855 (1976); Willard v. Employment Sec. Dep't, 10 Wash. App. 437, 517 P.2d 973 (1974).

However, Hawaii courts have held that they will not lightly disturb findings based on the credibility of witnesses or weight of evidence. De Victoria v. H & K Contractors, 56 Hawaii 552, 545 P.2d 692 (1976) (judgment of credibility is primarily a responsibility of the administrative agency); Williams v. Hawaii Housing Auth., 5 Hawaii App. ——, 690 P.2d 285 (1984) (judgment of credibility is within the province of the board and court would not disturb findings).

[31] HAWAII REV. STAT. § 91-14(g)(6) (1976).

[32] HAWAII REV. STAT. § 91-14(g)(1) (1976).

[33] HAWAII REV. STAT. § 91-14(g)(2) (1976).

[34] HAWAII REV. STAT. § 91-14(g)(3) (1976).

[35] HAWAII REV. STAT. § 91-14(g)(4) (1976).

fact. Particularly illustrative of this point are the decisions which have been appealed directly to the supreme court.[36]

Under the workers' compensation statute, appeals are taken directly from the State of Hawaii Labor and Industrial Relations Appeals Board to the Hawaii Supreme Court and are limited to a review of questions of law.[37] Administrative conclusions of law are generally freely reviewable.[38] However, since *De Fries v. Association of Apartment Owners*[39] in 1976, both the supreme court and ICA have applied the "clearly erroneous" standard of Hawaii Revised Statutes section 91-14(g)(5) to judge workers' compensation appeals.[40]

The appellate courts have indicated that circuit courts were also to apply the "clearly erroneous" standard of HAPA when reviewing adminstrative decisions in cases where an administrative decision has been appealed to a circuit court (primary review) and then to an appellate court (secondary review).[41] For example, in *Aio v. Hamada*,[42] the Hawaii Supreme Court upheld a circuit court decision affirming a Hawaii Public Employment Relations Board (HPERB) interpretation of a provision of the Hawaii Collective Bargaining Act. Although statutory interpretation is normally a question of law,[43] the supreme court de-

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[36] Jones v. Hawaiian Elec. Co., 64 Hawaii 289, 639 P.2d 1103 (1982) (whether a lease with an option to purchase was evidence of indebtedness); *In re* Hawaiian Telephone Co., 65 Hawaii 293, 651 P.2d. 475 (1982) (whether a rate increase was just, reasonable, and nondiscriminatory); *In re* Hawaii Elec. Light Co., 60 Hawaii 624, 594 P.2d 612 (1979) (whether a rate increase was reasonable); *In re* Kauai Elec. Div. of Citizens Util. Co., 60 Hawaii 166, 590 P.2d 524 (1978) (whether a rate increase was reasonable); *In re* Charley's Tour & Transp. Inc., 55 Hawaii 463, 552 P.2d 1272 (1974) (whether the Public Utilities Commission's conclusions were supported by substantial evidence).

[37] HAWAII REV. STAT. § 386-88 (1976).

[38] *See* Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1182-83 (1981); Stern, *supra* note 18, at 72.

[39] 57 Hawaii 296, 555 P.2d 855 (1976).

[40] *See* Chung v. Animal Clinic, 63 Hawaii 642, 636 P.2d 721 (1981); De Victoria v. H & K Contractors, 56 Hawaii 552, 545 P.2d 692 (1976); Danuser v. J.A. Thompson, Inc., 3 Hawaii App. 564, 655 P.2d 887 (1982); Tsuchiyama v. Kahului Trucking & Storage, 2 Hawaii App. 659, 638 P.2d 1381 (1982); Hamabata v. Hawaiian Ins. & Guar. Co., 1 Hawaii App. 350, 619 P.2d 516 (1980).

[41] *See* Agsalud v. Lee, 66 Hawaii 425, 664 P.2d 734 (1983) (whether Lee was unemployed within the meaning of HAWAII REV. STAT. § 383-(16)); Aio v. Hamada, 66 Hawaii 401, 664 P.2d 727 (1983) (the supreme court applied the "clearly erroneous" standard to an administrative agency's interpretation of a statute); Wailuku Sugar Co. v. Agsalud, 65 Hawaii 146, 648 P.2d 1187 (1982) (whether appellants were adversely affected workers within the meaning of the statute). *See also* Nakamine v. Board of Trustees of the Employees Retirement Sys., 65 Hawaii 251, 649 P.2d 1162 (1982); Bennet G. Cariaga, 65 Hawaii 404, 652 P.2d 1143 (1982); McGlone v. Inaba, 64 Hawaii 27, 636 P.2d 138 (1981) (whether the circuit court abused its discretion in refusing to allow the appellants to testify).

[42] 66 Hawaii 401, 664 P.2d 727 (1983).

[43] *See* Pierce & Shapiro, *supra* note 38 at 1182-83; Stern, *supra* note 18 at 72.

cided that neither it nor the circuit court could overrule the agency on this point unless the decision was clearly erroneous.[44]

However, in a 1983 decision, *Foster Village v. Hess*,[45] the ICA indicated the circuit courts were not required to use the "clearly erroneous" standard of HAPA in all cases on primary review by holding that it would not use the "clearly erroneous" standard in all cases on secondary review.[46] Instead, the standard of review would depend on the question presented. Thus, in *Foster Village*, the ICA distinguished between questions of law, which it held were freely reviewable, and questions of fact, which it held were subject to the "clearly erroneous" standard.[47]

Outdoor Circle clarified that the standard of review by which a circuit court is to judge an administrative decision depends on the issue on appeal.[48] The court resolved that violations of constitutional or statutory provisions, acts exceeding the bounds of statutory authority, and other errors of law are questions of law that are freely reviewable.[49] The court further decided that findings of fact are reviewable under the "clearly erroneous" standard and questions of procedure are reviewable under the "arbitrary and capricious" or "abuse of discretion" standard.[50]

The supreme court affirmed *Outdoor Circle* on this issue in *Camara v. Agsalud*.[51] In *Camara*, the supreme court held that a circuit court is free under HAPA to reverse an agency's decision with regard to questions of law and is bound by the "clearly erroneous" rule with regard to questions of fact and

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[44] 66 Hawaii at 406, 664 P.2d at 731.

[45] 4 Hawaii App. 463, 667 P.2d 850 (1983).

[46] *Id.* at 469, 667 P.2d at 854.

[47] *Id.*

[48] 4 Hawaii App. at 638-39, 675 P.2d at 789. Determining the nature of the issue on appeal is probably the most difficult task. Certain issues are clearly questions of law: interpretation of contract terms, American Sec. Bank v. Read Realty, 1 Hawaii App. 161, 616 P.2d 237 (1980); the existence of duty, e.g., the duty owed by the State to a pedestrian, Friedrich v. Department of Transp., 60 Hawaii 32, 586 P.2d 1037 (1978); sufficiency of evidence, House v. Ane, 56 Hawaii 383, 538 P.2d 320 (1975); admission of evidence, Kamano v. Coelho, 24 Hawaii 689 (1919). Other issues are clearly questions of fact: whether a signature on a deed is a forgery, Iaea v. Iaea, 59 Hawaii 648, 586 P.2d 1015 (1978); whether a joint venture exists, Shinn v. Edwin Yee, Ltd., 57 Hawaii 215, 533 P.2d 733 (1976); breach of duty, Krohnert v. Yacht Systems Hawaii, Inc., 4 Hawaii App. 190, 664 P.2d 738 (1983).

Mixed questions of fact and law usually arise from the application of law to fact: negligence, Friedrich v. Department of Transp., 60 Hawaii 32, 586 P.2d 1037 (1978). Generally, however, courts label mixed questions as ultimate facts and review them under the clearly erroneous standard. *See* Molokoa Village Dev. Co. v. Kauai Elec. Co., 60 Hawaii 582, 593 P.2d 375 (1979) (whether a utility company officer acted within the scope of his apparent authority).

[49] 4 Hawaii App. at 638-39, 675 P.2d at 789.

[50] *Id.*

[51] 67 Hawaii ____, 685 P.2d 794 (1984).

mixed questions of fact and law.[52]

Outdoor Circle and *Camara* provide clear guidelines by which a circuit court is to review administrative appeals. As a result, appellants no longer have to overcome the difficult "clearly erroneous" threshold to appeal a question of law to a circuit or appellate court. Instead, the standard of review on primary administrative appeal parallels those of civil appeals: questions of law are freely reviewable, mixed questions and question of fact are reviewable under the "clearly erroneous" standard, and procedural matters are reviewable under the "arbitrary and capricious" standard.

C. Appellate Court's Review

1. Background

The HAPA provisions for secondary review, like the provisions for primary review, are unclear. HAPA provides that appeals from a circuit court's review of an administrative decision be made pursuant to Chapter 602 of the Hawaii Revised Statutes.[53] Chapter 602 in turn, empowers the appellate courts to hear questions of law and mixed questions of law and fact that are appealed from lower tribunals.[54] Under Rule 52(a) of the Hawaii Rules of Civil Procedure (Rule 52(a)), the appellate courts may also review a trial court's findings of fact.[55] However, the standard of review that an appellate court is to apply on secondary appeal is not expressly provided by statute and was not definitely established by the Hawaii courts prior to *Outdoor Circle*.

a. ICA Review of Administrative Appeals

Prior to *Outdoor Circle*, the ICA's review of administrative appeals to the circuit courts was identical to its review of other civil appeals. In non-adminis-

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[52] *Id.* at ____, 685 P.2d at 797.

[53] HAWAII REV. STAT. § 91-15 (Supp. 1983) provides: "Review of a final judgment of the circuit court under this chapter shall be governed by chapter 602."

[54] HAWAII REV. STAT. § 602-5 (Supp. 1983) provides:

> **Jurisdiction and powers.** The supreme court shall have jurisdiction and powers as follows:
>
> (1) To hear and determine all questions of law, or mixed law and fact, which are properly brought before it on any appeal allowed by law from any court or agency.

The intermediate court of appeals hears cases which are referred to it by the supreme court.

[55] HAWAII R. CIV. P. 52(a) provides:

> In all actions tried upon the facts without a jury or with an advisory jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

trative appeals, questions of law decided by a lower court are freely reviewable[56] and findings of fact are reviewed under the clearly erroneous standard of Rule 52(a).[57] Mixed questions of law and fact are either freely reviewable or judged under the "clearly erroneous" standard, depending on the circumstances.[58]

This approach appears to be premised on its decision in *Scott v. Contractors Licensing Board*.[59] In *Scott*, one of its earliest decisions, the ICA declared that the circuit court acts as a trier of fact under the appeals procedure of HAPA.[60] The ICA concluded that the circuit court's decision did not comply with Rule 52(a) since it did not sufficiently set forth the findings of fact upon which it based its decision. The case was therefore remanded to the circuit court. Consequently, *Scott* established that secondary review of administrative findings of fact is governed by Rule 52(a).

The view that the circuit court acts as a trial court on primary review prevailed and was expanded upon in subsequent decisions. For example, in *Foodland v. Agsalud*,[61] the appellants challenged both the agency's and circuit court's findings of fact relating to an employee's availability for work. The ICA reviewed the lower court's findings under the "clearly erroneous" standard of Rule 52(a) and upheld both lower tribunals.[62]

Questions which have both legal and factual attributes were also subject to the limitations of Rule 52(a). In *Homes Consultant Company v. Agsalud*,[63] the

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[56] *See, e.g.*, Molokoa Village Dev. Co., Ltd. v. Kauai Elec. Co., 60 Hawaii 582, 593 P.2d 375 (1979); Friedrich v. Department of Transp., 60 Hawaii 32, 586 P.2d 1037 (1978), Ajirogi v. State, 59 Hawaii 515, 583 P.2d 980 (1978).

[57] *See, e.g.*, Friedrich v. Department of Transp., 60 Hawaii 32, 586 P.2d 1037 (1978); Ajirogi v. State, 59 Hawaii 515, 583 P.2d 980 (1978); State v. Miller, 4 Hawaii App. 603, 671 P.2d 1037 (1983); Yorita v. Okumoto, 3 Hawaii App. 148, 643 P.2d 820 (1982).

[58] Mixed findings made by an agency are generally judged under the "clearly erroneous" standard especially when an agency is applying a specific statute to a particular set of facts. Stern, *supra* note 18, at 101.

Certain issues considered freely reviewable as questions of law are actually mixed questions. For example, the construction of the terms of a contract is basically a factual inquiry but is generally held to be a question of law and, therefore, freely reviewable. American Sec. Bank v. Read Realty, 1 Hawaii App. 161, 616 P.2d 237 (1980). *See also* Stern, *supra* note 18, at 111.

The ICA, in *State v. Miller*, 4 Hawaii App. 603, 671 P.2d 1037 (1983), separated the factual aspects of the issue from the legal aspects. The court judged the factual finding, whether the continuance granted to the defendant was at his request or with the consent of his counsel, under the "clearly erroneous" standard. The legal question, whether the continuance constituted an excluded period under the speedy trial provision of HAWAII R. PENAL P. 48(c)(1)-(5), was judged under the "right/wrong" standard.

[59] 2 Hawaii App. 92, 626 P.2d 199 (1981).

[60] *Id.* at 94, 626 P.2d at 203.

[61] 3 Hawaii App. 569, 656 P.2d 100 (1982).

[62] *Id.* at 572-73, 656 P.2d at 103.

[63] 2 Hawaii App. 421, 633 P.2d 564 (1981).

ICA upheld a State of Hawaii Department of Labor's finding that because Homes had exercised control over its salespersons, it was liable for unemployment compensation contributions. The circuit court had found that Homes was not liable for the contributions because it did not exercise sufficient control over its sales persons. However, the ICA determined that relevant case law did not require direct control to establish an employment relationship. The court therefore held that the supervision which Homes exercised over its sales persons was sufficient to establish liability for unemployment compensation contributions. The court reviewed this mixed issue under the "clearly erroneous" standard of Rule 52(a).[64]

Since a circuit court reviews an administrative finding under the "clearly erroneous" standard of HAPA,[65] the ICA's use of the "clearly erroneous" standard of Rule 52(a) subjected administrative findings of fact and mixed findings to a double "clearly erroneous" review at the secondary appeal level.

In cases decided immediately prior to *Outdoor Circle*, the ICA clarified that questions of law are freely reviewable on secondary appeal.[66] In *Foster Village*,[67] the ICA explicitly stated that Rule 52(a) applies only to questions of fact and that appellate courts are free to review a circuit court's conclusions of law in an administrative appeal.[68]

Feliciano v. Board of Trustees of the Employees' Retirement System,[69] demonstrates the ICA's use of the two standards of review. In *Feliciano*, the circuit court had determined that the appellant's injury was work-related. The ICA reviewed this question of fact under the "clearly erroneous" standard.[70] It therefore reversed the lower court's determination because it was not supported by reliable, probative, and substantial evidence. The court, however, freely reviewed the question of whether a decision for workers' compensation purposes is legally binding on the State Employees Retirement System Board.[71] The ICA held that the circuit court had erred in determining that the workers' compensation finding was binding on the Employees Retirement System.

Thus, prior to *Outdoor Circle*, the ICA judged an appeal from a circuit court's review of an administrative decision under the same standards as any other civil appeal. This position, however, was not consistently endorsed by the Hawaii

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[64] *Id.* at 425-26, 633 P.2d at 567.

[65] HAWAII REV. STAT. § 91-14(g)(5) (1976).

[66] Foster Village Community Ass'n v. Hess, 4 Hawaii App. 463, 667 P.2d 850 (1983); Feliciano v. Board of Trustees of the Employees' Retirement Sys., 4 Hawaii App. 26, 659 P.2d. 77 (1983).

[67] 4 Hawaii App. 463, 667 P.2d 850 (1983).

[68] *Id.* at 468, 667 P.2d at 853-54.

[69] 4 Hawaii App. 26, 659 P.2d 77 (1983).

[70] *Id.* at 31-32, 659 P.2d at 81.

[71] *Id.* at 32-33, 659 P.2d at 82.

Supreme Court.

b. Hawaii Supreme Court Review of Administrative Appeals

The Hawaii Supreme Court originally judged secondary administrative appeals under a once-removed standard similar to that of the ICA. Hence, on secondary review, the supreme court judged the lower court's findings rather than the agency's decision. The supreme court, however, judged the circuit court's decisions under the "clearly erroneous" standard of HAPA instead of the Rule 52(a) standard.

This position was reflected in *National Tire Company v. Kauffman*,[72] an early decision under HAPA. In this case, the appellant challenged the circuit court's adoption of the agency's finding of fact. The lower court found that National Tire had not made a bona fide offer of work to Kauffman. Kauffman, therefore, was eligible for unemployment compensation. The supreme court stated that the circuit court's review was governed by the "clearly erroneous" standard of HAPA and indicated that it also weighed the circuit court's review under HAPA's "clearly erroneous" standard.[73] Thus, the court conducted a once-removed review of the administrative decision and used a double "clearly erroneous" standard. Unable to find the degree of error necessary to reverse the decision, the supreme court held that the circuit court's finding was not clearly erroneous within the meaning of HAPA.[74]

In subsequent cases, however, the supreme court did not conduct a once-removed review. Instead, the court directly reviewed administrative decisions under the HAPA standards, without reference to the substance of the circuit court's decision.[75] For example, in *Mc Glone v. Inaba*,[76] the supreme court up-

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[72] 58 Hawaii 265, 567 P.2d 1233 (1977).

[73] *Id.* at 275, 567 P.2d at 1239. The court stated, "[F]rom our examination of the record here presented, we cannot say that the findings of the circuit court were clearly erroneous within the meaning of HRS § 91-14(g)."

[74] *Id.* at 265, 567 P.2d at 1239.

[75] Agsalud v. Lee, 66 Hawaii 425, 664 P.2d 734 (1983) ("we cannot but agree with the circuit court that the Referee's decision was supported by 'reliable, probative, and substantial evidence.' "); Aio v. Hamada, 66 Hawaii 401, 664 P.2d 727 (1983) ("we are convinced from our own review that the foregoing HPERB rulings are reasonable and not clearly erroneous"); Wailuku Sugar Co. v. Agsalud, 65 Hawaii 146, 648 P.2d 1187 (1982) ("we are left with a firm conviction that a mistake was made by the referee"); Bennet G. Cariaga v. Del Monte Corp., 65 Hawaii 404, 652 P.2d 1143 (1982) ("we find that the LIRAB's decision in concluding that Cariaga's depression and resulting death stemmed from the absence of his girlfriend rather than unemployment was not clearly erroneous"); McGlone v. Inaba, 64 Hawaii 27, 636 P.2d 138 (1981) ("we do not find clearly erroneous the BLNR's conclusion that the property construction would probably not have a significant effect on the sanctuary").

[76] 64 Hawaii 27, 636 P.2d 158 (1981).

held a circuit court's decision that affirmed a State of Hawaii Board of Land and Natural Resources finding that the impact of construction of underground utilities in a conservation area was insufficient to require an environmental impact statement. In reaching its decision, the supreme court determined that both it and the circuit court were required to review the agency's decision under the HAPA standards.[77] The supreme court therefore reviewed the agency decision without regard to the circuit court's conclusions.

In *Wailuku Sugar Company v. Agsalud*,[78] the court also appeared to conduct a "right/wrong" review. Both the circuit court and State of Hawaii Department of Labor had found that two Wailuku Sugar Company workers had retired voluntarily and, therefore, were ineligible for a workers' readjustment allowance under a federal program. The supreme court stated that the issue it was deciding was whether the department's finding was clearly erroneous under HAPA. In reversing both the circuit court's and the department's findings of fact, the court gave no deference to the circuit court's review of the department's decision.[79]

The supreme court has recently indicated that it will continue to review the administrative decision rather than the circuit court's decision. In *Camara v. Agsalud*,[80] the court determined that the State of Hawaii Department of Labor's finding that the appellant was discharged for misconduct was inconsistent with the undisputed facts. The court therefore held that the circuit court was correct in reversing the department's decision.[81] In effect, the supreme court reviewed the circuit court's decision under the "right/wrong" standard.

The Hawaii Supreme Court denied certiorari in *Outdoor Circle*,[82] but specifically reserved decision as to the appropriate standard of review on secondary appeal. To date, the supreme court has not articulated the standard under which it judges administrative appeals.

c. Why Appellate Courts Struggle with the Appropriate Standard of Secondary Review

The difficulty which the appellate courts have had in ascertaining the correct standard of review on secondary appeal is due to several factors. First, the provisions of HAPA are ambiguous. Under Hawaii Revised Statutes section 91-14(g), "court" may be interpreted to apply both to the circuit court on primary

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[77] *Id.* at 34, 636 P.2d at 166-67.
[78] 65 Hawaii 146, 648 P.2d 1107 (1982).
[79] *Id.* at 151-52, 648 P.2d at 1111-12.
[80] 67 Hawaii___, 685 P.2d 794 (1984).
[81] *Id.* at ___, 685 P.2d at 798.
[82] 67 Hawaii___, 677 P.2d 965 (1984).

appeal and to appellate courts on secondary appeal. Moreover, while appeals from the circuit court are governed by Chapter 602 of the Hawaii Revised Statutes, neither HAPA nor Chapter 602 furnishes clear standards by which administrative appeals are to be judged.[83]

The second source of uncertainty is the disparate views that the supreme court and the ICA have expressed regarding a circuit court's role in reviewing an administrative decision. The ICA has held that a circuit court acts as the trier of fact on the agency record. In *Scott v. Contractors Licensing Board*,[84] the ICA concluded that under HAPA, the circuit court acted as the trier of fact when it reviewed an administrative decision. Thus, the circuit court was required to make specific findings of fact pursuant to Rule 52(a). Those findings were subject to review by the appellate court under the "clearly erroneous" standard.[85] A double "clearly erroneous" standard resulted when an agency's finding of fact was reviewed under Rule 52(a) because the finding also would have been reviewed by the circuit court under the "clearly erroneous" standard of HAPA.

The supreme court expressed a contrary view in *Life of the Land v. Land Use Commission*.[86] The court said that the circuit court in an administrative appeal has powers parallel to those of an appellate court.[87] Since HAPA does not specify that the provisions of Hawaii Revised Statutes section 91-14(g) are applicable only to the circuit court, this view would allow both the circuit and appellate courts to review an administrative decision under the HAPA guidelines.

A final factor contributing to the lack of definitive standards of review for secondary appeals is the nature of the appellate record. Because both courts review the same record, the appellate courts have found it difficult to separate their judgments on the merits of the agency decision from their judgments on the propriety of the circuit court's decision.[88]

2. *Analysis of the Outdoor Circle Opinion*

In *Outdoor Circle*, the ICA held that it was not bound by Rule 52(a) when judging an appeal from a circuit court's review of an administrative decision. Instead, the ICA applied the "right/wrong" standard in reviewing the circuit

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[83] *See supra* notes 53-54.

[84] 2 Hawaii App. 92, 626 P.2d 199 (1981).

[85] Hawaii R. Civ. P. 52(a).

[86] 58 Hawaii 292, 568 P.2d 1189 (1977).

[87] 58 Hawaii at 297, 568 P.2d at 1193.

[88] McGlone v. Inaba, 64 Hawaii 27, 636 P.2d 158 (1981); National Tire v. Kauffman, 58 Hawaii 265, 567 P.2d 1233 (1977); Foodland Super Market, Ltd. v. Agsalud, 3 Hawaii App. 569, 656 P.2d 100 (1982); Homes Consultant Co. v. Agsalud, 2 Hawaii App. 421, 633 P.2d 564 (1981).

court's decision.[89] Under this standard, the court directly reviewed the agency decision under the HAPA standards without deferring to the circuit court's decision. The substantive issue on appeal involved a mixed question: whether the facts as found by the LUC required a different classification for Kawainui Marsh.[90] The ICA decided that the lower court's ruling on this issue was correct based upon its own evaluation of the administrative record.[91]

The ICA noted that in an administrative appeal, the circuit court is confined to the administrative record and does not hear new evidence. It therefore reasoned that since both the appellate court and the circuit court reviewed the same record, there was no reason to defer to the lower court's decision.[92] Thus, on secondary review, the ICA conducted a review which was identical in scope to that conducted by the circuit court.

The court specifically reversed its decisions in *Foodland Super Markets*[93] and *Homes Consultant Company*,[94] in which it used the "clearly erroneous" standard to judge the lower court's findings of fact and mixed findings. Instead, the ICA adopted the "right/wrong" standard as articulated in *State v. Miller*[95] and *Davis v. Davis*.[96] In *Miller* and *Davis*, the ICA used the "right/wrong" standard in reviewing what it considered questions of law.[97]

In *Outdoor Circle*, the ICA expanded the "right/wrong" standard by expressly abandoning the clearly erroneous standard of Rule 52(a), which only applies to questions of fact and mixed questions.[98] *Outdoor Circle* therefore appears to remove the double "clearly erroneous" standard that previously applied to administrative findings of fact and mixed findings at the secondary appeal level. Thus, it appears that the "right/wrong" standard now applies to all aspects of the circuit court's review.

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[89] 4 Hawaii App. at 640, 675 P.2d at 790.

[90] *Id.* at 645, 675 P.2d at 792.

[91] The ICA used the "right/wrong" standard as defined in Davis v. Davis, 3 Hawaii App. 501, 653 P.2d 1167 (1980). In *Davis*, the court said that under the "right/wrong" standard it examines the facts and answers the questions on appeal without giving weight to the trial court's decision. *Id.* at 506 n.3, 653 P.2d at 1170 n.3.

[92] 4 Hawaii App. at 639-40, 675 P.2d at 789-90.

[93] 3 Hawaii App. 569, 656 P.2d 100 (1982).

[94] 2 Hawaii App. 421, 633 P.2d 564 (1981).

[95] 4 Hawaii App. 603, 671 P.2d 1037 (1983).

[96] 3 Hawaii App. 501, 653 P.2d 1167 (1980).

[97] State v. Miller, 4 Hawaii App. 1037 (1983) (the scope of periods excluded from the speedy trial requirements under HAWAII R. PENAL P. 48(c)(1)); Davis v. Davis, 3 Hawaii App. 501, 653 P.2d 1167 (1980) (whether father's changed circumstances were sufficient to warrant review of support agreement).

[98] HAWAII R. CIV. P. 52(a) provides:

> Findings of fact should not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.

See also supra text accompanying notes 57-71.

A majority of other jurisdictions have adopted the "right/wrong" or freely reviewable standard on secondary administrative appeal, reasoning that the appellate court is in as good a position as the trial court to review the agency record.[99] The ICA position also finds support in two federal circuits.[100]

The United States Supreme Court, however, will not freely review an appeal from a lower court's review of an administrative decision under federal administrative procedure. In *Universal Camera v. NLRB*[101] and *NLRB v. Pittsburg S.S. Company*,[102] the Court said that it would intervene and reverse a court of appeals decision only if the substantial evidence test is misapprehended or misapplied.[103] The Court further stated that it would not review conflicts of evidence nor would it reverse the lower court because it weighed the evidence differently. However, the Supreme Court's position may reflect concerns not applicable to state appellate courts. For example, in *NLRB v. Pittsburg S.S. Company*, the Court refused to overturn the Sixth Circuit Court of Appeals because it decided that Congress had expressly delegated review of NLRB decisions to the circuit courts of appeals under the Taft-Hartley Act.[104]

Outdoor Circle provides the first clear guidelines for secondary appeal in Hawaii. It also simplifies the review process by using the same standards at each level. However, while the decision appears to establish the standard for secondary review, the Hawaii Supreme Court has not affirmed the ICA on this issue.[105] In affirming the result in *Outdoor Circle*, the supreme court deliberately abstained from determining the applicable standard of review on secondary appeal. Instead, the court decided that the ICA could have reached its decision under either the "clearly erroneous" or the "right/wrong" standard.[106] *Outdoor*

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[99] *See, e.g.*, City of Birmingham v. Morris, 396 So.2d 53 (Ala. 1981); Arkansas Real Estate Comm'n v. Harrison, 585 S.W.2d 34 (Ark. 1979); Rados v. Occupational Safety and Health Appeals Bd., 89 Cal. App. 3d 550, 152 Cal. Rptr. 510 (1979); Cook v. Iowa Dep't of Job Service, 299 N.W.2d 698 (Iowa 1980); Unified School Dist. v. Dice, 228 Kan. 40, 612 P.2d 1203 (1980); *In re* Pautz, 295 N.W.2d 635 (Minn. 1980); Ingram v. Civil Service Comm'n, 584 S.W.2d 633 (Mo. 1979); Southwest Gas Corp. v. Public Service Comm'n, 614 P.2d 1080 (Nev. 1980); Seidenberg v. N.M. Board of Medical Examiners, 80 N.M. 135, 452 P.2d 469 (1969); Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash. 2d 267, 552 P.2d 674 (1976); Sanitary Transfer & Landfill, Inc. v. Department of Natural Resources, 85 Wis. 2d 1, 270 N.W.2d 144 (1978). *But see* C.F. Indus. v. Tennessee Public Serv., 599 S.W.2d 536 (Tenn. 1980).

[100] Brown v. United States, 670 F.2d 747 (8th Cir. 1982); Committee for an Independent P-I v. Hearst, 704 F.2d 467 (9th Cir. 1983).

[101] 340 U.S. 474 (1951).

[102] 340 U.S. 498 (1951).

[103] 340 U.S. at 491, 340 U.S. at 503, respectively.

[104] 340 U.S. at 502.

[105] 67 Hawaii ____, 677 P.2d 965 (1984).

[106] *Id.*

Circle is consistent with the supreme court's decision in *Life of the Land*,[107] in which the court stated that the circuit court acts like an appellate court rather than a trial court on administrative review. It is also consistent with previous supreme court decisions that appear to directly review administrative decisions.[108] However, because the supreme court declined to reach the question, the issue remains unsettled.

In addition, the effect of *Outdoor Circle* on the ICA's *Scott*[109] decision is unclear. According to *Scott*, when the circuit court reviews administrative findings, it is in the same position as a trial court.[110] Since Rule 52(a) is the appropriate standard for review of a trial court's findings of fact, the rule would also apply in an appeal from a circuit court's review of an administrative finding of fact. In light of the weight of authority and the Hawaii Supreme Court's prior decisions, the better interpretation is that *Outdoor Circle* reverses *Scott* on this issue by implication. Thus, the inexact language of HAPA should be read to allow both the ICA and the circuit court to review administrative decisions under Hawaii Revised Statutes section 91-14(g).[111]

Outdoor Circle may also affect whether Rule 52(a) applies to the analogous situation in which a trial court's decision is based upon documentary or undisputed evidence. The Hawaii appellate courts have not addressed this issue. One author suggests that Rule 52(a) should not apply in cases where the lower court decision is based on documentary or non-demeanor evidence because the appellate court's deference to a trial court is based on the trial court's opportunity to judge the demeanor of the witnesses.[112] If the evidence is documentary, the trial judge has no better perspective upon which to render his judgment than the appellate judge. In adopting the "right/wrong" standard in *Outdoor Circle*, the ICA adopted this justification.[113] Moreover, cases decided in the United States circuit courts of appeals for the second and third circuits have reflected this view.[114]

However, the drafters of the Federal Rules of Civil Procedure intended that

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[107] 58 Hawaii 292, 568 P.2d 1189 (1977).

[108] *See supra* text accompanying notes 75-82.

[109] 2 Hawaii App. 92, 626 P.2d 199 (1981).

[110] *Id* at 94, 626 P.2d at 203.

[111] *See supra* note 30.

[112] 5A J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 52.04 (1983).

[113] 4 Hawaii App. at 640, 675 P.2d at 789-90.

[114] The most cited and criticized case in this regard is Oryis v. Higgins, 180 F.2d 537 (2d Cir. 1950), *cert. denied*, 340 U.S. 810 (1950), wherein Judge Frank held that when only non-demeanor evidence was heard Rule 52(a) did not apply to review of the lower court's findings of fact. Moreover, Judge Frank outlined different degrees of applicability of Rule 52(a) depending on the amount of non-demeanor evidence heard by the trial court. *See also* U.N. Korean Reconstruction Agency v. Glass Product Methods, 291 F.2d 168 (2d Cir. 1961); Davis v. U.S. Steel Supply, 688 F.2d 166 (3d Cir. 1982).

the clearly erroneous standard apply to all findings of fact regardless of the trial court's opportunity to judge demeanor evidence.[115] Professor Wright explains that the clause which has caused the confusion in the rule's application provides that: "Findings of fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.*"[116] Professor Wright maintains that this clause is merely an additional element that the appellate court must consider when reviewing a trial court's findings of fact and is not the qualification upon which the rule rests.[117]

Additionally, the clear weight of authority is that Rule 52(a) applies to all findings of fact of the trial court.[118] The United States Supreme Court has held that the rule applies to all findings of fact, regardless of the nature of the evidence.[119] In *Lundgren v. Freeman*,[120] the Ninth Circuit Court of Appeals also held that Rule 52(a) is applicable to all reviews of findings of fact, regardless of the evidence. While recognizing that Ninth Circuit decisions have reached both sides of the issue,[121] the court concluded that the cases exercising free review of decisions based on documentary evidence were cases in which questions of law rather than questions of fact were decided.

In light of the weight of authority and the Ninth Circuit's position, the better view seems to be that Rule 52(a) applies to a trial court's findings of fact based upon documentary or undisputed evidence. Thus, to the extent the *Scott* decision suggests that Rule 52(a) applies to these situations, it should not be

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[115] *See* Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 516 (1963).

[116] FED. R. CIV. P. 52(a).

[117] Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 769 (1957).

[118] A majority of federal circuits have decided that Rule 52(a) is applicable even in cases where the evidence is documentary or undisputed. *See, e.g.*, Merrill Trust v. Bradford, 707 F.2d 467 (1st Cir. 1972); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983); Oscar Gruss v. First Bank of Eldorado, 582 F.2d 424 (7th Cir. 1978); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Sea-Rite Indus. v. Johnson, 453 F.2d 1192 (10th Cir. 1971); *In re* Sierra Trading Co., 482 F.2d 333 (10th Cir. 1973); Seaboard Coastline Rail Co. v. Trailer Train, 690 F.2d 1343 (11th Cir. 1982); Case v. Morisette, 475 F.2d 1300 (D.C. Cir. 1973).

Some of these courts, however, more readily reach the conclusion that a finding of fact is clearly erroneous (under Rule 52(a)) when the finding is based on non-demeanor evidence. *See, e.g.*, Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983); Oscar Gruss v. First Bank of Eldorado, 582 F.2d 424 (7th Cir. 1978); Seaboard Coast Line v. Trailer Train, 690 F.2d 1343 (11th Cir. 1982).

[119] United States v. United States Gypsum, 333 U.S. 364 (1948).

[120] 307 F.2d 104 (9th Cir. 1962). *Cf.* Committee for an Independent P-I v. Hearst, 704 F.2d 467 (9th Cir. 1983); Brown v. United States, 670 F.2d 747 (8th Cir. 1982) (review of administrative decisions by federal district courts given no deference by federal circuit courts because district court's review is limited to administrative record and it is in no better position than the circuit courts to review the agency action than the appellate court).

[121] 307 F.2d at 113.

disturbed.

3. *Impact*

The effect of the "right/wrong" standard adopted in *Outdoor Circle* is to give the losing party in an administrative action two equal chances on appeal. A party need not demonstrate increasingly higher levels of error as it was required to do under the double "clearly erroneous" standard.

In view of the difficulty of applying the double "clearly erroneous" standard, *Outdoor Circle* strikes a reasonable balance between preserving the functions of the administrative agency and providing the public and the bar with clear and intelligible standards under which to bring appeals.

Moreover, the "right/wrong" standard promotes uniformity in administrative actions. Appellate courts are recognized as superior to circuit courts in this respect.[122] The collegial atmosphere of the forum reduces the chance that the decision will be based on the bias of a particular judge.[123] Additionally, appellate courts are more experienced at maintaining an internally consistent body of law.[124] Because the ICA and the Hawaii Supreme Court are now the ultimate arbiters of administrative decisions, chances are reduced that divergent results will prevail on the same facts simply because different trial court judges weighed the evidence differently. Under the clearly erroneous standard,[125] in contrast, courts cannot freely review these decisions to reach uniform results because the threshold is significantly higher.

A detrimental result of this decision may be an increase in the number of appeals of administrative decisions that would result in duplication of judicial effort. However, in several post-*Outdoor Circle* decisions,[126] the ICA has accorded much deference to the decisions of the administrative agencies. In these cases, the ICA reviewed the administrative decisions under a strong presumption of validity. The court appears to have discovered HAPA's threshold requirement that the substantial rights of the petitioners must have been violated before a court will reverse, modify or remand an administrative decision.[127] This requirement is embodied in the Hawaii Revised Statutes section 91-14(g).

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[122] *See* Schorr, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. REV. 765, 796 (1983); Stern, *supra* note 18, at 82-83.

[123] *See* Schorr, *supra* note 122, at 798-99; Stern, *supra* note 18, at 82-83.

[124] *See* Schorr, *supra* note 122, at 796-97.

[125] HAWAII R. CIV. P. 52(a).

[126] Williams v. Hawaii Housing Auth., 5 Hawaii App. ____, 690 P.2d 285 (1984); Chock v. Bitterman, 5 Hawaii App. ____, 678 P.2d 576 (1984); *In re* Kaanapali Water Corp., 5 Hawaii App. ____, 678 P.2d 584 (1984).

[127] Williams v. Hawaii Housing Auth., 5 Hawaii App. ____, 690 P.2d 285 (1984); *In re* Kaanapali Water Corp., 5 Hawaii App. ____, 678 P.2d 584 (1984).

The ICA has also required petitioners to prove that the decision is "unjust and unreasonable in its consequences."[128] These additional threshold questions, which were infrequently applied in previous decisions, may serve to limit excess appeals. Moreover, the clear standards which *Outdoor Circle* sets forth provide definite guidelines under which litigants may assess the possibility of success on appeal.

III. VIOLATIONS OF THE SUNSHINE LAW

Hawaii's Sunshine Law[129] mandates that all meetings of administrative agencies be open to the public with the exception of meetings devoted to adjudicatory functions.[130] However, the Act makes special provisions for the LUC, requiring that all LUC meetings be open to the public.[131]

The appellants in *Outdoor Circle* alleged that the LUC's failure to adopt its conclusions of law at a public meeting violated the open meeting provision of the Sunshine Law.[132] The LUC contended that the open meeting provision did not apply, since drafting and adoption of its conclusions of law were merely routine ministerial chores in light of the fact that it had adopted its findings of fact and voted to deny the petition for reclassification at a public meeting.[133]

In determining whether the LUC had violated the Sunshine Law, the ICA considered the definition of "adjudicatory function" a pivotal issue. The court reasoned that if the adoption of conclusions of law by the LUC was considered an adjudicatory function, the LUC would have to adopt its conclusions of law at an open meeting pursuant to Hawaii Revised Statutes section 92-6(b).[134]

The ICA ruled that the adoption of conclusions of law was an adjudicatory function and, therefore, subject to the open meeting requirement.[135] The court said that the LUC should at least have disseminated the drafted conclusions and

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[128] Chock v. Bitterman, 5 Hawaii App. ____, 678 P.2d 576 (1984).

[129] HAWAII REV. STAT. ch. 92 is known as the "Hawaii Sunshine Law."

[130] HAWAII REV. STAT. § 92-3 (1976) mandates:

> Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to section 92-4 and 92-5.

HAWAII REV. STAT. § 92-6(a)(2) (1976) provides: "The open meeting requirement does not apply to the adjudicatory function of administrative agencies."

[131] HAWAII REV. STAT. § 92-6(b) (1976) requires open deliberation of the adjudicatory functions of the LUC. Thus all deliberations of the LUC fall within the open meeting requirements of HAWAII REV. STAT. § 92-3 (1976).

[132] 4 Hawaii App. at 641-42, 675 P.2d at 791.

[133] *Id.*

[134] *See supra* note 131; 4 Hawaii App. at 641-42, 675 P.2d at 791.

[135] 4 Hawaii App. at 641-42, 675 P.2d at 791.

adopted them at an open meeting.[136] This holding is in accord with *Chang v. Planning Commission of the County of Maui*,[137] in which the supreme court held that deliberations that result in the issuance of findings of fact and conclusions of law are adjudicatory functions.[138]

Although the court decided that the failure to adopt the conclusions of law in accordance with the Sunshine Law was a violation of the statute, it concluded that the violation was not "willful" in light of the fact that the LUC had held five full days of hearings and had voted at an open meeting to deny the reclassification petition.[139] Thus, the court held that the LUC's decision was not voidable because the Sunshine Law requires a showing of "willful violation."[140]

The ICA definition of "willful" requires a knowing and deliberate intent to violate the provisions of the Sunshine Law rather than mere inadvertence.[141] The ICA's interpretation of "willful" is consistent with that of the Hawaii Supreme Court. In *Aio v. Hamada*,[142] the supreme court interpreted the term "willful" as it related to a collective bargaining act. The court approved of an agency's construction that required a "conscious, knowing, and deliberate intent to violate the provisions of the chapter."[143] The court rejected the appellants' interpretation that would have required a finding of "willfulness" upon a showing that the act was committed "voluntarily" and "with plain indifference to the law."[144] Therefore, when an agency makes a good-faith effort to comply with the mandates of the Sunshine Law, a violation based on an erroneous presumption will not void the agency's decision. This interpretation is consistent with a majority of courts, who view a "willful" act as one done in knowing

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[136] *Id.*

[137] 64 Hawaii 431, 643 P.2d 55 (1982).

[138] *Id.* at 443, 643 P.2d at 63-64. The *Chang* court held, however, that the adjudicatory function exception applied to the Maui Planning Commission. Therefore, the findings of fact and conclusions of law issued by the commission were not voidable.

[139] 4 Hawaii App. at 642, 675 P.2d at 791.

[140] HAWAII REV. STAT. § 92-11 (1976) provides that an agency decision made in violation of the Sunshine Law is voidable only upon a showing that the violation was "willful."

[141] The ICA said:

> [The LUC] did not hold a meeting to adopt the conclusions of law because it viewed this as a "housekeeping" function and assumed that the Sunshine Law did not apply. Under such circumstances, we hold that there was no willful violation of the Sunshine Law and the conclusions of law are not voidable.

4 Hawaii App. at 642, 675 P.2d at 791.

[142] 66 Hawaii 401, 664 P.2d 727 (1983).

[143] *Id.* at 410, 664 P.2d at 733.

[144] *Id.* Willful conduct has been interpreted to include acts done in "plain indifference" to the law. However, accidental conduct and inadvertence do not constitute "plain indifference." Instead willful conduct requires a knowing intent to violate the law, although no showing of malice is necessary. Georgia Elec. Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979).

violation of the law.[145]

Outdoor Circle thus provides a framework for the interpretation of the "willful violation" requirement of the Sunshine Law. As a result of *Outdoor Circle*, decisions made in violation of the open meeting provision will only be deemed "willful violations" if the agency deliberately intended to circumvent the law. The circumstances surrounding the decision, as in *Outdoor Circle*, may provide proof of such intent. Thus, adequate notice and opportunity of the parties to be heard may evince an attempt to comply with the provisions of the Sunshine Law. Moreover, as a result of *Outdoor Circle*, the LUC may no longer adopt conclusions of law in an informal fashion, but rather, it must convene a public meeting.

IV. CONCLUSION

Outdoor Circle is significant because, along with *Camara v. Agsalud*,[146] it provides clear guidelines under which a circuit court must review an administrative decision. *Outdoor Circle* clarifies the review provisions of HAPA, Hawaii Revised Statutes section 91-14(g). It instructs circuit courts to review administrative factual findings and mixed findings under the "clearly erroneous" standard. Circuit courts are directed to review errors of procedure under the "arbitrary and capricious" standard of Hawaii Revised Statutes section 91-14(g)(6), and are free to review questions of law.

These standards are also applicable to an appellate court's review under the "right/wrong" standard adopted in *Outdoor Circle*. Under the "right/wrong" standard, an appellate court may review the administrative decision under HAPA without giving any deference to the intervening circuit court decision. This eliminates the compound "clearly erroneous" standard with respect to appeals of administrative factual and mixed findings and provides an intelligible and logical standard by which administrative appeals may be judged.

Outdoor Circle also furnishes direction for evaluating whether a particular act is voidable under the Sunshine Law. The Sunshine Law provides that an administrative decision is voidable if made in "willful violation" of the law. In

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[145] Donovan v. McKissick Prod. Co., 719 F.2d 350 (10th Cir. 1983) (willful violation of Fair Labor Act requires awareness of violation even if only suspected); Coates v. National Cash Register Co., 433 F. Supp. 615 (W.D. Va. 1977) (willful violation of 29 U.S.C. § 626 requires intent); Dunlop v. New Hampshire Jockey Club, 420 F. Supp. 416 (D.N.H. 1976) (willful requires awareness of violation); Lee v. National Bank and Trust Co. of Columbus, 153 Ga. App. 656, 266 S.E.2d 315 (1980) (willful violation of statute requires more than mere fact that provision was not followed); State v. Oxondine, 64 N.C. App. 559, 307 S.E.2d 583 (1983) (in criminal law, willful means doing a wrongful act without justification or excuse); City of Kingsport v. Quillen, 512 S.W.2d 569 (Tenn. 1983) (willful requires knowing intent).

[146] 67 Hawaii____, 685 P.2d 794 (1984).

keeping with the majority view, *Outdoor Circle* requires a showing of deliberate intent to violate the law, thus indicating a willingness by the ICA to uphold administrative decisions made in conformance with the spirit and intent of the Sunshine Law.

Denise Nip

Wong v. City & County: Discovery Sanctions and Law of the Case Doctrine in Hawaii

I. INTRODUCTION

In *Wong v. City & County*[1] the Hawaii Supreme Court applied the doctrines of "law of the case"[2] and "comity"[3] to overturn a trial court's modification of discovery sanctions imposed by the motions court. The sanctions had been imposed against the city for its failure to respond to a request for the production of a traffic signal control box. The supreme court reversed the trial court's modification of the prior discovery sanctions since it found no "cogent reasons" to justify the trial court's departure from the doctrine of law of the case.[4]

This note first discusses the imposition of sanctions for failure to produce requested items during pre-trial discovery. It next examines the application of the doctrines of law of the case and comity to the recently established motions and trial court subdivisions of the First Judicial Circuit.[5] Application of the

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[1] 66 Hawaii 389, 665 P.2d 157 (1983).

[2] Law of the case is the practice of courts to refuse to disturb prior rulings in a particular case. *Id.* at 396, 665 P.2d at 162-63; *see also* Jordan v. Hamada, 64 Hawaii 446, 450, 643 P.2d 70, 72 (1982) (as a matter of sound judicial policy, it is well settled that questions of law determined by a court should be respected by subsequent courts of equal and concurrent jurisdiction confronting the same case).

[3] 66 Hawaii at 395, 665 P.2d at 162. Comity refers to the judicial practice of deferring to the decisions of courts in different states and jurisdictions out of respect. The policy considerations of comity were elaborated in Mast, F. & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900), where the Court stated:

> Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinions of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right.

[4] 66 Hawaii at 396, 665 P.2d at 163.

[5] *See* "Chief Justice Lum Informs Western Judges of Hawaii Progress," HAWAII BAR NEWS, Nov. 1984, at 1, col. 1. A month after taking office Chief Justice Lum divided the First Circuit Court into civil and criminal divisions, each with motions court and trial court subdivisions.

doctrines helps to clearly define the relationship between these two courts of concurrent jurisdiction. The note concludes by examining two aspects of the court's decision which will impact on future litigation. By upholding the broad discretionary authority of the motions court to issue sanctions, the supreme court both deters abuses of the discovery process and helps to achieve a more efficient court system.

II. FACTS

On September 14, 1974, the traffic signals at the intersection of Waialae and Kilauea Avenues malfunctioned. All signals were red except the lights on the mauka (mountain) side of Waialae Avenue, which were green.[6] Plaintiff Rachelle Shields and a companion were walking across Waialae Avenue in the mauka direction.[7] After reaching the median strip, they noticed the malfunctioning traffic lights.[8] Although congested at the intersection, traffic was lighter in the lane mauka of the medial strip.[9] After waiting for several minutes, the young women crossed the street.[10] An automobile driven by defendant Gail Beddow struck and injured plaintiff Shields as she crossed the mauka lane of Waialae Avenue. Defendant Beddow did not realize the lights were malfunctioning.[11]

In 1976, Rachelle Shields and her parents sued the City and County of Honolulu, among others, claiming that the city's negligent failure to maintain properly the traffic signal control box caused the accident.[12] Following unsuccessful informal requests for inspection of the traffic signal control box,[13] the plaintiffs made a formal request for production of the box on May 31, 1978.[14] On June 1, 1978, a private contractor under city supervision removed and destroyed the box.[15]

The plaintiffs moved for sanctions for failure to make discovery under the Hawaii Rules of Civil Procedure.[16] On October 3, 1978, Judge Arthur S.K.

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[6] 66 Hawaii at 390, 665 P.2d at 159.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 391, 665 P.2d at 159.

[12] *Id.* Defendants Gail Beddow, Altec Corp., Amfac, Inc., and Econolite Corp. settled out of court. *See* Opening Brief for Appellant at 21.

[13] 66 Hawaii at 391, 665 P.2d at 159.

[14] *Id.*

[15] *Id.* On or about June 1, 1978, approximately two weeks after an informal request by plaintiff to produce the traffic light control box, the box was removed from the intersection by a private contractor and discarded by the City. *See* Opening Brief for Appellant at 12.

[16] 66 Hawaii at 391, 665 P.2d at 160; HAWAII R. CIV. P. 37 provides:

Fong of the civil motions court imposed sanctions declaring that the defendant city was "negligent in that it had a malfunctioning traffic signal control box"[17] that caused the traffic lights to malfunction, and that the city was "estopped from claiming that the traffic signal control box was defective in design or manufacture or that any such alleged defective condition was the cause of the malfunction."[18] However, the sanctions order declared that the city was not estopped from asserting its claims as to proximate cause, comparative negligence, assumption of risk, or any other affirmative defenses.

On March 1, 1982, the case was assigned to trial court where Judge Robert Won Bae Chang granted the city's motion for reconsideration of the sanctions.[19] Judge Chang modified the prior sanctions by declaring that the city "failed to properly maintain the traffic signal control box."[20] Judge Chang then granted the city's motion for summary judgment, concluding there was no "legal basis"[21] upon which the city could be held liable, even assuming it had failed to maintain the control box.

Two major issues on appeal resulted in a reversal of Judge Chang's rulings.

(b) Failure to Comply with Order.

. . . .

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

[17] 66 Hawaii at 391, 665 P.2d at 160.

[18] *Id.*

[19] *Id.* at 392, 665 P.2d at 160.

[20] *Id.* The modified sanction reads: " 'The City failed to properly maintain the traffic signal control box at Waialae and Kilauea causing the traffic lights at said intersection to malfunction on September 14, 1974.' The remainder of Judge Fong's original order is not affected by this ruling."

[21] *Id.* Although Judge Chang did not state his reason for holding there was no legal basis upon which the City would be liable to the plaintiffs, the Hawaii Supreme Court postulated that the "court's apparent concern was that plaintiffs had failed to make a prima facie showing that the City had breached a duty owed to plaintiffs and that the City's breach was a proximate cause of Rachelle Shields' injuries." *Id.* at 397, 665 P.2d at 163.

First, the supreme court found that reconsideration of the imposition of discovery sanctions was improper. The court explained that under the doctrine of law of the case, a trial judge should not modify a prior interlocutory ruling of a brother or sister judge unless cogent reasons or a forcibly convincing argument exists.[22] Furthermore, courts of coordinate jurisdiction should not depart from the general rule of comity which "commands even greater respect than 'law of the case' " under such circumstances.[23] Addressing the propriety of the original sanctions order, the supreme court noted that the circuit court has broad discretion in determining what sanctions are appropriate under Rule 37 of the Hawaii Rules of Civil Procedure.[24] The supreme court held the motions court did not abuse its discretion, reasoning that the sanctions ordered were proper since they were "commensurate with the prejudice suffered" by the plaintiffs.[25]

The second major issue on appeal was whether the trial court erred when it granted the city's motion for summary judgment on the issue of the city's liability.[26] The supreme court analyzed the elements of the city's negligence to determine if there was any "legal basis"[27] for liability. The court first found that the city owed both an implied and an express duty to the motoring public and pedestrians, including plaintiff Shields.[28] The court cited the implied duty of a local government to motorists and pedestrians. This duty has been established in a recent line of cases[29] that draws upon the principle that control and power to repair highways implies a duty to repair them.[30] The *Wong* court

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[22] *Id.* at 395-96, 665 P.2d at 162.

[23] *Id.* at 396, 665 P.2d at 162.

[24] *Id.* at 394, 665 P.2d at 161.

[25] *Id.* at 392, 665 P.2d at 160. The sanctions in *Wong* were imposed under Rule 37(d), Failure to Respond to Request for Inspection. Rule 37(d), however, refers back to 37(b)(2)(A), (B), and (C), which delineate some of the sanctions the court may impose. *See supra* note 16.

[26] 66 Hawaii at 397, 665 P.2d at 163.

[27] *Id.* at 394, 665 P.2d at 161.

[28] *Id.* at 398, 665 P.2d at 164.

[29] The implied duty of the City to motorists and pedestrians to exercise ordinary care in highway safety operations has been established in a recent line of cases. First Ins. Co. of Hawaii, Ltd. v. International Harvester Co., 66 Hawaii 185, 659 P.2d 64 (1983) (duty not to validate truck-trailer driver's license without proper certification of applicant's competence); McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Hawaii 460, 558 P.2d 1018 (1977) (duty to maintain and repair all highways within the city, including shoulders); Terranella v. City & County of Honolulu, 52 Hawaii 490, 479 P.2d 210 (1971) (statutory duty to maintain shoulders of highway in reasonably safe manner). For a discussion of a local government's implied duty to motorists and pedestrians, see Note, *First Insurance v. International Harvester: Government Liability for Negligent Issuance of Drivers' Licenses*, 7 U. HAWAII L. REV. 189 (1985).

[30] *See* Reinhardt v. County of Maui, 23 Hawaii 102, 104 (1915) in which plaintiff-pedestrian fell into an open ditch across the Hana highway which had no guardrail or warning signal. The court stated: "Municipal corporations proper are liable to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control." Case law generally holds

found the city had an express duty to maintain traffic control devices under the Revised Charter of Honolulu[31] and under an express agreement with the state.[32]

After establishing duty, the supreme court determined that the city could not deny its breach of duty to the plaintiff since the sanctions established the fact that the malfunctioning traffic lights were due to the fault of the city.[33] Consequently, the only remaining issue was whether the city's breach of duty was the proximate cause of, or a "substantial factor"[34] in, the plaintiff's injury.

On the issue of causation, the supreme court concluded that the issues of proximate cause and intervening acts by other defendants presented triable issues of fact.[35] Furthermore, according to the original sanctions order, the city was not estopped from proving comparative negligence or other affirmative defenses.[36] Therefore, the court remanded the case for jury deliberation.

III. RULE 37 SANCTIONS

A. *Background*

Rule 37 of the Hawaii Rules of Civil Procedure grants a court authority to

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that a municipal corporation owes a duty to the public to reasonably maintain and operate its traffic signal control devices. *See, e.g.*, Wisner v. State of Arizona, 123 Ariz. 148, 598 P.2d 511 (1979); Grantham v. City of Topeka, 196 Kan. 393, 411 P.2d 634 (1966); Garrison v. State of Louisiana, 401 So. 2d 528 (La. Ct. App. 1981); Austin v. City of Romulus, 101 Mich. App. 662, 300 N.W.2d 672 (1980); White v. City of Vicksberg, 210 So. 2d 914 (Miss. 1975); Fanning v. City of Laramie, 402 P.2d 460 (Wyo. 1965).

[31] REVISED CHARTER OF HONOLULU, art. VI, § 6-1202(b), renumbered art. VI, § 6-1102(b) (1978), imposes a duty to "[l]ocate, select, install and maintain traffic control facilities and devices and street lighting systems."

[32] The agreement with the state provided: "[t]he CITY shall have the full responsibility for and bear all costs for operating and maintaining the traffic control devices involved in the transfer of operational control." Wong v. City & County, 66 Hawaii at 398, 665 P.2d at 163.

[33] *Id.* at 396, 665 P.2d at 164.

[34] *Id.* at 399, 665 P.2d at 164. Mitchell v. Branch & Hardy, 45 Hawaii 128, 132, 363 P.2d 969, 973 (1960), invoked a two-step test of legal causation involving (1) "substantial factor" analysis and (2) policy concerns. The court stated:

> The best definition and the most workable test of proximate or legal cause so far suggested seems to be this: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

Id. (citing Restatement (Second) of Torts § 431 (1973)).

[35] 66 Hawaii at 398-400, 665 P.2d at 164, (citing Collins v. Greenstein, 61 Hawaii 22, 41-42, 595 P.2d 275, 284 (1979)).

[36] *Id.* at 396, 665 P.2d at 163.

impose sanctions for failure to make discovery.[37] Rule 37(a) provides that when a party fails to respond to requests for discovery, the discovering party may move for an order compelling discovery.[38] If the ordered party fails to comply, the court may make "such orders in regard to the failure as are just."[39] This provision gives the court broad discretion in deciding the type of sanction to impose. Rule 37(b) sets forth several possible sanctions, including designation of facts, preclusion of claims and defenses, introduction of designated evidence, the striking of all or part of the pleadings, dismissal of complaints, and default judgment.[40] According to Rule 37(d), a party who fails to respond to a request for inspection[41] is subject to these sanctions.[42]

The Federal Rules of Civil Procedure served as the model for the Hawaii Rules of Civil Procedure. Discovery sanctions under Rule 37 of the Hawaii rules and the Federal rules are identical.[43] Due to the similarities between the Hawaii rules and federal rules, the Hawaii Supreme Court utilizes both federal court decisions and interpretations of the federal rules by noted commentators when interpreting the Hawaii rules.[44]

When the Federal Rules of Civil Procedure were adopted in 1938, the Advisory Committee of Civil Rules to the United States Supreme Court was guided by the due process holdings of two United States Supreme Court decisions in drafting Rule 37. *Hovey v. Elliot*[45] and *Hammond Packing Co. v. Arkansas*[46] imposed due process limitations on the use of dismissal and default judgment

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[37] HAWAII R. CIV. P. 37. *See also* HAWAII R. CIV. P. 1 (The rules "shall be construed to secure the just, speedy and inexpensive determination of every action."); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2281 (1970); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 480-81 (1958); Comment, *Standards For Imposition of Discovery Sanctions*, 27 ME. L. REV. 247 (1975).

[38] HAWAII R. CIV. P. 37(a).

[39] *Id.* 37(b)(2).

[40] *Id.* 37 (b)(2)(A), (B) and (C).

[41] *Id.* 37(d).

[42] *Id.*

[43] *Cf.* Fed. R. Civ. P. 37.

[44] *See* 66 Hawaii 389, 393, 665 P.2d 157, 161 (1983) (citing 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.02[2] (1982) *and* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2284 (1970)); *see also In re* Ellis, 53 Hawaii 23, 28, 487 P.2d 286, 289 (1971) ("[I]n matters relating to the conduct of business before our courts the construction of a counterpart federal provision is highly persuasive.").

[45] Hovey v. Elliot, 167 U.S. 409 (1897). In *Hovey*, plaintiff was ordered to pay over funds to the court or his answer would be stricken and he would be held in contempt. Plaintiff disobeyed the order. On appeal, the United States Supreme Court held it was a denial of due process to punish a party for contempt by precluding a case from trial on the merits.

[46] Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909). The *Hammond* Court affirmed a judgment by default when defendant refused to comply with discovery of documents under a statutory provision regarding corporations.

as sanctions.[47] In *Hovey*, the Court held that precluding the right to trial on the merits as punishment for failure to pay a sum of money pursuant to a court order was impermissible as a denial of due process.[48] The advisory committee viewed *Hovey* as establishing the limits of the unjustifiable use of sanctions "for the mere purpose of punishing for contempt."[49]

In contrast, the *Hammond* Court upheld a trial court's entry of default judgment for refusal to produce documents. The Court relied upon the presumption that the refusal to produce evidence is an admission of lack of merit in an asserted defense.[50] However, the Court pointed out that a bona fide effort to comply, and a reasonable showing of an inability to comply with the order would be sufficient to avoid the harshness of default judgment.[51] The advisory committee described *Hammond* as representing the "justifiable use of such measures as a means of compelling the production of evidence."[52] Thus, prior to 1958, the relatively harsh sanctions of dismissal and default were considered improper if a party could show a reasonable inability to comply with a discovery order or that the sanction was imposed as punishment.

In the 1958 decision of *Societe Internationale v. Rogers*,[53] the United States Supreme Court held that Rule 37 does not authorize the dismissal of an action for noncompliance with a pretrial production order if the failure to comply is due to an inability to comply with the order.[54] In *Societe Internationale*, the district court dismissed plaintiff's action because of his failure to procure certain documents allegedly connecting plaintiff with a former enemy of the United States.[55] Procuring the documents without Swiss government authority would have exposed plaintiff to criminal prosecution under Swiss law.[56] Plaintiff

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[47] 4A J. MOORE, J. LUCAS, D. EPSTEIN, MOORE'S FEDERAL PRACTICE ¶ 37.03[2] (2d ed. 1984).

[48] 167 U.S. at 444.

[49] 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2283 at 760 n.45 (1970) (quoting the advisory committee).

[50] 12 U.S. at 351. The *Hammond* Court reasoned that "due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."

[51] *Id.* at 347.

[52] *Id.*

[53] 357 U.S. 197 (1958).

[54] *Id.* at 212.

[55] *Id.* at 201.

[56] 357 U.S. at 197. The trial court ordered production of documents under Rule 34 of the Federal Rules of Civil Procedure. Plaintiff opposed because, *inter alia*, Swiss law made disclosure a criminal act. The trial court dismissed the action holding that the evidence might be crucial to the defendant and that Swiss law was no basis for failing to comply with the order. The Court of Appeals affirmed. The United States Supreme Court reversed, noting that plaintiff's failure to comply was due to an inability to comply and not to willfulness, bad faith or fault. The Court referred to *Hammond Packing* and stated that a bona fide effort which results in a reasonable showing of an inability to comply with the order should not result in dismissal of the action.

had made efforts to obtain the release of numerous documents, and a plan was developed which would have allowed a neutral party access to the documents.[57] The district court rejected the plan and ordered dismissal.[58] The Supreme Court reversed and held that dismissal of the complaint was not justified because plaintiff's failure to comply was due to an inability to comply rather than to willfulness, bad faith, or fault.[59]

Societe Internationale further held that sanctions may be imposed for a mere failure to comply with a discovery order without a finding of willful noncompliance.[60] In so holding, the Court resolved a conflict between lower courts regarding the effect of the rule's reference to a party who "refuses to obey" a production order.[61] Some courts had made distinctions between "refusal" and "failure" to comply.[62] "Refusal" was interpreted as willful disobedience, while "failure" was not considered a willful act and therefore was not subject to sanctions.[63] The *Societe Internationale* Court concluded that refusal to obey is the same as failure to comply for purposes of Rule 37. Sanctions are available in either case and willfulness, bad faith, and fault are relevant only in determining what sanctions are just.[64]

In 1970, Rule 37 was amended to clarify this provision.[65] The amendment to Rule 37 substituted the word "failure" wherever the word "refusal" appeared, thus allowing sanctions to issue for a mere failure to comply with discovery regardless of the willfulness, bad faith, or fault of the noncomplying party.[66] The amendment thus conferred greater discretion upon trial courts in imposing sanctions. In addition, the application of sanctions under Rule 37 was brought into conformity with *Societe Internationale*.[67]

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[57] *Id.* at 202, 203.

[58] *Id.* at 203.

[59] *Id.* at 212.

[60] *Id.* at 208.

[61] *Id.* at 207-08.

[62] *Id.* at 207.

[63] *Id. See also* 4A J. MOORE, *supra* note 47, at ¶ 37.01[8] (Advisory Committee Note of 1970 to Amended Rule 37).

[64] 357 U.S. at 208.

[65] Rosenberg, *supra* note 37, at 489-90; 4A J. MOORE, *supra* note 47, at ¶ 37.21.

[66] 4A J. MOORE, *supra* note 47, at ¶ 37.22.

[67] *Compare* Societe Internationale v. Rogers, 357 U.S. 197 *with* Rule 37 *and* Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577, 579 (1st Cir. 1975) (The court upheld a dismissal because the president of a corporation, though not designated to testify, refused for two years to give a deposition.). *See also* Smith v. Schlesinger, 513 F.2d 462, 467 (D.C. Cir. 1975) (Sanctions were imposed when defendant refused to produce an investigative file for *in camera* inspection. The court stated: "The 'preclusion' sanction employed by the District Court is properly employed against a willful violation of a discovery order."); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118, 121-22 (5th Cir. 1967) (An order dismissing complaint for failure to produce a witness was vacated because failure to comply was due to inability. A nationally known

In 1976, the United States Supreme Court reaffirmed *Societe Internationale* in *National Hockey League v. Metropolitan Hockey Club, Inc.*,[68] holding that the most severe sanction of dismissal is appropriate only upon a showing of "flagrant bad faith" or a "callous disregard" of the discovery process.[69] More significantly, however, the Court approved the deterrent use of sanctions, distinguishing deterrence from punishment, which the Court found unacceptable.[70] The Court explained that:

> the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.[71]

Since *National Hockey League*, courts have consistently applied severe sanctions only in situations where deterrence cannot be achieved through less drastic measures.[72] Thus, while not required under the 1970 amendments, a showing of willfulness, bad faith, or fault remains relevant to the selection of the proper sanction.[73] Such a showing justifies imposition of the most severe sanctions of dismissal or default judgment.[74]

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service hired by plaintiff failed to locate the witness.).

[68] National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640, 643 (1976) (The trial court ordered sanctions against plaintiff for not answering crucial interrogatories after 17 months and numerous extensions and admonitions.).

[69] *Id.* at 640, 643.

[70] *Id.* at 643.

[71] *Id.*

[72] *See* Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980) (Even though the interrogatories were submitted nearly a year late, dismissal for failure to timely answer interrogatories was reversed as inappropriate where failure to comply was attributed to the fault of the attorney.); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1370 (9th Cir. 1980) (A sanction of $500 was imposed against a government attorney who "demonstrated a callous disregard for the discovery process and the orders of this court." After further delay, the court imposed a preclusion of evidence sanction.); Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 503-05 (4th Cir. 1977) (Evidence was insufficient to establish a pattern of conduct on the part of the manufacturer in a products liability action to frustrate discovery. The court reversed default judgment since one of the critical issues never addressed by the district court was a consideration of "any less severe sanction than default judgment.").

[73] *See* Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 58-62 (2d Cir. 1971) (Default judgment was granted because defendant deliberately chose not to appear for pre-trial deposition.); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860-61 (5th Cir. 1970) (An order striking a claim for damaged records was vacated because the district court held no hearing or made no finding of bad faith or willful failure to comply with a request for information.).

[74] *See* Trans World Airlines, Inc. v. Hughes, 449 F.2d at 58-62; Dorsey v. Academy Moving & Storage, Inc., 423 F.2d at 860. If a party proves willfulness, bad faith, or fault in order to show intent to obstruct the discovery process, they have also shown that the very reason for the

B. The Sanctions in Wong v. City & County

In *Wong*, the Hawaii Supreme Court held that the lower court did not abuse its discretion when it imposed sanctions, reasoning that the sanctions were "commensurate with the prejudice suffered."[75] In so concluding, the court considered two factors. First, the plaintiffs had lost the opportunity to prove through their experts that the malfunction of the traffic lights was due to improper maintenance of the traffic signal control box.[76] Second, the city was at fault for destroying the control box.[77] The court therefore reasoned that the city should not benefit from destroying "potentially significant" evidence.[78]

Under the standard implicitly adopted in *Wong*, a judge must analyze the disadvantages to the movant as well as the fault of the noncomplying party to determine the proper sanctions. This standard is comparable to the standards used in other jurisdictions. Several jurisdictions have held that sanctions must be "no more severe than is necessary to prevent prejudice to the movant."[79]

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existence of the discovery rules, i.e., the narrowing of the issues, has been thwarted. Such acts of obstruction do not contribute to the smooth and just resolution of disputes and are, therefore, not condoned by any judicial system. Hence, the Court endorsed the deterrent use of discovery sanctions in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

[75] 66 Hawaii at 394, 665 P.2d at 161.

[76] *Id.* at 394, 665 P.2d at 161. Plaintiff argued the absolute necessity of having the traffic signal control box to show "negligent failure to properly maintain" it. Defendant argued that the "timer base" rather than the control box was the crucial item and that the timer base had been replaced on the day of the accident, two years prior to the action. *Compare* Brief for Appellant at 19 *and* Brief for Appellee at 20-21. Plaintiff's expert admitted that he would need the control box in the same condition as it existed on the day of the accident to make a proper determination of what caused the traffic light to malfunction. *See* Deposition of Elmer T. Nelson, Brief for Appellant at 16. On the day of the accident, four years prior to the Request for Production of the Control Box, the *timer base* was replaced after which the traffic lights worked properly. *See* Deposition of Steven S. Kunihisa, Record on Appeal at 780; Brief for Appellee at 21.

[77] 66 Hawaii at 394, 665 P.2d at 161.

[78] *Id.* at 394, 665 P.2d at 161.

[79] *See* Wilson v. Volkswagen of America, Inc., 561 F.2d at 504-05 (The trial court carefully evaluated the needs of the discovering party, considered the effect of non-compliance on the ability of the defendants to establish their case, and concluded that no remedy other than default judgment would prevent prejudice to the movant.); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970), *cert. denied sub nom.*, Trefina v. United States, 400 U.S. 878 (1970) ("[T]he courts should impose sanctions no more drastic than those actually required to protect the rights of other parties . . . ." citing C. WRIGHT, FEDERAL COURTS § 90, at 946 & n.14); Comment, *supra* note 37, at 265-66.

The "least restrictive alternative" theory seeks to impose sanctions which are no more severe than necessary to prevent prejudice to the movant. This theory derived from concern for a party's seventh amendment right to jury trial. For application of the least restrictive alternative theory to discovery sanctions, *see also* Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 996 (8th Cir. 1975); American Cas. Co. of Reading, Pa. v. Howard, 173 F.2d 924, 927 (4th Cir. 1949); Kozlowski v. Sears, Roebuck and Co., 71 F.R.D. 594, 598 (D. Mass. 1976) ("If prejudice to the

The factors employed in this test include the needs of the discovering party, the nature of the non-compliance, the extent to which the absence of the evidence will impair the ability to establish the case, and whether the recusant party's conduct will impair a fair trial.[80]

Several federal courts, including the United States Supreme Court, employ a balancing of interests test[81] that requires a balancing of the ability of the recalcitrant party to comply with the order and the effect of the sanction upon the merits of his case, weighed against the movant's actual need for the information requested.[82] This test is comparable to the test employed in *Wong*. The *Wong*

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plaintiff has occurred, and if imposition of a sanction less severe than judgment by default will remedy such prejudice, the Court will vacate the judgement by default and will impose such lesser sanction.").

[80] *See* Wilson v. Volkswagen of America, 561 F.2d at 505 (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)); *Cf.* Von Der Heydt v. Rogers, 251 F.2d 17, 19 (D.C. Cir. 1958) (Burger, J. concurring) (Chief Justice Burger, as a circuit judge, put forth as factors to consider: (a) the materiality of the information sought; (b) the possession, custody or control of the information in appellant (the recalcitrant party); and (c) the refusal of appellant to obey an order made under Rule 34.); Von Der Heydt v. Kennedy, 299 F.2d 459, 461 (D.C. Cir. 1962) (Judge Bastian similarly characterized the elements as (1) the existence of the documents; (2) materiality; and (3) possession, custody and control.). *See also* Kozlowski v. Sears, Roebuck and Co., 71 F.R.D. at 596-97 (Defendant failed to explain the circumstances or mitigate its failure to comply with the court order; examination of the facts showed that defendant had sole control over the materials, exclusive knowledge of the research, design, manufacture, testing, inspection, marketing, advertising, sale, and warranties. The court held production of the items requested was material to the merits of the case and failure to produce would cripple the plaintiff's preparation for trial.).

[81] *See* Comment, *supra* note 37, at 269-73 and n.129.

[82] *See* Societe Internationale v. Rogers, 357 U.S. at 212-13 ("It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case."); Dunbar v. United States, 502 F.2d 506, 509 n.2 (5th Cir. 1974); Dorsey v. Acadamy Moving & Storage, Inc., 423 F.2d at 861.

Dunbar involved an action against the Federal Bureau of Investigation for return of money sent through the mails. The court reversed dismissal of the complaint by plaintiff, who refused to answer interrogatories about the source of the money. In footnote two, the court said: "It is perhaps worthy of note that even though a given piece of information may be 'relevant' for the purposes of Rule 26(b), the less relevant that information becomes, the less appropriate a Rule 37 sanction is, where there is a failure or refusal to produce the information."

In *Dorsey*, plaintiff claimed damages for lost and damaged music records of the late musician Jimmy Dorsey. Defendant requested the years in which the records were manufactured. This information was not produced. The court stated that the burden of establishing the value of the records was on the plaintiff, and plaintiff's inability to produce the information sought at trial would be a serious handicap in establishing the truth of the matter asserted.

Wright and Miller argue that because of the constitutional and policy considerations, the court's discretion in meting out severe sanctions should be confined to the "flagrant case" in which it is demonstrated that the failure to produce materially affected the substantial rights of the adverse party and is prejudicial to the case. 8 C. WRIGHT & A. MILLER, *supra* note 37, at §

court considered the city's control of the evidence before its destruction as well as the plaintiff's loss of opportunity to prove improper maintenance of the traffic control box. The *Wong* standard, however, may not require a showing of actual need for the evidence withheld, since the destroyed evidence in *Wong* was characterized as "potentially significant."[83]

In addition to establishing a standard by which courts should impose sanctions, *Wong* illustrates the application of due process considerations in imposing sanctions. The discovery sanction imposed by Judge Fong established the negligent failure of the City & County of Honolulu to properly maintain the traffic signal control box and precluded the city from claiming defective design or manufacture of the control box.[84] Such sanctions are sometimes referred to as "establishment-preclusion" orders.[85] Normally, such orders are considered less drastic than striking of pleadings, dismissal, or default judgment, particularly if the dispositive facts and issues remain for trial resolution.[86] However, both establishment and preclusion orders may produce results similar to the more severe sanctions.

For example, in a case where a party persistently refuses to comply with discovery, an order establishing facts dispositive to the case makes a motion for summary judgment appropriate.[87] While dismissal of the action might be the more usual procedure, the two-step process is also proper.[88] Likewise, a preclusion order is considered drastic when it denies a party's right to trial on the merits[89] especially where matters of fact have been rendered incontestable.[90]

2289. *See also* Trans World Airlines v. Hughes, 332 F.2d at 614-15 (2d Cir. 1964), *rev'd on other grounds*, 409 U.S. 363 (Imposition of a severe sanction must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited.); Guilford Nat'l Bank of Greensboro v. Southern Ry., 297 F.2d 921, 923-25 (4th Cir. 1962); Roberson v. Christoferson, 65 F.R.D. 615, 622 (D.N.D. 1975); Williams v. Krieger, 61 F.R.D. 142, 145 (D.N.Y. 1973); Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565, 574 (D. Md. 1963).

[83] 66 Hawaii at 394, 665 P.2d at 161.

[84] *Id.* at 391, 665 P.2d at 160.

[85] *See, e.g.*, Ketchikan Cold Storage Co. v. Alaska, 491 P.2d 143, 145-48 (Alaska 1971); Bachner v. Pearson, 432 P.2d 525, 529 (Alaska 1967).

[86] MOORE, *supra* note 47, at ¶ 37.03[2.-3], 37-67, [2.-4], 37-69.

[87] McMullen v. Travelers Ins. Co., 278 F.2d 834, 835 (9th Cir. 1960) (Appellant's persistent refusal to submit to a physical examination on the insurance company's demand resulted in establishment of a physical condition contrary to his claim of total disability.) *See also* MOORE, *supra* note 47, at ¶ 37.03[2.-3], 37-68.

[88] *See* McMullen v. Travelers Ins. Co., 278 F.2d at 835. The Ninth Circuit Court of Appeals held that while the more normal way of disposing of a case involving a persistent refusal to comply with discovery was to dismiss it, summary judgment appeared "eminently proper."

[89] Ketchikan Cold Storage Co. v. Alaska, 491 P.2d at 147. In *Ketchikan*, an eminent domain case where a property owner failed to comply with discovery regarding the income history of the property, an establishment-preclusion order was entered against the owner. The court concluded that "an establishment-preclusion order which prevents full adjudication of a case on its merits is

Because of the potentially harsh results, neither establishment nor preclusion orders will be applied to a necessary element of a case absent a showing of willful disobedience, gross indifference to the rights of the adverse party, deliberate callousness, or intended negligence.[91]

In *Wong*, the court imposed an establishment-preclusion order rather than the harsher sanction of designating the city's negligence as the proximate cause of the accident. The sanctions order left open the issues of proximate cause, comparative negligence, assumption of risk and other affirmative defenses, thus precluding summary judgment for the plaintiff. The sanctions in *Wong* were designed to counteract the prejudice to plaintiff's case caused by the destruction of potentially significant evidence while minimizing infringement upon the merits of the defendant's case.

These sanctions are well within the due process limitations imposed by the United States Supreme Court.[92] In *Wong*, although the court did not find any

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so drastic a sanction that it should be employed only upon the clearest showing that such a course is required." In footnote three, the *Ketchikan* court compared Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957) in which the court of appeals found that a penalty of default for failure to appear at a deposition was too drastic due to the defendant's illness and presence in Germany. The court stated that it had the responsibility of doing justice, and that a party's fair day in court should not be denied absent a serious showing of willful default. The *Ketchikan* court also stated that the holding was consistent with *Bachner*. In *Bachner*, a negligence action involving a plane crash, the respondent filed a request for production of certain parts of the plane. Petitioner first denied having possession of the parts and agreed to file an affidavit supporting his denial. The affidavit was never filed. The lower court ordered sanctions in the form of an establishment-preclusion order, which the supreme court upheld. The *Ketchikan* court agreed with *Bachner's* reasoning that "the trial court 'could well have concluded that petitioner was recalcitrant and was not in good faith attempting to comply with what was required of him.' " 491 P.2d at 147-48 n.3 (quoting *Bachner*, 432 P.2d at 528). *See* Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 915 (2d Cir. 1959) (Plaintiff was precluded from presenting evidence on issues upon which it failed to provide defendant with factual information. The court said that a preclusion order is a drastic measure and "should be exercised only to the extent necessary to achieve the desired purpose—that is, an entirely just disposition of the case in a speedy and efficient manner.").

[90] 491 P.2d at 147.

[91] MOORE, *supra* note 47, at ¶ 37.03[2.4], 37-71 (citing State of Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978)); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d at 860-61 (inability to find records where non-complying party had burden of proof). *Cf.* Vickers v. Kansas City, 216 Kan. 84, 531 P.2d 113 (1975) (To determine whether dismissal or a sanction short of dismissal was warranted, the court considered whether the evidence sought went to a dispositive issue in the case as well as whether the failure to comply was due to inability rather than to willfulness or bad faith. Dismissal was reversed because the documents withheld did not go to a dispositive issue, but were merely corroborative of deposition testimony.).

[92] *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 640, 643; Societe Internationale v. Rogers, 357 U.S. at 208, 212. The Court in these cases explained that Rule 37 must be read in light of the taking clause of the fifth amendment. The Court further outlined the due process limitations of Rule 37 citing *Hovey v. Elliott* and *Hammond Packing Co.*

willfulness or bad faith on the part of the city, it clearly found the destruction of the evidence was due to the fault of the city.[93] *Societe Internationale* authorizes courts to impose dismissal or default judgment when a failure to comply with a discovery order is due to fault.[94] In addition, the numerous unsuccessful informal requests and the written formal request for production of the traffic signal control box,[95] coupled with its destruction, constituted a pattern of persistent discovery failure. Such persistent failure has been held to justify dismissal in other jurisdictions.[96]

Moreover, to the extent the sanctions serve as a deterrent to future abuses of the discovery process the decision is consistent with *National Hockey League* and its progeny.[97] The standard "commensurate with the prejudice suffered," however, does not indicate a deterrent intent. Rather, the court appears to be concerned with fairness in disclosure during the discovery process.

IV. Law of the Case Doctrine

A. Background

In *Wong*, the supreme court discussed both the doctrines of comity and law of the case. The "law of the case" doctrine embodies the judicial policy "to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself."[98] The doctrine is a matter of court practice rather than a legal standard.[99] In determining whether the doctrine should apply, courts are guided by the policy considerations of comity, judicial courtesy, fairness, and efficient judicial administration.[100] The principle of comity requires that courts

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v. Arkansas. *See* notes 45-52 and accompanying text.

[93] 66 Hawaii at 394, 665 P.2d at 161.

[94] 357 U.S. at 212.

[95] 66 Hawaii at 390, 665 P.2d at 159.

[96] *See* McMullen v. Travelers Ins. Co., 278 F.2d 834, 835 (9th Cir. 1960) (Appellant's claim of total disability was disposed of through summary judgment because he persistently refused to submit to physical examinations requested by the insurance carrier.); *see also* MOORE, *supra* note 47, at ¶ 37.03[2.-3], 37-68.

[97] The *National Hockey League* Court endorsed a vigorous approach to the deterrence function of sanctions. *See* note 71 and accompanying text. Support for deterrence was cited in a number of federal court decisions. *E.g.*, Affanato v. Merrill Bros., 547 F.2d 138, 140 (1st Cir. 1977); Paine, Webber v. Immobiliaria de Puerto Rico, Inc., 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); Emerick v. Fenick Indus. Inc., 539 F.2d 1379, 1381 (5th Cir. 1976).

[98] 66 Hawaii 389, 396, 665 P.2d 157, 162 (1983). *See also In re* Ryan, 31 Hawaii 547, 550 (1930) (Law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.").

[99] *In re* Ryan, 31 Hawaii 547, 550 (1930).

[100] *See* Jordan v. Hamada, 64 Hawaii 446, 450, 643 P.2d 70, 73 (1982) ("the doctrine may

of one state, jurisdiction, or coordinate division give effect to the judicial decisions of another court out of deference and mutual respect.[101] Comity, like law of the case, is a matter of policy rather than an obligation arising under law. While comity is a broad concept that generally insures that courts will acknowledge each other's decisions, law of the case is a case-specific principle that prior determinations of questions of law are to govern subsequent proceedings in the same action.

Hawaii's courts have applied the law of the case doctrine in at least three situations:[102] application of an appellate ruling on remand to the lower court or administrative agency;[103] review of prior appellate decisions by the same appellate court; and review of a prior interlocutory order or ruling by another court of equal and concurrent jurisdiction.

1. *Application of Law of the Case on Remand*

Courts apply the law of the case doctrine most strictly when a case has been

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allow reconsideration of decided matters in the interest of judicial expediency"); Cain v. Cain, 59 Hawaii 32, 37, 575 P.2d 468, 473 (1978) ("where justice requires, exceptions to the doctrine of law of the case are made"); Gallas v. Sanchez, 48 Hawaii 370, 382, 405 P.2d 772, 779 (1965) (Law of the case "is designed to obviate undue prolongation of litigation."); Gustetter v. City & County of Honolulu, 44 Hawaii 484, 490, 354 P.2d 956, 960 (1960) ("If the circuit court had not corrected the error of law . . . this court would have been obliged to do so, this being an error in jurisdiction.").

[101] BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

[102] Formerly, federal authority suggested that law of the case was applicable only with regard to a decision on a former appeal from a final determination from the court below. *See* United States v. United States Smelting, Refining, and Mining Co., 339 U.S. 186, 198-99, *reh'g denied*, 339 U.S. 972 (1950) (Law of the case is like res judicata and applies only to final judgments but not to interlocutory orders even when such orders are appealable by statute). This ruling stood for the principle that law of the case was not applicable to a decision on a former appeal from an interlocutory order but applied only to prior appellate decisions on the merits of the case. Dicta in Gallas v. Sanchez, 48 Hawaii at 382, 405 P.2d at 779, allowed Hawaii state courts to correct plain mistakes of a serious nature in a previous ruling. Currently, law of the case is used to describe multiple situations in which one court considers its own prior rulings or those of other courts on either the trial or appellate level. Law of the case also applies to appeal and review of prior rulings by the same judge, an issue not addressed in this note. *See* 66 Hawaii at 396, 665 P.2d at 162.

[103] In the 1982 case of *Jordan v. Hamada*, the Hawaii Supreme Court applied the law of the case doctrine in a new procedural context. In *Jordan*, the circuit court was acting as an appellate court for decisions of the Hawaii Public Employees' Relations Board. After remand to the state board for determination of unresolved issues on appeal, the plaintiff attempted to argue his case before a different division of the same circuit court. The supreme court affirmed the second circuit court judge's refusal to hear the second appeal and concluded that law of the case doctrine required that the plaintiff's second appeal be heard by the original court, and limited the appeal to those issues which were not decided on the first appeal. 64 Hawaii at 450, 643 P.2d at 73.

remanded after a ruling by an appellate court. The decision of the appellate court becomes the "law of the case" and controls all subsequent stages of litigation. On remand, therefore, the trial court is directed to adhere strictly to the appellate decision. In *Wong Wong v. Honolulu Skating Rink*,[104] the Hawaii Supreme Court adopted the federal standard that mandates the trial court to follow the decisions of the appellate court.[105] The court noted that it is "well-settled that such questions as were determined when this case was formerly before [the supreme court] are now law of the case and are not now open to inquiry."[106] Clearly a question of law decided on appeal cannot be reheard or examined upon subsequent trial in the same case. Appellate courts, however, are free to overrule their own prior decisions when conditions warrant a departure from the doctrine.

2. *Application of Law of the Case to Prior Appeals*

Appellate courts also apply law of the case doctrine to cases which have been remanded following an appeal. Appellate review in these cases is generally lim-

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[104] Wong Wong v. Honolulu Skating Rink, 25 Hawaii 347, 348-49 (1920). In *Wong Wong*, non-suit issued in the first trial which was reversed on two issues did not preclude either party from defending or asserting issues other than those already decided on appeal. Areas within the two issues that were not ruled on also remained open. The court stated: "We did not go further into the question at that time as it was not necessary for us to do so in order to dispose of the question then before us."

See also Cain v. Cain, 59 Hawaii 32, 575 P.2d 468 (1978). The court adhered to the strict application of the doctrine in cases on remand to the trial court and the rule that law of the case may also settle issues or matters which were excluded from direct appellate review because they were improperly presented. On first appeal, the Hawaii Supreme Court affirmed the family court's property distribution plan. In family court, the spouse argued that the court had no power to award an interest in jointly owned property acquired prior to the marriage. The family court rejected this argument on the basis of res judicata. Affirming the family court, the Hawaii Supreme Court agreed with the outcome, but asserted that its decision was based upon law of the case, not res judicata. However, the court said that where a lower court has reached a correct decision its decision will not be disturbed on the basis that the reasons it gave for the action were erroneous. In addition, the court implicitly recognized the family court's ability to distribute separate interest in joint property. Thus, the law of the case doctrine may also settle matters or issues which are excluded from immediate appellate review because they were not properly presented. Finally, the court said that "where justice requires," exceptions may be made to law of the case on second appeal.

[105] *Wong Wong* cited two United States Supreme Court cases as establishing the appropriate federal standard: Roberts v. Cooper, 61 U.S. 467 (1858) and Illinois v. Illinois Cen. R.R., 184 U.S. 77 (1902). The *Roberts* Court stated: "None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation." 25 Hawaii at 350 (quoting 61 U.S. at 481).

[106] 25 Hawaii at 350.

ited to whether the trial court properly construed and applied the appellate mandate on remand.[107] However, the doctrine does not require strict adherence when appellate courts review their own prior rulings in the same case.[108] Support for appellate departure from law of the case derives from *Lewers & Cooke v. Atcherly*,[109] in which the United States Supreme Court held that an appellate court ruling was properly overruled by the same appellate court at a later date. Consistent with this conclusion, the Hawaii Supreme Court stated in a later case that "where justice requires, exceptions to the doctrine of law of the case are made and we may re-examine our holdings on the second appeal in the same case . . . ."[110]

Glover v. Fong III[111] further defined the scope of the doctrine and justifications for appellate exceptions to law of the case. In *Glover*, decided more than fifty years after *Lewers & Cooke*, the Hawaii Supreme Court established the "cogent and convincing reasons" standard to measure the proper exercise of judicial discretion in applying law of the case. In *Glover*, the defendant urged the supreme court to re-examine the holding of a prior appeal[112] that allowed an action for damages in a mandamus case.[113] The court refused to reconsider its previous holding since the holding of the prior appeal "established the law of the case in further proceedings . . ." and was harmonious with other decisions and was not erroneous.[114]

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[107] 59 Hawaii at 36, 575 P.2d at 472-73.

[108] *See* Henderson v. United States, 218 F.2d 14, 16 (6th Cir.), *cert. denied*, 349 U.S. 920, *reh'g denied*, 349 U.S. 969 (1955) (appellate courts have the "abstract power" to re-examine issues and even reach a result inconsistent with its decision in the first appeal in the same case). *See also* Rainbow Island Prods., Ltd. v. Leong, 44 Hawaii 134, 351 P.2d 1089 (1960); Von Holt v. Izumo Taisha Mission, 44 Hawaii 147, 355 P.2d 40 (1960) (a prior holding which awarded attorney's fees was vacated); Rosenbledt v. Wodehouse, 25 Hawaii 561 (1920) ("[I]t is generally held that [a ruling on demurrer] is not such a final adjudication that the court may not at any time before final judgment reconsider its ruling and enter a contrary one, especially if convinced that a mistake was made."); Bartlett v. Hawaiian Carriage Mfg. Co., 13 Hawaii 311 (1901); Gay v. Mendonca, 7 Hawaii 293 (1888).

[109] Lewers & Cooke v. Atcherly, 222 U.S. 285 (1911).

[110] Cain v. Cain, 59 Hawaii at 37, 575 P.2d at 473.

[111] Glover v. Fong, 42 Hawaii 560, 578 (1958). There were three *Glover v. Fong* cases heard before the Hawaii Supreme Court. *Glover I*, 39 Hawaii 308 (1952), referred to as the "mandamus case," involved an action by plaintiff to recover a payment approved by the City and County of Honolulu controller, but not paid because the city auditor refused to make the payments. In *Glover II*, 40 Hawaii 503 (1954), referred to as the "prior appeal," the supreme court reversed a lower court's sustaining of a demurrer, which initially favored the city. *Glover III*, 42 Hawaii 560 (1958), involved an action to recover damages resulting from the two prior causes of action. *Id.* at 562.

[112] 42 Hawaii at 562.

[113] *Id.* at 562-63.

[114] *Id.* at 579.

In addition, the *Glover* court enumerated several factors or "cogent reasons" which may justify an appellate court's deviation from law of the case doctrine, including a lack of harmony with other decisions, any injustice or hardship which would flow from a change, mistakes of law or fact, and whether injustice to the rights of the parties would result by adhering to the first opinion.[115]

Thus, *Glover* replaced the somewhat vague and subjective standard for deviation from the doctrine where "justice requires" with more specific guidelines. Abuse of discretion will be found where prior appellate rulings by another court are disturbed without "cogent reasons" as set forth in *Glover*. This movement toward a more objective standard serves to guide judicial discretion when reviewing prior appeals, a standard that is consistent with the purpose of law of the case doctrine.

3. *Application of Law of the Case to Courts of Coordinate Jurisdiction*

Prior to *Wong*, the standard for application of law of the case for courts of concurrent jurisdiction was not clearly formulated. In 1930, in *In re Ryan*,[116] the Hawaii Supreme Court first considered the application of the doctrine to decisions by courts of coordinate jurisdiction. In *Ryan*, the mother of a minor attempted to remove Bishop Trust Company as guardian of the minor's estate. Bishop Trust's demurrer to the mother's petition in probate was overruled.[117] The matter came for hearing on the merits before a second judge who ruled against the mother. On appeal, the mother claimed the first judge's dismissal of the demurrer established law of the case and that the second judge's overruling of the first judge was the "exercise of an assumed appellate jurisdiction."[118] The supreme court rejected the notion that the second proceeding was an appellate proceeding since the prior rulings were interlocutory and not final judgments.[119] In affirming the second judge's action, the court followed Mr. Justice Holmes' reasoning that the principle of law of the case merely expresses the practice of courts generally to refuse to reopen what has been decided and is not a limitation on the power of the court.[120] With the *Ryan* decision, Hawaii joined other jurisdictions that regarded the doctrine of law of the case as a matter of practice and policy rather than a matter of law.[121] Under *Ryan*, departure from law of

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[115] *Id.* at 578-79.

[116] 31 Hawaii 547 (1930).

[117] 31 Hawaii at 548.

[118] *Id.* at 548-49.

[119] *Id.*

[120] *Id.* at 550.

[121] *See* Handi Inv. Co. v. Mobil Oil Co., 653 F.2d 391, 392 (9th Cir. 1981) ("Although 'law of the case' is not an 'inexorable command' a prior decision of legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or

the case was permissible when the court was "convinced that a mistake was made."[122]

The court further defined the proper circumstances leading to an exception from law of the case doctrine in *Gallas v. Sanchez*.[123] The *Gallas* court declared that a court may reconsider an earlier ruling if it finds that the ruling was "probably erroneous and more harm would be done by adhering to the earlier rule than from the delay incident to a reconsideration."[124] The plaintiff in *Gallas* argued that because the defendant's motions for judgment on the pleadings, for dismissal, and for directed verdict were all denied by the close of the plaintiff 's case-in-chief, the sufficiency of the complaint was established through the law of the case.[125] Thus, the plaintiff argued that the prior rulings were binding on the court and that the court erred in granting a directed verdict in favor of the defendant. The supreme court affirmed the directed verdict and declared that law of the case is not such an "unyielding rule as to take from the court the power to correct manifest error or plain mistake of a serious nature in a previous ruling, but is designed to obviate undue prolongation of litigation."[126] The *Gallas* court recognized that exceptions to the doctrine exist where issues for reconsideration go to the very power of the court to hear a case (such as lack of jurisdiction or improper venue) or to the merits of a case (such as the failure to state a claim).[127]

In summary, Hawaii case law has exhibited a trend toward an objective stan-

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the prior decision was clearly erroneous and would result in injustice."); Higgins v. California Prune & Apricot Growers, Inc., 3 F.2d 896, 898 (2d Cir. 1924) (Judge Learned Hand stated: "[T]he 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense."); Marshall Field & Co. v. Nyman, 285 Ill. 306, 120 N.E. 756 (1918) (ordinarily the power of one judge to overrule another should not be exercised); Plattner Implement Co. v. International Harvester Co., 133 F. 376 (8th Cir. 1904) (one judge should not overrule another except for the most "cogent reasons" but he has power to do so); Willard v. Willard, 194 App. Div. 123, 185 N.Y.S. 569 (1920) (as a general rule the second judge should not vacate the order of the first judge except in "exceptional cases"). Recent opinions have rearticulated the policy underlying law of the case that a judicial determination of an issue should end the litigation when the same issue is addressed by courts of coordinate jurisdiction. *See e.g.*, Chicago & North Western Transp. Co. v. United States, 574 F.2d 926 (7th Cir. 1978); People v. Watson, 57 A.D.2d 143, 393 N.Y.S.2d 735 (1977). *See generally* Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1.

[122] *In re* Ryan, 31 Hawaii at 551.

[123] 48 Hawaii 370, 405 P.2d 772 (1965).

[124] *Id.* at 382, 405 P.2d at 779 (citing 2 MOORE'S FEDERAL PRACTICE ¶ 12.14 at 2266 n.11) (currently cited in 2A J. MOORE, J. LUCAS, D. EPSTEIN, MOORE'S FEDERAL PRACTICE ¶ 12.14 at 2337 n.11 (2d ed. 1984)).

[125] *Id.* at 381-82, 405 P.2d at 779.

[126] *Id.* at 382, 405 P.2d at 779.

[127] *Id.* at 383, 405 P.2d at 779-80 (citing 2 MOORE'S FEDERAL PRACTICE ¶ 12.14 at 2266-67) (currently cited in 2A MOORE'S FEDERAL PRACTICE, *supra* note 124, at 2336-37).

dard for application of the law of the case doctrine. A "bright line" rule governs cases on remand. Trial courts must adhere to prior decisions in the same case. The appellate court rule is also clear. Appellate courts may modify or vacate their own rulings only when "cogent reasons," as set forth in *Glover*, are present. In contrast, prior to *Wong*, the standard for application of law of the case in courts of coordinate jurisdiction continued to be subjective. As a matter of policy, judges of coordinate courts refrained from overruling prior decisions of another judge unless "convinced that a mistake was made." The dispute over reconsideration of the imposition of sanctions in *Wong* and Judge Chang's subjective interpretation of the original sanctions order set the factual background for replacement of this standard with the more explicit "cogent reasons" standard.

C. The Law of the Case Doctrine

In reversing Judge Chang's order granting the motion to reconsider the sanctions, the *Wong* court first addressed the application of law of the case doctrine to a modification of a sanctions order by a court of concurrent jurisdiction.[128] The court stated that "[a] judge should generally be hesitant to modify, vacate or overrule a prior interlocutory order of another judge who sits in the same court."[129] The law of the case doctrine, the court explained, "refers to the usual practice of courts to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself."[130] The court further explained that where the decisions of a judge of equal and concurrent jurisdiction are reviewed, judicial restraint in modifying the decision stems from courtesy and comity, which "commands even greater respect that the doctrine of 'law of the case'. . . ."[131] The *Wong* court concluded that if the trial judge does not have "cogent reasons" to modify the motion court judge's rulings, "any modification . . . will be deemed an abuse of discretion."[132]

The court next considered whether Judge Chang had "cogent reasons" for modifying the original sanctions order. Judge Chang's modification omitted the finding of negligence per se and provided that "[t]he City failed to properly maintain the traffic signal control box at Waialae and Kilauea causing the traffic lights at said intersection to malfunction on September 14, 1974."[133] The su-

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[128] *Id.* at 396, 665 P.2d at 162. Appellant Rachelle Shields Wong argued that the law of the case doctrine precluded the trial court judge from modifying the sanctions order. *See* Brief for Appellant at 22-26.

[129] 66 Hawaii at 396, 665 P.2d at 162.

[130] *Id.* at 396, 665 P.2d at 162-63.

[131] *Id.* at 395, 665 P.2d at 162.

[132] *Id.* at 396, 665 P.2d at 162.

[133] *Id.* at 392, 665 P.2d at 160.

preme court attributed Judge Chang's modification of the sanction order to his interpretation of the word "negligence."[134] Judge Chang apparently thought that the use of the word negligence connoted "liability with regard to breach of duty and proximate cause."[135] Judge Fong, in contrast, used the word "negligence" to describe the city's failure to use ordinary care in the maintenance of the traffic control device. The court stated that the issue was not the correctness of the wording of the sanctions, but whether the disagreement was sufficient ground for modification of the sanctions order.[136] Finding no cogent reason for the modification, the court held that Judge Chang's modification was improper.

The supreme court thus appears to have adopted the "cogent reasons" standard established in *Glover* for determining whether a court of coordinate jurisdiction is bound by law of the case doctrine.[137] The *Glover* factors provide exceptions to the doctrine when prior mistakes of fact or law have been made and no hardship or injustice would result from departure from the law of the case.[138]

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[134] *Id.* at 395, 665 P.2d at 162. Though the court appears to leave open the question of applicability of the two negligence theories, the cases show no real problem. Negligence in the narrow sense is defined by Martin v. Wilson, 23 Hawaii 74, 88 (1915) as "the failure to do what a reasonable and prudent person would ordinarily have done under given circumstances, as well as the doing of what such person would, under the circumstances, not have done." Negligence in the broad sense is defined by Medeiros v. Honomu Sugar Co., 21 Hawaii 155, 159 (1912) to include the classic elements of duty, breach of duty, causation and resulting injury to the plaintiff. In the "narrow" sense, negligence interpreted by Judge Fong would mean "that the City would be deemed to have failed to do what it ordinarily should have done, that is, the City would be deemed to have failed to properly maintain the traffic signal control box." 66 Hawaii at 395, 665 P.2d at 162. *See also* Carreira v. Territory of Hawaii, 40 Hawaii 513, 517 (1954); Solomon v. Niulii Mill & Plantation, 32 Hawaii 865, 871 (1933); Louis v. Victor, 27 Hawaii 262, 263 (1923); Hughes v. McGregor, 23 Hawaii 156, 158-59 (1916); Ward v. Interisland Steam Nav. Co., 22 Hawaii 488 (1915).

[135] 66 Hawaii at 395, 665 P.2d at 162. The trial court concluded that the term "negligence" established liability against the City:

> THE [TRIAL] COURT: . . . for your information, the Court ruled with regard to Judge Fong's prior ruling that the Court had set aside that ruling because that ruling held that because the City could not produce the traffic signal device, that the City was negligent, *and therefore, Judge Fong had established liability* by the fact that the traffic signal device was not available. The Court set aside that ruling in this case.

See Transcript of Hearing, 2-5-82, at 15 (emphasis added).

[136] 66 Hawaii at 395, 665 P.2d at 162.

[137] *Id.* at 396, 665 P.2d at 162. *See supra* note 110 and accompanying text. The court also cited Jordan v. Hamada, 64 Hawaii at 450, 643 P.2d at 72; Cain v. Cain, 59 Hawaii at 36, 575 P.2d at 472-73; Gallas v. Sanchez, 48 Hawaii at 382, 405 P.2d at 779; and Glover v. Fong, 42 Hawaii at 578.

[138] The utility of the *Glover* standard is apparent when applied to the facts of *Wong*. The first factor, "lack of harmony with other decisions" does not apply because the sanctions order was well within the settled law on Rule 37. The second factor, which requires that "no injustice or

Other jurisdictions have considered additional factors in formulating a standard for departure from law of the case.[139] In some jurisdictions, a court of concurrent jurisdiction may depart from the doctrine under exceptional circumstances. For example, the Third Circuit Court of Appeals determined that exceptional circumstances existed when a judge who originally rendered a decision was not available for rehearing.[140] Similarly, death and resignation of the original judge are considered exceptional circumstances justifying departure from the doctrine.[141] Exceptional circumstances also include prior errors of law, one of the *Glover* factors. For example, in *Castner v. National Bank of Anchorage*,[142] the second judge was convinced that an error of law had been made in denying motions for dismissal and summary judgment. Rather than adhering to principles of comity and allowing a futile trial to proceed, the second judge reversed the first judge and permitted an immediate appeal. The avoidance of a useless and expensive trial in this instance constituted a cogent reason justifying depar-

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hardship would flow from a change," is clearly contrary to plaintiff's assertion that plaintiff relied on the sanctions for nearly two years and conducted discovery accordingly. Opening Brief for Appellants at 19-21. Detrimental reliance is a crucial factor in considering whether to modify a standing interlocutory order. *See generally* 1B MOORE, *supra* note 47, at ¶ 0.40[2]. The third factor is whether "principles of law have been incorrectly declared the first time." In *Wong*, the second judge disagreed with the motions court judge by determining the term "negligence" established liability against the City. The supreme court implicitly held that the first judge was correct by pointing to the disagreement and reversing the modification. Therefore, it appears that no principle of law had been "incorrectly declared the first time." *See* 66 Hawaii at 394-96, 665 P.2d at 161-62; *see also* Transcript of Hearing, Feb. 5, 1982 at 15, and Nov. 17, 1982 at 21. The fourth factor, whether "mistakes of fact" support a departure from law of the case, does not apply since no factual mistakes were alleged in *Wong*. The final factor, whether "injustice to the rights of the parties would be done by adhering to the first opinion" does not apply to the facts in *Wong*. Thus, as applied to *Wong*, the *Glover* standard of cogent and convincing reasons establishes the second judge's abuse of discretion in modifying the sanctions.

[139] *See generally*, Annot. 20 A.L.R. Fed. 13 (1974); Vestal, *supra* note 121, at 26-29.

[140] T.C.F. Film Corp. v. Gourley, 240 F.2d 711, 714 (3d Cir. 1957) (petition for relief by writ of mandamus denied where relief would require a judge of coordinate jurisdiction to vacate order overruling prior decision of a temporary judge).

[141] United States v. Desert Gold Mining Co., 433 F.2d 713 (9th Cir. 1970) (following death of district judge who ruled on partial summary judgment, the final judgment remained subject to reconsideration and revision by second trial judge, a successor judge, or a different judge to whom the case might be assigned); Magee v. General Motors Corp., 213 F.2d 899 (3d Cir. 1954) (where trial judge died after expressing opinion that jury verdict was clearly against the weight of the evidence, second judge should have set aside verdict and granted motion for a new trial); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804 (9th Cir. 1963), *cert denied*, 375 U.S. 821 (1963) (where judge was on vacation and unavailable to hear motion for preliminary injunction, no cogent reason existed for another judge of coordinate court to hear arguments for motion).

[142] 278 F.2d 376 (9th Cir. 1960).

ture from the rule of comity and the law of the case.[143]

"Patent error"[144] also justifies one judge's overruling another in the same case. Patent error refers to a prior decision based upon an error of law or fact and therefore resembles the *Glover* factors that provide for a departure from the law of the case due to a prior mistake of law or fact.[145] However, the "patent error" standard includes a subjective element based upon a judge's interpretation of prior rulings.[146] To insure adherence to law of the case, a corollary to the "patent error" rule was formulated: an alleged error which is not patent or an issue on which there is a division of authority will not be reconsidered.[147]

In addition, the weight of authority controlling the first ruling is sometimes ambiguous. For example, in *In re Naturalization of Alacar*,[148] the petitioner's claim to United States citizenship depended upon whether his residence on Midway Island for over a year was considered a residence in the United States. The second judge reviewed the congressional hearings surrounding Hawaii's statehood to determine whether Hawaii's claim to Midway established Midway as part of the United States. The second judge upheld the first judge's finding that petitioner's residence on Midway did not break his continuing residence in the United States, since the second judge could not say the decision was "patently erroneous" based upon the somewhat ambiguous congressional intent.[149]

Thus, the "patent error" justification for departure from law of the case avoids subjective judicial decisions only where application of the law to a prior ruling is clear. The patent error standard provides little guidance and places too much emphasis upon each court's interpretation of prior decisions. Objectivity in court procedure is essential to the goals of promoting fairness and certainty that underlie the law of the case doctrine.[150] Application of the "patent error"

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[143] *Id.* at 379-80.

[144] United States v. First Nat'l Bank & Trust Co., 263 F. Supp. 268, 269-70 (D. Ky. 1967) (since on appeal the Supreme Court did not rule on an issue in an antitrust case, on remand the former ruling by the same court became law of the case and would not be re-examined absent a patent error); Rojas-Guitierrez v. Hoy, 161 F. Supp. 448 (D. Cal. 1958), *aff'd on other grounds*, 267 F.2d 490 (9th Cir. 1958) (decision in a similar deportation case within the same court that marijuana was not a narcotic within the meaning of the Immigration and Nationality Act of 1952 was law of the case and would not be overruled unless patently erroneous on its face).

[145] *See supra* notes 114 and 137 and accompanying text.

[146] Greyhound Computer Corp. v. International Business Mach. Corp., 559 F.2d 488, 508 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

[147] Wells Fargo & Co. v. Cuneo, 241 F. 727, 729 (D.C.N.Y. 1917) (where first district court judge sustained jurisdiction over parties although there was no uniformity of opinion on the issue, second judge followed first ruling and cited reasons of comity and uniformity of decision in the same court).

[148] *In re* Naturalization of Alacar, 196 F. Supp. 564 (D. Hawaii 1961).

[149] *Id.* at 567.

[150] *See infra* note 170.

standard in other jurisdictions suggests that well-defined guidelines such as the *Glover* factors may enhance this objectivity.

Other policy considerations support an objective standard for law of the case. Courts apply the doctrine in order to promote, preserve, and maintain the orderly administration of justice.[151] For example, free reconsideration of the rulings of motions court judges by trial judges would result in a duplication of effort. Mini-appeals to the trial court would result, based upon differences of opinion among circuit court judges. It is unavoidable that judges will have differences of opinion as illustrated in the *Wong* case. Application of the law of the case doctrine attempts to avoid potential conflict between judges of coordinate jurisdiction. Under such circumstances, an objective standard for the law of the case doctrine presents an orderly means to limit litigation and avoid judicial embarrassment.[152] Judges may look to the specific guidelines of the doctrine to

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[151] Loegering v. County of Todd, 185 F. Supp. 134 (D. Minn. 1960), *aff'd on other grounds*, 297 F.2d 470 (8th Cir. 1961). In *Loegering*, motion for dismissal of wrongful death action based on lack of diversity jurisdiction was denied by the first judge. An identical motion for dismissal before a second judge of the same court prompted the district court to state:

> Regardless of the merits of the contention, it would ill behoove this court, even if so minded, to set aside the considered ruling of a confrere on a multiple-judge court. We have taken the position that good public policy and the orderly and consistent administration of justice require us in most cases to follow the ruling of our associates even though our individual judgment might dictate a contrary conclusion.

See United States v. Wheeler, 256 F.2d 745, 747 (3d Cir. 1958), *cert. denied*, 358 U.S. 873, *reh'g denied*, 358 U.S. 913 (1958); T.C.F. Film Corp. v. Gourley, 240 F.2d 711, 714 (3d Cir. 1957); Sutherland Paper Co. v. Grant Paper Box Co., 9 F.R.D. 422, 423 (1949); Bradford v. Chase Nat'l Bank of City of New York, 24 F. Supp. 28, 33 (D.N.Y. 1938).

[152] Stevenson v. Four Winds Travel, Inc., 462 F.2d 899, 905 (5th Cir. 1972) (The rule that a latter judge should respect and not overrule a prior decision and order is "essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases." (quoting Plattner Implement Co., 133 F. at 378-79); Plattner Implement Co. v. International Harvester Co., 133 F. at 379 (where ruling by second temporary district judge on implied lien for amounts expended for freight and storage conflicted with a prior ruling by the resident judge, the court of appeals stated that a rule which would permit "one judge to sustain a demurrer to complaint, another of coordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable."); United States v. First Nat'l Bank & Trust, 263 F. Supp. 268, 269 (D. Ky. 1967) ("For a judge of coordinate jurisdiction to reverse judgment of a fellow judge who tried the case . . . is to do disservice to the law and create disrespect for it. There must be an end to litigation. . . ."); Hearst Radio, Inc. v. Federal Communications Comm'n, 73 F. Supp. 308, 309 (D.D.C. 1947) (In denying a motion for a three judge court which previously had been denied by a former judge of the same court, the second judge stated: "[T]he present motion should not have been made. In effect it seeks to have me review the order of another judge of this court. If tolerated it would inevitably lead to hopeless confusion and embarrassment in the administration of justice in this court.").

resolve their differences. Moreover, the doctrine prevents confusion and disrespect for the courts that might result if judges within the same case openly disagreed on the finer points of the law.[153] At least one court has asserted that such a situation may lead to "judge shopping."[154]

While the law of the case doctrine primarily promotes the interests of efficient court administration, courts must also avoid inequitable results in applying the doctrine. The issue arises when reconsideration of prior rulings in the interest of expediency conflicts with achieving equitable results. A federal standard which offers guidance in this respect derives from *Simmons v. Grier Brothers Co.*[155] The *Simmons* test requires that reconsideration be granted "only provided due diligence be employed and a revision be otherwise consonant with equity."[156] The *Simmons* test thus requires that reconsideration be "consonant with equity," a requirement encompassing equitable notions of detrimental reliance upon the prior order. For instance, reconsideration might be improper if a party relied upon the prior ruling for purposes of conducting discovery or litigation so that reversal of the previous decision would adversely affect their interests. Notions of estoppel by judgment[157] may also be involved when a party

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[153] *In re* Insull Util. Invs., Inc., 74 F.2d 510, 515-16 (7th Cir. 1935) (law of the case expedites the administration of justice and prevents undue controversies between courts of coordinate jurisdiction); Humphrey v. Bankers Mortgage Co., 79 F.2d 345, 353 (10th Cir. 1935) ("[I]n such circumstances the deliberate judicial acts of one judge are not open to review by another judge of the same court having coordinate jurisdiction. That is a salutary rule of comity . . . . Any other would strike down orderly procedure and substitute unseemly conflict in its stead."); Hardy v. North Butte Mining Co., 22 F.2d 62, 63 (9th Cir. 1927) (A proper order appointing receivers may not be vacated by another judge sitting in the same court since "it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."); Plattner Implement Co. v. International Harvester Co., 133 F. 376, 378-79 (8th Cir. 1904) ("It is unavoidable that judges will differ on the many questions arising during litigation and therefore law of the case is essential to prevent conflicts, to the speedy conclusion of trial and administration of the law."); Sutherland Paper Co. v. Grant Paper Box Co., 9 F.R.D. at 423.

[154] United States v. First Nat'l Bank & Trust Co., 263 F. Supp. 268, 269 (D. Ky. 1967). *See also* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 253 F.2d 536, 541 (9th Cir. 1958) (Reconsideration of a prior order would be a waste of court time and energy and "it would involve the hazard of confusing or unseemly discord between two courts of appeal concerning essentially the same controversy. It would encourage the practice of 'forum shopping,' which is inimical to sound judicial administration.").

[155] 258 U.S. 82 (1922).

[156] *Id.* at 91.

[157] Estoppel by judgement is akin to law of the case and rests upon the principle that once a matter in dispute between parties has been resolved by a competent court, relitigation of the matter is barred. Thus, a judicial determination of fact or law is conclusive and binds parties in subsequent proceedings between them in the same case. *See, e.g.*, Humphrey v. Faison, 247 N.C. 127, ____, 100 S.E.2d 524, 529 (1957) ("[W]hen a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over

seeks to adopt a position inconsistent with the original order. The *Glover* guidelines encompass similar equitable notions. Thus, "hardship" or "injustice" to the parties must also be assessed in applying the doctrine.

V. The Impact of *Wong v. City & County*

The combined effect of the court's holding on two issues strengthens the authority of the motions court to impose sanctions for failure to make discovery. First, the flexible standard announced in *Wong* for imposition of sanctions for pretrial discovery failure enhances the broad discretion of the motions court. Sanctions may be imposed which are "commensurate with the prejudice suffered" by the disadvantaged party. Second, sanctions become firmly established once they are ordered since the Hawaii Supreme Court's emphasis on comity and law of the case doctrine restrains the trial court from overruling the motions court. Therefore, the *Wong* decision impacts directly on pretrial discovery and litigation at the motions court level.

Wong provides guidance for the imposition of discovery sanctions beyond establishing that sanctions may be imposed which are "commensurate with the prejudice suffered." Although the court focused on the prejudice or disadvantage to the movant, the relevance of the destroyed or withheld evidence to the merits of the dispute and the fault of the disobedient party are important factors. While the evidence must be "potentially significant,"[158] the court in *Wong* did not make a specific determination of the weight and sufficiency of the traffic control box. Instead, the court accepted the assertion that destruction of the traffic control box had caused the plaintiff to lose the opportunity to prove why the traffic control device malfunctioned,[159] a result which is best explained by the court's reluctance to force the motions court to predict the weight and sufficiency of destroyed evidence. In *Wong*, the traffic control device played a prominent role in the plaintiff's dispute with the city. Nevertheless, the loss of "potentially significant" evidence conceivably encompasses any discoverable

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again at any time thereafter so long as the judgment or decree stands unreversed."); Mansker v. Dealers Transp. Co., 160 Ohio St. 255, ____, 116 N.E.2d 3, 6 (1953) ("Briefly stated, 'estoppel by judgment' simply means that the final adjudication of a material issue by a court of competent jurisdiction binds the parties in any subsequent proceeding between or among them . . . ."); Price v. Clement, 187 Okla. 304, ____, 102 P.2d 595, 597 (1940) ("A fact or question which was actually and directly in issue . . . is conclusively settled by the judgment therein . . . and cannot be again litigated in any future action . . . in any other court of concurrent jurisdiction upon the same or a different cause of action.").

[158] 66 Hawaii at 394, 665 P.2d at 161. Relevance is a threshold issue to the question of what is discoverable. Potentially significant evidence may be information that "appears reasonably calculated to lead to the discovery of admissible evidence." *See* Hawaii R. Civ. P. 26(b)(1).

[159] 66 Hawaii at 394, 665 P.2d at 161.

evidence.

The *Wong* decision also raises the issue of whether failure to comply with informal requests for discovery will trigger sanctions. In *Wong*, several unsuccessful informal requests for production of the traffic signal control box preceded the formal written request.[160] The control box was apparently destroyed the day following the formal request.[161] The sanctions in *Wong* were imposed for failure to respond to a request for inspection under Rule 34 of the Hawaii Rules of Civil Procedure.[162] However, Rule 34 does not distinguish between informal and formal requests. The rule simply provides that the request "shall set forth the items to be inspected . . ."[163] and "a reasonable time, place, and manner of making inspection . . . ."[164] The court may have characterized the initial oral requests by plaintiff's counsel as "informal" because it was uncertain whether the requests fully complied with the requirements of Rule 34.[165] However, the fact that both informal and formal requests had been made suggests that informal requests may trigger sanctions.

A recent Hawaii Intermediate Court of Appeals decision, *Doe I v. Roe I*,[166] provides some additional guidance. In *Doe I*, petitioner's counsel informally agreed to provide copies of letters from the respondent to the petitioner. Subsequently, petitioner's counsel failed to provide the document in violation of Hawaii Family Court Rule 34,[167] and sanctions similar to those in *Wong* were imposed. Viewed together, the two cases suggest that the court will impose sanctions when the recusant party has knowledge of the discovering party's need, yet refuses to turn over the material for lack of a formal request.

In this respect, attorneys should make formal requests for inspection to avoid unnecessary litigation over informal discovery practices. Formal requests remove the ambiguities of informal requests by providing a written and specific document which may be referred to later. Furthermore, formal discovery requests protect the attorney from potential malpractice suits when failure to comply with informal discovery requests has a negative effect on his client's case.[168]

The *Wong* decision also serves as a deterrent. The focus on prejudice to the disadvantaged party deters discovery abuses since any prejudice suffered may

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[160] *Id.* at 391, 665 P.2d at 159.

[161] *Id.*; *see supra* note 15.

[162] 66 Hawaii at 391-93, 665 P.2d at 159-60.

[163] HAWAII R. CIV. P. 34(b).

[164] *Id.*

[165] 66 Hawaii at 391, 665 P.2d at 159.

[166] Doe I v. Roe I, 3 Hawaii App. 15, 639 P.2d 1121 (1982).

[167] *Id.* at 16, 639 P.2d at 1123.

[168] *See generally* Lange v. Hickman, 92 Nev. 41, 544 P.2d 1208 (1976) (For discovery failure by plaintiff's counsel leading to dismissal of case, "client's recourse is an action for malpractice."); *see also* Comment, *Attorney's Negligent Failure to Comply With Procedural Deadlines and Court Calendar Orders - Sanctions*, 47 TEX. L. REV. 1198 (1969).

trigger sanctions. In addition, the focus on the fault of the recusant party encourages preservation of potentially significant evidence. In this respect, a showing of willful disobedience or callous disregard is not required for imposition of sanctions.[169] The decision thus suggests that a party in control of a tangible piece of evidence that is central to the issues in dispute should take measures to preserve the discoverable material. Moreover, conduct which leads to the destruction or suppression of evidence will probably constitute fault and could trigger the most severe sanctions.

The doctrines of comity and the law of the case also enhance the broad discretion of the motions court to impose sanctions. A prior sanctions order, or any other interlocutory ruling, becomes the law of the case and will be disturbed by the trial court only if "cogent reasons" support modification of the order.

Wong establishes a standard for departure from the law of the case that is more objective than the previous standard, that permitted reconsideration when a judge was "convinced a mistake was made."[170] Objective guidance for judicial discretion promotes uniformity in two ways. First, a judge no longer has to rely upon his own subjective interpretations of prior rulings in applying law of the case doctrine. For example, a judge's subjective preference for the wording of a sanctions order should not compel reconsideration of the prior order. The factors enumerated in *Glover* and implicitly adopted in *Wong* will assist in determining when to modify or vacate a prior ruling. Second, *Wong* promotes uniformity since the same "cogent reasons" standard is applicable both to appellate review of prior appellate decisions and to review of prior decisions by courts of coordinate jurisdiction.

Finally, the impact of *Wong* on the motions and trial court subdivisions of the circuit court is consistent with the objectives of the supreme court. One major objective of Chief Justice Herman Lum is to streamline the civil case load.[171] By preserving the power of the civil motions court to order sanctions and make other interlocutory rulings, the supreme court has reaffirmed the equal authority of the motions and trial courts. Thus, the supreme court avoids deciding conflicts between judges of concurrent courts and instead promotes a more efficient court system. In this regard, *Wong*'s deterrence of abuses in discovery and "judge shopping" may be viewed as another step to remove delays, obstacles, and deliberate hindrances to fair and speedy trials upon the merits of a case.

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[169] *See supra* notes 64-74 and accompanying text.

[170] 31 Hawaii at 551.

[171] *See* Address by Chief Justice Herman Lum, *Hawaii Bar News*, Apr., 1984 at 1, col. 1.

VI. CONCLUSION

Two standards for judicial abuse of discretion are prescribed in *Wong*. The standard for imposing discovery sanctions and the standard for applying the law of the case doctrine are dissimilar yet serve the common purpose of maintaining efficient court practice and respect for the judiciary. The broad discretionary standard for imposing sanctions for discovery failure permits a court to issue sanctions under Rule 37 that are commensurate with the prejudice suffered by the disadvantaged party. Destruction of potentially significant evidence, combined with conduct which leads to fault in discovery failure, are important determinants of the sanction to be imposed. A showing of willful disobedience or callous disregard by the disobedient party is not required nor is a showing of the relevance of the destroyed evidence. The broad discretionary standard serves a deterrent function by allowing the imposition of sanctions that prevent a party from benefiting from discovery failure.

Wong also sets an objective and more restrictive standard for abuse of discretion when one court rules on a prior decision of a court of coordinate jurisdiction. Judicial discretion to overrule a prior order is narrower than the discretion to impose sanctions for failure to produce items for inspection in discovery. Policy considerations of comity, courtesy and efficient court procedure restrain the trial court from overruling the motions court. A prior sanctions order, issued under the broad discretionary authority of the motions court, will be disturbed only when cogent reasons are presented to the trial court. The objective cogent reasons test ensures that a proper interlocutory ruling will control subsequent proceedings in the same case. A prior ruling or order will not be overruled or modified due to the subjective interpretation of a second judge ruling on the same issue. *Wong* also achieves uniformity in the law of the case doctrine by holding both appellate courts and courts of coordinate jurisdiction to the cogent reasons standard. The cogent reasons standard reflects the basic judicial policy that objectivity in court practice, as well as objectivity in the application of substantive law, is essential to efficiency and respect for the judiciary. Thus, the combined impact of the court's holdings on the imposition of discovery sanctions and the application of the law of the case doctrine should help to achieve a more efficient court system.

Dana Ishibashi
Ted N. Pettit

The Erosion of Home Rule in Hawaii: *City and County of Honolulu v. Ariyoshi*

I. INTRODUCTION

In *City and County of Honolulu v. Ariyoshi*[1] (*Honolulu v. Ariyoshi*), the Hawaii Supreme Court defined the limits of home rule in Hawaii. The court classified City and County of Honolulu executives as personnel for matters of compensation, thereby validating the regulation of their salary levels by state legislation. As a result, state statute prevailed over county ordinance in the area of employment.

Local governments, unlike states, have no plenary power by virtue of their sovereignty.[2] Broadly defined, home rule allows for local self-government.[3] Constitutional and legislative home rule provisions grant power to counties over local affairs and limit legislative encroachment by the state.[4] The rationale for allowing expanded use of home rule provisions is that, for certain governmental matters, a local entity better understands its own needs and problems than does the state at large.[5] Thus, some states, either through constitutional amendment

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[1] 67 Hawaii ____, 689 P.2d 757 (1984).

[2] 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 403 (3d ed. 1979); City of Trenton v. New Jersey, 262 U.S. 182, 185-86 (1923); O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 100 (1982).

[3] 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.41 (3d ed. 1979).

[4] 1 C. ANTIEU, ANTIEU'S LOCAL GOVERNMENT LAW, MUNICIPAL CORPORATION LAW § 3.01 (1984); 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.83 (3d ed. 1979); Sandalow, *The Limits of Municipal Power Under Home Rule: A Rule for Courts*, 48 MINN. L. REV. 643, 650-51 (1964).

[5] O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 104 (1982); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968). In theory, there are a number of advantages to home rule. Among them are: (1) each community may choose the kind of local government that is best suited for its needs; (2) unhampered local control allows for prompt action in dealing with local problems, which thereby relieves state governments from dealing with these municipal concerns; and (3) the possibility of conflicting legislation emanating from state and local bodies is eliminated. *Id.* at 270-72.

Critics, however, attack the practical application of home rule, especially in larger cities. For instance, there is a greater danger of local corruption with home rule than without it. Also, it is difficult to distinguish between state and local functions. Moreover, home rule may not be as

or by legislative act, have granted certain municipalities home rule status to govern such matters as the structure, organization, procedure and personnel of their governments.

Although the concept of home rule is not new, extended use of home rule provisions is comparatively recent.[6] In 1970, for instance, Hawaii was one of only seven states that permitted all its counties to exercise home rule powers.[7]

Article VIII, section 2 of the Constitution of the State of Hawaii grants home rule to Hawaii's counties. The Hawaii Supreme Court twice addressed the parameters of this provision and home rule in Hawaii. The first decision in 1978, *Hawaii Government Employees Association v. County of Maui*[8] (*HGEA*), addressed a conflict between state statutes and county charter provisions in an employment context. The second case, *Honolulu v. Ariyoshi*, decided late in 1984, is the subject of this note.

II. FACTS

The charters[9] of the City and County of Honolulu (Honolulu), Hawaii, Maui and Kauai counties set payment of certain executive officers' salaries by ordinance.[10] These counties enacted ordinances in accordance with their respective enabling charter provisions.[11]

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effective where the municipality is made up of diverse constituency, or where the voters are apathetic or uninformed. Given the complexities of modern life, critics would allow states to have the primary interest in most governmental functions. *Id.* at 272-73.

[6] The home rule movement in the United States began in the 1870's. O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 100 (1982).

[7] The other states are: California, Maryland, New York, Ohio, Oregon, and Washington. Hawaii differs from mainland states because its local government structure is composed of only four major counties: the City and County of Honolulu (Honolulu), Hawaii County, Kauai County, and Maui County. The fifth, Kalawao County on the island of Molokai, is the site of the Hansen's Disease treatment center. Kalawao County separated from Maui County in 1905 and today is administered by the State Department of Health. There are no other local governments in the State of Hawaii. M. BEAMS, HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978, ART. VII LOCAL GOVERNMENT 5-8 (1978).

[8] 59 Hawaii 65, 576 P.2d 1029 (1978).

[9] A charter is a written grant enumerating the privileges and franchises of the grantee. It is the instrument that evidences the creation of a corporation. 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9.02 (3d ed. 1979).

[10] For example, the provision in the Revised Charter of the City and County of Honolulu (1973) provides:

> § 3-116 Adoption of pay plan. All persons employed in the executive branch of the city or by any of its boards or commissions, whether as officers or otherwise, except those whose pay is otherwise provided for, shall be paid in accordance with a pay plan recommended by the mayor and enacted with or without modification by ordinance. . . .

[11] For example, HONOLULU, HAWAII, REV. ORDINANCES § 6-3.1 (1978) provides:

On May 27, 1982, the governor signed Act 129 into law,[12] limiting certain executive county officers from receiving salary increases after June 30, 1982.[13] The law also prohibited certain state or county employees' salary increases that were contingent on negotiated salary adjustments received under collective bargaining agreements.[14] In the event that a court held the limitation and prohibition sections of the law unconstitutional, a severability clause of the act reduced

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Section 6-3.1 Deputies and clerks. The salary ranges and schedules of the deputies and law clerks of the Department of the Corporation Counsel and Prosecuting Attorney shall be set by the Corporation Counsel and Prosecuting Attorney respectively with the salary range and schedule of the highest ranking deputy to be five percent less than that of the Corporation Counsel or Prosecuting Attorney and for subsequent salary ranges and schedules in descending order with a five percent differential between salary ranges and schedules.

[12] Act of May 27, 1982, 1982 Hawaii Sess. Laws 193, 212-13 (codified in pertinent part in HAWAII REV. STAT. §§ 46-21.5 and 78-18.3 (Supp. 1982)).

[13] In pertinent part, Section 34 of Act 129 provides:

Section 34. [C]hapter 46, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

§ 46 Prohibition on increase of salaries of certain county officers and employees. The salary of a city and county or county officer or employee of the executive branch who is:

(1) Exempt from civil service by section 76-77(1), but whose salary is or becomes at least equal to or more than the salary of the head of any department of the city or county under which employed; or

(2) Exempt from civil service by section 76-77(2); ***shall not be increased after June 30, 1982.***

Act of May 27, 1982, § 34, 1982 Hawaii Sess. Laws 193, 213 (emphasis added). Section 34 of Act 129 does not apply to Honolulu because HAWAII REV. STAT. §§ 76-77(1) and 76-77(2) apply only to the counties of Hawaii, Kauai, and Maui.

[14] Section 34A of Act 129 provides in pertinent part:

Section 34A. The Hawaii Revised Statutes is amended by adding a new section to be appropriately designated and to read as follows:

§ ____. Prohibition on certain increases in salaries for certain state and county officers or employees. Any law to the contrary notwithstanding, neither the State nor any of the counties shall provide or pay to the following state or county officers or employees any adjustment or increase in his or her respective salary or compensation where such adjustment or increase constitutes a mandatory adjustment or increase which is, directly or indirectly, dependent upon and related to negotiated salary adjustments or increases received under collective bargaining agreements by civil service or other public employees covered by collective bargaining: any elected or appointed officer or employee in the executive and judicial branches of state government and the executive branch of any county government (1) whose salary or compensation is fixed, limited, or otherwise specified by statute, ordinance, or other legislative enactment whether or not in express dollar amount of express dollar amount ceilings; (2) who is not subject to chapters 76 and 77; and (3) who is excluded from collective bargaining and not subject to chapter 89C.

Act of May 27, 1982, § 34A, 1982 Hawaii Sess. Laws 193, 214. Note that in both sections 34 and 34A the legislature did not freeze legislative salaries even though they too are automatically adjusted according to collective bargaining increases.

state grants-in-aid to the counties.[15] These three sections together comprised Part IV of Act 129.[16]

Four of Hawaii's five counties, together with affected public executives, challenged this compensation ceiling.[17] On motions for summary judgment, the lower court declared the challenged sections void, invalid and unenforceable, because the sections violated the home rule provisions of the Hawaii State Constitution.[18] The state appealed.

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[15] Section 35 of Act 129 provides in pertinent part:

> If section 34 or 34A shall be deemed invalid for any reason by a court of competent jurisdiction, any grant-in-aid made by the State to a county pursuant to section 248-6, Hawaii Revised Statutes, shall be reimbursed to the State by that county in an amount equal to any mandatory salary adjustment or increase provided or paid to any of that county's officers or employees subject to section 34 or 34A where such salary adjustment or increase is, directly or indirectly, dependent upon and related to negotiated salary adjustments or increases received under collective bargaining agreements by civil service or other public employees covered by collective bargaining.

[16] The challenged portion of the bill actually comprised only a small portion of the bill passed by the Hawaii Legislature and signed into law by the Governor. The rest of the bill concentrated on salary increases for officers in the state executive branch including judges and other judicial officers, and certain officers of legislative service agencies. Also, the legislature created an advisory board to serve as a compensation review commission. Their duties were to examine the salaries of categories of non-civil service state and county employees and then recommend a salary schedule for these employees. H.B. Conf. Comm. Rep. No. 88, 11th Hawaii Leg., Reg. Sess., 1982 HOUSE J. 1210.

Much of the testimony presented at the legislative hearings concentrated on judicial pay increases. The Director of Personnel Services for the state offered written testimony concerning the salary freeze. He cited disparities between state and city and county of Honolulu compensation schemes. The salaries differed partly due to a 42% increase (compounded through July 1, 1981) for city and county department heads, while salaries for similar officers in the state remained stagnant. (Salaries for state officials were last adjusted on January 1, 1976.) Subsequent to 1976, those public officers whose pay was linked to collective bargaining increases continued to have annual pay adjustments. Thus the relationship between officers of the state and their city and county counterparts, although comparable in 1976, diminished. The Director of Personnel Services recommended passage of the pay bill in order to promote a catch-up adjustment for that group of public officials denied salary increases over the previous six years. Testimony presented by Donald Botelho, 11th Hawaii Leg., Reg. Sess. (1982).

[17] The plaintiffs included the counties of Hawaii, Honolulu, Kauai and Maui. Also included were the incumbent Mayor of Honolulu, her Managing Director, Deputy Managing Director, Director of Office of Information and Complaint, Chief and Deputy Chief of Police, Prosecuting and First Deputy Prosecuting Attorney, Bandmaster, City department heads and the first deputy or first assistant to those respective department heads at the time, in their individual capacities.

Additionally, Arthur E. Ross, a Deputy Prosecuting Attorney, filed a suit in his individual capacity, on behalf of himself and all other Deputy Prosecuting Attorneys and Corporation Counsel employed in the City's departments of Corporation Counsel and Prosecuting Attorney. The court later consolidated both suits. City and County of Honolulu v. Ariyoshi, 67 Hawaii ____, 689 P.2d 757 (1984).

[18] *Id.* at ____, 689 P.2d at 760.

The Supreme Court of Hawaii reversed. The majority, comprised of Justices Hayashi and Padgett, and Chief Judge Burns, sitting by designation, held the challenged sections to be a valid exercise of the legislature's function to control matters of statewide concern.[19]

Chief Justice Lum, joined by Justice Nakamura, dissented.[20] The dissent argued that Act 129, a statutory law, was subordinate to county provisions that governed the structure of county government. The Hawaii State Legislature's passage of Act 129, in the eyes of the dissenters, was an unconstitutional infringement on the very structure and organization of the county governments.[21] As such, it attacked the counties' ability to self-govern and eroded the meaning of county home rule.[22]

III. BACKGROUND

A. *History and Scope of Home Rule in Hawaii Since Statehood*

Prior to 1972,[23] all county charters, even if adopted under the state constitution, were no more than statutory charters.[24] The legislature therefore controlled the counties by means of statutory law that superseded all ordinances and charter provisions.

The 1968 Constitutional Convention (Con Con) changed this structure. The Con Con fashioned a home rule article based on the model constitution recommended by the American Municipal Association, omitting, however, the words "personnel" and "procedure" from the draft.[25] The drafters of the constitution

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[19] *Id.* at ____, 689 P.2d at 764. The trial court found section 35 constitutionally valid. The majority of the Supreme Court of Hawaii did not reach a conclusion as to the validity of section 35. Because they found both sections 34 and 34A constitutional, the issue of the validity of section 35 was moot.

[20] Justice Nakamura filed a separate dissenting opinion as to the invalidity of section 35 of Act 129. *Id.* at ____, 689 P.2d at 766.

[21] *Id.* at ____, 689 P.2d at 765 (Lum, C.J., dissenting).

[22] *Id.*

[23] Chikasuye v. Lota, 51 Hawaii 443, 462 P.2d 192 (1969) (present constitutional provisions, although enacted in 1968, were not to take effect until 1972).

[24] Fasi v. City and County of Honolulu, 50 Hawaii 277, 439 P.2d 206 (1968). This case, decided prior to the passage of the constitutional provision in question, held that the state statute superseded the Honolulu Charter on the issue of a salary increase for council members.

Even though Honolulu adopted its charter under then Article VII § 2 of the Hawaii Constitution, the Charter remained no more than a statutory charter subject to legislative control. *Fasi* provided the impetus for the 1968 constitutional amendment. STAND. COMM. REP. NO. 53, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 229 (1968).

[25] South Dakota adopted this model provision in 1962. The article provided the basis of a proposal submitted to the Constitutional Convention by the Hawaii State Association of Counties. STAND. COMM. REP. NO. 53, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HA-

deleted "personnel" so that the legislature would not be deprived of its power to enact and maintain such laws as the Civil Service Act.[26] Also, the drafters excluded "procedure" in order to preserve the authority of such statutes as the Administrative Procedure Act.[27] Thus the 1968 Con Con provided for county charter provisions to prevail over statutory provisions with respect to the executive, legislative, and administrative structure and organization of the counties.[28] The state could only affect the counties in these areas when transferring or reallocating a power or function to a county or when passing a general law.

Terms used in the constitutional provision such as "structure," "organization" and "general laws" are inherently ambiguous. Judicial decisions help define the actual parameters of home rule in Hawaii. How expansively courts interpret the concepts of "structure" and "organization" determines the actual degree of county autonomy.

B. *Restrictions on the Ability of the Legislature to Pass Laws Affecting the Counties*

The Hawaii State Constitution[29] limits Hawaii's legislature to enact only "general laws" for its political subdivisions.[30] The courts have defined "general"

WAII OF 1968 at 229 (1968).

[26] *Id.*

[27] *Id.* In a debate of the Committee of the Whole on Local Government, Delegate Ushijima stated:

> Well, Section 2 is the charter provision. We have by our action given certain areas constitutional right insofar as charter provisions are concerned, and that is in the field of executive, legislative, administrative structure and organization. I think the committee report is very clear as to the reasons why we left out procedure and personnel. We have had lots of witnesses who testified that insofar as personnel matters are concerned, we should retain it on a statewide level and retain the philosophy of Act 188 (Civil Service Act) which is presently in force. . . .

2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 422-23 (1978) (Statement of Delegate Ushijima).

[28] HAWAII CONST. art. VIII, § 2.

[29] Without a fairly specific restriction clearly enumerated in a state constitution, all state legislation is valid, subject to federal constitutional limitations. O. REYNOLDS, *supra* note 2, at 77, 91.

[30] HAWAII CONST. art. VIII, § 2. A general law is defined as follows:

> A statute is ordinarily regarded as a general law, if it has a uniform operation. Within the meaning of this rule, a statute has a uniform operation, if it operates equally or alike upon all persons, entities, or subjects within the relations, conditions, and circumstances prescribed by the law, or affected by the conditions to be remedied, or, in general, where the statute operates equally or alike upon all persons, entities, or subjects under the same circumstances. Mere classification does not preclude a statute from being a general law. A law is a general one where it relates to persons, entities, or things as a class, or operates equally or alike upon all of a class, omitting no person, entity, or thing belonging to the

very broadly.[31] In application, this constitutional restriction has not been difficult to overcome.

The greatest restriction on the legislature's power to regulate the counties relates to the structure and organization of the counties. Unless the legislature enacts a general law allocating or transferring a county's powers, charter provisions prevail over statutory requirements in these areas.[32] Structure and organization are sacrosanct—indeed they lie at the very core of home rule.

HGEA[33] addressed the validity of various provisions in the Maui Charter that conflicted with state law. The court upheld those charter sections relating to the composition of a county commission, an area of purely local concern. Similarly, the provisions providing for removal of the police chief, and for qualifications of the liquor commissioner and of the director of the water department were only local matters.[34] The court, however, declined to find that the work of the civil service and compensation administration had only local impact, finding instead that such activities concerned personnel matters, not basic structure and organization.[35] While many similarities may be drawn between *HGEA* and

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class. A special law, on the other hand, "relates to particular persons or things or to particular persons or things of a class . . . instead of all the class."

M. BEAMS, *supra* note 7 at 25.

[31] *See, e.g.*, Bulgo v. County of Maui, 50 Hawaii 51, 430 P.2d 321 (1967). In *Bulgo* the Chairman of the Maui County Board of Supervisors died while in office. He had already been elected to serve another term at that position. His successor was appointed prior to the termination of his term, and the successor insisted on holding the Chairmanship for the next two years in addition to the remainder of the old term. That year, in response to the Board's request, the Legislature passed a law providing special elections for county chairs when the chair dies before taking office. In response to a suit initiated by a taxpayer, the court held that such a law was general, and thus sustainable.

[32] HAWAII CONST. art. VIII, § 2.

[33] 59 Hawaii 65, 576 P.2d 1029 (1978). The first challenged provision in *HGEA* concerned the acquisition, establishment, and maintenance of a public water system. The court deemed this to be a local function based on the historical operation of waterworks by the County and on legislative delegation. *Id.* at 82, 576 P.2d at 1039-40. The court also held that other challenged provisions concerning liquor control and police functions were local concerns. *Id.* at 83, 576 P.2d at 1040. In so holding, the court simply agreed with legislative committee reports, which were allegedly based on public testimony, due deliberation, and consideration. All three conclusions involved some balancing of factors as well. The court considered the promotion of government responsiveness to local demands and that county budgets financed these functions. *Id.* at 84, 576 P.2d at 1040.

[34] *Id.* at 82-85, 576 P.2d at 1039-41.

[35] *Id.* at 86, 576 P.2d at 1041. An argument could be made that personnel is part of structure and organization based on a Louisiana precedent. La Fleur v. City of Baton Rouge, 124 So.2d 374 (La. App. 1960). In *La Fleur*, the city charter provision was similar to the Hawaii clause, differing only in that it contained "personnel" in its superior clause. The court held that personnel fell within the realm of the structure and organization of the government. Compensation was considered part of internal organization. The 1968 Constitutional Convention completely

Honolulu v. Ariyoshi, especially since both involved questions of employment, one major difference exists: the former involved civil service employees whereas the latter involved exempt employees.[36]

IV. The Decision

A. *The Majority*[37]

The Hawaii Supreme Court held that a state-imposed cap on salary increases for county officials did not violate the constitutional provision granting home rule to the counties. Compensation of the appointed county officials, the court ruled, was a matter of statewide concern.[38] The court classified the officials as personnel, and personnel are explicitly excluded from the structure and organization of county government.

A committee report from the 1968 Con Con provided the basis of the decision. The committee specifically deleted "personnel" from the draft presented to it, convinced that the legislature should not be deprived of the power to enact laws of statewide concern, such as the Civil Service Act.[39]

The majority also concentrated on *HGEA*, which held that the counties were not granted complete home rule.[40] In *HGEA* the court emphasized that the

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obviated this argument by passing the provision as it did, specifically excluding the word personnel from the home rule section. M. Beams, *supra* note 7 at 24-25.

[36] Justice Kidwell separately concurred and dissented in *HGEA*. He offered a standard to determine whether a law was of statewide importance: Is the decision of significance only to persons of a particular county or to the people of the state itself? 59 Hawaii at 89-90, 576 P.2d at 1043. In *Honolulu v. Ariyoshi*, the majority ignored this test, while the dissent implicitly followed similar logic in its opinion.

[37] Much of the majority opinion concentrated on the question of Plaintiff Arthur Ross' standing to challenge the statute. The court did find that Ross' salary schedule was contingent upon the civil service compensation scheme, and that Ross therefore had a personal stake in the outcome of this controversy.

[38] City and County of Honolulu v. Ariyoshi, 67 Hawaii at ____, 689 P.2d at 764.

[39] Stand. Comm. Rep. No. 53, 1 Proceedings of the Constitutional Convention of Hawaii of 1968 at 229 (1968).

[40] 67 Hawaii at ____, 689 P.2d at 763. The 1968 Constitutional Convention delegates debated the extent of the powers granted to the counties as follows:

> DELEGATE GOEMANS: Mr. Chairman, Delegate Ushijima, could you explain to me the concept in Section 2. We have often heard as a matter of law—heard it stated as a matter of law that a municipal government is a creature of the state. Inherent in that concept is the proposition that no sovereignty rests in a municipal body. It would appear on reading this that this is in fact a grant of sovereignty to the counties to a certain degree and if that is the case, is that constitutional?
>
> First question. The provisions in Section 2 concerning that certain matters shall be superior than to statute. Is that a grant of sovereignty to the counties?

deletion of "personnel" from the constitutional provision was intentional and

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DELEGATE USHIJIMA: We don't use the term "sovereignty." We use the term "home rule."

DELEGATE GOEMANS: Well, would you call it sovereignty?

DELEGATE USHIJIMA: Well, I don't know what your definition of sovereignty is. What we are doing here is to give certain basic rights, constitutional rights to the charters, to the various counties insofar as the enactment of their charter is concerned. You want to ask me if it's constitutional, I would say yes. Whether it is constitutional or not, I'd say yes. We're amending the Constitution, as I understand it.

DELEGATE GOEMANS: As this has been brought into, it is just accepted as a matter of law that the municipal government is a creature of the state.

DELEGATE USHIJIMA: All powers rest with the supreme court (sic) and that of the state. That is the Billings Rule. When you say constitutional, you mean in violation of the Constitution of the United States or our State Constitution?

DELEGATE GOEMANS: Well, I am talking about constitutional law generally. If that is a matter of law and if this provision does to a certain degree grant sovereignty and by sovereignty I mean that in a certain area the counties are no longer subject to control by the State, and by the State I mean, of course, the legislature, then it is a grant of sovereignty and then that statement that the counties are the creature of the state wouldn't apply to that degree. . . .

DELEGATE DODGE: I think that the answer to Delegate Goemans' question is found in Section 1 of Article I of the Bill of Rights where it says that all political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority. So the delegation of what power we are giving the municipalities or the counties under Section 2 comes from us. It doesn't come from the State. We can apportion or the people can apportion those powers among the several units of government any way they want to and because it is the Constitution, it is constitutional. . . .

DELEGATE GOEMANS: It isn't a matter here of spelling out what powers and functions are granted to the counties superior to legislative enactment. That is left to each of the counties to determine for themselves. We are just mandating them, it appears to me, mandating them the ability to spell out what their charter shall be. If we were in this Constitution specifically delineating what was going to apply to each county, then I could see that that would follow logically, but here we are just giving them the ability to do something without setting the limits, without being specific. It seems to be a grant of sovereignty to the counties which I don't know that you can do.

DELEGATE DODGE: Mr. Chairman, it seems to me that the phrase "grant of sovereignty to counties" is not what we have done in this committee report. What this Section 2 actually means, or means to me, and I think meant to the committee, was that we were just crowding out certain areas in protecting counties from legislative interference, while reserving at the same time to the state legislature the power to withdraw powers and functions or reallocate them between the county and the state government. And we felt that in the area of the things that are spelled out in Section 2, those were not of statewide concern. Those were of purely local concern and therefore the counties should be able to determine those things themselves. This is certainly the provision that seems to me that's in between a constitutional grant of local government, what we normally call "residual powers," and the concept of only delegated powers. It falls somewhere in the middle. . . .

that the state government maintained the right to impose laws of a general nature. Finding that Act 129 applied to plaintiffs' salaries, the majority supported its decision by citing the holding in *HGEA*.[41]

In addition, the legislative finding[42] that compensation of county officials was

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Comm. of the Whole Debates, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 424-25 (1968).

[41] 67 Hawaii at ____, 689 P.2d at 763.

[42] The findings of fact for Section 34 were as follows:

> The purpose of this section is to prohibit the increase of the salaries of certain city and county officers of the executive branch June 30, 1982. The salaries of elected officials, department heads, first deputies to department heads, and certain officers and employees under the mayor's offices which are at least equal to or more than the salary of a department head are subject to this section.
>
> Efficient and effective government requires a reasonable relationship among the salaries of full-time, top-level officers of all jurisdictions according to levels of responsibilities. Salary inequities and disparities among top-level officers produce morale problems, which may result in less than the best performance of duties by officers with the problems.
>
> The State has recognized the principle of equal pay for equal work to minimize such problems, at least for lower level public officers and employees. The principle has been implemented in civil service classification and collective bargaining laws of statewide application which cover civil service officers and employees of the State and counties. Implementation of the principle has provided a system of public employment which promotes efficient and effective government at all levels by requiring approximately the same compensation to officers and employees with essentially the same responsibilities, experience, and work performance.
>
> Unlike the salaries of their subordinate civil service officers and employees which are rationally interrelated under the classification and collective bargaining processes, the salaries of top-level officers of the State and counties are not presently interrelated in a similar manner. Each of the jurisdictions establishes the salaries independent of the other. Thus, there is no formal schedule which interrelates salaries according to rational criteria among all jurisdictions.
>
> The legislature finds that a schedule of integrated, equitable, and reasonable salaries among top-level officers of all jurisdictions is necessary to provide for more efficient and effective government. . . .
>
> [T]hus, the legislature finds that, to ensure a stable situation while the commission is conducting its review and for the fullest benefit to be derived from the intended schedule, the salaries of top-level county officers must not be increased until after legislative review of the recommendation.
>
> The legislature also finds that the salaries of certain top-level county officers subject to this section are adjusted automatically when adjustments are made to the salaries or wages of their subordinate employees under collective bargaining agreements.
>
> Such an automatic adjustment provision is unsound and inadvisable public policy which is detrimental to the public interest. . . .
>
> The legislature further finds that such automatic adjustments for any top-level officer of any level of government are anathema to good government and to present sunshine laws of this State . . . .
>
> The legislature finds that this section concerns purely personnel matters within the pow-

of statewide concern supported the *Honolulu v. Ariyoshi* decision. The court accepted the premise that integration of the county and state salary structures to provide a more efficient and effective government for the people of Hawaii was a facially valid legislative enactment. As a result, in this area of statewide concern, statutory provisions superseded charter provisions.

B. The Dissent[43]

Finding that the plaintiffs' compensation was within the county's authority,

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ers of the legislature and does not intrude upon the executive or administrative structure or organization of any county. The legislature further finds that this section is a law of statewide concern and interest and is necessary to provide for more efficient and effective government for the people of Hawaii.

The legislature further finds that prohibiting the increase of salaries of county officers subject to this part does not affect the powers and functions of the officers. These county officers have certain powers and functions which are assigned under state general law, county charter provisions, or county ordinance. The extent of the powers and functions are not dependent upon the amount of salaries. . . . Thus, the legislature finds that this section in no way limits the powers or changes the functions of the officers, nor does this section alter the powers such that the ability to perform the functions are impaired, nor does this section alter functions such that the powers to accomplish them are insufficient.

The findings of fact for Section 34A were very similar:

A basic conflict of interest exists when the elected or appointed county officers whose salaries are adjusted according to collective bargaining agreements are parties in negotiating the collective bargaining agreements . . . .

[T]he legislature finds that the current problem of an inequitable, unintegrated, and uncoordinated compensation system between and among certain high level elected and appointed officers or employees of the state and county governments, especially between and among the counterpart positions at these two levels of government, is an urgent and important matter of statewide concern and interest requiring immediate legislative action . . . .

[T]he legislature finds that this section is a law of statewide concern and interest which is necessary to remedy the unsound public policy referred to above which is detrimental to the public interest. Furthermore, the legislature finds that no charter provision of any county specifically requires the salaries of the subject county officers or employees to be automatically adjusted according to adjustments under collective bargaining agreements. The legislature also expressly notes that the new statutory prohibition contained in this section is not only a law of statewide concern but also a law of general application which applies equally, across the board to all counties and the State.

Act of May 27, 1982; 1982 Hawaii Sess. Laws 193, 213-14.

[43] 67 Hawaii at ____, 689 P.2d at 764. The dissent agreed that Arthur Ross had standing to contest the constitutionality of sections 34 and 34A of Act 129. Additionally, Justice Nakamura filed a separate opinion in which he endorsed full scale Chief Justice Lum's conclusion. *Id.* at ____, 689 P.2d at 766. He further wrote that section 35 was infirm, and represented "a transparent attempt to exercise by indirection a power withheld from the legislature by the framers of the constitution and the people of Hawaii." *Id.* Justice Nakamura would have held section 35

Chief Justice Lum contended that the majority misinterpreted and expanded *HGEA*.[44] He compared the types of employees involved in *HGEA*, civil service workers, with those in *Honolulu v. Ariyoshi*, key officers and employees exempt from civil service. The dissent asserted that the majority exceeded the bounds of *HGEA* in its *Honolulu v. Ariyoshi* decision by casting key political appointees in the same category as civil service appointees.[45]

Chief Justice Lum argued that Act 129 was not a general law. First, the pay bill did not allocate or reallocate the powers or functions of the county governments. Second, the law was not of statewide concern. He argued therefore that charter provisions prevailed over the statutory Act 129. The freezing of salaries, the Chief Justice wrote, "strikes at the very heart of the structure and organization of county governments."[46] The majority opinion, in his view, breached the basic principles and concepts of home rule.

V. COMMENTARY

The Hawaii State Constitution imposes a number of requirements that the legislature must fulfill in order to pass a valid law relating to the counties. First the law must be general, a requirement arguably fulfilled by Act 129.[47] The constitution states that a general law need not be applicable to all counties[48] and also authorizes the legislature to enact laws of statewide concern.[49]

Only general laws that allocate or reallocate governmental "powers and functions" are constitutional.[50] While Act 129 may well be a general law, for "general" may be broadly defined,[51] Act 129 arguably changes neither a power nor a function of the county government. The majority opinion did not address the allocation of powers issue.

Instead, the court concentrated on the issue of whether the pay bill was of statewide concern, bypassing the critical issue of power allocation. Complete deference to the legislative finding that county salaries affected the entire state

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unconstitutional. *Id.*

[44] 67 Hawaii at ——, 689 P.2d at 765.

[45] *Id.*

[46] *Id.*

[47] *See supra* notes 30-31 and accompanying text.

[48] HAWAII CONST. art VIII, § 2. At the 1968 Committee of the Whole debates, the delegates briefly discussed general laws. Delegate Ushijima stated "[W]e also took into account some of the problems that might possibly arise insofar as uniformity and charter provisions are concerned, and that is why we have included the last paragraph of the proposed Section 2." 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 423 (1972).

[49] HAWAII CONST. art. VIII, § 6.

[50] *Id.* at § 2. The dissent pointed out that no powers changed because the counties still had the opportunity to set salaries.

[51] *See supra* notes 30-31 and accompanying text.

enabled the court to avoid consideration of the power allocation clause of the state constitution. When voters endorsed the 1968 constitutional provision, Hawaii's counties did not receive "complete home rule;" they received "only limited freedom from legislative control."[52]

Of critical importance to the *Honolulu v. Ariyoshi* opinion is the definition of "personnel." Clearly, the drafters of the constitutional amendment intended all civil service matters to be left to the legislature,[53] an entirely appropriate delegation of power because compensation of state civil service employees is a matter of statewide concern with which the legislature should properly deal.

County officials, however, are not similarly situated as civil service employees. First, civil service employees are selected in a nondiscriminatory fashion and must comply with standard selection regulations.[54] In contrast, the mayor or her department heads appointed the officials in *Honolulu v. Ariyoshi*. Appointment of these key officials was not politically neutral. Rather, the administration selected these individuals on the basis of their ability to implement the executive's directives and policies. These were loyal political party members, officials that formed an integral part of county administration.

Clearly the state now has the power to regulate public executives' compensation, even though this regulation limits a county's ability to determine its own course. Capping the salary level of key officials curtails the attractiveness of those positions to potential county applicants. With a dearth of qualified applicants for key positions, a county's ability to function is limited in a very direct and serious fashion.[55] Thus, the impact of the *Honolulu v. Ariyoshi* decision on the counties may prove to be problematic.

VI. IMPACT

Honolulu v. Ariyoshi has both an immediate and far-reaching impact in both legal and political terms. In the immediate future, the salaries of Honolulu officials will drop to match the prevailing salaries of state employees. Not surprisingly, some of the incentive to work for local government may also diminish.[56] The caliber of potential county appointees, then, may decline as a result

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[52] STAND. COMM. REP. NO. 53, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 230 (1972).

[53] *Id.* at 229 and Comm. of the Whole Debates, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 422 (1972).

[54] *See* HAWAII REV. STAT. chs. 76 and 77 (1976).

[55] In his dissent Chief Justice Lum warned that this cap on salaries might lead to the erosion of the county governments. 67 Hawaii at ____, 689 P.2d at 765.

[56] At the 1982 Senate Ways and Means Committee hearing the Director of Personnel Services for the state presented the following table to show the disparities between state and county compensation for officials:

of this decision.[87]

While salaries at the county level fall, morale among state workers may rise. The majority premised their holding that Act 129 was a law of statewide con-

SALARY RELATIONSHIP AMONG STATE EXECUTIVES, CITY AND COUNTY OF HONOLULU EXECUTIVES, AND SUBORDINATE STATE EMPLOYEES

	Prior Differences 1-1-76		Current Differences 7-1-81		Projected Differences 7-1-82	
Governor	$50,000	+$5,097	$50,000	−$10,172		−$16,413
Mayor	44,903	(+11%)	60,172	(−21%)	$66,413	(−33%)
Lieutenant Governor	$45,000	+$4,468	$45,000	− $9,888		−$15,375
Managing Director	40,532	(+11%)	54,888	(−22%)	$60,375	(−34%)
State Dept. Heads	$42,500	+$7,075	$42,500	− $7,496		−$12,386
C & C Dept. Heads	35,425	(+20%)	49,896	(−17%)	$54,886	(−29%)
	HRS §78-18 not to		Cvl. Srvc.	$47,652	Cvl. Srvc.	$52,417
Highest Paid Subordi-	exceed deputies'		DOE	$46,052	DOE	$50,657
NATE STATE EMPLOYEES*	salary ($38,000)		UH	$55,648	UH	$60,935

*Statutory limitation declared unconstitutional, Civil No. 66791, *PEMAH vs. State of Hawaii*. Salaries of subordinates exceed those of superior officers. Projected differences based on a 10% adjustment effective July 1, 1982 for civil service and DOE subordinates and a 9.5% adjustment effective July 1, 1982 for UH faculty.

Testimony presented by Donald Botelho before the Senate Committee on Ways and Means, 11th Hawaii Leg., Reg. Sess. (1982).

[87] The salary cap may be only a temporary measure. The appointed Commission reported their studies of the levels of compensation to be awarded various levels of employees to the Twelfth Legislature on February 28, 1983. The Commission recommended:

A. that specific rates be established for the four highest executive positions, and

B. that in respect to the concept of home rule, that the appropriate governing offices, boards or agencies establish specific rates of compensation for the other included executives within the ranges provided by the integrated salary structure.

Public Officers and Employees Compensation Review Commission, Report to the Twelfth Hawaii State Legislature, 12th Sess. (1983).

The Commission also proposed a Hawaii State Integrated Salary System. The Commission grouped varying classifications of employees together and proposed thirteen different salary ranges. For instance Group VI salary scale ranged from $48,400-56,600. Included in the Group VI classification were Deputy Department Heads (City and County), Department Heads (Neighbor Islands), Deputy City Clerk (City and County), Deputy Director of Council Services (City and County), Corporation Counsel, First Deputy (City and County), and Prosecuting Attorney, First Deputy (City and County).

In Group IX, the Commission included Managing Director (City and County), Mayor (Neighbor Islands), Circuit Court Judge, Administrative Director of the State, and Associate Judge, Intermediate Court of Appeals. The recommended salary level of Group IX was $60,400-72,600.

Group X included the Mayor (City and County), Chief Judge, Intermediate Court of Appeals, and Associate Justices. Slated salary level for that group was $70,400-84,600. The Governor alone occupied Group XIII with a salary range of $89,400-106,600.

The Commission further recommended the organization of a permanent compensation commission to conduct periodic reviews of the executive compensation structure, to approve the placement of new executive classifications, and to periodically review the classifications to assure that the classifications retain the appropriate salary grades. *Id.*

cern on the legislative finding that state workers' motivation suffered due to higher county salaries. Theoretically, state workers benefitted by the salary cap on comparable workers at comparable levels, and state productivity should increase as a result.[58]

From an economic standpoint, Act 129 aids the state as well. Without a cap on salaries, the state might be forced to match salaries in order to compete with county salaries. In a time of fiscal austerity like the present, such a situation could be disastrous for the state government.[59]

Act 129 is a significant example of a very pervasive element that permeates the Hawaiian governmental structure—centralization. Traditionally, governmental activities in Hawaii centered around Honolulu.[60] Local government played a subsidiary role to that of the state. The holding in *Honolulu v. Ariyoshi* continues this tradition while at the same time limiting the counties' opportunities to assert autonomy.

Such complete centralization, however, competes with the fundamental nature of home rule. In home rule, local governments make the decisions integral to their welfare. In Hawaii, the Con Con delegates specifically precluded state interference from the structure and organization of municipal governments unless powers were either allocated or changed.[61] Such areas as the number of members sitting on a county council were clearly left within the domain of the local government.[62] Salaries of county appointees, the supreme court recently decided, no longer fall within those parameters.

Centralization, while traditional, may no longer be the most efficient method of government for Hawaii. Presently, both the state and the county legislate in many areas. For instance, in the area of land development, a myriad of local and

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[58] *See supra* note 42 and accompanying text.

[59] With the passage of Act 129, the Legislature recognized that state executives often did not receive the same compensation as county employees. For instance, a House Committee reported:

> [T]he salaries of elected and appointed county officers, in general, have also been more frequently and more adequately adjusted in comparison with the salaries of the State officers covered by this bill. . . .
>
> In viewing the foregoing, your Committee believes that salary adjustments for the State officers covered by this bill are merited to alleviate the existing pay inequities in the public sector. . . .

H.R. STAND. COMM. REP. NOS. 686-82 and 790-82, 11th Hawaii Leg., Reg. Sess., 1982 HOUSE J. at 1210, 1262.

[60] Honolulu was named the capital of Hawaii in 1850. Hawaii is the only state in the United States to be ruled by a monarchy at one time in its history. UNIVERSITY OF HAWAII DEPARTMENT OF GEOGRAPHY, ATLAS OF HAWAII 98 (1983).

[61] HAWAII CONST. art. VIII, § 2.

[62] STAND. COMM. REP. NO. 53, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 at 229 (1972).

state permits are necessary before commencement of construction.[63] This dual structure is time consuming, expensive, and creates an anti-development and anti-business environment.[64]

Increased power to implement decisionmaking at the county level would allow for variations between islands rather than imposing uniformity on all. Counties differ as to strengths and weaknesses at an institutional as well as at a resource level. Rather than imposing one state structure on all local government, home rule recognizes the variations of each government. Home rule assumes that the state may not interfere in an area in which a local government best knows its needs and legislates to fulfill those needs. Such a ruling certainly would bestow more autonomy on Hawaii's counties, as well as convey respect to local government. Instead, at least temporarily, statewide uniformity prevails, unresponsive to the unique realities of each of the counties.[65]

Undeniably, the Hawaii Supreme Court in *Honolulu v. Ariyoshi* tightened the parameters within which home rule operates. The court expanded the already liberal interpretation of "general" and "statewide" to encompass legislative findings as to morale. The court did not question the legislative determination before endorsing it verbatim.

Hawaii's highest court expanded the meaning of personnel as well, while limiting the definition of structure and organization. The latter can no longer

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[63] D. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 170-71 (1984). Professor Callies stated that at least 30 development regulations may apply to a modest shoreland development, even if the development was zoned for development under county zoning ordinances and was properly classified under state land use law. *See generally* F. BOSSELMAN, D. FEURER & C. SIEMON, THE PERMIT EXPLOSION (1976).

[64] The problem reached national attention with a *Forbes* [*Magazine*] article published in 1983. One paragraph stated:

> [H]awaii's political leaders, led by Governor George Ariyoshi, could compete with the Soviet Union's bureaucrats in their rigid regulation of every facet of the islands' economic life. Example: Suppose you want to manufacture circuit boards in Hawaii. Better check first where you fit in the all-encompassing State Plan that has governed the islands since 1978. (Try Section 226-10: "objective and policies for the economy-potential growth activities.") Then prepare to wade through the morass of implementing boards and commissions—it may take four to six years to approve a plant site—and brace yourself for "protective" measures like the 4% use tax on equipment and purchases made outside the state and a 0.5% excise on manufactured goods. No wonder high-technology firms, though assiduously courted by Ariyoshi's planners, employ a scant 200 workers in Hawaii.

Cieply, *East of Eden*, 131 FORBES, Jan. 31, 1983, at 34, 35.

[65] 762,534 people live in Honolulu, while the population of Hawaii, the next most populated county, is 92,053. Hawaii, however, comprises 63% of the states' land while O'ahu, where Honolulu is located, is the smallest of the states' four counties. The average income on O'ahu is $23,556. On Hawaii the average per capita income is $19,132. Certainly diversities between the counties exist. UNIVERSITY OF HAWAII DEPARTMENT OF GEOGRAPHY, ATLAS OF HAWAII 107-20 (1983); M. BEAMS, *supra* note 7 at 5.

encompass the former, and all decisions as to personnel are left to the state. State statutes now preempt county ordinances in the area of public employment of any type.

Both the house and senate drafters were obviously aware that the pay bill impacted on home rule.[66] The legislature nonetheless defined it as "of statewide importance," and the Hawaii Supreme Court supported the move. This uncritical judicial endorsement of legislative action is crucial because the Hawaii Supreme Court interprets the home rule provision in the Hawaii Constitution very narrowly. Home rule counties simply do not have autonomy in Hawaii. Rather, counties may legislate as they choose, subject to legislative intervention on matters of "statewide" importance, a term to be defined apparently as broadly as the legislature chooses. If the court continues to endorse uncritically the legislature's actions in this area then little remains of the constitutional guarantee of county home rule.

VII. CONCLUSION

The decision in *Honolulu v. Ariyoshi*, which defined home rule in Hawaii for the second time, is the most important to date because it further constrains the ability of the counties to legislate on their own behalf. In addition, the opinion strengthens the power of the legislature to act on matters of general concern, an area broadly defined by both the constitution and the courts. An active legislature, supported by the Hawaii Supreme Court, will continue to impact strongly on county government autonomy in Hawaii.

Elizabeth Kent

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[66] *See supra* note 42 and the legislative findings and purpose section therein. Note particularly that much of the language mirrors that of the constitutional amendment.

Further, Arthur Ross testified against the bill at a Senate Government Operations Committee hearing. He specifically stated that if the bill passed, he intended to take the matter to court. Interview with Arthur E. Ross, Deputy Prosecutor, City and County of Honolulu, in Honolulu (Jan. 8, 1985).

"To Waive All Rights and Interests"—The Problem With Antenuptial Agreements in Hawaii: *Rossiter v. Rossiter*

I. INTRODUCTION

In recent years, the incidence of marital separation and divorce has risen noticeably.[1] This phenomena, in part, explains the increased use of antenuptial agreements[2] by couples about to be married.[3] In *Rossiter v. Rossiter*,[4] the Hawaii Intermediate Court of Appeals (ICA) addressed an issue of first impression in Hawaii concerning the validity and effect of an antenuptial agreement.[5]

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[1] W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 897 (1984); Clark, *Antenuptial Agreements*, 50 U. COLO. L. REV. 141 (1979). *See generally* Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAWAII L. REV. 381 (1984). Consider these statistics for Hawaii:

Year	*No. of Divorces*	*Per 1,000 Persons*
1970	2,589	3.3
1980	4,438	4.6

STATE OF HAWAII DATA BOOK 93 (1983).

[2] As the name implies, an antenuptial agreement is "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." UNIF. PREMARITAL AGREEMENT ACT § 1(1), 9A U.L.A. 269, 270 (Supp. 1984). Typically, antenuptial agreements govern alimony and property distribution. Clark, *supra* note 1, at 141; Note, *For Better or For Worse . . . But Just in Case, Are Antenuptial Agreements Enforceable?*, 1982 U. ILL. L.F. 531, 534 [hereinafter cited as Note, *For Better or For Worse*]. However, antenuptial agreements can be used to define a variety of issues affecting a marriage, such as child support, personal behavior, or relationships with other persons. W. WADLINGTON, *supra* note 1, at 1114. *See also* UNIF. PREMARITAL AGREEMENT ACT § 3, 9A U.L.A. at 271 (Supp. 1984).

[3] W. WADLINGTON, *supra* note 1, at 1114; Clark, *supra* note 1, at 141; Note, *For Better or For Worse*, *supra* note 2, at 531. The increase in the use of antenuptial agreements can also be attributed to changing roles of men and women, an awareness that the marriage might not last for life, and the desire to retain a self-identity. W. WADLINGTON, *supra* note 1, at 1114.

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

[5] A secondary issue addressed by the court involved a jurisdictional question. Defendant-husband raised an issue concerning the sale of land to which plaintiff-wife's mother held title. He claimed that his mother-in-law held the land in trust and that the land should have been listed for sale in the division of the marital property. However, the court affirmed the family court's

The *Rossiter* court refused to enforce the oral antenuptial agreement alleged by the husband.[6] The court held that because the agreement was oral and made "in consideration of marriage,"[7] a writing was required to satisfy the statute of frauds.[8] Although the doctrine of part performance can operate as an exception to the writing requirement,[9] the court concluded that the husband's actions were insufficient to constitute part performance of the agreement.[10] Moreover, in dicta, the court said that its discretionary power to apply equitable principles could be used to override an agreement, despite its validity.[11] The court reasoned that "[a] valid antenuptial agreement is only one of the factors to be considered by the court in making an equitable distribution of property."[12] Thus, even if the court had found the agreement valid, its decision not to enforce the agreement could find an alternative justification in equity.

This note focuses on both the statute of frauds holding and the equity discussion.[13] It begins by analyzing the court's application of the statute of frauds. Particular emphasis is given to the interpretation of the phrase "in consideration of marriage," which placed the agreement within the statute, and to the doctrine of part performance, which failed to take the agreement outside the statute. This analysis is followed by a discussion of the court's discretionary power to invoke equitable principles, placing particular emphasis on the difference between equity and traditional contract doctrines.

Finally, the note presents a discussion of the legal and practical implications

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decision that it had no jurisdiction to hear matters affecting title of the record holder of property who was not a party to the claim. *Id.* at 333-37, 666 P.2d at 620.

[6] 4 Hawaii App. at 334, 666 P.2d at 619.

[7] The court's interpretation of "in consideration of marriage" is critical to this case. *See infra* notes 59-90 and accompanying text.

[8] 4 Hawaii App. at 338, 666 P.2d at 619. The Hawaii Statute of Frauds is found in HAWAII REV. STAT. § 656-1(3) (1976). *See infra* text accompanying note 54.

[9] *See infra* notes 91-110 and accompanying text.

[10] 4 Hawaii App. at 339, 666 P.2d at 621.

[11] *Id.* at 339-40, 666 P.2d at 621. A point of much debate is how the court's discussion of equitable principles should be treated. The language of the court suggests that it is an alternative holding. However, this author has chosen to analyze that portion of the opinion as dicta. Dicta are defined as:

> Opinions of a judge which do not embody the resolution or determination of the court. Expressions in the court's opinion which go beyond the facts before the court and therefore are individual views of [an] author of [an] opinion and [are] not binding in subsequent cases.

BLACK'S LAW DICTIONARY 408 (5th ed. 1979).

One commentator, perhaps in an attempt to reach a balance, classified the equity discussion as an "alternative rationale." Kastely, *supra* note 1, at 398.

[12] *Id.* at 340, 666 P.2d at 621-22.

[13] *See supra* note 5.

of the decision in Hawaii. Given the rise of divorce and separation cases in recent years, the courts are more frequently called upon to determine the division of property owned by the couple.[14] Where the parties allege the existence of an antenuptial agreement governing rights and obligations in the event of divorce, *Rossiter* is an important case casting doubt on the enforceability of such agreements in general, and of oral agreements in particular.

II. FACTS

Don and Patricia Rossiter were married in December 1973 in California.[15] Three months later, in March 1974, the couple moved to Hawaii and purchased property in the town of Moloaa on the island of Kauai.[16] Over the span of a few years, they built and furnished a home on the property as well as established an auto repair business in a nearby town.[17]

Don and Patricia each made personal contributions of money or other assets to their marriage. Generous gifts to Patricia from her family, totaling $21,600, financed a good portion of the couple's personal and business expenses.[18] In addition, Patricia contributed $3,000 of her own money for a total contribution of $24,600.[19] In comparison, Don brought into the marriage a sailboat purchased at $3,995 in 1966 and some auto repair tools.[20] With the aid of his sons from a previous marriage and his friends, Don also cleared the Moloaa land and constructed the house where the couple resided.[21]

In 1981, Patricia filed for divorce.[22] During the course of the divorce proceedings, Don contended that the couple had made an oral agreement "prior to

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[14] Kastely, *supra* note 1, at 383.

[15] 4 Hawaii App. at 335, 666 P.2d at 619.

[16] *Id.* The couple resided together in Hawaii until their separation in 1981. Brief for Appellant at 3, Rossiter v. Rossiter, 4 Hawaii App. 333, 666 P.2d 617 (1983).

[17] *Id.* at 335, 666 P.2d at 619. The repair shop was located in Kilauea, Kauai, and was known as "Don's Kilauea Garage." *Id.*

[18] *Id.* When Don and Patricia were married, they received $5,500 as a gift from Patricia's mother. The couple used these funds to make the $8,000 down payment on a piece of unimproved property and to purchase building materials. In 1976, Patricia received an additional $5,000 gift from her mother with which the couple purchased additional building materials, made payments on the property, and established Don's auto repair business. In 1979, a $6,000 gift to Patricia financed the purchase of home furniture, building supplies, and business expenses. Finally, in 1980, Patricia's mother gave her $5,100 for medical/living expenses and house payments. *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

and conditional to [the] marriage"[23] whereby Patricia would "never" force the sale of their marital home.[24] The family court, however, in a Supplemental Decree of Absolute Divorce, disregarded the alleged oral antenuptial agreement and ordered the sale of the Moloaa residence.[25] The proceeds of the sale were to be used, among other things, to reimburse Patricia $18,000 for monetary contributions to the marriage. The remaining balance was to be divided equally between the couple.[26]

Don appealed the family court ruling.[27] He objected to the sale of the house and contended that his actions constituted part performance of the oral agreement which relieved him of the statute of frauds writing requirement.[28] The ICA disagreed and affirmed the lower court's decision.[29]

III. The Law Governing Antenuptial Agreements

A. *Enforceability of Antenuptial Agreements as a Matter of Policy*

Prior to the 1970's, courts in general viewed antenuptial agreements contemplating a possible divorce[30] unfavorably.[31] Two policy reasons supported this

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[23] *Id.* at 338, 666 P.2d at 620.

[24] *Id.* at 336, 666 P.2d at 619.

[25] *Id.* On October 22, 1981, the family court entered a Decree of Absolute Divorce. On January 4, 1982, the appellate court entered the Supplemental Decree of Absolute Divorce which formed the basis of Don's appeal. *Id.*

[26] *Id.* In addition to reimbursing Patricia, proceeds from sale of the house would cover: (1) costs of the sale, e.g., realtor's fees; and (2) compensation to a hired carpenter for materials and services rendered during construction of the residence. *Id.*

[27] *Id.* at 334, 666 P.2d at 618.

[28] *Id.* at 336, 338, 666 P.2d at 620.

[29] *Id.* at 340, 666 P.2d at 622.

[30] Many jurisdictions have long recognized the enforceability of antenuptial agreements that seek a distribution of property upon the death of one spouse, as long as they are free from fraud and overreaching and reflect a full and free disclosure between the spouses as to their respective assets. Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, (1977); Walker, *Waiver of Maintenance: Is It Enforceable?*, 6 FAM. ADVOCATE 22 (1984). *See* list of cases cited in Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500, 504 (1984).

Such contracts are held to be conducive to marital stability and thus in harmony with public policy. *Gross*, 11 Ohio St. 3d at 105, 464 N.E.2d at 504. Factors for upholding their validity include the spouses' interest in preservation of their respective estates and a reasonable desire to avoid disputes concerning property after one spouse's death. *Id.*

In Hawaii, property division agreements contemplating possible death are authorized in the Uniform Probate Code that has been adopted and codified at chapter 560, Hawaii Revised Statutes. The statute reads in pertinent part:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or

view. First, courts found that antenuptial agreements ran contrary to the state's strong interest in preserving marital stability.[32] Agreements where one spouse waived rights to marital property were seen as an inducement for the other spouse to seek divorce and thereby retain all the property for himself or herself. For example, in a 1964 Tennessee case,[33] the court took a clear position against an agreement limiting the wife's interest upon divorce when it said:

> Such contract could induce a mercenary husband to inflict on his wife any wrong he might desire with the knowledge his pecuniary liability would be limited. In other words, a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay.[34]

Economic concerns comprised the second policy reason for the courts' refusal to enforce antenuptial agreements. Courts were unwilling to enforce agreements limiting or eliminating a spouse's responsibility to provide financial support for fear that the other spouse might become a ward of the state.[35] For example, in a 1908 Wisconsin case,[36] the court said:

> The law requires a husband to support, care for, and provide comforts for his

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waiver signed by the party waiving after fair disclosure.
HAWAII REV. STAT. § 560:2-204 (1976).

[31] Norris v. Norris, 174 N.W.2d 368 (Iowa 1970); Ledoux v. Her Husband, 10 La. Ann. 633 (1855); Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697 (1968); Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).

[32] *See, e.g.*, Ledoux v. Her Husband, 10 La. Ann. 663 (1855) (antenuptial agreement where wife forfeited certain property rights not enforced because of public policy to preserve order and good morals). *See also* L. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW (1981); Note, *For Better Or For Worse*, *supra* note 2.

[33] Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288 (1964).

[34] *Id.* at 604, 385 S.W.2d at 293. See also Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697, 699 (1968) where the court said:

> If such an agreement as the one alleged by respondent were enforceable, it would induce the wife to goad the husband into separating from her in order that the agreement could be put into effect and she could strip him of all his property. Our society had been built around the home, and its perpetuation is essential to the welfare of the community. And the law looks with disfavor upon an agreement which will encourage or bring about a destruction of the home.

[35] *See, e.g.*, Williams v. Williams, 29 Ariz. 538, 243 P.2d 402 (1926) (refusal to enforce antenuptial agreement where the husband attempted to modify his duty to provide financial support); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906) (court unwilling to enforce antenuptial agreement that limited support obligations); Ryan v. Dockery, 143 Wis. 431, 114 N.W. 820 (1908). *See also* Note, *For Better or For Worse*, *supra* note 2.

[36] Ryan v. Dockery, 134 Wis. 431, 114 N.W. 820 (1908).

> wife in sickness, as well as in health. . . . The husband cannot shirk [this requirement], even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife . . . cannot vary the personal duties and obligations to each other which result from the marriage contract itself.[37]

In contrast, the 1970's witnessed the emergence of a different trend toward greater relaxation of the traditional restrictions placed on antenuptial agreements.[38] The trend began with the landmark case of *Posner v. Posner*[39] in which the Florida Supreme Court ruled that if the antenuptial agreement were valid and enforceable at the time made, it should be upheld like any other valid contract, subject to judicial modification in the event of changed conditions at the time of divorce.[40]

This case, decided in 1970, involved a divorced millionaire-husband and a twenty-seven year old saleswoman-wife.[41] To appease the husband's reluctance to marry for fear of losing his fortune to his wife, the wife proposed, and the husband accepted, an antenuptial agreement whereby she would receive only $600 per month in alimony. When the couple divorced a few years later, the wife sued for a larger alimony award.[42]

The Florida Supreme Court recognized the increasing prevalence of divorce and the recent liberalization in divorce laws with the advent of no-fault divorce.[43] Such changes justified and necessitated a change in public policy.[44] The

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[37] *Id.* at 432, 114 N.W. at 821.

[38] *See infra* note 47.

[39] 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

[40] *Id.* at 386. The *Posner* court's holding was in accord with FLA. STAT. ANN. § 61.14 (West 1969 and Supp. 1983).

[41] 206 So. 2d 416, 420 (Fla. 1968) (Swan, J., dissenting).

[42] *Id.* at 416.

[43] 233 So. 2d at 384. The court said:

> This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no "guilty" party—is being adopted by many groups and has been adopted by the State of California in a recent revision of its divorce laws providing for dissolution of a marriage upon pleading and proof of "irreconcilable differences" between the parties, without assessing the fault for the failure of the marriage against either party.

Id.

[44] *Id.* ("the institution of marriage is the foundation of the familial and social structure of our nation and as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the 'sanctity' of a marriage . . .held by our ancestors only a few generations ago, has been greatly eroded in the last several decades . . . . With divorce such a common place fact of life, it is fair to assume that many prospective marriage partners . . . might want to . . . agree upon . . . the disposition of their property and the alimony rights of

court stated: "We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists."[45] In order to be consistent with this change, the court upheld the agreement and discarded the "contrary to public policy" rule.[46]

Following the *Posner* decision, other courts began treating antenuptial agreements more favorably.[47] They recognized that certain antenuptial agreements, particularly those concerning property rights,[48] did not necessarily encourage or

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the wife in the event their marriage, despite their best efforts, should fail. . . .) *Id.*

[45] *Id.*

[46] *Id.*

[47] Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984); Hill v. Hill, 356 N.W.2d 49 (Minn. App. 1984); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Marschall v. Marschall, 195 N.J. 16, 477 A.2d 833 (1984); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984). *See also* Note, *For Better or For Worse*, *supra* note 2, at 540. For a recent list of cases and statutes from the various jurisdictions regarding antenuptial agreements, see Freed, *What the States Say About Prenuptial Agreements*, 6 FAM. ADVOCATE 26 (1984).

The *Gross* court summarized some of the factors contributing to this favorable evolution of policy as:

> [T]he greater frequency of divorce and remarriages, the percentage drop in marriage generally, the adoption by a number of states of the Uniform Marriage and Divorce Act and most significantly, the widespread adoption of "no-fault" divorce laws.

11 Ohio St. 3d at 104, 464 N.E.2d at 505.

[48] There is a split of authority among the states as to whether a premarital agreement may control the issue of spousal support and maintenance. *See* UNIF. PREMARITAL AGREEMENT ACT § 3 comment, 9A U.L.A. at 271. Some states do not permit a premarital agreement to control the issue. *In re* Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979); Fricke v. Fricke, 42 N.W.2d 500 (Wis. 1950). *See* Frey v. Frey, 298 Md. at 563 n.3, 471 A.2d at 711 n.3.

Other states permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards. Newman v. Newman, 653 P.2d 728 (Colo. 1980); Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); Unander v. Unander, 265 Ore. 102, 506 P.2d 719 (1973). *See also* UNIF. PREMARITAL AGREEMENT ACT § 3 comment, 9A U.L.A. at 271.

One author explains the distinction as stemming from the fundamental difference between provisions settling property division and alimony or support issues. Walker, *Waiver of Maintenance*, 6 FAM. ADVOCATE 22 (1984). Property issues concern the disposition of assets known or anticipated at the time of execution. Neither party is expected to be unfairly affected if the initial bargain was fair and fully negotiated. In contrast, waiver of support payments involves a prediction at the time of the contract that a party will be self-supporting after divorce. If wrong, the party may become a public ward. *Id.*

Thus, even the Uniform Premarital Agreement Act, with its presumption of enforceability as to antenuptial agreements in general, authorizes the court to order support provisions where the provision in the agreement modifies or eliminates spousal support in a manner causing a party to

incite divorce or cause a spouse to become a state ward. To the contrary, antenuptial agreements that defined expectations and responsibilities of the parties promoted rather than reduced stability in a marriage.[49] Furthermore, courts recognized that little could be gained by forcing the parties of a broken marriage to stay together.[50]

B. Oral Agreements and the Statute of Frauds

Despite the policy shift favoring antenuptial agreements in general, oral agreements may remain unenforceable for failure to satisfy the statute of frauds.[51] *Rossiter v. Rossiter* is such a case. Since it involved an oral antenuptial agreement, it invoked the Hawaii Statute of Frauds[52] which requires that certain types of agreements be in writing and signed by the party to be charged.[53] In particular, agreements made in consideration of marriage fall within this requirement under what is frequently referred to as the "marriage clause." The statute provides in pertinent part:

> No action shall be brought and maintained in any of the following cases:
>
> . . .
>
> (3) To charge any person, upon an agreement *made in consideration* of marriage;
>
> Unless the promise, contract, or agreement, upon which the action

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be eligible for public assistance. UNIF. PREMARITAL AGREEMENT ACT prefatory notes, 9A U.L.A. at 269.

[49] *See supra* note 47.

[50] Clark, *supra* note 1, at 149.

[51] The original Statute of Frauds was enacted in 1677 by the English Parliament. A. CORBIN, CORBIN ON CONTRACTS, § 275 (1950). Prior to the 14th century, oral agreements were generally unenforceable. However, with the development of the action of assumpsit, oral agreements gained the respect of enforceability. *Id. See also* E. A. FARNSWORTH, CONTRACTS, § 6.1 (1982). Absent a written document, fraud and perjury were easily committed. A. CORBIN, *supra* § 275; E. A. FARNSWORTH, *supra* § 6.1. *See, e.g.*, Barksworth v. Young, 4 Drew 1, 62 Eng. Rep. 1 (1956). In response to this problem, the Statute of Frauds was developed. A. CORBIN, *supra* § 275.

The original English version serves as a model for similar provisions throughout this country. E. MURPHY & R. SPIEDEL, STUDIES IN CONTRACT LAW 645 (1977); Clark, *supra* note 1, at 142. The Hawaii statute is no exception. The intent of the English statute was to prevent fraud and perjury, but some provisions serve other purposes as well. For example, the marriage provision and the suretyship provision encourage the parties to recognize the importance of their acts; thus, these provisions prevent ill-considered or impulsive promises. E. A. FARNSWORTH, *supra* § 6.1.

[52] HAWAII REV. STAT. § 656-1 (1976).

[53] *Id.* The statute requires a writing for the following types of agreements: surety, sale of real property, agreements made in consideration of marriage, and agreements not to be performed within one year.

> is brought, . . . is in writing, and is signed by the person to be charged therewith, or by some person thereunto by him in writing lawfully authorized.[54]

Simply put, under this clause, failure to document in writing the terms of a pre-marital agreement made "in consideration of marriage" renders the contract unenforceable.

Like other agreements, oral marriage agreements are susceptible to fraud and perjury and therefore justify the writing requirement. However, when marriage is involved, the statute seems even more appropriate and necessary. Parties about to marry may enter into pre-marital agreements without giving full thought to the terms.[55] So overcome with the impending marriage, they may be vulnerable to making an agreement without fully understanding its significance. Thus, a writing requirement forces the parties to reflect upon the consequences of the agreement more thoroughly before acting.[56]

However, not all agreements made prior to marriage must necessarily be in writing. The statute only encompasses those agreements "made in consideration of marriage."[57] This raises a critical question as to the meaning of the phrase "in consideration of marriage." Since *Rossiter* is the first appellate decision in Hawaii interpreting the marriage clause,[58] a review of case law from other jurisdictions may prove instructive.

1. *"In Consideration of Marriage"*

Courts in other jurisdictions have had the opportunity to apply similar marriage clauses and interpret the phrase "in consideration of marriage."[59] Some courts have found that where the agreement evolved as a result of the marriage, and no other factor constituted adequate consideration, the promise to marry acted as the consideration.[60] Therefore, a writing was required under the statute of frauds.

For example, in a 1951 Rhode Island case, *Hutnak v. Hutnak*,[61] the husband promised the wife that *if* she would marry him, "they would be partners and

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[54] *Id.* § 656-1(3) (emphasis added).

[55] Clark, *supra* note 1, at 142.

[56] *Id. See also supra* note 51.

[57] HAWAII REV. STAT. § 656-1(3) (1976).

[58] 4 Hawaii App. at 337, 666 P.2d at 620.

[59] Miller v. Greene, 104 So. 2d 457 (Fla. 1958); Henry v. Henry, 27 Ohio St. 121 (1875); Hutnak v. Hutnak, 78 R.I. 231, 81 A.2d 278 (1951). *See generally* Clark, *supra* note 1, at 143; Annot., 75 A.L.R. 663, 663 (1961).

[60] *See supra* note 59.

[61] 78 R.I. 231, 81 A.2d 278 (1951).

everything they had or accumulated would be for the both of them."[62] The court found that the agreement fell within the statute of frauds because the marriage composed the main if not the sole object of the agreement.[63]

In another case, *Henry v. Henry*,[64] an 1875 Ohio decision, the wife made an oral promise that if the husband would marry her, move onto her land and make improvements on the land, she would convey the land to him.[65] The husband argued that the promise to move onto the land and make improvements constituted consideration to take the agreement outside the statute.[66] The court recognized these factors as adequate consideration, but also found that the marriage was consideration because "but for the intended marriage, the contract would not have been made."[67] Therefore, the agreement fell within the statute.[68]

These two cases illustrate the judicial standards used in determining whether the parties made an agreement in consideration of marriage. In *Hutnak*, the court viewed the promise to marry as the sole inducement to enter into the agreement. In *Henry*, the court reasoned that without the promise to marry, the property agreement would never have been made. In both cases, marriage went to the heart of the events surrounding the agreement and composed a key factor in the creation of the agreement.

When other factors served as the main inducement and the promise to marry was only secondary or incidental, some courts treated the agreement as made independently of the marriage,[69] rather than "in consideration" thereof. As a result, the agreement fell outside the statute of frauds and a writing was not required.

A case on point is *Steen v. Kirkpatrick*,[70] a 1904 Mississippi decision. The parties made an agreement to marry.[71] After making this agreement, they made

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[62] *Id.* at 233, 81 A.2d at 279.

[63] *Id.* at 235, 81 A.2d at 279-80.

[64] 27 Ohio St. 121 (1875).

[65] *Id.* at 126.

[66] *Id.* at 128.

[67] *Id.*

[68] Another problem arises when marriage serves as consideration in combination with other consideration for an agreement. The *Henry* court indicated that the statute still applies and a writing is required when marriage is only partial consideration for the agreement. *See also* Miller v. Greene, 104 So. 2d 457 (Fla. 1958); Finch v. Finch, 10 Ohio St. 501 (1860). *See generally* Clark, *supra* note 1, at 143; Annot., 75 A.L.R.2d 633, 642 (1961).

[69] Steen v. Kirkpatrick, 84 Miss. 63, 36 So. 140 (1904); Hendershoot v. Hendershoot, 135 N.J. Eq. 232, 37 A.2d 770 (1944); Larsen v. Johnson, 78 Wis. 300, 47 N.W. 615, 23 Am.St. Rep. 404 (1890). *See generally* Clark, *supra* note 1, at 153; Annot., 75 A.L.R.2d at 648 (1961).

[70] 84 Miss. 63, 36 So. 140 (1904).

[71] *Id.* at 65, 36 So. at 140-41. The husband, Steen, was a widower, and the wife, Robinson, was a widow. Each had children of their own. The suit was between the heirs of the spouses. *Id.*

an additional oral agreement forfeiting rights to each other's property.[72] The court identified two independent sets of promises: the agreement to marry[73] and the agreement governing property rights.[74] The court held the property agreement could not have been made in consideration of marriage because the agreement to marry had already become binding.[75] Therefore, the property agreement was merely in contemplation of marriage and thus avoided the writing requirement.[76]

Similarly, in the 1944 case of *Hendershot v. Hendershot*,[77] the New Jersey court found the agreement independent of the marriage.[78] In that case, the wife had been setting aside money for her son's education before the couple engaged to marry.[79] Thereafter the parties considered investing in a hotel where the wife's funds would be needed to consummate the deal.[80] She informed her husband-to-be of her concern for her child's educational fund. He orally promised to legally adopt her son and make provisions for him in his will since they would soon be married.[81] Relying on this promise, the wife contributed her money towards the hotel deal.[82] The New Jersey court found that the husband's promise was not made in consideration of marriage.[83] The consideration for the agreement lay in the wife's changed circumstances due to her monetary contribution.[84] The court treated the marriage as secondary to the agreement.[85]

In summary, not all oral antenuptial agreements are made in consideration of marriage. Some courts have found that where the promise to marry is incidental to the agreement, it is made in contemplation of marriage.[86] However, even

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[72] *Id.* The property agreement was made the day before they were married. *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 135 N.J. Eq. 232, 37 A.2d 770 (1944).

[78] *Id.* at 238, 37 A.2d at 772.

[79] *Id.* at 235, 37 A.2d at 771. The wife was a divorcee with two children. After her divorce she supported herself and her children by working as a high school teacher. One of her sons died before she became engaged to marry Hendershoot. *Id.*

[80] *Id.* The parties spoke extensively about ways to raise the necessary funds for the hotel. The wife said she could probably contribute about $10,000. She was also able to borrow money from her mother and brother. She did this and later repaid the loan. *Id.*

[81] *Id.* The husband never did make provisions for the wife's son. *Id.* at 236, 37 A.2d at 772.

[82] *Id.* at 235, 37 A.2d at 771.

[83] *Id.* at 238, 37 A.2d at 772.

[84] *Id.*

[85] *Id.* New Jersey makes no distinction between consideration and contemplation. *See* Koch v. Koch, 95 N.J. Super. 546, 232 A.2d 157 (1967). However, the result is essentially the same. Where the agreement is independent of the marriage, the agreement is not held to be made in consideration of marriage.

[86] *See supra* notes 77-85 and accompanying text.

where this distinction is not recognized, if other binding consideration already exists, the marriage is deemed separate from the agreement.[87]

The statute of frauds applies only to an agreement made in consideration of marriage. This is determined by analyzing whether the agreement induces or results from the promise to marry.[88] A "but for" test can function to identify either of these situations.[89] It is irrelevant that other consideration exists in addition to the promise to marry. Where marriage, either in whole or in part, composes the consideration for the agreement, a writing is strictly required.[90] However, an exception to this strict requirement is found in the doctrine of part performance.[91]

2. *Part Performance of an Oral Contract*

The doctrine of part performance provides that if a party justifiably relies on an oral agreement and renders substantial performance, fairness requires enforcement of the agreement notwithstanding the statute of frauds.[92] As a result, the writing requirement of the statute may be effectively waived.

This doctrine purports to prevent usage of the statute of frauds to perpetrate fraud.[93] For example, where the plaintiff has performed on a contract with the

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[87] *See supra* notes 70-76 and accompanying text.

[88] *See supra* notes 61-68 and accompanying text.

[89] *See supra* notes 64-68 and accompanying text.

[90] *See supra* notes 64-68 and accompanying text.

[91] Yee Hop v. Young Sak Cho, 25 Hawaii 494 (1920) (oral lease); Lopez v. Soy Young, 9 Hawaii 117 (1893) (oral settlement of estate). *See infra* notes 92-110 and accompanying text. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1979).

[92] Monarco v. LoGreco, 35 Cal. 2d 621, 220 P.2d 737 (1950) (oral contract for conveyance of land); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909) (oral employment contract); Hawaiian Trust Company v. Cowan, 4 Hawaii App. 166, 663 P.2d 634 (1983) (landlord tenant dispute). *See, e.g.*, McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Annot., 54 A.L.R.3d 715 (1970). *See also* A. CORBIN, *supra* note 51, § 421; RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (1979), which states:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

[93] Perreira v. Perreira, 50 Hawaii 641, 447 P.2d 667 (1968) (land conveyance); Busque v. Marcou, 147 Me. 289, 86 A.2d 873 (1952) (antenuptial agreement to devise estate). *See also* Riggles v. Erney, 154 U.S. 244, 254 (1894) where the Court stated:

> If the parole agreement be clearly and satisfactorily proven, and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done acts in part performance of such agreement, to the knowledge of the defendant—acts which have so altered the relations of the parties as to prevent their restoration to their former condi-

defendant's knowledge, it would be unfair to allow the defendant to interpose the statute of frauds as a defense to performance on his or her part. For lack of a written agreement, the defendant would thus benefit from the plaintiff's part performance.

In order to successfully apply the doctrine, the part performance must have been done unequivocally in pursuance of the oral agreement.[94] For example, in a 1978 Montana case,[95] the prospective purchasers of land made substantial improvements on the property and paid the mortgage and taxes, all in reliance on the oral agreement to execute the sale.[96] The court held that their performance clearly related to the agreement to sell and not to any other agreement or relationship between the parties.[97] Therefore, the part performance sufficed to take the agreement outside the statute of frauds.

The doctrine of part performance generally does not apply to marital agreements.[98] This is so primarily for two reasons. First, courts have held that the act of marriage is insufficient performance to take the agreement outside the statute[99] because marriage cannot serve the dual purpose of both avoiding and invoking the statute of frauds.[100] In other words, marriage may serve only one purpose. If it functions to bring the agreement within the statute, it does nothing further to take it outside as well. As a Maine court said: "The marriage adds nothing to the very circumstance described by the statutory provision which makes the writing essential."[101]

Second, courts have held that the performance of duties traditionally associ-

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tion—it would be virtual fraud to allow the defendant to interpose the statute as a defense, and thus to secure himself the benefit of what has been done in part performance.

[94] Perreira v. Perreira, 50 Hawaii 641, 447 P.2d 667 (1968); Rose v. Parke, 4 Hawaii 593, 595 (1833) (dissenting opinion) (land sale); McCallister v. McCallister, 342 Ill. 231, 173 N.E. 745 (1930); Burgess v. Wright, 565 S.W.2d 854 (Mo. 1978) (real estate conveyance); Annot., 74 A.L.R. 218 (1931) (agreement where husband improved land). *Contra* Abernathy v. Abernathy, 339 S.W.2d 817 (Mo. 1976) (improvements on land may suffice to take agreement outside the statute of frauds); Holt v. Story, 642 S.W.2d 394 (Mo. Ct. App. 1982) (real estate contract). *See generally* A. CORBIN, *supra* note 51, §§ 425 and 430.

[95] Burgess v. Wright, 565 S.W.2d 854 (Mo. 1978).

[96] *Id.* at 855.

[97] *Id.* at 857.

[98] Miller v. Greene, 104 So. 2d 457 (Fla. 1958); Maddox v. Maddox, 224 Ga. 313, 161 S.E.2d 870 (1968); Busque v. Marcou, 147 Me. 289, 86 A.2d 873 (1952); Tellez v. Tellez, 51 N.M. 416, 186 P.2d 390 (1947); Marcum v. Marcum, 21 Misc. 2d 474, 194 N.Y.S. 327 (1959); Lieber v. Mercantile National Bank at Dallas, 331 S.W.2d 463 (Tex. Civ. App. 1960, *writ ref'd n.r.e.*).

[99] *Supra* note 98.

[100] *See* Miller v. Greene, 104 So. 2d at 461 (Fla. 1958); Busque v. Marcou, 147 Me. 289, 86 A.2d 873 (1952); A. CORBIN, *supra* note 51, § 463.

[101] Busque v. Marcou, 147 Me. at 295, 86 A.2d at 876.

ated with marriage fails to take the agreement outside the statute.[102] For example, an antenuptial agreement might involve a promise to make improvements on the land or render services of care. Some courts have treated improvements on land and rendition of other services as traditional marital duties rather than as reliance on an agreement and therefore are reluctant to construe such performance as unequivocally related to a contract agreement.[103]

This was the case in the 1930 Illinois decision of *McCallister v. McCallister*.[104] The wife made an oral promise to convey land to the husband if he would cultivate and improve the land.[105] The court treated the husband's work on the land as performance of his normal marital duties to earn an income and support his family.[106] His performance was not unequivocally related to the parol agreement and therefore could not take the promise outside the statute of frauds.

More recently, in the 1980 Texas case of *Tatum v. Tatum*,[107] the wife rendered services such as nursing, cooking, and cleaning in reliance on an antenuptial agreement where the husband promised to bequeath his property to his wife.[108] The court refused to enforce the agreement and stated that the rendition of such services by the wife was not sufficient part performance.[109] The wife's services were construed as traditional marital duties and could not be viewed as unequivocally related to the contract agreement.

In sum, although part performance may be used to take an oral agreement outside the statute of frauds, courts tend to take a narrow view of an act allegedly done in pursuance of a premarital agreement. For the doctrine to apply, the performance must be completely removed from the marital relationship and solely in reliance on the agreement.[110]

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[102] McCallister v. McCallister, 342 Ill. 231, 173 N.E. 745 (1930) (promise to cultivate and improve land); Tellez v. Tellez, 51 N.M. 416, 186 P.2d 390 (1947) (promise to take care of husband); Earp v. Earp, 57 N.C. App. 194, 290 S.E.2d 739 (1982) (promise to return to marital domicile); Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697 (1968) (promise to continue to live with husband); Tatum v. Tatum, 606 S.W.2d 231 (Tex. Civ. App. 1980) (promise to nurse, cook, and clean); Annot., 74 A.L.R. 218 (1931) (promise to improve lands).

[103] McCallister v. McCallister, 342 Ill. 231, 173 N.E. 745 (1930); Annot., 74 A.L.R. 218 (1931). *See also* 73 AM. JUR. 2d *Statute of Frauds* § 464 (1974).

[104] 342 Ill. 231, 173 N.E. 745 (1930).

[105] *Id.* at 233, 713 N.E. at 746.

[106] *Id.* at 237, 713 N.E. at 747.

[107] 606 S.W.2d 231 (Tex. Civ. App. 1980).

[108] 606 S.W.2d at 232.

[109] *Id.* at 233.

[110] *See supra* note 94.

C. *Analysis of Rossiter*

1. *The Statute of Frauds*

The first major question decided by the ICA[111] was whether the oral agreement between Don and Patricia Rossiter fell within the statute of frauds.[112] The court held that, without doubt,[113] the marriage clause[114] applied because Patricia's promise not to "force sell" the house was made in consideration of marriage.[115] The court apparently based its decision solely on Don's testimony in which he stated the agreement was made "prior and conditional to [the] marriage."[116]

On the one hand, case law[117] and statutory intent[118] strongly support the court's conclusion. For example, in the *Hutnak* case[119] the court ruled that when marriage served as the basis for an agreement, marriage also comprised the consideration. Similarly, the *Henry*[120] court held when an agreement would not have been executed "but for" the marriage, marriage acted as consideration. The *Rossiter* case presented a similar situation. The agreement to marry appeared fundamental to the agreement never to force sell the house because it was "prior and conditional to [the] marriage."[121] Thus, in line with other jurisdictions, the *Rossiter* court appropriately applied the statute of frauds.

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[111] The court dismissed the jurisdiction issue in a very brief analysis. The court reasoned that as record owner of the property where the auto repair business was situated, Patricia's mother was an indispensable party to an action affecting her interest in that property. *See In re* Estate of Grace, 34 Hawaii 24, 33 (1966); Brown v. Kaahanui, 29 Hawaii 804, 807-09 (1927); Smyth v. Takara, 26 Hawaii 69, 72 (1921). It followed then that since she was not a party to the action, the court had no jurisdiction to address a question regarding the sale since it affected the property. *See* Haiku Plantation Ass'n v. Lono, 56 Hawaii 96, 102-03, 529 P.2d 1, 5 (1974); Filipino Federation of America, Inc. v. Cubico, 46 Hawaii 353, 372, 380 P.2d 488, 498-99 (1963). The court did not discuss *whether* Patricia's mother should have been made a party.

[112] HAWAII REV. STAT. § 656(1) (1976).

[113] 4 Hawaii App. at 338, 666 P.2d at 620 (1983). The court stated that the agreement was "undoubtedly" made in consideration of marriage. *Id.*

[114] HAWAII REV. STAT. § 656(1), (3) (1976). *See supra* text accompanying note 54.

[115] 4 Hawaii App. at 338, 666 P.2d at 620 (1983).

[116] *Id.*

[117] *See supra* note 59. *See generally* Kastely, *supra* note 1, at 398.

[118] *See supra* note 51.

[119] 78 R.I. 231, 81 A.2d 278 (1951).

[120] 27 Ohio St. 121 (1875).

[121] Don said in testimony that the agreement was made "prior and conditional to [the] marriage." 4 Hawaii App. at 336, 666 P.2d at 620. Query whether the parties would have married without the agreement. Although the answer to this question is not clear-cut from the opinion, one could reasonably infer that there would have been no basis for the agreement had the parties not intended to marry. The fact that they made the agreement indicates the marriage would not have occurred without it. *Id.*

Second, it appears that the court used the statute exactly as intended: to prevent fraud and to prevent parties from entering into a contract without considering the seriousness of it.[122] When any agreement is oral, one or both of the parties could have misunderstood the terms or failed to correctly remember them. This is particularly true when an antenuptial agreement is at issue.[123] Parties about to be married are vulnerable to pressure, and do not want to threaten their impending marriage. Therefore, one party may be more likely to agree to the marriage terms of the other spouse, terms which he or she might not even understand.

In this case, Don or Patricia could have misconstrued the terms of their agreement. Nothing in writing substantiated either of their contentions. Furthermore, the nature of the agreement was so vague in and of itself because it involved a house that did not even exist. As one commentator stated, "an oral promise . . . regarding a residence not yet owned or constructed must be viewed with suspicion."[124] Thus, the court acted prudently when it invoked the statute.

On the other hand, perhaps the ICA construed the marriage clause too strictly. The conclusion that the agreement was made "in consideration of marriage" was apparently based on Don's testimony about the agreement made "prior and conditional to [the] marriage."[125] However, the court did not consider other important factors and alternatives pertinent to this particular set of facts before it treated the agreement as made in consideration of marriage.

For example, had the family court probed more deeply, as did the *Steen*[126] court, it might have found that the agreement was made in contemplation of marriage. It is possible that Don and Patricia had already planned to marry or would have made the agreement without the marriage. Don said the agreement was made "prior . . . to the marriage."[127] This could have been interpreted to mean that an agreement to marry already existed at the time the couple entertained the matter of the house. If this were so, the marriage could have been treated as incidental to the agreement not to force sell the house, not consideration for it.[128] In the alternative, rather than treating the marriage as the consideration, the court could have viewed Don's provision of love and financial support, his construction of the house, or his operating the auto repair business as adequate consideration[129] for the agreement. Neither the family court nor the

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[122] *See supra* note 51.

[123] Clark, *supra* note 1, at 142.

[124] Kastely, *supra* note 1, at 398.

[125] 4 Hawaii App. at 338, 666 P.2d at 620.

[126] 84 Miss. 63, 36 So. 140 (1904). *See also supra* text accompanying notes 70-76.

[127] 4 Hawaii App. at 338, 666 P.2d at 620.

[128] *See Hendershoot v. Hendershoot*, 135 N.J. 232, 37 A.2d 770 (1944).

[129] *See* Larsen v. Larsen, 78 Wis. 300, 47 N.W. 615, 23 Am.St. Rep. 404 (1890) (love and

ICA weighed these other possibilities. The appellate court should have remanded the case for further findings of fact.

2. *Part Performance*

Following the statute of frauds issue, the ICA addressed the question of part performance.[130] The court concluded the agreement could not be enforced under the doctrine of part performance because Don's acts were traditional marital duties and not referable solely to the agreement.[131] It reasoned that "[t]he acts constituting part performance 'must clearly appear to have been done in pursuance of the contract, and to result from the contract and not from some other relation.' "[132] The court further recognized that marriage and marital duties are not generally construed as unequivocal part performance of an antenuptial agreement.[133] In this case, Don's acts were not related solely to the contract; they were also his marital duties.[134] Though his acts may have been performed in reference to the antenuptial agreement, they were equally referable to his responsibilities within the marriage.[135] In other words, according to the court, Don would have performed these acts without the agreement.

Rejection of the doctrine stands consistent with the court's treatment of the marriage as consideration. It continued to view the conduct of the parties in relation to the marriage. The move to Hawaii, the purchase of the property, and the construction of the house, like the agreement, were all deemed a direct link to the marriage, and thus traditional marital duties.[136] The court also acted consistently when it rejected the doctrine as a means to take the agreement outside the statute of frauds. Since marriage triggers the statute, it would have been inconsistent for the court to use the act of marriage or the performance of marital duties as an exception to the statute.[137] Moreover, *Rossiter* stands in line

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support as adequate consideration).

[130] 4 Hawaii App. at 338-39, 666 P.2d at 620-21.

[131] *Id.* at 339, 666 P.2d at 621. The court stated that the doctrine was appropriate when, for example, it would be "intolerable in equity for the owner of a tract of land knowingly to suffer another to invest time, labor and money in that land, upon the faith of a contract that did not exist." *Id.* at 338-39, 666 P.2d at 621 (citing 73 AM. JUR. 2d *Statute of Frauds* § 400 (1974)).

[132] 4 Hawaii App. at 339, 666 P.2d at 621 (quoting Annot., 30 A.L.R.2d 1419, 1421-22 (1953)).

[133] *Id.*

[134] *Id.* (citing 73 AM. JUR. 2d *Statute of Frauds* at 91 (1974)).

[135] *Id.*

[136] *Id.*

[137] Courts have consistently held that the act of marriage does not constitute part performance of a contract. *See supra* note 98. This is one of the policy arguments against invoking the doctrine of part performance. *See supra* text accompanying notes 98-101.

with the majority of courts[138] such as the *McCallister*[139] court which held similar marital acts insufficient to constitute part performance.

However, the decision to group all those acts, particularly building one's own home, is arguably inconsistent with the notion of traditional marital duties. Most couples who purchase a home either buy a ready-built dwelling or hire a contractor to build them a house.[140] In this case, Don chose to construct the home himself. In doing so, he devoted a great deal of his personal effort and labor as well as solicited the assistance of a few close friends and his two sons. It would have been unrealistic for Don to build a house without some assurance that he would continue to own it. Construction of the marital dwelling was not a mere traditional duty in this case.[141] This was an undertaking beyond his marital obligations, a personal undertaking perhaps worthy of recognition as reliance on the agreement that he would never be forced to sell the home which he personally had built.

In summary, the court found no reason to take the agreement out of the statute of frauds. The oral agreement was made in consideration of marriage, and therefore required a writing.[142] Don's testimony substantiated this holding. Furthermore, Don's acts in reliance on the contract were deemed traditional marital duties, not actions referable solely to the contract. Thus, his acts could not function as part performance to take the agreement out of the statute.[143] As a result, the agreement was unenforceable.

D. Judicial Discretion in the Distribution of Property

Regardless of the existence or validity of an antenuptial agreement governing the distribution of property, the family court's discretionary power in making a fair award has been recognized.[144] In *Rossiter*, the ICA said, "Even if the ante-

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[138] *See supra* notes 102-03 and accompanying text.

[139] 342 Ill. 231, 173 N.E. 745 (1930). *See also supra* note 102.

[140] Statistically, it is difficult to assess the exact number of couples who do in fact build their own homes. However, a monthly local business journal reported only eight of 33 building permits issued during a recent one week period were for structures to be built by the owner. Pacific Business News, Jan. 21, 1985, at 22, col. 5-6.

[141] While most courts treat acts such as improvements on land as traditional marital duties, perhaps it is time for the courts to consider changing this view. *See, e.g.*, Abernathy v. Abernathy, 339 S.W.2d 817 (Mo. 1976) (Improvements on land may suffice to take an agreement outside the statute of frauds.).

[142] 4 Hawaii App. at 338, 666 P.2d at 620.

[143] *Id.* at 339, 666 P.2d at 621.

[144] Booker v. Booker, 219 Ga. 358, 133 S.E.2d 353 (1963); Amos v. Amos, 211 Ga. 670, 95 S.E.2d 5 (1956); Tomlinson v. Tomlinson, 170 Ind. App. 331, 352 N.E.2d 785 (1976) (court considered the valid antenuptial agreement as well as other factors in making the award). *See also* Vareen v. Vareen, 222 Ga. 500, 175 S.E.2d 865 (1970) (trial court varied from the oral

nuptial agreement was enforceable, it would not be binding on the court."[145] This is so because, in the opinion of the intermediate court, the agreement can be superseded by a family court judge's discretionary power.[146]

In 1955, the Hawaii legislature first authorized judicial discretion in the division of property[147] for the purpose of "confer[ring] upon the Judge who grants a final decree of divorce the power to make property settlements. . . ."[148] Today this discretionary power is codified in section 580-47 of the Hawaii Revised Statutes which reads in pertinent part:

> (a) Upon granting a divorce, 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*; (4) allocating, as between the parties, the responsibility for the payment of the debts

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agreement made between the parties during trial recess); L. WEITZMAN, *supra* note 32, at 354-55; Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213 (1939); Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROBS. 225 (1939).

Under the common law, division of property upon separation or divorce was not an issue. By marrying, a woman relinquished all her property and contractual rights to her husband. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984); Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 418 (1981). *See also* I. BAXTER, MARITAL PROPERTY § 6:1 (1973); H. CLARK, LAW OF DOMESTIC RELATIONS (1968); Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. REV. 211 (1973).

By the turn of the century, a series of statutes known as the Married Women's Act removed many of these restrictions placed on women by allowing them the right to contract and retain separate property. *See* H. CLARK, *supra* at 421. Thus, husbands and wives were allowed to contract provided the agreement did not alter the essentials of the marriage relationship or promote divorce. L. WEITZMAN, *supra* note 32, at 338. *See* Sharp, *supra* at 1401.

While some states adopted a community property system, the majority of the states retained the common law. However, rather than making awards based solely on title, as the strict common law would have required, nearly all of the common law states modified the doctrine by developing their own theories of property distribution. L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY § 1.03 (1983). Some adopted a form of equitable distribution based on partnership principles borrowed from the community property system: all property acquired during the marriage was subject to division regardless of title, unless categorized as separate property. *Id.* Others permitted division of all property of the spouses, no matter when or how acquired. *Id.*

[145] 4 Hawaii App. at 339, 666 P.2d at 621.

[146] *Id.* at 340, 666 P.2d at 621. *See also* HAWAII REV. STAT. § 580-47, which authorizes the judge's discretionary power.

[147] HAWAII REV. STAT. § 324-37 (1955) (current version at HAWAII REV. STAT. § 580-47 (1976 and Supp. 1984)). The law granted the judge power "[t]o divide and distribute the estate, real, personal, or mixed . . . in such proportion as shall appear just and equitable." This reads similarly to the current version of the statute. However, the current version provides guidelines for determining "just and equitable." *See infra* note 149 and accompanying text.

[148] Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960).

> of the parties. . . . 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.[149]

The statute authorizes the court to reach both separate and marital property in making a divorce settlement. Thus standing alone, this discretionary power may encourage litigation. If each divorcing spouse believes that his or her claim to property is the "right" one, they may prefer to litigate and appeal to the judge's discretion, rather than settle, in the hopes of obtaining a more favorable court-ordered award.[150]

However, the court's discretion is not unfettered. The statutory checklist of considerations[151] and recent Hawaii case law interpreting the provision provide more precise guidelines for the court in making its determination.[152]

In a leading 1983 case, *Raupp v. Raupp*,[153] the ICA addressed the problem of valuing and distributing premarital property.[154] The parties had been married for ten years. Each entered the marriage with substantial, but varying amounts of separate property.[155] During the course of the marriage, the couple sold some of their property and placed the proceeds into the "marital pot."[156] Upon divorce, the court, faced with the problem of dividing property, invoked

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[149] HAWAII REV. STAT. § 580-47(a)(1976) (emphasis added). Hawaii is one of 19 states that allows the court to reach both marital *and separate* property. The other states include Alaska, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, New Jersey, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Washington, Wisconsin, and Wyoming. L. GOLDEN, *supra* note 144, at 21.

[150] Kastely, *supra* note 1, at 5 n.22.

[151] *See supra* note 149 and accompanying text. *See also* Carson v. Carson, 50 Hawaii 182, 436 P.2d 7 (1967); Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960).

[152] Wakayama v. Wakayama, 4 Hawaii App. 652, 673 P.2d 1044 (1983) (marital fault irrelevant to property division); Takara v. Takara, 4 Hawaii App. 68, 660 P.2d 529 (1983) (interspousal gifts recognized; each spouse should be awarded one-half net value of property that is jointly owned at time of divorce); Raupp v. Raupp, 3 Hawaii App. 602, 658 P.2d 329 (1983) (Each party should be awarded the date-of-marriage net value of his or her premarital property and the date-of-acquisition net value of gifts and inheritances received during the marriage.); Brown v. Brown, 1 Hawaii App. 533, 621 P.2d 984 (1981) (outstanding debts related to upkeep of residence should be paid by party awarded the residence); Au-Hoy v. Au-Hoy, 60 Hawaii 354, 590 P.2d 80 (1979) (Where parties have maintained separate earnings and expenses throughout the marriage, the court can allow each to keep his or her separate estate.).

[153] 3 Hawaii App. 602, 658 P.2d 329 (1983).

[154] This case is important in disputes involving premarital property, inherited property, and gifts.

[155] *Id.* at 603-05, 658 P.2d at 332-33 (1983). The wife brought in over $140,000 worth of property while the husband brought in over $12,000. *Id.*

[156] *Id.*

its discretionary power and returned to each spouse the date-of-marriage value of the property that each had initially contributed. The remaining balance was then equally divided. Thus, the ICA announced a general rule:

> [I]t is equitable to award each divorcing party at the DOM [date of marriage] net value of his or her premarital property. . . : [and] to award each divorcing party their date of acquisition net value of gifts and inheritances which he or she received during the marriage.[157]

In the same year as *Raupp*, the ICA announced another important guideline concerning the distribution of marital property in *Takara v. Takara*.[158] In this case, the husband owned three pieces of property prior to marriage.[159] A few months after the marriage, the husband transferred ownership of two of these separate properties to himself and his wife as tenants by the entirety.[160] In addition, they acquired another house as tenants by the entirety.[161] When the couple divorced, the court faced the question of whether to treat the husband's transferred premarital property and its appreciated value as joint or separate property. No reason existed for the court to treat the transfer by the husband as conditioned on the success of the marriage.[162] Therefore, the court ruled that "it is equitable to award each party one-half of the net value of property jointly owned at the time of divorce."[163] This rule compliments the *Raupp* rule by equally dividing the property and appreciation remaining after each party has been reimbursed the value of his or her contribution at the date of marriage.[164]

However, under certain circumstances, the *Takara* rule is not appropriate. In *Au-Hoy v. Au-Hoy*,[165] a 1979 case, the Hawaii Supreme Court upheld the lower court's decision to award property according to personal ownership. In this case, the parties had been married for 30 years. They had always maintained separate checking and savings accounts, paid for their own needs, and

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[157] *Id.* at 610-11, 658 P.2d at 335-36 (1983). *See* Kastely, *supra* note 1, at 386-92, for a more in-depth discussion of the *Raupp* case.

[158] 4 Hawaii App. 68, 660 P.2d 529 (1983).

[159] *Id.* The husband's property consisted of three pieces of inherited property, two in which he held sole interest and one in which he held a one-half interest. *Id.*

[160] *Id.* at 68, 660 P.2d at 530. The parties began living together in February, 1977. They married in March, 1978, and in August, 1978, the husband executed the transfer.

[161] *Id.* The couple purchased a piece of property and constructed a home thereon. *Id.*

[162] Although the court did not address the question of whether the ownership transfer was a gift, apparently the court viewed it as such. The court said: "In this case, however, during the marriage, the Husband *gave* the Wife joint title of two of the Husband's three premarital properties." (emphasis added). *Id. See also* Kastely, *supra* note 1, at 392 n.59.

[163] 4 Hawaii App. at 71, 660 P.2d at 530.

[164] The court did not address how it would handle depreciated value, but the opinion seems to indicate that, like appreciation, depreciation would be incurred by both partners. *See id.*

[165] 60 Hawaii 354, 590 P.2d 80 (1979).

owned separate properties.[166] They owned one piece of property as tenants by the entirety.[167] Upon divorce, the court awarded the husband his two separately owned lots and the wife her separate property. As to the jointly owned land, the court further awarded to the husband and wife as tenants in common the lot used as the family home.[168] Under these facts, the court ruled:

> 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 Court to allow each to keep his or her separate estate where such award is fair and equitable under all circumstances.[169]

Hence, the Hawaii courts have refined, to some degree, the notion of equitable distribution. First, premarital property should be returned to each party and valued according to the property value at the time of marriage.[170] Second, the balance should be equally divided between the parties,[171] except where an implicit agreement exists to maintain separate estates.[172] However, these general rules raise the question whether the court can invoke its discretionary power in the face of a valid antenuptial agreement. Since *Rossiter* is a case of first impression in Hawaii, case law from other jurisdictions is instructive.

2. *Family Law or Contract Law?*

When a court must determine the enforceability of a valid antenuptial agreement, it faces at least two opposing doctrines: (1) the family law doctrine of equitable distribution, and (2) traditional contract doctrine.[173]

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[166] *Id.* at 355, 590 P.2d at 81. The wife had an interest in a piece of Kona property held by her in common with her other family members. The husband owned two Pupukea lots separately. *Id.*

[167] *Id.* This lot was located in Pupukea and was used as the family home. *Id.*

[168] *Id.* at 356-57, 590 P.2d at 81. However, the wife received the right to occupancy for life, along with the duty to assume all mortgage payments, property taxes, charges and improvements. *Id.*

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

[170] *See supra* notes 153-57 and accompanying text.

[171] *See supra* notes 158-64 and accompanying text.

[172] *See supra* notes 165-69 and accompanying text.

[173] *See* L. WEITZMAN, *supra* note 32, at 353-59. Professor Weitzman tends to support the contract theory. *See also* Sharp, *supra* note 144. Professor Sharp's thesis supports the family law theory. Although her article addresses separation agreements, it provides an excellent discussion of the family law theory in regards to marital contracts.

a. Family Law Doctrine

Traditionally, the state has maintained a vital interest in regulating marriage because marriage is considered the foundation of our country's family and societal structure.[174] Moreover, the court's role in regulating marriage, divorce and marriage contracts stands strongly rooted in statutory tradition. The Hawaii marriage statute,[175] which was originally enacted over 100 years ago in 1872,[176] provides the requirements for a valid marriage, regulating, among other things, who can marry whom.[177] Other statutes authorize the court to grant or deny divorce.[178] As part of its traditional role, the court is required to make a finding "whether the marriage is irretrievably broken," or "suggest to the parties that they seek counseling."[179]

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[174] *See* Posner v. Posner, 233 So. 2d at 384 (Fla. 1970). *See also* Poe v. Ullman, 367 U.S. 497, 533, *reh'g denied*, 368 U.S. 869 (1961), where the Court said the institution of marriage is "an institution which the State not only must allow, but which always and in every age it has fostered and protected."

[175] HAWAII REV. STAT. § 572-1 (Supp. 1984).

[176] 1872 Hawaii Sess. Laws, ch. 23, § 1.

[177] The statute reads in pertinent part:

> In order to make valid the marriage contract, it shall be necessary that:
>
> (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever . . .
>
> (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age . . .
>
> (3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;
>
> (4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
>
> (5) Neither . . . is afflicted with any loathsome disease concealed . . . to the other party;
>
> (6) It shall in no case be lawful for any person to marry in the State without a license . . . duly obtained from the agent appointed to grant marriage licenses; and
>
> (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages . . . .

HAWAII REV. STAT. § 572-1 (Supp. 1984).

[178] *See* HAWAII REV. STAT. § 580-41 (1976), which reads in pertinent part:

> The family court shall decree a divorce from the bond of matrimony upon the application of either party when the court finds: (1) the marriage is irretrievably broken . . . .

[179] HAWAII REV. STAT. § 580-42 reads in pertinent part:

> (a) If both of the parties by complaint or otherwise have stated . . . that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.
>
> (b) If one of the parties has denied . . . that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation and shall
>
> (1) Make a finding whether the marriage is irretrievably broken, or

Therefore, when parties are about to terminate a relationship which is a state-created and state-regulated institution, the court's intervention via its discretionary power seems understandable, necessary, and expected. This is especially true in the face of an agreement which might contravene or undermine the court's traditional role in a divorce.

The notion of judicial discretion finds its basis in equity.[180] Equity ensures fairness and avoids a result which, although in line with a valid agreement, would be harsh and unjust.[181] This standard permits the court a wide range of discretionary power. It allows a judge to modify a provision which he or she does not consider appropriate by weighing the merits of the agreement and by considering the surrounding circumstances.[182]

As mentioned earlier in this note, the leading case regarding antenuptial agreements is *Posner v. Posner*.[183] The *Posner* court identified three criteria for reviewing antenuptial agreements: (1) whether the agreement was obtained through fraud, duress, mistake, misrepresentation or nondisclosure; (2) whether the agreement was unconscionable; and (3) whether changed facts and circumstances at the time of judgment render the agreement unfair and unreasonable.[184]

The first and third criteria of nondisclosure and changed circumstances are standards unique to family law.[185] These standards are important because unlike most other contracts, the parties to an antenuptial agreement stand in a confidential relationship to each other.[186] As quoted in *Posner*: "The relationship between parties to an antenuptial agreement is one of mutual trust and confidence. Since they do not deal at arms length they must exercise a high degree of good faith and candor in all matters bearing upon the contract."[187] Perhaps because of this confidential relationship, courts review such agreements to protect against abuse or overreaching by one spouse, and thus ensure "adequate provisions" for the spouse.[188]

For example, in the 1974 Illinois case of *Eule v. Eule*,[189] the parties entered into an antenuptial agreement whereby each forfeited alimony and property

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(2) Continue the matter . . . and may suggest to the parties that they seek counseling.

[180] L. GOLDEN, *supra* note 144, at 2; L. WEITZMAN, *supra* note 32, at 354-55.

[181] L. WEITZMAN, *supra* note 32, at 355.

[182] *Id. See also* Clark, *supra* note 1, at 150-51.

[183] 233 So. 2d 381 (Fla. 1970).

[184] *Id.* at 385.

[185] L. WEITZMAN, supra note 32, at 344-47; H. CLARK, *supra* note 144, at 524-25.

[186] Posner v. Posner, 257 So. 2d at 535.

[187] *Id.* (quoting from Del Vecchio v. Del Vecchio, 143 So. 2d 17, 21 (1962)).

[188] L. WEITZMAN, *supra* note 32, at 354-55; Clark, *supra* note 1, at 150-51. *See also* Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984).

[189] 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974).

rights if they separated or divorced within seven years.[190] The wife filed for divorce prior to seven years and challenged the validity of the agreement.[191] The court recognized the modern tendency to uphold antenuptial agreements, but held the agreement unenforceable for failure to provide the wife with an equitable settlement in lieu of her waiver of rights.[192] The court did not consider the result engendered by the agreement fair and reasonable.

When the court invokes equity as it did in *Eule*, fairness is insured. The court facilitates a result that leaves the parties in a condition which the court views to be in accord with the circumstances of their marriage and their agreement.

b. Contract Law Doctrine

Proponents of the contract law doctrine argue that an antenuptial agreement should be treated "like any other contract."[193] At least two legal reasons support this view.[194] First, traditional contract doctrines such as unconscionability, fraud, duress, and mutual mistake can adequately protect the parties.[195] Such doctrines safeguard against unfairness in the negotiation process and ensure that the parties are fully informed and acting voluntarily.[196]

Consider the 1975 Florida case of *Potter v. Collin*.[197] The couple entered into a detailed nine-page antenuptial agreement wherein the wife waived any interest in the husband's property.[198] After the husband died, the wife challenged the validity of the agreement.[199] The court upheld the agreement even though it

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[190] *Id.* at 85-86, 320 N.E.2d at 508. The plaintiff-wife had been married six times, and the defendant-husband had been married nine times. The parties had been married to each other three times. *Id.*

[191] *Id.* at 86, 320 N.E.2d at 509.

[192] *Id.* at 88, 320 N.E.2d at 510. The decision was reversed because the lower court failed to consider all the surrounding circumstances. In particular, the court refused to admit evidence that the wife had considerable assets from a previous marriage. These assets included $6,500 cash, two automobiles, and monies from the sale of a certain real estate. *Id.* at 511.

[193] Potter v. Collin, 321 So. 2d 128 (Fla. App. 1975); Singer v. Singer, 318 So. 2d 439 (Fla. App. 1975); L. WEITZMAN, *supra* note 32, at 351-54; Sharp, *supra* note 144, at 1403.

[194] The *Marschall* court also suggests that treatment of antenuptial agreements can minimize the cost of divorce. 195 N.J. Super. at 27-28, 477 A.2d at 839.

[195] L. WEITZMAN, *supra* note 32, at 344-59.

[196] *Id.* at 353.

[197] 321 So. 2d 128 (Fla. App. 1975).

[198] *Id.* at 130. The husband had been married two times previously. Both marriages ended unhappily. Since the husband's assets were worth well over $1 million, it was the husband who proposed the antenuptial agreement. The husband's attorney prepared the agreement. *Id.*

[199] *Id.* at 131. According to the agreement, the wife would receive a lump sum of $20,000 upon his death. *Id.*

was "seemingly unreasonable and penurious"[200] because she had entered into the agreement with a sound mind.[201] In this case, the detailed agreement and the wife's sound state of mind created a presumption that she acted free of fraud, duress, or misrepresentation.

Second, contract law promotes predictability.[202] Parties to the agreement can expect certain results, rather than being subjected to the vague and unfamiliar arena of "judicial discretion."[203] The New Jersey court has held that a valid antenuptial agreement waives the right to equitable distribution by a court.[204] In *Marschall v. Marschall*, a 1984 case, the New Jersey court said when an agreement is valid, particularly where there is full disclosure, the execution of that agreement serves as a waiver of the parties' right to have a court apply equitable principles.[205] In this case, the court did not consider fairness to be a material issue for the court to determine. Apparently, it gave greater weight to predictability when it stated: "A 'fairness' test would raise a difficult question as to the meaning of that term in the context of such an agreement."[206]

Thus, in summary, while some courts see a need to invoke equity despite a valid antenuptial agreement when questions of fairness are at stake,[207] others find traditional contract law adequate when the agreement is otherwise valid at its inception.[208] Still other courts predominantly in the most recent cases adopt both contract principles with an overlay of equitable principles.[209] As noted by the National Conference of Commissioners on Uniform State Laws, there is a significant lack of uniform treatment among the states.[210] Rather than reflective of basic policy differences between the states, the lack of uniformity results from a "spasmodic reflexive response to varying factual circumstances at different

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[200] *Id.*

[201] *Id.* at 132. The wife had a high school education, had experience in the business world, and had consulted with an attorney who advised her not to sign the agreement. *Id.*

[202] L. WEITZMAN, *supra* note 32, at 353-54; Clark, *supra* note 1, at 183; Kastely, *supra* note 1, at 18; Sharp, *supra* note 144, at 1403; Note, *For Better or For Worse*, *supra* note 2, at 540-56.

[203] Sharp, *supra* note 144, at 1403.

[204] Marschall v. Marschall, 195 N.J. Super. 16, 477 A.2d 833 (1984) (An antenuptial agreement provided that in the event of termination of the marriage, each party would retain his or her separate property free from claims of the other party, and the wife would receive a lump sum payment. The court questioned whether there had been full disclosure and therefore remanded the case for a full hearing.).

[205] *Id.* at 31, 477 A.2d at 841.

[206] *Id.*

[207] *See supra* notes 174-92 and accompanying text.

[208] *See supra* notes 193-206 and accompanying text.

[209] *See* I. BAXTER, MARITAL PROPERTY § 41:5 (Supp. 1983).

[210] UNIF. PREMARITAL AGREEMENT ACT, prefatory notes, 9A U.L.A. at 269. The problems caused by the lack of certain and uniform treatment among the states, exacerbated by the mobility of the population, prompted the promulgation of the Uniform Premarital Agreement Act. *Id.*

times."[211]

E. *The Rossiter Decision*

Citing Hawaii's divorce statute,[212] the *Rossiter* court said "even if the antenuptial agreement was enforceable"[213] the family court had the power, based on equity, to order the sale of the house.[214] The ICA agreed with the lower court that the sale was necessary to reimburse Patricia for her monetary contributions. This resulted in a fair and equitable outcome for Don as well because he received one half of the balance from the sale of the house, the auto repair business, and the property he brought into the marriage.[215] Thus, as stated by the court, equity would have prevailed over a valid and enforceable antenuptial agreement in any event.[216]

These statements come as no surprise given the court's propensity to exercise its discretionary power in divorce settlements.[217] In cases such as *Raupp v. Raupp*,[218] *Takara v. Takara*,[219] and *Au-Hoy v. Au-Hoy*,[220] the appellate courts affirmed the lower court's use of discretion in distributing property. For example, the *Raupp* case involved the valuation of separate property which the parties contributed to the "marital pot"[221] whereas the *Au-Hoy* couple specifically intended to keep their separate properties.[222] The significant factual differences begged the court to weigh the individual merits of each case. The court's discretion was critical in reaching an equitable result.

The need for the court to ensure a fair result is especially true when it comes to situations involving an antenuptial agreement. The circumstances surrounding an agreement might change significantly by the time of performance of the agreement such that enforcement would render an inequitable result.[223]

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[211] *Id.*

[212] HAWAII REV. STAT. § 580-47 (1976 and Supp. 1984). *See supra* text accompanying note 149.

[213] 4 Hawaii App. at 339, 666 P.2d at 621.

[214] *Id.* at 340, 666 P.2d at 622.

[215] *Id.*

[216] *Id.* at 340, 666 P.2d at 621.

[217] *See supra* note 152.

[218] 3 Hawaii App. 602, 658 P.2d 329 (1983).

[219] 4 Hawaii App. at 68, 660 P.2d at 529 (1983).

[220] 60 Hawaii 354, 590 P.2d 80 (1979).

[221] 3 Hawaii App. at 608, 658 P.2d at 334.

[222] 60 Hawaii at 355, 590 P.2d at 81-82.

[223] Clark, *supra* note 1, at 151. *See, e.g.*, Posner v. Posner, 233 So. 2d 381 (Fla. 1970). The potential for abuse of the confidential relationship between parties about to be married is another reason for the court to ensure an equitable result. *See supra* notes 184-86 and accompanying text. However, the facts of *Rossiter* did not indicate that such abuse had occurred.

This may have prompted the *Rossiter* court to use judicial discretion as an alternative rationale for its decision not to enforce the alleged antenuptial agreement between Don and Patricia.[224] If the antenuptial agreement existed and was valid, it would have been unfair not to reimburse Patricia for her substantial monetary contributions to the marriage.[225] When Don and Patricia entered into their agreement, the parties may have planned to pool their resources in order to build and furnish their home. Arguably, the unanticipated imbalance in their respective contributions which followed procurement of the agreement represents a "change of circumstance."[226] This change required judicial intervention to ensure that Patricia would be reimbursed her equitable share.[227] Perhaps Don could have reimbursed Patricia out of his own assets.[228] If he could not, proceeds from the sale of their property would have been the logical source of reimbursement.

However, valid reasons support the argument that antenuptial agreements should be treated "like any other contract" rather than applying equitable principles to them.[229] Traditional contract doctrines provide adequate safeguards because the courts must scrutinize agreements for fairness, fraud, duress, conscionability, and other validity factors.[230]

The facts in *Rossiter* indicate that if an agreement existed and was enforceable under contract law, the *Rossiter* agreement would have been enforceable despite the change in circumstances. Like the parties in the *Potter*[231] case, arguably both Don and Patricia entered into the agreement with full understanding of the terms of their agreement.[232] Patricia admittedly represented to Don that she would never cause him to lose his home as his first wife had done.[233] This would indicate lack of fraud, duress, or misrepresentation and thus create a

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[224] 4 Hawaii App. at 340, 666 P.2d at 621 (1983).

[225] Patricia contributed $24,600 to the marriage. 4 Hawaii App. at 335, 666 P.2d at 619. Clearly, this represents a substantial amount of money.

[226] The concept of "changed circumstances" purports to mitigate potential harm, hardship or disadvantage to a spouse which would be occasioned by a divorce. Examples of hardship include an extreme health problem requiring considerable care and expense, change in employability, additional burden of child care, marked change in cost of maintenance, and changed standard of living occasioned by the marriage. Gross v. Gross, 11 Ohio St. 3d at 109 n.11, 464 N.E.2d at 509 n.11. These examples refer to a situation where one spouse will be left in a destitute or disadvantageous condition, rather than the *Rossiter* type situation.

[227] *See Posner*, 233 So. 2d at 383-84.

[228] *See infra* note 235.

[229] *See supra* note 193.

[230] L. WEITZMAN, *supra* note 32, at 356-59; Clark, *supra* note 1, at 143; Kastely, *supra* note 1, at 18.

[231] Potter v. Collin, 321 So. 2d 128 (Fla. App. 1975).

[232] *See infra* text accompanying note 233.

[233] Brief for Appellant at 12, Rossiter v. Rossiter, 4 Hawaii App. 333, 666 P.2d 617 (1983).

presumption that both Don and Patricia entered into the agreement knowingly and voluntarily.[234]

The family court could have achieved a fair result by decreeing alternatives other than selling the house. For example, Don might have been willing to reimburse Patricia for her contributions or to seek a loan and buy out Patricia's interest in the property. A graduated payment schedule could have been devised where Don would have repaid Patricia the money over the course of a few years.

Since the lower court apparently did not consider these alternatives,[235] the ICA could have remanded the case. Application of contract principles, coupled with one of these alternatives, would have achieved a just result while preserving the notion of freedom to contract.

In sum, the ICA embraced the family law doctrine over the contract doctrine. Although that portion of the opinion dealing with judicial discretion is dicta, it indicates the court's position with respect to antenuptial agreements.

IV. Impact of the Rossiter Decision

As a case of first impression in Hawaii,[236] *Rossiter* sets out the intermediate court of appeal's treatment of antenuptial agreements. However, the case leaves at least two important questions unanswered. First, under what conditions will the court enforce an oral antenuptial agreement? Second, how will the court treat written antenuptial agreements?

A. *Oral Antenuptial Agreements*

The *Rossiter* court's broad treatment of the marriage clause in effect creates a presumption that all oral antenuptial agreements are made in consideration of marriage and are unenforceable for failure to satisfy the statute of frauds.[237] It is unclear whether this case will only apply to provisions governing property divi-

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[234] Reference to a contention by Patricia that the agreement was subject to fraud, duress, or misrepresentation appears nowhere in the opinion.

[235] No evidence which indicates that the family court considered such alternatives exists in the record. Reference to a reimbursement scheme was made by Don's attorney when he said: "While she denies promising that, in the event of separation she would accept reimbursement of her contributions rather than asking for 50% of the fair market value of the house." Record at 158, *Rossiter*, 4 Hawaii App. 333, 666 P.2d 617 (1983).

[236] 4 Hawaii App. at 337, 666 P.2d at 620. In Au-Hoy v. Au-Hoy, 50 Hawaii 354, 590 P.2d 80 (1979), the Hawaii Supreme Court did give deference to the apparent intention of the parties to keep separate property. However, that case did not involve an antenuptial agreement. *See supra* notes 165-69 and accompanying text.

[237] 4 Hawaii App. at 338, 666 P.2d at 620.

sion or to all antenuptial agreements in general.[238] However, given the court's reasoning,[239] the subject matter of the agreement, be it property division, alimony payments or the parties' conduct in relation to each other, will probably not concern the court.[240] Rather, the court will focus on the relationship of the marriage to the agreement. If the marriage goes to the heart of the agreement[241] or if the agreement would not have occurred but for the marriage,[242] the court will deem the agreement as made in consideration of marriage and thus unenforceable.

For the oral antenuptial agreement to be enforceable, it must be absolutely clear that consideration other than the marriage existed separate and independent of the marriage. Marriage can only be incidental or secondary to the agreement.[243] Couples making an oral agreement should specify that the marriage is not consideration. A simple utterance that "this agreement is not in consideration of marriage" would probably be insufficient.

However, laypersons are not likely to be aware of an essential legal element such as consideration. Many will tend to make an oral agreement without express consideration. As as result of the court's strict adherence to the writing requirement under the statute of frauds, oral antenuptial agreements will most likely have a low success rate.[244]

Similarly, this court will probably take a conservative approach to the doctrine of part performance as an exception to the statute of frauds by retaining a traditional view of marriage and its related duties.[245] When the performance is *undoubtedly independent* of a marriage duty, the court might apply the doctrine.[246] However, since Don Rossiter's moving 3,000 miles to Hawaii and building a house were construed as traditional marital duties,[247] it is difficult to imagine which acts the court will treat as independent of marriage.[248]

Clearly, the court will not look favorably upon oral antenuptial agree-

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[238] In Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974), the court made a distinction between antenuptial agreements governing alimony and antenuptial agreements governing property rights. *See also* UNIF. PREMARITAL AGREEMENT ACT § 3, 9A U.L.A. 271 (Supp. 1984).

[239] *See supra* text accompanying notes 212-35.

[240] 4 Hawaii App. at 338, 666 P.2d at 620. *See also supra* note 59.

[241] *See, e.g.*, Hutnak v. Hutnak, 78 R.I. 231, 81 A.2d 278 (1951).

[242] *See, e.g.*, Henry v. Henry, 27 Ohio St. 121 (1875).

[243] When the marriage is secondary, some jurisdictions view the agreement as made in contemplation, rather than in consideration of marriage. Therefore, the writing requirement is waived. *See supra* notes 69-85.

[244] *See supra* note 59.

[245] 4 Hawaii App. at 339, 666 P.2d at 621. *See also supra* text accompanying notes 98-110.

[246] 4 Hawaii App. at 339, 666 P.2d at 621. *See also supra* notes 91-92.

[247] 4 Hawaii App. at 338, 666 P.2d at 620-21.

[248] T. . . v. T. . ., 216 Va. 867, 224 S.E.2d 148 (1976) (wife's change of plans as to her job and the relinquishment of her child for adoption were sufficient part performance).

ments.[249] While most couples might feel an aversion towards the formality of written agreements just prior to marriage, they would be well-advised to put those feelings aside and execute the agreement in writing.

B. *Written Antenuptial Agreements*

The parting paragraphs in *Rossiter* concerning the pervasiveness of judicial discretion[250] even cast doubts on the enforceability of valid written agreements. While Hawaii courts reputedly adopt a progressive approach to the law in general,[251] the *Rossiter* court's conservative view of the oral agreement[252] indicates its preference for a conservative treatment of written antenuptial agreements as well. However, the ICA did acknowledge the modern trend upholding antenuptial agreements in other jurisdictions.[253] It also noted that "it is within the trial court's discretion to consider a valid antenuptial agreement in its allocations of the parties' property. . . ."[254] Thus, hope for the success of antenuptial agreements in Hawaii still exists.

In any event, the first step is to determine the agreement's validity. In doing so, courts in different jurisdictions have relied upon the following factors in varying combinations: (1) full disclosure and/or adequate knowledge;[255] (2) absence of fraud, duress, and mistake;[256] (3) adequate and independent legal representation;[257] (4) substantive fairness at the time of execution;[258] and (5)

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[249] 4 Hawaii App. at 338, 666 P.2d at 620.

[250] *Id.* at 339-40, 666 P.2d at 621.

[251] *See, e.g.*, Nishi v. Hartwell, 52 Hawaii 188, 211, 473 P.2d 116, 128 (1970) (Abe, J., dissenting). Justice Abe said: "The court has indicated its willingness to pioneer new case laws to bring about justice and fairness and to meet the needs of changing times." *See also* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Pickard v. City & County, 51 Hawaii 134, 452 P.2d 445 (1969); Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Fergerstrom v. Hawaiian Ocean View Estates, 50 Hawaii 374, 441 P.2d 141 (1968); Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 433 P.2d 220 (1967).

[252] 4 Hawaii App. at 338, 666 P.2d at 620.

[253] *See supra* note 31.

[254] 4 Hawaii App. at 339, 666 P.2d at 621.

[255] Newman v. Newman, 653 P.2d 728 (Colo. 1982); Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Marschall v. Marschall, 195 N.J. Super. 16, 477 A.2d 833 (1984); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984); Laird v. Laird, 597 P.2d 463 (Wyo. 1979).

[256] Newman v. Newman, 653 P.2d 728 (Colo. 1982); Hill v. Hill, 356 N.W.2d 49 (Minn. 1984); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984); Laird v. Laird, 597 P.2d 463 (Wyo. 1979).

[257] Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984); *In re* Estate of Benker, 416 Mich. 681, 331 N.W.2d 193 (1982). *Compare* Hill v. Hill, 356 N.W.2d 49 (Minn. 1984).

substantive fairness at the time of performance.[259] Proponents or opponents of an antenuptial agreement and their attorneys should be prepared to prove or disprove these factors in the event of divorce.

Full disclosure requires that each party inform the other of his or her assets. This ensures that the parties enter into the agreement with full knowledge and understanding of what they relinquish. However, courts vary as to the degree of disclosure required.[260] One court commented that the multitude of cases on financial disclosure were "as various and in many cases as wondrous, as are these facts."[261] As a practical matter, full disclosure may be best achieved by attaching to the agreement a schedule of assets listing their approximate values as well as the parties' annual incomes over the past few years.[262]

In the alternative to full disclosure, other jurisdictions have held that adequate knowledge by the party challenging the antenuptial agreement would suffice.[263] At a minimum, a party must know of the other party's assets. In either case, where the parties entered into the agreement with full disclosure and/or adequate knowledge, courts have enforced the agreement.[264]

Fraud, duress, or mistake in the procurement of an antenuptial agreement render the agreement invalid.[265] Some courts consider these critical factors because the confidential relationship between parties about to be married is particularly prone to abuse.[266] However, in some of the more recent cases courts have refused to scrutinize antenuptial agreements any closer than they would other contracts because of a belief that the close scrutiny was reflective of an archaic presumption of inequality between the husband and wife.[267] Thus, the agree-

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[259] Newman v. Newman, 653 P.2d 728 (Colo. 1982); Hill v. Hill, 356 N.W.2d 49 (Minn. 1984); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984).

[260] Potter v. Collin, 321 So. 2d 128 (Fla. App. 1975); Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Hill v. Hill, 356 N.W.2d 49 (Minn. 1984); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984).

[261] Marschall v. Marschall, 195 N.J. Super. 16, 477 A.2d 833 (1984) (court recommended annexing a schedule setting out approximate values of each party's assets and income); Laird v. Laird, 597 P.2d 463 (Wyo. 1979) (fact that detailed disclosure was not made did not void a properly executed antenuptial agreement).

[262] Laird v. Laird, 597 P.2d at 468 (Wyo. 1979).

[263] Marschall v. Marschall, 195 N.J. Super. 16, 477 A.2d 833 (1984).

[264] *See* Knoll v. Knoll, 65 Or. App. 484, 671 P.2d 718 (1983) (wife's general knowledge of husband's assets based on her employment in his business sufficient to validate agreement when husband had not made a disclosure).

[265] *See supra* note 255.

[266] *See* Newman v. Newman, 653 P.2d 728 (Colo. 1982); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Hill v. Hill, 356 N.W.2d 49 (Minn. 1984); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973).

[267] *See supra* note 186.

[268] Laird v. Laird, 597 P.2d 463 (Wyo. 1979). *See also In re* Estate of Burgess, 646 P.2d 623, 625 (Okla. 1982) where the court stated:

ment must be freely and voluntarily entered to be valid.[268]

Adequate legal representation requires separate and independent representation by an attorney for each spouse.[269] However, courts generally do not consider this factor as a condition of validity. Rather, they do take it into consideration as an evidentiary factor to prove other requirements such as duress[270] or knowledge.[271] In either case, adequate legal representation provides an added safeguard to which the Hawaii courts might look in determining the validity of an antenuptial agreement.

Courts weigh the fairness of the agreement at two different stages.[272] Some consider whether the agreement was fair at the time of procurement.[273] This criterion is discussed in terms of procedural fairness to determine whether there was fraud, duress or other overreaching.[274] Other courts consider whether the agreement was fair at the time of performance.[275] In other words, the courts look for changed circumstances since procurement. This criterion prevents an unfair or unreasonable result.

While some courts apply "fairness at the time of performance" to agreements

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Well intentioned though this chivalrous attitude may have been in the past, times have changed. It will no longer do for courts to look on women who are about to be married as if they were insensible ninnies, pathetically vulnerable to overreaching by their fiancés and in need of special judicial protection.

[268] *See* Gross v. Gross, 11 Ohio St. 3d at 105, 464 N.E.2d at 506 ("agreements are valid and enforceable if three basic conditions are met: one, if they have been entered into freely without fraud . . . ."). *See also*, UNIF. PREMARITAL AGREEMENT ACT § 6 comment, 9A U.L.A. at 273 ("[I]n each of these situations it should be underscored that execution must have been voluntary . . . .").

[269] *In re* Estate of Benker, 416 Mich. 681, 331 N.W.2d 193 (1982).

[270] *In re* Ross, 670 P.2d 26, 28 (Colo. 1983) (evidence that wife counselled with and had the benefit of her attorney's advice supported the court's finding that the agreement was not signed under duress); Frey v. Frey, 298 Md. at 563, 471 A.2d at 711 (1984) (the importance of independent legal advice in evaluating whether the agreement was voluntarily and understandingly made).

[271] Marschall v. Marschall, 197 N.J. Super. at 30, 477 A.2d at 840 (that plaintiff was represented by independent counsel might support an argument that plaintiff knew the meaning of the agreement she was signing).

[272] Frey v. Frey, 298 Md. at 563, 471 A.2d at 711 ("the agreement must be fair and equitable in procurement and result").

[273] Newman v. Newman, 653 P.2d at 733 ("Antenuptial agreements are subject to a fairness review within the common law context of review for fraud, overreaching, or sharp dealing. Such an analysis must take place as of the time of execution of the contract and not as of the time of the separation . . . .").

[274] *See supra* note 273.

[275] Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982) (among the criteria for determining whether to enforce an agreement is whether the facts and circumstances changed since the agreement was executed); Frey v. Frey, 298 Md. at 563, 471 A.2d at 711; Newman v. Newman, 653 P.2d at 733.

governing both property division and alimony, others make a distinction.[276] Changed circumstances may weigh against an agreement regulating alimony, but not against one governing property division. One court said:

> When the agreement involves property, the court should not substitute its judgment and amend the contract. . . . There is sound public policy rationale for not strictly enforcing [an alimony provision] which, even though entered into in good faith and reasonable at the time of execution, may have become unreasonable or unconscionable as to its application to the spouse upon divorce. It is a valid interest of the state to mitigate potential harm, hardship, or disadvantage to a spouse which would be occasioned by the breakup of the marriage. . . .[277]

The Hawaii courts may choose from among these procedural and substantive factors. However, the *Rossiter* court said "[e]ven if the antenuptial agreement was enforceable, it would not be binding on the court."[278] These statements, although dicta, strongly suggest the court's intention to continue beyond a determination of an agreement's validity. Even if an agreement satisfies the validity requirements, final determination rests within the family court judge's discretion.

In light of the strong language in *Rossiter*, it is uncertain whether the court will even attempt to develop criteria and thus implicitly recognize certain antenuptial agreements, or whether it will simply allow discretionary power to dictate a settlement. Resolution of this question awaits a future case.

V. Conclusion

Rossiter v. Rossiter represents the court's first evolving standards regarding antenuptial agreements.[279] To be enforced, they must be in writing. Otherwise, they will fail under the statute of frauds.[280] The doctrine of part performance is generally insufficient to take an antenuptial agreement outside the statute.[281]

The court has not yet decided how it will treat written antenuptial agreements. It is unclear whether the court will take a modern approach and enforce antenuptial agreements that are freely entered, conscionable, and accompanied by adequate disclosure or knowledge,[282] or whether the court will look suspi-

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[276] Newman v. Newman, 653 P.2d at 734 (Colo. 1982); Gross v. Gross, 11 Ohio St. 3d at 108-09, 464 N.E.2d at 509 (1984); Hill v. Hill, 356 N.W.2d at 57 (Minn. App. 1984).

[277] Gross v. Gross, 11 Ohio St. 3d at 109, 464 N.E.2d at 509 (1984).

[278] 4 Hawaii App. at 340, 666 P.2d at 621.

[279] This was a decision of first impression. 4 Hawaii App. at 337, 666 P.2d at 620.

[280] *Id. See also* Hawaii Rev. Stat. 656-1(3) (1976 and Supp. 1983).

[281] *See supra* note 47.

[282] *See supra* note 31.

ciously at antenuptial agreements and tend not to enforce them.[283] However, *Rossiter* strongly suggests that Hawaii courts may exercise their discretionary powers despite the validity of an antenuptial agreement[284] and depart from the trend of authority nationally.[285]

Linda Rose

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[283] 4 Hawaii App. at 340, 666 P.2d at 621-22.

[284] *See supra* notes 213-16 and accompanying text.

[285] *See supra* notes 47-48.

SEARCH AND SEIZURE: A Reduced Reasonable Expectation of Privacy—*State v. Ching*, 67 Hawaii ____, 678 P.2d 1088 (1984); *State v. Snitkin*, 67 Hawaii ____, 681 P.2d 980 (1984); *State v. Ortiz*, 67 Hawaii ____, 683 P.2d 822 (1984)

I. INTRODUCTION

Three recent decisions by the Hawaii Supreme Court continue the court's development of the proper scope of warrantless searches of closed containers by police officers. In *State v. Snitkin*,[1] the first of the two decisions which upheld warrantless searches, the court emphasized that a narcotics dog's sniff of the airspace surrounding a closed container is not a fourth amendment search and, therefore, that prior reasonable suspicion is not an absolute prerequisite to the state's use of narcotics detection dogs to sniff all the packages in a cargo room of a private mail carrier. The court further held that the procedure was not unreasonable since a balance between the state's interest in using dogs and the individual's interest in freedom from unreasonable government intrusion tipped in the state's favor. In the next case, *State v. Ortiz*,[2] the court held that if a police officer has an objectively reasonable belief that a detainee is armed, he may conduct a protective weapons search of the area or of a container, such as the knapsack in this case, reasonably within the detainee's conceivable grasp. *State v. Ching*,[3] the opinion disallowing a warrantless search, held that in an inventory search of lost property, here a brass container, the police may search only to the extent necessary to identify the owner. These cases demonstrate that the Hawaii Supreme Court, basing its decision on *State v. Kaluna*,[4] continues to afford greater protection to individual privacy interests affected by inventory searches than the United States Supreme Court.[5] However, when police are

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[1] 67 Hawaii ____, 681 P.2d 980 (1984).

[2] 67 Hawaii ____, 683 P.2d 822 (1984).

[3] 67 Hawaii ____, 678 P.2d 1088 (1984).

[4] 55 Hawaii 361, 520 P.2d 51 (1974).

[5] In *Kaluna*, 55 Hawaii at 373, 374, 520 P.2d at 61, the court had indicated that officers should use the less intrusive alternative of sealing closed containers and obtaining search warrants on the basis of probable cause already developed. The court based this ruling on art. 1, § 5 of the Hawaii Constitution and thus was able to be more protective of individual rights than the United States Supreme Court had been in *Illinois v. Lafayette*. In *Lafayette*, Chief Justice Burger had

actually investigating possible criminal activity and thus are conducting protective weapons searches or using narcotics dogs, the court, like the United States Supreme Court, is less protective of individual freedoms and more tolerant of warrantless searches than prior rulings evidenced it would be.[6]

II. Facts and Court's Decisions

A. State v. Snitkin

In *State v. Snitkin*, an officer from the Drug Enforcement Agency Task Force assigned to the Honolulu International Airport was carrying out his daily survey of the packages which had arrived at Federal Express. The officer had no reason to suspect that any particular package contained drugs and simply let the dog loose to sniff any and all parcels. The dog "alerted" to the package addressed to the defendant.[7] After the police obtained a search warrant, they found that the package contained cocaine and charged Snitkin with promoting a dangerous drug in the second degree.[8]

In a suppression hearing, the circuit court judge, basing his decision on the 1982 Hawaii Supreme Court case *State v. Groves*,[9] granted the motion. *State v. Groves* had held that a narcotics detection dog's sniff of a suitcase is not a fourth amendment search.[10] However, the court had qualified this holding with dicta that it would not tolerate the use of dogs in "general exploratory searches."[11] The circuit court judge's view was that routine dog sniffs came under this prohibition.[12]

In reversing the suppression ruling, the Hawaii Supreme Court stressed its holding in *Groves* that a narcotics dog's sniff of the airspace surrounding a

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emphasized that under the U.S. Constitution police officers need not use the less intrusive alternative. ___ U.S. ___, 103 S. Ct. 2605, 2610 (1983).

[6] These include State v. Barnes, 58 Hawaii 333, 568 P.2d 1207 (1977) and State v. Onishi, 53 Hawaii 593, 499 P.2d 657 (1972). In *Barnes*, the court disallowed the search of a paper bag, which was on the automobile seat next to a driver whom police reasonably suspected of coming from a drug buy. The police in *Onishi* stopped a suspect whom they had chanced upon in Waikiki; although they had a warrant to search his apartment for stolen police rifles, the court suppressed the result of a frisk, a loaded pistol.

[7] The court stressed the reliability of the dog which had correctly sniffed out drugs 325 times.

[8] 67 Hawaii at ___, 681 P.2d at 982.

[9] State v. Groves, 65 Hawaii 104, 649 P.2d 366 (1982).

[10] 65 Hawaii at 112, 649 P.2d at 372.

[11] 65 Hawaii at 114, 649 P.2d at 373. The *Groves* court stated that its approving the use of a narcotics dog on the basis of reasonable suspicion should not be read to give carte blanche to all uses of these dogs. 65 Hawaii at ___, 649 P.2d at 372.

[12] 67 Hawaii at ___, 681 P.2d at 982.

closed container is not a fourth amendment search.[13] The dog searches only the airspace surrounding a package, not its contents; and citizens possess a reasonable expectation of privacy only in the contents of packages.[14] Since the dog sniff in *Snitkin* was not a search for fourth amendment purposes, the court did not demand that the officer have any specific justification which constituted reasonable suspicion or probable cause. For example, no one needed to have noticed the obvious smell of contraband and thus singled out the package before a narcotics dog was brought in.[15]

The only restraint the court placed on the use of narcotics dogs is that it not be unreasonable or abusive.[16] In doing so, the court indirectly equated the unreasonable use of dogs with the prohibited "general exploratory searches" of *Groves*.[17] The court explained that a search is unreasonable when the state's interest does not outweigh the individual's interest in freedom from unreasonable government intrusions.[18]

In this particular balance, the court held that the state's interest was substantial and specific. The police were involved in detecting and preventing drug trafficking; moreover, they had good reason to focus on Federal Express because it was the number one air cargo carrier used by drug traffickers in Hawaii.[19] On the other hand, the privacy interest of the defendant in the airspace was minimal and the intrusion on the privacy right was likewise minimal. That is, the

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[13] Justice Hayashi was the author of both the *Groves* and *Snitkin* decisions as well as *Ortiz* and *Ching*.

[14] 67 Hawaii at ____, 681 P.2d at 983.

[15] The *Groves* decision had stressed that the marijuana odors coming from the containers were readily detectable by the human nose. Other courts, such as the Ninth Circuit, have required that the odors be detectable by people before dogs can be used. United States v. Beale, 674 F.2d 1327, 1333 (9th Cir. 1982). It is questionable, however, whether a human could have smelled the small quantity of cocaine found in the package sent to Snitkin.

[16] 67 Hawaii at ____, 681 P.2d at 983.

[17] In *Groves*, the court had indicated it would "not condone the use of these dogs in general exploratory searches. . . ." 65 Hawaii at 114, 649 P.2d at 373. The *Snitkin* court rephrased this prohibition when it noted that *Groves* had held that "we would not countenance unreasonable or abusive uses of narcotics dogs." 67 Hawaii at ____, 681 P.2d at 983. Dicta in *Groves* had, however, condemned "a wholesale examination of all baggage in the hope that a crime might be detected. . . ." 65 Hawaii at 113, 649 P.2d at 373.

[18] 67 Hawaii at ____, 681 P.2d at 983. It appears contradictory for the court to be imposing restrictions on that which it has held not be to a search; however, the court seems to be implying that the state must have some justification for its use of narcotics dogs, even if that justification is not sufficient to constitute reasonable suspicion. In *Snitkin*, the court said that although the sniff was not a search, it did not find the Fourth Amendment "irrelevant." 67 Hawaii at ____, 681 P.2d at 983. If the state does not have this minimum level of justification, the court implies it will find the procedure a search; it implies this by saying it prohibits the use of narcotics dogs in "general exploratory *searches*." 65 Hawaii at 114, 649 P.2d at 373 (emphasis added).

[19] Approximately one-quarter of the Drug Enforcement Agency Task Force's 179 drug recoveries had been at Federal Express. 67 Hawaii at ____, 681 P.2d at 984.

dog sniff was extremely limited "in the manner in which the information is obtained and in the content of the information revealed by the procedure."[20]

B. State v. Ortiz

In the second decision discussed in this article, *State v. Ortiz*, the court found that another search, this one conducted during an investigative stop, was also a minimal intrusion on the defendant's privacy.[21] The search was generated by the defendant's suspicious behavior. The defendant, who was walking alone across an empty parking lot at 2 a.m., saw a police car on the street, ran and hid among some trash cans. When the officer found the defendant and asked what was in the knapsack on the ground next to him, the defendant grabbed for it.[22] The police officer considered this behavior suspicious, took the knapsack away and immediately felt what he took to be the butt of a handgun through the fabric. When the officer opened the knapsack, he indeed found a handgun. The officer thereupon arrested Ortiz, who was subsequently charged with possession of a firearm by a felon.[23]

The trial court, in ruling on the motion to suppress, found that the officer had conducted a valid investigative stop and even had sufficient probable cause to arrest the defendant but that the opening of the knapsack exceeded the scope of a search incident to arrest. The trial court found that once the bag was removed from the immediate control of the defendant, the officer had no reason to open the knapsack without a search warrant.[24]

The Hawaii Intermediate Court of Appeals, reviewing this ruling, agreed that the search was an invalid search incident to arrest but reversed the trial court nevertheless. It found that the search was justified under a "plain feel" rule.[25]

In reviewing the decision by the intermediate court of appeals, the Hawaii

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[20] *Id.* The court indicated in an extensive footnote that the lack of human confrontation might be an important factor and that it would have to decide in a future case if the use of dogs against people would still keep the level of intrusion minimal. *Id.* at ____ n.1, 681 P.2d 984 n.1.

[21] State v. Ortiz, 67 Hawaii ____, ____, 683 P.2d 822, 827 (1984).

[22] The detainee acknowledged that the knapsack was his. 67 Hawaii at ____, 683 P.2d at 824.

[23] 67 Hawaii at ____, 683 P.2d at 822.

[24] *Id.*

[25] The intermediate court of appeals developed the plain feel rule as an analogy to the plain view rule. Relying on United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981), it explained that "plain feel" occurs when the original governmental intrusion is justified and the subsequent feeling of contraband is inadvertent. Therefore, the officer's inadvertent feeling of the handgun after he had legitimately seized the knapsack constituted a "plain feel" exception to the warrant requirement. State v. Ortiz, 4 Hawaii App. 143, 161 n.19, 662 P.2d 517, 530 n.19 (1983).

Supreme Court affirmed the result but vacated the "plain feel" ruling.[26] The majority explained that it did not want to establish yet another exception to the warrant requirement. Instead, it easily found the search to be valid as a protective weapons search incident to an investigative stop.[27]

In discussing the next issue, whether the police officer could search the knapsack once it was removed from the defendant's immediate control, the majority cited *Terry v. Ohio*[28] and noted that a weapons search during a valid investigative stop must be "*reasonably* related in scope to the circumstances which justified the interference in the first place."[29] The court explained that the "reasonableness of a weapons search is determined by balancing the state's interest in searching against the individual's interest in freedom from unreasonable government intrusions."[30] Commenting in general on the relation between justification and scope, the court distinguished the scope of investigative stops when there is reasonable suspicion that the detainee is armed from those stops when there is no such reasonable belief. The court indicated searches were permissible only when weapons were involved. Thus, *State v. Kaluna*,[31] on which the trial court had relied, and its progeny[32] were inapposite. *Kaluna*, for example, had involved the search of a folded tissue packet so small that it could not reasonably contain a weapon.

After concluding this general discussion of scope and justification, the court turned its attention to the balancing test set forth in *Terry* to determine the reasonableness of this particular search. The state had two strong interests—a dangerous weapon was involved and the officer could not be expected to return the unopened knapsack to the defendant and thereby possibly endanger his own life.[33] First, the officer's reasonable suspicion that the defendant was armed with

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[26] 67 Hawaii at ____, 683 P.2d at 824. The dissent supported the majority in its rejection of the plain feel rule; in fact, it characterized it as "novel," *Id.* at ____, 683 P.2d at 829, as well as "labored and circuitous," *Id.* at ____, 683 P.2d at 830.

[27] The defense helped the majority reach this result by its concession not only that the investigative stop was valid but, more damagingly, that there was reasonable suspicion that the defendant was armed. 67 Hawaii at ____ n.3, 683 P.2d at 825 n.3. Although the court analyzed the specific facts of the case independently of this concession, it nevertheless refused to allow the defense to withdraw the concession. *Id.* at ____ n.3, 683 P.2d at 825 n.3.

[28] Terry v. Ohio, 392 U.S. 1 (1968), was the first case in which the Supreme Court expressly found investigative stops lawful but stipulated that the only search allowable was for weapons.

[29] 67 Hawaii at ____, 683 P.2d at 826 (emphasis added).

[30] *Id.*

[31] 55 Hawaii 361, 520 P.2d 51 (1974).

[32] In *Barnes*, an officer had stopped a car allegedly occupied by a person who had just bought drugs from a dealer. The subsequent search of a brown paper bag on the seat next to the driver was disallowed because the police officer did not have specific information that the sale had been made.

[33] 67 Hawaii at ____, 683 P.2d at 826. The court separated what appears to be essentially one interest, the officer's safety, into two components.

a dangerous handgun was sufficient to justify the weapons search. The court noted the defendant's grab for the bag, the officer's being alone, the lateness of the hour, the possibility of a hidden accomplice, and the officer's apparent recognition of a handgun. The combination of these factors provided the necessary reasonable suspicion.[34]

The court called the second state interest a "catch-22" situation.[35] "Police officers need not risk a shot in the back by returning containers which they reasonably suspect contain a dangerous weapon but may lack probable cause to seize."[36] Without definitively ruling on the matter, the court assumed that the officer's apparent recognition of the feel of a handgun did not generate probable cause; it noted that the officer was not positive a handgun was involved and therefore said "it is likely"[37] the officer had only reasonable suspicion and not probable cause that the defendant was committing a crime—the gun might have been a toy.[38]

On the other side of the balance, the defendant's privacy interest was greatly reduced once the officer had properly grabbed the knapsack and apparently felt the gun. Therefore, the court found that the subsequent opening was only a *de minimis* intrusion.[39] This section of the opinion concluded with the court's acknowledgment that protecting privacy interests through the exclusionary rule has little deterrent effect on police misconduct when a police officer is faced with personal danger.[40]

The court went on to consider a separate issue—the extent to which the police officer could go beyond the detainee's person to make a protective weapons search of the area or a container.[41] It held that the search could extend to an area or a container from which the detainee could conceivably grasp a weapon.[42] So, in spite of the police officer's having possession of the knapsack, it was conceivable that the detainee might have grabbed for it, especially if the officer had set it down. The court again speculated that the defendant might have had a hidden accomplice who in some unspecified way might have helped the detainee. Therefore, the court found that the officer's control was not exclu-

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[34] *Id.* at ____, 683 P.2d at 826-27.

[35] *Id.* at ____, 683 P.2d at 827.

[36] *Id.*

[37] *Id.*

[38] *Id. Terry* and its progeny did not explain exactly when probable cause is developed—during the pat down or the subsequent positive identification of the article when it is removed from the clothing or person of the suspect.

[39] 67 Hawaii at ____, 683 P.2d at 827.

[40] *Id.* at ____, 683 P.2d at 828.

[41] *Id.*

[42] The court indicated that it derived this holding from State v. Jenkins, 62 Hawaii 660, 619 P.2d 108 (1980), which had involved an arrest, not an investigative stop.

sive and that the search was justified.[43]

The dissent in this case criticized not only what it called the conjuring of the hidden accomplice but also the failure of the court to rule consistently with *Kaluna*.[44] It noted that in *Kaluna*, the court had been particularly disturbed by two United States Supreme Court cases which allowed police to search whatever containers arrestees had in their possession.[45] Therefore, the *Kaluna* court had demanded that searches be "no greater in intensity than absolutely necessary under the circumstances."[46] The two justices in the dissent in this case expressed their agreement with *Kaluna*, which required the police to seal a small packet. They indicated that the majority was able to reach its decision by ignoring prior Hawaii law based on *Kaluna* and by interpreting the facts for itself rather than accepting the factual determination of the trial court that the officer had exclusive control over the knapsack.[47] The dissent claimed the majority conjured the accomplice to facilitate this re-interpretation. The dissent concluded by discussing the majority's characterization of the opening of the knapsack as *de minimis*. It said that Hawaii law had never considered the warrantless search of a closed container *de minimis*.[48]

C. State v. Ching

The third recent Hawaii Supreme Court ruling on the proper scope of warrantless searches was based on a search which took place under much less pressing circumstances. In *State v. Ching*,[49] the police merely needed to identify the owner of lost property which had been turned in to them. A father had brought in an unzipped leather pouch which his son had just found in the public parking lot next to the police station. Besides the defendant's driver's license and a credit card, the pouch contained a key ring with an opaque brass cylinder attached.[50] When the officer unscrewed this cylinder, he found cocaine. The trial

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[43] 67 Hawaii at ____, 683 P.2d at 829.

[44] *Id.* at ____, 683 P.2d at 831 (Nakamura, J., dissenting).

[45] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

[46] 55 Hawaii at 369, 520 P.2d at 59.

[47] The judges were particularly critical of the majority's substitution of its factual determination for that of the trial court. The dissent felt there was not adequate ground for a "clearly erroneous" finding. 67 Hawaii at ____, 683 P.2d at 832. The majority, on the other hand, indicated that the trial court had modified its factual determination so that it did not explicitly find that the officer had exclusive control. *Id.* at ____ n.8, 683 P.2d at 829 n.8.

[48] The dissent also based this part of its opinion on State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[49] State v. Ching, 67 Hawaii ____, 678 P.2d 1093 (1984).

[50] The inventory search in *Ching* was routine. In a decision approving of a warrantless inventory search, the United States Supreme Court had stressed that one of the factors making inven-

court suppressed the evidence and the Hawaii Supreme Court affirmed this decision.[51]

In answer to the state's contention that this was not a fourth amendment search, the court reiterated its holding from *State v. Kaluna* that police inventories are searches and thus subject to the requirement of reasonableness.[52] Relying on common sense, the court rejected the state's argument that the defendant lost all reasonable expectation of privacy when he lost the property; it acknowledged, however, that the reasonable expectation of privacy was reduced. The officer's unscrewing the cap intruded even on this reduced expectation of privacy.[53]

In evaluating this search under the inventory exception to the warrant requirement, the court first set forth four state interests articulated by the United States Supreme Court in *Illinois v. Lafayette*[54] as justifications for inventory searches: (1) protection of the owner from theft of his property while in police custody; (2) protection of the police from false claims for lost or stolen property; (3) removal of potential weapons from arrestees; and (4) verification of the arrestee's identity.[55] The Hawaii court noted that this statement of state interest arose in the context of a post-arrest stationhouse inventory search. The current search was conducted under totally different circumstances—someone had turned in lost property.[56] Therefore, although the first three interests were present, they were less significant than the last interest, identification of the owner. For example, the court pointed out that usually valuables are already missing by the time lost property is turned in to the police and therefore the interest in safeguarding the owner's property is much diminished. Moreover, it is unlikely that owners would bring false claims against the police department when other people handled the property before it was turned in to the police. Finally, it is unlikely that lost property is dangerous.[57]

The court further distinguished its approach from that used by the United States Supreme Court. In *Illinois v. Lafayette*, the Court had not required the less intrusive means.[58] The Hawaii Supreme Court, on the other hand, has held that the Hawaii Constitution provides greater individual protection and requires

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tory searches acceptable is their routineness. South Dakota v. Opperman, 428 U.S. 364 (1975).

[51] 67 Hawaii at ____, 678 P.2d at 1090-91.

[52] *Id.* at ____, 678 P.2d at 1091.

[53] *Id.* at ____, 678 P.2d at 1091-92.

[54] Illinois v. Lafayette, ____ U.S. ____, 103 S. Ct. 2605 (1983). *Lafayette* had involved the routine inventory of a shoulder bag of an arrestee. The police officer discovered illegal drugs in a cigarette package.

[55] 67 Hawaii at ____, 678 P.2d at 1092.

[56] *Id.*

[57] *Id.* at ____, 678 P.2d at 1093.

[58] ____ U.S. at ____, 103 S. Ct. at 2610.

less intrusive means if feasible.[59] Therefore, the officer should have sealed the pouch once he determined the identity of the owner. He could have conducted a more thorough search and opened the closed container without a warrant only in the unlikely case that he had a reasonable belief that the lost property was valuable or dangerous.[60]

III. ANALYSIS

These three decisions demonstrate the Hawaii Supreme Court's interpretation of an area which is particularly in flux—the exclusionary rule.[61] In only one of the cases did the court clearly act in conformity with its earlier decisions and require police to limit the scope of a search. However, this occurred when no crime or suspicious activity was being investigated; the police department was simply functioning as a repository for lost and found articles. No substantial state interest in fighting crime was restricted by this decision.

It is also noteworthy that *Ching*, as well as *Kaluna*, the decision on which it is based, took place in the comparative safety of the stationhouse. Although this factor could not by itself lead to the conclusion that warrantless searches conducted at police stations will never be allowed, the presence of fellow officers contributes to the safety of the officer holding the detainee's or arrestee's property. By contrast, in *Ortiz*, the court emphasized that the officer was one-on-one with the defendant; the officer's being alone added to the potential danger of the situation. The officer needed to approach Ortiz to arrest him; if the officer were encumbered by a knapsack, he would not be able to respond adequately if Ortiz had attacked him or if a hidden accomplice had jumped him. If he had placed the knapsack on the ground, Ortiz, or again the hidden accomplice, might have grabbed it and extracted the gun.[62] The presence of another officer would have mitigated the danger substantially.

The Hawaii Supreme Court has consistently distinguished inventory searches by according little weight to the state's interest in conducting them.[63] For example, in *State v. Kaluna*, it denounced the need to preclude fraudulent claims as "at best a tenuous reason"[64] to approve inventory searches. The *Kaluna* court had said that an inventory search should be rigidly circumscribed, perhaps more

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[59] *Kaluna*, 55 Hawaii at 369 n.6, 520 P.2d at 58 n.6.

[60] 67 Hawaii at ____, 678 P.2d at 1093.

[61] *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[62] 67 Hawaii at ____, 683 P.2d at 829.

[63] On the other hand, in *Opperman*, 428 U.S. 364 and *Lafayette*, ____ U.S. ____, 103 S. Ct. 2605, the United States Supreme Court had found a substantial state interest in inventory searches.

[64] 55 Hawaii at 374, 520 P.2d at 61.

so than any other type of justified warrantless search.[65] In *Ching*, the court likewise found insufficient state interest to conduct an inventory search of the closed container. Moreover, the state interest did not outweigh even the diminished reasonable expectation of privacy in lost articles.[66] At this point in its analysis, the court possibly contradicted itself. In rejecting the state's argument that it had a substantial interest in protecting valuables, the court appeared to undercut its own position that the individual had some reasonable expectation of privacy in the container. That is, the court found that there was no significant state interest in protecting valuables precisely because people would have most likely already gone through the container looking for and stealing valuables. Why the owner would reasonably[67] expect that the contents would "remain private"[68] in such a circumstance is not made clear.[69]

The other two decisions, *State v. Snitkin* and *State v. Ortiz*, involved the active pursuit and prevention of criminal activity, and the court was willing to give arguably broader latitude to police than its earlier decisions indicated it would.[70] For example, the court acknowledged the state's interest in stopping drug trafficking to be strong, so strong that it refused to consider routine dog sniffs "general exploratory searches."[71] The court narrowed this holding by stressing that one-quarter of the illegal drugs brought into Hawaii by air were transported via Federal Express and, therefore, the dog sniffs were conducted at the site of a known conduit of drugs.[72] This, of course, raises the question of what is a known conduit; certainly, the court was generous in its characterization of Federal Express. Federal Express was the locus of approximately forty-

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[65] *Id.*

[66] 67 Hawaii at ____, 678 P.2d at 1092.

[67] Katz v. United States, 389 U.S. 347 (1967), had held that one of the factors in determining whether an expectation of privacy is reasonable is whether society is prepared to acknowledge it as such.

[68] In State v. Groves, 65 Hawaii 104, 649 P.2d 366 (1982), the court approvingly cited People v. Price, 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981), which was concerned with the smell of contraband emanating from a piece of luggage. *Price* stood for the proposition that a person has a reasonable expectation of privacy in the air only if a person coming in contact with the luggage would not notice the odor.

[69] The court could perhaps have cleared up this apparent contradiction by balancing more overtly the reduced reasonable expectation of privacy against the reduced state interest in protecting valuables in lost property, but it did not do so.

[70] *See supra* note 6.

[71] 67 Hawaii at ____, 681 P.2d at 983.

[72] Perhaps this statistic overstates the case. Although one-quarter of the Drug Enforcement Agency Task Force's interceptions at the Honolulu International Airport were at Federal Express, it is very unlikely that this comprises one-quarter of all the drugs shipped illegally into Hawaii by air. At the time of *Snitkin*, there was no testimony that the agency was systematically "surveying" incoming flights from overseas as well as other cargo carriers and other airports which have direct flights from overseas.

two narcotics recoveries in about two and one-half years. This averages out to about 1.5 packages each month out of the thousands going through Federal Express during that time.[73] Of course, the court did not find a dog sniff to be a search so the level of justification necessary to withstand the "general exploratory search" prohibition must be low; this case gives an index of just how low.

Police officers' being able to protect themselves is at least as strong a state interest as stopping drug trafficking. The court stressed that officers making valid investigative stops should be able to protect themselves without jeopardizing the admissibility of evidence obtained during a protective weapons search. The court was willing to give the officer in the field greater flexibility in responding to any situation in which he felt his life might be in danger. After all, as a commentator asked in an article on investigative stops, "[h]ow can even the most enlightened and conscientious courts ever fail to detect the presence of the necessary, indefinable less-than-probable-cause probability of a weapon."[74] Thus, the Hawaii Supreme Court also turned away from the restrictions it had earlier imposed on police officers conducting investigative stops;[75] it now struck a balance in the state's favor by basing its result on the need for police officers to investigate crimes without putting their own safety on the line.

However, by being more willing to accept the possibility of a weapon and by broadening the scope of the area which an officer may search, the court implicitly shifted the focus from the level of suspicion determining the scope of the intrusion to the level of the state interest in safety determining that scope.[76] In this case, the officer's safety was more important than his having only reasonable suspicion and not probable cause to arrest. In fact, the court said that the proper scope of the search was the same as in arrest situations—the conceivable grasp—presumably because the court recognized the same degree of danger in both situations.[77]

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[73] The relative percentage of interception of drugs out of all containers subjected to dog sniffs has been a factor in at least one decision. In People v. Mayberry, 31 Cal. 3d 335, 644 P.2d 810 (1982), the California Supreme Court noted that .76% of flights incoming from Florida were found to have narcotics aboard.

[74] Amsterdam, *supra* note 61, at 436.

[75] *See supra* note 6. In these earlier cases it had failed to find the reasonable possibility that the detainee was armed although circumstances were such that it could have.

[76] In Terry v. Ohio, 392 U.S. 1 (1968), the Court accepted the view that "the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.* at 10. If an officer suspects criminal activity, he can stop and question; if he suspects the detainee is armed, he can frisk; if he has probable cause, he can conduct a full-blown search of the person. Therefore, the Court stressed that reasonable suspicion gives rise to an authority to make only a "limited search," which "may realistically be characterized as something less than a 'full' search." *Id.* at 26. *Barnes*, 58 Hawaii 333, 568 P.2d 1207 also contrasts the more limited nature of a search based on reasonable suspicion from one based on probable cause.

[77] During investigative stops, police officers can search only for weapons; in searches incident

IV. CONCLUSION

These three decisions indicate that the court will balance the state interests versus the privacy or freedom interest of the individual and that when the state is involved in the active pursuit and investigation of crime, the state interest will predominate against a reduced reasonable expectation of privacy. The greater protection that the Hawaii Constitution gives to individual privacy interests prevails only when the state interest in the apprehension of criminals is coincidental.

Patricia J. McHenry

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to arrests, they can search for fruits of the crime as well as for weapons. *Kaluna*, 55 Hawaii at 364, 520 P.2d at 55. However, this additional justification for searches incident to lawful arrest is not significant. Once courts become as sensitive to the possibility of the detainee's having a weapon as the Hawaii Supreme Court has in this decision, the officers' being able to search for fruits of the crime does little to distinguish searches incident to arrest from those incident to an investigative stop.

CONSTITUTIONAL LAW: Private Federal Causes of Action to Enforce the Trust of the Hawaiian Homes Commission—*Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984)

I. INTRODUCTION

The Ninth Circuit Court of Appeals, in its second consideration of *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*[1] (*Keaukaha II*), found that a private federal cause of action is available to enforce the provisions of the Hawaiian Homes Commission Act of 1921 (Commission Act), incorporated into the Admissions Act of 1959.

In the earlier opinion[2] (*Keaukaha I*), the court held that no implied private cause of action existed under either the Commission Act or the Admissions Act, and the Supreme Court denied certiorari.[3] However, before the district court had entered final judgment, plaintiffs amended their complaint to reflect the intervening Supreme Court decision in *Maine v. Thiboutot*,[4] which held that private causes of action under 42 U.S.C. § 1983[5] were available to enforce rights created by federal statute even if no private cause of action was created by the statute itself.

II. BACKGROUND

A. *The Acts*

In 1921, Congress created the Hawaiian Homes Commission[6] and set aside approximately 200,000 acres to be leased at nominal rates to native Hawaiians. The stated purpose of the Hawaiian Homes Commission Act was to aid the

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[1] 739 F.2d 1467 (9th Cir. 1984).

[2] Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978).

[3] 444 U.S. 826 (1979).

[4] 448 U.S. 1 (1980). The precise issue before the Court was the availability of attorney's fees under 42 U.S.C. § 1988 (1982), but in order to determine that, the Court had to reach the § 1983 issue.

[5] 42 U.S.C. § 1983 (1982).

[6] Hawaiian Homes Commission Act, Pub. L. No. 34, § 1, 42 Stat. 108 (1921).

return of native Hawaiians to farm and homestead lands from which, for familiar reasons, they had been dispossessed.[7]

The trust of the Hawaiian Home lands was given to the State of Hawaii as a condition for admission to the Union in 1959. The Admissions Act[8] called it "a compact with the United States." The state was required to hold the lands "as a public trust . . . for the betterment of the native Hawaiians . . . and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."[9] This is the only enforcement provision of the Act.

B. Keaukaha I

In the early 1970's, the Hawaiian Homes Commission, pursuant to a 1954 amendment to the Commission Act,[10] agreed to exchange twelve acres of homestead land for equivalent acreage of Hawaii County land to enable the County to construct a flood control project in the Waiakea-Uka area. The requested acreage of Commission land eventually grew to 25.5 acres, but no County lands were exchanged to compensate the Commission.

In 1975 plaintiffs, lessees of or qualified applicants for Hawaiian Home lands, brought suit against the Commission and others, seeking declaratory and injunctive relief. Plaintiffs alleged that the Commission had violated the provisions of the Commission Act relating to exchanges and had also violated its fiduciary obligations under the Admissions Act. The district court granted plaintiffs' motion for summary judgment in September 1976. The State defendants filed an appeal to the Ninth Circuit, alleging lack of jurisdiction under 28 U.S.C. § 1331 as well as attacking the merits of the case.

The court of appeals addressed the jurisdictional question. The court said first that it must examine the claims under the Commission Act and the Admissions Act separately. Further, the court divided the inquiry under each Act into two questions: "whether there exists (1) an implied private cause of action and (2) federal question jurisdiction."[11] The court found that the Admissions Act did not imply a private cause of action and that the Commission Act did not provide federal question jurisdiction and so reversed the district court.

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[7] It has been argued that the true purpose of the Commission Act was the protection of the sugar industry from unchecked homesteading by concentrating the native Hawaiians onto land undesirable to the sugar interests. "Most of the lands made available to the Commission were arid and of marginal agricultural value." Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 865 (1975).

[8] Pub. L. No. 86-3, 73 Stat. 5 (1959).

[9] *Id.* at § 5(f). This provision has never been used.

[10] Act of June 18, 1954, ch. 319, 68 Stat. 262 (1954).

[11] 588 F.2d at 1220.

In deciding that no private cause of action was implied by the Admissions Act, the court used the four-element test articulated in *Cort v. Ash*.[12] The first element is the question whether the plaintiff is "one of the class for whose especial benefit the statute was created."[13] Since the stated purpose of the trust imposed by the Admissions Act was "the betterment of native Hawaiians,"[14] the court found that this element was satisfied.[15] The second question is whether there is "any indication of legislative intent, explicit or implicit, either to create a remedy or deny one."[16] The court found that given the "protracted consideration" in the Admissions Act, it was unlikely that any cause of action other than that reserved to the United States was intended.[17] The third and fourth elements of the *Cort* test are whether an implied cause of action is consistent with the underlying purposes of the statute and whether the cause of action is "one traditionally relegated to state law."[18] In analyzing these elements, the court emphasized that the purpose of the Admission Act was "to transfer complete ownership and responsibility of the Commission Act program and the home lands to Hawaii."[19] Therefore, the court found it "most appropriate for Hawaii's laws and judicial system to deal with it."[20]

Using the same reasoning, the court then held that the Commission Act did not provide federal question jurisdiction. Although the Act did create rights in the plaintiffs, the case did not arise under the laws of the United States because those rights lost their federal nature with the Admission of Hawaii into the Union.[21] It may be noted in passing that the characterization of the Commission as exclusively a state problem ignores the facts that not only was the Commission created by an act of Congress, and the lands given to the state as a compact with the United States, but also the exclusive remedy provided in the Admissions Act is suit by the United States. At the very least, this suggests that the federal government intended to retain *some* responsibility for the trust it had created.

III. *Thiboutot* and its Progeny

Following this rebuff and the Supreme Court's denial of certiorari, plaintiffs

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[12] 422 U.S. 66 (1975).
[13] *Id.* at 78.
[14] *See supra* note 8.
[15] 588 F.2d at 1223.
[16] 422 U.S. at 78.
[17] 588 F.2d at 1223.
[18] 422 U.S. at 78.
[19] 588 F.2d at 1224.
[20] *Id.*
[21] *Id.*

filed an amended complaint based on *Maine v. Thiboutot*.[22] In that case, the plaintiff claimed that state officials had deprived him of federal benefits to which he had a right under the Social Security Act. Justice Brennan, writing for the majority, held that private citizens could sue state officials under 42 U.S.C. § 1983 for denial of rights created by federal statutes. Section 1983 provides that persons operating under color of law of a state or territory who deprive a citizen of "rights, privileges or immunities secured by the Constitution and laws shall be liable" for suit. The Court rejected the historical argument, advanced by Justice Powell in his dissent, that "laws" in the context of 1871, when section 1983 was enacted, referred only to civil rights legislation.[23] *Thiboutot* seemed to open the door for plaintiffs seeking to enforce federal statutes.[24] However, two subsequent cases have limited the holding of *Thiboutot* and provided the two-part test by which *Keaukaha II* was decided.

In *Pennhurst State School v. Halderman*,[25] a retarded resident of a Pennsylvania home for the disabled sued the school and state administrators, alleging that conditions in the home were unsanitary, unsafe, and inhumane. The circuit court of appeals affirmed[26] a judgment for plaintiffs on the grounds that the conditions at the school violated the bill of rights section of the Developmentally Disabled Assistance and Bill of Rights Act.[27] The Supreme Court reversed. Justice Rehnquist, writing for the majority, held that the purpose of the statute was to fund state programs, not impose federal norms upon the states, and so the bill of rights was only advisory, not a condition of the federal grant.[28] As a result, no enforceable federal rights were created. The section 1983 claim was not raised by either party, since *Thiboutot* had been decided after the case was appealed, but in dicta, the Court identified two exceptions to the *Thiboutot* rule: first, statutes which, by creating "exclusive remedies," foreclose private enforcement under section 1983; and, second, statutes which create no "right secured" for section 1983 to enforce.[29] Had the issue been raised, *Pennhurst* would have

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[22] 448 U.S. 1 (1980).

[23] *Id.* at 12-19.

[24] Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DE PAUL L. REV. 31 (1983).

[25] 451 U.S. 1 (1981). On remand, the court of appeals affirmed its earlier judgment, basing its opinion on Pennsylvania state law. 673 F.2d 647 (3d Cir. 1982) (en banc). On appeal, the Supreme Court again reversed, using as its method this time the eleventh amendment. 104 S. Ct. 900 (1984).

[26] Halderman v. Pennhurst State School and Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc).

[27] 42 U.S.C. § 6010 (1976 & Supp. III 1979).

[28] 451 U.S. at 17. Justice Rehnquist distinguished between rights granted when Congress acts pursuant to § 5 of the fourteenth amendment ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") and those created by legislation, such as the Developmentally Disabled Assistance Act, enacted pursuant to the spending power.

[29] 451 U.S. at 28.

been decided as an exception under the second condition.

Middlesex County Sewage Authority v. National Sea Clammers Association[30] illustrates the first exception to the *Thiboutot* rule that the Court enunciated in *Pennhurst*. *Sea Clammers* was a suit by fishermen and others against various government officials alleging that sewage and other waste products were being dumped into the Atlantic Ocean in violation of the Federal Water Pollution Control Act.[31] Citing the comprehensive enforcement scheme which included citizen suit provisions,[32] Justice Powell wrote that the "unusually elaborate enforcement provisions" evidenced Congressional intent to foreclose other remedies, including section 1983 suits.[33]

To what extent Justices Powell and Rehnquist, who dissented in *Thiboutot*, have succeeded in cutting back the impact of that case is yet to be determined. It may be noted, however, that the statute held not to create enforceable rights in *Pennhurst* was specifically called a "bill of rights." This suggests that the conservatives are prepared to go rather far in limiting *Thiboutot*.

IV. KEAUKAHA II

In *Keaukaha II* the court of appeals used the two-part test developed in *Pennhurst* and *Sea Clammers* to decide whether the plaintiffs had a cause of action under section 1983. First, following the argument advanced by Justice White in his *Pennhurst* dissent,[34] the court stated that "there is a presumption that a federal statute creating enforceable rights may be enforced in a section 1983 action."[35] The court noted that *Sea Clammers* and succeeding cases in other circuits have required either a comprehensive enforcement scheme or clear evidence of Congressional intent to foreclose alternate remedies before ruling out a section 1983 claim.[36] The Admissions Act provides "only a single, public remedy by reserving a right to sue in the federal government."[37] Therefore, "the Admissions Act does not contain a sufficiently comprehensive enforcement scheme to foreclose a section 1983 remedy."[38]

The court then turned to the second *Pennhurst/Sea Clammers* test. Under *Pennhurst*, Congress must specifically mandate, not merely imply, a specific

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[30] 453 U.S. 1 (1981).

[31] 33 U.S.C. §§ 1251-1376 (1976 & Supp. V (1981)).

[32] 33 U.S.C. § 1365(a). The "citizen suit" provisions included a 60 day notice requirement, with which plaintiffs had failed to comply.

[33] 453 U.S. at 14-15.

[34] 451 U.S. at 51 (White, J., dissenting in part).

[35] 739 F.2d at 1471.

[36] *Id.* at 1470-71.

[37] *Id.* at 1471.

[38] *Id.*

right for the plaintiff.[39] The court found that "the Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."[40] The defendants did not deny that any enforceable rights were created by the Admission Act. Rather, following the reasoning of *Keaukaha I*, they asserted that since the state had been given responsibility to administer the trust lands, the rights created became state, not federal rights.[41] The court rejected that argument, noting that not only is the power to enforce the obligation retained by the federal government, but the trust obligation is itself rooted in federal law.[42] The court held that therefore plaintiffs had stated a federal cause of action under 42 U.S.C. § 1983.[43]

V. Conclusion

If *Keaukaha II* is upheld, native Hawaiians will in the future be able to enforce the trust held by the State of Hawaii for their benefit. The Ninth Circuit Court of Appeals held that even under the *Pennhurst/Sea Clammers* exceptions, the *Thiboutot* doctrine permits a private section 1983 suit to accomplish such enforcement. If the case should reach the Supreme Court, perhaps the boundaries of *Thiboutot/Pennhurst/Sea Clammers* will become more clear, and those boundaries may determine the future of the Hawaiian Homes Commission.

John P. Powell

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[39] 451 U.S. at 20.

[40] 739 F.2d at 1471.

[41] *Id.* at 1471-72.

[42] The court did not comment on the fact that they were rejecting the reasoning of *Keaukaha I*.

[43] 739 F.2d at 1472.

LOCAL GOVERNMENT TORT LIABILITY: Common Law Application of the "Special Relationship" Doctrine—*Cootey v. Sun Investment, Inc.*, 5 Hawaii App. ____, 690 P.2d 1324 (1984).

I. INTRODUCTION

The Hawaii Intermediate Court of Appeals (ICA)[1] held that when a local government exercises control over the actions of a private subdivider of land it has a legal duty not to require or approve the installation of drainage facilities which create an unreasonable risk of foreseeable harm to a neighboring landowner. The ICA reversed the trial court's directed verdict for the defendant by concluding that a court may hold a local government liable for the negligent acts of a third person. The ICA determined that under common law principles the County of Hawaii and the private developers formed a "special relationship" which prevented them from developing a private subdivision in such a manner as to cause damage to the property of adjoining landowners.

II. CASE HISTORY

In 1972, the Cooteys built a home on their houselot in Kamuela Lakeland Subdivision on the island of Hawaii.[2] On September 27, 1973, the County of Hawaii sent Sun Investment, Inc. (Sun) an approval letter tentatively authorizing Sun to subdivide 34.284 acres in Kamuela.[3] The approval letter set forth conditions[4] for final approval of the subdivision,[5] which included the construc-

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[1] The Hawaii State Legislature created the Intermediate Court of Appeals (ICA) with the passage of House Bill No. 92, approved on May 25, 1979. Act 111, 1979 Hawaii Sess. Laws 259. The opinion by the ICA represented a unanimous decision by the court and was written by Associate Judge Walter M. Heen, who was joined by Chief Judge James A. Burns and Associate Judge Harry J. Tanaka.

[2] Cootey v. Sun Investment, Inc., 5 Hawaii App. ____, 690 P.2d 1324, 1327 (1984).

[3] *Id.* at ____, 690 P.2d at 1327.

[4] The letter required the subdivider to submit drainage calculations and plans for approval by the Department of Public Works and the State Highways Division." *Id.*

[5] Sun's subdivision was called Puukapu Acres, Unit I, and consisted of 27 houselots averaging 1.1803 acres per lot. Sun's property was separated from the Lakeland subdivision by a large pasture approximately 320 feet wide. *Id.*

tion of drainage facilities. On October 2, 1974 the County of Hawaii gave final approval for the construction plans for the subdivision, including the designed drainage system prepared by JHK Tanaka, Inc. (Tanaka), an engineering corporation representing Sun.[6] The topography of the subject area in Kamuela was such that the Cootey's property was located at a lower elevation than that of Sun's subdivision.[7] Sun completed installation of the drainage system in 1976.[8] Between December 1978 and March 1980, heavy rains flooded the Cootey's home on at least five occasions, due to runoff surface water that had flowed through a drainage pipe and accumulated onto the Cootey's property.[9]

On May 5, 1980, the Cooteys filed an action for damages against Sun and the County of Hawaii.[10] A jury trial commenced on October 25, 1982 in the Circuit Court of the Third Circuit.[11] Upon completion of all the evidence all parties moved for directed verdicts under Rule 50(a), of the Hawaii Rules of Civil Procedure.[12] The circuit court granted the defendants' motions and denied the plaintiffs' motion.[13] Judgment was entered and the Cooteys (plaintiffs) filed their notice of appeal on December 16, 1982.[14]

III. Decision of the ICA

The ICA dismissed without merit the Cooteys' argument that the defendants

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[6] Tanaka represented Sun in obtaining subdivision approval from the County of Hawaii, prepared the construction plans for the subdivision, designed the drainage system, and had generally supervised the construction work. *Id.* at ____, 690 P.2d at 1327-28.

[7] Prior to the development of Puukapu Acres, surface water that collected thereon flowed through a natural watercourse within Puukapu Acres onto the adjoining pasture. From there the surface water flowed onto the Lakeland property. *Id.* at ____, 690 P.2d at 1328.

[8] The approved plans called for a 50 foot wide roadway to cut across a natural watercourse which prior to the Puukapu Acres development collected the surface water through the watercourse and onto the adjoining pasture. From the pasture it flowed onto Lakeland where the Cooteys' property was located. Tanaka installed a 15-inch drainpipe under the road at the intersection with the watercourse. The pipe was designed to carry the surface water from the side of the road away from Lakeland to the nearer side and return it to the same watercourse. The water would continue into the watercourse, a distance of approximately 420 feet, and onto the pasture. *Id.*

[9] Two floodings took place in December of 1978, one each in February and November of 1979, and another in March of 1980. *Id.*

[10] JHK Tanaka, Inc. (Tanaka) was added as a defendant in an amended complaint filed on September 8, 1980. *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] The ICA disagreed with the defendants' contention that the order granting their motions for directed verdict did not dispose of the cross-claims among the defendants thereby preempting appellate jurisdiction. *Id.*

owed them a statutory duty.[15] The appeals court concluded that the Cooteys failed to furnish evidence: (1) that submission of either a drainage map or drainage calculation was a prerequisite to subdivision approval either by law or regulation; (2) that items requested by the County of Hawaii were requested as a condition for approval; and (3) that a drainage map had been submitted to the County of Hawaii which met all the requirements prior to approval of the subdivision.[16] Moreover, the court determined that the County of Hawaii did not have a duty to maintain the drainage facility because the dedication of improvements by the developers was incomplete,[17] and as such the County of Hawaii did not "accept" legal control over the drainage system.[18]

However, the court found liability on a "special relationship" theory based on common law principles in which the County of Hawaii had a duty to prevent the private developers from constructing the subdivision in such a fashion as to cause damage to the Cooteys' property.[19] The ICA maintained that once the County imposed requirements on the developer to provide drainage facilities, it had a duty to ensure that the subdivision and its facilities did not create an unreasonable risk of foreseeable harm to the Cooteys.[20] The foreseeability test utilized by the ICA centered on the duty to control the conduct of a third person as to prevent them from causing harm to another when "it is foreseeable that a government employee's negligent performance of a statutory duty might result in harm to someone. . . ."[21]

In analyzing the duty owed by the developers to the Cooteys the ICA set forth a two-pronged test as articulated in *Rodriques v. State*.[22] First, the ICA

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[15] The ICA examined HAWAII REV. STAT. § 62-34(7) which authorizes the counties to regulate subdivisions; and HAWAII REV. STAT. § 265-6 which defines the County's responsibility regarding maintenance. *Id.* at ____, 690 P.2d at 1329-30.

[16] *Id.* at ____, 690 P.2d at 1330.

[17] Evidence showed that the developers failed to remove some trees growing within the road right-of-way. Furthermore, up until the date of trial the developers had made no attempt to dedicate the improvements. *Id.*

[18] The ICA announced the general rule that "municipalities are not responsible for maintenance of improvements in private subdivisions until the municipality has accepted or exercised some manner of legal control over them." *Id.* (citing Carter v. Hawaii County, 47 Hawaii 68, 384 P.2d 308 (1963); E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 33.43 (3d ed. 1983); Thompson v. Town of Portland, 159 Conn. 107, 266 A.2d 893 (1970); La Salle Nat'l Bank v. Chicago, 19 Ill. App. 3d 883, 312 N.E. 2d 322 (1974)). *See also* 63 C.J.S. *Municipal Corporations* § 886.

[19] 5 Hawaii App. at ____, 690 P.2d at 1331-32.

[20] *Id.* at ____, 690 P.2d at 1332.

[21] The ICA imposed liability on the municipality by accepting the minority position of other courts which define the "scope of government duty in terms of foreseeability and impose liability thereon." *Id.* at ____, 690 P.2d at 1331. *See* Comment, *Municipal Tort Liability For Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 553 (1983).

[22] 5 Hawaii at ____, 690 P.2d at 1332 (citing Rodrigues v. State, 52 Hawaii 156, 472 P.2d

followed a foreseeability test whereby the developers had a duty to construct the subdivision in such a manner as to avoid creating an unreasonable risk of foreseeable harm to the Cooteys.[23] Second, the court concluded that if the interference with the natural flow of the surface water caused by the development was unreasonable under the circumstances of this particular case, then the developers breached their duty and would be liable for damages.[24] After establishing there was sufficient evidence to warrant submission of the issues to the jury, the ICA reversed and remanded the case to the trial court.[25]

IV. ANALYSIS

The general rule in municipal tort law is that a municipal corporation is not liable for the injuries suffered by a member of the public caused by the negligence of an employee in the performance of a statutory duty.[26] The court, however, recognized the existence of several exceptions to this general rule. The first exception noted by the ICA is the "special relationship"[27] principle; the second exception involves claimants who are members of a particular class of individuals which a statute clearly intended to benefit.[28] The ICA chose to adopt the first exception.[29]

The ICA's decision to reverse the judgment of the circuit court follows the trend in many states[30] to waive,[31] to some degree, the traditional governmental

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509 (1970) (owners of a houselot sued the State of Hawaii under the State Tort Liability Act for damages caused to their home by surface waters overflowing a blocked drainage culvert)).

[23] In *Rodrigues*, the Hawaii Supreme Court defined the foreseeability test: "[T]he defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the the conduct unreasonably dangerous." 52 Hawaii at 174, 472 P.2d at 521.

[24] This conclusion was consistent with *Rodrigues*, in which the court stated that in Hawaii "each possessor of land may interfere with the natural flow of surface water for the development of his land so long as such interference is not unreasonable under the circumstances of the particular case." *Id.* at 164-65, 472 P.2d at 516.

[25] 5 Hawaii App. at ____, 690 P.2d at 1335.

[26] *See* Comment, *supra* note 21, at 549.

[27] *Id.* at 550. *See* Campbell v. City of Bellevue, 85 Wis. 2d 1, 530 P.2d 234 (1975) (plaintiff's wife was electrocuted when an inspector failed to initiate corrective action after plaintiff reported discovering an electric current on nearby property).

[28] Comment, *supra* note 21, at 549. *See* Halvorsen v. Dahl, 89 Wis. 2d 673, 574 P.2d 1190 (1978) (the widow of a man killed in a hotel fire brought a wrongful death action against the city claiming a failure by the city to properly enforce the applicable building codes). *Cf.* Gordon v. Holt, 65 A.D.2d 344, 412 N.Y.S.2d 534 (1979) (similar code was construed as declaring only a general duty to the public).

[29] 5 Hawaii App. at ____, 690 P.2d at 1332.

[30] "By the 1970's about half the states had abolished the municipal immunity either by direct judicial action or legislation or both, except that the usual immunity for legislative and judicial

tort immunity[32] previously held by political subdivisions.[33] The ICA first noted that precedent had been established for employing the "special relationship" exception in Hawaii in *Seibel v. City and County of Honolulu*.[34]

The plaintiffs in *Seibel* attempted to establish a special relationship between the city and their decedent's assailant by virtue of the prosecutor's knowledge of the assailant's history of sex offenses, and on the basis of a circuit court order conditionally releasing him from custody after an acquittal of those charges by reason of impairment of mental capacity.[35] The Hawaii Supreme Court concluded that general tort principles would govern any finding of liability on the part of the city to control the conduct of a third person.[36] The court held that the general rule is set forth in Restatement (Second) of Torts section 315 (1965), which states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.[37]

Although the Hawaii Supreme Court concluded that no special relationship

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action was retained and strict liability was not imposed." W. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 131, at 1052 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON ON TORTS].

[31] The American Law Institute (ALI) recognizes the modern rule to be that municipalities generally have no immunity at all. The ALI has adopted the following:

> Local Government Entities
>
> (1) Except as stated in Subsection (2), a local government entity is not immune from tort liability.
>
> (2) A local government entity is immune from tort liability for acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an administrative function involving the determination of fundamental governmental policy.
>
> (3) Repudiation of general tort immunity does not establish liability for an act or omission that is otherwise privileged or is not tortious.

RESTATEMENT (SECOND) OF TORTS § 895C (1965).

[32] The traditional rule was "that municipalities held a government immunity in tort, but one different both in origin and scope from the 'sovereign' or governmental immunity of the state." PROSSER & KEETON ON TORTS, *supra* note 30, at 1051.

[33] Local governmental immunity originated in 1798 in the case of Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Rep. 359 (1798), where a municipality was not viewed as a separate entity, so that a claim was in effect a claim against the entire population of the county. PROSSER & KEETON ON TORTS, *supra* note 30, at 1051.

[34] 61 Hawaii 253, 602 P.2d 532 (1977).

[35] 5 Hawaii App. at ____, 690 P.2d at 1331.

[36] Seibel v. City and County of Honolulu, 61 Hawaii 253, 257, 602 P.2d 532, 536 (1977).

[37] *Id.* at 258, 602 P.2d at 536.

existed in *Seibel*,[38] it nonetheless opened the door and established the "special relationship" exception in Hawaii. A key element of the ICA's analysis centered on the fact that the Hawaii Supreme Court did not discuss the "special relationship" exception from the standpoint of a statutory duty in *Seibel*.[39]

The ICA reasoned that since the "special relationship" exception was not limited to a statutory duty in *Seibel*, the court could therefore extend the principle one step further, by finding a basis for the exception in the common law.[40] In doing so the ICA declined to adopt the majority view[41] which restricts the application of the "special relationship" exception absent a showing of an undertaking[42] by a government employee or some other extraordinary circumstances.[43] Instead, the ICA chose to follow the minority position which defines the scope of local governmental liability on the basis of a foreseeability test.[44]

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[38] 5 Hawaii App. at ____, 690 P.2d at 1331.

[39] *Id.* at ____, 690 P.2d at 1331-32.

[40] *Id.*

[41] Comment, *supra* note 21, at 551.

[42] *Id.* at 551 n.74.

[43] An argument for restricting the application of the "special relationship" exception is that it would emasculate the public duty doctrine. In those court decisions which do apply the "special relationship" exception to permit recovery against municipal corporations, three factors recur:

(1) There is an inherently dangerous or imminently hazardous condition which places a greater responsibility on the government to act properly. *Compare* Runkel v. City of New York, 282 A.D. 173, 123 N.Y.S.2d 489 (1953) *aff'd and modified sub nom.* Runkel v. Homelsy, 286 A.D. 1101, 145 N.Y.S.2d 729 (1955), *aff'd*, 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957) (The city was held liable to plaintiffs buried in a collapsed building where city inspectors found the building dangerous, unsafe, in danger of collapse, and requiring demolition or securing, but took no action) *with* Sanchez v. Village of Liberty, 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977) *modified*, 44 N.Y.2d 817, 377 N.E.2d 748, 406 N.Y.S.2d 295 (1978) (In plaintiff's action for wrongful death in a multiple dwelling fire alleging that the building inspector was incompetent and the building violated statutes and ordinances, the court denied recovery because no "special relationship" existed and the building was not found to be a dangerous instrumentality).

(2) There is a present danger that is open, obvious, and requiring immediate government action, whereby the local government bears a greater responsibility to the individual. *See* Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 897 (1958) (Where the police were notified that the decedent had received death threats for having supplied information leading to the arrest of a well known criminal, the city was subject to liability for failure to provide police protection).

(3) There is actual reliance by the individual claimant on the municipality's representations and conduct, whereby the responsibility of the municipality for the protection of the individual is increased. *See* Smullen v. City of New York, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (the city was held liable where blatant violations of codes covering excavations existed, and a city inspector told the plaintiff's decedent that the "trench was pretty solid there" and did not need to be shored, and the trench collapsed). Comment, *supra* note 21, at 551 n.74.

[44] "If it is foreseeable that a government employee's negligent performance of statutory duty might result in harm to someone, then the municipality will be held liable." Comment, *supra*

The court justified its position by highlighting Hawaii's established public policy to hold the State and its political subdivisions liable and accountable for the torts of their employees.[45]

In choosing to employ the minority position, the ICA reasoned that where a local government exercised control over subdivision improvements by private developers, a duty would be imposed requiring local governments to deny approval of improvements which would create an unreasonable risk of foreseeable harm to neighboring landowners.[46] The general rule, in the court's opinion, creates a harsh result in denying any liability against the local government.[47] The ICA determined that such a result would clearly be in contravention of Hawaii's public policy regarding local government tort liability.[48]

V. CONCLUSION

The decision to establish a common law duty requiring local governments to refrain from approving drainage facilities which create an unreasonable risk of foreseeable harm to neighboring landowners appears reasonable and appropriate. By providing injured landowners with an exception to the general rule against local government tort liability, the court alleviates the harsh results produced by a broad interpretation of the municipal tort immunity doctrine. This decision will allow future courts flexibility in exercising their discretion in balancing the equities between the injured party and the local government.

The effect of this decision will be to compel local governments to give due consideration to the granting of authorization for subdivision improvements. Furthermore, it will require county employees to use greater scrutiny in examination of planned developments, and possibly require far more extensive impact statements by developers. The problem posed for local governments as a result of this decision relates to the difficulty in allocating their already limited fiscal resources to cover the imposition of this expanded liability. This problem is compounded further by the general unwillingness of insurance companies to

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note 21, at 553.

[45] "The basic . . . [principle] of governmental tort liability in Hawaii [now] is that the State and its political subdivisions shall be held accountable for the torts of governmental employees . . . ." First Ins. Co. of Hawaii v. International Harvester Co., 66 Hawaii 185, 189, 659 P.2d 64, 67 (1983) (citing Salavea v. City and County, 55 Hawaii 216, 220, 517 P.2d 51, 54 (1973)).

[46] 5 Hawaii App. at ____, 690 P.2d at 1332.

[47] "[S]uch a rule would allow the municipality to control the actions of a subdivider yet escape the consequences of having thereby created an unreasonable risk of foreseeable injury to a neighboring landowner." *Id.*

[48] *Id.*

insure local governments,[49] and as such counties may be forced to decrease social services or increase local taxes.

Robert D.S. Kim

[49] Comment, *supra* note 21, at 561. *See* Vitullo & Peters, *Intergovernmental Cooperation and Municipal Insurance Crisis*, 30 DEPAUL L. REV. 325, 329 (1981).

DAMAGES: Reducing Plaintiff's Trial Award in Multiple Settlement Cases—*Nobriga v. Raybestos-Manhattan, Inc.*, 67 Hawaii ____, 683 P.2d 389 (1984)

I. INTRODUCTION

In *Nobriga v. Raybestos-Manhattan, Inc.*,[1] the Hawaii Supreme Court held that a release and settlement given to a joint tortfeasor is to be treated collectively with all other releases and settlements given by the injured party, not individually, with respect to its effect on the injured party's recovery at trial. The court, in effectuating the "plain intent and meaning"[2] of Hawaii Revised Statutes section 663-14, part of the Uniform Contribution Among Joint Tortfeasors Act,[3] rejected a literal construction of the statute. The statute provides:

> Release; effect on injured person's claim. A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.[4]

By so holding, the court appears to have assured plaintiffs of full recovery of the jury award without prejudice to the joint tortfeasor's interest. Moreover, the court's holding will likely increase a defendant's incentive to settle in joint tortfeasor situations, a recognized goal of the Uniform Contribution Among Joint Tortfeasors Act.[5]

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[1] 67 Hawaii ____, 683 P.2d 389 (1984).

[2] *Id.* at ____, 683 P.2d at 394.

[3] At common law, the release of one joint tortfeasor for any amount released all tortfeasors. To ameliorate this harsh rule and to encourage settlements, the Uniform Contribution Among Joint Tortfeasors Act was promulgated and adopted by Hawaii in 1941 as HAWAII REV. STAT. §§ 663-11 to -17 (1976). 67 Hawaii at ____, 683 P.2d at 393; Ginoza v. Takai Elec. Co., 40 Hawaii 691 (1955).

[4] HAWAII REV. STAT. § 663-14 (1976).

[5] "The policy of the Act is to encourage rather than discourage settlements. The tortfeasor who settles removes himself entirely from the case so far as contribution is concerned if he is able and

II. Facts and Decision

Tristan Nobriga, an employee of the Pearl Harbor Naval Shipyard from 1941 to 1969, filed suit in the First Circuit Court of Hawaii against twenty-four manufacturers and suppliers of asbestos products.[6] As a result of asbestos exposure at the shipyard he contracted malignant mesothelioma.[7] He subsequently died from that illness.[8]

All but two of the defendants, Eagle-Picher Industries, Inc. (Eagle-Picher) and Raybestos-Manhattan, Inc.[9] (Raybestos-Manhattan), settled prior to trial, pursuant to release forms that complied with Hawaii Revised Statutes section 663-15, which provides:

> Release; effect on right of contribution. A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasors to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasors, of the injured person's damages recoverable against all the other tortfeasors.[10]

The two non-settling defendants continued to trial. The theories of both negligence and strict liability were submitted to the jury, which found each of the twenty-four defendants liable on both theories in equal percentages.[11] The jury returned a verdict of $564,055.00 in favor of the plaintiffs.[12] The jury also

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chooses to buy his peace for less than the entire liability." Uniform Contribution Among Joint Tortfeasors Act, *Commissioner's Commentary to 1955 Amendments*, 12 U.L.A. 65 (Master ed. 1975) [hereinafter cited as Commissioner's Comment]. Although Hawaii adopted the 1939 version of the Act, the policy of the 1955 Act was not changed. *Id.*

[6] The twenty-four defendants were: Aloha State Sales Company, Inc.; Amarex Corporation; Armstrong Cork Company; Carey Canada, Inc.; The Celotex Corporation; Combustion Engineering, Inc.; Delaware Asbestos and Rubber Company; Eagle-Picher, Inc.; Fibreboard Corporation; Forty-Eight Insulations, Inc.; GAF Corporation; Garlock Inc.; H.K. Porter Co., Inc.; J.P. Stevens, Inc.; Johns-Manville Sales Corporation; Keene Corporation; Nicolet, Inc.; Owens-Corning Fiberglass Corporation; Owens-Illinois, Inc.; Raybestos-Manhattan, Inc.; Ruberoid Company; Southern Asbestos Company; and Unarco Industries, Inc.

[7] 67 Hawaii at ____, 683 P.2d at 391.

[8] Nobriga's estate, wife, and children continued the suit as the plaintiffs upon his death. *Id.* at ____, 683 P.2d at 390.

[9] Raymark Industries succeeded Raybestos-Manhattan, Inc. as defendant. *See id.* at ____, 683 P.2d at 390.

[10] Hawaii Rev. Stat. § 663-15 (1976).

[11] One student commentator has suggested a system for allocating damages among tortfeasors found liable on the basis of both negligence and strict liability. Note, *Apportioning Damages Among Multiple Strict Tort Liability and Negligence Defendants: A Proposed System of Group Contribution*, 12 Rutgers L.J. 309 (1980).

[12] 67 Hawaii at ____, 683 P.2d at 391.

fixed the individual liabilities of each of the twenty-four defendants.[13] The trial court then applied section 663-14, which refers to a single tortfeasor, by calculating each settling defendant's pro rata[14] share of the verdict on an individual basis.[15] The trial court first multiplied each settling defendant's liability by the verdict to calculate the amount each tortfeasor would have paid had the tortfeasor gone to trial.[16] If the figure was less than the amount paid for its release, the amount paid was deducted from the jury award; if greater, the calculated amount was used to offset the award.[17] As a result, the court reduced the jury award by $552,081.85, the total of each defendant's individually de-

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[13] *Id.* at ____, 683 P.2d at 391.

[14] BLACK'S LAW DICTIONARY 1098 (5th ed. 1979) defines "pro rata" as: "Proportionately; according to a certain rate, percentage, or proportion. According to measure, interest, or liability." *E.g.*, Lahocki v. Contee Sand & Gravel Co., 41 Md. App. 579, 620, 398 A.2d 490, 513-14 (1979).

[15] The lower court, in its "Decision Re Application of Settlement Proceeds and Jury Verdict under Chapter 663," devised the following table:

	SETTLEMENT	%LIABILITY		GREATER
1. Aloha State Sales	$ 7,000.00	0%		7,000.00
2. Amatex	2,500.00	1%=	$5,640.55	5,640.55
3. Armstrong Cork	4,000.00	0%		4,000.00
4. Carey Canada	1,000.00	0%		1,000.00
5. Celotex	31,662.49	9%=	$50,764.95	50,764.95
6. Combustion Eng.	25,425.00	0%		25,425.00
7. Delaware Asbestos	500.00	0%		500.00
8. Eagle-Picher		3%		
9. Fibreboard	39,920.82	4%=	$22,562.20	39,920.82
10. Forty Eight	4,000.00	1%=	$5,640.55	5,640.55
11. GAF	2,000.00	0%		2,000.00
12. Garlock	6,000.00	0%		6,000.00
13. H.K. Porter	25,000.00	2%=	$11,281.10	25,000.00
14. J.P. Stevens	1.00	0%		1.00
15. Johns-Manville	186,829.11	39%=	$219,981.45	219,981.45
16. Keene	7,500.00	0%		7,500.00
17. Nicolet	7,258.33	0%		7,258.33
18. Owens Corning	92,035.63	3.5%=	$19,741.92	19,741.92
19. Owens Illinois	2,500.00	3.5%=	$19,741.92	19,741.92
20. Pittsburgh Corning	15,750.00	1%	$5,640.55	5,640.55
21. Raybestos Manhattan		20%		
22. Ruberoid		1%=	5,640.55	5,640.55
23. Southern		0%		
24. Unarco	4,700.00	2%	11,281.00	11,281.00
Total	$465,582.38			$552,081.85

Id. at ____, 683 P.2d at 391-92.

[16] *See supra* note 15.

[17] 67 Hawaii ____, 683 P.2d at 393. *See supra* note 15.

termined pro rata share.[18] In comparison, the total consideration paid for the twenty-two releases was only $465,582.38.[19] Judgment was entered against Raybestos-Manhattan and Eagle-Picher for $11,973.15, the difference between $564,055.00 and $552,081.85.[20]

The Hawaii Supreme Court, disagreeing with the trial court's computation, reversed the judgment.[21] The court agreed with the lower court that, pursuant to Hawaii Revised Statutes section 663-14, the jury award must be reduced by the greater of (1) the amount received by plaintiff as consideration for the release or (2) the monetary sum a tortfeasor would have had to pay according to his, her, or its percentage of liability.[22] This, concluded the court, was what the "clear and unambiguous language of the statute" required.[23]

The Hawaii Supreme Court, however, did not agree with the trial court's literal interpretation of the statute.[24] The court instead applied Hawaii Revised Statutes section 1-17 to construe section 663-14. The statute reads:

> Number and Gender. Words in the masculine gender signify both the masculine and feminine gender, those in the singular or plural number signify both the singular and plural number, and words importing adults include youths or children.[25]

The court read the words "one joint tortfeasor" in section 663-14 as "joint tortfeasors," and the word "release" as "releases."[26] According to the court's interpretation, the statute calls for the releases to be treated collectively rather than individually with respect to their effect upon the plaintiff's claim.[27] As a result, the jury award would be offset by the greater of (1) the actual monetary compensation received by the injured party or (2) the aggregate pro rata share of the settling tortfeasors based upon their total liability.

The court first aggregated the liabilities of the twenty-two settling defen-

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[18] *See supra* note 15.

[19] 67 Hawaii at ____, 683 P.2d at 393.

[20] *Id.* at ____, 683 P.2d at 392.

[21] *Id.* at ____, 683 P.2d at 391.

[22] *Id.* at ____, 683 P.2d at 393. "[A] party is entitled to only one satisfaction of a judgment. Appellants are entitled to no more compensatory damages than the jury awarded." *Id.* at ____, 683 P.2d at 393. *See also* Beerman v. Toro Mfg. Corp., 1 Hawaii App. 111, 615 P.2d 749 (1980). In Ginoza v. Takai Elec. Co., 40 Hawaii 691 (1955), the Hawaii Supreme Court reduced the judgment by the amount of consideration paid even though there was no determination of releasee's liability.

[23] 67 Hawaii at ____, 683 P.2d at 393.

[24] *Id.* at ____, 683 P.2d at 392, 393.

[25] HAWAII REV. STAT. § 1-17 (1976).

[26] 67 Hawaii at ____, 683 P.2d at 394.

[27] *Id.* at ____, 683 P.2d at 393.

dants, a total of 67%.[28] This percentage was multiplied by the amount of the verdict to find the aggregate pro rata share of the settling tortfeasors based upon their total liability, or $377,916.00.[29] As this figure was less than the $465,582.38 consideration paid by the settling defendants, the jury award was reduced by the amount of consideration paid.[30] The balance, $98,472.62, was prorated between Raybestos-Manhattan and Eagle-Picher in proportion to their respective liabilities.[31]

III. COMMENTARY

In reaching its decision, the court's foremost concern was to allow plaintiffs the full recovery of their damages: the full amount of the jury award.[32] Under the trial court's literal reading of the statute, plaintiffs received $86,499.47 less than the jury awarded.[33] The court concluded that such an "inequitable result" was clear evidence of the impropriety of a literal application of the statute when more than one defendant settles.[34]

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[28] *Id.*

[29] *Id.* at ____, 683 P.2d at 393-94.

[30] *Id.* at ____, 683 P.2d at 394.

[31] *Id.* The computation of the Hawaii Supreme Court may be summarized as follows:

Aggregate liabilities	67%
x jury award	$ 564,055.00
Aggregate pro rate share of settling tortfeasors	$ 377,916.00
Total consideration paid	$ 465,582.38
$ 377,916.00 < $ 465,582.38	
$ 564,055.00 − 465,582.38 =	$ 98,472.62

Judgment was entered for $98,472.62 against Raybestos-Manhattan and Eagle-Picher. Raybestos-Manhattan: 20% liability, $59,680.38; Eagle-Picher: 13% liability, $38,792.24.

[32] *Id.* at ____, 683 P.2d at 393; Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968).

[33] 67 Hawaii at ____, 683 P.2d at 392.

[34] *Id.* at ____, 683 P.2d at 393. North Dakota's Century Code expressly requires collective treatment of several releases to avoid inequitable results. N.D. CENT. CODE § 32-38-02 (1957) reads in pertinent part:

> Pro rata shares. In determining the pro rata shares of tort-feasors in the entire liability:
> 1. Their relative degrees of fault shall not be considered.
> 2. If equity requires the collective liability of some as a group shall constitute a single share.
> 3. Principles of equity applicable to contribution generally shall apply.

These provisions were derived from the Uniform Contribution Among Joint Tortfeasors Act as revised in 1955 by the Commission On Uniform State Laws. The North Dakota Supreme Court held, however, that the North Dakota comparative law statute impliedly repealed § 32-38-02(1) above. North Dakota law now requires that each tortfeasor's relative degree of fault is determinative of the pro rata share attributable to that tortfeasor, regardless of the amount of consideration

Further, by treating each settlement and release individually under the statute, a different result occurs when the plaintiff settles with each of the several tortfeasor defendants by separate releases as opposed to the result obtained in settlement by one joint release.[35] The court thought this difference to be contrary to the intent of the legislature.[36]

The Hawaii Supreme Court's decision seems proper. First, under the court's interpretation, the amount deducted from the jury award more accurately reflects the plaintiff's actual consideration received, thus the plaintiff stands a better chance to recover the full amount of the jury award. Only if the total amount of settlement is less than the monetary sum the released tortfeasors would have had to pay as their pro rata share of liability would a plaintiff receive less compensation than the jury awarded.[37] This result conforms with the court's articulated desire to compensate plaintiff to the full extent of the jury awarded damages.[38]

Second, a plaintiff is not penalized for failing to have perfect foresight in each individual settlement. Under the trial court's approach, this was not true. Should the plaintiff settle with an individual tortfeasor for an amount which varies from what the jury later determines to be that tortfeasor's pro rata share, the amount of variance would have been deducted from the jury's total award.[39] Thus, plaintiff would have been penalized for not settling at precisely what the jury later assesses.

Third, this penalty would likely result in a chilling effect upon the parties' incentive to settle. A plaintiff may not want to risk settling with an individual defendant because, unless the plaintiff settles with all of the joint tortfeasors, he stands to lose money from the trial verdict, the amount lost corresponding to the total of the amount each settlement varies from the jury's determinations.[40]

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paid. Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979).

The Hawaii Supreme Court refused to follow *Bartels* and ruled that the Hawaii Comparative Negligence Statute does not impliedly repeal any section of the Hawaii Uniform Contribution Among Joint Tortfeasors Act. 67 Hawaii at ____, 683 P.2d at 393; *accord* Liberty Mut. Ins. Co. v. General Motors Corp., 65 Hawaii 428, 653 P.2d 96 (1982) (per curiam).

New Jersey amended the Uniform Contribution Among Joint Tortfeasors Act to provide for pro tanto reduction of the injured party's judgment against any other tortfeasor under New Jersey law and achieved the same result as the Hawaii Supreme Court. The New Jersey provisions contain no concurrent limitation on the non-settling tortfeasor's extent of liability, but the Hawaii Supreme Court held that the Hawaii statute provides such limitation. *See* Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977) (strict pro tanto reduction of jury award).

[35] 67 Hawaii at ____, 683 P.2d at 393.

[36] *Id.*

[37] *Id.*

[38] *See supra* note 32 and accompanying text.

[39] *See supra* text accompanying notes 16-17.

[40] *See supra* text accompanying note 17.

Conversely, if the plaintiff instead takes all of the joint tortfeasors to trial, the plaintiff stands a better chance to recover the entire jury award. Hence, a dollar for dollar reduction rather than a pro rata deduction encourages settlement.[41]

A defendant would also be discouraged from settling under the lower court's interpretation. Because the deduction is taken from the jury's total award, the effect is to take the deduction from the non-settling defendant's pro rata share. Moreover, a settling defendant has no right of contribution against the non-settling defendant.[42] Thus, any amount deducted from the total jury award based on a settlement for less than the jury's determination for that tortfeasor results in a windfall to the non-settling defendant since neither the plaintiff nor the settling defendant can recoup the sum.[43] As a result, a defendant may prefer to go to trial for the chance at reducing its liability.

Fourth, although the court did not expressly consider the interests of the defendants, the court's construction of the statute does not seem substantially unfair to the tortfeasors. The settling defendants have paid their dues for peace.[44] No settlement would be affected by this decision. The non-settling defendant also suffers no additional liability beyond what the jury may find.[45] The decision, therefore, takes little away from the joint tortfeasor except the possibility of a windfall.

IV. CONCLUSION

In conclusion, the Hawaii Supreme Court has enabled plaintiff to recover the full damages awarded by the jury when settling with several tortfeasors under section 663-14. With the same stroke, the court has removed a windfall to non-settling defendants. As a result, each party's incentive to settle has been enhanced. The Hawaii Supreme Court's decision therefore furthers a recognized

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[41] Lahocki v. Contee Sand & Gravel Co., 41 Md. App. 579, 618-19, 398 A.2d 490, 513 (1979). *See also* Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977) (pro tanto reduction of jury award).

[42] HAWAII REV. STAT. § 663-12 (1976) reads in pertinent part: "A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement."

[43] *See supra* text accompanying notes 17 and 42.

[44] A release given in good faith and before judgment will preclude a claim for contribution against the released tortfeasor. *E.g.*, Grace v. Buckley, 13 Mass. App. 1081, 435 N.E.2d 655 (1982).

[45] 67 Hawaii at ____, 683 P.2d at 392; Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979). *Cf.* Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977) (strict pro tanto reduction of jury award without consideration of non-settling defendant's share of liability).

goal of the Uniform Contribution Among Joint Tortfeasors Act by encouraging settlement in multiple defendant cases.

Gaye Lynne Chun

GENERAL LIABILITY INSURANCE: *Sturla, Inc. v. Fireman's Fund Insurance Company*, 67 Hawaii ____, 684 P.2d 960 (1983); *Hurtig v. Terminix Wood Treating and Contracting Co.*, 67 Hawaii ____, 692 P.2d 1153 (1984)

I. INTRODUCTION

The Comprehensive General Liability (CGL) insurance policy is one of several kinds of insurance policies that cover products liability. The CGL policies are complex, containing a number of standard provisions which extend benefits, and a number of exclusionary provisions that serve to restrict that coverage. The products hazard and completed operations provisions of CGLs are intended to insure against the possibility that the goods, product, or work completed by the insured will cause damage to other property. The two cases discussed herein address the extent of coverage provided by such policies.

II. FACTS

A. Sturla, Inc. v. Fireman's Fund Insurance Company

In *Sturla, Inc. v. Fireman's Fund Insurance Company*,[1] the Hawaii Supreme Court held that the "business risk" exclusions[2] to a CGL[3] are intended to ne-

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[1] 67 Hawaii ____, 684 P.2d 960 (1983).

[2] The court refers to the following exclusions as business risk exclusions to which coverage does not apply:

> (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from
>
> (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or
>
> (2) the failure of the named insured's product or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness, or durability warranted or represented by the named insured; but this exclusion does not apply to loss of use of other tangible property from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than the insured;
>
> (n) to property damage to the named insured's products arising out of such products or

gate coverage for the contractual liability of an insured when a product fails or is inadequate and the damage is confined to the work product.[4] The court further concluded that the terms of the policy could not have given rise to an objectively reasonable expectation by the intended beneficiaries that the policy would cover their loss. In construing the relevant terms of the policy, the court indicated that the risks insured under the CGL policy are only those damages to other persons or property caused by a faulty product or workmanship.

Sturla, Inc., a distributor of carpet products,[5] sold carpet to the Kiahuna Beach and Tennis Resort development on the island of Kauai. Soon after installation, the carpet faded and the condominium owners and developers demanded that the carpet be replaced. Sturla denied the carpet was defective[6] and took no steps to supply new carpet. The owners and developer brought legal action against Sturla, the manufacturer, and the installer.[7] Sturla presented its

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any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

Id. at ____, 684 P.2d 960, 963 (1983).

[3] The Comprehensive General Liability (CGL) policy provides various coverages, including premises operations, products liability, and contractual liability.

Products liability insurance covers liability for damages imposed by law upon the insured because of accidental bodily injuries resulting from defects in goods or products manufactured or sold, handled or distributed by the insured or others trading in its name, if the accident occurs after the named insured has given up possession of goods or products to others and if the accident occurs away from the premises owned, rented, or controlled by the named insured. It also covers work or services performed by the named insured, provided the accident occurs after the insured has completed or abandoned the operation and it occurs away from the premises owned, rented, or controlled by the named insured.

2 R. LONG, THE LAW OF LIABILITY INSURANCE § 11.01 (1984).

[4] Work product as used here means the goods manufactured, sold, handled or distributed by the insured as well as services performed by the named insured. *See* 2 R. LONG, *supra* note 3.

[5] The carpet was manufactured by E.T. Barwick Industries, Inc. The manufacturer had been declared bankrupt at the time of the decision. *Sturla*, 67 Hawaii at ____ n.1, 684 P.2d at 961 n.1.

[6] Sturla attributed the discoloration to atmospheric conditions prevailing in the Poipu area. *Id.* at ____, 684 P.2d at 961.

[7] Plaintiffs sought damages for the cost of replacing the defective carpet, consequential damages, and interest on the damages. *Id.* The insurance policies at issue here limited damage to tangible property. *Id.* at ____, 684 P.2d at 963. Pre-1966 versions of policies did not clearly state that consequential damages to other property which resulted from deficient products or work, without accompanying physical damage, were not covered. Subsequent policies provide that damages covered include the loss of use of property resulting from property damage; prop-

insurer, Fireman's Fund with a request to assume defense of the suit. The insurer denied that the policy offered protection, based on its interpretation of the definition of property damage[8] and several exclusions set forth in the policy.[9] Sturla then sued the insurer, seeking a declaration of coverage and a duty to defend. The trial court decided for the insurer, holding that there must have been damage to something or someone other than the product itself for liability coverage to exist. Sturla appealed.[10]

The Hawaii Supreme Court began its analysis with an examination of the relevant provisions of the insurance policy. First, the court determined that while the insuring clauses[11] appeared to provide broad protection against property damage claims, certain exclusionary clauses[12] were clearly intended to negate coverage for the contractual liability of the insured when the work or work product itself is defective.[13] In *Sturla*, the damage was confined to discoloration

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erty damage is defined as injury to or destruction of tangible property. The intent is to provide coverage for consequential damage when it occurs with physical damage to property other than the work product. *See* Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 445 (1971).

[8] The insuring clause states that Fireman's Fund:

> will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> . . . .
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and . . .[Fireman's Fund] shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage, even if the allegations of the suit are groundless, false or fraudulent . . . .

67 Hawaii at ____, 684 P.2d at 962-63.

[9] See *supra* note 1 for the business risk exclusions-(m), (n), (o), and (p). Exclusion (a) also limits liability:

> (a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner.

Id. at ____, 684 P.2d at 963.

[10] *Id.* at ____, 684 P.2d at 962.

[11] *See supra* note 8.

[12] The court was addressing clauses (m), (n), (o), and (p), *supra* note 2, and referred to them as the "business risk" exclusions. *Id.* at ____ n.5, 684 P.2d at 963 n.5.

[13] *Id.* at ____, 684 P.2d at 963 (citing Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971)). Henderson points out that the products hazards and completed operations provisions are designed to provide protection against tort liability for physical damages to others, not contractual liability for economic loss because the product contracted for did not meet specifications. *Id.* The rationale for denying coverage where there is no allegation that the insured's faulty work caused any property damage to property other than the work product of the insured is that the insured is in a good position to prevent the occurrence of problems and the consequences of not performing well

of the carpet and thus excluded by provision (n) which excludes coverage for "property damage to the named insured's products arising out of such products or any part of such products."[14] The court went on to examine the "business risk" exclusions in the context of the whole policy. They noted that provision (a) provided that the insurance does not apply:

> to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner . . . .[15]

Thus provision (a) specifically exempted a warranty of quality or fitness from the exclusion and appeared to be "repugnant" to the business risk exclusions which denied coverage for contractual liability. Despite the apparent conflict, the court did not find it necessary to apply the rule that ambiguous insurance policies be construed liberally against the insurer and in favor of the insured.[16] According to the court, the contract taken as a whole was not ambiguous; the objectively reasonable expectations of the intended beneficiaries with regard to coverage were clear enough to surmount the alleged problem of ambiguity.[17]

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is a risk of every business venture which is appropriately borne by the insured-contractor. Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 239, 405 A.2d 788, 791 (1979). Insurance is essentially risk sharing. If rates are to be predictable and affordable, then the sharing must be limited to those risks that are beyond the control of the insured. Tinker, *The Law of Liability Insurance*, 25 FED'N INS. COUN. Q. 217, 224 (1975).

[14] *Sturla*, 67 Hawaii at ____, 684 P.2d at 963.

[15] *Id.*

[16] *Id.* at ____, 684 P.2d at 964 ("Because insurance policies are contracts of adhesion and are premised on standard forms prepared by the insured's attorneys, we have long subscribed to the principle that they 'must be construed liberally in favor of the insured and ambiguities resolved against the insurer.' ") (quoting Alexander v. Home Ins. Co., 27 Hawaii 326, 328 (1923)). The rule is one of several doctrines the courts employ to regulate insurance contracts because they are contracts of adhesion. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

[17] The courts have uniformly reached the conclusion that similar exclusionary clauses are unambiguous when applied to claims of this nature. Haugen v. Home Indem. Co., 86 S.D. 406, 412-13, 197 N.W. 2d 18, 22 (1922). However, a few courts have found the conflict between the two exclusionary clauses ambiguous and have applied the rule construing ambiguities in favor of the insured. *See* Federal Ins. Co. v. P.A.T. Homes, Inc., 113 Ariz. 136, 547 P.2d 1050 (1976); Fountainbleau Hotel Corp. v. United Filigree Corp., 298 So. 2d 455 (Fla. App. 1974); Fresard v. Michigan Millers Mut. Ins. Co., 97 Mich. App. 584, 296 N.W. 2d 112 (1980). In finding the contract as a whole was not ambiguous, the Hawaii Supreme Court also relied on the principle of enforcing the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of the insurance contract. *Sturla*, 67 Hawaii at ____, 684 P.2d at 964. This is the corollary of the principle of resolving ambiguities against the insurer. According to Keeton, application of the doctrine enforcing the objectively reasonable expectations of the

In finding that the contract taken as a whole was not ambiguous with respect to the scope of coverage sought by Sturla, the court came to two important conclusions regarding the standard form policy. First, the only risks insured by the policy were "injury to people and damage to property caused by a faulty product or workmanship."[18] Second, although exclusion (a) did not extend coverage in this case, when considered with exclusion (o), it appeared to provide coverage for the breach of an implied warranty where further property damage is involved.[19]

B. Hurtig v. Terminix Wood Treating and Contracting Co.

The Hawaii Supreme Court recently held that a CGL insurance policy, iden-

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insured is the direction in which insurance law appears to be moving. He argues that this is a principle insurance law should adopt. It is an objective standard and produces certainty and predictability about legal rights. Keeton, *supra* note 16, at 967.

[18] *Sturla*, 67 Hawaii at ____, 684 P.2d at 964 (citing Weedo v. Stone-E-Brick, Inc., 81 N.J. at 239, 405 A.2d at 791). The court noted that this was a fundamental point and used the following example from *Weedo* to illustrate the boundary between a "business risk" and an occurrence that would give rise to coverage under a CGL:

> When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling, and chipping result, the poorly performed work will perforce have to be replaced or repaired by a tradesman or a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the home owner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the policy before us in this case. The happenstance of the latter is entirely unpredictable—the neighbor could suffer a scratched arm or a fatal blow to the skull from the peeling stonework. Whether the liability of the businessman is predicated upon warranty theory or, preferably and more accurately, upon tort concepts, injury to persons and damage to other property constitute the risks intended to be covered under the CGL.

Sturla, 67 Hawaii at ____ n.6, 684 P.2d at 964 n.6 (quoting *Weedo*, 81 N.J. at 240-41, 405 A.2d at 791-92).

[19] 67 Hawaii at ____, 684 P.2d at 965 (citing Haugen v. Home Indem. Co., 86 S.D. 406, 413, 197 N.W.2d 18, 22 (1972)). The Hawaii court relied on the *Haugen* analysis of a policy with similar exclusions. The *Haugen* court reasoned that the clause in paragraph (a) merely removed breach of implied warranty from the specific exclusion in paragraph (a) relating to contractual liability. The exception in exclusion (a) could not serve to extend coverage, as an expansion of coverage would be counter to the concept of an exclusion—to subtract coverage. The court in *Haugen* went on to explain that all the exclusions served as limits on each other. *Id.* Tinker explains that:

> "Each exclusion is meant to be read with the insuring agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies there should be no coverage, regardless of the inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions.

Tinker, *supra* note 13, at 223.

tical to the policy in *Sturla*, covered the liability of Terminix Wood Treating and Contracting Co., Ltd. (Terminix) when its inadequate performance of a termite inspection and treatment contract led to termite damage to a home.[20] The court concluded that exclusionary provision (o) only excluded loss confined to the insured's own work or work product, and that coverage existed for damage to the home since the exclusion did not clearly provide otherwise. By so holding, the court extended coverage to property damage claims resulting from breach of implied warranty unless the claimed loss is confined to the insured's work or work product.

Terminix contracted with Helen and Bernard Hurtig to inspect and treat their home for termite infestation. The Hurtigs sued Terminix, alleging that Terminix's failure to correctly perform the contract led to termite damage to their home. Terminix brought a third-party complaint against the insurers, Hawaiian Insurance and Guaranty Company Limited and United National Insurance Company Limited.[21] The First Circuit Court granted partial summary judgment against the insurers, holding that exclusion (o) in the policy did not negate the insurer's duty to defend and extend coverage for any property damage to the home caused by termite infestation.[22] The Intermediate Court of Appeals of Hawaii affirmed, basing its holding on the insured's objectively reasonable expectation that the policy did not exclude liability for damage to the home.[23]

On further appeal by the insurers, a majority of the Hawaii Supreme Court held that the damage to the Hurtig home was covered under the provisions of the policy based on two grounds. First, the court did not accept the insurer's argument that the work product was a "termite free house."[24] Since the damage to the home was damage to something other than the work product, exclusion (o) was not applicable. The court then applied the doctrine that insurance policies are to be liberally construed in favor of coverage for the insured, and held that coverage existed under the policy since the exclusions did not clearly provide otherwise.[25] Second, the court relied on their construction of an identi-

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[20] Hurtig v. Terminix Wood Treating & Contracting Co., 67 Hawaii at ____, 692 P.2d 1153 (1984).

[21] *Id.*

[22] Hurtig v. Terminix Wood Treating & Contracting Co., 5 Hawaii App. ____, 685 P.2d 799, 800-01 (1984).

[23] *Id.*, 685 P.2d at 801.

[24] *Hurtig*, 67 Hawaii ____, 692 P.2d at 1154. The court said the work performed was the inspection of the home and the application of the chemicals. *Id.*

[25] *Id.* However, the *Hurtig* court was addressing exclusion (o) specifically. Exclusion (m)(2), *supra* note 2, does provide that failure to meet the level of performance warranted is excluded. One other court has addressed the applicability of exclusion (m)(2) to a situation similar to the one in *Hurtig*. They determined the policy was unambiguous and would not provide coverage for loss to the home from termite damage. *See* General Ins. Co. of America v. Truly Nolen of

cal policy in *Sturla* to find "property damage claims of third persons resulting from the insured's breach of implied warranty are covered unless the loss is confined to the insured's own work product."[26]

The dissent argued that there was no distinction between Sturla's failure to supply a carpet fit for its intended purpose and Terminix's failure to eradicate the termites. Further, the risks insured by the standard form policy, as delineated in *Sturla*, are "injury to people and damage to property caused by [a] faulty [product or] workmanship."[27]

III. COMMENTARY

The purpose of liability insurance is to pay for losses that occur despite normal precautions to prevent them.[28] The insurance coverage is not intended to cover an expected or intended loss: the loss must be unexpected and unintended as viewed from the point of view of the insured.[29] Similarly, the products hazard and completed operations provisions of such policies are not intended to provide coverage for the insured's goods, products, or completed work: the risk insured against is the risk that the work product will cause damage to other property.[30]

However, both courts and commentators have noted that insurance policy provisions providing coverage in the area of products liability and completed operations are particularly complex.[31] Since insurance contracts are contracts of

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America, Inc., 136 Ariz. 142, 664 P.2d 686 (1983). However, in *Hurtig*, the applicability of exclusion (m) was not argued at the trial level. The Hawaii Intermediate Court of Appeals declined to consider exclusion (m) on appeal. Hurtig v. Terminix Wood Treating and Contracting Co., ____ Hawaii App. ____, 685 P.2d 799, 801 (1984). The court would not reverse a judgment based on a legal theory not raised in the court below. *Id.* (citing *In re* Keamo, 3 Hawaii App. 360, 650 P.2d 1365 (1982)). They found *Truly Nolen* inapposite because it was based on an exclusion other than exclusion (o). *Hurtig*, ____ Hawaii App. ____, 685 P.2d 799, 801 (1984).

[26] *Hurtig*, 67 Hawaii at ____, 692 P.2d at 1154 (citing *Sturla*, 67 Hawaii at ____, 684 P.2d at 965). The *Sturla* court applied the logic of the *Haugen* court in arriving at the construction of the policy provisions. *See supra* note 19. In a situation where exclusion (m)(2) was applicable, that logic would have to recognize that exclusion (m)(2) would serve as an additional limit on coverage and result in exclusion of coverage for product failure to meet the level of performance warranted.

[27] 67 Hawaii at ____, 692 P.2d at 1155 (Nakamura, J., dissenting).

[28] Sorensen, *What a Lawyer Ought to Know About Products Liability Insurance Coverage*, 1968 TRIAL LAW. GUIDE 322, 324-25.

[29] *Id.*

[30] Henderson, *supra* note 13.

[31] One commentator notes "[t]he complexity of the CGL form derives from the complexity of the thoughts and concepts being expressed and the application of those concepts to widely varying facts." Tinker, *supra* note 13, at 222 (1975). In Peerless Ins. Co. v. Clough, 105 N.H. 76, 83,

adhesion, the courts have employed the doctrine that ambiguities in insurance contracts are resolved against the party responsible for its drafting to protect the insured from such contracts.[32] One commentator has suggested that the broader principle of honoring the objectively reasonable expectations of applicants and intended beneficiaries explains most of the decisions resolving genuine ambiguities against the policy draftsman.[33]

In *Sturla*, the court delineated the boundaries between the risks encountered in doing business and occurrences that would result in liability under a CGL.[34] There the court was presented with a straightforward situation. The damage arose out of and was confined to the work product, and exclusion (n) clearly negated coverage for damage to work or work product. The court also relied on the objectively reasonable expectations of the insured to find that the insurance policy did not cover the damage.[35] In so holding, the court followed the weight of authority.[36]

In *Hurtig*, the court was presented with a more difficult problem because although there was damage to property other than the work product, the damages were not in the nature of an accident—unintended or unexpected.[37] The

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193 A.2d 444, 449 (1963), the Supreme Court of New Hampshire said:

> [T]he plaintiff gave the defendant coverage in a single, simple sentence easily understood by the common man in the marketplace. It attempted to take away a portion of this same coverage in paragraphs and language which even a lawyer, be he from Philadelphia or Bungy, would find difficult to comprehend.

[32] *See supra* note 16.

[33] Keeton, *supra* note 17, at 961. Keeton notes that judicial opinions in the area of insurance law are often not clear on the principled bases for their decisions. He offers three broad principles to account for what would otherwise appear to be deviant decisions: an insurer will be denied unconscionable advantage, the reasonable expectations of applicants and intended beneficiaries will be honored, and detrimental reliance will be redressed. *Id.* at 967-68.

[34] *See supra* note 18.

[35] *See supra* note 17.

[36] In Pittsburgh Bridge & Iron Works v. Liberty Mut. Ins. Co., 444 F.2d 1286 (3d Cir. 1981) the court delineated the factual situations where the applicability of the provision excluding injury to or destruction of work product would generally arise:

> (1) where X supplies a part to Y, who constructs an entity from X's part and from other parts and X's part proves defective, causing damage to the entity; and
>
> (2) where X himself constructs an entity from his own parts or others' parts, and (a) a part of the entity is defective and causes damages to someone or something other than the entity, or (b) a part of the entity is defective and causes damages to the entity itself.

According to the court the decisions uniformly concluded that the exclusion did not apply to situations (1) and (2)(a); in situation (2)(b), while the cases were not uniform, the weight of authority held the exclusion was applicable. *Id.* at 1288.

[37] Generally, an accident is an unexpected, unforeseen, unintended, unusual event. BLACK'S LAW DICTIONARY 14 (5th ed. 1979). However, courts have found an accident based on the failure of a product to perform the function for which it was sold. *See* Geddes & Smith, Inc. v.

termite damage to the home was precisely the damage the Hurtigs sought to avoid by employing Terminix. An unexpected result would have been damage to the home or injury to the persons in the home caused by the chemicals applied to treat the home for termites. However, the majority did not address this unexpected versus expected issue. They simply applied the ambiguity principle to find coverage for the insured.

The court's decision in *Hurtig* blurs the distinction between business risks and occurrences that give rise to liability under the CGL. The opinion also supports the principle that inadequate performance is sufficient to result in coverage whenever there is damage to property other than the work product, regardless of the nature of the damage. The effect in this case was to "compel an insurance carrier to assume the 'business risks' of an insured" and to "transmute a liability policy into a performance bond."[38]

Nevertheless, the result can be explained by the tension that exists between effecting the intent of the policies and the court's policy of regulating insurance contracts to protect the intended beneficiaries from contracts of adhesion. The insurers have had difficulty defining the business risk exclusions with precision.[39] Insurers have revised the provision addressing failure of the product to serve the purpose intended in 1966, and again in 1973 as a result of the uncertainty caused by the language of the provision.[40] The results in the courts have not been consistent either.[41] The decision in *Hurtig* simply reflects that situation. The message from the court is that they will continue to construe such policies in favor of the insured whenever insurance contracts do not clearly define coverage.

St. Paul Mercury Indem. Co., 51 Cal. 2d 558, 334 P.2d 881 (1959) (accident where defective doors were installed in a building); St. Paul Fire and Marine Ins. Co. v. Northern Grain Co., 365 F.2d 261 (8th Cir. 1966) (accident where planting of wrong type of seed resulted in reduction in following season's yield); Yakima Cement Prods. Co. v. Great American Ins., 93 Wash. 2d 210, 608 P.2d 254 (1980) (negligent manufacture of panels constituted accident).

[38] *Hurtig*, 67 Hawaii at ____, 692 P.2d at 1156 (Nakamura, J., dissenting).

[39] *See* Tinker, *supra* note 31.

[40] *See* Long, *supra* note 3.

[41] *Cf.* Labberton v. General Cas. Co., 53 Wash. 2d 180, 332 P.2d 250 (1958) (dealer's products liability provided coverage when dealer who sold fertilizer to farmer furnished a defective machine to spread it which resulted in improper distribution and a diminished wheat crop) *and* Stauffer Chem. Co. v. Insurance Co. of North America, 372 F. Supp. 130 (D.C.N.Y. 1973) (coverage applied to chemical company that sold a product that was supposed to prevent seed rot when potato crop was damaged by seed rot) *with* Escambia Chem. Corp. v. U.S. Fidelity & Guar. Co., 212 So. 2d 884 (Fla. App., 1968) (products liability did not cover damage to a farmer for reduced corn crop resulting from defective fertilizer) *and* Kyllo v. Northland Chem. Co., 209 N.W.2d 629 (N.D. 1973) (policy provided no coverage for loss of profits when insured's customer used herbicide which failed to control weeds, resulting in diminished pinto bean crop).

IV. CONCLUSION

In *Sturla*, the court applied the principle of enforcing the objectively reasonable expectations of the insured to find the CGL policy did not provide coverage for damage confined to a product purchased from the insured. In *Hurtig*, the court applied the principle that ambiguities in insurance policies will be construed liberally in favor of the insured; this resulted in coverage for damages that were in the nature of a business risk.

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