UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 9

1987

University of Hawaii Law Review

Volume 9 / Number 2 / Fall 1987

ARTICLES

FACULTY COMMENT

COMMENTS

RECENT DEVELOPMENTS: 1986-1987

Subscriptions

THE UNIVERSITY OF HAWAII LAW REVIEW is published semi-annually. Subscriptions are given for the entire year only and are payable in advance. Subscriptions in the United States are $16 for two issues in 1984 if remitted before March 31, 1984 (elsewhere, $17 per year). Remit payment only for the current year. Subscriptions are renewed automatically unless timely notice of termination is received.

Send subscription orders to: University of Hawaii Law Review, William S. Richardson School of Law, 2515 Dole Street, Honolulu, Hawaii 96822. Make checks payable to: R.C.U.H.—Law Review.

Manuscripts

Unsolicited manuscripts submitted for publication are welcomed but must be accompanied by return postage if return of the manuscript is desired.

Notice to Our Readers

Volume 7, Issue 2 of the University of Hawaii Law Review included an article by Tae Hee Lee entitled *Legal Aspects of U.S.-Korea Trade.* A similar article was submitted to the Dickinson Journal of International Law, which published it under the title *Some Aspects of United States-Korea Trade Relations* at 2 DICK. J. INT'L L. 267 (1984). The editorial board of the University of Hawaii Law Review was unaware of the Dickinson article at the time of Hawaii's publication.

Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation

by Eric K. Yamamoto**

** Associate Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa. B.A., University of Hawaii at Manoa, 1975; J.D., Boalt Hall School of Law, University of California at Berkeley, 1978. The author would like to thank specially John Gotanda for his invaluable research, insight and hard work. His efforts have been essential to the preparation of this article.

I. INTRODUCTION

Over the last fifteen years vociferous criticism has been leveled at the civil litigation system in the United States. Criticism has been voiced by litigants with horror stories, by a disenchanted general public and by overwhelmed practicing attorneys. Much of the criticism has focused on the symptoms of systemic problems: overcrowded dockets, undue cost, delay, waste, and insensitivity to human needs. Additional scholarly criticism has been directed at perceived failures of the adversary system—failures ostensibly rooted in conceptually and technically flawed procedures which encourage frivolous filings, promote runaway discovery and only begrudgingly authorize judicial control over cases at any time prior to trial.[1]

This criticism has generated a flurry of activity and serious efforts to revamp the rules of civil procedure. Recent efforts have not only tinkered with existing

[1] *See* Batista, *Sanctioning Attorneys For Discovery Abuse—The Recent Amendments to the Federal Rules of Civil Procedure: Views From the Bench and Bar*, 57 ST. JOHN'S L. REV. 671 (1983); Brazil, *Improving Judicial Control Over the Pretrial Development of Civil Actions: Model Rules For Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875; Miller, *The Adversarial System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need For an Umpire*, 31 SYRACUSE L. REV. 543 (1980); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

rules but dramatically reconceptualized important aspects of the adversarial process itself. One indicia of the depth of current concern is the frequency of major amendments to the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure were amended significantly four times over their first forty-one years and were amended thrice between 1980 and 1985. Recent amendments have created the "managerial judge" by actively introducing judges into the litigation process from its outset, by authorizing judges to limit and control discovery even before there is abuse or overuse and by liberalizing the standard for imposing punitive sanctions to compel attorneys to streamline the process of litigation through the elimination of "unreasonable" filings.[2]

In response to this national trend and to the Hawaii Judiciary's efforts in improving judicial administration, the Hawaii state court system is also undergoing both restructuring and fine-tuning. The Judiciary has adopted a sophisticated system of docket control,[3] tightened circuit court rules to facilitate case preparation and settlement before trial[4] and initiated an ambitious mandatory arbitration program as part of its emphasis on alternative dispute resolution.[5] Significantly, the Judiciary's Rules Committee is also presently considering substantial changes to the Hawaii Rules of Civil Procedure, including changes similar to those made in the federal rules concerning managerial judges.

Will the federal procedural innovations be effective? Or are they merely a band-aid cure for a systemic ailment? Do they rest on a firm theoretical foundation? What will this mean for judges, litigants, lawyers and the public? In Hawaii, what is and indeed should be the evolving role of the civil litigation judge? Should the Hawaii Rules of Civil Procedure be amended to follow the new federal rules and empower the managerial judge?

The first purpose of this article is to stimulate public discussion of these questions by examining the impact of the proposed new managerial rules. Careful scrutiny and discourse are essential in light of their potentially dramatic effect upon Hawaii's civil litigation system. The second purpose is to recommend adoption of new managerial rules 11, 16, 26(b)(1), 26(f) and 26(g) with adjustments. These rules, sensitively applied, should enhance the overall quality

---

[2] *See* Order Amending the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983). *See also* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981) [hereinafter Peckham, *Judge as Case Manager*].

[3] The Hawaii Judiciary recently adopted a master calendar system designed to centralize caseflow. The civil and criminal calendars in the First Circuit Court are each controlled by one administrative judge in charge of case assignment and reporting. THE JUDICIARY, STATE OF HAWAII, 1984-1985 ANNUAL REPORT 4 (1985). In addition, civil case filing, tracking, calendaring, and monitoring of orders and judgments are now computerized as part of the plan for a centralized statewide system of automation. THE JUDICIARY, STATE OF HAWAII, 1985-86 ANNUAL REPORT 10 (1986).

[4] HAW. CIR. CT. R. 12, 12.1.

[5] HAW. ARB. R. (1986).

of justice delivered through the Hawaii state courts by reducing litigation delay and cost without unduly burdening attorneys or the courts, sacrificing judicial impartiality or diminishing fair access.

This article starts with the concept of the managerial judge and its place generally within the adversarial process. It next examines the concept's efficiency rationale in the context of enhancing the quality of justice. Finally, it examines specific provisions of the new federal rules which give judges significant managerial powers to pare down the pretrial process and quicken the resolution of cases. The appropriateness of these rules is evaluated not only in terms of efficiency but also in terms of the basic values underlying the civil litigation system—particularly the values of participation and substantive effectuation.

Predicting the impact of the adoption of the new rules, of course, involves a degree of conjecture. Missing as a backdrop are empirical studies involving the Hawaii circuit courts. The recommendations, however, are rooted in considerably more than guesswork. Numerous studies preceded the adoption of the new federal rules in 1980 and 1983. Commentators at the time overwhelmingly favored adoption. Five years of operation in the federal courts have yielded generally favorable, albeit preliminary, results. The available data on the impact of managerial judges and comments by judges themselves indicate that greater efficiency has been achieved without sacrificing fairness. State court experiments with managerial procedures also have found a marked reduction in delay and pretrial cost.

Perhaps most important, this article's recommendations are directly in line with the Hawaii Judiciary's policy goals. The recommendations appear to be the next logical step for streamlining the Hawaii civil litigation process. Adoption of the rules would keep Hawaii in the forefront of improvements in judicial administration for state courts.[6] As Judge Peckham has observed:

> [T]he leaders of the American bar and bench now urge state jurisdictions to abandon their traditional passive role of allowing lawyers to control the process of the litigation, with all the cost and delay that ensue. Instead, the trial courts are being asked to monitor and supervise aggressively their cases from start to finish. I perceive that we are about to witness a dramatic change in the way most of our state trial courts do business.[7]

---

[6] In 1986, Hawaii Supreme Court Chief Justice Lum received the American Judges Association's Award of Merit for his work on improving judicial administration.

[7] Peckham, *A Judicial Response To the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 254 (1985) [hereinafter Peckham, *A Judicial Response*]. Judge Peckham is the Chief Judge for the United States District Court for the Northern District of California and is a primary exponent of the managerial judge.

II. "JUSTICE DELAYED, JUSTICE DENIED:" THE PROBLEM OF CASE CONGESTION AND MOUNTING PRETRIAL COSTS

A primary goal of the Hawaii Judiciary has been the reduction of case congestion and ultimately the elimination of undue delay and cost in resolving cases. The adage "justice delayed is justice denied"[8] has become even more poignant over the last decade as court congestion and delays have worsened across the country.[9] "Litigation explosion"[10] and "hyperlexis"[11] are the descriptive terms often employed. Some dispute has arisen about the extent, impact and even existence of the "litigation explosion."[12] Two facts, however, are undisputed: (1) case filings and the overall complexity of cases have increased dramatically over the last fifteen years; and (2) the cost of litigating has soared.

A. Increased Case Filings

In 1985, then United States Supreme Court Chief Justice Warren Burger commented:

> The caseloads in both federal and state courts experienced fantastic growth during the past sixteen years. From 1969 to 1984, new filings annually in federal district courts grew from 112,606 to 298,330. . . . The cases passing through the state court systems show a similar sharply upward curve. Numbers are only part of the story; cases are becoming increasingly complex. Both trends are cause for concern—and possibly alarm—when projected toward the twenty-first

---

[8] Hoffman, *Forward* to FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS vii (1977) ("Justice delayed may be justice denied or justice mitigated in quality").

[9] In the late 1950's, then Chief Justice Earl Warren recognized the dangers of court congestion and delays:

> Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and imperceptibly corroding the very foundations of constitutional government in the United States. Today, because the legal remedies of many our people can be realized only after they have sallowed with the passage of time, they are mere forms of justice.

Address by Chief Justice Earl Warren, ABA Annual Meeting (1958), *cited in* Yager, *Justice Expedited—A Ten-Year Summary*, 7 UCLA L. REV. 57 (1960).

[10] Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

[11] Manning, *"Hyperlexis," Our National Disease*, 71 NW. U. L. REV. 767 (1977).

[12] *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61 (1983) (suggesting that the litigation explosion may be a myth created by an "elite" of judges, professors, deans and practitioners).

century.[13]

Civil case filings in Hawaii state courts reached a peak in the six-year period between 1977 and 1983,[14] increasing by 150% in the First Circuit alone.[15] Although case filings have diminished somewhat since then, the most recent statistics still indicate that the number of cases currently filed annually are 60% greater than the number filed in 1977.[16] In addition, available data, although sketchy, suggests that the median time for disposition of civil cases[17] increased slightly between 1981 and 1986.[18] Although this data paints a general picture at best, it does underscore the importance of the Hawaii Judiciary's commitment to improving procedures and reducing congestion, delay and undue cost.[19]

The increase in case filings nationwide is commonly attributed to the coalescence of legal developments and socio-psychological forces. Legislatures and courts have recognized many new substantive[20] and procedural[21] rights by pro-

---

[13] Burger, *Introduction* to *Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985) (Symposium). Nationally, annual civil filings in state courts increased 20% in the five-year period between 1978 and 1983. BUREAU OF JUSTICE STATISTICS BULLETIN, CASE FILINGS IN STATE COURTS 1 (1983).

[14] In 1981, the total case load for the Hawaii circuit courts was 34,000. In 1986, total case load was 40,000—a 30 percent increase. In 1981, total case load for district courts was 880,000 cases. In 1986, case load was over one million cases. In 1981, total case load for the family courts was 40,000. In 1986, total case load was almost 60,000—a 50% increase. Address by Hawaii Supreme Court Chief Justice Herman Lum, American Conference of Judges (Oct. 22, 1986) [hereinafter Chief Justice Lum's Speech].

[15] The number of civil filings for the Hawaii First Circuit Court were: FY 1977-78, 3111; FY 1978-79, 3373; FY 1979-80, 3589; FY 1980-81, 3927; FY 1981-82, 5717; FY 1982-83, 6783. Civil filings since then declined some and then stabilized: FY 1983-84, 5181; FY 1984-85, 4995; FY 1985-86, 4869. Information from Mitch Yamasaki, Office of the Administrative Directors of the Courts, The Judiciary, State of Hawaii (Jan. 23, 1987).

[16] *Id.* Part of the recent decrease in filings may be attributable to the state judiciary's aggressive alternative dispute resolution program and such private mediation programs as the Neighborhood Justice Center.

[17] Median time of disposition was: FY 1981-82, 274 days; FY 1982-83, 263 days; FY 1983-84, 402 days; FY 1984-85, 309 days; FY 1985-86, 282 days. *Id.*

[18] Case backlog pressures have eased. The annual number of case terminations increased substantially as an apparent result of the court's use of a retired judge in 1983 to dispose of stagnant cases and the employment of a "pure" master calendar system. Annual civil case terminations have increased by twenty-nine percent. Chief Justice Lum's Speech, *supra* note 14.

[19] Conversations with Honolulu litigators revealed what appear to be two generally held perceptions about litigation in the Hawaii First Circuit Court: (1) most cases proceed at a reasonable pace, primarily due to the deadlines in the new Circuit Court Rules and the tough noncontinuance policy maintained by Chief Administrative Judge Philip Chun; and (2) the litigation system tolerates too many tenuous filings as well as excessive pretrial activity in a significant number of cases.

[20] For example, federal legislation has created claims for sexual discrimination, truth-in-lending violations and interstate racketeering. Burger, *Annual Report on the State of the Judiciary*, 69

viding a judicial forum for the vindication of interests society has come to deem important. More attorneys are competing in the marketplace and advertising has emblazoned "attorneys-for-hire" in the public consciousness.

Perhaps most significant, people are more aware of their legal rights and are more willing to pursue them in court. Commentators view this trend both favorably and with alarm. They favorably view the assertion of bona fide claims that heretofore went unasserted simply for lack of recognition.[22] They also deem salutary the assertion of novel claims, especially by politically and socially disadvantaged groups, that are plausibly rooted in lines of developing legal thought.[23] They view with alarm the "increased [and indiscriminate] tendency to define personal problems and social troubles in terms of legal rights and obligations . . . [which] cause an escalating case load for judicial institutions."[24] More people are looking to judges to resolve what are essentially nonlegal disputes.

The expansion of substantive rights, the increased availability of attorneys, the aggressive advertisment of attorney services and a litigious societal outlook encourage case filings in a procedural system already designed for easy initial access. Conclusory pleadings supported by bare factual outlines will survive a rule 12(b)(6) motion to dismiss for failure to state a claim.[25] Mechanisms established to deter groundless filings have proven woefully inadequate.[26]

Finally, economic incentives make lawsuits in this country easy to maintain

---

A.B.A. J. 442, 442-43 (1983) ("[I]n just the short span of [fourteen] years Congress has enacted more than 100 statutes creating new claims, entitlements, and causes of action."). State courts have created claims of strict products liability and wrongful termination of employment. *See also* Miller, *supra* note 1, at 5-6.

[21] Many new procedural rights have been recognized, especially in the context of administrative agency regulation of private interests. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[22] *See, e.g.*, Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 49. Simon notes that knowledge of one's legal rights is essential to the proper functioning of the system. "[T]he poor, who are unable to purchase legal services, may remain poor for precisely that reason. Their ignorance of the law puts them in an inferior bargaining position which will prevent them from realizing the full value of their labor in the market." *Id.* at 49-50.

[23] *See infra* note 25.

[24] Sarat, *supra* note 10, at 321-22.

[25] Conley v. Gibson, 355 U.S. 21, 47-48 (1957), established the enduring standard for satisfaction of rule 8(a)(2)'s requirement of a "short plain statement of the claims showing that the pleader is entitled to relief." The Court in *Conley* stated that a complaint survives a rule 12(b)(6) motion "unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 46-47. For a wonderful illustration of the application of that standard, see Dioguardi v. Durning, 139 F.2d 774 (2d. Cir. 1944). The official forms to the rules also aptly illustrate the minimal pleading threshold. *See, e.g.*, FED R. CIV. P. Form no. 9; HAW. R. CIV. P. Form no. 9.

[26] *See infra* section IV(B).

and acceptable to lose. The cost of responding to discovery requests is borne by the producing party, and prevailing parties generally are not entitled to payment of their attorneys' fees by the losing parties.[27] When all of these forces combine, justice within the system "becomes costly, slow, and as a result, inaccessible. The goal of access to justice is defeated when too many claims overwhelm the limited resources of the courts."[28]

B. Spiraling Litigation Costs

The cost of legal services, and litigation in particular, has sky-rocketed.[29] Escalating cost has contributed to public cynicism about the judicial system and lawyers.[30] The direct victims of spiraling cost are the courts and litigants. Society is also a victim as confidence in the judicial system diminishes and as fair access to courts is inhibited. Acknowledging the insidious nature of such societal cost, the American Bar Association has taken the position that "[i]t is ethically wrong for the judicial resolution of disputes to be prohibitively expensive."[31]

Two major contributing factors have been identified. First, congestion due to the sheer volume of cases has delayed disposition time and imposed additional costs upon litigants and courts.[32] Second, and more important, expansive use of liberal pretrial procedures has fueled rising pretrial costs. Most of the strident criticism of the civil litigation system has focused on the overuse of discovery rules which were designed to maximize truth-seeking but which are often used primarily as strategic weapons.[33] Justice Powell's comments are representative:

---

[27] The cost of responding to discovery requests is borne primarily by the party producing the information. *See generally* FED. R. CIV. P. 30-34. Most important, the "American Rule" on attorneys' fees precludes the prevailing party from recovering its fees from the loser. *See generally* Rosenberg, *Contemporary Litigation in the United States*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 153 (H. Jones ed. 1977).

[28] Sarat, *supra* note 10, at 322.

[29] It is estimated that in 1983 "the portion of the gross national product (GNP) attributable to legal services was over $33 billion, representing a 58.6 percent increase in real terms [above inflation] . . . over 1973." Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 222 (1985). Although little data is publicly available, general consensus is that the cost of litigating in Hawaii has risen markedly as fee rates have climbed and as more complicated cases have been filed.

[30] *See generally* YANKELOVICH, SKELLY & WHITE, INC., THE PUBLIC'S IMAGE OF COURTS (National Center for State Courts 1978).

[31] ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 59 (1984) [hereinafter ABA ACTION COMM'N].

[32] *See*, Peckham, *A Judicial Response*, *supra* note 7, at 254 n.4.

[33] Professor Brazil's study of Chicago litigators found that between 80% and 92% of the attorneys agreed that "the purpose of imposing work burdens or economic pressure on another

> Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of discovery procedures available under the rules.[34]

Mounting criticism about delay and excessive pretrial cost compelled the American Bar Association to create the Action Commission to Reduce Court Costs and Delay.[35] The Federal Judicial Center and the National Center for State Courts have assiduously studied the problem.[36] In September of 1985 the National Center and thirty-five cosponsoring organizations held a nationwide conference on reducing cost and delay.[37]

The overwhelming conclusion of these bodies and scholars is that the "key [to reducing delay and costs] lies in controlling the pretrial process"[38] and that the key to controlling the pretrial process is the managerial judge.[39]

III. CASE MANAGEMENT AND THE MANAGERIAL JUDGE

A. *Functions of the Managerial Judge*[40]

The hallmark of the managerial judge is early intervention in and control over

---

party or attorney . . . had been a factor affecting their use of discovery tools." Brazil, *Civil Discovery: Lawyers' View of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787, 857-58.

[34] Amendments to the Federal Rules of Civil Procedure, 55 F.R.D. 521 (1980) (Powell, J., joined by Rehnquist, J., and Stewart, J., dissenting). Professor Brazil's study revealed that "[e]ven litigators who frankly admitted that they were becoming wealthy primarily because of fees attributable to discovery expressed amazement and concern about the rapid escalation of the expense of conducting and complying with discovery." Brazil, *Views From the Frontlines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 233-34.

[35] *See, e.g.*, ABA ACTION COMM'N, *supra* note 31, at 2; P. CONNOLLY, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28 (Federal Judicial Center 1978).

[36] *See* Sipes, *Reducing Delay In State Courts—A March Against Folly*, 37 RUTGERS L. REV. 299, 303-04 (1985).

[37] *Id.* at 309 n.49.

[38] Miller, *supra* note 1, at 14.

[39] The managerial judge in civil litigation is seen as a solution complemented by methods of alternative dispute resolution. *See generally* Moukhad, *CPR Working Taxonomy of Alternative Legal Processes: Part IV*, in ALTERNATIVES TO THE HIGH COST OF LITIGATION (Spec. supp. 1983).

The Hawaii First Circuit Court has embarked on an ambitious mandatory court-annexed arbitration program for tort claims under $50,000. HAW. ARB. R. (1986). The 1986 Hawaii legislature, sitting in special session on tort reform, raised that ceiling to $150,000. Arbitral proceedings are conducted by private volunteer attorneys screened initially by the court. Discovery is minimized and firm deadlines for resolution of cases are imposed.

[40] "Judicial administration," in its larger sense, has two components. The first might be termed "system administration." This encompasses calendar control, computer tracking of filing

the civil litigation process.[41] Rather than waiting for the completion of substantial discovery and an impending trial date, the managerial judge intervenes early in the process and guides the pretrial development of the case. The entire pretrial phase of litigation is no longer left to often harried attorneys who essentially proceed unsupervised according to strategic concerns and the pressures of day-to-day law practice.

General consensus is that the intent of the original federal rules—the smooth self-execution of the pretrial phase,[42] has been subverted by liberal pleading and discovery rules, a hands-off judicial posture and attorneys' allegiance solely to their clients.[43] Expansive use of the rules of pleading and discovery is generally considered imperative to the zealous representation of one's client.[44] One result is a client well-served in terms of maximal development of the merits of his position but perhaps ill-served in terms of ultimate costs and benefits. Another result is a party's partial capitulation solely as a consequence of the threatened cost of further litigation. In some situations an otherwise fair outcome on the merits is nevertheless rendered "unjust" by the time lag or the psychic and financial cost of achieving it. These are the concerns of the managerial judge.

As discussed below, after the filing of the complaint and answer the managerial judge enters a preliminary scheduling order to get the case moving quickly. In this manner, the judge controls the initial joinder of parties, the timely filing of pleadings and establishes an initial discovery schedule.[45]

Rule 11 provides the managerial judge with the authority to control "unreasonable" filings (pleadings and motions) through the application of a tighter standard for sanctioning frivolous filings. The new standard eliminates subjective bad faith as the benchmark for imposing sanctions and substitutes a rea-

---

deadlines and a streamlined methodology for trial setting and assigning cases to judges. Responsibility for these tasks falls with the administrative judge generally rather than trial judges. The focus of this article is not on system administration but on the second aspect of judicial administration—"individual case management."

The term "managerial judge" encompasses the single judge assigned total responsibility over a case from the outset, as in the federal courts, or alternatively, as potentially in the Hawaii circuit courts, the collective efforts of several judges performing various tasks related to different aspects of a single case.

[41] Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH L. REV. 887, 890 (1984) [hereinafter Comment, *Prescriptions*]. *See also* Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and A Proposal For More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 789 (1985).

[42] Prior to recent amendments, the rules were not intended to encourage judicial involvement in the pretrial stage of litigation. *See* FED. R. CIV. P. 16 advisory committee note.

[43] "The chief source of frustration in processing cases is not outright rule violations or disobedience of court orders but rather sheer overuse of the system . . . ." Miller, *supra* note 1, at 17.

[44] Comment, *Prescriptions*, *supra* note 41, at 903. *See also* HAW. C.P.R. Canon 7.

[45] FED. R. CIV. P. 16(b). See *infra* section IV(a) for a detailed discussion of federal rule 16.

sonableness standard.[46] By design, this modestly heightens attorney responsibility to conduct an inital investigation, reduces stress on the court and litigants and minimizes costly future fighting over meritless positions. Assuming a sensitive judicial touch, this can be achieved without returning to the byzantine intricacies of a code pleading system[47] and without limiting access to the courts or the inhibiting the assertion of novel yet plausible theories of law.[48]

The managerial judge also controls the pretrial process by controlling discovery. He does so by setting discovery schedules pursuant to rules 16, 26(b)(1) and 26(f), by preventing the filing of "unreasonable" discovery requests and responses (through new rule 26(g)[49] which is similar to rule 11), and perhaps most important, by "limiting" discovery *at the outset* even before there has been abuse or overuse. New rule 26(b)(1)(iii)[50] empowers the managerial judge to tailor and limit discovery according to the needs of the case, the amount in controversy, the importance of the legal issues and, significantly, the resources of the parties.

Finally, with a sense for development of the case, the managerial judge is actively involved in searching for the earliest moment to achieve a fair settlement. In contrast, the standard settlement conference under existing procedures which, although effective, usually triggers settlement a month or less before trial, after discovery is completed and trial preparation has begun.[51]

---

[46] See *infra* section IV(B) for a detailed treatment of federal rule 11.

[47] In code pleading states tremendous resources are often expended fighting over the sufficiency of pleadings. Code pleading generally requires a statement of "facts sufficient to state a caurse of action," and parties battle over whether the allegations are indeed facts or mere legal conclusions and whether the facts are evidentiary or ultimate. *See, e.g.*, Gillespie v. Goodyear Service Stores, 258 N.C. 487, 128 S.E.2d 762 (1963). The notice pleading system of the federal and Hawaii rules was designed to eliminate such technical requirements and the ensuing cost of challenges.

[48] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986). See *infra* section IV(B)(5) for a discussion of the concerns over the adoption of new rule 11.

[49] *See infra* text accompanying note 292.

[50] *See infra* text accompanying note 278.

[51] Even under the much-improved system in the Hawaii First Circuit Court, judges still do not become involved in supervising, controlling or directing the development of the case except where a case is designated complex litigation. The new circuit court rules require filing of detailed pretrial statements (plaintiff's statement is due one year from the filing of the complaint and defendant's responding statement is due sixty days later, subject to extensions granted by the court) (HAW. CIR. CT. R. 12(a)(2)), witness lists (HAW. CIR. CT. R. 12(a)(2)(iv)), and settlement conference statements (HAW. CIR. CT. R. 12.1(b)). Active judicial control of the case, however, does not occur until shortly before trial, usually at the settlement conference or the pretrial conference in preparation for trial.

B. Rationale for the Managerial Judge: Enhancing the Quality of Justice—Reducing Delay and Pretrial Cost Without Sacrificing Impartiality or Diminishing Fair Access

Although "quality of justice" is a phrase with myriad meanings, it can be usefully defined and given practical effect. It must be the focal point of any analysis of the appropriateness of new rules. Commentators assume that the new powers of managerial judges will result in quicker disposition of cases and reduced pretrial activity and that this increased efficiency will necessarily mean better quality justice.[52] Indeed, as discussed below, researchers, judges, and commentators agree that managerial rules implemented by committed judges significantly increase judicial efficiency. The "inexpensive" resolution of disputes is the primary value embodied in the federal procedural system.[53] However, other value must also be examined.

Greater efficiency does not assure that the judicial process will be fairer.[54] Perhaps the starkest example involves the elimination of procedural due process hearing rights. While this would provide greater judicial efficiency, the quality of justice[55] would suffer in many instances. If discovery is so truncated that parties are encouraged to hide the "truth" or the pleading threshold is so high that substantial access to the courts is inhibited, enhanced system efficiency will be served but justice will not be served.

The impact of new managerial rules on the quality of justice might be most productively assessed in terms of basic values underlying the process of civil litigation. Efficiency is but one of values which underlie the common law civil litigation system. At least four basic values other more qualitative than efficiency are acknowledged as significant. These are, according to Professor

---

[52] *See, e.g.*, Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337, 350 (1985) ("The rhetoric of reducing litigation cost attempts to fuse justice with reducing expenses, often in a simplistic or conclusory manner. Although arguing that the legal system is fairer when its cost is minimized, this rhetoric bypasses the troubling questions of deriving justice from the market's allocation—and pricing—of litigation.").

[53] The rules are to be "construed to secure the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

[54] *See* Franaszek, *supra* note 52, at 343-44.

[55] One commentator has noted that the evaluation of the impact of litigation reform on the quality of justice can be undertaken from either of two perspectives:

> At its most extreme, inquiry into the quality of justice is a counterfactual inquiry, examining whether reform procedures make any difference in the substantive disposition of a controversy. More commonly, however, analyses of this quality of justice explores whether the reformed litigation process minimizes the possibility of erroneous decisions by providing a full and fair hearing. It is an evaluation of a procedure, not an end result. If the procedure leaves unaltered the present configurations of the litigation system (except for its cost), it is considered to be "just."

Franaszek, *supra* note 52, at 344.

Michelman, dignity, participation, deterrence and substantive effectuation.[56] A system single-mindedly geared towards efficiency risks disserving these values. especially participation, as access is inhibited, and substantive effectuation, as complicated or novel but socially important legal positions are deprived of full development.

In light of the tension between efficiency and these values, the new managerial rules could be said to enhance the quality of justice if they maximize access to courts for those with nonfrivolous claims and allow for reasonable and fair case development on the merits while minimizing unnecessary burdens on the court and litigants. Enhancing the quality of justice in this manner is especially important for defendants who might find it cheaper to settle than to litigate a tenuous claim and for plaintiffs who might find it necessary to give up on a bona fide claim because the cost of vindicating it is prohibitively expensive.[57]

1. *Efficiency*

The standard reason proffered for the creation of the managerial judge is increased efficiency.[58] Early intervention and tighter control mean less delay. Reducing delay benefits the litigants by resolving disputes and defining rights and obligations more quickly.[59] Less delay generally means less cost.[60] Early

---

[56] Briefly,

> [d]ignity values reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. Deterrence values recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. Effectuation values see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172.

[57] The key, it would appear, is the system's pretrial capacity to (1) discourage "unreasonable or unnecessary" filings, (2) limit discovery while allowing parties reasonable access to relevant information, (3) pace reasonably pretrial activities, and (4) facilitate early settlement. See *infra* section IV for an in-depth discussion of the impact of the new rules on these aspects of the litigation system.

[58] *See* Franaszek, *supra* note 52, at 350, 362.

[59] Delay may be in the interest of certain defendants and their insurers who, assuming liability, might find it more profitable to defer payment until the last possible moment, reasoning that a possible assessment of prejudgment interest on the amount ultimately paid will be less than their return on the amount invested during the "deferral" period.

[60] The ABA Commission's study found that a reduction in case disposition time did not necessarily result in a reduction in cost as measured by attorney time spent on each pretrial activity. ABA ACTION COMM'N, *supra* note 31, at 64. The Commission noted, however, that to

judicial control also means pared down pretrial activity. Fewer pleadings and motions, and discovery tailored to the needs of the case translate into reduced pretrial expenses. Less cost obviously benefits the court and the litigants already before the court. It also expands opportunities for access for persons with meritorious claims who have been excluded from the judicial process due to the cost of participation.

Initially, opponents of active case management asserted that it might be unnecessarily costly.[61] They contended that since the judge's time is the most expensive judicial resource, additional judicial supervision would further increase costs.[62] Growing evidence to the contrary seems to have tempered the criticism. Nevertheless careful examination of the issue is warranted.

The goal and the apparent reality of case management is that the managerial judge limits pretrial activity and "brings cases to settlement or trial sooner than if their progress were left entirely to the impetus of the parties."[63] Studies have not definitively assessed the overall cost savings or the extent to which cost savings are passed on to litigants. Studies are in agreement, however, that the cost savings ultimately achieved through judicial management exceed any additional initial management costs.[64]

a. Federal courts

The Federal Judicial Center studied various case management techniques, focusing on six federal judicial districts.[65] The Center concluded that early judicial intervention, firm scheduling and oversight of discovery were effective management techniques.[66] Average disposition time was cut in half.[67]

Judicial involvement in the pretrial phase of federal litigation has grown in

---

the extent the reduction of delay is a consequence of settlements earlier in the process, cost savings to litigants will result since attorney time will be spent on fewer activities. *Id.* at 65.

[61] *See, e.g.*, Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 422-24 (1982).

[62] Professor Resnik has asserted that "[r]ather than concentrate all of their energy deciding motions, charging juries, and drafting opinions, managerial judges must meet with parties, develop litigation plans, and compel obedience to their new management rules." *Id.* at 423-24.

[63] Peckham, *A Judicial Response*, *supra* note 7, at 267.

[64] "Certain studies have demonstrated a high level of elasticity in judicial productivity, suggesting that additional pretrial demands upon judges might be met with little or no impact on existing judicial functions." Nordenberg, *supra* note 1, at 565-66. *See also* Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977). See *infra* note 155 and accompanying text concerning additional transitional costs from a traditional to a managerial model.

[65] CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 1, 5 (Federal Judicial Center 1977).

[66] *Id.* at 33-35.

[67] *Id.* at 19, 35.

importance.[68] Judicial case management has been so effective that although the number of case filings has increased, the average time of disposition has decreased.[69] Delay "has been substantially reduced."[70]

b. State courts

The ABA Action Commission To Reduce Court Costs and Delay,[71] established in 1979, studied pilot programs using cost reduction measures in state courts. The experiments focused on case management and simplified pretrial procedures.[72] The Commission concluded that for state courts, like federal courts, "[j]udicial caseflow management controls will decrease the time consumed by litigation. Based on our work, we believe a comprehensive set of controls following a case from its filing through disposition will produce the most significant reductions in overall case processing time."[73] This conclusion was later embodied in a new section to the ABA's Standard 2.50 - Caseflow Management and Delay Reduction.[74] Most important, the Commission found that time schedules, in combination with tailored discovery produced the greatest reduction of pretrial activity.[75]

The National Center for State Courts also exhaustively studied trial court delay, concluding in 1978 that "the most promising technique for reducing delay is court management of case processing from commencement to disposition."[76] Several studies have since been conducted to examine the effectiveness of case management in state courts. Although the type of management procedures examined differed, all involved judicial control from the outset of a case. The results were consistent on one key point: "court control of the pace of litigation during all pretrial stages has produced dramatic improvements in shortening the time required to bring disputes to a conclusion."[77]

Dramatic results were achieved in a case management experiment in Mari-

---

[68] Judges' managerial powers were expanded by amendments to FED. R. CIV. P. 11, 16 and 26(b) and 26(g) in 1983. Amendments to rules 26(f), 33(c), 34(b) and 37(b)(2) were made in 1980 to control escalating costs.

[69] Peckham, *Judge as Case Manager*, *supra* note 2, at 770.

[70] Peckham, *A Judicial Response*, *supra* note 7, at 258.

[71] The Commission was created to test court procedures aimed at reducing delay and cost in litigation. ABA ACTION COMM'N, *supra* note 31.

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

[73] *Id.* at 21.

[74] ABA STANDARD 2.50—CASEFLOW MANAGEMENT AND DELAY REDUCTION (1976).

[75] ABA ACTION COMM'N, *supra* note 31, at 15.

[76] Sipes, *supra* note 36, at 304 (citing T. CHURCH, A. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS, EXECUTIVE SUMMARY PRECIS 64 (National Center for State Courts 1978).

[77] Sipes, *supra* note 36, at 312.

copa County Superior Court in Phoenix, Arizona. In one year the managerial judges cut average case disposition time by more than one-third, reduced pending case loads by 36% and settled 31% more cases than non-managerial judges.[78] The "Economical Litigation Project," which involved two experiments in Kentucky circuit courts, also yielded significant results. The experiments were conducted consecutively and covered four years, including follow-up interviews with attorneys. The management procedures used a "case flow manager," who was a court administrator to set and monitor pleading deadlines. Individual judges thereafter monitored the cases and closely controlled discovery.[79] The

---

[78] *Id.* at 304.

[79] *See* Planet, *Reducing Case Delay and The Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 RUTGERS L. REV. 279 (1985).

> Under the ELP rules and using internal procedures developed by the court staff, a typical civil case would be processed as follows.
>
> 1. Filing
>
> The rules apply to contract, personal injury, property damage, and property rights cases. From the time of filing, each ELP case is monitored by the court administrator acting as caseflow manager to ensure service within thirty days and the filing of answers within twenty days of service. Plaintiff's counsel is notified by telephone to effect service or move for default. If plaintiff's counsel does not act upon the admonishments of the caseflow manager, the judge sends a letter seeking counsel's cooperation in moving the case along.
>
> 2. Motions
>
> Under the ELP rules, unopposed motions are presumed to be granted, and only opposed motions are scheduled for hearing. The hearing date is set by the parties using a tight rule-made schedule. . . . The judges routinely rule from the bench and take few motions under advisement.
>
> 3. Discovery
>
> A discovery conference is set for approximately two weeks after joinder. At the conference, which can be conducted by the judge in person or by telephone, a discovery plan is made and later set forth by an order that includes a discovery completion date and either a final pretrial conference or a trial date.
>
> Under the rules, the use of depositions and interrogatories is limited. Depositions of the parties can be taken by notice, but nonparty depositions of expert or fact witnesses are allowed only by leave of court. The plaintiff's deposition must be taken by the defendant before any other discovery is initiated. Interrogatories are limited to twenty single-part questions per set. At the discovery conference, the judge considers counsels' requests for more interrogatories or depositions of nonparty witnesses. Counsel's allotted discovery time is based on the complexity of the case, the availability and access of witnesses for depositions, and factors unique to the case. The rules provide for a presumptive discovery period of fifty days.
>
> The original version of the ELP rules provided no deadline for the filing of summary judgment motions, but a 1983 revision requires all such motions to be filed by the completion of discovery. At that time, which is ten days prior to the final pretrial conference, the parties must also exchange certain pretrial information including lists of witnesses with summaries of their testimony; descriptions of physical evidence and copies of documents to be presented at trial; lists of experts, their qualifications, and summaries of their testimony; and brief statements describing each issue of law and fact. Another modification of the

ABA's Action Commission evaluated the raw data and found that time of disposition, pretrial activity and overall cost to litigants were all significantly reduced:

> 1. Total case processing time from filing to disposition and elapsed time at major litigation phases were both significantly reduced.
> 2. The number of procedural events (e.g., motions, discovery, hearings) was also reduced.
> 3. These reductions were achieved without apparent impact on the case outcome.
> 4. Reductions in case processing time and procedural activity resulted in savings in the amount of time spent on ELP cases by most attorneys.
> 5. These savings in attorney time resulted in reduced fees (twenty-four percent reduction) to clients in hourly fee arrangements; contingent fee billings blocked any such pass-through.
> 6. The reductions in case processing and attorney time and in the amount of procedural activity were achieved without affecting the qualitative aspects of the litigation process represented by attorneys' abilities to prepare adequately for trial or settlement.[80]

---

original ELP rules requires that this information also be filed with the court, and the parties must file a certificate of compliance by the deadline date.

4. Pretrial Conference

The primary objective of the final pretrial conference is not to generate settlements but to prepare for trial. The principal objectives of the conference are to simplify the issues, resolve pending procedural issues, dispose of summary judgment motions, and ensure that the attorneys will be prepared to make crisp evidentiary presentations at trial. While the judge is urged to inquire into the status of settlement negotiations, this is done primarily to determine the extent to which the trial calendar can be stacked. In simpler cases the court bypasses the final pretrial conference entirely.

5. Trial

ELP cases are not given priority over other cases on the judge's civil docket. Under the rules, trials should be held within thirty days of the final pretrial conference. The rules also prohibit the continuance of trial unless counsel makes a showing of good cause.

6. Managing the ELP Docket

Under the ELP, cases are subject to internal operating procedures intended to eliminate nonproductive time between litigation events and to maximize judge and court staff time. Key is the function of a court employee designated as the caseflow manager, who monitors ELP cases for compliance with the time standards contained in the rules, enabling the court to centralize caseflow management. The caseflow manager is authorized to contact counsel to ascertain the case status and may be involved in scheduling hearings, conferences, and trials in ELP cases. The ELP rules also adhere to a strict continuance policy. Using these management devices, judge time spent in administrative matters should be reduced, and events are more efficiently scheduled to avoid court continuances.

Id. at 281-83.

[80] *Id.* at 284-85.

These and other similar studies[81] are not definitive and, of course, do not guarantee identical results in the Hawaii courts. They do indicate, however, that the managerial judge in the Hawaii courts is likely to make the civil litigation system more efficient by reducing both delay and pretrial cost.

2. *Assuring impartiality and preserving fair access*

Innovations for greater systemic efficiency carry qualitative risks. In evaluating the qualitative impact of the managerial judge, two important points of analysis emerge. The first is the appropriateness of the managerial judge in the adversarial process in terms of judicial impartiality. The second is the impact of the managerial rules on fair access to the judicial process.

a. The adversarial process and judicial impartiality

In light of current and projected needs of the civil litigation system, are we willing to accept in concept a further modification of the classic adversarial model to encompass managerial judges? Judges, the bar and the public must be willing to accept and implement a subtle yet important shift in the roles of judge and lawyer. In the federal courts, strong concern was initially voiced about what was perceived to be the potentially deleterious impact of the managerial judge upon the adversary system.[82]

For a time proponents and opponents of the managerial judge engaged in heated debate.[83] The intensity of the debate has subsided as preliminary results indicate the salutary effect of the federal managerial judge.

Opponents of the managerial judge argued that radical departure from the role of judge as passive uninvolved arbiter was dangerously inconsistent with classical notions of the adversary system. They also argued that the active managerial judge would become "interested" in the outcome of the case, therefore tainted, and that his possibly biased direction of the pretrial phase of the case would essentially be shielded from appellate review.[84] In short, the managerial judge would have raw power without accountability and be likely to exert too great an influence on the case—the quality of justice would suffer.

---

[81] For example, the ABA Commission's study of time schedule management in Vermont courts found reduced case disposition time. It also found, however, that in the absence of simplified pretrial procedures and judicial control over discovery, scheduling deadlines did not noticeably diminish pretrial activity. *Id.* at 75.

[82] Resnik, *supra* note 61, at 430.

[83] *See generally* Resnik, *supra* note 61; Flanders, *Blind Umpires—a Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

[84] Resnik, *supra* note 61, at 429-30.

(1) The managerial judge as an evolutionary rather than revolutionary change in the adversarial process

Concern about the managerial judge's "radical" alteration of the adversary system seems to be rooted in a positivist view of law. The role of judges is to assure "blind justice."[85]

the classical adversarial model

The classical positivist model of civil litigation assumes a society of individuals with conflicting interests who resort to a system of law to enable individuals to resolve conflicts with some semblance of imposed order. The litigants are self-interested gladiators who determine truth through combat. The judge is a neutral, uninvolved observer whose role is to make the ultimate arbitral decision in light of the "facts" presented within a rigid and defined system of procedure designed to constrain excesses in the judge's actions. Law is viewed as systematic and objective in character,[86] and procedural rules simply "impose regularity on the actions of the" judge.[87]

Although we cling to traditional positivist notions of individualism and blind justice in the resolution of private conflicts between individuals,[88] that model of civil litigation for federal and Hawaii courts has been rejected. Both the Federal and Hawaii Rules of Civil Procedure, with the provisions for full discovery, and liberal pleading and joinder, coupled with the general expansion of substantive rights, have rendered the classical model anachronistic.[89] Scholars have recognized that the basic premise of this model, a society of individuals with conflicting interests looking to law solely as the sovereign's tool for neutral resolution of intensely individualized conflicts, does not reflect the reality or the function of law in society.[90] Law regularizes shared expectations about societal interactions, and judges are not simply dispassionate oracles who blindly apply a set of hardened rules to the information garnered and presented by the parties.[91]

---

[85] The textual discussion of various theoretical models is necessarily abridged. Its purpose is to provide a general conceptual overview for evaluating concerns about the managerial judge's impact on the adversarial process.

[86] *See generally* H. HART, THE CONCEPT OF LAW (1961); Chayes, *The Role of Judges in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

[87] Simon, *supra* note 22, at 43.

[88] Resnik, *supra* note 61, at 381-83.

[89] Miller, *supra* note 1, at 7-8.

[90] Simon, *supra* note 22, at 60.

[91] See *infra* notes 95-104 and accompanying text for a discussion of the purposivist or realist model.

Although procedural rules are ostensibly "designed to deal with a technical problem,"[92] their actual function is far-reaching and their impact extends beyond the mere "technical problems." The reality is that without close supervision, individual litigants can manipulate neutral procedures to "thwart the enforcement of the substantive rules and to affect the exercise of state power in accordance with their individual ends."[93] When this occurs, judicial decisions "result not from the neutral, systematic application of rules to given factual premises, but from strategic exercise of procedural discretion by private parties."[94] Attorneys engaged in large case litigation, particularly construction and antitrust litigation, will verify this reality.

The classical adversarial model does not account for this interaction between judge and litigants and does not accurately reflect the effect of procedural rules upon substantive norms.

"purposivist" model

Legal philosophers and judges within the common law system have laid bare the failings of the classical model and have developed and refined what might be generally termed a "purposivist" or "realist" view of the law and the process of civil litigation.[95] In general outline the purposivist model underlies the federal and Hawaii rules and influences the manner in which judges interpret and apply rules of procedure. The basic premise of the purposivist model is that people are bound together by shared norms. The purpose of law is not just to maintain order, but also to "coordinate the actions of citizens so as to further their common purposes as effectively as possible."[96]

Societal norms, by definition, are generally self-enforcing, but not in all instances. Substantive "law is a technical apparatus for advancement of social norms;"[97] and rules of procedure are the tools for that advancement. Thus, in terms of both substance and procedure, "[j]udges reach behind rules directly to the social purposes the rules are intended to serve and when they find the rules

---

[92] Simon, *supra* note 22, at 44.

[93] *Id.*

[94] *Id.*

[95] *See e.g.*, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); R. POUND, THE SPIRIT OF THE COMMON LAW chs. 7-8 (1921); L. Brandeis, *Business—A Profession, The Opportunity in the Law, The Living Law*, in BUSINESS: A PROFESSION, 1-12, 313-27, 344-63 (1914); Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292 (1954). *See also* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, ch. II (1958) (unbound edition prepared for classroom use).

[96] Simon, *supra* note 22, at 62.

[97] *Id.* at 63.

wanting in light of the relevant purposes, they . . . modify the rules."[98] Implicit in this view is the recognition that the manipulation of procedural rules can alter substantive outcomes and that judges must therefore carefully scrutinize private use of supposedly neutral state-authorized procedures.

This belief appears to inform federal and Hawaii judges' wide-ranging interpretations of procedural rules in the "interest of justice"[99] and the judicial engrafting of principles such as "prejudice" onto the literal terms of the rules.[100] Judges use these concepts correctively to avoid results that flow from the literal provisions of rules, but which are inconsistent with strongly perceived norms of either procedural and substantive fairness.[101] Although the rules of procedure provide a sturdy framework for litigation, there is considerable play in the joints. Responsibility devolves to the judge to assure that litigants exercise that play fairly according to larger norms of procedural fairness.

So, despite lingering positivist notions, we already have in place a flexible procedural system which belies the concept of the dispassionate, completely uninvolved judge who makes no value judgments in rigidly administering a case or deciding a dispute. We have a procedural system in which judges are

---

[98] *Id.* Professor Llewellyn's comments are apt.

> Far be it from me to dispute that the concepts of substantive rights and of rules of substantive law have had great value. They moved definitely and sharply toward fixing the attention of thinkers on the idea that procedure, remedies, existed not merely because they existed, nor because they had value in themselves, but because they had a purpose. From which follows immediate inquiry into what the purpose is, and criticism, if the means to its accomplishment be poor. They moved, moreover, to some extent, toward sizing up the law by significant life-situations, instead of under categories of historically conditioned, often archaic remedy-law: a new base for a new synthesis; a base for law reform.

K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 11 (1962). The purposivist model has been criticized as too illusive—that no two judges will have the same perception of social norms. This illusiveness is said to diminish the legitimacy of the procedural system because the public perceives the system as arbitrary in implementation.

[99] The rules are to "be construed to secure the *just*, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. FED. R. CIV. P. 15 provides: "[L]eave [to amend] shall be freely given as *justice* so requires."

[100] *See* Beeck v. Aquaslide 'N Dive Corp., 562 F.2d 537 (8th Cir. 1977); Bail v. Cunningham Bros., Inc., 452 F.2d 182 (7th Cir. 1971); Zielinski v. Philadelphia Piers, Inc., 139 F. Supp. 408 (E.D. Pa. 1956). *See also* Wong v. City & County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983).

[101] For example, in International Savings & Loan Ass'n v. Woods, ____ Haw. ____, 731 P.2d 151 (1987), the Hawaii Supreme Court ruled in a mortgage foreclosure action that although the mortgagor failed to comply with the express appeal certification requirements of rule 54(b) the court would entertain the mortgagor's appeal of the interlocutory decree of foreclosure. The court noted that a contrary ruling would mean loss of the mortgagor's home before an appeal could be properly filed. The court then expressly limited its ruling to the mortgagors before it, declaring that all mortgagors in future actions would have to comply with the certification requirements of rule 54(b).

involved in assessing values and social norms as a means for fairly operating the system and doing justice.[102]

Indeed, federal and Hawaii judges already make countless pretrial value judgments that shape the course of the litigation, and in many instances, ultimate results. Judges rule on the sufficiency of pleadings (should a litigant be allowed to burden the system by being allowed to get to the discovery phase to determine if she has a legitimate claim), control aspects of discovery (at least after problems arise, through protective orders, orders compelling discovery, and sanctions) and orchestrate settlements. In doing so, they make implicit value judgments about the social and legal importance of the issues, the importance of providing a judicial forum for the plaintiff, the need for information in light of the cost of obtaining it, the relative interests and financial strengths of the parties and the sincerity of the efforts of the parties and their attorneys in their use of the system.[103]

The role of the active managerial judge, therefore, is less a revolutionary recasting of the role of the civil litigation judge in the adversarial process. The managerial judge is an *evolutionary* extension in light of current needs.

(2) Concerns about impartiality

Assuming general acceptance of the concept of the managerial judge in the adversarial process, do the specific powers conferred upon judges by new rules of procedure enhance or at least preserve procedural fairness? As discussed above, it appears that new rules 11, 16, 26(b)(1), 26(g), and 26(f), which coalesce into powers of the managerial judge, would increase efficiency of the Hawaii

---

[102] One judge candidly described the process as follows:

> [T]he judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, and . . . the ratiocination appears only in the opinion . . . the vital motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause, and . . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics . . . .

Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

[103] Professor Llewellyn discusses "a sophisticated reversion to a sophisticated realism:"

> Gone is the ancient assumption that law is because law is; there has come since, and remains, the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means. Here value judgments reenter the picture, and should. Observing particular, concrete facts of conduct and of expectation which suggest the presence of "an interest," one arrives at his value conclusion that something in those facts calls for protection at the hands of state officials.

K. LLEWELLYN, *supra* note 98, at 22.

courts.[104] Would those rules, implemented by the managerial judge, taint the pretrial process by removing the cloak of disinterested judicial impartiality?

The principal criticism of case management has been that fairness in the pretrial process is jeopardized under the new rules since the judge, in managing of the pretrial process, interacts intimately with the parties and their attorneys and becomes a participant in shaping the litigation, thereby diminishing objectivity. In addition, a judge's view is thought to be colored by considering matters inadmissible in evidence at trial.[105] Professor Resnik has maintained that not only will awareness of inadmissible evidence taint a judge's perception of the final outcome, frequent intimate pretrial contact will prejudicially influence a judge's handling of a trial.[106] This danger is exacerbated, it is contended, because control over the pretrial process is especially susceptible to abuse since it is shielded from appellate review.[107]

These are weighty criticisms. Responses, principally by judges, have been strong and seem persuasive. The notion of impartiality advanced by critics of managerial judges appears to be unrealistically based on the positivist concept of the arbiter who retains his neutrality by avoiding contact with parties' pretrial skirmishings. But, as Judge Peckham has eloquently put it, "[i]mpartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotions from one's rational faculties."[108] Modern civil litigation systems are built upon this concept of impartiality. In many pretrial situations, such as in rulings on evidentiary motions, judges are exposed to inadmissible material.[109] In these situations, "we do not consider the judicial mind contaminated."[110] In the experience of Judge Peckham, judges are eminently capable of impartially sorting through the type of information considered by judges in resolving discovery disputes or making scheduling decisions.[111] As Professor Miller has aptly noted, "[t]he goal of judicial neutrality . . . does not require judicial ignorance. The notion that justice is or ought to be blind should extend only to ensuring impartiality."[112]

One meritorious suggestion is that impartiality and even-handed managerial decisions can be encouraged by conducting status and pretrial conferences, in-

---

[104] *See supra* notes 58-80 and accompanying text.

[105] Resnik, *supra* note 61, at 426-31.

[106] *Id.* at 427.

[107] *Id.* at 429-30.

[108] Peckham, *A Judicial Response*, *supra* note 7, at 262.

[109] On issues of relevance under rules 401-403 of the Federal Rules of Evidence, "[r]uling requires knowledge of the lawyer's strategies and the full contour of the case being developed." Flanders, *supra* note 83, at 520.

[110] Peckham, *A Judicial Response*, *supra* note 7, at 262.

[111] *Id.* at 263.

[112] *See generally* Miller, *supra* note 1.

cluding dispositions of discovery disputes, on the record.[113] This would provide a detailed record for appellate review. A useful record could also be generated through pretrial conference orders supplemented by recorded attorney commentary on objectionable aspects of the orders.

Providing a solid record would be consistent with the apparent movement in federal appellate courts away from almost total deference to lower court pretrial decisions[114] to a posture of moderate scrutiny under the abuse of discretion standard.[115] Although the absence of a final judgment would preclude interlocutory review of pretrial decisions in most instances,[116] moderate appellate scrutiny even after final judgment would serve to rectify serious mismanagement decisions[117] and establish workable parameters for future decisions. This could be accomplished without opening the appellate floodgates since relatively few cases would reach the final judgment stage for appeal.

The current practice in the Hawaii circuit courts, having pretrial procedures including settlement conferences, conducted by a judge who does not handle the actual trial would more adequately address many of the aforementioned concerns about impartiality.[118] Thus, the concerns about improper judicial bias, although signalling a need for constant caution, should be addressable through judicial sensitivity, a scrutinizing private bar, modest appellate review based on a solid record of pretrial proceedings and, at least in Hawaii, a separation of pretrial and trial judges.

b. Fair access

Another and perhaps more significant potential adverse effect of the managerial rules is the subtle diminishing of fair access to the judicial process. "Access," as used here, encompasses both initial entry into the system and the

---

[113] Peckham, *A Judicial Response*, *supra* note 7, at 263.

[114] *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626 (1962) ("The authority of a court to dismiss [a plaintiff's action] sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . . .").

[115] *See, e.g.*, Silas v. Sears, Roebuck and Co., 586 F.2d 382 (5th Cir. 1978) (trial court's discretion to impose an appropriate solution for a party's noncompliance with a pretrial order is broad but not unlimited). *See generally* Peckham, *Judge as Case Manager*, *supra* note 2.

[116] *See*, 28 U.S.C. § 1291 (1982); *Id.* § 1292. But see HAW. REV. STAT. § 641-(1)(b) (1985), stating that "an appeal . . . may be allowed . . . whenever the circuit court may think the same advisable for the speedy termination of litigation before it." This statute, unlike the federal statute, could be used to appeal all pretrial decisions in Hawaii circuit courts, upon certification of the appeal by a circuit court judge.

[117] Egregious mismanagement decisions might be corrected immediately through writs of mandamus or prohibition.

[118] HAW. CIR. CT. R. 12.1.

ability reasonably to develop the merits of one's legal position. "Fair" access is diminished where unduly harsh threshold requirements chill plaintiffs from bringing potentially meritorious claims that are based on plausible extensions of existing law or novel legal theories rooted in evolving societal concerns, or where unduly truncated discovery opportunities prevent fair development of important aspects of difficult cases.

Procedural innovations, however efficient, which preclude participation in these ways undermine the system's quality of justice. The system is qualitatively undermined by retarding the evolution and development of the law, by fueling public sentiment that the system is unresponsive to societal concerns and by effectively excluding people, especially those without recourse through political channels, who have no other means for vindicating rights society is on the verge of recognizing as legally significant.[119]

The drafters of the new federal rules were aware of this potential problem. The new rules were intended to reduce cost and delay without diminishing fair access. As discussed in detail in part IV, the rules on their face are structured with ample flexibility to assure fair access and courts have been applying them accordingly.[120]

Briefly, rule 11's attempt to deter "unreasonable" filings is not intended "to chill an attorney's enthusiasm or creativity."[121] In an effort to assure fair access federal courts have drawn a high line between frivolous claims subject to sanctions and novel claims with a plausible legal basis: a claim is "legally unreasonable" only if it bears no chance of success under existing precedents and where no reasonable argument can be made to extend, modify or reverse existing law.[122]

Indeed, the overall impact of the managerial rules may well be to enhance fair access. Discovery rules 26(b)(1), 26(f) and 26(g) are intended, *inter alia*, to limit discovery according to the importance of the issues, the needs of the case, the amount at stake and the resources of the parties.[123] This should expand access opportunities for persons of modest means.

Fair access, however, may be inhibited in another manner under the new rules—if the managerial judge becomes overly zealous in limiting discovery and prevents fair development of important legal positions. This is a concern with

---

[119] *See infra* notes 247-249 and accompanying text. Professor Rawls approaches "justice" focussing on a system's treatment of the least advantaged. The moral value and social efficacy of a legal system, according to Rawls, should be measured by the system's capacity to accord those least advantaged the equivalent opportunity to achieve fair substantive outcomes as those of greater advantage. J. RAWLS, A THEORY OF JUSTICE (1971).

[120] *See infra* notes 247-249 and accompanying text.

[121] *See infra* note 247.

[122] *See infra* text accompanying note 246.

[123] *See infra* section IV(C).

due process overtones. While rules do confer considerable discretionary power,[124] that power is set within parameters that attempt to accommodate two competing concerns: minimizing the overuse of pretrial rules as strategic weapons and facilitating the quest for relevant information. Managerial judges have been sensitive to this accommodation. Thus far state experiments have concluded that managerial judges have not negatively affected the qualitative pretrial development of cases, quality quality measured in terms of an attorney's ability to develop the case for trial.[125] While these experiments are not the last word on the issue, they indicate that judicial sensitivity in implementing the new discovery rules can go a long way towards accommodating the competing concerns.

IV. AN ANALYSIS OF THE MANAGERIAL RULES: NEW RULES 11, 16 & 26

This section examines the prominent provisions of the "managerial" rules in the context of the foregoing discussion on enhancing the quality of justice.

A. Judicial Control Over the Pretrial Process—New Rule 16

New rule 16 provides the main vehicle for early judicial control over the pretrial process. Its purpose is to reduce delay and cost by making case management standard practice while allowing for less active judicial handling of cases requiring minimal supervision.[126]

The 1983 amendments to federal rule 16 concerning pretrial conferences were the first changes to the rule since its enactment in 1938. The original version of the rule, which is identical to the current Hawaii rule, had been soundly criticized as ineffectual. The Advisory Committee noted four principal criticisms:

> 1. [pre-trial] conferences are often seen as a mere exchange of legalistic contentions with no real analysis of the particular case;
> 2. the result is frequently nothing more than an agreement on minutiae;
> 3. [pre-trial] conferences are seen as unnecessary and time-consuming in cases that

---

[124] *See supra* notes 114-115 and accompanying text.

[125] *See supra* notes 79-80 and accompanying text.

[126] The Advisory Committee recognized that an amendment to rule 16 "is necessary to encourage pretrial management that meets the needs of modern litigation." FED. R. CIV. P. 16 advisory committee note. The Committee noted that "when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices." *Id. See also* FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977).

will be settled before trial;

4. [pre-trial] meetings can be ceremonial and ritualistic with having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter binding stipulations.[127]

In response to these criticisms and in light of the evolving role of the managerial judge, the Advisory Committee amended rule 16 in three important areas. First, the new rule is far more encompassing in scope. Former rule 16 was narrow in focus; it was designed to frame issues for trial. The new rule authorizes the court to call pretrial conferences to manage all phases of the pretrial process.[128] In addition to framing issues and facilitating trial preparation,[129] the

---

[127] FED. R. CIV. P. 16 advisory committee note.

[128] *Id.* FED. R. CIV. P. 16 provides:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control as that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

rule is expressly designed to establish early judicial control to avoid unduly pro-

---

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

In contrast, HAW. R. CIV. P. 16, which is identical to the original version of Federal rule 16, provides:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amend-

tracted case development,[130] to discourage wasteful or dilatory pretrial tactics[131] and to promote early settlement.[132]

The new rule reflects the Advisory Committee's sentiments on the expanded range of concerns of the managerial judge and lists items for consideration during pretrial conferences. Among the significant new items are the "elimination of frivolous claims or defenses" at the outset,[133] the appropriateness of referral of the dispute to an alternative dispute resolution mechanism,[134] early settlement[135] and the need "for adopting special procedures for managing difficult or protracted actions."[136] To enhance productivity, the rule requires the presence of an attorney for each party who is authorized to enter into stipulations on matters "participants may reasonably anticipate may be discussed . . . ."[137]

Second, new rule 16 mandates the issuance of a scheduling order within 120 days of the filing of the complaint.[138] The mandatory aspect of the scheduling order is revolutionary. It is rooted in the conclusion of numerous studies indicating that scheduling orders significantly reduce case disposition time[139] and in the apparent belief that judges will not bother to generate scheduling orders unless so compelled.

The scheduling order sets initial time limits for joinder of parties,[140] amendments of pleadings,[141] filing and hearing of motions[142] and completion of discovery.[143] The rule 16 scheduling order, in conjunction with rule 26(b)(1) re-

---

ments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

[129] FED. R. CIV. P. 16(a)(4).

[130] FED R. CIV. P. 16(a)(2). For an interesting discussion on creating an accelerated pretrial schedule utilizing alternative dispute resolution and modifications to rule 16, see McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985).

[131] FED. R. CIV. P. 16(a)(3).

[132] FED. R. CIV. P. 16(a)(5).

[133] FED. R. CIV. P. 16(c)(1).

[134] FED. R. CIV. P. 16(c)(7).

[135] FED. R. CIV. P. 16(a)(5).

[136] FED. R. CIV. P. 16(c)(10).

[137] FED. R. CIV. P. 16(c).

[138] FED. R. CIV. P. 16(b).

[139] *See supra* notes 63-80 and accompanying text.

[140] FED. R. CIV. P. 16(b)(1).

[141] *Id.*

[142] FED. R. CIV. P. 16(b)(2).

[143] FED. R. CIV. P. 16(b)(3).

garding discovery limitations and the optional rule 26(f) discovery conference,[144] is intended to establish realistic time constraints according to the needs of the particular case. This individual tailoring of timetables should provide for greater efficiency than a single system-wide timetable for all cases.[145] Realistic timetables effectively control both the pace and quality of pretrial activities. They

> stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in the litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.[146]

Flexibility is built into the scheduling order mandate. Parties can seek to amend the order for "good cause."[147] Rule 16 also authorizes the court, via local rules, to exempt categories of cases from the mandatory scheduling order.[148] For example, cases with less than $25,000 in controversy may tend to be self-limiting in terms of the pretrial process and may not need a scheduling order. Rule 16 contemplates a blanket exemption for such cases.

Third, new rule 16 authorizes the managerial judge to impose sanctions. The former rule made no provision for sanctions, although courts sometimes drew upon their inherent powers to impose sanctions.[149] Sanctions are authorized for failure to obey pretrial or scheduling orders, for failure to appear at pretrial

---

[144] FED. R. CIV. P. 26(f).

[145] Where local court rules establish a single timetable for all cases, that timetable could be viewed as setting the outer time limits. See HAW CIR CT. R. 12 for an example of a single timetable that applies to all cases.

[146] REPORT TO THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 28 (1979).

[147] FED. R. CIV. P. 16(b). The "good cause" standard for modifying the scheduling order is less stringent than the "substantial hardship" standard embodied in other rules. *See* FED. R. CIV. P. 26(b)(3). The Advisory Committee did not want undue difficulty in obtaining modifications to compel attorneys to seek initially "the longest possible periods for completing pleading, joinder and discovery." FED. R. CIV. P. 16 advisory committee note.

[148] Although a mandatory scheduling order encourages the judge to become involved in case management early in the litigation, subdivision (b) "envisions that there are some categories of cases which are routine, which historically are seldom tried, which often are filed for tactical reasons or other reasons, and it would be an unnecessary burden on counsel and the court to enter a scheduling order." Address by Charles E. Wiggin, Annual Judicial Conference, Second Judicial Circuit of the United States, 101 F.R.D. 161, 179 (1983) [hereinafter Wiggin Speech]. Subdivision (b) of rule 16 "permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained." FED. R. CIV. P. 16 advisory committee note.

[149] *See* FED. R. CIV. P. 16(f) advisory committee note.

conferences, for being substantially unprepared to participate in such conferences and for refusing to participate in good faith.[150] The sanctions specified in the rule are inclusive and range from orders of default to assessments of attorneys fees.[151] The Advisory Committee hoped to assure vigorous use of rule 16 as a management tool by providing a range of sanctions to encourage attorney compliance.[152]

New rule 16's goals and scope are thus exemplary. They appropriately expand the powers of the judge to control the pretrial process. The mandatory scheduling order in section (b), however, introduces several potential administrative problems.

When should the scheduling order be entered? Is the 120 day deadline realistic? A scheduling order will be effective only if the outlines of the case have developed sufficiently to suggest the ultimate number of parties involved, the significance and complexity of the issues and likely discovery needs. A perfunctory scheduling order based on a bare-bones complaint and answer will not be an order tailored to the needs of the case. Federal court experience has yet to determine the wisdom of the 120 day deadline. A more workable deadline might be 180 days, or six months. This would allow for completion of basic pleadings and preliminary discovery (interrogatories and document productions). At this stage of the litigation the court and counsel may be better able to evaluate the needs of the case and fashion a meaningful scheduling order that provides realistic discovery guidance.[153]

Will the mandatory scheduling order, which must be preceded by some form of judge/attorney contact, be ineffectual if not wasteful for certain categories of cases? Undoubtedly so. As mentioned above,[154] section (b) builds in flexibility by authorizing local rule exemptions. The administrative problem lies in adequately pre-defining exempt categories and in fitting actual cases into those categories. Categories readily definable according to fixed criteria—such as amount in controversy—may not in practice adequately demarcate cases for which

---

[150] Under subdivision (f), the judge has discretion to impose sanctions under rule 37(b)(2)(B), (C), or (D) and/or assess reasonable expenses incurred resulting from noncompliance, including attorneys fees.

[151] FED. R. CIV. P. 16(f).

[152] FED. R. CIV. P. 16(f) advisory committee note ("explicit reference to sanctions reenforces [sic] the rule's intention to encourage forceful judicial management").

[153] Another option is to schedule a mandatory pretrial conference to coincide with defendant's filing of its pretrial statement. Under Hawaii Circuit Court Rule 12(a)(8) the responsive pretrial statement is due 60 days after plaintiff's pretrial statement is filed, which is due one year after the complaint is filed. No such conference is currently held. The parties would be as much as six months from trial and in practice substantial discovery is conducted during that period. *See* HAW. CIR. CT. R. 12(a)(e). A scheduling/discovery order entered at that time might productively guide the remainder of the pretrial process.

[154] See *supra* note 148 for a discussion of section (b).

scheduling orders are counterproductive. Categories defined by important but soft factors—such as importance or complexity of the issues, difficulty of discovery, obstinance of counsel—require preliminary factual development and judgment calls. This problem appears to be eminently solvable over time. Trial and error tinkering with exempt categories is one approach.

Another potential administrative problem involves the initial availability of judicial resources. The transition to mandatory scheduling orders and early pretrial conferences may entail initial commitment of additional judicial resources. The commitment involves "additional" start-up resources because judges will be required to do more at an earlier time. The commitment is "initial" because studies and federal court experience indicate that as cases are processed through the system the overall cost and time savings will far surpass additional up-front judicial costs.[155]

Finally, a pure master calendar system requires some modification to accommodate rule 16's mandatory scheduling order and early pretrial conferences. New rule 16 was structured with the federal courts' "individual assignment" system in mind. Under this system, each case is assigned to a particular judge when it is filed.[156]

That judge is responsible for all aspects of the case—from pleading to post-trial motions. In contrast, the Hawaii's First Circuit Court segregates judges according to function under a master calendar system. The average civil case will see at least three judges—one for motions, one for settlement shortly before trial and one for trial. How adaptable is the master calendar system?

Commentators generally believe that a judge in an assignment system is "more motivated to monitor and expedite his cases because he feels greater individual responsibility for those cases . . . [and any] lack of diligence and organization will soon be reflected in the increase in his pending case load."[157] They also believe, however, that active case management is appropriate in a master calendar system.[158] Judge Peckham has noted that it is possible to "integrate effective case management with a master calendar system . . . [and] state court judges who prefer the master calendar system should not hesitate to institute case management techniques because of the fear that their efforts will

---

[155] *See supra* notes 63-80 and accompanying text.

[156] Federal district courts changed from a master calendar system to an individual assignment system in 1969.

[157] Peckham, *A Judicial Response*, *supra* note 7, at 257. *See also* Enslen, *Should Judges Manage Their Own Caseloads*, 70 JUDICATURE 200 (1987).

[158] An early study by the ABA Commission On Standards of Judicial Administration concluded that "the success of caseflow management thus is not necessarily dependent on the procedural characteristics of case assignment" (whether individual or master calendar). M. SOLOMON, CASEFLOW MANAGEMENT IN TRIAL COURTS 29-30 (1973) (Supporting Study 2).

be wasted."[159]

If the anticipated reduction in judicial case load materializes as a result of the Hawaii mandatory arbitration program more judges should be available to handle the cases that bypass arbitration—predominantly larger, more complex cases.[160] In this projected setting, there is sound reason to believe that a master calendar system can be adapted to achieve the efficiencies of managerial judges in an assignment system.[161]

In light of the potential administrative problems just discussed, the most prudent approach for Hawaii courts may be to adopt rule 16 without the mandatory aspect of the scheduling order. Rule 16, so modified, in conjunction with rules 26(b)(1) and 26(f), would give judges significant power to control the pretrial process without making active management mandatory. This would forestall administrative difficulties, discussed above, while awaiting evaluation and refinement of the mandatory scheduling order process by the federal or

---

[159] Peckham, *A Judicial Response*, *supra* note 7, at 257.

[160] *See supra* note 39. Peter Adler, head of the Hawaii Supreme Court's Alternative Dispute Resolution Program, estimates that with the legislatively imposed ceiling of $150,000, up to ninety percent of all tort claims may be processed through arbitration. The program later plans to expand to also encompass contract claims. Currently the arbitration program is in its fledgling stage. Its ultimate impact on judicial case loads is still a matter of conjecture.

[161] "Pretrial judges" could not only handle motions but also enter the initial scheduling orders and establish parameters for discovery. This would provide pretrial continuity, with the judges developing basic familiarity with the cases that bypass arbitration. These judges would also be in a position to orchestrate early settlement—although a separate settlement judge would still be used if needed. "Trial judges" would then be assigned as the cases go to trial, just as under the present master calendar system. For flow charts of modified master calendar systems which encompass case management principles, see M. SOLOMON, *supra* note 158, at 16, 17.

A second option would be the "case flow manager" system used in the ELP experiment in the Kentucky courts. *See supra* note 79 and accompanying text.

Another option would be to keep the present system in place for simple cases and designate all multi-party, discovery-intense cases "complex litigation" and assign those cases to judges early on. The anticipated reduction in cases due to the mandatory arbitration program may allow for more individual case assignments.

This would require revision to reinterpretation of Circuit Court rule 12(a)(11). Relatively few cases are currently designated complex litigation. There are at least two apparent reasons. First, the unofficial commentary to the rule cautions reluctance: "The court will not grant the motion just because a case has multiple parties or issues, or involves a potentially substantial amount of money." HAW. CIR. CT. R. 12(a)(11) unofficial comment. Early assignment of a case will be made "only when [the court] is satisfied an early assignment will effectuate the interests of judicial economy and fairness to litigants." *Id.* Second, the parties must request the designation, and, as discussed below, attorneys generally desire to control the pretrial process and do not often file 12(a)(11) motions. *Id.*

The feasibility of these and other options for implementing new managerial rules requires further study and discussion. It does appear, however, that any number of options would be effective.

other state courts.

B. *New Rule 11—"Stop, Look, and Inquire"*[162]

New federal rule 11 gives the managerial judge a potent weapon for combating cost and delay arising out of groundless filings by eliminating the requirement of subjective bad faith for the imposition of sanctions and replacing it with an objective "reasonableness" standard. The rule requires parties and their attorneys to "stop, look and inquire" reasonably before asserting claims or defenses or filing motions. Although the new federal rule has been in effect for only three years, it's impact has been dramatic.[163] Federal district and appellate

---

[162] *See* Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985) [hereinafter Note, *Reasonable Inquiry*].

[163] *See* McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986) (sanctions upheld where suit barred by collateral estoppel doctrine filed with intention to harass or to cause delay.); Reliance Ins. Co. v. Sweeney Corp. 792 F.2d 1137 (D.C. Cir. 1986) (appellant and attorney sanctioned for frivolous appeal after failing to cite any authority or reveal any facts underlying their position and failing to respond to an order to show cause concerning sanctions); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (attorney's fees awarded to municipal defendant in groundless antitrust and civil rights action); Norris v. Grosvenor Mktg., Ltd., 803 F.2d 1281 (2d Cir. 1986) (Second Circuit advised district court upon remand to exercise its "broad discretion in fashioning sanctions" and grant defendant's request for [r]ule 11 sanctions in meritless breach of contract action barred by prior arbitration); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (reversal of lower court award of attorney's fees to defendants in unconstitutional arrest, excessive force, and malicious prosecution action; rule 11 limited to testing the attorney's conduct at the time a paper is signed and does not impose a continuing obligation to the attorney); Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986) (copyright infringement action remanded to district court for articulation of reasons behind denial of award of attorney's fees); Stephens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056 (4th Cir. 1986) (order imposing rule 11 sanctions against plaintiff's counsel in declaratory judgment action on liability insurance policy reversed as abuse of discretion because action "had a reasonable basis in fact and law and was not objectively frivolous nor interposed for any improper purpose"); Cohen v. Virginia Elec. and Power Co., 788 F.2d 247 (4th Cir. 1986) (attorney's fees award affirmed because plaintiff's motion for leave to amend was filed for improper purpose of determining whether defendant would oppose it, with the intention of withdrawing the motion if opposed); Davis v. Veslan Enter., 765 F.2d 494 (5th Cir. 1985) (attorney's fees imposed for undue delay against defendant who filed removal petition after jury returned its verdict); Sites v. I.R.S., 793 F.2d 618 (5th Cir. 1986) (rule 11 sanctions appropriate where taxpayers' petitions to quash summons to their bank were filed despite "longstanding, unequivocal, dispositive precedent rejecting taxpayer's claims"); Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (district court's denial of attorney's fees reversed as abuse of discretion where plaintiff's attorneys failed to conduct sufficient prefiling investigation of the facts and the law underlying products liability claim); Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985) (order for rule 11 sanctions affirmed against attorney for asserting factually baseless defense of exigent circumstances in civil rights action for warrantless entry of home); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (plaintiff's attorneys sanctioned for refusing to "recognize established law of the U.S. Supreme Court and this

courts, although sometimes with differing interpretations,[164] have enthusiastically embraced the new rule. "[T]he message of [new] [r]ule 11 and of the sanctions that have been imposed under [r]ule 11, is clear: *'don't waste the court's or the opposing party's time.'* "[165]

Former federal rule 11, which is identical to current Hawaii rule 11, proved totally ineffective in preventing meritless filings. There are no reported cases of sanctions under Hawaii rule 11.[166] In the forty-five year history of the former federal rule 11, only eleven reported cases found violations.[167]

Circuit that defeated several of the plaintiff's claims"); MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) (District Court of Hawaii's award of attorney's fees affirmed against plaintiff for asserting mail fraud charges not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (order for rule 11 sanctions for "misleading" arguments in brief reversed; rule 11 construed as not imposing upon district courts the burden of evaluating under ethical standards the accuracy of all lawyer's arguments); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (order for sanctions reversed where plaintiff's claim under Voting Rights Act had an objectively defensible legal basis even though the claim ultimately failed); Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985) (sanctions against defendant upheld where defendant agreed to a stipulated settlement dismissing the case and then hired another attorney solely to delay the entry of the stipulated dismissal through a groundless motion to set aside the settlement). The one Supreme Court case mentioning new rule 11 is Burnett v. Grattan, 468 U.S. 42, 50 n.13 (1984) (noting that "the administration of justice is not well-served by the filing of premature, hastily drawn complaints").

[164] KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS xi (Federal Judicial Center 1985).

[165] ABA SECTION OF LITIGATION, SANCTIONS: RULE 11 AND OTHER POWERS 9 (1986) (emphasis original) [hereinafter SANCTIONS].

[166] In response to continuing criticism of frivolous suits, the Hawaii legislature in 1980 and again in 1986 passed legislation attempting to deter groundless actions. Unfortunately, neither enactment is likely to achieve its goal.

In 1980 the legislature enacted section 607-14.5 of the Hawaii Revised Statutes (attorneys' fees in civil actions) authorizing courts to award attorneys' fees, as they "deem just" upon a specific finding that "all claims by the party are completely frivolous and are totally unsupported by the facts and the law." Act of June 17, 1980, ch. 286, 1980 Haw. Sess. Laws 547. The statute is vague and extremely limited in scope. It only applies where all claims in the action are "completely frivolous" (which is undefined) *and* have no basis at all in law and fact. It applies only to "claims," including counterclaims. *See* Harada v. Ellis, 4 Haw. App. 439, 667 P.2d 834 (1983). It does not apply to defensive pleadings or motions. The award can be made only against the plaintiff itself; plaintiff's attorney cannot be sanctioned.

In 1986, as a part of its tort reform package, the legislature authorized awards of attorneys' fees for claims or defenses "not reasonably supported by law." HAW. REV. STAT. § 607-14.5 (Supp. 1986). Awards are not to exceed 25% of the amount claimed. This provision is poorly crafted. If its aim is to deter ill-supported defenses as well as groundless claims, why is the ceiling on fee awards determined in both instances by the amount of plaintiff's prayer? Why is frivolousness defined only in terms of claims not reasonably supported by "law"? The law may initially support a claim based on allegations which prove to be factually groundless. Ultimately, new rule 11, if adopted, may provide needed guidance on interpretations of this section.

[167] *See* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Fed-*

Under the former federal rule, a party or attorney's signature certified that he had read the document filed and that "to the best of his knowledge, information and belief, there was good ground to support it."[168] An attorney could be sanctioned only for "willful violations."[169] These provisions were consistently interpreted to mean that an attorney could not be sanctioned if for whatever reason he personally believed at the time that there was some good ground to support his filing.[170] This subjective standard, requiring proof of bad faith, failed to deter frivolous litigation.[171] Proof of what counsel actually believed at the time presented an insurmountable hurdle in most instances, and judges were reluctant to sanction attorneys who were not shown to be intentionally abusing the system.

Rule 11 fell into disuse. Consequently, the federal rules were effectively devoid of early screening or deterrent mechanisms for claims, defenses and motions which appeared plausible on paper but which upon reasonable investigation clearly lacked support in fact or law. Without early screening or deterrent mechanisms attorneys were allowed to be fast and loose or at least careless in their filings. Indeed, attorneys were subtly encouraged in that direction due to the increased settlement leverage for the filing party—the cost to an opponent responding to and attempting to defeat a groundless filing is often high. Attorneys vaguely defined public responsibilities as officers of the court were often subsumed by their private obligations as zealous advocates for their clients.

In 1983, the Supreme Court and Congress responded by amending rule 11 to expand judicial powers to strike filings and impose disciplinary sanctions as means for checking the filing of papers not reasonably supported by law or fact. Deterrence was the stated rationale. One study found that some judges also attributed compensatory and punitive purposes to the rule.[172] Whether singular or tripartite in purpose, the amended rule modestly increases the pre-filing in-

---

eral Rule of Civil Procedure 11, 61 MINN. L. REV. 1 (1976). *See also Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans*, 54 FORDHAM L. REV. 1 (1985).

[168] *Id. See also* FED. R. CIV. P. 11 (1938).

[169] *Id.*

[170] *See, e.g.*, Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980); *In re* Ramada Inns Sec. Litig., 550 F. Supp. 1127 (D. Del. 1982).

[171] 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1334 (1971). Under the original version of rule 11, courts experienced considerable confusion as to:

(1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action,

(2) the standard of conduct expected of attorneys who sign pleadings and motions, and

(3) the range of available and appropriate sanctions.

FED. R. CIV. P. 11 advisory committee note. *See also* RHODES, RIPPLE & MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (Federal Judicial Center 1981).

[172] *See* KASSIN, *supra* note 164, at x.

vestigative responsibilities of attorneys and parties and imposes mandatory sanctions for unreasonable filings.[173] Awards of attorneys' fees against both parties and their attorneys are intended to create an economic disincentive for careless or abusive filings.

In practice, federal courts have tended to apply rule 11 in a straightforward manner, avoiding uncertainty that might unfairly disrupt the way most attorneys practice. According to a survey of cases by the Federal Judicial Center during the year following adoption of the new rule, although federal judges imposed sanctions in a variety of situations, they imposed them predominantly where filings were clearly careless or abusive. Representative cases include "the filing of a claim after the statute of limitations had expired, or without subject matter jurisdiction, and frivolous motions to disqualify defendant's attorney, for summary judgment, or for a change of venue."[174] Recent federal court decisions have also limited the scope of rule 11, addressing concerns that the rule not impair fair access to the courts or impose undue burdens upon counsel.[175]

Under the new federal rule 11:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer knowledge, information and belief *formed after reasonable inquiry* it is *well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and* that is *not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[176]

The rule thus enunciates a new two-part standard for attorney performance: (1) whenever he signs a pleading or motion he must have conducted reasonable inquiry to determine whether the filing is "legally unreasonable or without factual foundation";[177] *and* (2) whenever he signs a pleading or motion he is certifying that it is not filed for a purpose that is "improper."[178]

---

[173] Wiggin Speech, *supra* note 148, at 161. Judge Mansfield, Chairman of the Advisory Committee commented that the primary purpose of the amendment to rule 11 was to "reduce frivolous claims, defenses or motions" and to deter "costly meritless maneuvers." Letter from Judge Mansfield, Chairman of the Advisory Committee to Judge Gignoux and the Members of the Standing Committee on Rules of Practice and Procedure, 97 F.R.D. 165, 192 (1983). *See also* Note, *Reasonable Inquiry*, *supra* note 162, at 751, 773 (1985).

[174] KASSIN, *supra* note 164, at 6.

[175] *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

[176] FED. R. CIV. P. 11 (emphasis added).

[177] *Zaldivar*, 780 F.2d at 830 (9th Cir. 1986).

[178] *See generally* Unioil, Inc. v. E.F. Hutton & Co., 802 F.2d 1080, 1089 (9th Cir.), *withdrawn pending petition for reh'g*, 809 F.2d 548 (9th Cir. 1986).

1. Reasonable inquiry requirement

The most significant change to rule 11 lies in the redefinition of the concept of "frivolousness." The amended rule eliminates the subjective good faith test of the original version and replaces it with an objective "reasonable inquiry" standard.[179] The Advisory Committee commented that the new "standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation."[180]

One purpose of this new standard is to eliminate ignorance as an excuse for the assertion of plainly unsubstantiable positions.[181] It does not matter who performed the inquiry, but rather, "whether as a result the attorney has adequate knowledge . . . sufficient to enable him to certify that the paper" is reasonably supported."[182] There is no longer allowance for a "pure heart, empty head excuse."[183]

New rule 11 thus imposes an affirmative duty on the part of the attorney to reasonably investigate the basis of the claim, defense or motion before filing. Judicial inquiry on a rule 11 motion focuses on what investigative steps the attorney took before certifying the filing. Whether the inquiry was "reasonable" depends on the circumstances of each situation. Relevant factors include:

[H]ow much time for investigation was available to the signer; whether he had to

---

[179] Some courts have apparently persisted in applying a subjective bad faith standard. *See, e.g.*, Suslick v. Rothchild Sec. Corp., 741 F.2d 1000 (7th Cir. 1984) (award of attorney's fees denied because no showing of subjective bad faith on part of plaintiff or her counsel where district court all but invited plaintiff to resumit complaint on at least two occasions); Gieringer v. Silverman, 731 F.2d 1272 (7th Cir. 1984) (attorney's fees denied to defendants where no showing of subjective bad faith on part of plaintiffs even though plaintiffs statements in depositions seemed to indicate their sole purpose in bringing suit was to obtain settlement); Rubin v. Buckman, 727 F.2d 71 (3d Cir. 1984) (district court on remand should give parties opportunity to present submissions on bad faith issue in reconsidering defendants' request for attorney's fees).

[180] *Zaldivar*, 780 F.2d at 829 (1986) (quoting FED. R. CIV. P. 11 advisory committee note). Attorneys fees have been awardable under an objective reasonableness standard in civil rights litigation. The Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988 (1982), entitles the prevailing party to recovery of its attorneys fees. Where the defendant has prevailed, it must establish "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[181] *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985).

[182] *Id. See generally* Home-Pack Transport, Inc. v. Donovan, 39 Fed. R. Serv. 2d 1063, 1066 (D. Md. 1984) (counsel violated rule 11 by not making reasonable inquiry where motion had no basis in law and was not submitted under time pressure even though counsel obtained oral advice of other attorneys and acted in good faith).

[183] KASSIN, *supra* note 164, at 5. Although the new Federal rule has stricken the requirement of willfulness, it still remains a factor to be considered in determining the appropriate choice of sanctions. *See* Wiggin Speech, *supra* note 148, at 178.

> rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.[184]

Thus the "reasonableness" standard embodied in rule 11 is flexible. It is intended to accommodate the realities of law practice and not to impose unduly onerous or unrealistic investigative burdens upon counsel.[185]

The following discussion addresses the two components of rule 11's reasonable inquiry standard: whether the filing is well-grounded in fact and whether it is warranted by law or a good faith argument for change in the law. It then addresses post-filing inquiry obligations and questions about the scope of the reasonable inquiry requirement.

---

[184] FED. R. CIV. P. 11 advisory committee note. At least two federal district courts have identified the level and type of legal experience of counsel as a relevant factor. *See, e.g.*, McQueen v. United Paperworkers Int'l Union Local 1967, No. C-1-84-1196 (S.D. Ohio, Feb. 26, 1985) (inquiry into expertise attorney may aid court in assessing reasonableness of counsel's conduct under rule 11); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctions appropriate where the two attorneys who signed the complaint had seven and twelve years experience and held themselves out as labor law specialists, thus raising strong inference that their bringing of action was for improper purpose).

[185] How will judges actually account for the realities of law practice in the context of rule 11 standards? The answer touches upon several interrelated variables: the judge's commitment to rule 11's purposes, the judge's perception of the demands of law practice and the judge's sense of what was fair to have asked of the particular attorney in light of his experience and resources.

The Federal Judicial Center's study of judicial application of rule 11 standards yielded interesting findings. The study was conducted shortly after the adoption of new rule 11, when judges were in the initial stages of interpreting its provisions. The study found that judges tended to apply a mixed subjective intent/objective reasonableness standard to certain types of cases. As a result some good faith violations of the reasonableness standard elicited disciplinary action and some did not. Kassin, *supra* note 164, at 27. Judges tended to sanction "simple negligence or laziness more heavily than they do incompetence or lack of experience, despite their apparent equivalence in implying the lack of bad faith." *Id.* Judges also tended to be more lenient in imposing sanctions upon pro se litigants. This seems to imply that judges examine the reasons for the groundless filing and determine whether the reasons are acceptable according to such factors as the experience and resources of counsel (or the absence of counsel).

The study concluded that "the 1983 amendments to Rule 11 have apparently increased judges' willingness to enforce the certification requirements." *Id* at 45. It also stated, however, that judges in certain types of cases apply a modified objective standard to minimize the perceived harshness of the pure objective standard: "judges rather naturally make distinctions within the category of good faith violations. . .[and] in the absence of bad faith only serious forms of [unreasonable] misconduct appear to have resulted in the award of fees." *Id.* at 27. The study suggests a four-tiered model describing judges' initial rulings under new rule 11.

a. Well-grounded in fact

For most filings, reasonable factual inquiry includes thorough discussions with the client and important witnesses[186] and a review of available documents.[187] Although rule 11 is designed to eliminate the "file first ask later" approach, it does not require the equivalent of substantial discovery before filing. Where a party and attorney are unable to obtain important information through informal investigation, they have discharged their duty of reasonable inquiry.[188] It is the omission or misstatement of material fact, avoidable through ordinary investigation, that is the focal point of the reasonable factual inquiry requirement.

Unioil, Inc. v. E.F. Hutton & Co., Inc.[189] illustrates the application of this requirement. In *Unioil*, plaintiffs brought a class action suit against several brokerage houses and individuals alleging market manipulation of Unioil stock.[190] Without investigation or inquiry, Joseph L. Alioto, plaintiff's counsel, improperly named Zelezny, a stockbroker, as the class representative.[191] Alioto had not

Four-Tiered Model Describing Judges' Rulings on Rule 11 Motions for Sanctions

Characterization of Attorney's Conduct	Rule 11 Prescriptions	Actual Decision Model (% Sanctions Granted)
1. Nonviolation (pleading is reasonable under the circumstances)	No sanctions	No sanctions (2%)
2. Nonwillful good-faith violation (reasonableness standard not met because of factors such as incompetence, lack of experience, case complexity, and oversight)	Sanctions	Variable sanctions (61%)
3. Willful good-faith violation (reasonableness standard not met because of personally controllable factors such as neglect or laziness)	Sanctions	Sanctions (85%)
4. Willful bad-faith violation (reasonableness standard not met because of willful disregard or misrepresentation of the facts or law, or improper purpose)	Sanctions	Sanctions (98%)

[186] Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983) (personal interviews with client and key witnesses).

[187] Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984).

[188] *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (reasonableness of plaintiff's factual inquiry must be assessed in light of the availability of relevant information); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 262 (E.D. Mich. 1985). ("The difficulty of investigating [antitrust claims] prior to the initiation of a lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the 'reasonable inquiry' standard.")

[189] 802 F.2d 1080 (9th Cir.), *withdrawn pending petition for reh'g*, 809 F.2d 548 (9th Cir. 1986).

[190] Plaintiffs alleged a "concerted scheme to sell Unioil stock short in violation of federal antitrust and securities laws, RICO, and various California laws." *Unioil*, 802 F.2d at 1084.

[191] Based on Zelezny's deposition testimony, the Ninth Circuit affirmed the district court's

contacted Zelezny prior to filing the complaint or conducted an independent investigation, relying instead upon the reference of forwarding counsel.[192] Subsequently, the district court dismissed the action and imposed sanctions under rule 11 for failure to conduct reasonable inquiry.[193] Alioto appealed the imposition of sanctions.

Under the subjective standard of former federal rule 11 and current Hawaii rule 11, only a willful violation would have subjected Alioto to sanctions. Thus, unless the defendant could have shown that Alioto filed the complaint with the knowledge that Zelezny was an improper class representative, sanctions would have been inappropriate. Under the reasonable inquiry standard of the new rule, however, Alioto's subjective intent was deemed irrelevant. The Ninth Circuit found that Alioto failed to conduct reasonable investigation since a competent attorney would have taken further steps prior to the filing of the lawsuit to insure that the class claims were properly represented.[194]

Wells v. Oppenheimer & Co., illustrates the appropriateness of sanctions for motions not well-grounded in fact.[195] The court sanctioned defense counsel for filing an unreasonable motion for summary judgment, finding that "although the defendants acted in subjective good faith in moving for summary judgment, there was no objective basis for the attorney to conclude that the motion was well-grounded as the questions of fact were obvious."[196] Implicit in the court's decision were concerns about undue expense to the plaintiff, unnecessary time burdens on the court and improper use of the summary judgment motion as a discovery shortcut.

---

finding that Zelezny's claims clearly were not typical of those of the class and that Zelezny's apparent conflicting interest class members' interests clearly made him "inadequate" as a class representative. *Id.* at 552, 558.

[192] The Ninth Circuit deemed not clearly erroneous the district court's findings that (1) Alioto had reason to know that Zelezny was the only named plaintiff who appeared to be independent of Unioil, (2) Alioto knew virtually nothing about forwarding counsel on his inquiry into Zelezny's suitability as a class representative, (3) Alioto's firm represented itself as experienced in complex business litigation, (4) Alioto had ample time to investigate before filing, (5) no severe time or monetary constraints impeded any investigation, and (6) the class of allegations threatened defendants with mass liability and aroused a vigorous and costly defense. *Id.* at 557.

[193] The district court also found plaintiff's counsel in violation of rule 11 for: (1) attempting to disengage from class discovery without cause and from the class action suit without court approval; and (2) failure to comply with the requirements for statements under oath. *Id.* at 553.

[194] *Id.* at 558-59. *Cf.* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973) (court applied what amounted to the reasonable inquiry standard to find a violation under old rule 11).

[195] 101 F.R.D. 358 (S.D.N.Y. 1984).

[196] *See id. See also* SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984) (sanctions imposed for groundless summary judgment motions).

b. Warranted by law or a good faith argument for a change in law

Rule 11 also requires reasonable inquiry to determine whether the filing is warranted by law or a good faith argument for a change in the law. Although the Ninth Circuit recently held that rule 11 and the ethical rules are not coextensive,[197] rule 11 does address a problem with ethical as well as practical dimensions: the assertion in court of a position lacking any plausible legal basis. Thus an attorney's duty of zealous client representation does not abrogate her obligation not to misrepresent the law to the court.

In a case providing important guidance for Hawaii attorneys, the Ninth Circuit in *Zaldivar v. City of Los Angeles*[198] delineated the standard for determining whether a pleading or motion is warranted by law. In *Zaldivar*, plaintiffs asserted that defendant's failure to distribute a bilingual recall notice constituted a violation of the Federal Voting Rights Act.[199] The district court granted summary judgment against plaintiffs, holding that the Act was inapplicable because it did not apply to conduct of private individuals and because it applied only to "acts of voting" and a recall notice is not an act of voting.[200] Subsequently, the district court sanctioned plaintiffs under rule 11, finding plaintiffs' claims "frivolous" and "totally without merit."[201] The Ninth Circuit, however, reversed the imposition of sanctions.

The Ninth Circuit noted that under rule 11's "warranted by law" requirement, the pleader "need not be correct in his view of the law;" rather, "at a minimum, [the pleader based on reasonable inquiry] must have a good faith argument for his or her view of what the law should be."[202] The court concluded that sanctions under rule 11 were inappropriate since plaintiffs had advanced the plausible argument that the literal provisions of the Voting Rights Act were to be expansively construed to effect the strong remedial purposes of the Act. In light of legislative history and expansive judicial construction of analogous provisions, the court found the legal basis of plaintiffs' position objectively defensible, even though that position ultimately failed.[203]

---

[197] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

[198] 780 F.2d 823 (9th Cir. 1986).

[199] *Id.* at 825-27. Plaintiffs filed an action in federal district court to enjoin the City of Los Angeles from processing defendants' recall petitions. *Id.* at 826.

[200] *Id.* at 827.

[201] *Id. See also* Zaldivar v. City of Los Angeles, 590 F. Supp. 852 (C.D. Cal. 1984).

[202] *Zaldivar*, 780 F.2d at 827.

[203] *Id.* at 834. The Ninth Circuit recognized the Advisory Committee's mandate that courts are expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. *See* FED. R. CIV. P. 11 advisory committee note. *See also*, Davis v. Veslan Enter., 765 F.2d 494 (5th Cir. 1985) (assertion must be based on a plausible view of the law); Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (Where it is patently clear that

In contrast, the plaintiff's claims in *Rodgers v. Lincoln Towing Service, Inc.*[204] lacked an objectively defensible legal basis, and were therefore sanctionable. The Seventh Circuit affirmed the district court's finding of "counsel's incompetence in the handling of this matter by making 'frivolous' and 'worthless' claims,"[205] noting that "counsel has refused to recognize or to grapple with the established law of the [United States] Supreme Court and of this Circuit that defeats several of the claims."[206]

Advocacy of positions foreclosed by prevailing precedent does not in all situations constitute a rule 11 violation. "[G]ood faith argument[s] for the extension, modification, or reversal of existing law"[207] fall squarely within the bounds of permissible conduct. All arguments for changes in law, however, do not pass rule 11 muster. A new legal theory or an argument for reversal of existing law must be made in "good faith."[208] This good faith standard is a marked departure from the subjective intent standard of former rule 11. "Good faith arguments" are to be measured objectively: Did counsel through reasonable inquiry have any reasonable basis for his arguments for a change of law?[209] Counsel's arguments need not bear a high probability of success so long as they are objectively defensible;[210] that is, they have a plausible basis in developing lines of legal or social thought, and therefore have some "realistic possibility" of success.[211]

c. Post-filing inquiry

The reasonableness requirement in new rule 11 is tested at the time of filing. Judicial debate exists, however, as to whether the duty of reasonable inquiry continues after initial filing. The Fifth Circuit in *Southern Leasing Partners, Ltd. v. McMullan*,[212] held that counsel had a continuing obligation under rule 11 to

---

a claim has absolutely no chance of success under existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, rule 11 is violated.).

[204] 771 F.2d 194 (7th Cir. 1985).

[205] *Id.* at 206.

[206] *Id.* at 205.

[207] FED. R. CIV. P. 11.

[208] *Id.*

[209] *See* Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). For a discussion of rule 11's potential for chilling vigorous advocacy see *infra* text accompanying notes 244-49.

[210] FED. R. CIV. P. 11.

[211] *See* Note, *The Dynamics of Rule 11*, 61 N.Y.U. L. REV. 300, 324 (1986) [hereinafter Note, *Rule 11 Dynamics*].

[212] 801 F.2d 783 (5th Cir. 1986). In *Southern Leasing*, the district court imposed sanctions under rule 11 for the filing of an action which was later dismissed on res judicata grounds. *Id.* at 787. The court held that reasonable inquiry, pre or post-filing, would have revealed the impropri-

review, reexamine, and reevaluate his position as the facts came to light after initial filing. This position is generally consistent with the rule's ultimate goal of deterring litigation over meritless positions. It tends, however, to impose onerous monitoring burdens on counsel.

In light of the reasonableness calculus which attempts to balance burdens and benefits, the Second Circuit's position in *Oliveri v. Thompson*[213] seems more sensible. The court in *Oliveri* held that "[r]ule 11 applies only to the initial signing of a 'pleading, motion, or other paper.' "[214] Concerned about overburdening attorneys, the court concluded that under rule 11 an attorney does not have a continuing obligation to monitor the validity of the position advocated. This is consistent with the Advisory Committee comments which focus inquiry on the attorney's conduct solely at the time of "submission."[215]

d. Scope of reasonable inquiry requirement

Disagreement also exists about the scope of rule 11's reasonable inquiry requirement. Must every allegation in a complaint (or every argument in a motion) fail the reasonable inquiry test before rule 11 is violated? Or does an "unreasonable" claim (or argument) in an otherwise well-grounded filing constitute a rule 11 violation as to the unreasonable part?

The Ninth Circuit recently held that the entire "pleading, motion, or other paper" must fail the reasonable inquiry test.[216] A pleader might therefore, with impunity, allege one plausible claim and join with it ten groundless claims. The opposing party's cost of defeating those ten claims goes unreimbursed and considerable court time is consumed. The pleader is encouraged to over-plead because of the additional initial settlement leverage. The Seventh Circuit has adopted what appears to be a better approach. Even though some of the assertions in a filed document satisfy the reasonable inquiry standard, those that do

---

ety of the claim. *Id.* at 789. *See also* Woodfork v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (attorney obligated to reevaluate earlier certification of case under rule 11 if he subsequently learns of information of evidence which reasonably leads him to believe there is no factual or legal basis for his position); Smith v. United Transp. Union Local 81, 594 F. Supp. 96 (S.D. Cal. 1984) (rule 11 sanctions appropriate where attorneys raised affirmative defenses previously stricken by the court and obviously ignored relevant law subsequently brought to their attention by plaintiffs).

[213] 803 F.2d 1265 (2d Cir. 1986). In *Oliveri*, the Second Circuit reversed the district court's order to impose sanctions under rule 11 for plaintiff's failure to dismiss civil rights claims after discovery indicated that the claims were tenuous. *Id.* at 1281.

[214] *Id.* at 1274.

[215] *See supra* note 203.

[216] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986). ("The Rule permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support . . . is frivolous.").

not trigger rule 11 sanctions.[217] This approach better addresses the problem of undue litigant and court costs arising out of the shotgun method of litigating.

2. *Improper purpose test*

The second part of the rule 11 certification requirement concerns improper purposes. Sanctions are warranted if the pleading or motion is filed for an "improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation."[218] This provision addresses the problem of "misusing judicial procedures for personal or economic harassment."[219]

Although an "improper purpose" test suggests an examination into subjective intent, several federal courts of appeal have steadfastly rejected this notion.[220] Instead, courts inquired into whether the signer's actions under the circumstances, as objectively measured, manifested a desire to harass or delay.[221] The focus is not on the actual consequences of the signer's act, and it is not enough that the filings "bother, annoy or vex the complaining party."[222]

Chevron U.S.A., Inc. v. Hand[223] is illustrative. The defendant's initial counsel negotiated a favorable settlement on defendant's behalf.[224] Attorneys for the parties filed a "stipulation and dismissal" that ended the suit and severed the supply/purchase business relationship of the parties.[225] Defendant, however, hired another attorney solely, it appears, to delay effectuation of the stipulation

---

[217] Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985) (The failure of "several" but not all of plaintiff's claims to satisfy the reasonable inquiry standard constituted a rule 11 violation.). *See also* Mohammed v. Union Carbide, 606 F. Supp. 252 (E.D. Mich. 1985) (Rule 11 sanctions imposed for lack of reasonable prefiling inquiry in defamation claim, even though reasonable inquiry had been conducted on complex antitrust claim.); Florida Monument Builders v. All Faiths Mem. Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984) (entire pleading need not be frivolous to trigger rule 11 sanctions).

[218] *See* FED. R. CIV. P. 11 advisory committee note.

[219] *Golden Eagle*, 801 F.2d at 1537.

[220] *See, e.g.*, Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

[221] According to Judge Schwarzer:

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the costs of litigation that was needless, or whether they lacked any apparent legitimate purpose.

Schwarzer, *supra* note 181, at 195.

[222] *Id.*

[223] 763 F.2d 1184 (10th Cir. 1985).

[224] *Id.* at 1186.

[225] *Id.*

and dismissal until defendant could "find another source of supply."[226] That new attorney filed a rule 60(b) motion challenging the stipulation.[227] The Tenth Circuit affirmed the district court's finding that the motion was filed for the purpose of delay and was therefore in violation of the second prong of rule 11.[228]

In *Zaldivar*,[229] the Ninth Circuit wrestled with the issue of whether a complaint well-grounded in fact and law may, nevertheless, violate rule 11 because it was filed for an "improper purpose."[230] The court found that since rule 11 provides that a filing must be "well grounded in fact and . . . warranted by existing law . . . *and* [must not be] interposed for any improper purpose," the two clauses operate independently and the violation of either constitutes a violation of the rule.[231] The court declined to decide in general principle when a properly grounded pleading or motion might still constitute impermissible harassment. Focusing on the specific facts of *Zaldivar* and implicitly on fair access concerns, the court articulated a principle narrowly limited to the filing of complaints, concluding that a single complaint which complies with the well-grounded-in-fact and warranted-by-law clauses cannot constitute impermissible harassment, regardless of the motivation for its filing.[232]

The court did, however, outline two scenarios where otherwise proper filings might be deemed sanctionable harassment. The court noted that the "filing of excessive motions . . . even if each is well grounded in fact and law, may under particular circumstances be 'harassment' under [r]ule 11."[233] The court also indicated that the "filing of [an] action in federal court, after the rejection in state court of its legal premise" might constitute harassment "under the second prong" of rule 11, provided that there "exist[s] an identity of parties involved in the successive claims, and a clear indication that the proposition urged in the second claim was resolved in the earlier one."[234]

3. *Mandatory sanctions*

Once a court finds a violation of rule 11, "the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, or represented

---

[226] *Id.*

[227] *Id.*

[228] *Id.* at 1187.

[229] *See supra* text accompanying notes 188-193.

[230] *Zaldivar*, 780 F.2d at 832. ("In short, may an attorney be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper?")

[231] *Id.*

[232] *Id.*

[233] *Id.* at 832 n.10.

[234] *Id.* at 834.

party, or both, an appropriate sanction, which may include an order to pay the other party . . . the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee."[235] New rule 11 thus explicitly mandates the imposition of sanctions once the rule's standards have been violated.[236]

Judges retain considerable discretion in fashioning appropriate sanctions.[237] A court is not limited in its selection. The most common sanction is an assessment of the opposing party's reasonable costs, including attorney's fees.[238] Sanctions are usually imposed upon the attorney, although parties also have been penalized.

There is one cautionary note. Rule 11 is not intended to shift to the loser the burden of the prevailing party's attorney's fees whenever a complaint is dismissed or a motion is denied. Sanctions flow only from transgressions of rule 11 standards. A motion for sanctions that fails the reasonable inquiry test is itself subject to rule 11 sanctions.[239]

4. *Standards of appellate review*

Appellate review has become an important element of judicial efforts to clarify rule 11 standards. Conceptually, the standard of appellate review of rule 11 decisions is divided into three degrees of deference. First, de novo review is appropriate if the dispute centers upon the legal conclusion that the uncontroverted facts constituted a violation of rule 11.[240] Second, if the facts relied upon by the court are disputed on appeal, review is appropriate under the rule 52(a) clearly erroneous standard.[241] Finally, the abuse of discretion standard is applicable to challenges to the appropriateness of the type and extent of the

---

[235] FED. R. CIV. P. 11 (emphasis added).

[236] The intent of mandatory sanctions is to reduce judicial reluctance to impose sanctions on violators. *See* Fed. R. Civ. P. 11 advisory committee note; Comment, *Prescriptions*, *supra* note 41, at 892.

[237] The Advisory Committee notes that under the new rule, "[t]he court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." FED. R. CIV. P. 11 advisory committee notes.

In determining the appropriate sanction, courts should consider: (1) the gravity and impact of the violation; (2) the need for general deterrence; and (3) the need for punishment. *See* Schwarzer, *supra* note 221, at 200-201.

[238] *See* Kassin, *supra* note 164, at xi.

[239] *See* Anderson v. Pepsi Cola Metro. Bottling Co., No. 84-CV-8144-FL (E.D. Mich., Feb. 1, 1985); Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 991 (N.D. Ill. 1984).

[240] *Golden Eagle*, 801 F.2d at 1538.

[241] *Zaldivar*, 780 F.2d at 828.

sanctions.[242]

5. Concerns over the adoption of new rule 11

In expanding judicial power and establishing more stringent standards for attorney performance, Congress and the Supreme Court intended to minimize unreasonable filings thereby decreasing "delay and expense in civil proceedings."[243] A potential side effect of rule 11 is that it might deter development of creative or new legal theories.[244] Commentators worry that access to the judicial process might be severely curtailed, especially for the disadvantaged and politically powerless groups who have traditionally based their claims upon novel legal theories. Indeed, a rule that inhibits fair participation or prevents the effectuation of substantive rights, no matter how efficient in operation, would be unacceptable.

Judges applying new rule 11 must be sensitive to these potential pitfalls. The drafters of new rule 11 were, and they therefore specifically built into the rule flexibility to allow for the filing of creative or novel legal theories.[245] Under the rule, sanctions for "legally unreasonable" filings are appropriate only when the legal position asserted has no chance of success under existing precedents *and* when no reasonable argument can be made to extend, modify, or reverse existing law.[246] Recognizing the importance of access for people with potentially meritorious although unconventional claims or novel defenses, the comments to

---

[242] *Id. See also* Westmoreland v. CBS, Inc. 770 F.2d 1168 (D.C. Cir. 1985). This conceptual construct is of course subject to judicial alteration in practice. The degree of judicial deference actually accorded and the reasons therefor are complex matters beyond the scope of this article.

[243] *See* Carter, *The History and Purpose of Rule 11*, 54 FORDHAM L. REV. 4 (1986). *See generally* Schwarzer, *supra* note 41.

[244] *See, e.g.*, Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23 (1985). *See also* Resnik, *supra* note 61.

[245] *See* Note, *Rule 11 Dynamics*, *supra* note 211, at 324. ("Rule 11 was not intended to penalize advocates of unpopular causes. Indeed, the 'argument to change the law' clause should be interpreted as an incentive to litigate colorable, albeit novel claims.").

[246] Eastway Const. Corp. v. City of New York, 762 F.2d 243 (1985). In *Eastway*, the Second Circuit Court noted that:

> In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. . . . [W]here it is patently clear that a claim has absolutely no chance of success under existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands, Rule 11 has been violated.

Id. at 254. *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Fraizer v. Cast, 771 F.2d 259 (7th Cir. 1985); Chevron, USA, Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985).

the amended rule specifically note that rule 11 is not meant to "chill an attorney's enthusiasm or creativity."[247]

The judicially-developed "objectively defensible" test for legal reasonableness set forth in *Zaldivar*,[248] and the "no reasonable argument" standard for extensions or modifications of existing law should therefore be applied within the context of the Advisory Committee's mandate to avoid chilling attorney creativity. Together, they provide solid judicial guidance for protecting litigants with novel positions plausibly connected with social and legal developments.[249]

Another concern is the possibly disproportionate impact of the new rule upon plaintiffs. In every case, rule 11's initial impact will be upon the plaintiff who is deciding whether or not to sue. The overall impact of the rule, however, along with its discovery counterparts 26(g) and 26(b)(1)(iii), should be more or less evenly felt by plaintiffs and defendants. Defendants will be constrained in filing counterclaims, many of which are filed to gain leverage, and in asserting groundless defenses. Defendants will also have to think twice about filing motions to dismiss or for summary judgment that are intended merely to pressure plaintiffs or to flush out plaintiffs' legal theories.[250]

Particularly significant from a plaintiff's perspective is the impact of rule 26(g), the discovery rule counterpart of rule 11. As discussed below, rule 26(g) proscribes "unreasonable" discovery requests, responses, and objections. In addition, rule 26(b)(1)(iii) authorizes the judge at the outset to limit discovery reasonably according to the needs of the case and the resources of the parties. The managerial judge, collectively employing these rules, can provide a significant measure of protection for plaintiffs from litigation excesses, especially in multiple defendant cases.

The absence of definitive studies or a solid body of federal court experience on the impact of rule 11 counsels caution in application and continuing scrutiny. The design of rule 11's drafters and judicial sensitivity to date, as exemplified in *Zaldivar*, however, indicate that rule 11's ultimate impact will not be the chilling of novel legal theories or the unfair burdening of plaintiffs or defendants. Its ultimate impact may well be the elimination of careless or thoughtless filings and filings by persons using the courts simply to vent their nonlegal grievances. Restricting access for the former is appropriate for obvious reasons. Restricting access for the latter is appropriate because lengthy groundless actions, however emotionally gratifying, are expensive in terms of the judge's and the litigants' time and ultimately preclude others from timely access

---

[247] FED. R. CIV. P. 11 advisory committee note (1983).

[248] *See supra* text accompanying notes 188-193.

[249] For a further discussion of the impact of the new rules on fair access to the judicial process, see *supra* text accompanying notes 119-25 and *infra* text accompanying notes 281-82.

[250] *See, e.g.*, Wells v. Oppenheimer, 101 F.R.D. 358 (S.D.N.Y. 1984).

to the judicial process. The United States Supreme Court recently commented:

> [W]hile freedom and access to the court is indeed a cherished value, every misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and that time could be devoted to considering claims which merit consideration.[251]

A final concern is that new rule 11 might lead to protracted and expensive satellite litigation.[252] Considerable litigation has arisen in federal courts.[253] The Advisory Committee anticipated litigation clarifying rule 11 standardds initially. Such questions as the nexus between rule 11 and the ethical rules need addressing.[254] It also predicted that as a body of law developed, litigation would subside. Clear guidance and strong initial enforcement should encourage confirmance and reduce the need for sanctions in future cases. The committee believed that the increased management efficiency of the district courts resulting from rule 11 would outweigh the initial burdens of ancillary litigation.[255] This should be especially true for the Hawaii courts if new rule 11 is adopted. By the time new rule 11 is adopted in Hawaii, a substantial body of federal cases will exist to guide Hawaii judges.[256]

---

[251] Talamini v. Allstate Ins. Co., 470 U.S. 1067 (1985).

[252] *See, e.g.*, Unioil Inc. v. E.F. Hutton, 802 F.2d 1080 (9th Cir. 1986); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986). *See generally* Weiss, *supra* note 244.

[253] *See supra* note 163.

[254] The Ninth Circuit recently clarified the nexus between rule 11 and the ethical rules. *See* Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986). In *Golden Eagle*, the court held that an attorney's violation of the ethical rules for failing to cite contrary authority does not constitute a violation of rule 11. Nor is rule 11 violated when an attorney "misleads" the court by implying that his legal position is based on existing law when it is based instead on a good faith argument for a change in the law. Rule 11 does not require counsel to specify whether his argument is based on existing law or an argument for change. *Id.* at 1540. Focusing on the text of Rule 11 and problems of judicial administration, the court articulated a general principle separating rule 11 from the ethical rules: "Rule 11 . . . does not impose upon the . . . courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments." *Id.* at 1542.

[255] *See* Wiggin Speech, *supra* note 248, at 161.

[256] The ABA Section of Litigation has offered "Practical Suggestions to Avoid Rule 11 Sanctions." Those general suggestions, omitting citations, bear repeating:

(1) Recognize that your subjective good faith in filing the pleading is not enough to avoid sanctions.

(2) Confirm that your pleading is not designed to harass the adversary or to delay or extend the cost of the proceeding, and remember that the objective circumstances of the litigation will probably determine whether there has been an improper purpose.

(3) Conduct a thorough personal interview with your client and key witnesses about the

C. *Limiting discovery without stifling reasonable case development—new rules 26(b)(1), 26(f) & 26(g)*

Increasing attention has focused on the collision between the liberal truth-seeking spirit of the discovery rules and the unreasonable cost of "doing discovery" over the last ten years.[257] Although much of the concern has been directed toward larger case litigation, the discovery process in moderate-sized cases has also been criticized. New federal rules 26(b)(1), 26(f) and 26(g) significantly expand the powers of the managerial judge to control discovery from the outset of the litigation. These new rules, which are interwoven into new rule 16, attempt to direct the managerial judge to seek an accommodation of competing concerns by allowing for discovery of relevant information without permitting disproportionate cost.

The 1980 and 1983 amendments to rule 26 are designed to achieve this accommodation in four ways. The amendments (1) limit the scope of discovery on the basis of practical concerns never before recognized in the traditional adversarial system; (2) establish the discovery conference as a tool of the managerial judge; (3) require attorney certification of the "reasonableness" of discovery requests, responses and objections; and (4) specify sanctions for noncompliance.

---

pleading.

(4) Review pertinent documents that may support pleading.

(5) If the facts supporting the pleading are available without discovery, greater factual certainty is required.

(6) If the facts are available *only* through discovery, evaluate proof available from your client and make a reasonable assessment of the proof likely from the adversary.

(7) Make your own personal assessment of legal issues such as jurisdiction and venue and of defenses which might bar the claim, such as statute of limitations.

(8) If you are not experienced in the given field (for example, anti-trust law or RICO claims), make an informed decision as to the validity of the claim or defense, or at the very least get an independent opinion from an experienced practitioner. You must bring some experience to bear on the issues before invoking the federal court system. Be aware, however, that reliance upon other counsel on fundamental questions of the law (as opposed to the facts) has resulted in sanctions.

(9) In writing your briefs, confirm that your legal theories are supported by existing law, or a good faith argument for the extension, modification or reversal of existing law. It is entirely appropriate to urge that existing law be changed. In fact, vigorous representation of your client requires such an approach. However, if your argument seeks a change of existing law, make it clear to the court in your brief what your position is and do not delude the court as to the actual state of the law.

(10) If you must file a pleading hurriedly to avoid a time bar, do so and *promptly thereafter* carry out the foregoing suggestions.

(11) If you are local counsel, do not sign the pleading or motion unless you have determined that Rule 11 has been complied with by lead counsel.

SANCTIONS, *supra* note 165, at 9-11 (emphasis added).

[257] *See infra* note 305.

The original version of rule 26 of the Federal Rules of Civil Procedure (and its current Hawaii counterpart) provided that unless the court ordered otherwise, "the frequency of use [of the methods of discovery] . . . is not limited."[258] This language embodied a policy favoring unlimited discovery in search of relevant information. In the seminal case on the scope of discovery, *Hickman v. Taylor*,[259] the Supreme Court affirmed this policy of broad discovery. The original rules contemplated attorney implementation of this policy with minimal judicial involvement. The Advisory Committee noted, as late as 1970, that the discovery rules were "designed to encourage extra judicial discovery with a minimum of judicial intervention."[260]

This self-regulating system, however, proved unworkable. Attorneys learned and were ultimately compelled to manipulate the discovery process to their client's advantage, resulting in widespread uneconomical overuse of the rules.[261]

> There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high cost to litigants, and the correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.[262]

The original federal rules and the current Hawaii rules assumed collective attorney loyalty to the system and inherent market constraints as means for avoiding overuse of the discovery rules. Supervision and enforcement mecha-

---

[258] FED. R. CIV. P. 26(a).

[259] 329 U.S. 495, 501 (1947). ("Civil trials no longer need be carried on in the dark . . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.")

[260] FED. R. CIV. P. 26(a) advisory committee note.

[261] The focus on "overuse" of discovery machinery should be distinguished from violations of specific discovery rules.

> While there are instances in which lawyers make improper discovery requests under the rules or resist information that is clearly discoverable, it is suggested that this does not represent the critical problem with the discovery process. The most significant discovery problem is that the tools are so vast and the scope so broad that even obtaining the information to which a party is legitimately entitled under the rules has become a wasteful, time-consuming, dilatory, and expensive process.

Existing rule 37 provides sanctions for violations of specific discovery rules but does not address the problem of "overuse." rule 26(c) authorizes protective orders "for good cause shown" to prevent "undue burden or expense" but only becomes operative at the point of crisis—when a party is imminently threatened. It does not facilitate planning reasonably to limit discovery. Thus existing rules do not address the problem of potential "overuse" as viewed from the commencement of the case.

[262] *See* Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System In the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

nisms were woefully weak.[263] These assumptions proved unrealistic, especially for larger cases.[264] The new rules are more pragmatic. The reality is that an attorney's allegiance lies first and foremost with her clients. The canon of ethics requires it.[265] Business practicalities encourage it. Zealousness in representation readily translates into strategic use of opportunities allowed by the rules.[266] Given this firmly entrenched mind-set, with its underpinnings in the ethical code, and litigants' demands for hard-nosed litigators, the new rules acknowledge that it is unrealistic to expect all attorneys to voluntarily and consistently restrain themselves against misusing the opportunities provided by the system.[267]

New rule 26 demands attorneys' concomitant allegiance to the welfare of the system and everyone affected by it. It gives the managerial judge greater power to shape and control discovery. Indeed, the "is not limited" policy of former rule 26(a) has been replaced with a radically different policy. The new provisions are intended "to encourage district judges to identify instances of needless

---

[263] *See* Cohn, *Federal Discovery: A Survey of Local Rules and Practices In View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979).

[264] Many cases are litigated without discovery disputes. However, even attorneys who prefer to minimize discovery struggles tend to perceive their allegiance to their clients to include strategic overuse of the discovery rules. Professor Brazil's study found:

> Our data portrays a system permeated with subtle and overt forms of resistance, a system whose tools often are used inartfully or as a means to exert pressure on or secure some tactical advantage over an opponent. This thoroughly adversarial process is inefficient and expensive. It also fails to achieve its primary purpose: to assure "mutual knowledge of all the relevant facts gathered by both parties [that] is essential to proper litigation."

Brazil, *supra* note 33 at 881.

[265] *See, e.g.*, HAW. C.P.R. Canon 7.

[266] Hawaii experience indicates that although attorneys are generally cooperative, client allegiance and concern about malpractice compels many attorneys to overuse discovery mechanisms. Civil administrative judge for the First Circuit Court, Philip Chun, observed:

> I think, perhaps, sometimes discovery is being abused. The parties want too much. They're "out fishing," but you have to look at it on a case-to-case basis. I don't think you can make the general statement that discovery is being abused, because definitely, with all the litigation we have now, if an attorney does not do his discovery, he is subject to malpractice.
>
> So you're stuck. You have to attempt to do the discovery and that's why, lots of times, it ends up before us as to whether or not that is discoverable.

Interview with Judge Philip Chun and Judge Edwin Honda, 19 HAW. B.J. 117, 130 (1985).

[267] As one litigator commented:

> Requiring that a lawyer either exercise restraints in carrying out discovery on his client's behalf or be sanctioned, interferes with the attorney's obligation of undivided allegiance to his client. The full parties' action of a lawyer in his role as partisan advocate touches "the integrity of the adjudicative process itself."

Fishbein, *New Federal Rule 26: A Litigator's Perpective*, 57 ST. JOHN'S L. REV. 739, 746 (1983).

discovery and to limit the use of various discovery devices accordingly."[268]

1. *Rule 26(b)(1)*

The conceptual centerpiece is amended rule 26(b)(1). The rule rejects three traditional notions of procedural fairness: first, that "more is better";[269] second, that "procedural neutrality" in the positivist sense means that rules must treat all parties as if they are on equal footing (even if they are not);[270] and third, that all issues are created equal in importance.[271] In rejecting these notions, rule 26(b)(1) acknowledges that outcomes are altered and the quality of justice is often impacted by the burden and expense of the parties' "permissible" use of discovery devices.[272]

The amended rule 26(b)(1) is therefore designed to "prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."[273] It encourages judges to limit discovery before disputes arise. The managerial judge is authorized to limit discovery under 26(b)(1) upon motion by a party or on his own accord.[274] This provision therefore complements rule 16's provisions concerning scheduling and pretrial conferences.[275] During those conferences the judge can exercise his 26(b)(1) authority to set discovery timetables and limit the scope of permissible discovery.

The first two subsections of rule 26(b)(1) authorize judges to limit discovery for commonly accepted reasons—if the discovery contemplated would be "cumulative or duplicative"[276] or could be obtained in a less burdensome manner.[277] In contrast, the third subsection, 26(b)(1)(iii), is striking in its originality. It articulates significant values often implicitly acknowledged by judges in

---

[268] FED. R. CIV. P. 26 advisory committee note.

[269] *See supra* note 259 and accompanying text.

[270] *See supra* notes 86-94 and accompanying text.

[271] *Id.*

[272] *See supra* notes 98-102 and accompanying text.

[273] FED. R. CIV. P. 26(b)(1) advisory committee note.

[274] FED. R. CIV. P. 26(b)(1).

[275] *See* FED. R. CIV. P. 16(a)(3) (discouraging wasteful pretrial activities); FED R. CIV. P. 16(b)(3) (time limits for discovery); FED. R. CIV. P. 16(c)(11) (other matters as may aid in disposition).

[276] FED. R. CIV. P. 26(b)(1)(i).

[277] FED. R. CIV. P. 26(b)(1)(ii). The Advisory Committee noted:

> The first element of this standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories.

FED. R. CIV. P. 26 advisory committee note.

their rulings but never formally recognized in the adversarial process. Rule 26(b)(1)(iii) addresses the problem of over-discovery by establishing the principle of "proportionality."[278] The quest for relevant information is to be tempered by considerations of burden and expense. "Undue burden and expense" are to be measured by taking account of "the needs of the case, the amount in controversy," the "importance of the issues at stake," and the "limitations on the parties' resources."[279]

This last factor is particularly significant because the federal rules have finally acknowledged that the extent of a party's litigation resources can materially affect the outcome of a case. All parties are not created equal, and financial inequality and liberal discovery opportunities often combine to distort fair results. Thus, in limiting discovery under rule 26(b)(1)(iii), a judge is to consider the discovery needs of the case in light of the amount in controversy and "the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests."[280]

The cost reduction goal of 26(b)(1)(iii)'s proportionality principle is intended to benefit directly litigants and the court and ultimately the general public. Applied conscientiously over time, rule 26(b)(1)(iii) should also have the salutary effect of expanding access opportunities to middle income litigants as well as the poor and politically powerless who may have only the courts for recourse against injustice.[281]

---

[278] In drafting the amended discovery rules the Judicial Conference determined that over discovery "results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues at stake." Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Fed. R. Civ. P. (June 1981)*, 90 F.R.D. 451, 481 (1981) [hereinafter Committee on Rules.].

[279] FED. R. CIV. P. 26(b)(1)(iii). The Advisory Committee notes state:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.

FED. R. CIV. P. 26(b) advisory committee note.

[280] *Id.*

[281] Poor people and politically powerless minority groups are usually represented, if at all, by public interest law organizations. Those organizations generally have severely limited litigation budgets. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (calling for a "more searching judicial inquiry" in his much-discussed footnote, Chief Justice Stone cited the precarious political position of "discrete and insular minorities" in a democratic society as distinguished from those with access to the political process"). *See also* Massachusetts Bd. of Retire-

Rule 26(b)(1) in general, and subsection (iii) in particular, also serve as a nice counterbalance to rule 11. Although, as discussed earlier,[282] rule 11's "stop, look and inquire" mandate will affect both plaintiffs and defendants, plaintiff's counsel may sometimes feel the greater initial impact since the threshold question in every suit is whether or not to file the complaint. Rule 11 is specifically designed to restrict access by deterring frivolous claims. Rule 26(b)(1)(iii), on the other hand, should expand access opportunities for cost-conscious plaintiffs with nonfrivolous claims, especially in multiple defendant settings. Applied sensitively, rules 11 and 26(b)(1)(iii) have the potential for restricting unwarranted filings while promoting fair access, benefiting both plaintiffs and defendants.

Criticism of new rule 26(b)(1)(iii) has focused not on conceptual propriety, but on problems of application. The "proportionality standard" has been described as "nebulous"[283] and an invitation to "judicial arbitrariness."[284] Critics note that a judge must determine "proportionality" without unduly restricting discovery since liberal discovery is the heart of a notice pleading system. This is thought to be a particularly onerous judgment call because "[t]he rule itself provides no guidance as to [how the various factors are to be weighed in determining] whether discovery is unduly burdensome or expensive."[285]

While lack of uniform application is a potential problem warranting continuing scrutiny, it does not seem particularly troublesome. The goals of rule 26(b)(1)(iii) are clearly stated, and its factors are clearly identified. Judges with litigation experience should at least have a basic sense for how those factors are to be weighed.[286] Consensus standards will evolve by word of mouth and judi-

---

ment v. Murgia, 427 U.S. 307, 313 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971); ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 151 (1980).

[282] *See supra* text accompanying note 250.

[283] Cavanagh, *supra* note 41, at 799.

[284] Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 280 (1982).

[285] Cavanagh, *supra* note 41, at 799.

[286] An additional concern is the traditional reluctance of judges to get involved in discovery matters. Will a change in the discovery rules necessarily bring about the desired degree of judicial supervision? Many possible explanations are given for traditional judicial reluctance, including the desire to maintain a neutral appearance, insufficient familiarity with the substance of complex areas of law and simply a lack of respect for and interest in discovery matters. *Id.*

Reluctance to intervene is understandable when judges are already overburdened with heavy case loads. However, studies indicate that this fear is unwarranted. Increased efficiency and reduced disposition time are the result of increased judicial control from the outset. *See supra* notes 58-80 and accompanying text.

Unless fundamental change is effected in both the philosophy underlying the rules and the attitudes of bench and bar towards them, "the Discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs." Order on 1980 Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1000-01 (1980)

cial opinions. On balance, the seemingly obtainable benefits of new rule 26(b)(1), especially in conjunction with new rule 16, appear to outweigh potential vagueness problems.

2. *Rule 26(f)*

An important 1980 addition to the rules, rule 26(f),[287] authorizes optional discovery conferences. The rule's purpose is to tentatively identify the "issues for discovery purposes, establish . . . a plan and schedule of discovery, set . . . limitations on discovery, if any . . . ."[288] Rule 26(f) thus supplements rule 16's provisions concerning pretrial conferences and the elimination of wasteful pretrial activities and 26(b)(1)'s substantive standards for limiting discovery. In Judge Schwarzer's experience, setting discovery guidelines tailored to the needs of the case will "reduce subsequent discovery disputes and piecemeal motions to compel or for protective orders, and tend to nip in the bud any notion by a party to wage an attrition campaign using discovery as a weapon."[289]

The limited availability of the discovery conference, however, tends to under-

---

(Powell, J., dissenting).

[287] FED. R. CIV. P. 26(f) provides:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes:
>
> (1) A statement of the issues as they then appear;
>
> (2) A proposed plan and schedule of discovery;
>
> (3) Any limitations proposed to be placed on discovery;
>
> (4) Any other proposed orders with respect to discovery; and
>
> (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.
>
> Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.
>
> Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

[288] FED. R. CIV. P. 26(f).

[289] Schwarzer, *supra* note 181, at 407.

mine its effectiveness. A discovery conference is authorized under the rule only upon motion of one of the parties who establishes both parties' inability to resolve discovery disputes privately. The practical concern of the drafters of 26(f) about unnecessary discovery conferences is warranted. Mandatory discovery conferences would be wasteful in certain types of cases. The "solely at the option of the parties" provision of rule 26(f), however, seems inconsistent with the principle of managerial discretion embodied in rules 16 and 26(b)(1).[290] Rules 16 and 26(b)(1), in concert, implicitly give judges the discretion to do on their own initiative what rule 26(f) explicitly authorizes judges to do only upon request of the parties. It makes sense to revise new rule 26(f) to authorize judges to call discovery conferences on their own initiative as well as at the request of parties. This would preserve the optional nature of the discovery conference while giving the judge flexibility in managing cases.[291]

3. *Rule 26(g)*

New rule 26(g) is the discovery counterpart to rule 11. A substantial portion of the rule 11 analysis discussed above is applicable to subsections (1) and (2) of rule 26(g). The attorney signing a discovery request, response or objection certifies that it has been formed after "reasonable inquiry" and that it is (1) consistent with the discovery rules and warranted by existing law or a good faith argument for change in the law, (2) not interposed for any improper purpose, and (3) not "unreasonable or unduly burdensome or expensive given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues . . . ."[292]

The scope of 26(g) is limited. An attorney's signature on a discovery response does not certify the truthfulness of the response.[293] The attorney only certifies that she has made a reasonable effort to assure that her client has provided all

---

[290] *See* FED. R. CIV. P. 16; FED. R. CIV. P. 26(b)(1).

[291] Justice Powell dissented to the 1980 amendments to rule 26(f) and other rules because the changes did not go far enough towards controlling the discovery abuses:

> I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

[292] FED. R. CIV. P. 26(g).

[293] FED. R. CIV. P. 26 advisory committee note.

available information responsive to the discovery request.[294]

Prior to the adoption of rule 26(g), discovery sanctions were infrequently imposed both because of "confusion as to the range of available, and appropriate sanctions and because of a perceived reluctance by many courts to impose any sanctions."[295] New rule 26(g) explicitly requires that "sanctions be imposed on attorneys who fail to meet the [certification] standards . . . ."[296] Appropriate sanctions for violations include "an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."[297]

Unlike the provisions for monetary sanctions in rule 37, 26(g) "deprives the court the power to decide not to sanction a lawyer's failure to satisfy the substantive obligations the rule imposes."[298] Once the court finds a violation of rule 26(g) standards the judge must impose sanctions. Thus, rule 26(g) establishes standards of behavior and requires the imposition of sanctions for transgressions of those standards.

Rules 37(a)(4) and 37(d) do not mandate the imposition of monetary sanctions for failure to perform acts specified in rule 37. The judge must still determine whether nonperformance (*e.g.*, improper answer interrogatories) was "substantially justified."[299] Rules 37(a)(4) and 37(d) thus delineate specific acts parties are to perform and vest discretion with the judge in deciding whether nonperformance warrants sanctions.[300] Practical experience suggests judicial reti-

---

[294] *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

[295] Sofaer, *Sanctioning Attorneys For Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 690-91 (1983).

[296] FED. R. CIV. P. 26(g) advisory committee note.

[297] FED. R. CIV. P. 26(g). The Advisory Committee noted that the sanctions, which are specifically designed to curb discovery abuse, would be more effective if they were diligently applied and "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." FED. R. CIV. P. 26 advisory committee note (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)). For a discussion of the advantages of monetary sanctions to curb discovery abuse see Brazil, *supra* note 1, at 921-37; Sofaer, *supra* note 295, at 696-731.

[298] Brazil, *supra* note 1, at 939.

[299] FED. R. CIV. P. 37(a)(4), (d). Rule 37(b) does mandate the imposition of sanctions for violations of a court's prior discovery order, including sanctions of contempt, defaults and admissions of fact. Rule 37(b) differs from rule 26(g) and rules 37(a)(4) and 37(d) in that the former rule only applies to violations of existing discovery orders entered ostensibly to resolve pending discovery disputes, while the latter rules apply in the absence of prior court orders.

[300] *See, e.g.*, Baker v. Bledsoe, 85 F.R.D. 545, 548-49 (W.D. Okla. 1979) (rule 37 accords the trial judge "wide discretion in applying sanctions to protect the pretrial discovery process"). Commentators have noted that this discretionary approach "show[s] no evidence of being able to control the abuses attendant upon excessive and burdensome discovery." Epstein, Corcoran, Kreiger & Carr, *An Update on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Clubs, Inc., 84 F.R.D. 145, 171 (1980).

cence in imposing rule 37 sanctions except for egregious misconduct.[301]

4. *Summary of new rule 26*

In contrast to Hawaii's rule 26, which essentially leaves the discovery process to attorney control and provides for judicial control only in limited circumstances such as the issuance of protective orders, new federal rule 26 mandates "greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis."[302] Under the new rule, "[j]udges are encouraged [from the outset] to control discovery more closely, and the parties are encouraged to be less adversarial in their conduct.[303] Moreover, new rules 16, 26(b)(1), 26(f) (as modified), and 26(g) empower the judge to regulate discovery as the potential need for regulation is perceived, rather than to wait for party initiation.[304]

The amendments to federal rule 26 thus comprise a package designed to reduce delay and cost arising out of "overuse" of discovery mechanisms. They attempt to do so flexibly by establishing early judicial control as the standard practice while providing for minimal or no judicial intervention in where warranted. They attempt to reduce delay and cost not only to benefit litigants and the court but also to expand access opportunities to those excluded from the judicial process due to prohibitive cost. In so doing the new discovery rules are designed to address the principal criticisms about the fairness of the pretrial process.[305]

---

[301] *See, e.g.*, Wong v. City & County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983). A 1979-1985 survey by the ABA Section of Litigation revealed "relatively few cases where the federal district courts have imposed sanctions for anything but the most egregious and abusive behavior in the conduct of discovery. Dispositive sanctions are imposed, but only after provocations sufficient to try the patience of most saints. Monetary sanctions are imposed but generally only in nominal amounts . . . ." SANCTIONS, *supra* note 166, at 13. *See generally* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (dismissal of an action for failure to obey a discovery order).

[302] FED. R. CIV. P. 26 (b) advisory committee note. *See* CONNOLLY, HOLLEMAN & KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 77 (Federal Judicial Center 1978).

[303] Sofaer, *supra* note 295, at 695.

[304] New rule 26 also contemplates alternative dispute resolution mechanisms in combination with discovery provisions. *See* Peckham, *A Judicial Response*, *supra* note 7. Under this system, two stages of discovery would be adopted: (1) minimal discovery to enable the parties to make a realistic assessment of the strengths and weaknesses of the case; and (2) additional discovery needed for trial if alternative dispute resolution mechanisms fail. *Id.* at 255.

[305] The "unfairness" of the combination of undue delay and cost and the denial of fair access, all arising out of overuse of discovery procedures, is aptly described by Justice Powell:

> The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and

V. CONCLUSIONS AND RECOMMENDATIONS

The time is right for the managerial judge in Hawaii's circuit courts. The number of annual civil case filings in the circuit courts has risen dramatically over the last ten years. Increasingly complex cases are being litigated. The cost of litigating has soared. The Hawaii Judiciary's commitment to reducing litigation delay and pretrial cost is undisputed. The challenge is how best to act upon that commitment as the civil litigation process in Hawaii continues to evolve.

The recently revised Circuit Court Rules for the First Circuit initiated changes aimed at reducing the overall time of litigation. These rules have been generally effective in establishing a single set of deadlines for all cases, but the rules have not gone far enough. Judges still do not become involved in guiding the pretrial development of a case. As a result, uncontrolled and excessive pretrial activity still occurs. The court-annexed mandatory arbitration program promises to reshape the contours of the court's caseload. Ultimately, the program will divert substantial numbers of simpler and smaller cases away from the litigation system. The remaining cases will be predominantly larger and more complex.

Civil judges will be called upon to exercise greater managerial control over cases to expedite dispositions, lessen unnecessary pretrial activity and accompanying costs and assure fair access to and treatment by the system.

Amending The Hawaii Rules of Civil Procedure to incorporate new federal rules 11, 16, 26(b)(1), 26(f) and 26(g), with minor adjustments, will give civil judges needed managerial powers. Rule 11 is designed to eliminate the waste attendant to frivolous filings, focusing on reasonableness rather than good faith. It modestly increases attorney's initial investigative duties by assuring that filings are reasonably grounded in fact and law. It also assures that a document is not filed for an improper purposes such as delay or harassment.

Rule 16 authorizes pretrial conferences and gets the civil judge involved in shaping the pretrial development of a case. It permits the judge to set timetables for pleadings, for joinder of parties and for discovery. In conjunction with rules 26(b)(1) and 26(f), rule 16 authorizes the court to participate from the outset in shaping discovery according to the informational needs of the case, the amount in dispute, the importance of the issues and the resources of the parties. In adopting new rule 16, it has been suggested that the 120 day mandatory scheduling order be excised from the rule. Administrative problems in the implementation and ambiguous returns on the efficacy of the 120 day deadline

---

relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

counsel caution at this time.

Rule 26(f) authorizes the court to call discovery conferences to define and limit the course of discovery before abuses of the system occur. Suggestions have been made to modify the rule to allow the court, as well as the litigants, to trigger discovery conferences. This would make the rule consistent with the broad managerial powers conferred upon judges by the other new rules.

Rule 26(g) completes the package of managerial rules. It is the discovery counterpart to rule 11 and authorizes the court to sanction unreasonable discovery requests, responses or objections, or those filed for an improper purpose.

State and federal court experiences to date indicate that a carefule application of the rules can yield positive results without unduly burdening attorneys, diminishing impartiality or impairing fair access to the system. The ultimate beneficiaries are litigants and the public as a greater sense of proportionality and fairness is restored to a much maligned system of justice.

The New Standards of Unfair Competition: An Economic Analysis of the *Du Pont v. FTC* Litigation

by Sumner LaCroix*, Walter Miklius**, James Mak***

I. INTRODUCTION

Until very recently, economists had little to contribute to the analysis of cases involving "unfair methods of competition" brought under the Federal Trade Commission Act (FTC Act)[1] and Hawaii's Unfair Competition Act.[2] By contrast, economic theory has helped to shed light on cases brought under other antitrust laws. Economic theory has been more useful in those cases because the objectives of the other antitrust laws are the promotion of free competition and are often closely identified with "efficiency," the operational definition of which is supplied by economic theory.[3] However, economic theory provides little, if any guidance to the meaning of an "unfair method of competition." Benjamin Klein reflected the view of the economics profession when he stated that "terms such as 'unfair' are foreign to the economic model of voluntary exchange which implies anticipated gains to all transactors."[4] This may explain why the Sherman Act[5] and the Clayton Act,[6] the most important statutes regulating business

---

* Associate Professor of Economics, University of Hawaii; Researcher, Social Science Research Institute. Helpful comments were received from participants in the 1986 meetings of the Western Economic Association.

** Professor of Economics, University of Hawaii.

*** Professor of Economics, University of Hawaii.

[1] 15 U.S.C. §§ 41-58 (1976).

[2] HAW. REV. STAT. § 480 (1985).

[3] *See* H. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 15 (1987); R. POSNER, ECONOMIC ANALYSIS OF LAW 11-15 (3d ed. 1986); P. SAMUELSON & W. NORDHAUS, ECONOMICS 28-29, 482-88 (12th ed. 1985).

[4] Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356 (1980).

[5] 15 U.S.C. §§ 1-11 (1976).

[6] 15 U.S.C. §§ 12-27 (1976).

competition, have been extensively analyzed by economists,[7] while the FTC Act and state unfair competition statutes have generally escaped attention.

Even though economic theory does not supply an operational definition of "unfairness" per se, economists may still be able to contribute to analysis of "unfair methods" cases if an operational definition of "unfairness" were supplied from an outside source, for example, Congress, the federal courts, or the FTC. The objective of this article is to examine the history of the FTC Act and Hawaii's Unfair Competition Act, as well as the case law at the federal and state levels, in order to determine if such a definition has been provided. The results of this review lead to the conclusion that an operational definition of "unfair methods of competition" had not been provided by any external source. However, the situation has gradually changed over the last ten years, as a series of federal appellate court decisions has provided criteria for evaluating unfair methods of competition.[8] These cases revive criteria first proposed in 1962 by Donald Turner in his classic analysis of oligopoly behavior.[9] This article concentrates on the most important of these cases, the 1984 decision of the Second Circuit Court of Appeals in *E.I. Du Pont de Nemours & Co. v. FTC*.[10] *Du Pont* and its criteria are presented and analyzed in Part III.

The criteria proposed in these cases are of recent vintage and the ultimate effect of the criteria cannot be evaluated until more time has elapsed.[11] It is possible, however, to illustrate the potential importance of the criteria by examining what decisions may have been reached in past cases if the criteria proposed in *Du Pont* had been followed. Part IV presents a review of federal and state cases to determine whether the same decision would have been reached had the *Du Pont* criteria been available. Part V discusses the case law and

---

[7] *See* R. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS (1985); R. POSNER & F. EASTERBROOK, ANTITRUST (1981) [hereinafter POSNER, ANTITRUST]; P. AREEDA & D. TURNER, ANTITRUST LAW (1978); R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[8] *See* Federal Prescription Serv. v. American Pharmaceutical Ass'n, 663 F.2d 253, 267 (D.C. Cir. 1981) (conspiracy to monopolize); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978) (conspiracy to exclude competitors); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (tie-in sales); Venzie Corp. v. United States Mineral Prod. Co., 521 F.2d 1309, 1314 (3d Cir. 1975) (tie-in sale/resale restrictions). *See also* Proctor v. State Farm Mut. Auto Ins. Co., 675 F.2d 308, 327 (D.C. Cir. 1982) (price fixing); Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1200-01 (7th Cir. 1981) (price fixing); Workman v. State Farm Mut. Auto. Ins. Co., 520 F. Supp. 610, 617, 620-22 (N.D. Cal. 1981) (price fixing/boycott).

[9] Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

[10] 729 F.2d 128 (2d Cir. 1984).

[11] Two recent cases which have cited *Du Pont* but have not relied on it in a substantive manner are *In re* General Motors Corp., 103 F.T.C. 641 (1984) and United Air Lines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107, 1115 (7th Cir. 1985).

critiques the treble damage provisions in state unfair competition statutes. This analysis has particular relevance to Hawaii, as Hawaii's Unfair Competition Act contains a treble damages provision.[12] Part VI presents the conclusions and a summary of the results.

II. THE EVOLVING STANDARDS OF UNFAIR COMPETITION

A. *Federal Law*

In September of 1914, President Wilson signed the FTC Act into law. Its enactment was a response to the notion that the Sherman Act could not carry the full burden of maintaining competition in all markets.[13] Congress[14] worried that the Sherman Act was too narrowly framed to prevent a wide variety of damaging anticompetitive trade practices,[15] a concern which was amplified by the United States Supreme Court's announcement of the "Rule of Reason" in *Standard Oil Co. v. United States.*[16] President Wilson was less preoccupied with

---

[12] HAW. REV. STAT. § 480-11 (1985).

[13] For a more complete discussion of the legislative history of the FTC Act, see Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 229 (1981) [hereinafter Averitt, *Unfair Acts*]; Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 229 (1980) [hereinafter Averitt, *Unfair Methods*]; and Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

[14] The statement by Senator Newlands is representative. 47 CONG. REC. 1225 (1911).

[15] See, e.g., the remarks of Senator Robinson who detailed eleven specific acts of unfair competition. 51 CONG. REC. 11,229-30 (1914).

[16] 221 U.S. 1 (1911). In this case, the government contended that *all* contracts in restraint of trade were illegal, and that the language of § 1 of the Sherman Act must be interpreted literally. However, writing for the Court, Chief Justice White found that only restraints of trade which were held to be "unreasonable" by the courts were illegal:

> In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case with its literal language. The error involved lies in assuming the matter to be decided. This is true because, as the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act . . . .
>
> . . . .
>
> If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason* becomes the guide . . . .

the scope of the antitrust laws, emphasizing instead his concern that their administration and enforcement be decisively changed; he "hoped the agency [FTC] would improve the business environment by formulating definite standards of conduct to replace the uncertainties of case-by-case adjudication."[17] Congress responded to these concerns by prohibiting "unfair methods of competition" in section 5 of the FTC Act.[18]

Since the enactment of the FTC Act, a lively debate has flourished concerning the meaning of the term "unfair methods of competition" and the wisdom of Congress' choice of this language. It is usually said that Congress used such a vague phrase because it was impossible to define all practices which could conceivably impair competition.[19] Even if all unfair practices were codified, the ingenious business mind would soon be working overtime to create additional practices to challenge the lawmaker. The Supreme Court's remarks regarding section 5 in *FTC v. Indiana Federation of Dentists*[20] support Congress' use of the imprecise terminology:

> The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, . . . but also practices that the Commission determines are against public policy for other reasons . . .[21]

Id. at 63-66 (emphasis added).

For a discussion of the Rule of Reason; see also *infra* notes 99-107 and accompanying text.

[17] Averitt, *Unfair Methods*, *supra* note 13, at 229.

[18] 15 U.S.C. §§ 41-58 (1976). This article is concerned with "unfair methods of competition," not with "unfair or deceptive acts or practices." The latter language was added to § 5 by the 1938 Wheeler-Lea Amendment, 15 U.S.C. §§ 41, 44-45, 52-58 (1976). The amendment was prompted by the Supreme Court's decision in FTC v. Raladam, 283 U.S. 643 (1931). The legislative history of the FTC Act and Supreme Court rulings in cases after its passage indicate that the term, "unfair methods of competition," is directed toward relationships between business firms. In *Raladam*, the FTC demonstrated that consumers had been hurt by a business firm's practices: the Court ruled that proof of consumer harm was insufficient and that the FTC had to prove that competition had been damaged by the alleged § 5 violation. The enactment of the Wheeler-Lea Amendment relieved the FTC from the burden of proving competition has been harmed if it could show that consumers have been injured by the firm's practices.

[19] The Senate report on the FTC Act gave an explicit accounting of this position:

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration confirming unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing twenty of them into law it would be quite possible to invent others.

S. REP. NO. 597, 63d Cong., 2d Sess. (1914), at 13.

[20] 106 S. Ct. 2009 (1986).

[21] *Id.* at 2016. See *infra* text accompanying notes 105-107 for a discussion of *Indiana Fed'n of*

The Supreme Court's approving reference to its ruling in the 1972 *Sperry & Hutchinson*[22] *(S&H)* case indicates that the three-fold classification of "unfair methods of competition" proposed in *S&H* is still relevant. In *S&H*, the Court posed three questions:

> First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.[23]

In the above passage, the Court describes business practices which fall under the jurisdiction of the Commission: (1) practices which violate the *letter* of the antitrust laws; (2) practices which violate the *spirit* of the antitrust laws; and (3) practices which are not violations of either the letter or the spirit of the antitrust laws, yet still meet the Commission's and the federal courts' criteria for being unfair.[24]

Business practices which violate the spirit of the antitrust laws are those which produce effects similar to the practices explicitly banned by the Sherman and Clayton Acts, but which, nonetheless, are not violations of these statutes. An example of a violation of the spirit of the Clayton Act was *Atlantic Refining v. FTC*.[25] Atlantic and Goodyear Tire had entered into a contractual arrangement which produced the same effects as a tying contract. Atlantic sponsored the sale of Goodyear products to its wholesale and retail outlets in return for commissions. The dealers were restricted from buying competing products from other manufacturers and were pressured by Atlantic to buy minimum quantities of Goodyear products.[26] While the contractual arrangements could not be char-

---

Dentists.

[22] 405 U.S. 233 (1972).

[23] *Id.* at 239. See *infra* text accompanying notes 92-98 for a discussion of the *S&H* case.

[24] By including the third type of business practice, Congress allowed the FTC to enjoin business practices which are not violations of the letter or spirit of the Clayton and Sherman Acts, but which, in the words of Justice Black, "obviously [conflict] with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market." FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

[25] 381 U.S. 357 (1965). This example is taken from Silcox's excellent analysis of the changing scope of § 5 cases. *See* Silcox, *Unfair Methods of Competition: The Courts Revive Proof of Injury to Competition in Antitrust Cases Under Section 5 of the FTC Act*, 29 ANTITRUST BULL. 423, 444-45 (1984).

[26] 381 U.S. at 365-67. Exclusive dealing has been defined as a contractual requirement by which retailers or distributors promise a supplier that they will not handle the goods of competing producers. 15 U.S.C. § 14 (1976). For an economic analysis of exclusive dealing, see Marvel,

acterized as exclusive dealing or a tie-in sales contract, which are prohibited under section 3 of the Clayton Act,[27] the Supreme Court found "that the central competitive characteristic was the same in both cases—the utilization of economic power in one market to curtail competition in another."[28] While Atlantic's contract with Goodyear did not violate the letter of the Clayton Act, the contract accomplished goals which Congress had the intent of proscribing. The general language of section 5 allowed the Commission to proceed in *Atlantic Refining*, while the more definite criteria of the Sherman and Clayton Acts would not allow the Attorney General of the United States or Atlantic's competitors to bring an action against Atlantic.

The third category specified by the Court in *S&H* is, however, the most troublesome.[29] In *S&H*, the Supreme Court stated that the FTC would be justified in declaring a practice "unfair" if it "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[30] To provide guidance pertaining to what public values are relevant, the Court approvingly restated, in a footnote to the *S&H* decision,[31] three factors used by the FTC in its formulation of the "Cigarette Rule:"

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[32]

These guidelines have been perceived as being so general, that Ernest Gellhorn has stated these factors allow the FTC "to roam freely in search of business practices that are inconsistent with personal and social values of individual commissioners . . . ."[33] Congressional criticism of the FTC's use of these criteria prompted the Federal Trade Commission to write a letter to the Chairman of

---

Exclusive Dealing, 25 J. LAW & ECON. 1 (1982).

[27] 382 U.S. at 369. Atlantic's business practices could not be characterized as exclusive dealing, because they did not threaten to cut off the supply of Goodyear products if retailers purchased from other manufacturers. Instead, Atlantic cut off payments provided to dealers carrying only Goodyear products.

[28] *Id.*

[29] See *supra* notes 23-24 and accompanying text.

[30] *S&H*, 405 U.S. at 244.

[31] *Id.* at 244 n.5.

[32] *Id.*

[33] Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 940 (1983).

the Senate Committee on Commerce, Science, and Transportation.[34] In response, the Commission stated that it acts only on the basis of *S&H*'s first two criteria, and that nearly all of its decisions have some basis in the first criterion.[35] Notwithstanding the FTC's defense of its practices, in 1980, Congress enacted detailed amendments to the FTC Act which prohibited application of the unfairness doctrine in certain instances[36] and curtailed its use in rulemaking for at least three years while Congress engaged in oversight hearings.[37]

B. Hawaii's Unfair Competition Act

All states except Alabama have enacted statutes which prohibit business practices usually classified as "unfair competition." Fourteen states, including Hawaii, have enacted statutes using language similar to section 5 of the FTC Act.[38] Enacted in 1965, Hawaii's Unfair Competition Act prohibits "unfair methods of competition . . . in the conduct of any trade or commerce."[39] The Act is intimately tied to section 5 of the FTC Act as section 3 specifies that judicial decisions in cases brought under the act are guided by federal case law.[40] The major difference between the two statutes is that section 5 allows only "cease and desist" orders, while competing firms can bring treble damages

---

[34] Letter from Senators Ford and Danforth to Michael Pertschuk, Chairman of the Federal Trade Commission, June 13, 1980 (cited in Averitt, *Unfair Acts*, *supra* note 13, at 227 n.14).

[35] Reply letter from Michael Pertschuk, Chairman of the Federal Trade Commission, *reprinted in* H.R. REP. NO. 156, 98th Cong., 1st Sess. 27, 33 (1983).

[36] FTC Improvements Act, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[37] The FTC Improvements Act also specified that all FTC rules were subject to Congressional review and could be vetoed by either the House of Representatives or the Senate. *Id.* at § 21, at 393.

[38] These states include Alaska, Connecticut, Florida, Illinois, Louisiana, Maine, Massachusetts, Montana, North Carolina, South Carolina, Vermont, Washington, and Wisconsin.

[39] HAW. REV. STAT. § 480-2 (1985) defines unfair competition:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

For an earlier discussion of chapter 480, see Kemper, *Hawaii's Section Five of the FTC Act: The Ubiquitous Antitrust Law*, 6 HAW. B.J. 5 (1969).

[40] The interpretation of § 480-2 is specified in HAW. REV. STAT. § 480-3 (1985) as: "This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes."

This provision was not included when the Unfair Competition Act was enacted in 1961; it was added by amendment in 1965 and rewritten by the Legislature in 1981 to expand the previous provision which required that "the courts will be guided in their interpretation of [chapter 480] by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act." HAW. REV. STAT. § 480-3 (1976) (amended 1985).

actions under the Hawaii Statute.[41] Only four other state unfair competition statutes allow competitors to sue for treble damages.[42] We will discuss the treble damages provision of the Hawaii statute more extensively in Part V.

C. Confusion Between Unfair Methods and Unfair Practices

While the criteria for unfair competition set forth in the *S&H* decision may or may not be appropriate as standards in "unfair practices and acts" cases, they seem inappropriate for "unfair methods of competition" cases. It is important to emphasize the difference between the two situations, as they usually address very different problems. Unfair methods cases investigate certain practices of a business or industry with respect to their impact on product price and output. Unfair methods cases deal with relationships between two or more firms.[43] Unfair acts and practices cases usually pertain to relationships between a firm or industry and its customers. These cases focus on whether a business practice is deceptive or whether it is likely to mislead or cheat consumers.[44]

---

[41] HAW. REV. STAT. § 480-13 (1985) allows private parties to bring suit. The statute establishes four essential elements: (1) a violation of chapter 480; (2) injury to plaintiff's business or property resulting from such violation; (3) proof of the amount of the damage; and (4) a showing that the action is in the public interest or that the plaintiff is a merchant.

HAW. REV. STAT. § 480-14 (1985) permits suits by the state, while HAW. REV. STAT. § 480-15 (1985) allows the state to ask for injunctions similar to the "cease and desist" orders granted the federal authorities.

While HAW. REV. STAT. § 480-13 (1985) provides for treble damages, in Beerman v. Toro Mfg. Corp., 1 Haw. App. 111, 615 P.2d 749 (1980), the Hawaii Intermediate Court of Appeals ruled that there is no claim for treble damage allowable for personal injury by the statute.

[42] The four states allowing competitors to sue for treble damages are Texas, Massachussets, North Carolina, and Washington. *See* Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688 (Tex. 1979); Washington v. Schwab, 103 Wash. 2d 542, 693 P.2d 108 (1985).

[43] This is reflected in the FTC's institutional structure: the Bureau of Competition is responsible for unfair methods investigations, while the Bureau of Consumer Protection is responsible for unfair practices investigations.

[44] A survey of Hawaii cases alleging violations of HAW. REV. STAT. § 480-2 (1985) reveals that most of the cases are "unfair practices" cases. *See* Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) (purchaser of home claimed seller made fraudulent representations concerning existence of water leakage in the home, thus the acts and practices of the salesman violated § 480-2); Ai v. Frank Huff Agency, 61 Haw. 607, 607 P.2d 1304 (1980) (commission by a collection agency of a practice prohibited by chapter 443 is characterized as unfair or deceptive act or practice for the purpose of § 480-2); Gonsalves v. First Ins. Co. of Hawaii, 55 Haw. 155, 516 P.2d 720 (1973) (insured brought action seeking damages of unfair trade practices with regard to coverages and exclusions in policy issued on a house which collapsed); Hawaiian Ins. v. Blair, 6 Haw. App. ____, 726 P.2d 1310 (1986) ("passing off" or "palming off" an inferior product for a better product makes case for "unfair competition"); Eastern Star v. Union Bldg. Materials, 6 Haw.

The distinction is important, as "unfair methods" cases present the same problems for the economy as antitrust cases. The central problem in antitrust and unfair methods cases is not whether a business practice is "unfair" by an ethical standard, but whether a practice raises price and restricts output in an industry or, in a predatory context, whether a practice is driving efficient firms out of business.[45] Senator Hollis' remarks during the 1914 legislative debates over the FTC Act, which originally banned only "unfair methods of competition," are apt: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[46]

Senator Hollis' brief remarks on unfair competition could well have been made during the debate over the Sherman Act because they aptly summarize the policy goals of the antitrust laws and reflect the viewpoints of many eco-

---

____, 712 P.2d 1148 (1985) (unfair or deceptive trade act or practices for breach of contract and common law fraud); Myers v. Cohen, 5 Haw. App. 232, 687 P.2d 6 (1984) (action filed against attorney and law firm alleging malicious prosecution, abuse of process and deceptive trade practices arising out of the filing of counterclaim in a prior proceeding); Phillips v. Kula 200 II, 4 Haw. App. 350, 667 P.2d 261 (1983) (limited partnership sued partnership for breach of fiduciary duty); Rosa v. Johnston, 3 Haw. App. 420, 651 P.2d 1228 (1982) (purchasers of solar water system alleged that seller made misrepresentations during the sales process); Wiginton v. Pacific Credit Corp., 2 Haw. App. 435, 634 P.2d 111 (1981) (action for unfair and deceptive collection practices); Ailetcher v. Beneficial Fin. Co., 2 Haw. App. 301, 632 P.2d 1071 (1981) (automobile dealer and employee alleged that action of the finance company in refusing to extend loans to customers of automobile dealership until the employee paid a delinquent loan an unfair act); Beerman v. Toro Mfg. Corp., 1 Haw. App. 111, 615 P.2d 749 (1980) (action for damages against various defendants, including manufacturer and distributor of power motor for injuries caused by allegedly defective mower; whether the manufacturer and distributor made knowing misrepresentations about the safety of the product an issue).

For Hawaii cases on "unfair methods of competition," see Charley's Tour & Transp., Inc. v. InterIsland Resorts, Ltd. (CT&T), No. 80-0060 (D. Haw. 1985) (whether reduced prices below Hawaii Motor Carrier Law constituted predatory pricing conspiracy); Island Tobacco Co. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 627 P.2d 260 (1981) (whether defendants fostered below-cost sales of cigarettes through written agreement); Technicolor v. Traeger, 57 Haw. 113, 551 P.2d 163 (1976) (whether post-employment restrictive covenant in employment agreement constitued unlawful restraint of trade). For a discussion of *CT&T*, see *infra* text accompanying notes 108-113.

[45] The passage would suggest that Congress intended the enforcement of the antitrust laws to be guided by the effect of business practices on consumer welfare. For a proponent of this view, see R. BORK, *supra* note 7, at 50-71. An alternative view is provided by Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). Letwin provides support for the popular view that the antitrust laws were motivated by a hostility toward big business. *See* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54 (1965).

[46] 51 CONG. REC. 12,146 (1914), *quoted in* Averitt, *Unfair Methods*, *supra* note 13, at 279 n.225.

nomic and legal commentators. Yet the legislative debates also reveal that Congress was concerned with passing anti-monopoly legislation that would not just duplicate the Sherman Act, but would overcome some of its limitations.[47] Responding to this concern and the argument that there were too many unfair methods of competition to enumerate, Congress declined to specify what it meant by "unfair methods of competition" when it enacted section 5 into law.[48]

Congress' use of general language does not mean that the language must be vague in meaning. While it may be impossible to enumerate all unfair methods of competition in a statute, the criteria for determining whether a method of competition is unfair can be carefully defined. Unfortunately, the various definitions discussed in section 2 are inadequate for this purpose, as they fail to distinguish between standards in unfair methods cases and standards in unfair practices cases. The basic problem with the *S&H* criteria is that the ethical content is inappropriate in this context; the criteria were designed to evaluate business practices which deceive consumers, not business practices which affect competition in the market. Perhaps FTC performance could be improved by devising a separate set of standards for "unfair methods of competition," thereby restricting the *S&H* methods to "unfair practices."[49]

III. The *Du Pont* Criteria for Unfair Competition

A review of the legislative history of the FTC Act as well as the cases litigated under its section 5 suggests that an operational definition of "unfair methods of competition" was neither provided in the Act nor was implied in court decisions. This situation persisted until the mid-1970s when a series of federal court decisions[50] revived a standard proposed in 1962 by Donald Turner.[51] Turner focused on situations in which all, or almost all, the firms in an industry adopt the same methods of competition.[52] He pointed out that "con-

---

[47] See *supra* text accompanying notes 13-37 for the historical background.

[48] *See* H.R. Rep. No. 1142, 63rd Cong., 2d Sess. 19 (1914) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness. Even if all known unfair practices were to be specifically defined and prohibited, it would be at once necessary to begin over again.").

[49] Averitt notes that the *S&H* language is not as expansive as it may appear at first glance. "The language evidently refers not to the Commission's powers under 'unfair methods of competition,' but rather to its powers under 'unfair or deceptive acts or practices.' The latter concept found its way into the case through a series of more or less procedural errors." Averitt, *Unfair Methods*, *supra* note 13, at 286.

[50] *See supra* note 8.

[51] *See generally* Turner, *supra* note 9.

[52] *Id.* at 657.

scious parallelism"[53] may be a sign of collusion or merely the consequence of each firm independently maximizing its profits:

> The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.[54]

This part focuses on a recent case which offers an excellent application of Turner's proposed standard of conduct. The 1984 decision by the Second Circuit Court of Appeals in *E.I. Du Pont de Nemours & Co. v. FTC* contains an operational definition of "unfair methods of competition" that is closely related to Turner's analysis.[55] The case is particularly interesting, as it illustrates the ease with which efficient methods of competition can be condemned under various other legal standards of conduct.

On May 30, 1979, the FTC filed a complaint against the four manufacturers of lead-based antiknock gasoline additives, Du Pont de Nemours & Company, Ethyl Corporation, PPG Industries, and Nalco Chemical Company, alleging that they had violated section 5 of the FTC Act by using methods of competition that facilitated the adoption of a uniform price level substantially above average cost.[56] The following methods were attacked by the FTC: (1) delivered price contracts[57] where the price included the cost of transportation;[58] (2) use of "most favored nation" clauses guaranteeing that a price discount would be given to all customers; (3) use of clauses guaranteeing thirty days notice before

---

[53] *Id.* at 656.

[54] *Id.* at 658.

[55] 729 F.2d 128 (2d Cir. 1984). This article refers to the *Du Pont* decision; other commentators refer to this case and the preceding litigation as "the *Ethyl* litigation."

[56] *In re* Ethyl Corp., 101 F.T.C. 425 (1983).

[57] The classic references on delivered price contracts conclude that these contracts were used to facilitate cartel pricing. *See generally* F. MACHLUP, THE BASING-POINT SYSTEM (1949); Clark, *Basing-Point Methods of Price Quoting*, 4 CANADIAN J. ECON. 477 (1938); McGee, *Cross-Hauling—A Symptom of Incomplete Collusion Under Basing-Point Systems*, 20 S. ECON. J. 369 (1954); Stigler, *A Theory of Delivered Price Systems*, 39 AM. ECON. REV. 1143 (1949). For a modern reference strongly categorizing basing-point pricing as a facilitating device, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 70-71 (1976).

[58] Recently, literature has emerged showing how delivered price contracts can be efficiently used by firms in a competitive industry. *See generally* Carlton, *A Reexamination of Delivered Pricing Systems*, 26 J. LAW & ECON. 51 (1983); DeCanio, *Delivered Pricing and Multiple Basing Point Equilibria*, 99 Q. J. ECON. 329 (1984); Haddock, *Basing-Point Pricing: Competitive vs. Collusive Theories*, 72 AM. ECON. REV. 289 (1982).

a price increase will take place;[59] and (4) notification in the press of price changes before their effective date.[60]

Following extensive hearings before the administrative law judge, on August 5, 1981, the judge found that the alleged practices constituted both "unfair methods of competition" and "unfair acts and practices" in violation of section 5.[61] He entered an order prohibiting advance notice of price increases, uniform delivered prices, use of "most favored nation" clauses, and limiting announcements of price increases to the press and others.[62]

Upon appeal, the FTC issued the Final Order and Opinion[63] on March 22, 1983, by a three to one margin, with Chairman Miller dissenting. The order stated that Du Pont and Ethyl had engaged in "unfair methods of competition" through the combined use of the "most favored nation" contractual clauses, uniform delivered pricing, and extra advance notice to customers of price increases beyond the thirty day contractual period.[64] PPG Industries and Nalco were found to have violated section 5 only with regard to the use of

---

[59] One commentator shows how most-favored-customer pricing (MFCP) can be used by a firm to facilitate coordination in a price-setting duopoly. MFCP guarantees current customers that if a lower price is paid for the firm's product in a specified future period, they will receive a rebate equal to the differential. Most-favored-nation pricing (MFNP) guarantees that if a lower price is offered to another customer in the current period, then the favored firm will also receive the price discount. *See generally* Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17 RAND J. ECON. 377 (1986).

Another commentator discusses a variety of practices which could be used as facilitating devices: most-favored-customer pricing, most-favored-nation pricing, meeting-competition clauses (which stipulate that the buyer will be offered some form of protection if another seller offers a lower price), and meet-or-release clauses (which are a type of meeting-competition clause that stipulate that the seller will meet any prices offered by another seller or release the buyer to purchase from the other seller). *See also generally* Salop, *Practices That (Credibly) Facilitate Oligopoly Coordination*, [hereinafter Salop, *Oligopoly Coordination*] in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265-90 (J. Stiglitz & G. Mathewson eds.) (1986) [hereinafter J. STIGLITZ, NEW DEVELOPMENTS].

[60] For a stimulating discussion of facilitating devices and their role in the *Du Pont* litigation, see Elzinga, *New Developments on the Cartel Front*, 29 ANTITRUST BULL. 3 (1984). *See also* Grether & Plott, *The Effects of Market Practices in Oligopolistic Markets: An Experimental Examination of the* Ethyl *Case*, 22 ECON. INQUIRY 479 (1984). The authors concluded that their joint maximization oligopoly model received little support from the experimental data, but they did find that practices "analogous to those of the industry resulted in the highest prices of all the treatments studied." *Id.* at 500. On the other hand, their experiments did not address "the possibility that the practices perform functions in addition to those explored in the experiments related to cost reduction, risk reduction, etc." *Id.*

[61] *Ethyl Corp.*, 101 FTC at 568-69.

[62] *Id.* at 569-72.

[63] *Id.* at 592.

[64] *Id.* at 639-44.

uniform delivered pricing.[65]

No evidence was presented demonstrating that the four firms had colluded to adopt the challenged practices. However, the FTC acknowledged that section 5 of the Act did not prohibit independent pricing by individual firms. It argued that section 5 could be violated even in the absence of an agreement if firms engage in interdependent conduct that, because of the market structure and conditions, facilitates price coordination in a way that substantially lessens competition in the industry.[66] The FTC concluded that these conditions were met because the methods were adopted in an industry with structural characteristics that do not support competitive pricing—high seller concentration, small likelihood of new entries because of a sharply declining market demand, inelastic demand, and homogeneous product.[67]

Since none of the methods were undertaken in agreement with the other manufacturers, this case would surely have been dismissed if it had been brought under the Sherman Act. The Supreme Court established over thirty years ago that conscious parallelism is not a violation of the Sherman Act.[68] For a price-fixing case to succeed under the Sherman Act, there must be conspiracy.[69] The FTC ruled, however, that section 5 prohibits a wider range of conduct and it can be violated even in the absence of an agreement.[70]

Du Pont appealed and the Second Circuit Court of Appeals reversed the FTC's decision.[71] The court set forth the following criteria for determining whether business conduct constitutes unfair methods of competition:

> In our view, before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of section 5, a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. If, for instance, a seller's conduct, even absent identical behavior on the part of its competitors, is contrary to its independent self-interest, that circumstance would indicate that the business practice is "unfair" within the meaning of section 5. In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of section 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate

---

[65] *Id.* at 644-46.

[66] *Id.* at 598-99.

[67] *Id.* at 607-09.

[68] Theatre Enter., Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954).

[69] For a discussion of necessary and sufficient conditions to establish a conspiracy under the Sherman Act, see Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

[70] *Ethyl Corp.*, 101 FTC at 596.

[71] 729 F.2d 128 (2d Cir. 1984).

> reason. To suggest, as does the Commission in its opinion, that the defendant can escape violating section 5 only by showing that there are "countervailing procompetitive justifications" for the challenged business practices goes too far.[72]

Borrowing liberally from FTC Chairman Miller's dissenting opinion, the court found that the four business practices could accomplish legitimate business goals for each firm.[73] Judge Mansfield observed that many of the business practices in question had been used by one of the industry participants, Ethyl Company, when it was the sole producer of antiknock compounds.[74] For example, the most favored nation clause was used

> as a guarantee against price discrimination between its own customers who competed against each other in the sale of gasoline containing antiknock compounds. The clause assured the smaller refiners that they would not be placed at a competitive disadvantage on account of price discounts to giants such as Standard Oil, Texaco and Gulf.[75]

Similarly, Ethyl Company quoted delivered prices to its customers in 1937, when it was the only firm in the industry.[76] The fact that each of the three competitors used this practice when they entered the industry tells nothing beyond the simple point that successful firms are often excellent models for new entrants. Moreover, the court found that

> [c]ustomers demanded a delivered price because it would require the manufacturers to retain title to and responsiblity for the dangerously volatile compounds during transit to the refiner's plant and in at least some cases would result in savings on state transportation and inventory taxes which the customer would pay if title passed prior to delivery.[77]

Thus, each of the practices could be profitably used by a single firm for efficiency purposes. This by itself does not preclude the possibility that a practice could also be used by colluding firms. The uniform use of the practice increases the probability that it is being used for anticompetitive purposes, but does not rule out competitive uses of the practice. Aware of this distinction, the Second Circuit Court of Appeals added the second criterion, whether the practice was adopted with "an anti-competitive purpose."[78] This criterion requires

---

[72] *Id.* at 139-40 (footnote omitted).
[73] *Id.* at 141-42.
[74] *Id.* at 140.
[75] *Id.* at 134.
[76] *Id.* at 133.
[77] *Id.*
[78] *Id.* at 140.

the FTC to show that the practice was used to further a cartel.

The Second Circuit's opinion in *Du Pont* demonstrates the radical departure from past antitrust enforcement. Prior to the recent cases which apply Turner's standard, the court has merely asked whether the business practice *could* be used to further a cartel.[79] In the case of an affirmative answer, the practice was banned with only a cursory look at the anti-competitive impact of the practice on the particular market in question. By contrast, following the Second Circuit's criteria, a court must now ask whether the challenged business practice is consistent with pursuit of a legitimate business objective. If the business practice is only efficient when the parties are explicitly or tacitly coordinating their conduct, the court would then require theoretical and empirical evidence of a practice's anticompetitive impact on the market being investigated.

This standard should not be confused with a procompetitive standard. The court specifically noted that forcing the defendant to provide " 'countervailing procompetitive justifications' for the challenged business practices goes too far."[80] The *Du Pont* criteria focus instead on the firm's choices with respect to the competitive process. A firm can earn higher profits by increasing its efficiency or by circumventing competition. The intermediate case, in which each firm uses practices which alone would increase its efficiency, but when used by other firms decrease efficiency, is subject to the stronger criterion that the anticompetitive effect of this practice must be proven. Why should the FTC prosecute a firm for using a business practice which improves its efficiency? Should a firm which is slow in adopting a new, efficient business practice be penalized even further for its slow reaction function? Under the criteria in *Du Pont*, prosecution would only take place if the anticompetitive effects of such actions can be proved.

The new criteria transform a tradition of antitrust hostility toward business pricing practices into a new era of cautious acceptance without destroying the

---

[79] See, e.g., Atlantic Refining v. FTC, 381 U.S. 357, 371 (1965), where the Court observed that "[t]he anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications in determining whether this was a method of competition which Congress has declared unfair and therefore unlawful." In FTC v. Brown Shoe Co., 384 U.S. 316 (1966), Justice Black noted the court of appeals finding that the "custom of giving free service to those who will buy their shoes is widespread," but did not evaluate whether the "custom" in question could be efficient. *Id.* at 319 (citation omitted).

Du Pont was preceded by Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308 (D.C. Cir. 1982), which announced a similar rule by the "plywood litigation" where the defendants argued the court should apply criteria similar to those announced in *Du Pont*. *In re* Plywood Antitrust Litig., 655 F.2d 627 (5th Cir. 1981), *cert. dismissed sub nom.*, Weyerhaeuser Co. v. Lyman Lamb Co., 462 U.S. 1125 (1983). The Supreme Court would have had a chance to rule on the merits of this argument, but the parties settled the case and the Court dismissed the writ.

[80] 729 F.2d at 140.

broader reach of section 5. If, for example, the efficiency rationale for the simultaneous use of the four contested business practices in *Du Pont* could have been rejected and anticompetitive damages proved, then the four producers in *Du Pont* could have been convicted *without any proof of conspiracy*. Thus, the door is open for the FTC to pursue Judge Posner's recommendation that tacit collusion be prosecuted under the antitrust laws, as long as the cases are carefully drawn and presented.[81] Moreover, it is still possible for the FTC to pursue cases like *FTC v. Brown Shoe* or *Grand Union v. FTC* which could not be brought under the Clayton or Sherman Acts.[82] Finally, the criteria's prohibition of practices which are "collusive, coercive, predatory, or exclusionary" allow the FTC to bring prosecutions in the field of business torts.[83]

IV. Implications of the *Du Pont* Criteria for Antitrust Enforcement

It is too soon to tell whether the *Du Pont* criteria will have an impact on subsequent section 5 cases.[84] However, its potential importance can be illustrated by examining how prior antitrust cases would have been decided had the *Du Pont* criteria been applied.

A. Brown Shoe

Examine, for example, the FTC's arguments in the *Brown Shoe* case.[85] Brown Shoe Company had a franchise program with its retailers. It provided certain services to franchisees, which were not provided to other retailers, in return for the promise that the franchisee adopt Brown Shoe as its primary line. Shoe prices charged to franchisees and nonparticipating retailers were identical. The FTC used the following strategy to attack Brown's franchise agreements:

> The effect . . . [of the franchise contracts] is to foreclose and exclude competitors from a substantial segment of the shoe market—the segment represented by this . . . 24 million dollars in sales . . .
>
> [T]here is clear cut legal precedent . . . to find, without more, once it has been established that (1), Brown is a dominant shoe co; (2), the amount of commerce of 24 million dollars is a substantial amount of commerce; and (3) that Brown does enforce these exclusive dealing contracts with approximately 700

---

[81] *See* R. Posner, Antitrust, *supra* note 7, at 39.

[82] FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

[83] *DuPont*, 729 F.2d at 140.

[84] *See supra* notes 8 and 11.

[85] *Brown Shoe*, 384 U.S. at 317.

of its customers. Without more this is a violation of . . . [Sec.] 5.[86]

In its brief to the United States Supreme Court, the FTC noted that Brown's restrictive agreements "appear to be wholly devoid of any redeeming justification. The services and benefits Brown offers can be furnished as well without the exaction of an exclusionary agreement that forecloses competition."[87] When it was discovered that exclusionary contracts did not exist, the FTC changed its arguments emphasizing that other shoe manufacturers would be excluded by Brown Shoe's offer of free services. The decision to notice only the foreclosure of competitors ignores many relatively simple efficiency-based explanations of Brown's franchise plan. For example, provision of services may not be cost-justified until a retailer handles a minimum volume of shoes. Services provided by Brown may be used by the retailer to promote other brands of shoes, thereby raising a free-riding problem. Moreover, other dealers could also offer free services to clients handling requisite volume.[88]

In fact, the FTC hearing examiner was forced to consider efficiency explanations of the franchise plan.[89] Dealers testified that their participation in the franchise plan increased their profits. Responding to this testimony, the hearing examiner acknowledges that "for some retailers it would be an unwise business practice for them to carry conflicting lines, but the law protects the buyer's freedom of choise, even if the choice is uneconomic for him."[90] Of course, if Brown is providing services to retailers, it is Brown that needs to be protected against retailer free-riding. Regardless, under the *Du Pont* criteria *Brown Shoe* would have been decided differently. The cited record clearly supports the proposition that there is an "independent legitimate business reason for [Brown's] conduct."[91]

B. Sperry & Hutchinson

FTC v. Sperry & Hutchinson[92] is another case which would have profited from an application of the *Du Pont* criteria. Sperry & Hutchinson (S&H) would not allow consumers or retailers to set up businesses which facilitated the exchange of trading stamps. Rather than asking why trading stamps were widely used in seemingly competitive sectors of the economy, the FTC instead focused

---

[86] FTC Record, vol. 1, at 86, *quoted in* Peterman, *The Federal Trade Commission v. Brown Shoe Company*, 18 J. LAW & ECON. 361, 381 (1975) (footnote omitted).

[87] Petitioner's Brief at 28, *cited in* Peterman, *supra* note 86, at 389.

[88] *Id.* at 373-80.

[89] *Id.* at 383.

[90] *Id.*

[91] *DuPont*, 729 F.2d at 139-40.

[92] 405 U.S. 233 (1972).

on the injury to consumers from S&H's redemption restrictions.[93] Gellhorn's perceptive analysis of the case concluded that the Court did not consider the economic role of trading stamps: "Retailers use trading stamps to offer customers a deferred rebate for their purchases. Such rebates are one of several forms of indirect price competition that retail stores use to stimulate continuity of sales and to build additional clientele."[94] Instead of examining the possible efficient use of stamps by firms, the FTC concentrated on one feature of the plan, the prohibition of exchanging stamps.[95] If consumers could exchange their stamps for cash or other stamps, the entire rationale of stamps, building clientele for a retailer, would be defeated. Yet in its decision, the Supreme Court did not ask how the restraint affects S&H's efficiency. It merely noted that consumers are restrained.[96]

Use of the *Du Pont* rules in *S&H* may have improved or reversed that decision, but they would not have illuminated the structure of the case. If fault must be assigned for the *S&H* decision, the economics profession deserves a large part of the blame. Trading stamps have been around since the end of the nineteenth century. Yet, current knowledge is meager concerning the detailed operation of this marketing tool. Trading stamps have been strongly defended or denounced, but rarely carefully analyzed. Gellhorn's 1983 analysis of the efficient and inefficient use of trading stamps points the direction for new models. He recognized that stamps, like any other marketing device, for example, coupons, resale price maintenance, exclusive territories, basing point pricing, most favored nation clauses, are not invariably negative or positive forces in the economy.[97]

These devices could be used either to capture monopoly rents or to enhance efficiency. Economic theories in this field must recognize this duality if they are to be useful. Models which produce observable implications of efficient and inefficient uses of a business practice will have immediate application in section

---

[93] 405 U.S. at 236-38.

[94] Gellhorn, *supra* note 33, at 905.

[95] For the most important economic analyses of trading stamps, see Beem, *Who Profits from Trading Stamps?*, HARV. BUS. REV., 123 (Nov.-Dec. 1957); Bell, *Liberty, Prosperity and No Stamps*, 40 J. BUS. 194 (1967); Davis, *The Economics of Trading Stamps*, J. BUS. 141 (1959); Sherman, *Trading Stamps and Consumer Welfare*, 17 J. INDUS. ECON. 29 (Nov. 1968); Strotz, *On Being Fooled by Figures: The Case of Trading Stamps*, 30 J. BUS. 304 (1958); and Alchian & Klein, *Trading Stamps* (unpublished and undated manuscript) (copy on file at the University of Hawaii Law Review office).

[96] 405 U.S. at 248.

[97] For a discussion of inefficient and efficient uses of coupon pricing, see La Croix, *Coupon Pricing and Efficiency* (1986) (unpublished manuscript) (copy on file at the University of Hawaii Law Review office). See also the comments on Salop, *Oligopoly Coordination* in *Discussion of the Paper by Steve C. Salop* in J. STIGLITZ, NEW DEVELOPMENTS, *supra* note 59, at 291-94.

5 cases.[98]

C. Du Pont *and the Rule of Reason*

The arguments used by the FTC in *Atlantic Refining*[99] could not be used today. The FTC argued that Atlantic's contract with Goodyear produced the same effect as a exclusive dealing contract, and was, therefore, per se illegal in accordance with Supreme Court rulings in such cases. Consideration of efficient uses of the business practice in question was unnecessary. Yet the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.* to use the Rule of Reason in nonprice vertical restraint cases would not necessarily have changed the Court's ruling in *Atlantic*.[100] An examination of the Rule of Reason formulation in *Chicago Board of Trade v. United States* is instructive: "[The] test of legality is whether the constraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[101] Notice that this is exactly the type of analysis which is rejected by the *Du Pont* court which suggests that requiring a defendant to demonstrate that a business practice has "countervailing procompetitive justifications . . . goes too far."[102] In fact, a practice adopted by one firm often increases that firm's efficiency, thereby increasing its market share. To show that a firm's actions increase competition in the market is difficult. The adoption of an efficient business practice by just one firm in an industry leads to higher industry output and a lower market price, but also to lower market shares for competitors. It is too easy for the courts to confuse the lower market shares, and competitor complaints, with a decrease in competition. In most cases, the appropriate index of competition is to examine the effect of the practice on industry output.[103]

The output standard imposes a difficult burden on defendants. Regression analysis has been used in this regard to control for other *ceteris paribus* conditions, but its problems in this application have been well documented.[104] In-

---

[98] Ronald Coase called for these types of models in 1972 when he noted that most economic models of pricing practices ignored efficiency rationales for the practices. *See* Coase, *Industrial Organization: A Proposal for Research*, in POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59 (V. Fuchs, ed. 1972).

[99] 381 U.S. 357 (1965).

[100] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[101] 246 U.S. 231, 238 (1918).

[102] 729 F.2d at 139.

[103] F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 697-701 (2d ed. 1980) suggests cases in which the output test would not be positively correlated with welfare gains.

[104] *See* Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

stead of the output measure, courts have used the concept of "foreclosure" as a measure of the decrease in competition. In the most general terms, when an efficient business practice is adopted by a firm, that firm will expand and other firms will contract. It is a short jump to the conclusion that the expansion of the innovating firm is "predatory," that the "anticompetitive practice" has injured the other firms—after this leap, foreclosure arguments seem quite reasonable. All too often the benefits resulting from the practice's implementation, such as reducing free-riding, making cheating more costly, and encouraging the free flow of information, are ignored, and the deleterious effects on inefficient firms are highlighted. In sum, the Rule of Reason standard requiring that a business practice "promote competition" is unworkable and is too strict.

D. FTC v. Indiana

In the Supreme Court's most recent unfair methods case, *FTC v. Indiana Federation of Dentists*,[105] the Court once again reiterated the *Chicago Board of Trade* formulation of the Rule of Reason. The Rule of Reason was applied to a "workrule" propounded by an association of dentists. It prohibited dentists from passing on x-rays to insurance companies for review of their treatment plan. The Court ruled that this type of restriction was illegal, as such "a restriction require[d] some competitive justification even in the absence of a detailed market analysis."[106] Procompetitive justifications could not be found by the FTC. The Supreme Court agreed, finding the agreement to violate section 1 of the Sherman Act and, by implication, section 5 of the FTC Act.[107]

In this type of case, the *Chicago* formulation of the Rule of Reason retains some plausibility. The FTC discovered a horizontal collusion to set certain contractual terms. It declared that the collusion was illegal unless it generated demonstrable benefits to offset the reduction in competition generated by the conspiracy. A careful examination of the dentists' arguments reveals that the agreement was devoid of offsetting benefits *and* that an explicit conspiracy existed. A decision under the *Du Pont* criteria would have yielded an identical solution. An investigation of the dentists' workrule failed to show that it increased the efficiency of individual dentists, yet the anticompetitive purpose of the rule was strongly inferred by the dentists' collusion.

By contrast, the application of the *Chicago* standard to noncollusive business practices would lead to incorrect results. If a single dentist refused to turn over x-rays to an insurance company, the anticompetitive purpose inferred by conspiracy would be absent. Patients who were unhappy with the dentist's refusal

---

[105] FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009 (1986).

[106] NCAA v. Board of Regents, 468 U.S. 85, 109-10 (1984).

[107] *Indiana Fed'n of Dentists*, 106 S. Ct. at 2021.

would switch to other dentists and possibly other insurance companies. In a noncollusive environment, the suspicion would be that this dentist must be maximizing profits when he is free to prescribe treatment without the intervention of the insurance company. If the dentist is better at evaluating dental conditions than most insurance companies, then some patients may pay to obtain the higher quality service. Other patients may not want to wait until the insurance company has reviewed the x-rays to obtain treatment.

Yet, if a *Chicago* Rule of Reason inquiry were conducted, it would be difficult to identify "procompetitive" effects of the agreement. In this type of situation, a *Chicago* Rule of Reason inquiry would tend to find a violation of the law. Without a procompetitive justification for the practice, the widespread adoption of this rule with its suspicious overtones would prompt an inference that tacit collusion was present. If the *Du Pont* criteria had been used, a "procompetitive" rationale for the practice would not be a necessary condition for the practice to be legal under the antitrust laws. The FTC's investigation would focus on whether the practice is in the individual interest of a single dentist. Even if a legitimate business rationale for the practice could not be found, it would not be condemned unless it could be shown that the practice would only be profitable if other firms in the industry adopted the practice, showing that there was tacit or explicit collusion.

In sum, the *Du Pont* criteria provide a better standard for use in antitrust cases than the *Chicago* Rule of Reason. To require practices to be "procompetitive" is to ban practices which increase firm and industry efficiency. In Part V, we will consider other reasons why the *Du Pont* criteria should be used as a standard in all antitrust cases.

E. *Hawaii Unfair Competition Act*—CT&T v. InterIsland Resorts, Ltd.

A case of particular interest is *Charley's Tour & Transportation, Inc. v. InterIsland Resorts, Ltd.* (*CT&T*).[108] Although CT&T originally alleged a predatory pricing conspiracy in violation of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, no evidence was presented to support these allegations. Therefore, these claims were eliminated by a directed verdict, leaving the treble damage action under Hawaii's Unfair Competition Act as the only remaining issue.[109] Thus, this case provides a good example of pure "unfair competition" uncontaminated by other antitrust violations.

CT&T alleged that other transportation companies had secretly reduced service prices below those mandated by the provisions of the Hawaii Motor Carrier

---

[108] No. 80-0060 (D. Haw. 1985). The case was tried before a jury.

[109] *Id.*

Law.[110] CT&T argued that persistent below-tariff pricing constituted unfair competition.

A brief summary of the pricing provisions of the Hawaii Motor Carrier Act is useful at this point.[111] First, it provided for regulation of tariff rates by the Public Utilities Commission (PUC) and specified that tariff rates must be "just and reasonable."[112] The law does not permit the PUC to initiate rate reviews; it can only act in response to complaints.[113] Second, it allowed the motor carriers to agree among themselves on the rates to be charged and exempted any such agreements from the State's antitrust laws.[114]

The economic theory of regulation informs us that at meetings of their industry trade association, the Western Motor Tariff Bureau (WTMB), the licensed carriers had incentives to set tariffs which would maximize industry profits.[115] In order for the industry to achieve maximum profits, individual firms must agree to sacrifice some of their independence. In this case, each firm must agree to give up the freedom to set its own price and output—the prices will be determined by the industry trade association.[116]

The market must be divided, as each transportation company would like to expand production at the higher official tariff. To prevent individual companies from increasing their production and undermining the monopoly price, the regulatory commission must strictly enforce official tariffs. Yet Hawaii's Public Utilities Commission (PUC) neither enforced the official rates nor allocated business among the carriers. Although the carriers acted through the WMTB to set higher than competitive prices, the regulatory agency never took strong action to enforce the WMTB agreement.[117] In fact, the legislative auditor cited the following reason for lack of tariff enforcement:

> In our interviews and discussions with those involved in the motor carrier aspect of the public utilities program, we detected not only a neglect in looking

---

[110] *Id. See* Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment, *CT&T*.

[111] HAW. REV. STAT. ch. 271 (1985).

[112] *Id.* § 271-20(c).

[113] *Id.* § 271-20(d-e).

[114] *Id.* § 271-35.

[115] *See* Stigler, *The Economic Theory of Regulation*, 2 BELL J. ECON. 3 (1971) [hereinafter Stigler, *Economic Theory of Regulation*]; Peltzman, *Toward a More General Theory of Regulation*, 19 J. LAW & ECON. 211 (1976). *See generally* M. OLSON, THE RISE AND DECLINE OF NATIONS (1982).

[116] *See generally* G. STIGLER, THE THEORY OF PRICE (3d ed. 1966). Chapter 13 contains a full discussion of the process of setting price and allocating output to attain maximum industry profits.

[117] LEGISLATIVE AUDITOR OF THE STATE OF HAWAII, MANAGEMENT AUDIT OF THE PUBLIC UTILITIES PROGRAM, VOL. III: THE REGULATION OF TRANSPORTATION SERVICES: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII 52 (Audit Report No. 75-6, 1975).

> out for the interests of the tourists but a general attitude that one might expect from the carriers themselves but not from a governmental agency—namely, that the tourists are here today and gone tomorrow and that prices should be set at what the traffic will bear to make sure as many outside dollars are left in Hawaii as possible. Thus, the cards are all stacked against the tourist-consumers who use passenger carrier services in Hawaii.[118]

Without enforcement, any licensed carrier had incentives to cheat on the WMTB agreement and charge less than the official rates.[119] If all carriers *but one* continued to charge the official rates, the price cutting carrier would be able to attract as many customers as it wanted and still earn higher than normal profits. This strategy would only succeed if the price cut could be kept secret from other firms in the industry. Otherwise, retaliatory price cuts render the price cutting strategy ineffective. Each carrier wants to be the carrier which free-rides on the industry price agreement and earns higher profits. But, if each carrier adopts the strategy of cheating on the price agreement, the basic purpose of the agreement, raising price to earn high profits, will not be attained. In the absence of enforcement activity by the regulatory agency, this process of "secret" price cutting will occur repeatedly until competitive rates are approached. The end result cannot be desired by the group of carriers—the monopoly profits earned at the WMTB prices are reduced to competitive profits by the "secret" price cuts.

Thus, the WMTB was able to propose prices which would maximize profits for the licensed carriers, but was unable to require firms to charge these prices. In the absence of any enforcement activity by the PUC, individual firms had incentives to cheat on the official tariffs as quickly as possible. They did not, however, want the other firms to know they had cut prices—they were hoping that the remaining firms would continue to charge the official rates, thereby allowing the cheaters to pick up some of their business. This well-known argument[120] helps us to explain why the licensed carriers tried to keep their violations of the WMTB rates a secret: if other carriers found out about the rate cutting, they would respond by reducing their prices below the official tariffs. The effects of these price cuts would be to reduce or eliminate the original firm's gain in sales and profits.

The *Du Pont* criteria would be easy to apply to a case such as *CT&T*. Was rate cutting by an individual firm supported by an independent legitimate reason? If the firm was the only firm (or one of only a few firms) to cut rates, then

---

[118] *Id.* at 47.

[119] See McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191 (1960) and Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964) for classic discussions of monitoring collusive agreements.

[120] *See generally* Stigler, *Economic Theory of Regulation*, *supra* note 115.

its profits would rise. Note also that industry output would expand and the average price charged to industry customers would fall. Did rate cutting have an "anticompetitive" purpose? Again, as a result of the price cutting, output expanded. Moreover, there was no evidence presented that the prices were predatory (below any relevant measure of average or marginal cost) and Sherman Act charges to this effect were dismissed by Judge King.[121]

Judge King, relying on the criteria for unfair competition in the *S&H* decision, instructed the jury that Hawaii's unfair competition law was violated if the defendants had knowingly cut prices in violation of the Hawaii Motor Carrier Act.[122] The jury found the defendants guilty, but awarded no damages.

Whether the defendants would have been found guilty under the *Du Pont* criteria depends on the interpretation of the word "legitimate." If the meaning of this word is "consistent with self-interest" or "consistent with a firm's profit-maximizing objective," then the defendants should have been found not guilty. If, however, the word "legitimate" pertains to any action which is illegal under some statute, then the verdict would have been the same as that actually rendered. The latter interpretation was employed by Judge King, although he relied on the *S&H* rather than the *Du Pont* decision.

The latter interpretation, if widely adopted, would lead to serious implications. The violation of any law could be prosecuted under the appropriate statute, in this case the Hawaii Motor Carrier Act or Hawaii's Unfair Competition Act, if the plaintiff is a competitor of the defendant. Since Hawaii's Unfair Competition Act carries a treble damage penalty, two different penalties could be assessed for an identical violation depending only under which statute the action is brought. Thus, it would provide an incentive for competitors to bring a flood of suits against their competitors claiming "unfair competition" regardless of the actual statute being violated. Under such a standard, any violation of

---

[121] *CT&T*, No. 80-0060 (D. Haw. 1985).

[122] The jury instructions given were:

> In this connection, you are instructed that motor carriers in the ground transportation business in Hawaii are subject to regulation under the Hawaii Motor Carrier Law. That law requires that a carrier obtain a certificate or permit issued by the Hawaii Public Utilities Commission autorizing [sic] the transportation, and that a certificated carrier file with Commission "tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property." This means no carrier shall knowingly and wilfully charge a rate other than as set forth in its filed tariff . . . .
>
> An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done "wilfully" if done voluntarily and intentionally, and with specific intent to do something the law forbids.

Jury Instructions, *CT&T* at 29-30 (on file at the University of Hawaii Law Review office). In Ai v. Frank Huff Agency, 61 Haw. 607, 607 P.2d 1304 (1980), the Hawaii Supreme Court noted that the legislature predetermined that violations of chapter 443 would constitute per se "unfair or deceptive acts or practices" for the purposes of § 480-2.

a law by a business would subject the firm to treble damages. Given the criticism with which the antitrust treble damage remedy has been recently subjected[123] and the absence of a rationale for an extension of its scope, it appears unwise to extend its application to other realms of the law. If violations of Hawaii's Motor Carrier Act warrant a treble damage penalty, there is no reason why such a penalty cannot be explicitly incorporated into the Motor Carrier Act.

This part reviews important unfair competition cases decided prior to the revival of Turner's criteria in *Du Pont* and other appellate decisions. Our conclusion is that application of the *Du Pont* criteria in these earlier cases would have produced better decisions. It is reasonable, therefore, to assume that the application of these criteria to future cases will produce decisions which contribute to the efficiency of the economy.

V. A General Framework for Antitrust Law

The implications of the *Du Pont* criteria to cases under section 5 of the FTC Act have been discussed. However, the *Du Pont* criteria do more than merely supply the operational definition of "unfair methods of competition" in section 5 cases. The criteria also represent a significant departure from past antitrust enforcement and are applicable to the enforcement of all antitrust laws. This part shows the implications of such a broader application of the criteria.

Whenever a court makes a decision, there are four possible outcomes which are categorized in Table 1.

Table 1. Possible Outcomes of the Judicial Decision

	True State of the Nature	
Judicial Decision	Not Liable	Liable
Not Liable	Correct Decision	Type 2 Error
Liable	Type 1 Error	Correct Decision

In two of the four possible outcomes, the correct decision is reached. For example, the decision is accepted as correct and it indeed reflects the true state of nature or it is rejected as incorrect and reflects the true state of nature. In the remaining two outcomes, an error is made. For example, when the decision is accepted as correct, although it is actually incorrect or the decision is rejected as

[123] The classic reference in this area is Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329 (1974). More recent analyses include Breit & Elzinga, *Private Antitrust Enforcement*, 28 J. LAW & ECON. 405 (1985) and Easterbrook, *Detrebling Antitrust Damages*, 28 J. LAW & ECON. 445 (1985).

incorrect, although it is actually correct.

In statistics, these errors are known formally as Type 1 and Type 2 errors, respectively.[124] It follows that judicial enforcement, other things being equal, should emphasize reduction of Type 2 errors, if from society's point of view the cost resulting from the commission of Type 2 errors is larger than the cost from committing Type 1 errors or vice versa. It is alleged that the former is often the case.

Posner[125] has used this type of analysis to explain why it is presumed that a defendant in a criminal case is to be presumed innocent and that the standard for his conviction is more demanding than the standard in a civil lawsuit: If the cost of punishing an innocent person is higher than the cost of allowing an individual who has committed a crime to go free, then the criminal law standard is rational.

Unlike the enforcement of the criminal laws, however, the emphasis in antitrust enforcement has been on minimizing Type 1 errors, for instance, the emphasis has been on reducing the chances that a guilty individual would escape punishment. One would expect therefore, that in enforcement of antitrust laws, the cost to society from the commission of Type 1 errors must be greater than the cost from the commission of Type 2 errors. It is argued below that this is not the case, and that the *Du Pont* criteria redresses the previous imbalance in the enforcement of the law.

It is widely recognized that judges make errors, although not formally as Type 1 and Type 2 errors. The exchange between Easterbrook[126] and Markovits[127] is, for example, in essence a disagreement over the trade-offs between Type 1 and Type 2 errors, the cost of committing each error, and the cost of reducing the probability of committing both types of errors. Both commentators agree that judicial decisions in antitrust cases have focused on minimizing Type 1 errors. Easterbrook argues, however, that there are three reasons that the costs of committing Type 2 errors are smaller than the costs of committing Type 1 errors. First, most of the questionable practices are not anticompetitive. Second, the economic system corrects monopoly more readily than it corrects judicial errors, because "[t]here is no automatic way to expunge mistaken decisions of the Supreme Court. A practice once condemned is likely to stay condemned, no matter what its benefits. A monopolistic practice wrongly excused will eventually yield to competition, though, as the monopolist's higher prices

---

[124] For an elementary presentation of these concepts, see R. HOGG & E. TANIS, PROBABILITY AND STATISTICAL INFERENCE 253, 261 (1977).

[125] *See* POSNER, ANTITRUST, *supra* note 7, at 521.

[126] Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) [hereinafter Easterbrook, *Limits of Antitrust*].

[127] Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41 (1984) [hereinafter Markovits, *Limits to Simplifying Antitrust*].

attract rivalry."[128]

Third, in many cases the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large. The error of permitting harmful conduct will impose losses over only a part of the range of output, while the error of condemning beneficial conduct will impose losses over the entire range of output.[129]

It logically follows, therefore, that antitrust enforcement should also minimize Type 2 rather than Type 1 errors. Thus, in order to accomplish this task, Judge Easterbrook proposes "to create simple rules that will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risk of competitive injury."[130]

To ensure that efficient business practices are not enjoined, Easterbrook proposes a set of criteria which cases would have to meet before a court would begin consideration under the Rule of Reason.[131] The criteria include proving that the defendant has market power; that there is a link between the antitrust injury and the defendant's profit; that vertical practices are widely used by all competitors; that industry output and price have been discernably affected by the violation; and that the court examine the identity of the plaintiff to determine whether private and social incentives are aligned in litigation.

Only when a potentially-efficient business practice passes all five filters would the court undertake the efforts required by today's Rule of Reason. Easterbrook argues that the use of the filters would cut inquiry short in most cases, saving substantially on litigation costs and uncertainties.

Markovits also recognizes the importance of avoiding Type 2 errors but not because of their cost but because "the antitrust laws contain criminal provisions."[132] He also argues that Easterbrook underestimates the cost of Type 1 errors and thus, it may be less desirable to increase the probability that defendants will be exonerated erroneously.

The main disagreement, however, appears to be over the current state of knowledge. According to Easterbrook, given the current state of our knowledge, it would be too expensive to reduce both types of errors by conducting a full inquiry into the economic benefits and costs of a particular business practice for every case. Even if this were done, the conclusions are not likely to be sufficiently definitive nor could judges and juries make appropriate evaluations. However, according to Markovits, "[w]e now understand the function of virtually all business practices. Moreover, these practices can be made comprehensi-

---

[128] Easterbrook, *Limits of Antitrust*, *supra* note 126, at 15.

[129] *Id.* at 16.

[130] *Id.* at 17.

[131] *Id.* at 17-38.

[132] Markovits, *Limits to Simplifying Antitrust*, *supra* note 127, at 54.

ble even to judges and juries who lack economic training."[133] It follows that given the state of our knowledge perceived by Markovits, it is feasible to reduce both types of errors at a reasonable increase in litigation costs.

Markovits' recommendation is based on the notion that progress in economic science during the last twenty years has allowed us to attain the requisite knowledge to evaluate the efficiency of business practices with a high degree of accuracy. It is not disputed that economists have a better grasp of business practices, but it is questionable whether the practices can be evaluated with a small degree of error. Just thirty years ago, economists believed that virtually all business practices were implemented by firms to exclude competitors and to monopolize their industry.[134] Gradually, the economics profession has recognized that reality is more complex. Business practices can be used to accomplish a wide variety of objectives. Almost all business practices challenged by antitrust authorities, with the exception of naked price fixing,[135] have an efficiency rationale.[136] With the use of the new theories, legal and economic commentators[137] have reviewed past cases and have found that many convictions for violating the antitrust laws have been based on incorrect economic theory. Given the importance of Type 2 error, the cost to the economy of these errors must have been substantial. Yet since the legal system has emphasized the importance of minimizing Type 1 errors in antitrust cases, these results do not surprise us.

It was the preponderance of Type 2 errors that prompted Easterbrook to propose his filters.[138] A broader application of the *Du Pont* criteria would accomplish the same purpose, by shifting the emphasis from reduction of the chance of committing Type 1 errors to reduction of the chance of committing Type 2 errors. The criteria are structured to prevent Type 2 errors, as they allow practices which could be in a firm's independent self-interest to survive antitrust inquiry when it cannot be clearly demonstrated that the practices are profitable

---

[133] *Id.* at 72.

[134] *See generally* Coase, *Industrial Organizations*, *supra* note 98.

[135] Recent cases have called into question the applicability of the per se rule against price fixing. *See* NCAA v. Board of Regents, 468 U.S. 85 (1984); Arizona v. Maricopa Medical Soc'y, 457 U.S. 332 (1982).

[136] The response to Salop's stylized model of the *Du Pont* litigation is typical. *See Discussion of the Paper by Steve C. Salop*, in J. STIGLITZ, NEW DEVELOPMENTS, *supra* note 59, at 291-94. *See also supra* note 97.

[137] *See generally* R. BORK, *supra* note 7; Carlton, *supra* note 58, DeCanio, *Pricing*, *supra* note 58; Gellhorn, *supra* note 33; Haddock, *supra* note 58; LaCroix, *supra* note 97; Marvel, *Exclusive Dealing*, *supra* note 26; Peterman, *supra* note 86. *See also* Barzel, *Competitive Tying Arrangements: The Case of Medical Insurance*, 19 J. ECON. INQUIRY 598 (1981); Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); Varian, *A Model of Sales*, 70 AM. ECON. REV. 651 (1980).

[138] For Easterbrook's discussion of filters (or "tests"), see generally Easterbrook, *Limits of Antitrust*, *supra* note 126.

only if the firms tacitly or explicitly coordinate their conduct. More Type 1 errors would be committed, but fewer Type 2 errors would occur. This would be efficient if, as we have argued above, Type 2 errors are more costly than Type 1 errors.

Adoption of the *Du Pont* criteria would complement the adoption of Easterbrook's filters. If a business practice has passed through Easterbrook's filters, and we are to examine the efficiency and collusive rationales for the practice, we should still be alert to the possibility of Type 2 error. Replacing the *Chicago* Rule of Reason inquiry with a *Du Pont* Rule of Reason inquiry would be a first step towards acknowledging the importance of legal error in the enforcement of antitrust laws. While legal error is most likely in the enforcement of section 5 of the FTC Act, as its language is less definitive and its scope more encompassing, it is equally important to consider Type 2 error in the enforcement of the other antitrust laws, as such an error is equally costly in that context. Application of the *Du Pont* criteria to all antitrust laws would improve the ability of the antitrust laws to improve the efficiency of the American economy.

VI. CONCLUSIONS

Until fairly recently economists have had little to contribute to the analysis of cases involving "unfair methods of competition." This is due in part both to the lack of guidance that economic theory provides on "unfair methods of competition" and to the lack of an operational definition provided by Congress, the courts, or the FTC.

This unfortunate state of affairs changed, however, with the string of cases leading up to the *Du Pont* decision. In these decisions, the criteria proposed over twenty five years ago by Donald Turner were revived and used to analyze a wide variety of business practices.[139] Although the implication of the *Du Pont* decision for the evolution of antitrust law is too early to evaluate, our hypothetical application of its criteria to past cases suggests that in many of these cases the decisions would have been different if the *Du Pont* criteria had been applied. It is expected, therefore, that these criteria will have a significant impact on future decisions.

The *Du Pont* criteria not only provide appropriate definition of "unfair methods of competition" for section 5 cases, but depart with past antitrust enforcement practices and are potentially applicable to enforcement of all antitrust statutes. If the criteria are applied more broadly, they would help to redress the imbalance in antitrust enforcement on reducing the probability of erroneous decisions of one type, for instance, allowing a guilty party to escape punishment. This emphasis has not been costless. In fact, it was achieved by simulta-

[139] Turner, *supra* note 9. *See also supra* notes 51-54 and accompanying text.

neously increasing the probability that innocent parties are punished. In antitrust enforcement, as in the enforcement of other statutes, the cost of committing the former type of error is more costly than the cost of committing the latter type of error.

The *Du Pont* criteria represent a major step forward in evaluating whether business practices violate antitrust laws, as they explicitly incorporate the cost of Type 1 and Type 2 errors. In a complicated, uncertain world, it is incumbent for lawyers, economists, and businessmen to consider the implications of errors for their decisionmaking. Incorporation of such considerations into legal standards cannot help but improve the efficiency of the economy and the legal system.

The Process of Self-Determination and Micronesia's Future Political Status Under International Law*

by Naomi Hirayasu**

I. INTRODUCTION

Micronesia encompasses more than 2100 islands in the western Pacific Ocean. The islands are small, scattered over three million square miles of ocean, with land area of less than 700 square miles. Geographically, Micronesia also includes Guam, Nauru and Kiribati. This work does not include those areas. It addresses the concerns of the rest of Micronesia, the Trust Territory of the Pacific Islands.

Micronesia is a trust territory established under the United Nations Charter. Eleven territories were placed under the Trusteeship System established by Chapters XII and XIII of the United Nations Charter. Micronesia was the only trust territory to be constituted as a Strategic Area Trust under Chapter XII, and is thus of explicit interest. Moreover, all of the other trust territories have effected a termination of their trust status, either by becoming independent, or by association with or integration into existing states. Micronesia, therefore, is the last remaining trust territory under the United Nations Trusteeship System. Our concern with Micronesia is that the negotiations for the termination of its trusteeship status with the United States, the administering authority for the area, have been virtually concluded, and the termination is at present being considered by the United Nations. This article emphasizes the arrangements for such termination and their compatibility with the Charter requirements. This work is not a detailed analysis of the Mandates or the Trusteeship System, which has been discussed elsewhere.[1]

**B.A., cum laude, Middlebury College, 1973; J.D., William S. Richardson School of Law, University of Hawaii, 1981; LL.M., The London School of Economics and Political Science, University of London, 1986. Member of the Hawaii Bar.

[1] *See, e.g.*, R. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIPS: A COMPARATIVE

The United Nations Trusteeship Council has approved the termination of the Trusteeship Agreement for Micronesia, the Trust Territory of the Pacific Islands.[2] The United States, pursuant to article 83 of the United Nations Charter, will soon submit to the Security Council the agreements for termination of the trusteeship for these Pacific islands. In the hope of shedding some light on this process, and also on the future political status of Micronesia after termination of the trusteeship (and these perspectives might well be applicable to Micronesia following the approval of the Compacts and the Covenant recently concluded between the United States and Micronesia, in accordance with the Constitutional processes of the United States and the Micronesian governments, even before termination of the trusteeship status by the Security Council) we will now proceed to examine the relevant history, and to analyze the future, or present, status of Micronesia under international law. To this end, the following discussion will include a brief review of the pertinent history of Micronesia and the negotiation history of these agreements, an examination of the Compact of Free Association negotiated by Palau, the Federated States of Micronesia and the Marshall Islands, and the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and the status of the Micronesian nations under international law at the conclusion of the negotiating process.

II. MICRONESIA UNDER COLONIAL RULE

Micronesia was discovered by the colonial powers in 1529 when the Spanish

---

STUDY (1955); L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (1946); Rappard, *The Practical Workings of the Mandates System*, in VARIA POLITICA 163 (1953) [hereinafter Rappard, *Practical Workings*]; Rappard, *The Mandates and the International Trusteeship Systems*, in VARIA POLITICA 181 (1953) [hereinafter Rappard, *Int'l Trusteeships*].

[2] 53 U.N. TCOR (Agenda items 4 & 16) at 1, U.N. Doc. T/RES/2183 (1986). In the Resolution adopted by the Trusteeship Council at its 1617th meeting on May 26, 1986, the Trusteeship Council "[c]onsidered that the Government of the United States, as the Administering Authority, had satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and deemed it appropriate for that Agreement to be terminated with effect from 30 September 1986." The Resolution passed the Trusteeship Council by a vote of 3 to 1, with the Soviet Union casting the dissenting vote. Although all 5 permanent members of the United Nations are entitled to sit on the Trusteeship Council, China has consistently chosen not to participate. *See* U.N. CHARTER art. 23. *See also* U.N. CHARTER art. 86, § 1(b).

It is anticipated that the termination will soon be submitted to the Security Council for its consideration. *See* International Herald Tribune, May 30, 1986, at 6, col. 1. It will be interesting to see whether the Security Council treats the issue as a procedural one of approval of a Trusteeship Council Resolution, or as a substantive matter of termination of a trusteeship.

came across the Marshall Islands in eastern Micronesia.[3] In 1565, the Spanish established Agana, Guam as a supply stop for vessels making their way from Mexico to the Philippines.

The Micronesians, who had inhabited the islands for some time before their discovery by the western world, are believed to have done so in two or three successive waves of immigration. Micronesians today are perceived to be of at least two distinct types, the Chamorros who constitute a majority of the indigenous inhabitants of Guam and the Northern Mariana Islands, and the Carolinians who constitute the rest of the Micronesian population.[4]

Small traditional kinship groupings and the undoubted difficulty of traversing great expanses of ocean on a regular basis must surely have contributed to the cultural diversity of Micronesia. Presently, more than nine languages are spoken, and clan and tribal groupings account for allegiances on a traditional level.

Before the discovery of Micronesia by western powers, Spain purported by the Treaty of Tordesillas in 1494 to exercise dominion over the whole of the Pacific Ocean.[5] However, apart from establishing a port of call on Guam, Spain was slow to exercise actual control over Micronesia.

Spain's primary concerns in the area were maintaining peace, and converting the Micronesians to Christianity. Economic development by Spain was limited. The Spanish removed virtually all of the Chamorro population from the islands of the Marianas to Guam for some time, and at the same time directly or indirectly contributed not only to substantial erosion of traditional ties in the Marianas, but also to the demise of a substantial number of the Chamorro population.[6]

In the latter part of the nineteenth century, Germany developed an interest in the economic potential of the islands, and commenced copra exploitation in the Marshall Islands. In 1885, when a dispute arose concerning their respective claims to the islands of Micronesia, Spain and Germany appealed to the Pope for a resolution of the matter. Pope Leo XIII rendered an award favorable to Spain, subject to some rights for German traders.[7]

---

[3] J. COULTER, THE PACIFIC ISLAND DEPENDENCIES OF THE UNITED STATES 170 (1957). For histories of Micronesia, see S. DESMITH, MICRONESIA AND MICROSTATES (1970); C. HEINE, MICRONESIA AT THE CROSSROADS: A REAPPRAISAL OF THE MICRONESIAN POLITICAL DILEMMA (1974); D. MCHENRY, MICRONESIA: TRUST BETRAYED (1975); PAST ACHIEVEMENTS AND FUTURE POSSIBILITIES: A CONFERENCE ON ECONOMIC DEVELOPMENT IN MICRONESIA (1984) (available in Hamilton Library, University of Hawaii, Pacific Collection) [hereinafter MICRONESIAN SEMINAR]; Mink, *Micronesia: Our Bungled Trust*, 6 TEX. L. REV. 181 (1971).

[4] There may in fact be three distinct groups in Micronesia since the Marshallese are deemed to be different from the Carolinian and the Chamorro populations.

[5] C. HEINE, *supra* note 3, at 11.

[6] *Id.* at 12; D. MCHENRY, *supra* note 3, at 5.

[7] S. DESMITH, *supra* note 3, at 123.

At the conclusion of the Spanish-American war in 1898, the United States took over the administration of Guam. Germany purchased the rest of Micronesia from Spain in 1899.[8]

Germany administered the islands until 1914, concentrating its attention on copra production in the Marshalls, and the mining of phosphates in Nauru and Palau. Shortly before World War I, pursuant to an agreement concluded with Great Britain, France and Russia, Japan took over political control of Micronesia. Japan's political control had been preceded by economic inroads into the islands. In addition to continuing the copra and phosphate operations, Japan also developed the maritime potential of the islands, and diversified agricultural production.[9]

Japan administered the islands as a Class C Mandate under the League of Nations Covenant.[10] After World War II, the United States became administering authority of the Trust Territory of the Pacific Islands under the United Nations Charter.

The various colonial administrations had different impacts on the traditional political and economic structures of the islands. While the Spanish did little for the economic potential of the islands, the German and Japanese administrations exploited the islands economically. The economic policies of the Germans and the Japanese, however, did not always benefit the Micronesians, who were often conscripted to work long hours in the phosphate mines at low wages.[11] The Japanese also brought in a substantial Japanese and Okinawan labor force. The Japanese administration economically benefitted the foreign population more significantly than the Micronesians. There was some spillover of economic benefit to the local population, and the Micronesians now remember the Japanese administration as a time of economic prosperity.

After World War II, when the United States took up its duties as administering authority, the Micronesian economy was in a sad state. Many of the industries had been destroyed during the war. The immigrants from Japan and Okinawa responsible for much of the economic benefit under the Japanese were repatriated, and many of the structures built by the Japanese had been destroyed during and immediately after the war. United States administrators, with good intentions, promised to rebuild the structures in a grander style;

---

[8] J. COULTER, *supra* note 3, at 171.

[9] For a study of Micronesia under Japanese administration, see T. YANAIHARA, PACIFIC ISLANDS UNDER JAPANESE MANDATE (1940).

[10] For a discussion of the Mandates System, see generally R. CHOWDHURI, *supra* note 1; L. GOODRICH & E. HAMBRO, *supra* note 1; Rappard, *Practical Workings*, *supra* note 1; Rappard, *Int'l Trusteeships*, *supra* note 1.

[11] Firth, *German Labour Policy in Nauru and Angaur, 1906-1914*, 13 J. PAC. HIST. 36 (1978); Purcell, *The Economics of Exploitation: The Japanese in the Mariana, Caroline and Marshall Islands, 1915-1940*, 11 J. PAC. HIST. 189 (1976).

however, the realities of administering a scattered territory on a limited budget resulted in many of these promises never being fulfilled.

For the first few decades of United States administration in Micronesia, United States policy has been described as one of benign neglect, and alternatively as one of anthropological non-intervention. The policy was one of minimal interference in Micronesia, and respect for and non-disturbance of traditional ways.[12]

The United States administrators failed to realize that Micronesia was not a *tabula rasa* in relation to the western world. Three previous colonial administrations had had a significant impact in Micronesia, and it was difficult, if not impossible, for Micronesians to fully return to their traditional ways.

From the inception of the trusteeship until 1951, Micronesia was under the jurisdiction of the United States Department of the Navy. In 1951, responsibility for administration of the islands was transferred to the Department of the Interior.[13] However, the Navy managed to regain administrative authority over the Northern Mariana Islands. During this time, the Navy allowed the CIA to use the Marianas for its purposes.[14] The Navy, when it relinquished control of the Marianas to the Interior Department in 1962, left behind roads, buildings, and other infrastructural development that, even today, especially given the Interior Department's more frugal budget, gives the Marianas a significant advantage over the other areas of Micronesia in economic development and potential. The United States military also employs a number of Micronesians in the Marshall Islands. In ministering to its perceived security needs, the United States also contributed to the economy of the islands. However, apart from the indirect benefit resulting from United States military operations, and a sizeable bureaucratic administrative superstructure, the islands' economic development was not significantly fostered by the United States administration.

III. MICRONESIA UNDER MANDATE: MICRONESIA AS A TRUST TERRITORY

Micronesia had been administered by the Spanish after discovery by western powers, then briefly by Germany. After World War I, the victorious allied powers devised the International Mandate System under the League of Nations for administration of the colonial territories detached from enemy states. Article 22 of the League of Nations Covenant defined these areas as "those colonies and territories . . . which are inhabited by peoples not yet able to stand by

---

[12] *See generally* N. MELLER, THE CONGRESS OF MICRONESIA (1969); R. TRUMBULL, PARADISE IN TRUST (1959).

[13] D. MCHENRY, *supra* note 3; P. MANHARD, THE UNITED STATES AND MICRONESIA IN FREE ASSOCIATION (1979) (available at the United States Embassy, London).

[14] D. MCHENRY, *supra* note 3, at 57.

themselves under the strenuous conditions of the modern world."[15] The mandate system was a compromise between the annexation of the former colonial dependencies, and the placing of those territories under international administration.

The mandated territories were classed as A, B or C territories under article 22 according to their perceived state of development.[16] An objective of the United Nations Trusteeship System "self-government or independence as may be appropriate to the particular circumstances of each territory . . . and the freely expressed wishes of the peoples concerned. . . ."[17] A comparable provision was made under the League of Nations Mandate System only for class A mandates. Article 22 describes class A mandates as "[c]ertain communities . . . having reached a state of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and

---

[15] Article 22 states, in pertinent part:

> To those colonies and territories, which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation, and that securities for the performance of this should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by the Mandatories on behalf of the League.
>
> The character of the Mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> . . . .
>
> There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

LEAGUE OF NATIONS COVENANT art. 22.

The "safeguards above mentioned" are as follows: freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases, and of military training of the natives for other than police purposes and the defence of territory, and (the Mandatory) is also directed to secure equal opportunities for the trade and commerce of other Members of the League. These safeguards are also set out in article 23 of the League of Nations Covenant.

[16] *Id.*

[17] U.N. CHARTER art. 76(b).

assistance by a Mandatory until they are able to stand on their own."[18]

The islands of Micronesia—the Marianas and the Carolines—were administered by Japan under its League of Nations Mandate as a class C mandate. Class C mandates were to be administered as integral parts of the mandatory's territory. Although article 23 of the League of Nations Covenant contained a provision directing members of the League to "undertake to secure just treatment of the native inhabitants of the territories under their control,"[19] the League of Nations Covenant contains no provision requiring the development of self-government or independence of class B or class C mandates. The category of class C mandates was designed for the Pacific islands territories, and included, in addition to Micronesia, New Guinea, Nauru, and Western Samoa. It also included South-West Africa (Namibia).

The International Trusteeship System set out in Chapter XII of the United Nations Charter establishes a system similar to the mandatory system set out in the League of Nations Covenant. Territories placed under the trusteeship system were to include, pursuant to article 77 of the United Nations Charter, League of Nations Mandates, territories detached from enemy states during World War II, and other territories voluntarily placed under trusteeship. The territories to be placed under the trusteeship system were left to subsequent agreement.

In the Trusteeship Agreement for the Former Japanese Mandated Islands, the Security Council, satisfied that the relevant provisions of the United Nations Charter had been complied with, approved the terms of trusteeship for the United States as trustee of those parts of Micronesia formerly under mandate to Japan. The trusteeship agreement was approved by the Security Council on April 2, 1947, and went into effect on July 18, 1947.[20]

The mandate system assumed that the mandated territories might be under the control of the mandatory power for a long time. This perspective is clear,

---

[18] LEAGUE OF NATIONS COVENANT art. 22. *See also* R. CHOWDHURI, *supra* note 1, at 11.

[19] LEAGUE OF NATIONS COVENANT art. 23.

[20] Trusteeship Agreement for the Former Japanese Mandated Islands, April 2, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

In the International Status of the South-West Africa Case, in 1950, the International Court of Justice advised that the Union of South Africa, acting alone, did not have the competence to modify the international status of the Territory of South-West Africa (Namibia). A modification of the international status of the mandated territory required the consent of the United Nations. 1950 I.C.J. 128.

In 1966, the General Assembly terminated South Africa's mandate. G.A. Res. 2145, 21 U.N. GAOR Supp. (No. 16) at 2. In 1971, the International Court of Justice advised that South Africa's continued presence in Namibia was illegal. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 176, 1971 I.C.J. Advisory Opinions and Orders 16.

The Class C Mandate for Micronesia was terminated both by the United Nations Security Council, and by acquiescence of the former Mandatory.

since article 22 allows class C mandates to be administered as integral parts of the territory of the mandatory power. By comparison, article 76(b) of the United Nations Charter specifically directs the administering authority to lead the people of the territory towards independence or self-government, as appropriate to the circumstances of the territory and the freely expressed wishes of the people concerned. Under the United Nations Trusteeship System, the trustee is also charged with the responsibility of encouraging respect for human rights and fundamental freedoms.

The United Nations Trusteeship System also differs from the League of Nations Mandate System in the classification of trust territories in one respect. The only difference is the distinction between trust territories general, and strategic area trusts.

Apart from being the only remaining trust territory under the United Nations Charter, Micronesia differs from other trust territories in another way. Micronesia is the only trust territory to be designated a strategic area trust, as provided for in articles 82 and 83 of the United Nations Charter.[21]

Under article 82 of the United Nations Charter, a strategic area or areas may be designated in any trusteeship agreement. The strategic area or areas may include part or all of the trust territory to which the agreement applies.

The United States has designated Micronesia a strategic area trust. Pursuant to article 5 of the Trusteeship Agreement,[22] and articles 76 and 85 of the United Nations Charter, the administering authority may establish bases, erect fortifications, station and employ armed forces in the territory, and make use of volunteer forces and facilities in the territory. Article 7 of the Trusteeship Agreement[23] permits the administering authority to declare specified areas closed for security reasons, and to suspend reports to or visits by the Trusteeship Council of the United Nations or by the General Assembly, in the closed area or areas.

---

[21] The United States had occupied Micronesia in the last and some of the most heated battles of World War II. *See generally* D. MCHENRY, *supra* note 3. Mindful of the strategic potential of Micronesia, there was some opinion in the United State favoring the immediate annexation of Micronesia for its strategic potential. Some of the other powers were not averse to this mode of territorial aggrandisement. For example, Russia quietly annexed the Kurile Islands after the war. R. EMERSON, FROM EMPIRE TO NATION 307 (1960). *See also* R. CHOWDHURI, *supra* note 1, at 118. However, in the light of the United States' own revolutionary history, and the struggles of its emergence and acceptance into the ranks of the community of sovereign states, there was significant liberal sentiment in the United States against territorial aggrandisement by annexation of peoples and territories without their consent. The placement of Micronesia under the aegis of the United Nations as a strategic area trust was a measure designed to accommodate these diverse interests. *See, e.g.*, Gilchrist, *The Japanese Islands: Annexation or Trusteeship?*, 22 FOR. AFF. 635 (1944).

[22] 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (1947).

[23] *Id.*

Article 83 assigns all United Nations functions relating to strategic areas to the Security Council. These functions include "the approval of the terms of the trusteeship agreement and of their alteration or amendment."[24] It may be noted that this allocation of functions does not explicitly include termination.

Article 76 provides that the objectives of the trusteeship system shall be:

> to further international peace and security, and . . . to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement.[25]

Although article 83(1) does not make any explicit provision for termination of a trusteeship agreement for a strategic area trust, article 76(b) requires the trustee to adhere to one of the basic objectives of the trusteeship system, the progressive development of the peoples of each territory towards independence or self-government, as appropriate, in accordance with the freely expressed wishes of the peoples concerned. In fulfillment of this basic objective, the United States has, officially since 1969, been in the process of negotiating their future political status with the duly constituted Micronesian governments. The negotiations have concerned the status of the Micronesian entities after the expected termination of the trusteeship, in accordance with the freely expressed wishes of the people, as expressed by plebiscites held in each of the negotiating units that constitute Micronesia.[26] As the United Nations is concerned that former colonial peoples and non-self-governing peoples are ensured self-determination as expressed in General Assembly Resolutions 1514 and 1541,[27] a detailed analysis of the processes and the terms on which Micronesia has achieved self-government is required.

IV. THE NEGOTIATIONS CONCERNING THE TERMINATION OF THE TRUSTEESHIP

The United States and the Micronesian negotiating teams have recently concluded negotiations on the terms of a Compact of Free Association for the Marshall Islands, the Federated States of Micronesia, and Palau.[28] In 1976, the

---

[24] U.N. CHARTER art. 83.

[25] *Id.* art. 76.

[26] For a comprehensive review of the early negotiations, see D. MCHENRY, *supra* note 3.

[27] G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960) [hereinafter G.A. Res. 1514]; G.A. Res. 1541, U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960) [hereinafter G.A. Res. 1541].

[28] Compact of Free Association for the Marshall Islands, the Federated States of Micronesia,

United States and the Northern Mariana Islands concluded negotiations on a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America.[29] The negotiations involved assertions of interest and accommodation on both sides.[30] The United States negotiated from a position of its perceived security and defense needs in the areas. The Micronesian negotiating teams sought to attain the highest possible level of United States funding consistent with the greatest possible degree of political autonomy.

All negotiators made concessions while attempting to attain their objectives in the negotiating process. The United States managed to achieve its objective given its perception of the strategic military location of Micronesia by securing a lease of the right to operate bases in Micronesia for a term of years. The United States also negotiated the right to foreclose access to or use of Micronesia to the military of any third country, known as rights of friendship, cooperation and mutual security.

The Micronesians also achieved their objective by obtaining the promise of a

---

and Palau, Pub. L. No. 99-239 (approved January 14, 1986) [hereinafter Compact of Free Association]. For the text of the Compact and interpretative amendments, see also H.R.J. Res. 187, 99th Cong., 1st Sess. (1985); S.J. Res. 77, 99th Cong., 1st Sess. (1985). For the text of the Compact and related subsidiary agreements, see S. Rep. No. 99-16, 99th Cong., 2d Sess. (1984). See Armstrong & Hills, *Current Developments: The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 AM. J. INT'L L. 484 (1984) for a brief summary of the provisions of the 1984 Compact. For a discussion of the 1980 Compact, see Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. J. INT'L L. 1 (1980); Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOKLYN J. INT'L L. 179 (1981). The text of the 1980 Compact is reprinted at 7 BROOKLYN J. INT'L L. 283 (1981).

[29] For the text of the Marianas Covenant, see Pub. L. No. 94-241, 90 Stat. 263 (1976) [hereinafter Northern Marianas Covenant]. For a brief review of the provisions of the Covenant, see Recent Developments, *United States Trusteeship—Law to Approve the Covenant to Establish a Commonwealth of the Northern Marianas Islands in Political Union with the United States, Publ. L. No. 94-241 (March 24, 1976)*, 18 HARV. J. INT'L L. 204 (1977) [hereinafter Recent Developments, *Northern Marianas Covenant*]. For criticisms of the Marianas Covenant, see generally D. MCHENRY, *supra* note 3; Green, *Termination of the U.S. Pacific Islands Trusteeship*, 9 TEX. INT'L L.J. 175 (1974); Metelski, *Micronesia and Free Association: Can Federalism Save Them?*, 5 CAL. W. INT'L L.J. 162 (1974); Comment, *The Marianas, the United States, and the United Nations: The Uncertain Status of the New American Commonwealth*, 6 CAL. W. INT'L L.J. 382 (1976) [hereinafter Comment, *The Uncertain Status*]; Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 TEMP. L.Q. 58 (1976) [hereinafter Comment, *International Law*]; Note, *Self-Determination and Security in the Pacific: A Study of the Covenant Between the United States and the Northern Mariana Islands*, 9 N.Y.U. J. INT'L L. & POL. 277 (1976) [hereinafter Note, *Self-Determination and Security*].

[30] For a discussion of the negotiating history, see D. MCHENRY, *supra* note 3; McDonald, *Termination of the Strategic Trusteeship, Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235 (1981).

significant level of funding by the United States during the term of the lease, at levels comparable to or higher than levels of funding under the Trusteeship Agreement. In addition, except for security and defense matters, the Compact grants to Palau, the Marshall Islands, and the Federated States of Micronesia, full internal and external sovereignty.

Although the United States, especially in recent years, has made significant financial contribution to the Micronesian economy, it has not managed to foster a high degree of economic advancement or self-sufficiency in Micronesia. The United States, however, was the first colonial administrator to foster the political advancement of the Micronesians beyond a basic level.

Previous colonial administrations allowed Micronesians little, if any, independence in their own political governance. The previous administrators had called gatherings of Micronesian chiefs to give them instructions, rather than to allow them to make decisions about the governance of Micronesia.

Previous administrators also occasionally managed, whether intentionally or inadvertently, to have a negative impact on the traditional authority structures. One significant element of traditional authority is the relationship between traditional lines of authority and the land. Such traditional leaders as were deemed not sufficiently amenable to colonial perspectives were circumvented or replaced.

Under United States administration, each district of Micronesia soon had its own district legislature, charged at minimum with advising the United States district administrator, and on occasion developing even greater responsibilities for governance of the districts.[31] Palau's district legislature, for example, dates back to 1947.[32] In these district legislatures, the administering authority played a significant part in the training of the Micronesians in the business of governing.

In 1965, under the tutelage of the United States, Micronesia convened the first session of the territory-wide Congress of Micronesia.[33] The Congress of Micronesia was initially deemed to be an advisory body, but soon took on legislative powers, and empowered a commission to investigate and to negotiate with the administering authority regarding the future political status of Micronesia and the termination of the trusteeship.

In 1969, the United States officially commenced negotiations with Micronesia regarding the termination of the trusteeship. The negotiating process has continued to the present, and has resulted in Commonwealth status for the Marianas, and a Compact of Free Association for the Marshalls, the Federated

---

[31] See N. MELLER, *supra* note 12, for a comprehensive history of Micronesia's early legislative efforts, and of the Congress of Micronesia.

[32] *Id.*; *See also* J. COULTER, *supra* note 3.

[33] N. MELLER, *supra* note 12.

States, and Palau.

Political advancement was accompanied by educational advancement. In 1962 and 1963, President Kennedy instituted extensive educational and social welfare programs for Micronesia, and most of the present Micronesian political elite have obtained diplomas and often advanced degrees from United States colleges and universities. However, in keeping with the United States policy of well-intentioned but somewhat short-sighted administration, many Micronesians obtained degrees enabling them to participate effectively in a political context. Few Micronesians learned skills that would be of significant assistance in the process of economic development.

In 1967, the Congress of Micronesia established a Political Status Commission. In 1969, the Commission submitted its report to the Congress of Micronesia, recommending that Micronesia be constituted as an internally self-governing state and enter into free association with the United States. Politically sophisticated Micronesians recognized that economic self-sufficiency had not been attained, and proposed to offer use of land, a scarce Micronesian resource, for United States military training and defense needs, in exchange for continued economic assistance.[34]

Official negotiations on the change of status began in Washington, D.C. in October of 1969. Micronesian negotiators were prepared to discuss a number of topics, including a Micronesian constitution, Micronesian control of land, United States conduct of Micronesian external affairs, Micronesian denial of use of Micronesia to any other country for strategic purposes, Micronesia's post-war damage claims, free movement of Micronesian people and goods into the United States, continued Micronesian access to United States courts, banking facilities, currency and postal services, and guaranteed financial aid to Micronesia. United States negotiators, perhaps because of a change from a Democratic to a Republican administration in 1968, apparently had no fixed position, and were prepared only to explore Micronesian proposals.[35]

At the second round of negotiations, the United States put forth the Commonwealth proposal. Micronesian negotiators rejected this proposal and instead adhered to their four basic principles: sovereignty, self-determination, the right to adopt a constitution, and free association in the form of a compact terminable by either party.[36]

The Commonwealth proposal, however, was not disfavored by all the Micronesian negotiating entities. The Marianas had long sought a closer relationship with the United States, and the Marianas District Legislature voted to separate from Micronesia and join the United States. The United States ignored repeated

---

[34] D. McHENRY, *supra* note 3, at 93.

[35] *Id.* at 96-97.

[36] *Id.* at 98-99.

informal overtures by the Marianas for separate negotiations, but capitulated in the end, and scheduled such separate negotiations for December of 1972.

The Marianas negotiators, in the opening session, stated: "We desire a close political union with the United States of America—a membership in the United States political family." Negotiators for the United States replied that they were "enheartened and grateful that the people of the Marianas would have reached the conclusion, voluntarily, to become a permanent part of the American family. . . ."[37]

At present, there may not be complete unity of perception regarding the Marianas' place in the American family. By one possible interpretation, the Marianas and the United States might be deemed to have differing views on the nature of the relationship.[38]

Thus, the Marianas proceeded to negotiate separately with the United States,

---

[37] *Id.* at 141.

[38] For example, in Official Joint Release by the Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands (Oct. 1, 1986) [hereinafter Joint Release], the Northern Marianas representative states:

> Since the people of the Northern Mariana Islands and the Congress of the United States approved the Covenant, we have been distressed to find that this concept, basic to the Covenant—that the Commonwealth is not a territory or possession of the United States, but something different, a self-governing commonwealth—has not always been understood or accepted by officials in the Federal government. That lack of understanding or lack of acceptance—as the case may be—on the part of officials of the federal government has given rise, we believe, to many of the issues that affect the relationship between the Northern Mariana Islands and the United States.

Id.

In contrast, the special representative for the United States noted, in part, as follows:

> Article 1, section 101 of the [C]ovenant specifically states: The Northern Mariana Islands upon termination of the trusteeship Agreement will become a self-governing commonwealth . . . in political union with and *under the sovereignty of* the United States. The United States, in a good faith effort to live up to the terms of the agreement, chose to implement a majority of the [C]ovenant prior to termination.
>
> Further, [C]ovenant section 102 provides the relations will be governed by the [C]ovenant *together* with applicable provisions of the United States Constitution, treaties, and laws as the *supreme law of the Northern Mariana Islands*. In other words, the [C]ovenant specifically provides that the commonwealth will be subject to federal laws. The United States agreed to limit its authority under section 105 so that the fundamental provisions of the agreement namely articles I, II, III and sections 501 and 805, may be modified only with the consent of both governments.
>
> The [C]ovenant also provides in section 104 that "the United States will have complete responsibility" and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

Id. (emphasis added). Thus, there may well be differences in the perception of the nature of the relationship between representatives of the United States and those of the Northern Mariana Islands.

and in 1976, the Commonwealth status that had been rejected at the outset by Micronesian negotiators was finalized for the Marianas. The process of fragmentation, once begun, seemed irreversible, and in 1974 and 1975, both the Marshall Islands and Palau demanded separate negotiations with the United States.[39]

There can be little doubt that the United States, as administering authority, did all that it could to further the political advancement of the peoples of the Northern Marianas and the rest of Micronesia. The United States separately administered the Marianas for approximately ten years pursuant to its obligations under article 6 of the Trusteeship Agreement and its obligations under article 76(b) of the United Nations Charter. That separate administration may have contributed to the economic development of the Marianas, but there were more compelling factors that played a part in the Marianas decision to seek separate negotiations. The Chamorro population, which constitutes the majority of the population in the Northern Marianas, is culturally and ethnically distinct from the people of the rest of Micronesia, and also speaks a different language. Apart from the actions of the numerous colonial administrators, there had been, before that time, no evidence of legal ties between the Marianas and the other parts of Micronesia from which territorial unity of sovereignty could be implied.[40]

Given the paucity of ties between the Marianas and the other parts of Micronesia apart from the ties created and fostered by the administering authority, there is no reason why the Marianas should not be allowed to reject the artificial status imposed on it by an accident of colonial administration, and be accorded the status of its choice, a commonwealth association with the United States. The argument is even more compelling in light of the initiation of the separate negotiation process by the Marianas, the extremely favorable agreement negotiated by its people, and the approval of the agreement in accordance with its constitutional processes and by a United Nations observed plebiscite.[41]

Indeed, each of the entities of Micronesia has selected its future political status both in accordance with internal constitutional processes of government

---

[39] Meller, *On Matters Constitutional in Micronesia*, 15 J. PAC. HIST. 83 (1980).

[40] On the issue of the separate negotiations and the Covenant for the Northern Mariana Islands, see generally D. MCHENRY, *supra* note 3; Green, *supra* note 29; Metelski, *supra* note 29; Comment, *The Uncertain Status*, *supra* note 29; Comment, *International Law*, *supra* note 29; Note, *Self-Determination and Security*, *supra* note 29; Recent Developments, *Northern Marianas Covenant*, *supra* note 29. On the issue of fragmentation or "secession," see also G.A. Res. 1514, *supra* note 27; G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2625]; The Case Concerning the Northern Cameroons, 1963 I.C.J. 15; Western Sahara, 1975 I.C.J. 6.

[41] Against this perspective, it is not unthinkable to argue that the relinquishment of sovereignty and the scope of potential defense obligations renders the agreement less than favorable to the Marianas.

and by plebiscite. It seems appropriate, then, to proceed to an examination of plebiscites generally, and of the Micronesian plebiscites.

V. PLEBISCITES

The plebiscite[42] is an acknowledged method for the exercise of self-determination. The genesis of the doctrine of self-determination can be found in the French Revolution. Self-determination can be perceived to be a corollary of the doctrine of popular sovereignty. Sarah Wambaugh suggests:

> The doctrine of national self-determination is based on and inseparable from that of popular sovereignty. Before the French Revolution sovereignty looked to the land and not to the inhabitants. . . . To the philosophers of the French Revolution the right of conquest, reasonable adjunct as it was of the divine right of kings, was incompatible with the right of people to choose their own rulers.[43]

Thus, the doctrine, at the outset, was applicable to a people's choice of government or form of government under which to live. In its evolution and application to the established states of Europe, the doctrine often was applied to a people's or a nation's choice of which of two states they would prefer to join.

The American Revolution provided an example of a third choice, the choice of termination of one form of political association with an established state, coupled with the selection of a government or a form of government under which to live. Although the context and consequences of these modes of self-determination may differ, all three have been referred to under the generic heading of self-determination.

After the genesis of the concept, the application of self-determination was for a long time limited to the second variety of self-determination, the choice of which one of two states a people or nation would prefer to join. This model dominated western thought, especially in light of the two world wars of this century. After World War II, the second model fell somewhat into disrepute. However, in the era of decolonization, the third model, termination of an existing political association coupled with the emergence of a new government of choice of government, has experienced a popular resurgence.

Cobban defines the principle of self-determination, in general terms, as "the belief that each nation has a right to constitute an independent state and determine its own government."[44] The distinction is between established and ex-

---

[42] A "plebiscite" is "a vote by which the people of an entire nation, state, or region express an opinion for or against a proposal. . . ." F. LEGHORN, SELF-DETERMINATION: THE PEOPLE'S CHOICE 8 (1962).

[43] S. WAMBAUGH, A MONOGRAPH ON PLEBISCITES 2 (1920).

[44] A. COBBAN, NATIONAL SELF-DETERMINATION 4 (1945). *See also* R. EMERSON, *supra* note 21;

isting states, and distinct peoples, nations, who may or may not constitute a state. Regarding the genesis of the concept of self-determination, Cobban states:

> The revolutionary theory that a people had the right to form its own constitution and choose its own government for itself easily passed into the claim that it had a right to decide whether to attach itself to one state or another, or constitute an independent state by itself. The effect of revolutionary ideology was to transfer the initiative in state-making from the government to the people.[45]

Cobban goes on to argue that effective opposition to the principle of self-determination came from imperialistic and expansionist tendencies, and notes that several secret treaties signed with Italy, Rumania, Japan and Russia show that the Allies after World War I were far from accepting any general principle of national self-determination. It may be recalled that Micronesia was itself the subject of one such treaty with Japan.

President Wilson was one of the leading advocates of self-determination. He proclaimed that "every people has a right to choose the sovereignty under which they shall live."[46] However, in the context of post-World War I Europe, the allied powers are often deemed to have intended the application of the principle only to Europe. And even in Europe, self-determination was often a *fait accompli* even before the allied discussions. Indeed, Cobban suggests that the triumphs of self-determination occurred before the cessation of hostilities, in a series of national movements made possible by the conditions of war.

Cobban does suggest that nationality is a dynamic concept, an indeterminate criterion. He posits that nationality cannot be an objective criterion if self-determination is to imply an element of choice.[47] To implement the principle of self-determination, Cobban explores the factor of common language, the vehicle of the plebiscite, or use of a team of experts.[48] Clearly, if self-determination implies an element of choice, the plebiscite is the most suitable vehicle. Cobban notes that in the process of national self-realization, it is impossible to avoid creating new minorities, and suggests that independence is only a matter of degree.[49]

Sarah Wambaugh has been involved in and has written extensively on the conduct of plebiscites. It is appropriate to turn to her works for a delineation of

---

A. RIGO-SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

[45] A. COBBAN, *supra* note 44, at 5.

[46] 2 R. BAKER & W. DODD, THE NEW DEMOCRACY: PRESIDENTIAL MESSAGES, ADDRESSES, AND OTHER PAPERS 187 (1926).

[47] A. COBBAN, *supra* note 44, at 21, 53, 61.

[48] *Id.* at 24-27.

[49] *Id.* at 23, 77.

the factors significant to the conduct of a "free and fair" plebiscite.

Upon examining and comparing the plebiscites held after World War I,[50] Wambaugh highlights various factors. One precept is the necessity for assuring the neutrality of the plebiscite area. The area must be free of foreign occupation during the voting. There must be no opportunity for military pressure during the plebiscite. Control of administration of the plebiscite should be by a neutral authority. The president of the plebiscite commission should not be a representative of one of the contending parties. Each commission should have full authority over laws and regulations regarding the conduct of plebiscites, for example, laws regarding freedom of association and public meetings.

Wambaugh stresses the importance of propaganda, and states that propaganda is not only a legitimate but a necessary part of a fair plebiscite. She considers the organization for registration and voting and suggests that communal committees, as registration authorities, should be composed of local people qualified to vote in the plebiscite, all parties being, insofar as possible, equally represented. She discusses suffrage qualifications both in terms of age and domicile, and suggests that registration may be the most reliable check on identity and the surest safeguard against false registration. All voting should be by secret ballot.

Additional factors should be considered. The factors include the wording of the ballot,[51] and the percentage necessary for approval.[52]

---

[50] S. WAMBAUGH, PLEBISCITES SINCE THE WORLD WAR 443-481 (1933).

[51] If, for example, the question allows the choice of joining one of two designated states, and not the choice of independence, then, arguably, the plebiscite might be deemed insufficient. However, this may not be conclusively presumed, for example, in a plebiscite endorsed by the General Assembly, the Northern Cameroons were given the choice of joining either the Federation of Nigeria, or the Republic of the Cameroon. Presumably the choices resulted from the particular circumstances of the people and their state of political and economic development. Both the General Assembly and the International Court of Justice approved the plebiscite, despite the absence of an independence option. 1963 I.C.J. 15.

[52] In two referenda held in Britain, for example, the 1975 referendum on continued British membership in the E.E.C., and the referendum for the devolution of Scotland and Wales held in 1979, a difference in the mode of computation significantly affected the outcome. In the E.E.C. referendum, a simple majority was required for approval. Thus, a vote of 58.4% in favor was sufficient for approval of the continuation of membership in the E.E.C. However, on the devolution issue, a vote of more than 40% of the registered voters was required for approval. Although the vote in Wales was 20.3% in favor of devolution, a vote in Scotland of 51.6% in favor was deemed insufficient for approval of devolution because the majority of those actually voting in favor of devolution did not constitute the requisite 40% of the registered voters. *Referendums: Three Nations*, THE ECONOMIST, March 10, 1979, at 20; *Don't Rig the Scottish Poll*, THE ECONOMIST, Feb. 4, 1978, at 21.

The principle is not directly applicable to the Micronesian plebiscites, because in most cases registration preceded the plebiscite by only a few months. The principle may be of significance in future Micronesian elections, depending on the method of registration chosen and the percentage

Given recent practice, it may be contended that the plebiscite is not necessary to self-determination. For example, in the Western Sahara Case,[53] the International Court of Justice acknowledged the vitality of the principle of self-determination, which it defined as the need to consider the freely expressed will of the people. The court referred to the explicit language of General Assembly Resolution 1541,[54] which appears to require that integration or free association should be realized as a result of the free and voluntary choice of the people expressed through informed and democratic processes. Self-determination, however, has not yet been implemented by way of plebiscite in the Western Sahara. Both Mauritania and Morocco have made claims to the Western Sahara. Algeria backed the Polisario independence movement. In 1976, the Polisario proclaimed the independence of the Western Sahara and the Sahara Arab Democratic Republic (SADR). In 1979, Mauritania withdrew from the part of the Western Sahara that it had formerly claimed. As of 1985, a referendum had not been conducted. The Polisario Front and Morocco continue their fighting in the area. As of July 1985, at least 62 states have announced their recognition of the Sahara Arab Democratic Republic.[55]

The plebiscite is often not utilized. Frequently, other means of self-determination are used. In West Irian, the Indonesian system of collective discussion and consensus—musjawarah—was employed instead of the plebiscite.[56] In Zimbabwe, the former British Crown Colony of Southern Rhodesia, elections were held under British supervision.[57] These examples may thus demonstrate

---

required for future approvals.

These examples demonstrate, however, the significance of the more general elements of the percentage required for approval, and the significance of not voting on an issue. In the Micronesian plebiscites, two contexts come to mind. First, in context of the Palauan plebiscite, where a 75% vote was deemed constitutionally required for approval. Second, in the context of the desired status in the event of disapproval of free association, because a close study of the results on these questions shows that, although those voting on the issue expressed a preference for a closer relationship with the United States in some instances, the number of people actually voting on the alternatives in the event of disapproval of free association was significantly less than the number of people voting on the issue of approval of the Compact. See *infra* section V(B) for a discussion of the first issue.

[53] 1975 I.C.J. 12.

[54] G.A. Res. 1541, *supra* note 27, at 29.

[55] 32 KEESING'S CONTEMPORARY ARCHIVES 34,203, 33,707 (1986); 31 KEESING'S CONTEMPORARY ARCHIVES 33,449, 33,955 (1985); 30 KEESING'S CONTEMPORARY ARCHIVES 32,821, 33,306 (1984); 29 KEESING'S CONTEMPORARY ARCHIVES 32,101 (1983).

[56] 15 KEESING'S CONTEMPORARY ARCHIVES 23,711 (1969); M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982); Sinha, *Has Self-Determination Become a Principle of International Law Today?*, 14 INDIAN J. INT'L L. 332, 352 (1974).

[57] Although elections were held to determine which parties and candidates were entitled to constitute the new government in Zimbabwe, the actual structure of the government was negotiated before the elections, in Britain, with representatives of all contending factions in attendance.

that the plebiscite is not necessary to the effective exercise of self-determination. However, it is submitted that, even if the plebiscite is not necessary to the exercise of self-determination, it is clearly sufficient, and constitutes a choice clearly expressing the will of the people concerned. In the instances where the plebiscite is utilized, a fairly accurate picture of the wishes of the people results. Additionally, people who have made a choice accurately reflected in a plebiscite are likely to accept the resulting state of affairs as one of their own choosing, and not as a state of affairs externally imposed. Therefore, when there is a desire to settle a situation by peaceful means, the plebiscite can be a suitable choice for self-determination.

The use of plebiscites has sometimes been disfavored. A plebiscite conducted in an area accustomed to traditional modes of decision-making may arguably become a tool to validate the result chosen by a colonial authority. The Micronesians, however, are politically knowledgeable in the ways of western democracy. The early plebiscites were conducted largely by the Micronesians. The later plebiscites were fully conducted by the Micronesians. The one attempt by the administering authority to change the wording of the ballot was frustrated by Micronesians by way of a sophisticated judicial challenge.[58] Thus, the wording of the ballot was in the hands of the Micronesians. Any requirement of more than a simple majority of those voting was imposed by Micronesians, and not by the administering authority.

It is not herein contended that a plebiscite is necessary to the exercise of self-determination. Instead, it is contended that self-determination realized by way of plebiscite nonetheless remains a means for a people to attain political autonomy in light of their freely expressed wishes.[59]

A. The Marianas Plebiscite

The Covenant for the Northern Mariana Islands was signed by United States and Marianas negotiators on February 15, 1975. It was unanimously approved by the Marianas District Legislature on February 20, 1975.[60] On April 10, 1975, the United States Secretary of the Interior issued a proclamation scheduling a plebiscite for June 17, 1975. The proclamation also set out the wording of the plebiscite ballot. A "yes" vote would be a vote for the Commonwealth as

---

26 KEESING'S CONTEMPORARY ARCHIVES, 30,165, 30,365 (1980).

[58] See *infra* note 82 and accompanying text for details of the Palauan judicial action.

[59] Kaur, *Self-Determination in International Law*, 10 INDIAN J. INT'L L. 479 (1970). *See also* R. EMERSON, *supra* note 21.

[60] Report of the United Nations Visiting Mission to Observe the Plebiscite in the Mariana Islands District, Trust Territory of the Pacific Islands, June 1975, 43 U.N. TCOR Supp. (No. 2) at 18, U.N. Doc. T/1771 (1976) [hereinafter UN Marianas Plebiscite].

set forth in the Covenant, and a "no" vote would be a vote against the Covenant with a remaining right to participate with the other districts of Micronesia in the determination of an alternative political status.[61]

In applying the foregoing guidelines, it is evident that the military presence of the administering authority was not a factor in the conduct of any of the Micronesian elections. The United States at present maintains virtually no troops in Micronesia, except for those in the Marshall Islands, and there the military is confined to a fairly discrete area. The most significant United States military presence in Micronesia is the provision of a thirteen person Civil Action Team generally engaged in the process of construction and infrastructural development; there is also a small Coast Guard Station in the Federated States of Micronesia. To date, military prospects concerning the Marianas remain only possibilities. The Marianas would look favorably upon the establishment of a military presence because of the economic benefit that would result. However, there is no immediate plan to develop United States bases in the Marianas.

In the Marianas, the plebiscite commissioner was a citizen of the administering authority. The advisory committee and the voter registration board were from the Northern Marianas.

The United Nations Trusteeship Council's visiting mission, sent to observe the plebiscite, noted that "[t]he visiting mission saw no sign of any improper intervention by the administration in the campaign and no complaints on this score were received. . . ."[62] From this statement, it may be concluded that the citizenship of the plebiscite commissioner did not result in any undue influence on the part of the administering authority on the conduct of the election.

Commenting on the use of propaganda, the visiting mission noted that the local press gave well-informed and broad coverage to the views of both the supporters and opponents of the Covenant. Free radio and television time were provided to both sides.

There were allegations that political education failed to focus on alternatives such as, for example, free association and independence.[63] The visiting mission concluded, however, that registration and suffrage were well handled. It was possible that domicile problems might have disenfranchised a few voters, but not in numbers large enough to have affected the outcome. Opponents of the Covenant suggested that the four month period between the signing of the Covenant and the holding of the plebiscite was too short, and the mission agreed that voters might have been better educated on the alternatives had the

---

[61] *Id.* at 24.

[62] *Id.* at 39.

[63] For a defense of this position, see generally Green, *supra* note 29; Metelski, *supra* note 29; Comment, *The Uncertain Status*, *supra* note 29; Comment, *International Law*, *supra* note 29; Note, *Self-Determination and Security*, *supra* note 29; Recent Developments, *Northern Marianas Covenant*, *supra* note 29.

education period been longer. It also noted that members of the Congress of Micronesia indicated that the plebiscite should have been held later, so that the plebiscite could follow the constitutional convention scheduled for all of Micronesia in July of the same year. Members of the Marianas Political Status Commission disagreed. The Mission concluded that the brevity of the campaign was unlikely to have appreciably affected the outcome.

Regarding the ballot options, it may be observed here that the choices presented to the Marianas voters allowed them to choose either the closer relationship of the Commonwealth, or continued negotiations with the rest of Micronesia for independence or free association. The vote in the Marianas was 78.8% in favor of the Covenant, 21.2% opposed to it.[64] The Covenant was therefore approved by plebiscite, a 50% vote having been deemed necessary for approval. It was subsequently passed by the United States Congress and signed by the President, and became effective United States law. Some portions of the Covenant will not be effective until all of Micronesia terminates its present status in relation to the United States.

B. *The Plebiscite in the Marshall Islands, the Federated States of Micronesia and Palau*

Shortly after the conclusion of the Marianas plebiscite, a constitutional convention called by the Congress of Micronesia resulted in a constitution for Micronesia. The constitution was signed by the official representatives to the constitutional convention in November 1975. The plebiscites were subsequently held in all areas seeking approval for the ratification of the constitution. The constitution was approved in Yap, Truk, Ponape and Kosrae. It was not approved in the Marshall Islands or Palau. The Marshalls and Palau broke away from the rest of Micronesia and adopted their own constitutions, and continued negotiating separately with the administering authority for termination of trusteeship status. Yap, Truk, Ponape and Kosrae became known as the Federated States of Micronesia.[65]

On November 17, 1980, a Draft Compact of Free Association was initialled by all three Micronesian governments and the negotiators of the administering authority. When President Reagan took office, a policy review was announced.

---

[64] U.N. Marianas Plebiscite at 34.

[65] Issue on the Trust Territory of the Pacific Islands, U.N. Department of Political Affairs, Trusteeship and Decolonization, (No. 16) at 20 (April 1980) [hereinafter UN Decolonization TTPI]. For additional information on the Federated States of Micronesia, see Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The* Otokichy *Cases*, 5 U. HAW. L. REV. 57 (1983).

After a delay, negotiations were resumed.[66] Some revisions were made to the Compact, and subsidiary agreements were concluded. The Compact and subsidiary agreements were signed by negotiators for Palau and the Federated States in 1982, and for the Marshall Islands in 1983.

United Nations observed plebiscites were held in all the relevant Micronesian entities.[67] Upon examining the plebiscites held in the Federated States and the Marshalls, it is clear that these plebiscites were conducted wholly by the entities themselves, with no interference by the administering authority.

In the Federated States, 79% voted in favor of the Compact. The second part of the ballot allowed the voters to express a choice of status in the event that the free association provided under the Compact was not approved. 73% of the voters favored independence in the event the Compact was not approved, and 27% favored a relationship with the United States other than free association.[68]

In the Marshall Islands plebiscite, which was similarly structured, 58% of the voters voted in favor of the Compact.[69] On part 2 of the ballot, 1,350 voters favored a relationship with the United States other than free association; 1,317 favored the Compact of Free Association without a section 177 agreement, and 474 voters favored independence.[70]

Thus, the Compact was approved in the Federated States by 79%, and in the Marshalls by 58%. In both cases, United Nations visiting missions observed, there was no interference by the administering authority. The entities had full authority and control over every aspect of the plebiscites, including voter regis-

---

[66] The Negotiations for the Future Political Status of the Trust Territory of the Pacific Islands, Office for Micronesian Status Negotiations, Washington, D.C. at 2 (November 1984).

[67] *See* Report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands, Trust Territory of the Pacific Islands, September 1983, 51 U.N. TCOR Supp. (No. 2) Doc. T/1865 [hereinafter UN Marshalls Plebiscite]; Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983, 51 U.N. TCOR Supp. (No. 1) U.N. Doc. T/1860 (May-June 1984) [hereinafter UN FSM Plebiscite]; Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1983, 50 U.N. TCOR Supp. (No. 3) Doc. T/1851 (May-June 1983) [hereinafter UN Palau Plebiscite].

[68] UN FSM Plebiscite, *supra* note 67, at 14-15.

[69] UN Marshalls Plebiscite, *supra* note 67, at 12-13.

[70] Under section 177 of the Compact, the Government of the United States accepted responsibility for compensating the citizens of Micronesia who suffered loss as a result of the nuclear testing program conducted by the United States in the Marshall Islands between June 30, 1946 and August 15, 1958. Under section 177, the United States government agreed to grant $150 million in settlement of these claims. There were some people in the Marshall Islands who were of the opinion that those suffering damage or loss could do better by bringing action in the courts of the United States. They objected that section 177 was in the nature of a release from liability under all claims. *See, e.g.*, Statement of Jonathan M. Weisgall, Legal Counsel to the People of Bikini Before the House Appropriations Subcommittee on Interior, 99th Cong., 1st Sess. 1245 (1985).

tration, propaganda, wording of the ballot, voting and tabulation of the results.

The situation in Palau was a little more complex. Article XIII, section 6 of Palau's constitution prohibits the use, testing, storage or disposal of harmful substances, such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and nuclear waste material within Palau without the express approval of three-quarters of the voters in a referendum. Article II, section 3 makes similar provision for a treaty, compact or other agreement regarding those substances and facilities, and requires approval by three-quarters of the voters and two-thirds of Palau's legislature.[71]

Therefore, the wording of the questions in Palau's ballot presented some problems. The first part of the ballot invited an affirmative or negative vote on the Compact. The third part of the ballot allowed voters to choose between a closer relationship with the United States, or independence, in the event of disapproval of the Compact. The second part of the ballot was concerned with the constitutional provisions set out above, and was initially drafted to read as follows, after its enactment by Palau's legislature:

> Do you approve of the agreement concerning radioactive, chemical and biological materials concluded pursuant to section 314 of the compact of free association?[72]

The ballots were, however, initially printed with the following wording after representations by the administering authority:

> Do you approve the agreement under section 314 of the compact which places restrictions and conditions on the United States with respect to radioactive, chemical and biological materials?[73]

There was some concern among Palauans that the question as restated might have the potential to mislead voters. They believed that the provisions of the Compact were actually less restrictive than the provisions of the Palauan constitution on the nuclear issue.[74] Days before the election was scheduled, a successful suit brought before the Palauan courts by one Palauan faction resulted in the adoption of the wording originally proposed by the legislature.[75] The results of the ensuing plebiscite were as follows: 61.4% in favor of the Compact, 51.3%

---

[71] The Marshall Islands constitution contains a similar provision. It can be overridden, however, by the Marshall Islands government absent a plebiscite. Palau's constitution is reprinted at 48 U.N. TCOR Sess. Fascicle at 2 (11 May-11 June 1981). For a discussion of the history of Palau's constitution, see Meller, *Palau's Constitutional Tangle*, 15 J. PAC. HIST. 74 (1980).

[72] UN Palau Plebiscite at 20.

[73] *Id.*

[74] The relevant provisions of Palau's constitution can be compared with the provisions of the Compact.

[75] UN Palau Plebiscite, *supra* note 67, at 21.

in favor of the section 314 agreement. In the event of non-approval of the Compact, 24.8% favored independence, and 31.1% favored a closer relationship with the United States. However, 43.9% of the ballots were blank as to proposition two.[76]

The visiting mission concluded that Palau had approved the Compact, but that the Compact could not enter into force because of an insufficient percentage of votes on the second question.[77] After due reflection, both the administering authority and Palau reached similar conclusions.

In September 1984, a second referendum was held in Palau on the nuclear issue. This time, the vote was approximately 66% in favor of the full Compact, including the nuclear provision. The requisite 75% was thus not attained.[78]

In September 1985, United States and Palauan negotiators concluded an agreement, referred to as an executive agreement by the United States, and a treaty by Palau. Palau's new President, Lazarus Salii, claims that the Palauan constitution does not prohibit the concession of transit rights to the United States. The treaty allows the ships and planes of the administering authority to enter Palau without disclosing whether they carry nuclear material. In return, the administering authority agrees not to use, test, store or dispose of nuclear material in Palau.[79] A third plebiscite, observed by the United Nations, was held in Palau on February 21, 1986. The vote was 72.2% in favor of the Compact as revised. The government of Palau has certified that the Compact was approved in the February 21st referendum.[80]

While Palau was in the process of negotiating an acceptable resolution consistent with its constitution, approval of the Compact proceeded in accordance with the constitutional processes of the administering authority, in relation to the Marshall Islands and the Federated States. President Reagan submitted the Compact for the Marshalls and the Federated States to the United States Congress. Congress approved the Compacts in the form of a joint resolution. However, changes in the tax and tariff provisions of the Compact were made. It is likely that the Federated States and the Marshalls will approve the modified Compact without deeming another plebiscite to be necessary, as the major provisions of the Compact are intact, including provisions regarding sovereignty

---

[76] *Id.* at 32-33.

[77] *Id.* at 38.

[78] Takeuchi, *The Presidential Problem in Palau*, PAC. ISLANDS MONTHLY, November 1984, at 33.

[79] Honolulu Sunday Star-Bull. & Advertiser, Aug. 18, 1985, at J3, col. 1; Honolulu Star-Bull., Nov. 25, 1985, at A9, col. 1. On the possible significance of the difference between a treaty and an executive agreement, see *infra* note 91 and accompanying text.

[80] Letter from Howard Hills, Legal Advisor, Office for Micronesian Status Negotiations, Washington, D.C. to the author (Feb. 25, 1986).

and financial assistance.[81] President Reagan signed the Compact on January 14, 1986. The wording of Congressional approval leaves room for Palau to be included within the scope of the Compact as passed by Congress.

There may be additional difficulties in the way of implementation of Palau's Compact. On May 20, 1986, opponents of the Compact sought a ruling that a 75% vote was necessary for approval of the Compact. On July 10, 1986, the Palauan trial court granted summary judgment on that issue for the plaintiffs. The Supreme Court of the Republic of Palau affirmed the trial court's decision on September 17, 1986 by holding that a 75% vote was necessary for approval.[82] Another plebiscite was scheduled in Palau in December 1986 for the approval of the Compact.[83]

Since it is likely that the Compact will soon be fully effective between the United States and the Micronesian nations, the next section of this paper will consist of an examination of the terms of the Compact and a comparison of the provisions of the Marianas Covenant, in the light of the substantive choices, or substantive limitations (if any) under international law.

---

[81] Letter from Howard Hills, Legal Advisor, Office for Micronesian Status Negotiations, Washington, D.C. to the author (June 13, 1986). The same Palauan faction that challenged the wording of the plebiscite ballot has mounted a challenge to the approval in the Palauan courts. See *infra* note 82 and accompanying text. The Palauan Compact has been submitted to Congress for approval.

[82] The Supreme Court of the Republic of Palau held as follows:

> We find that the government of Palau may not agree to operation of nuclear propelled vessels in Palauan waters without prior approval of "three-fourths of the votes cast in a referendum submitted on [the] specific question" in accordance with the provisions of article XIII, section 6 of the Constitution.

Gibbons v. Salii, Appeal No. 8-86, slip op. at 22 (Palau Sept. 17, 1986).

> We hold that the Compact has not been properly approved because the "specific question" required by article XIII, section 6 for the language of section 324 has not been presented to the voters. Moreover, fewer than three-fourths of the votes in the referendum were cast in favor of the Compact. This lack of required approval for section 324 means that the Compact is not a valid agreement of the Republic of Palau.

Gibbons, slip op. at 24-25.

The court further held:

> There being no dispute over the facts that the Compact received only 72.19% of the vote and that the requisite [sic] specific question(s) concerning the relevant provisions were not submitted to the voters, the trial court was correct in holding that Plaintiffs are entitled to [summary] judgment on Count 1 as a matter of law.

Gibbons, slip op. at 27.

[83] *See* Official Ballot, Republic of Palau, Referendum on the Compact of Free Association, Dec. 1986.

VI. The Choice of the Form of Future Political Status and the Exercise of Self-Determination

Self-determination is mentioned twice in the Charter of the United Nations. In article 1(2), among the principles of the United Nations is: "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." The principle of equal rights and self-determination of peoples also appears in article 55, in context of the basis of economic and social cooperation.

The General Assembly has on numerous occasions reaffirmed the principle, and has enlarged upon or given content to the principle. Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples,[84] is in the form of an authoritative interpretation of the Charter rather than a recommendation, and states: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Resolution 2625 (XXV) is one of numerous other resolutions reiterating and developing the content of the principle.[85]

It is, of course, acknowledged that General Assembly Resolutions are not in and of themselves binding on states. State practice, repetition over time, and acknowledgement by states of the binding character of the principle may establish a principle stated in a resolution as a rule of customary international law.[86]

It has been suggested that the scope and application of the principle are too imprecise to establish that it goes beyond the realm of *lege ferenda*.[87] Arguably, to deny the possibility of acknowledging self-determination as *lex lata* simply on the basis of perceived imprecision of application might well result in consigning many of the norms of international law to the same fate. Furthermore, there may be a basic distinction to be drawn between the existence of the right of self-determination and the scope of its application.[88] The right may exist even if the situations to which it is applicable, and the extent of that applicability, may not always be clear.

Rosalyn Higgins suggests, "[i]t therefore seems inescapable that self-determi-

---

[84] G.A. Res. 1514, *supra* note 27, at 66; G.A. Res. 1541, *supra* note 27, at 29.

[85] G.A. Res. 2625, *supra* note 40, at 121.

[86] *See* I. Brownlie, Principles of Public International Law 8 (3rd ed. 1979); J. Brierly, The Law of Nations 60 (5th ed. 1955). *See also* North Sea Continental Shelf Cases, 1969 I.C.J. 3 (boundaries on continental shelf between the Federal Republic of Germany, the Netherlands, and Denmark); The S.S. Lotus Case, 1927 P.C.I.J. Ser. A, No. 10 (France v. Turkey).

[87] *See* M. Pomerance, *supra* note 56.

[88] *See, e.g.*, J. Crawford, The Creation of States in International Law 98 (1979).

nation has developed into an international legal right."[89] Higgins goes on to explain that "the 1960 Declaration . . . taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination."[90]

In the Namibia Opinion, the International Court of Justice observed that "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."[91] In his separate opinion in the Western Sahara Case, Judge Dillard stated: "The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations."[92]

Assuming that the existence of the right of self-determination has been established, who is entitled to exercise it? Although the scope of application of the right may not be clear in every instance, trust territories under the United Nations Charter have the explicit right to the exercise of self-determination. The administering authority's obligations include, pursuant to article 76(b), the obligation to promote the political, economic, social, and educational advancement of the inhabitants of the trust territory, their progressive development towards self-government or independence.

Thus, the administering authority in this instance has the explicit obligation to promote the political advancement of the Micronesians and their progressive development towards self-government. In addition, the Trusteeship Agreement, in article 6, states:

> In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:
> 1. Foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the people concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; shall give due recognition to the customs of the inhabitants in providing a system of law for the Territory; and shall take other appropriate measures toward these ends.[93]

---

[89] R. HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 103 (1963). *See also* Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

[90] R. HIGGINS, *supra* note 89, at 104.

[91] 1971 I.C.J. 6, 31.

[92] 1975 I.C.J. 12, 121.

[93] 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

The United States is thus charged with leading the peoples of Micronesia toward self-government or independence, and that obligation must be fulfilled in accordance with the freely expressed wishes of the people. In light of the cultural diversity of the area, the United States had little choice but to negotiate the four agreements in accordance with the freely expressed wishes of the Micronesian peoples regarding the "selves" or nations that they had chosen as their negotiating units.[94]

What are the contours of the right of the Micronesian peoples—the factors, if any, that circumscribe their choices? We can look to the General Assembly Resolutions on the subject at least for guidance, in attempting to ascertain what limitations, if any, may in principle be placed on the choices available.

General Assembly Resolution 1514 (XV)[95] only addresses independence. Resolution 1541 (XV),[96] sets out three possibilities for the form of self-determination: independence, free association with an independent state, or integration with an independent state.

Resolution 1541 (XV) is limited to the transmission of information to the General Assembly on non-self-governing territories to which Chapter XI of the Charter is applicable. Arguably, Micronesia as a trust territory is subject to the provisions of Chapters XII and XIII of the Charter, and therefore does not come within the scope of Chapter XI. Presumably, the Trusteeship Council thought this was the case when it ceased to transmit information to the General Assembly regarding Micronesia, following the termination of the trusteeship for Papua New Guinea.[97] The Council, acknowledging that Micronesia, the last remaining trust territory, and a strategic area trust, was solely the concern of the Security Council and was not therefore within the sphere of concern of the General Assembly, as would be the case with a non-strategic area trust or a non-self-governing territory to which Chapter XI is applicable. Therefore, Resolution 1541 (XV) may not be dispositive of the applicable limitations, but it can still be referred to for guidance in setting out possible future choices for Micronesia.

Resolution 1541 (XV) does not set out the requisites for independence. An earlier General Assembly Resolution, 742 (VIII),[98] sets out the factors indica-

---

[94] For the contrary view, see generally D. MCHENRY, *supra* note 3; Green, *supra* note 29; Metelski, *supra* note 29; Comment, *The Uncertain Status*, *supra* note 29; Comment, *International Law*, *supra* note 29; Note, *Self-Determination and Security*, *supra* note 29.

[95] G.A. Res. 1514, *supra* note 27, at 66.

[96] G.A. Res. 1541, *supra* note 27, at 29.

[97] UN Decolonization TTPI, *supra* note 65 at 38, n.138.

[98] G.A. Res. 742, 8 U.N. GAOR Supp. (No. 17) at 21, U.N. Doc. A/2630 (1953). See *infra* notes 123-134 and accompanying text for a discussion regarding traditional standards for independence and the evolution of those standards. *See also* I. BROWNLIE, *supra* note 86, parts II & III.

tive of independence, including treaty making authority, and international responsibility, eligibility for membership in the United Nations, the right to provide for national defense, freedom to choose an internal form of government free from external control, and complete autonomy in economic, social and cultural matters.

Arguably, the relationship that all of Micronesia has chosen, except for the Marianas, is independence. Under the Compact, all the factors set out above are satisfied, if the defense provisions negotiated with the United States can be regarded as offering a choice to Micronesia in the exercise of its right to provide for national defense, to conclude a treaty of defense with the United States. President Salii of Palau is apparently of this opinion, since he calls the Compact, as amended, a treaty. According to the Vienna Convention on Treaties, a treaty is essentially concluded between states; therefore, Palau must be an independent state to have full treaty making powers.[99]

The factors indicative of free association, pursuant to Resolution 1541 (XV), are: (1) free and voluntary choice of the people of the territory through informed and democratic processes; (2) respect for the individuality and the cultural characteristics of the territory and its peoples; (3) freedom to modify the chosen status through the expression of will by democratic means and through constitutional processes; and (4) the right to determine its internal constitution.

It is likely that factors indicative of free association will be deemed to have been satisfied in the context of the Compact for Micronesia. The requirements that there be choice and internal sovereignty are unquestionably satisfied. Respect for cultural characteristics is better satisfied by separate status for the Marianas, given the cultural differences. Approximately three-quarters of its people are Chamorros, ethnically and culturally distinct from the Carolinians, who comprise the majority in the rest of Micronesia. Freedom to modify the status is also provided for in the Compact, although in instances of unilateral termination, the financial assistance and defense provisions continue. As Palau's president suggests, however, these may be deemed to be in the nature of treaty provisions, providing for voluntary and partial relinquishment of sovereignty; Micronesia, for its part, would be very reluctant to dispense with the financial assistance provisions of the negotiated Compact.

Integration is not at issue in the case of Micronesia, apart from the Marianas. Palau, the Marshalls, and the Federated States have apparently set themselves on the road to independence. In the case of the Marianas, it is open to question whether the status it has chosen is one of free association or integration. The Marianas have clearly chosen a permanent relationship with the United States.

---

[99] U.K. Treaty Series No. 58 (1980), Cmnd. 7964. *See* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 29 (2nd ed. 1984); A. MCNAIR, THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS 137-45 (1938).

Its relationship is modelled after Puerto Rico, and although Puerto Rico has attained Commonwealth status, the Spanish version of Puerto Rico's status might more accurately be translated as "free association."[100] In addition, the United Nations has considered Puerto Rico as an instance of free association.[101]

Since the Marianas have chosen a permanent relationship with the United States, it is necessary to consider the factors indicative of integration. Under the terms of Resolution 1541 (XV), integration should be on the basis of complete equality between the peoples of the Marianas and those of the United States. This equality should include equal rights of citizenship, equal guarantees of fundamental rights and freedoms, equal representation and participation at all levels of government. Integration should come about only in circumstances where advanced self-government and capacity for responsible choice, and evidence that the wishes of the people have been freely expressed, exist.

Arguably, the Marianas have achieved integration, and in so doing have substantially satisfied the factors set out in Resolution 1541 (XV). The integration is on an equal basis in regard to the rights of citizenship and guarantees of fundamental rights and freedoms. Although the Marianas have full internal self-government on a level comparable to the self-government of any state of the United States, they do not have representation in the United States Congress with full voting rights. The Marianas, however, have greater powers than states of the United States in some respects. For example, the Covenant allows the Marianas to restrict alienation of land to those of Northern Marianas descent. Since it is necessary to provide fundamental rights and freedoms to all citizens of the United States in the states of the United States, no state of the United States can retain such a power. And, given the privileges and immunities clause of the United States Constitution, if the Marianas chose to and acceded to "statehood" as a state of the United States, thus gaining voting representation in the United States Congress, it is likely that the Marianas would have to forego the privilege it has reserved to itself in expressly limiting ownership of land to those of Marianas descent. This right is a significant one from the Marianas perspective, so much so that it has been written into the Marianas constitution.

Although the factors set out in Resolution 1541 (XV) provide some general guidance, in light of its potential inapplicability to the Micronesian situation, it is submitted that the parameters of that right have not been exclusively or exhaustively set out in Resolution 1541 (XV). Indeed, the form that self-determination should take must be a flexible one, to accommodate the particular circumstances of each determination.

---

[100] A. LEIBOWITZ, COLONIAL EMANCIPATION IN THE PACIFIC AND THE CARIBBEAN 54 (1976).

[101] For a discussion of the status of Puerto Rico, see, e.g., Cabranes, *The Status of Puerto Rico*, 16 INT'L & COMP. L.Q. 531 (1967).

Resolution 2625 (XXV) acknowledges the need for this flexibility, and the possibility of tailoring the form to suit particular situations, in its explication of the right.[102] Micronesia, apart from the Marianas, could be deemed to fit into either of two categories: independence or free association. The Marianas situation is arguably one of either free association or integration. Both choices are clearly political choices freely determined by the people.

A. The Compact

The Compact of Free Association in the form in which it was passed by the United States House of Representatives and the Senate and signed by the President is explicitly applicable only to the Marshall Islands and the Federated States of Micronesia.[103] The joint resolution does approve, in principle, Palau's Compact text as published on November 14, 1985, and states that Palau's Compact shall take effect upon certification of approval by plebiscite, and the enactment of a Congressional joint resolution.[104]

Articles I and II of Title One of the Compact itself, Governmental Relations, states that the Marshalls and the Federated States have full internal and external self-government. The acknowledgement of internal self-government is largely an acknowledgement of a pre-existing state of affairs. Article III states that the peoples, acting through the Governments established under their respective Constitutions, are self-governing.

Section 121 sets out the external governmental capacity of the Micronesian nations, including the capacity to conduct foreign affairs and the capacity to enter into treaties and other international agreements. Section 127 states that all obligations, responsibilities, rights and benefits of the United States as administering authority are terminated.

Article IV of Title One allows Micronesians to work and reside in the United States. Article V provides for Micronesian representatives in the United States.[105] Article VI provides for environmental protection and allows the Mi-

---

[102] G.A. Res. 2625, *supra* note 40, at 121.

[103] *See supra* note 28. The Compact of Free Association as applicable to the Marshall Islands and the Federated States of Micronesia comprises Title II of Public Law 99-239, was passed by Congress, and signed by the President on January 14, 1986. Palau's Compact, approved in the referendum of February 21, 1986, was transmitted to Congress on April 9, 1986. Letter from Howard Hills, *supra* note 78.

[104] Compact of Free Association, *supra* note 28, tit. 1, art. V, § 501.

[105] Article V provides, inter alia, as follows:

"The Government of the United States and the Government of the Marshall Islands or the Federated States of Micronesia may establish and maintain representative offices in the capital of the other. . . ." *Id.* § 151. "The premises of such representative offices and their archives wherever located, shall be inviolable." *Id.* § 152(a). Immunity from search and seizure is provided for,

cronesian governments access the United States courts for this purpose. Article VII on General Legal Provisions states that the application of laws of the United States in Micronesia ceases as of the effective date of the Compact. Other provisions of that article concern judgments and finality of judgments, and compensation for nuclear testing.[106]

Title Two of the Compact sets out the Grant Assistance Provisions. As an example of the financial benefit to the Marshalls and the Federated States, the two nations in the first year of the Compact will together receive $127.8 million. This figure is exclusive of other assistance programs, such as the assistance of the United States Weather Service, the United States Postal Service, and the Federal Aviation Administration. The figure does include $10 million in "once only" grants that will not continue over the life of the Compact. By comparison, in 1982 the United States, as administering authority of the trust territory, spent $119.9 million on the whole of the trust territory, including not only the Marshall Islands and the Federated States, but also Palau.[107] Article Two also provides for negotiations in the thirteenth year regarding provisions that terminate in the fifteenth year. Among these are the provisions for financial assistance.

Articles V and VI of Title Two concern Trade and Finance and Taxation. These provisions are of interest because they are the only provisions that the United States House of Representatives significantly disagreed with, and proceeded to amend, not by amending the Compact itself, but by appending interpretative provisions to the legislation in the form of a Title IV.

The Compact provides that the Marshalls and the Federated States shall not be included within the customs territory of the United States, and that for the

---

and also, "[o]fficial communications in transit shall be inviolable and accorded the freedom and protections accorded by recognized principles of international law to official communications of a diplomatic mission." *Id.* Resident representatives of a government "shall not be liable to arrest detention pending trial, except in the case of a grave crime and pursuant to a decision by a competent judicial authority, and such persons shall enjoy immunity from seizure of personal property, [and] immigrations restrictions. . . ." *Id.* § 152(b).

"The assets of the sending Governments are exempted from direct tax, except for tax for specific goods and services, and resident representatives of a Government shall enjoy the same taxation exemptions as are set forth in Article 34 of the Vienna Convention on Diplomatic Relations." *Id.* § 152(c), (d). The provisions of the Compact are not, in every instance, the same as those under the Vienna Convention on Diplomatic Relations. For example, see article 31 of the Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, regarding immunity from criminal jurisdiction.

For the significance of diplomatic relations, from which the representation provided for in the Compact might well be distinguished, see *infra* notes 123-134 and accompanying text.

[106] Compensation for nuclear testing is a subject that deserves to be explored. It is, however, beyond the scope of this limited work. *See, e.g., supra* note 70 on the testing issue.

[107] MICRONESIAN SEMINAR, *supra* note 3.

purpose of assessing duties on products exported from Micronesia and imported into the United States, the Marshalls and the Federated States shall be treated as insular possessions of the United States. The House of Representatives disagreed, and in its interpretative provisions, deemed the treatment to be accorded to imports to be comparable only to that accorded to imports of eligible developing countries under the system of preferences.

The provisions of section 251 allow the Micronesian nations to use United States currency, but also allow them to institute the use of another currency if they so choose. Section 253 provides for the exemption from United States income tax of citizens of the Marshall Islands and the Federated States domiciled therein. The House deemed that this provision should not apply. Section 245(b) provides for an exemption from estate, gift, and "generation-skipping" transfer taxes of the United States. The House decided that 245(b) would apply only to non-residents and non-citizens of the United States.

Section 254(a) provides that if the governments of the Marshalls and the Federated States decide to impose an income tax upon a resident of those jurisdictions who resided within them for more than half the year, that resident would be relieved of liability for taxes to the government of the United States. The provision was also applicable to income derived from sources outside the Micronesian jurisdictions. The House nullified the effect of this provision, except for already existing exclusions, for example, the foreign tax credit.

Section 255 states that, when not otherwise manifestly inconsistent with the Compact, provisions of the United States Internal Revenue Code applicable to possessions of the United States shall be treated as applying to the Marshalls and the Federated States. This section also sets out procedures to be followed in the event of amendment, modification or repeal of the applicable provisions of the Internal Revenue Code. The House interpreted section 255 as a provision extending the benefits of section 936 of the Internal Revenue Code of 1954 to Micronesia. Section 936 provides for a tax credit for United States corporations in Puerto Rico and other specified areas of the United States. Section 936 states that if a United States corporation chooses to be taxed according to the terms of section 936, the taxable income received from the conduct of a trade or business by the corporation within one of the specified areas shall be a credit against any income tax payable by that corporation. The House therefore explicitly provided for the application of section 936 to the Marshalls and the Federated States, with the result that United States corporations in these nations will be eligible for the credit allowed by section 936. The House also clarified the amendment and termination procedures.

The reason for the amendments, the interpretative provisions, by the United States House of Representatives, as concurred in by the United States Senate in the form of the joint resolution as finally passed, was the fear that wealthy United States individuals and corporations would take advantage of these Com-

pact provisions and relocate themselves in Micronesia in order to escape substantial United States taxes.[108] The motive of the Micronesian nations in insisting on these tax and trade provisions was to encourage the flow of private United States funds and investment into Micronesia. On reflection, it is highly unlikely that the retention of these provisions would have had a significant negative impact on United States Internal Revenue collections. It might well have fostered positive ties between Micronesia and United States individuals and businesses. One of Micronesia's complaints about the United States administration of the territory has been that, although the United States contributed significantly to the current operations of the Micronesian entities—both in the form of subsidizing a sizeable government operation employing a large number of Micronesians and in the form of welfare programs and educational opportunities—the United States nonetheless has failed to foster the economic development of the islands. The allowance of the tax benefits proposed in the Compact would have probably resulted in the expansion of economic development in Micronesia by the United States private sector, a result that might not be incompatible with the views of the United States executive. While modifying the individual tax benefit provisions, however, the Congress did allow some tax benefit to corporations, comparable to the benefit enjoyed by corporations in Puerto Rico.

Title Three of the Compact deals with security and defense relations, and section 311 grants to the United States full authority and responsibility for security and defense matters. It includes the obligation to defend the Marshall Islands and the Federated States of Micronesia, the option to foreclose access by the military forces of any third country, and the option to establish and use military areas and facilities in the islands.

Section 314 of Title Three concerns hazardous material, the very subject of Palau's concern. That section states that, unless otherwise agreed, the United States shall not test by detonation or dispose of any nuclear weapon, or test, dispose of or discharge any toxic chemical or biological weapon, or any radioactive toxic chemical or biological materials in an amount or manner which would be hazardous to public health or safety.

That section further states that, unless otherwise agreed, except for transit or overflight, or in times of declared national emergency or war, or as necessary to defend against actual or impending attack, the United States shall not store in the Marshalls or the Federated States any toxic chemical materials intended for weapons use.

Title Three also allows the United States to invite members of the armed forces of other countries to use its military facilities, and sets out a separate

---

[108] CONG. Q., July 27, 1985, at 1478; Honolulu Star-Bull., Aug. 31, 1985, at A2, col. 1; Honolulu Star-Bull., Nov. 20, 1985, at A18, col. 1.

dispute resolution mechanism for the security and defense provisions of the Compact. Section 351 of the Compact directs the administering authority and the negotiating governments to establish a joint committee which would meet to consider any disputed issues.

Title Four of the Compact is titled General Provisions. Section 411 of that title is concerned with the approval of and effective date of entry into force of the Compact and requires mutual agreement between governments, approval by the Micronesian governments in accordance with their constitutional processes, a plebiscite, and approval by the United States in accordance with its constitutional processes. Section 412 sets out the plebiscite procedure:

> A plebiscite shall be conducted in each of the Marshall Islands and the Federated States of Micronesia for the free and voluntary choice by the peoples of the Trust Territory of the Pacific Islands of their future political status through informed and democratic processes. The Marshall Islands and the Federated States of Micronesia shall each be considered a voting jurisdiction, and the plebiscite shall be conducted under fair and equitable standards in each voting jurisdiction. The Administering Authority of the Trust Territory of the Pacific Islands, after consultation with the Governments of the Marshall Islands and the Federated States of Micronesia, shall fix the date on which the plebiscite shall be called in each voting jurisdiction. The plebiscite shall be called jointly by the Administering Authority of the Trust Territory of the Pacific Islands and the other Signatory Government concerned. The results of the plebiscite in each voting jurisdiction shall be deemed by a majority of the valid ballots cast in that voting jurisdiction.[109]

Section 421 concerns dispute resolution for all parts of the Compact except for security and defense matters.

Section 431 allows amendment by mutual agreement. Section 441 allows termination by mutual agreement, in which instance section 451 provides that economic assistance shall continue on mutually agreed terms. Section 442 addresses termination by the United States, in which case, pursuant to section 452 some provisions of the Compact, including provisions regarding economic assistance and security and defense provisions remain in force. Section 443 concerns termination by the Marshalls or the Federated States, and sets out procedures for termination. Section 453 provides that in the event of termination, some provisions, including the economic assistance and security and defense provisions, remain in effect.

The Compact, a product of more than fifteen years of negotiations, appears to satisfy the interests of all parties. Although the Compact effectively grants independence to the Micronesian nations, with the delegation of security and defense matters to the United States, the United States prefers to call the docu-

---

[109] Compact of Free Association, *supra* note 28, tit. 3, § 412.

ment a Compact of Free Association. The United States may be reluctant to let its charges grow away from it and may well be dismayed because the Marshalls, the Federated States and Palau have chosen not to be a permanent part of the United States family. However, it appears that these Micronesian entities are well on the road to independence, and whether the relationship is called independence or free association, it is in substance a relationship freely chosen. Although the Compact will soon be fully effective under United States domestic law, the termination of the trusteeship would do much to enhance Micronesia's economic status and potential in an international context. The fragmentation of the Micronesian nations into the Federated States of Micronesia, the Marshall Islands and Palau was a conscious, freely expressed choice, and it is in the nature of a *fait accompli*. To go backwards would be difficult, if not impossible. Any state choosing to oppose the termination of the trusteeship will hinder the Marshalls, the Federated States and Palau in their attempts to achieve a place in the community of nations.

What of the status that the Marianas have chosen, however? How does it compare to the status negotiated by the rest of the Micronesian entities? Apart from the delegation of external sovereignty to the United States, and the absence of an explicit termination provision, the Covenant of the Northern Marianas compares more than favorably to the Compact negotiated by the rest of the Micronesian entities. Indeed, the Marianas, as will be seen, have negotiated an exceptionally good deal for themselves, not only in comparison to the rest of Micronesia, but also compared to the rest of the United States.

B. The Marianas Covenant

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed by United States and Marianas negotiators, passed unanimously by the Marianas Legislature, approved by the people of the Marianas in a United Nations observed plebiscite, passed the United States Congress in the form of a joint resolution, and was signed by the President of the United States.[110] The Covenant is thus fully effective domestic legislation in the United States. However, the Covenant states that it will not become effective until termination of the Trusteeship; thus, the Marianas are also anxious to see the Trusteeship terminated.[111]

Section 101 of the Covenant specifies that the Northern Mariana Islands, upon termination of the Trusteeship Agreement, will be a self-governing Commonwealth in political union with and under the sovereignty of the United

---

[110] Pub. L. No. 94-241, 90 Stat. 263 (1976).

[111] Northern Marianas Covenant, *supra* note 29, art. X, § 1002.

States. The terms of the Covenant grant to the people of the Northern Marianas full internal self-government in accordance with a constitution of their own adoption.[112] The United States has full responsibility for foreign affairs.[113] Upon termination of the Trusteeship Agreement, the people of the Northern Marianas will be citizens of the United States, with the option, individually, to become nationals instead of citizens if they so choose.[114] The laws and constitution of the United States may be applied to the Northern Marianas, as set out in the negotiated Covenant.[115] For example, laws regarding federal services and assistance programs, banking laws, public health and social security laws are applicable to the Marianas. In contrast, laws regarding coastal shipping and minimum wage laws are not. These selected provisions will allow the Marianas to benefit from federal services and assistance programs, while also allowing it to benefit from foreign trade and the possibility of producing goods at lower cost due to the exemption from wage and hour laws. Provision is made for a commission, after termination of the Trusteeship Agreement, to examine United States laws and recommend those that should be applicable to the Marianas. The text of the applicable provision, section 504, directs the President of the United States to appoint the members of the commission. The commission is to consist of seven people. At least four must be citizens of the trust territory, resident in the Marianas for at least five years at the time of the appointment.

The Marianas are subject to United States income tax laws in the same manner as is Guam. The Marianas may also impose local taxes.[116] The Marianas will not be included in the customs territory of the United States and may impose duties on imports and exports. The United States must treat goods from the Marianas as favorably as those imported from Guam.

Funds attributable to the Marianas shall be held in trust in the Northern Marianas Islands Social Security Retirement Fund, and administered by the United States. The United States must supplement these funds if necessary, to assure benefits comparable to those received under the Trust Territory Social Security Retirement Fund.[117]

The economic assistance provisions of the Covenant provide that as of 1977, the Marianas will have received $14 million annually, as well as the full range of federal programs and services made available to territories of the United States. The initial grant assistance figure will have been adjusted for inflation, and will have been reviewed at the end of seven years, but will continue at the

---

[112] *Id.* art. II, § 103.

[113] *Id.* art. II, § 104.

[114] *Id.* art. III.

[115] *Id.* art. V.

[116] *Id.* art. VI, § 601(a). *See also* Liebman, *Income Tax Incentives for Investment in the Northern Mariana Islands*, 2 U. HAW. L. REV. 389 (1981).

[117] *Id.* art. VI, § 606.

levels provided unless Congress appropriates a different amount. For fiscal year 1986, for example, Interior requested $30.6 million for the Marianas. This figure included a request for $27.7 million calculated under the Covenant formula.[118] This figure does not include funding for the array of federal services and programs.

In addition, all customs duties, income taxes derived from the Northern Mariana Islands, all taxes collected by the United States on articles produced in the Marianas, and the proceeds of any other tax which Congress may levy on the inhabitants of the Marianas, must be paid into the treasury of the government of the Marianas.[119] This is not an unfavorable provision. While individual states of the United States may levy their own taxes, they have no automatic right to the return of all taxes levied by the United States government in their jurisdictions. This provision clearly grants more than equal treatment to the Marianas. It may also be recalled that provisions with somewhat similar effects were disapproved for the Marshall Islands and the Federated States, in Congressional consideration of the Compact.

The Marianas were also able to negotiate a favorable resolution concerning property owned by the United States in the Marianas. The Covenant provides for the vesting of title to all property of the United States in the Marianas, but it does provide that a lease be granted to the United States of lands required for the future possibility of establishing military facilities. The United States will pay approximately $20 million for a term of 50 years; an option for a second 50 year term is included.[120] Because the United States has no immediate plans for military construction, part of the land will be leased back to the Marianas, and the $2 million received by the United States from the lease to the Marianas will be used for development and maintenance of a park on the leased property.

It is interesting to compare the Marianas situation in regard to land with the agreement negotiated by the Marshalls and the Federated States regarding lands held by the administering authority. Pursuant to section 234 of the Compact of Free Association for the Marshalls and the Federated States, the United States government must turn over to these entities property to which it has title in these entities, except for property for which the United States determines that it has a continuing requirement.

Thus, in the Marianas, the United States has granted all property to which it has title in the Marianas to the Commonwealth of the Marianas. In the rest of Micronesia, the United States has retained the property for which it has a perceived need. In return, Micronesians have received a generous financial assis-

---

[118] Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 99th Cong., 1st. Sess. at 5 (1985).

[119] Northern Marianas Covenant, *supra* note 29, art. VII, § 703(b).

[120] *Id.*

tance package. They do not automatically receive, in addition to the financial assistance, all of the property of the United States in their jurisdictions.

The provisions regarding alienation of land are also favorable to the Marianas. The Covenant states:

> [T]he Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency: ". . . will until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent. . . ."[121]

In the Marianas, the United States may exercise the power of eminent domain "to the same extent and in the same manner as it has and can exercise the power of eminent domain in a State of the Union."[122] The United States agrees first to seek to acquire land through purchase, lease, exchange and in the event it does exercise its power of eminent domain, that power must be exercised only to the extent necessary, in compliance with the due process requirements of the United States Constitution. Thus, the United States government will have no greater power in the Marianas than it does in any state of the United States. From this it may be concluded that the Marianas have at least equal guarantees of fundamental rights and freedoms on the subject of eminent domain.

The people of the Marianas may also elect a representative to the Congress of the United States. Under the Covenant, the representative does not have any voting power.

The Marianas fare extremely well under the terms of the negotiated Covenant. Upon examination of the factors set out in Resolution 1541 (XV) as indicative of free association, the people of the Marianas have made a free and voluntary choice through informed and democratic processes. This acknowledges the cultural characteristics of the Chamorro people, which the alternative of union with the rest of Micronesia could not possibly do. The Marianas have the right to determine, and have in fact fully determined, their own internal constitution. The Covenant does not explicitly set out a mechanism for termination. However, there is nothing at present to prevent a right of termination from being implied. Given the repeatedly expressed preference of the people of the

---

[121] *Id.* art. VII, § 805.

[122] *Id.* art. VII, § 806(c). The "eminent domain" power of the federal government is subject to two requirements: (1) there can be no taking of property without just compensation, and (2) any taking of property must be for a public purpose. Pennsylvania Coal v. Mahon, 260 U.S. 303 (1922). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 458 (1978).

Marianas for a closer relationship with the United States, and the favorable terms of the negotiated Covenant, it is unlikely that any implied right of termination would ever be exercised.

Since the people of the Marianas have expressly chosen a permanent relationship with the United States, the factors indicative of integration should also be explored to determine whether the chosen relationship might also fit that model. The people of the Marianas had unquestionably reached an advanced stage of self-government when they freely expressed their choice of a permanent relationship with the United States. Although fully internally self-governing on a local level, their participation in government at a national level, while no less than that of Guam or Puerto Rico, is certainly less than the participation of a state of the United States. Their rights of citizenship and guarantees of fundamental rights and freedoms, however, are at least equal to if not greater than those of other citizens of the United States. The vesting in the Marianas of all land held by the government of the United States and the right to restrict alienation of land, are certainly benefits beyond those dreamed of by states of the United States. The right to all federal taxes collected is a benefit not possessed by states of the United States. The Marianas, having attained significant political advancement, have wisely put their skills to the project of economic benefit.

The situation of the Marianas counsels against the application of rigid, formal limitations on the available choices of self-determination. Although the Marianas might well fit into the category of free association, it is clear that its people have sought and have attained a status more in the nature of integration, with some additional benefits that integration might not provide.

The wisdom of Resolution 2625 (XXV) is evident in advising that self-determination by a people may be implemented by emergence into any political status freely determined by that people. The Marianas, the Marshalls, the Federated States and Palau have made their status choices, and any objection to their future status is an objection to a status chosen according to the freely expressed wishes of the peoples concerned.

VII. Sovereignty, Statehood, Recognition and International Legal Personality

Are the Micronesian nations of the Federated States of Micronesia, the Marshall Islands and Palau independent? Are they sovereign states, and are they entitled to recognition in the community of states? Are they entitled, at least, to the termination of the Trusteeship and to take their place in the community of states as participants in the international community and international fora?

Commentators agree that sovereignty is an elusive and relative concept. Sir Hersch Lauterpacht suggests that independence is often a controversial question,

and states that "the question of actual independence is not one capable of any easy or automatic answer."[123] Higgins suggests that absolute independence is impossible in these times, "that states are becoming increasingly interdependent in spheres which at one time would have been regarded as solely within the internal domain."[124] According to Pomerance, the recognition of independence has been a function so arbitrarily exercised that the determination is devoid of any meaningful content.[125]

These acknowledgements, however, do not mean that the determination is impossible. They simply mean that the concept is relative, and changes in the international community have resulted in differences in application in developing contexts. In addition, the concept itself is evolving in order to deal more effectively with developing situations to which it might be applied.

The traditional tests of sovereignty are as follows: an independent government possessing external independence which is independent of any other state, effective authority, internal stability, and a defined territory.[126] The progressive development of the test has resulted in the inclusion of an additional factor, the people—the existence of a people perceiving the government to be its legitimate government. Of course, this factor can readily be inferred from the traditional test as being implicit in the test of a defined territory, or as indicative of effective authority or internal stability.

The Montevideo Convention on the Rights and Duties of States,[127] which is generally regarded as expressing the customary law in this respect, stipulates that the state, as a person of international law, should possess the following qualifications: (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with other states. These factors do not significantly differ from the factors set out above: a government would be a government possessing effective authority, and fostering internal stability. The capacity to enter into relations with other states, which is more specific and, therefore, more easily determined than the concept of external independence, although arguably more limited in scope, would be determinative of external independence.

The declaratory and constitutive theories represent two views on the inception of sovereignty. The constitutive theory is based on contract, and views recognition. Thus, under this view, the state comes into existence upon recognition. The declaratory view posits the existence of a state as subject of international

---

[123] H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 45 (1944). *Cf.* 1 L. OPPENHEIM, INTERNATIONAL LAW § 63 (H. Lauterpacht 8th ed. 1955).

[124] R. HIGGINS, *supra* note 89, at 26.

[125] M. POMERANCE, *supra* note 56.

[126] It may be instructive here to compare these requisites with those set out by the General Assembly in Resolution 742 (VIII). See *supra* text accompanying note 90.

[127] 49 Stat. 3097, U.N.T.S. No. 881 (Dec. 26, 1933).

law as soon as that state exists in fact, and fulfills the conditions of statehood under international law. Recognition merely expresses willingness to accept this fact and enter into relations with the state.

The constitutive view may be deemed to suffer from the logical impossibility that international personality can be created by means of a treaty which presupposes the existence of the state in question. The declaratory view, however, does not suffer from this defect, because under this view, the state exists prior to the act of recognition.

That recognition is deemed to date back to the commencement of international activity by the recognized government also renders the declaratory view more plausible. Under the constitutive view, the relation back would be to a time when the state in question did not yet exist. Under the declaratory view, the activity of the government would be constitutive of the existence of the state, and the recognition merely declaratory of a preexisting state of affairs. Thus, the declaratory view does not suffer the defect of being forced to relate back to the existence of something that is deemed not to have been in existence prior to recognition.

Lauterpacht suggests that recognition is both declaratory and constitutive. It is declaratory of facts and constitutive of rights. The fundamental rule, he stresses, is that there be a state, represented by a government obeyed by the people, which exercises effective sovereignty.

Tests of recognition include effectiveness and legitimacy. Effectiveness has often been deemed to be a factual determination, and legitimacy has often been viewed as a political or ideological decision based on approval of the recognizing government of the form of the recognized government. Effectiveness as well as legitimacy can be presumed when self-determination is exercised by way of plebiscite. The freely expressed will of the people can constitute both effective exercise of the right of self-determination, and also allow an acknowledgement of the legitimacy of the government so chosen. Effectiveness can be evidenced by popular consent, one possible test of the effectiveness of power, and a consideration allowing a prediction of stability or permanence as well.

Although the proposition is not universally accepted, Lauterpacht suggests that once the prerequisites have been fulfilled, there may arise a right of recognition. This view has evolved to encompass a view that the sole test of recognition should be one of effectiveness, and to consider the test of legitimacy as lacking significance for purposes of recognition.

Conceptually, it may be useful to distinguish, first, between statehood and sovereignty; and secondly, between statehood and sovereignty on the one hand, and recognition on the other. Statehood exists from the moment it comes into being as an effective state. Sovereignty flows from statehood, and is grounded in the state's status as a subject of international law. The state can therefore exist as a subject of international law even before recognition by all states, or by a

significant number of states. This perspective assists in the understanding of the status of states recognized by some states in the international community, but not by others, sometimes on political grounds.

Lauterpacht expresses the fear that recognition might become a political rather than a legal determination. Recognition has sometimes been used politically as a means of acknowledging a government that is approved by the recognizing state. However, because of economic and political realities and the need sometimes to resort to informal relations with governments not formally recognized, formal recognition may often be of less importance than the reality of actual economic and informal ties. It is now increasingly the practice not to formally recognize governments, but to allow recognition to be inferred from the state of relations.

It may be instructive to compare British practice with United States practice on recognition. It has been suggested that British practice, in most instances, is grounded in a duty of recognition. United States practice distinguishes between statehood and recognition, and does not accept that the existence of the criteria for statehood gives rise to a duty to recognize.[128]

A consideration of the tests of implied recognition may be of significance here. Two tests deemed to establish implied recognition are the conclusion of treaties, and the acceptance and receipt of diplomatic representatives. Although there may be some doubt in the case of multilateral treaties, bilateral treaties are deemed a conclusive recognition by a state of the recognized government as representing the state.

Recognition of sovereignty may be of continuing significance in the context of treaty-making powers and thus of participation in international organizations. The Marshalls, the Federated States and Palau have full external sovereignty under the terms of the Compact. There should be little doubt that these nations have the capacity to participate in international and regional fora. The capacity, however, is not always coextensive with the right.

For example, Crawford suggests a corollary to the presumption of the Court in the Lotus Case of the freedom of action of states.[129] A state once sovereign is entitled to a presumption of continuing sovereignty. And a dependent nation is entitled only to a continued presumption of dependence, in the absence of compelling evidence to the contrary.[130]

The presumption, however, can be rebutted by an adequate evidentiary showing. Crawford suggests that the devolution of the British Commonwealth occurred gradually over time, and without *de jure* acknowledgement by Britain

---

[128] Warbrick, *Kampuchea—Representation and Recognition*, 30 INT'L & COMP. L.Q. 234 (1931).

[129] *See* The Lotus Case, 1927 P.C.I.J. ser. A, No. 10.

[130] J. CRAWFORD, *supra* note 88, at 25.

of the actual independence of the Dominions.[131] Recognition by the metropolitan state is not a necessary prerequisite to independence, as the United States demonstrated by its recognition of the independence of Latin American nations, even before recognition of their independence by Spain.[132]

A necessary element for statehood is that of international responsibility. It may be recalled that under section 127 of the Compact of Free Association, all obligations, responsibilities, rights and benefits of the United States as administering authority for the Trust Territory of the Pacific Islands are terminated.

Higgins states that "[t]he question of the extent to which independence or sovereignty may be delegated or ceded to another without resultant loss of statehood has never had a simple answer."[133] There must be actual independence, and it is necessary to look beyond form to substance. Higgins states that military arrangements with former administering powers do not necessarily deny the existence of independence:

> Treaties of mutual defense and assistance are commonplace, and the granting of bases to foreign troops is unexceptionable. . . . Certainly it would be a sad comment on international law if newly independent states had to prove their independence by total and complete rupture from their foreign administrators.[134]

Higgins suggests that sovereignty is a relative concept. The degree of independence required to establish statehood depends on the nature of the claim advanced. The claim to membership in the United Nations, for example, would require substantial recognition of sovereignty, while more modest claims to simple termination of a trusteeship, or, after that termination, the application for membership in regional organizations and possibly in specialized bodies of the United Nations, might not require the same degree of recognition of sovereignty.

The distinction between governments and states[135] is relevant to the Micronesian situation only to the extent that the Micronesian negotiating entities are duly constituted governments. As governments, they have been negotiating with the administering authority even before the recognition or acknowledgement of the existence of the Micronesian states. Assuming the continued existence of these governments, issues of succession to treaty rights and obligations are unlikely to arise.

---

[131] *Id.* at 244.

[132] *Id.* at 250.

[133] R. HIGGINS, *supra* note 89, at 26.

[134] *Id.* at 33.

[135] *See, e.g.*, J. FAWCETT, THE LAW OF NATIONS 47 (1968).

VIII. CONCLUSION

How, then, do the Micronesians fare in this increasingly interdependent world? The Marshalls, the Federated States and Palau can fulfill the requisites of the Montevideo Convention. Each nation is possessed of a defined territory and people, as established by the will of the people expressed by plebiscite. The Compacts acknowledge the full internal and external sovereignty of the negotiating governments. As Higgins suggests, full external sovereignty is not inconsistent with a treaty of defense.

There may be problems of recognition in light of the designation of the relationship as one of free association rather than independence. The actual content of the relationship should be determinative over form, and the Marshalls, the Federated States and Palau may well be deemed to be actually independent on the basis of the negotiated agreement. What the agreement is called is less significant than the actual nature of the relationship, and the acknowledgment of the relationship as one of independence does not affect the reality of the defense and economic assistance provisions of the agreement. Even in light of the administering authority's designation of the relationship as one of free association, there may be implied recognition on the part of the United States, in concluding individual bilateral treaties with each of the negotiating nations.

Sovereignty is a relative concept, and absolute independence is impossible in an interdependent world. The independence of the Micronesian nations should be sufficient for membership in regional organizations, and perhaps in specialized bodies of the United Nations. This should therefore be deemed sufficient for termination of the Trusteeship Agreement, possibly a prerequisite to the enjoyment of the benefit of admission to these regional and specialized organizations, in some instances. Consideration of admission to full membership in the United Nations is governed by article 4(1) of the Charter.[136]

One problem for the Federated States, the Marshall Islands and Palau is that, although they unquestionably possess full ability on a political level to participate in these organizations and bodies, there remains the consideration of economic ability. Now that they have set themselves on the road to independence, they must develop their economic potential to complement their political development, or else they might find themselves, in this economically interdependent world, still dependent upon the United States for economic maintenance. Such a continued state of affairs would result in a lessening of their economic independence and sovereignty in an economically interdependent world.

The Micronesian nations have been under the influence of four different administering powers in the last century. Although they are on good terms with

---

[136] Mendelson, *Diminutive States in the United Nations*, 21 INT'L & COMP. L.Q. 609 (1972); P. BLAIR, THE MINISTATE DILEMMA (1967).

their latest governor, never having seriously doubted the good intentions of the United States throughout at least 35 years of administration, Micronesians must nonetheless look forward to the inception of a more permanent state of affairs. The Northern Mariana Islands have chosen a permanent association with the United States. The Marshall Islands, the Federated States of Micronesia and Palau, have apparently chosen the road to independence. In light of the political sophistication of the Micronesians and the concrete and favorable terms of the Covenant and the Compact, it is clear that the Micronesians have negotiated terms advantageous to themselves, having wisely appealed also to the interests of the administering authority in order to arrive at a position of mutual benefit. Indeed, Micronesian representatives before the United Nations Trusteeship Council have been among the most vocal advocates of acceptance of the Compact and the Covenant, and of the termination of the Trusteeship. The Micronesians can only hope that the United Nations Security Council, upon examination of self-determination and the method by which that determination has been made by the Micronesians, and after consideration of the relative nature of sovereignty in an interdependent world, will approve the termination of the Trusteeship and allow them to get on with the work of developing their positions in their future and chosen relationships.

Judicial Seminars in Micronesia

by Addison M. Bowman*

I. INTRODUCTION

This article describes a unique program of judicial education and training being conducted by American law professors in Micronesia.[1] Sponsored jointly by the Supreme Court of the Federated States of Micronesia, the Supreme Court of the Republic of Palau, and the William S. Richardson School of Law at the University of Hawaii, a series of semi-annual, two-week seminars designed to impart essential legal skills to approximately fifteen Micronesian judges has been in progress since 1982. The Micronesian transition from Trust Territory of the Pacific Islands[2] to a cluster of emergent Pacific nations[3] is evidenced by new constitutions and new governments and accession to political leadership by Micronesians. The constitutions that have been adopted in the Federated States

---

* Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa. A.B., Dartmouth College, 1957; LL.B., Dickinson School of Law, 1963; LL.M., Georgetown University Law Center, 1964.

[1] Apart from Australia, Indonesia and the Philippines, the Pacific islands are divided into three groups: Melanesia, stretching from Papua-New Guinea to New Caledonia and Fiji and including the Solomons and New Hebrides; Polynesia, stretching from New Zealand to Hawaii and including Samoa, the Marquesas and Cook Islands; and Micronesia ("small islands"), consisting of the four archipelagoes of the Mariana, Caroline, Marshall, and Gilbert Islands. For an historical and anthropological survey of these islands, see D. OLIVER, THE PACIFIC ISLANDS (rev. ed. 1975).

[2] The United States acquired the Caroline, Mariana, and Marshall Islands in 1945, and since 1947 has administered them under a Trusteeship Agreement approved by the United Nations Security Council and the United States. *See infra* text accompanying note 19. *See also* Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), *reprinted in* 2 FSM CODE 895 (1982). The Trusteeship Agreement is also reprinted in C. HEINE, MICRONESIA AT THE CROSSROADS (1974).

[3] The Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau will perhaps soon be nation-states "freely associated" with the United States. See *infra* text accompanying notes 93-97. The free association status and the proposed arrangement with the Commonwealth of the Northern Mariana Islands are discussed in Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980).

of Micronesia[4] and the Republic of Palau[5] create judicial systems that closely resemble their American counterparts, and a common law jurisprudence has taken root. The judicial education program described in this article aims to generate a proficiency in common law analysis and decision making sufficient to enable Micronesian judges, as they decide the cases that will come before them, to fashion a common law embodying the traditions and aspirations of the Micronesian peoples.

II. GEOGRAPHICAL, POLITICAL, AND SOCIAL BACKGROUND

The Federated States of Micronesia (FSM) is a nation of 607 islands[6] covering a huge expanse of ocean north of the equator and west of the international dateline.[7] FSM includes most of the Caroline Islands.[8] What were formerly the island districts of Ponape, Truk, and Yap are now the four Federated States of Kosrae,[9] Pohnpei,[10] Truk,[11] and Yap.[12] The 607 islands of FSM comprise a

---

[4] The FSM Constitution is reprinted on p. C-3 of I FSM CODE (1982). For a comprehensive history of the development and adoption of the FSM Constitution, see N. MELLER, CONSTITUTIONALISM IN MICRONESIA (1985).

[5] The Palau Constitution is reprinted in PALAU NATIONAL CODE (1986).

[6] FEDERATED STATES OF MICRONESIA, NATIONAL YEARBOOK OF STATISTICS 5 (1981) [hereinafter FSM STATISTICS]. A number of the islands are high islands evidencing geologically recent volcanic activity, but most are sandy, coral islets forming atolls and encircling lagoons. For an explanation of the geological evolution from high islands to coral atolls, see E. LARSON AND P. BIRKELAND, PUTNAM'S GEOLOGY 535 (4th ed. 1982). Only 52 of the islands are inhabited. *See* U.S. DEP'T OF STATE, TRUST TERRITORY OF THE PACIFIC ISLANDS, 37TH ANNUAL REPORT TO THE UNITED NATIONS 3 (1984).

[7] FSM lies between 1° and 12° north latitude, and between 137° and 163° east longitude. Its eastern flank, Kosrae, lies midway between Honolulu and Australia and its western flank, Yap, lies directly east of the Philippines and midway between Australia and Japan.

[8] The Carolines, one of the four archipelagoes of Micronesia, comprise the island groupings of Pohnpei, Truk, Yap, and Palau, in east-to-west order. *See supra* note 1. The Palau Islands have become the Republic of Palau; the balance of the Carolines is now the Federated States of Micronesia. *See supra* note 3.

[9] Kosrae (previously spelled Kusaie), consisting of five islands with a total land area of 42.3 miles and a population of 6,262, was formerly part of Pohnpei, but in 1977 was detached and became one of the four FSM states. N. MELLER, *supra* note 4, at 25. Statistical information is derived from U.S. DEP'T OF STATE, *supra* note 6, and from FSM STATISTICS, *supra* note 6, at 4.

[10] Pohnpei (previously Ponape) consists of 163 islands with a land area of 133.4 square miles and a population of 26,922. U.S. DEPARTMENT OF STATE, *supra* note 6; FSM STATISTICS, *supra* note 6, at 4. The principal island, a high island also called Pohnpei, is one of the largest islands in Micronesia with an area of 129 square miles. The seat of the FSM national government is in Kolonia, Pohnpei's main town. For statistical data concerning Pohnpei, see PONAPE STATE STATISTICS OFFICE, PONAPE STATISTICAL YEARBOOK FOR 1981.

[11] Truk has 290 islands, a land area of but 49.2 square miles, and a population of 44,596. Truk thus claims half the population of FSM. U.S. DEP'T OF STATE, *supra* note 6; FSM STATISTICS, *supra* note 6, at 4.

[12] Yap boasts 149 islands, a land area of 45.9 square miles, and a population of 10,595. *See*

land mass of but 270 square miles and support a population of 88,375.[13] The Republic of Palau, consisting of 200 small islands with a land mass of 179 square miles and a population of 14,000, makes up the balance of the Carolines and lies to the west of FSM.[14]

Most of the Caroline Islands lie between 4° and 10° north latitude, and the climate is tropical. Natural resources are meager, especially on the atolls, and much of the population engages in subsistence farming and fishing.[15] Coconut, taro, and breadfruit are the principal subsistence crops. Marine resources are plentiful, and many Micronesian atolls encircle large lagoons shielded from ocean turbulence and teeming with fish and marine life.[16]

Micronesian society is traditionally matrilineal, and the matrilineage consisted of an extended clan with governance and landholding functions.[17] Traditional titles and chiefly rank were associated with clan membership and the location and size of the clan lands. Custom and tradition continue to exert powerful influence throughout FSM and Palau but erosion is evident. Many young people have migrated from outer islands and villages to the principal towns, where salaried work is available.

> American education [has] laid a foundation of knowledge and values which [has] gradually undermined satisfaction with a village life-style based upon subsistence farming supplemented by income earned from copra marketing, and constrained by the remaining hierarchical premises of tradition.[18]

For the past hundred years the people of the Caroline Islands have been dependent upon four successive foreign powers: Spain (1885-98), which acquired the Carolines through papal arbitration; Germany (1899-1914), which purchased the Carolines from Spain; Japan (1914-45), which wrested the Carolines from Germany and colonized them; and United States (since 1945),

---

U.S. DEP'T OF STATE, *supra* note 6; FSM STATISTICS, *supra* note 6, at 5. Life on a Yapese island is chronicled in K. BROWER, A SONG FOR SATAWAL (1983).

[13] U.S. DEP'T OF STATE, *supra* note 6, at 2.

[14] *See* DISTRICT ADMINISTRATOR OF PALAU, THIS IS PALAU 10 (1965); Kluge, *Palau Isn't Sure Whether "Paradise" Is There—Or Here*, SMITHSONIAN, Sept. 1986, at 44.

[15] In 1984, of FSM's population of 88,375, only 10,160 were employed as wage earners by government and private enterprise, see U.S. DEP'T OF STATE, *supra* note 6, at 2.

[16] *See* W. ALKIRE, CORAL ISLANDERS 23-28 (1978); W. ALKIRE, AN INTRODUCTION TO THE PEOPLES AND CULTURES OF MICRONESIA 7 (2d ed. 1977) [hereinafter PEOPLES AND CULTURES OF MICRONESIA].

[17] *See* PEOPLES AND CULTURES OF MICRONESIA, *supra* note 16, at 26-67. See also *infra* note 55 for a discussion of Trukese society.

[18] N. MELLER, *supra* note 4, at 17.

which seized the Carolines in World War II and has since governed and administered them as part of the Trust Territory of the Pacific Islands.[19] Throughout that century the Micronesians have preserved their languages,[20] maintained their customs and traditions, and sustained a hope for freedom and autonomy. Now, anticipating approval of the Compacts of Free Association,[21] Micronesians look hopefully toward a time of virtual political independence.

Since 1962 the Trust Territory of the Pacific Islands (TTPI) has been administered by the United States Secretary of the Interior.[22] This administration included the exercise of executive, legislative, and judicial functions and the designation and appointment of personnel for these purposes. The Trust Territory High Court, located on Saipan in the Mariana Islands, has until very recently performed all judicial functions in Micronesia.[23] The High Court appointed local judges in the various districts of the TTPI, but the district courts had limited jurisdiction and the judges received little or no education or training. Most cases of any substance were taken to the High Court, which had a trial-level division that traveled among the various districts to hear the disputes that arose.

By plebiscite held on July 12, 1978, the people of Kosrae, Pohnpei, Truk, and Yap adopted and ratified the Constitution of the Federated States of Micronesia.[24] The first FSM Congress convened in 1979,[25] and in 1981 President

---

[19] For a description of this history, see C. HEINE, MICRONESIA AT THE CROSSROADS (1974); N. MELLER, THE CONGRESS OF MICRONESIA (1969). Meller writes:

> Over 6,000 Americans were killed wresting Micronesia from Japanese control, and the temper of the American people hardly countenanced surrendering the islands to any other nation; conversely, the United States had early declared it sought no territorial gains from World War II. The placing of the area under United Nations trusteeship resolved the dilemma, and in 1947, with the Trusteeship Agreement, the islands technically came under civil administration.

Id. at 14. Governance of the Trust Territory was entrusted to the Commander-in-Chief, United States Pacific Fleet, from 1947 until 1951, when the responsibility was shifted to the Department of the Interior. *Id.* at 14-17.

[20] Each of the four Federated States has a separate language, and there are many dialects. Most people speak their own language plus at least English or Japanese. It is probable that English will become the common language of the Federated States. *See* C. HEINE, *supra* note 19, at 92. English is the language of the Government of the Federated States. *See* FSM STATISTICS, *supra* note 6. The same is true of Palau. Article XIII, section 1 of the Palau Constitution declares that "Palauan and English shall be the official languages," and section 2 elaborates: "The Palauan and English versions of this Constitution shall be equally authoritative; in case of conflict, the English version shall prevail."

[21] *See infra* text accompanying notes 93-96.

[22] EXEC. ORDER NO. 11,021, 48 U.S.C. § 1681 (1982).

[23] *See* Bowman, *Legitimacy and Scope of Trust Territory High Court Power to Review Decisions of Federated States of Micronesia Supreme Court: The* Otokichy *Cases*, 5 U. HAW. L. REV. 57, 65-68 (1983).

[24] *Id.* at 62. *See generally* N. MELLER, *supra* note 4. Pursuant to article XVI ("effective date"), the FSM Constitution took effect one year after ratification. According to 1 FSM CODE intro. (1982), the "establishment of constitutional government [took place] on May 10, 1979."

[25] *See* Bowman, *supra* note 23, at 62.

Tosiwo Nakayama administered the oath of office to FSM Supreme Court Chief Justice Edward C. King. King, an American lawyer, recognized an immediate need for judicial training in FSM. Micronesians had no experience in self-government, yet self-government was fast becoming a reality under a Constitution bearing substantial similarity to the United States Constitution. Constitutional conventions, moreover, were in progress or on schedule in the four FSM states of Kosrae, Pohnpei, Truk, and Yap and, predictably, those state constitutions would create state court systems with plenary jurisdiction and power similar to their United States state court counterparts.

The FSM Constitution creates a tripartite national government with checks and balances,[26] and adopts a federal model with four constituent states and state governments. The national government is a government of power "expressly delegated [or] . . . indisputably national [in] character."[27] As in the United States, the states hold the residual power.[28] The Constitution "is the supreme law of the Federated States of Micronesia . . . [and any] act of the Government in conflict with this Constitution is invalid to the extent of conflict."[29] Article IV contains a "Declaration of Rights" that closely resembles the United States Bill of Rights.[30] Article XI treats the judicial function and establishes the Supreme Court's jurisdiction to "review cases heard in the national courts, and cases heard in state or local courts if they require interpretation of this Constitution, national law, or a treaty."[31] The judicial article also contains what Chief Justice King calls the "judicial guidance" provision: "Court deci-

---

[26] *Id.* at 62-64. *See also infra* note 72.

[27] FSM CONST. art. VIII, § 1.

[28] *Id.* § 2.

[29] *Id.* art. II, § 1.

[30] For example, art. IV, § 5 specifies: "The right of the people to be secure in their persons, houses, papers and other possessions against unreasonable search, seizure, or invasion of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." In FSM v. Tipen, 1 FSM Intrm. 79 (Tr. Div. Pohnpei 1982), Chief Justice King, writing as trial division judge, noted the striking similarity between section 5 and the U.S. Constitution's fourth amendment, and observed that the Micronesian drafters had cited and alluded to U.S. Supreme Court decisions construing the Bill of Rights. "Thus," concluded King, "the Journal of the Micronesian Constitutional Convention teaches that, in interpreting the Declaration of Rights in the Constitution of the Federated States of Micronesia, we should emphasize and carefully consider United States Supreme Court interpretations of comparable language in the Bill of Rights of the United States Constitution." *Id.* at 85.

[31] FSM CONST. art. XI, § 7. Section 6 vests in the trial division of the Supreme Court "concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes . . . between citizens of different states . . . ."

sions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia."[32] Regarding the states, the Constitution specifies simply that a "state shall have a democratic constitution."[33]

The state constitutions establish judicial systems in each of the four FSM states. The Yap Constitution, for example, ordains that the "judicial power of the State shall be vested in the State Court [which] . . . shall be the highest court of the State and shall consist of a Chief Justice and two Associate Justices."[34] As in the national scheme, justices are appointed by the executive with advice and consent of the legislature.[35] The state constitutions charge the state judiciaries with the responsibility for promulgating rules of practice and procedure and for judicial administration. The state constitutions also require judicial deference to "state traditions and customs."[36] Judicial systems have been established in Kosrae, Pohnpei, Truk, and Yap and, as of 1987, twelve state justices have been appointed and confirmed and are hearing cases at the trial and appellate levels.

Organizationally and functionally, then, the FSM national and state judiciaries closely resemble their American counterparts, and state court judges are required to interpret and to apply constitutional and statutory language, to analyze and to follow precedent,[37] and to administer state justice systems. The FSM Supreme Court sought and obtained a congressional mandate to develop a judicial training program, recognizing that the proper discharge of these functions would require training and education. The first generation of Micronesian state judges has been drawn from the traditional societal leadership and has little if any background of formal law school training. These circumstances necessitate the development of a program of judicial education that emphasizes and incul-

---

[32] FSM CONST. art. XI, § 11. See also Semens v. Continental Air Lines, 2 FSM Intrm. 131 (Tr. Div. Pohnpei 1985) (construing the judicial guidance clause in a contract dispute). For a discussion of *Semens*, see *infra* text accompanying notes 52-53.

[33] FSM CONST. art. VII, § 2.

[34] YAP CONST. art. VII, §§ 1, 2.

[35] *Id.* § 3.

[36] *See e.g.*, KOSRAE CONST. art. VI, § 9. Section 9 provides: "Court decisions shall be consistent with this Constitution, State traditions and customs, and the social and geographical configuration of the State."

[37] Of particular concern is the need for state judges to apply and to follow FSM Supreme Court decisions construing the national constitution. The FSM Constitution provides, in article IX ("Legislative"), § 2p that the definition and penalization of "major crimes" is a national function. The National Criminal Code defines "major crimes" as those punishable by three years or more imprisonment. FSM CODE tit. 11, §902(a) (1982). The result is that crimes punishable by less than three years imprisonment are tried in the state courts. State court criminal jurisdiction is thus not insubstantial and national constitutional due process and related guarantees are fully applicable in such cases.

cates basic skills essential to the proper conduct of the judicial function in a common law framework, with maximum sensitivity to the overarching Micronesian desire to develop the law of the land and the sea in harmony with custom and tradition. These are ambitious goals. Chief Justice King's first step was to contact the faculty of the Richardson School of Law at the University of Hawaii. Hawaii's proximity to Micronesia was a factor in that decision,[38] as was King's belief that a faculty sensitive to issues peculiar to island societies would be most likely to contribute positively to the implementation of the judicial guidance provisions. The program commenced in 1982.

III. HISTORY OF THE PROGRAM

Early seminars[39] were held in August, 1982, and March, 1983, in Pohnpei which is the seat of the national government.[40] Each seminar lasted two weeks and consisted of two three-hour sessions per day for five days per week. Chief Justice King and his associate on the FSM Supreme Court, Justice Richard H. Benson, attended most seminar sessions and contributed to the early attainment of one important goal, that the seminars eschew a traditional teacher/student dichotomy and achieve a style of participatory dialogue that recognizes and respects every participant's ability to offer a meaningful individual contribution to the common educational task. The discussion format was facilitated also by the number of participants. The 1982 seminar, for example, had but ten participants including King and Benson.

The 1982 and 1983 seminars featured original materials that were distributed to the judges one month in advance of the seminars.[41] The materials included opinions from the United States and FSM Supreme Courts, constitutional and statutory excerpts, readings on legal analysis and the application of precedent, and a great many questions and problems that would focus seminar

---

[38] Hawaii lies roughly halfway between the American mainland and Micronesia.

[39] A judicial education seminar consisting of FSM Supreme Court justices and Trust Territory district court judges (some of whom would be appointed as state court justices) was held in Kosrae in August, 1981. "This was a reasonable first effort," notes Chief Justice King in a letter to the author dated March 31, 1986, "but . . . we plainly did not have time to put the necessary materials together and probably did not have the resources . . . to do so."

[40] Each of the two seminars was conducted by the author and by his colleague, Williamson B. C. Chang. Chang is an Associate Professor at the William S. Richardson School of Law, University of Hawaii at Manoa.

[41] A. BOWMAN, MATERIALS AND QUESTIONS FOR THE JUDICIAL EDUCATION AND TRAINING SEMINAR FOR THE JUDGES OF THE FEDERATED STATES OF MICRONESIA (1983); W. CHANG, CASES AND MATERIALS FOR THE JUDICIAL EDUCATION; AND TRAINING SEMINAR FOR THE JUDGES OF THE FEDERATED STATES OF MICRONESIA (1983); A. BOWMAN & W. CHANG, CASES AND MATERIALS FOR THE JUDICIAL TRAINING SEMINAR FOR THE JUDGES OF THE FEDERATED STATES OF MICRONESIA (1982).

discussion and facilitate collective problem solving. For example, at the 1982 seminar one discussion topic concerned the enforcement of judgments, a topic that was included in the agenda at the request of a Trukese justice. The materials contained some readings describing the law of enforcement of judgments in the United States and the following note:

> Anglo-American law has always favored money judgments in contract and tort cases, but this traditional development has been based on the assumption that judgment debtors will have money or attachable property. If this assumption does not usually hold true in Micronesia, then alternatives to money judgments should perhaps be explored. We will devote a training session to the exploration of this problem. In preparation, please give some thought to the following questions.
>
> In contract cases, there is the alternative of ordering specific performance. Should the remedy of specific performance be more readily available to contract plaintiffs? How have Micronesians customarily treated one who defaulted on a promise or a bargain?
>
> In tort cases involving negligent or intentional injury to persons or property, what alternatives to money damages are there? How have Micronesians customarily treated the tortfeasor? Could the tortfeasor be ordered to repair property, or to perform services? Has there been a traditional ceremony of apology? Has such a ceremony been considered adequate in the past? Should the law seek to enforce money judgments in areas where money damages have not been traditionally applied?[42]

As one ponders these questions, it becomes apparent that the faculty learns at least as much during seminar sessions as do the students.

The early seminars yielded a full realization of the responsibility of the judges for the development of the common law of Micronesia. The FSM has a penal code[43] but little legislation in the areas of contract, property, and tort, the predictable subject matter of the state judges' plenary jurisdiction. There are precedents from the Trust Territory High Court but those precedents are not mandatory and FSM judges are free to disregard them if wise social policy or due regard for custom and tradition dictates. In a word, the transition from Trust Territory of the United States to nationhood creates a moment of jurisprudential discontinuity that invites, if not requires, a reexamination of fundamental norms and values. This realization serves to imbue the seminars with a deepened sense of responsibility and purpose. And in addition to imparting basic analytical skills, the seminars take on the added dimension of confronting the judges with policy choices that may be presented to them in future litigation and generating the collective wisdom of a group of men currently occupy-

---

[42] A. BOWMAN & W. CHANG, *supra* note 41, at 60.

[43] National Criminal Code, FSM CODE tit. 11 (1982).

ing traditional leadership roles as well as judicial positions.

In retrospect we view the 1982 and 1983 seminars as initial, experimental components in a challenging undertaking in judicial education. By 1984 most of the first generation of state court judges had been appointed and confirmed. And by 1984, King and the author were able to articulate their primary goals: that within three to five years the seminars would yield training equivalent to the first year of formal law study, including the basic technique of common law analysis, and would enable the Micronesian judges to discharge their ongoing judicial tasks with increasing competence and confidence.

The inaugural seminar of the current series was held in Yap State in June, 1984.[44] In attendance at the Yap seminar was Chief Justice Mamoru Nakamura of the Supreme Court of the Republic of Palau. After participating in the seminar, Nakamura pledged Palau's future co-sponsorship of the seminars and offered to host the next one. The Palau seminar was held in January, 1985.[45] The second 1985 seminar was held in June in Pohnpei.[46] The February, 1986, seminar was held at the William S. Richardson School of Law in Honolulu and featured a diverse faculty including law professors, judges, and practicing lawyers. The June, 1986, seminar was hosted by Truk State,[47] and the most recent seminar was held in Kosrae State in January, 1987.[48]

The 1984 Yap seminar began with a week of very basic legal analysis training. Topics on the agenda were "Nature and sources of law," "Opinion analysis and the concept of precedent," "Judicial power and federalism," and "The role of custom." Again the materials were original.[49] Judges were asked to brief cases in advance of the seminar and to hand in their briefs for evaluation. Opinions were analyzed in the seminar sessions and the analysis was brought to bear on the solution of hypothetical problems. For example, the judges read and briefed *In re Iriarte*,[50] a case in which the FSM Supreme Court trial division held that a summary contempt proceeding had violated the alleged contemnor's due process rights. Seminar discussion of this opinion focused on the following

---

[44] This seminar was conducted by the author and his colleague, Mari Matsuda. Matsuda is an Assistant Professor at the William S. Richardson School of Law, University of Hawaii at Manoa.

[45] The Palau seminar was conducted by John Barkai and Mari Matsuda. Barkai is a Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa.

[46] The June, 1985, seminar was conducted by the author and by Jon Van Dyke. Van Dyke is a Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa.

[47] The June, 1986, seminar was conducted by Van Dyke and Eric K. Yamamoto. Yamamoto is an Assistant Professor at the William S. Richardson School of Law, University of Hawaii at Manoa.

[48] This seminar was conducted by the author and Amy H. Kastely. Kastely is an Associate Professor at the William S. Richardson School of Law, University of Hawaii at Manoa.

[49] *See* A. BOWMAN & M. MATSUDA, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA JUDICIAL SEMINAR (1984).

[50] 1 FSM Intrm. 239a (Tr. Div. Pohnpei 1983).

questions that were included in the materials following the *Iriarte* opinion:

> From your brief of the *Iriarte* decision, try to answer the following questions: What is a "contempt of court"? Where does the power to punish for contempt come from? Does your court have that power? What is "summary contempt"? When is summary contempt procedure appropriate? What was wrong with Judge Diana's contempt order? What should Judge Diana have done? What would you do if a person speaks to you in court the way Iriarte did to Diana? Are you bound by the *Iriarte* opinion and decision? Why or why not?[51]

Custom and tradition are of paramount importance to Micronesians, and the judicial guidance clause[52] imposes an explicit obligation on every Micronesian judge. Chief Justice King has construed the clause in a recent decision requiring the interpretation of a contract:

> I consider the Judicial Guidance clause to impose the following requirements on the Court's analytic method. First, in the . . . event that a constitutional provision bears upon the case, that provision would prevail over any other source of law. Second, any applicable Micronesian custom or tradition would be considered and the Court's decision must be consistent therewith. If there is no directly applicable constitutional provision, custom or tradition, or if those sources are insufficient to resolve all issues in the case, then the Court may look to the law of other nations. Any approach drawn from those other sources, however, must be consistent with the . . . principles of, and values inherent in, Micronesian custom and tradition. Even then, the approach selected for the common law of the Federated States of Micronesia should reflect sensitive consideration of the "pertinent aspects of Micronesian society and culture," including Micronesian values and the realities of life here in general . . . .[53]

Judges attending the Yap seminar read and briefed *FSM v. Ruben*,[54] a prosecution for assault with a machete in which a question of custom was presented. Sometime after midnight, when defendant and his wife and four small children were at home sleeping, defendant's wife's brother, in a drunken condition, approached the house, called out for his sister, and demanded food. Receiving no response, he kicked in the front door and entered the house where he was confronted by the defendant with a machete. Defendant then drove the intruder away from the house and in the effort cut the latter in the chest. In response to the defense argument that the assault was but an incident of the defendant's reasonable defense of his family and his household, the prosecution asserted that

---

[51] A. BOWMAN & M. MATSUDA, *supra* note 49, at 116.

[52] *See supra* text accompanying notes 32 and 36.

[53] Semens v. Continental Air Lines, 2 FSM Intrm. at 140-41.

[54] 1 FSM Intrm. 34 (Tr. Div. Truk 1981).

Micronesian custom allowed the brother-in-law free access to defendant's house and entitled the former to demand and receive food from defendant and his wife.[55] Indeed, even the defense agreed that "as a general proposition [the defendant's] own house is that of his brother-in-law and that his brother-in-law should have free access to it."[56] But the defense maintained, and the court agreed, that this customary privilege did not "extend to entry of the house at 1:00 a.m. in drunken condition destroying property, awakening and frightening the children and causing all in the house to be concerned about their personal safety."[57] The government's argument was rejected and the defendant was acquitted.

The *Ruben* case was a superb vehicle for seminar discussion and analysis. The court decided that the government had the burden of proving the applicability of the custom it asserted and that, no evidence on the point having been presented, the burden had not been met.[58] The obvious question, "How would a custom be proved?" generated a lively discussion. Some judges suggested they would take judicial notice of a custom. Others maintained that expert witnesses should be presented on such a question.[59] Of great interest was the realization that the judges themselves divided on the question of the applicability of the custom to the *Ruben* facts. Custom, like the common law, can provide but a set of general propositions, the applicability of which, in any given situation, may be in doubt. Of utmost importance, the judges agreed, is that litigants, or judges acting *sua sponte*, should inject custom and tradition into litigation whenever relevant in order to infuse the developing common law with this material.

A question of custom and the law was presented in *FSM v. Mudong*,[60] denying a motion to dismiss an aggravated assault prosecution. Mudong had allegedly attacked and injured one Manasa, and the opinion recounted the basis for

---

[55] "Trukese society," comments Alkire, "is based on a number of matrilineal clans (*einang*) which regulate marriage. Postmarital residence is matrilocal, and thus the basic social group is made up of several sisters and their children, minus out-marrying males plus in-marrying husbands. . . . A man after marriage has labor obligations not only to his wife's lineage but also to his sisters' (his own) lineage." PEOPLES AND CULTURES OF MICRONESIA, *supra* note 16, at 56. The result would be that both Ruben and his wife would have intraclan obligations to the latter's brother.

[56] *Ruben*, 1 FSM Intrm. at 39.

[57] *Id.*

[58] *Id.*

[59] The Judiciary Act of 1979, 1 FSM CODE tit. 4, § 113 (1982) ("assessors") allows justices of the supreme court to "appoint one or more assessors to advise . . . with respect to local law or custom or such other matters requiring specialized knowledge." Similar provisions appear in state legislation. *See, e.g.*, Ponape State Judiciary Act of 1982, S.L. No. 2L-160-82, § 5; Truk State Judiciary Act of 1982, Act No. 2-32, § 23.

[60] 1 FSM Intrm. 135 (Tr. Div. Pohnpei 1982).

Mudong's motion:

> About one week before the criminal proceedings were initiated, some 100 people, including the families of Messrs. Mudong [and] Manasa . . . gathered . . . to discuss the "friction" between the families. . . . At the meeting, the families offered and accepted apologies. Then, "to solemnize the occasion and to purge the bad feeling, both sides sat together and shared cups of sakau, something very important in the Ponapean tradition.". . .[The] uncle of Ketson Manasa . . . states that "it is the consensus of both sides that bad feelings be put to a stop, and that further prosecution of the criminal case may hinder that goal. . . . [F]or that reason, both sides agreed that request has to be made to the proper authorities to dismiss the case."[61]

The motion thus asserted that the customary settlement had effected appropriate reparations and resolved all hostilities, and that the victim and his family approved the request to terminate the prosecution. The court denied the motion but discussed the potential impact of a customary settlement in a criminal case.

The decision to terminate a criminal prosecution, the court recognized, "is, with limited exceptions, within the discretion of the prosecutor."[62] That prosecutorial discretion rests upon important policy and separation-of-powers considerations.[63] The *Mudong* prosecutor opposed the motion to dismiss and thereby asserted the state's paramount interest in the continuation of the case. The opinion recognized that the prosecutor represented "the more generalized interests of the larger society"[64] and that the function of the criminal proceeding is quite different from that of a customary apology and forgiveness ceremony. The ritual ceremony resolves disputes between families and fosters harmony among families and clans. The criminal sanction, on the other hand, vindicates society's interests in punishing the wrongdoer. "The two systems," the court concluded, "can be seen as supplementary and complementary, not contradictory."[65] There is no reason for one to preempt or obviate the other.

Shouldn't the law encourage customary dispute settlements? In a thoughtful piece of policy analysis, the *Mudong* court observed that, although families of accused persons "might find . . . termination of court proceedings a powerful incentive to enter into a customary settlement . . . the family of the victim might be more willing to . . . enter into a customary settlement with the family of the defendant, if the victim's family is confident that the constitu-

---

[61] *Id.* at 137.

[62] *Id.* at 140. The principle is a familar one in American jurisprudence. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

[63] *Mudong*, 1 FSM Intrm. at 140-41.

[64] *Id.* at 145.

[65] *Id.*

tional legal system will deal with the defendant."[66] In dictum the court observed that the court could, at sentencing time, "usefully consider and respond to" the fact of customary apology, forgiveness, and settlement.[67] In this way the court wisely accommodated the customary and criminal justice systems and, incidentally, generated an excellent teaching vehicle for the judicial seminar.

The second week of the Yap seminar was devoted to tort law, and the week began with a mock trial involving a construction accident in which a bulldozer had injured a child. The case presented questions of individual and vicarious tort liability and damages. One of the judges presided, and thereafter all judges were given an afternoon to write an opinion deciding the case. To date, every two-week seminar has devoted one full day to a mock trial and opinion-writing exercise. There are no juries in FSM, and trials are thus simplified in all but one respect: the trial judge must produce a written record of fact findings and legal conclusions adequate for appellate review.[68] Accordingly, the mock trials typically present one or two contested fact issues and a law question. Should the court adopt the principle of respondeat superior? This question was squarely presented in the mock trial in Yap. On questions such as this there is a tendency to reach almost automatically for American law, but the instructor's function is to invoke the judicial guidance provision and the analysis it demands.[69] The judges decided that respondeat superior was not inconsistent with Micronesian values, and produced written opinions explaining their reasoning.

The second installment of torts was delivered during the second week of the Palau seminar, held in January, 1985. The instruction included basic tort law, elements of a negligence case, vicarious liability, the role of insurance, products liability, malpractice, and defamation.[70] The first week of the Palau seminar treated several units of basic judicial functioning, including the conduct of pretrial motions and settlement conferences, decision-making in the bail, sentencing, and small claims contexts, legal research, and opinion writing. Simulated bail hearings, guilty pleas, sentencings, pretrial conferences, settlement conferences, and a trial were conducted. Materials included a hypothetical criminal case involving weapon and drug charges and presenting a question of posses-

---

[66] *Id.* at 147.

[67] *Id.* at 148.

[68] The 1985 Pohnpei seminar, devoted one session to "Trial judge's duty to make a proper record for appellate review." *See* A. BOWMAN & J. VAN DYKE, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA JUDICIAL SEMINAR 163-83 (1985). *See also infra* text accompanying notes 71-88. Included in these materials were FED. R. CIV. P. 52, FED. R. CRIM. P. 23(c), readings from NATIONAL CONFERENCE OF STATE TRIAL JUDGES, THE STATE TRIAL JUDGE'S BOOK (2d ed. 1969), and Stevenson & Zappen, *An Approach to Writing Trial Court Opinions*, 67 JUDICATURE 336 (1984).

[69] *See supra* notes 52 & 53 and accompanying text.

[70] *See* J. BARKAI & M. MATSUDA, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA JUDICIAL SEMINAR (1984).

sion. Written opinions deciding the case were obtained from the judges and evaluated.

The third seminar in the current series, held at Pohnpei in June, 1985, was devoted to constitutional law and evidence law.[71] The addition of the Palauan judges meant that two constitutions had to be treated. The Kosrae State Constitution was also included in the materials. There are a number of similarities among the FSM, Palau, and United States Constitutions. Each establishes a tripartite national government with checks and balances,[72] a national judiciary with supreme power of constitutional interpretation,[73] and a declaration of due process and fundamental rights.[74] The Pohnpei agenda included judicial review and jurisdiction, relationships among FSM, Palau, and the Trust Territory of the Pacific Islands, future relationships among FSM, Palau, the Marshall Islands, and the United States, state-national relations in FSM, jurisdiction over marine resources, due process, equal protection, and freedom of expression and religion. This was a rich menu, and additional time at the February, 1986, seminar was required to complete it. The 1985 Pohnpei seminar included a mock trial that presented a question of irregular employment termination raising freedom of expression, equal protection, and contested fact issues. The judges performed all the roles in this trial, and were critiqued.

The second week of the Pohnpei seminar was devoted to evidence law. A judicial system without juries lends itself to simplified evidence rules and the author, at the 1984 Yap seminar, had committed himself to the development of a streamlined set of non-jury evidence rules for FSM and Palau. The 1985 Pohnpei materials[75] contained the following prefatory note:

> The evidence materials are in fulfillment of a promise, made by the author in 1984, to write a set of evidence rules suitable for nonjury trial practice in the Federated States of Micronesia. Using, in most instances, the United States Fed-

---

[71] *See* A. BOWMAN & J. VAN DYKE, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA JUDICIAL SEMINAR (1985).

[72] *See, e.g.*, FSM CONST. art. IX ("Legislative"), §§ 2(b) (ratification of treaties), 2(o) (impeachment of president, vice president, and justices), 2(q) (override presidential veto), 22 (presidential veto); art. X ("Executive"), §§ 1 (president elected by Congress), 2(c) (power of pardon), 2(d) (appointment of judges with advice and consent of Congress); art. XI ("Judicial"), §§ 6(b), 7 (together with art. II, power of constitutional interpretation and judicial review); PALAU CONST. art. VIII ("Executive"), §§ 7(4) (appointment of judges), 7(5) (power of pardon); art. IX ("Legislative"), §§ 5(7) (ratification of treaties), 5(8) (approval of presidential appointments), 5(16) (impeachment of president, vice president, and justices), 15 (presidential veto and 2/3 override); art. X ("Judiciary"), §§ 5, 6 (together with art. II, power of constitutional interpretation and judicial review).

[73] FSM CONST. arts. II, XI; PALAU CONST. arts. II, X.

[74] FSM CONST. art. IV; PALAU CONST. art. IV.

[75] A. BOWMAN & J. VAN DYKE, *supra* note 71.

eral Rules of Evidence as a model, the author retained, adapted, or eliminated those rules depending on the criterion of suitability for nonjury practice. The result is a set of proposed rules that could be adopted in the national and state courts.

It is hoped that the judicial seminar sessions will test the rules in two ways: (1) By asking the judges to answer the questions and solve the problems that are interspersed throughout the materials . . . and thereby test the rules in the crucible of application; and (2) By using the proposed rules as a focal point for policy analysis, on the assumption that no one is better able to say what the FSM evidence rules should be than the FSM Judiciary. In this context the author will be happy to serve as reporter and provide drafts of amendments that are suggested in seminar sessions.[76]

The proposed evidence rules are characterized by two innovations. The first involves rule 403, which in the United States allows for the exclusion of relevant evidence "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."[77] Because of its pervasive scope and application, rule 403 is probably the most frequently invoked rule of evidence in jury trials.[78] Its proposed reformulation for non-jury practice is: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[79] The commentary to proposed rule 403 points out:

The proposed rule eliminates "danger of unfair prejudice, confusion of the issues, [and] misleading the jury" as factors justifying exclusion of relevant evidence. There are two reasons for this: (1) These factors are problematical in jury trials but judges are considered able to avoid prejudice, confusion, and being misled; and (2) In any event, the judge must necessarily learn of the nature of the evidence when he hears the proffer, and since the dangers are thus unavoidably risked the evidence may just as well be admitted for whatever it is worth. Note that evidence of no value is excluded by rule 402, and so rule 403 operates only in contexts where the evidence has *some* relevancy.[80]

The judges welcomed the proposed alternative to rule 403. They agreed that the trial judge necessarily confronts arguably prejudicial evidence under any formulation of the rule. In the first place, most evidence issues arise during the

---

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

[77] FED. R. EVID. 403.

[78] R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 156 (2d ed. 1983).

[79] A. BOWMAN & J. VAN DYKE, *supra* note 71, at 45.

[80] *Id.*

trial, and in any event the classic rule 403 judgment is essentially a contextual one, involving as it does a prediction of the impact of a particular evidence item on the ultimate trial result.[81] That is to say, even if a judicial colleague could be summoned to hear and dispose of a rule 403 objection, that person would be unable to furnish the ruling absent a substantial educational briefing concerning completed and anticipated trial events. Moreover, such a surrogate colleague may not be available in Micronesia. The FSM Supreme Court, for example, with trial and appellate jurisdiction, consists of but two justices. If one hears a case at the trial level, the other must be available to hear the appeal.[82] Under these circumstances the trial judge has little choice but to try the case and resolve the evidence issues as fairly and efficiently as possible.

The second innovation of the proposed nonjury evidence code for FSM and Palau is a revision of the hearsay rule coupled with complete elimination of the hearsay exceptions:

> *Bowman's proposed rule 801*: Hearsay evidence generally admissible.
> (a) *Hearsay defined.* "Hearsay" is a statement uttered by someone other than the witness giving testimony and offered to prove the truth of the matter stated.
> (b) *Admissibility.* Hearsay is generally admissible.
>
> *Bowman's proposed rule 802*: Hearsay to be accorded proper weight.
> In assigning probative value to hearsay evidence the court should consider its relevancy in the rule 401 sense discounted by (1) the strength of the possibility that the statement was never uttered, and (2) the ability or inability of the opponent to test the credibility of the hearsay statement and its declarant.[83]

The elimination of the hearsay rule at bench trials has been strongly advocated by Kenneth Culp Davis.[84] The hearsay analysis is arcane and convoluted and, more often than not, yields admissibility through one or more of the bur-

---

[81] Unfair prejudice, confusion of the issues, and misleading the jury, as these phrases are employed in FED. R. EVID. 403, connote an improper skewing of the trial outcome by reason of receipt of evidence. *See* E. CLEARY, MCCORMICK ON EVIDENCE 545-47 (3d ed. 1984). Professor Cleary observes: "Even the same item of evidence may fare differently from one case to the next, depending on its relationship to the other evidence in the cases and the importance of the issues on which it bears." *Id.* at 546.

[82] The judicial article of the FSM Constitution specifies that each supreme court justice "is a member of both the trial division and the appellate division . . . [and that n]o justice may sit with the appellate division in a case heard by him in the trial division." FSM CONST. art. XI, § 2. In order to constitute a three-justice appellate panel, the Court will designate two additional justices pursuant to art. XI, § 9: "The Chief Justice . . . by rule may . . . give special assignments to retired Supreme Court justices and judges of state and other courts."

[83] A. BOWMAN & J. VAN DYKE, *supra* note 71, at 159.

[84] Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970).

geoning exceptions.[85] Moreover, since the relevance rules are preemptive in all contexts, the hearsay exclusion, when effective, deprives the factfinder of evidence of some worth. For this reason the rule has been called the "child of the jury."[86] Its elimination in Micronesia was desired by the judges, and the only question remaining is whether the confrontation clause of the FSM Constitution,[87] which has not yet been construed, will be offended by the receipt of hearsay against the accused in criminal cases.[88]

In February, 1986, the FSM and Palau judiciary came to Honolulu for a two-week seminar at the University of Hawaii's Richardson School of Law. The Honolulu seminar was supported by a generous grant from the United States Information Agency.[89] The agenda featured criminal and civil procedure, juvenile courts, contracts and commercial law, and a constitutional law continuation.[90] The judges were welcomed by Hawaii's Governor George R. Ariyoshi, and were addressed by Hawaii Supreme Court Chief Justice Herman Lum on "The chief justice's role and responsbility in the matter of judicial administration and calendar control." Chief Judge James S. Burns of Hawaii's Intermediate Court of Appeals lectured on the subject of writing appellate opinions.

The Honolulu seminar mock trial presented a motion to suppress evidence in a criminal case. The hypothetical facts occurred on the main thoroughfare in Kolonia, the seat of the national government and principal town in Pohnpei, and entailed a police officer stopping a pickup truck and seizing a revolver inside the vehicle. There were two witnesses, the defendant-movant and the police officer, and these roles were performed by a law student and a member of the Honolulu Police Department. Chief Justice King presided, and the author and a colleague played the roles of counsel. The judges observed the hearing, discussed issues and procedures at its conclusion, and then wrote opinions deciding the motion to suppress. There was a sharply contested fact-credibility issue that could have been dispositive of the motion. Defendant insisted that

---

[85] Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 465-74 (1981).

[86] E. CLEARY, *supra* note 81, at 726 (quoting THAYER, PRELIMINARY TREATISE ON EVIDENCE 47 (1898)).

[87] FSM CONST. art. IV, § 6.

[88] *Cf.* Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905, 925-29 (1971); Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 382 (1968).

[89] The principal costs of the seminars, which are regularly funded by the FSM and Palau governments, are in the areas of travel and per diem for the participant judges. These costs were significantly increased in the Honolulu seminar, and the United States Information Agency generously lent support.

Judges were housed at the University's East-West Center. Seminar sessions were held twice daily at the law faculty conference room.

[90] *See* A. BOWMAN, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA—REPUBLIC OF PALAU JUDICIAL SEMINAR (1986).

the weapon was the fruit of a search of the glove compartment, but the officer maintained that the gun barrel was in open view protruding from a paper bag on the floor of the truck. The police officer's reasons for stopping the truck and his conduct of the arrest and seizure raised issues under a provision of the FSM Constitution bearing substantial similarity to the fourth amendment.[91]

The judges' opinions were excellent. Without exception, they perceived the need to resolve the fact question and to find specifically the location of the revolver immediately prior to its seizure. They had previously read, briefed, and discussed in seminar five FSM Supreme Court search and seizure opinions[92] of possible relevance to disposition of the motion to suppress, and they analyzed several of these cases in the legal discussion portions of their opinions. Every opinion furnished an adequate record for appellate review of the point.

The summer 1986 seminar was held in Truk and consisted of a week devoted to civil procedure and a week of examination and discussion of the Compacts of Free Association.[93] If a nation is not fully independent of another the next best status, it might be contended, is free association. The compact between the United States and FSM[94] recognizes that FSM is "self-governing" and fully autonomous in its internal affairs. In the conduct of foreign affairs, on the other hand, the free association status requires that FSM "consult" with the United States and afford the United States "full authority and responsibility for security and defense matters"[95] in the islands. The United States will have the authority to "establish and use" military bases in FSM, and the Micronesians will receive substantial sums of money every year during the life of the Compact.[96]

The materials on the compacts raised the important question, since resolved by the Palau Supreme Court,[97] whether the Compact of Free Association comports with the requirement of the Palau Constitution that any "agreement

---

[91] *See supra* note 30.

[92] Ludwig v. FSM, 2 FSM Intrm. 27 (App. Div. 1985) (search incident to arrest); Ishizawa v. Pohnpei, 2 FSM Intrm. 67 (Tr. Div. Pohnpei 1985) (search and seizure of fishing vessel); FSM v. George, 1 FSM Intrm. 449 (Tr. Div. Kosrae 1984) (issue of consent to enter private residence); FSM v. Mark, 1 FSM Intrm. 284 (Tr. Div. Pohnpei 1983) (seizure of plants from garden); FSM v. Tipen, 1 FSM Intrm. 79 (Tr. Div. Pohnpei 1982) (search of handbag).

[93] J. VAN DYKE & E. YAMAMOTO, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA—REPUBLIC OF PALAU JUDICIAL SEMINAR (1986).

[94] The Compacts of Free Association between the United States and the Governments of the Marshall Islands and FSM are reprinted in H.R.J. RES. 187, Pub. L. No. 99-239, U.S.C.S. (Supp., Feb. 1986) 4156. They have been approved by plebiscite in the Marshalls and FSM, and were signed into law by President Reagan on January 14, 1986. Final United Nations approval of the Compacts is contemplated in U.N. CHARTER arts. 83, 85.

[95] Compact of Free Association § 311(a).

[96] *Id.* §§ 211-219, 311(b)(3).

[97] Gibbons v. Salii, No. 8-86 (Sup. Ct. Palau) Sept. 17, 1986).

which authorizes use, testing, storage or disposal of nuclear . . . weapons intended for use in warfare shall require approval of not less than three-fourths (¾) of the votes cast in [a nationwide] referendum."[98] On September 27, 1986, in *Gibbons v. Salii*,[99] the Palau Supreme Court, per Chief Justice Nakamura, held that the Compact of Free Association with the United States, which received only 72% approval in a February, 1986, referendum in Palau, "has not been properly approved" and thus cannot be entered into by the Palau government. The problem is that Section 324 of the Compact[100] would have empowered the United States "to operate nuclear capable or nuclear propelled vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons . . . ." In the wake of *Gibbons*, the United States and Palau will need to begin again the process of negotiating the future political status of Palau.

The January, 1987, seminar, held on Kosrae and Pohnpei, treated contempt of court, judicial recusal and disqualification, judicial and legal ethics, and commercial law.[101] The mock trial featured a motion for recusal of the trial judge and an issue of statutory interpretation. The ethics materials presented issues of judges' personal ethics and of the judges' responsibility for regulating the practice of law in FSM. Each of the FSM states and the national government has adopted either the ABA Code of Professional Responsibility or the ABA Model Rules of Professional Conduct as the local governing standards, and so the Kosrae materials included problems and questions calling for solution under both sets of model rules.

IV. CONCLUSION

The partnership of the Supreme Courts of the Federated States of Micronesia and the Republic of Palau and the Richardson School of Law has produced a training program for trial and appellate judges in Micronesia. The law school's involvement in this endeavor can be seen as an aspect of its commitment to Pacific legal studies and Pacific Island legal development. The faculty is grateful to Chief Justice Edward C. King for having made it all possible.

---

[98] PALAU CONST. art. II, § 3; *see also id.* art. XIII, § 6.

[99] *See supra* note 97.

[100] *See* J. VAN DYKE & E. YAMAMOTO, *supra* note 93, at 79.

[101] *See* A. BOWMAN & A. KASTELY, SYLLABUS AND MATERIALS FOR THE FEDERATED STATES OF MICRONESIA—REPUBLIC OF PALAU JUDICIAL SEMINAR (1986).

United States Intervention in Nicaragua: Reflections in Light of the Decision of the International Court of Justice in *Nicaragua v. United States**

by Ved P. Nanda**

I.

On June 27, 1986, the International Court of Justice (I.C.J.) ruled 12 to 3 in the case concerning "*Military and Paramilitary Activities in and against Nicaragua*"[1] that the United States' activities in support of the Nicaraguan rebels ("contras") and its 1984 mining of Nicaraguan waters were "in breach of its obligation[s] under customary international law."[2] By the same margin, the I.C.J. rejected the United States justification of collective self-defense to undertake such activities,[3] and decided that the United States was "under a duty immediately to cease and to refrain from all such acts," and was "under an obligation to make reparation" to Nicaragua for injury caused by the breaches of United States obligations under customary international law.[4]

A month later, on July 31, 1986 after a three day discussion at the United Nations Security Council, the United States vetoed a resolution calling for "full compliance" with the I.C.J. judgment.[5] The vote was eleven in favor, one (the United States) against, and three (France, United Kingdom and Thailand)

---

* Based on a speech given at the University of Hawaii on April 29, 1987.

** Distinguished Visiting Scholar and Director of the Pacific and Asian Legal Studies Program, William S. Richardson School of Law, University of Hawaii at Manoa; Professor of Law and Director, International Legal Studies Program, University of Denver College of Law.

[1] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Merits), *reprinted in* 25 I.L.M. 1023 (1986).

[2] *See id.* at 146-47.

[3] Para. 2 of the operative part of the judgment, *id.* at 146.

[4] Para. 13 of the operative part of the judgment, *id.* at 149.

[5] *See* U.N. Docs. S/18250, 31 July 1986; S/PV.2704, 31 July 1986, *reprinted in* 25 I.L.M. 1352, 1364-65 (1986).

abstaining.[6]

Earlier, while overruling the United States objection to its jurisdiction, the I.C.J. had held on November 26, 1984, that it had jursidiction to hear the case.[7] This was followed on January 18, 1985, by a letter to the I.C.J. from the United States Agent, informing the I.C.J. of the United States position that the I.C.J.'s judgment "was clearly and manifestly erroneous as to both fact and law."[8] It added:

> The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.[9]

The I.C.J. nevertheless held written and oral proceedings, in which the United States did not participate, and eventually gave the judgment on the merits.

The I.C.J. judgment, holding that the United States was violating international law in supporting the "contras," was apparently of little concern to the United States Congress, since on August 13, 1986, the Senate approved, by a vote of 53 to 47, $100 million in aid to the Nicaraguan rebels.[10] On June 25, 1986, the House of Representatives had also voted to provide such aid.[11] In debates preceding the vote, issues of primary concern voiced by the opponents related to the fear of "another Vietnam," skepticism about the contras' prospects, anxiety about the "Reagan Doctrine," and misgivings about the conduct of the CIA and of the rebels, especially the latter's dismal human rights record.[12] Very little discussion, if any, was heard of the United States' obligations under international law during the House and Senate debates.

The implications of the United States' withdrawal from the I.C.J.'s proceedings and its rejection of the I.C.J.'s verdict are far-reaching and grave. The United States' action impedes the establishment of a world order which acknowledges the primacy of the rule of law and the pivotal role of international institutions and norms of international law in settling conflicts. In addition, notwithstanding the value of the I.C.J.'s judgment on the actual merits, the

---

[6] *See id.* at 1363.

[7] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 392 (Jurisdiction of the Court and Admissibility of the Application), *reprinted in* 24 I.L.M. 59 (1985).

[8] *Nicar. v. U.S.*, 1986 I.C.J. 14, 17 (para. 10) (Merits); 25 I.L.M. 1023, 1025 (1986).

[9] *Id.*

[10] *See* N.Y. Times, Aug. 14, 1986, at 1, col. 2.

[11] *See* N.Y. Times, June 26, 1986, at 1, col. 6.

[12] *See, e.g.*, Muravachik, *The Nicaragua Debate*, 65 FOREIGN AFF. 366 (Winter 1986-87).

argument is sound that the United States is still bound by the judgment and that this obligation extends to domestic courts as well.

II.

Recognizing the difficulty the I.C.J. faced in determining the facts relevant to the dispute, especially because of the non-appearance of the United States during the merits phase of the proceedings,[13] the I.C.J. *a fortiori* considered it "essential to guarantee as perfect equality as possible between the parties."[14] Thus, in addition to the oral and written testimony submitted by Nicaragua, the I.C.J. took into account material from various sources, for article 53 of the I.C.J.'s statute mandates that before deciding a case against a non-appearing party, the I.C.J. must satisfy itself "that the claim is well founded in fact and law."[15]

In the operative part of its opinion, the I.C.J. unanimously recalled "to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law."[16] However, on all important counts it held, by a majority varying from twelve to fourteen, against the United States. The I.C.J. held by fourteen to one that the United States, by failing to make known the existence and location of the mines it had laid, had breached its obligations under customary international law.[17] By the same margin, it held that the United States had breached its 1956 Treaty of Friendship, Commerce and Navigation with Nicaragua.[18]

By a vote of twelve to three, the I.C.J. held that the United States had breached its obligations under customary international law: (1) not to intervene in the affairs of another state "by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua[;]"[19] (2) not to

---

[13] *See Nicar. v. U.S.*, 1986 I.C.J. 14, 38-39 (para. 57) (Merits); 25 I.L.M. 1023, 1035-36 (1986).

[14] *Id.* at 40 (para. 59); 25 I.L.M. at 1036 (1986).

[15] Article 53 of the I.C.J. Statute provides:

> 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

But see Judge Schwebel's dissent, *Nicar. v. U.S.*, 1986 I.C.J. at 266 (Merits); 25 I.L.M. at 1149 (1986), in which he challenges the majority on both fact and law.

[16] Operative para. 16 of the judgment, Nicar. v. U.S., 1986 I.C.J. at 149; 25 I.L.M. at 1091.

[17] Operative para. 8 of the judgment, *id.* at 147-48; 25 I.L.M. at 1090.

[18] Operative para. 7 of the judgment, *id.* at 147, 25 I.L.M. at 1090.

[19] Operative para. 3 of the judgment, *id.* at 146, 25 I.L.M. at 1089.

use force against another state, by undertaking attacks on Nicaraguan territory;[20] (3) not to violate the sovereignty of another state, by directing or authorizing overflights of Nicaraguan territory;[21] and (4) not to interrupt peaceful maritime commerce and other obligations mentioned earlier, by laying mines in the internal or territorial waters of Nicaragua.[22]

Similarly, by a vote of twelve in favor and three against, the I.C.J. held that the United States was obligated "immediately to cease and to refrain from all such acts,"[23] and to make reparation to Nicaragua for injury caused by United States' breaches of obligations under customary international law.[24] On the latter issue, the obligation to make reparation for all injury caused to Nicaragua for breaches of the 1956 bilateral treaty between the United States and Nicaragua, the vote was fourteen to one.[25]

The Court also voted fourteen to one against holding the United States liable for providing the 1983 manual entitled *Operaciones sicologicas en guerra de guerrillas* (psychological operations for guerilla warfare) for the contras, although it acknowledged that the manual has "encouraged the commission by [the contras] of acts contrary to general principles of humanitarian law."[26]

The three judges in the minority on major issues were one each from Britain, Japan, and the United States. Sir Robert Jennings dissented primarily on technical grounds pertaining to the I.C.J.'s jurisdiction, in light of the application of the "multilateral treaty reservation" provisions of the United States declaration of acceptance of I.C.J. jurisdiction.[27] The United States' claim was that under this reservation, there can be no adjudication of a claim based on multilateral treaties, including the United Nations Charter.[28] Judge Shigeru Oda dissented on the ground that the issue was primarily political in nature and not legal, and consequently the I.C.J. should not decide the case.[29] The former executive director of the American Society of International Law, Judge Stephen Schwebel, was alone in challenging the veracity of "facts' as the Court determined them. Judge Schwebel justified the United States' action of supporting the contras and exerting armed pressure directly against Nicaragua as a response to Nicaragua's support of armed insurgency against El Salvador which amounted to an armed

---

[20] Operative para. 4 of the judgment, *id.* at 146-47; 25 I.L.M. at 1089-90.

[21] Operative para. 5 of the judgment, *id.* at 147, 25 I.L.M. at 1090.

[22] Operative para. 6 of the judgment, *id.*

[23] Operative para. 12 of the judgment, *id.* at 149, 25 I.L.M. at 1091.

[24] Operative para. 13 of the judgment, *id.*

[25] Operative para. 14 of the judgment, *id.*

[26] Operative para. 9 of the judgment, *Nicar. v. U.S.* at 148; 25 I.L.M. 1090.

[27] *See id.* at 528; 25 I.L.M. at 1280.

[28] *See id.* at 92-93 (para. 173); 25 I.L.M. at 1062-63.

[29] *See id.* at 212; 25 I.L.M. at 1122.

attack upon El Salvador.[30] Consequently, according to Judge Schwebel, the United States' action in support of El Salvador was permissible under the collective self-defense principle of international law.[31]

Notwithstanding the prohibition on the use of force, accepted either as a customary norm of international law or as a conventional mandate under the United Nations Charter,[32] the United States' actions against Nicaragua involving use of force would be justified under international law if undertaken in exercise of the "inherent right of individual or collective self-defense."[33] The twin criteria for a successful claim of self-defense are necessity and proportionality. Applying these generally accepted criteria, the I.C.J. did not find that the United States' activities in question were undertaken out of necessity and found that some activities could not be regarded as satisfying the criterion of proportionality.[34]

Based upon his determination of the facts in the case, Judge Schwebel, on the other hand, concluded that the United States was legally entitled to

> respond to Nicaragua's covert attempt to overthrow the Government of El Salvador by overt or covert pressures, military and other, upon the Government of Nicaragua, which are exerted either directly upon the Government, territory and people of Nicaragua by the United States, or indirectly through the actions of Nicaraguan rebels—the "*contras*"—supported by the United States.[35]

III.

Even though the United States withdrew from the I.C.J. proceedings, it is bound by the I.C.J. decision, for the United States' obligation to observe and enforce I.C.J. judgments was never terminated. Also, as a logical consequence of its respect for the rule of law, the United States must adhere to internationally accepted norms, especially those embodying restraints on the use of force.

As a law-abiding state which firmly believes in and cherishes a rich tradition in accepting the rule of law, the United States accepted the I.C.J.'s compulsory jurisdiction. True to its tradition, the commitment was designed to place "in-

---

[30] *See id.* at 259; 25 I.L.M. at 1146.

[31] *See generally id.* at 353-78; I.L.M. at 1193-1205.

[32] Article 2(4) reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[33] Article 51 of the U.N. Charter recognizes "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."

[34] *See Nicar. v. U.S.*, 1986 I.C.J. at 122-23 (para. 237); 25 I.L.M. 1077-78.

[35] *Id.* at 269 para. 6; 25 I.L.M. at 1151 (Schwebel, J., dissenting).

ternational relations on a legal basis, in contrast to the present situation, in which states may be their own judge of the law."[36] Under the agreement, a six month's notice period was to precede any termination of the United States' acceptance of the I.C.J. compulsory jurisdiction. Congress had explicitly stated that the passing of the six month notice period meant "a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding."[37]

The United States' obligation to be bound by the I.C.J. judgment is contained in article 94 of the United Nations Charter which mandates that a state shall comply with an I.C.J. decision to which it is a party. This obligation is self-executing,[38] and neither congressional nor executive action should violate an I.C.J. judgment.[39]

Compliance with restraints on the use of force serves the long-term interests of the United States and of the world community as well. The purported rationale, couched in terms of national security or national interest, which provides a basis for the justification of United States actions against Nicaragua, defeats the very purpose upon which the assertion is based. Our national interest cannot be made dependent on the violation of such fundamental norms as the prohibition against the use of force and respect for territorial integrity. Such a notion of "national interest," if applied and followed consistently, would lead to a decay in the core of international order, which in turn, renders the purported "national interest" entirely meaningless.

This concern for the prevention of international anarchy is not based on an alarmist tendency. In the face of a rising tide of international terrorism which threatens international order, it is clear that scrupulous adherence and attention to international norms is needed. The long-term interests of the United States or any other nation will certainly not be served by a further weakening of the existing constraints on the use of force. Even our short-term "national interest" is by no means served, to our or any other nation's advantage, as long as such interest serves to negate the existence and importance of a fundamental norm toward the establishment and refinement of which this nation has had a major responsibility. It is imperative that the United States be concerned with the future of normative behavior in the world community, as it shares a large responsibility for either promoting and respecting or for violating and ignoring basic international norms.

---

[36] S. REP. NO. 1835, 79th Cong., 2d Sess. 3 (July 25, 1946).

[37] *Id.* at 5.

[38] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[39] *See, e.g.*, Fitzmaurice, *The Problem of the "Non-Appearing" Defendant Government*, [1980] 51 BRIT. Y.B. INT'L L. 89. Similarly, a domestic court is bound to apply an I.C.J. judgment. *See* Chorzow Factory Case, 1928 P.C.I.J. (Merits) (ser. A) No. 17, at 33; S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY 77, 83-89 (1957).

Granted, a noticeable disregard for constraints on the use of force is evident in recent state practice. The continuing Iran-Iraq war, the war in the Falklands, the Soviet invasion of Afghanistan, the Libyan incursions into Chad, and conflicts in Southeast Asia, the Middle East and Southern Africa all illustrate the gradual erosion of the prohibition against the use of force. Notwithstanding the divergence of views regarding the nature and scope of the article 2(4) prohibition, I wholeheartedly agree with the cogent and persuasive argument by Professor Richard Falk that the adherence to normative restraints is most definitely in the national interest of the United States.[40]

Among influential international law scholars, Professor Michael Reisman has recently argued for an expansive interpretation of article 2(4).[41] Former Ambassador Jean Kirkpatrick's statement in the United Nations Security Council, following the United States' invasion of Grenada, provides an unusually broad, and, I would submit, unacceptable, reading of the language used in article 2(4), to wit, "or in any other manner inconsistent with the purposes of the United Nations," when she stated:

> The prohibitions against the use of the force in the UN Charter are contextual, not absolute. They provide ample justification for the use of force against force in pursuit of the other values also inscribed in the charter—freedom, democracy, peace. The charter does not require that peoples submit supinely to terror, nor that their neighbors be indifferent to their terrorization.[42]

Such a broad interpretation would provide an easy pretext for violation of the prohibition on the use of force.

Still others assert that the prohibition on the use of force, now embodied in article 2(4), which is subject to enumerated exceptions[43] (especially "the inher-

---

[40] *See* Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263 (1985).

[41] *See, e.g.*, Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985); Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984). *But see* Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1640 (1984). *See also* Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 229 (1983).

On legal analyses of the United States actions in Nicaragua, see generally Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985); Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986); Rowles, *U.S. Covert Operations Against Nicaragua and Their Legality under Conventional and Customary International Law*, 17 U. MIAMI INTER-AM. L. REV. 407 (1986).

[42] 83 DEP'T ST. BULL., No. 2081, Dec. 1983, at 74.

[43] In addition to the article 51 exception based on self-defense, the other exceptions are: (1) action by the Security Council under chapter VII, and (2) enforcement action under article 53

ent right of individual or collective self-defense," as contained in article 51), has in fact become a peremptory norm of international law.[44] The International Law Commission expressed its view during the course of its work on the law of treaties that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."[45]

IV.

A case was filed by a committee of citizens in the United States District Court for the District of Columbia, challenging the legality of the Reagan administration's aid of the contras.[46] Does such a plaintiff have standing in a United States court to challenge the United States' policy of aiding the contras, on the ground that it is in contravention of the I.C.J. ruling? Should the United States courts apply the holding of the I.C.J. and rule affirmatively? I would suggest that a plaintiff can rely upon treaty law, article 94 of the United Nations Charter, and customary international law to support such a challenge under international law in United States courts.

The principle that international law is part of the supreme law of the land and must be applied by United States courts has been accepted since the earliest years of the Republic.[47] International law as "part of our law" must be applied by courts "as often as questions of right depending upon it are duly presented for their determination."[48] But how can such plaintiffs rebut the proposition

---

with the authorization of the Security Council. Article 103 mandates that the Charter provisions regarding the obligations of member states are to prevail over any inconsistent treaty.

[44] *See, e.g.*, Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 13 (1980), where he asserts:

> Though writers disagree on the precise definition of *jus cogens*, they do agree generally that the principle of prohibition of the use of force is a prime example of it. Thus, the principle of non-use of force in Article 2.4 and the self-defense exception in case of armed attack in Article 51 are widely considered peremptory norms of international law.

Id. (footnotes omitted).

[45] Commentary of the International Law Commission to article 50 of its draft articles on the Law of Treaties, para. 1, [1966] II Y.B. INT'L L. COMM'N 247.

[46] *See* Committee of U.S. Citizens Living in Nicaragua v. Reagan, No. 86-2620, (D.D.C. Nov. 6, 1986). The author assisted the plaintiffs with their legal arguments in an *amicus* brief.

[47] U.S. CONST. art. VI, § 2; Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796); The Nereide, 13 U.S. (9 Cranch.) 388, 423 (1815) ("the court is bound by the law of nations, which is a part of the law of the land").

[48] The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560 (1984); 1 Op. Att'y Gen. 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." Opinion of Attorney General Randolph); 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 comment c (Tent.

that individuals have a private right of action under article 94 of the United Nations Charter only if it is self-executing, and since it is not, there is no such right?

I would submit that the principle of "self-execution" is a judicially created doctrine originally used to avoid striking down an existing law which conflicted with a subsequent treaty.[49] However, in a California state court decision, *Sei Fujii v. California*,[50] non-self-execution was expanded to deny a private right of action to individuals under article 55 of the United Nations Charter. Such a broad application of the non-self-execution principle is unwarranted.

The Revised Restatement of the Foreign Relations Law of the United States appropriately reflects a shift away from the *Sei Fujii* type of analysis. Section 131 states in part: "An international agreement is 'non-self-executing' if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or in those rare cases where implementing legislation is constitutionally required."[51]

The comments to Section 131 and the Reporters' Notes offer further explanation. Comment (h) notes: "If an international agreement or one of its provisions is non-self-executing in the United States, the United States is under an international obligation, to the extent provided for in the agreement, to adjust its laws and institutions as may be necessary to give effect to the agreement." According to Reporters' Note 5, "In general, agreements that can be readily given effect by executive or judicial bodies, federal or state, without further legislation, are deemed self-executing, unless a contrary intention is manifest."

Even if article 94 of the United Nations Charter were non-self-executing, which it is not, as Judge Bork noted in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*,[52] that principle bars a private right of action under a treaty only where authorizing legislation is absent. The Restatement is helpful in determining what "authorizing legislation" is, stating that in some instances the United States Constitution, "or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agree-

---

Draft No. 6, 1985) ("The proposition that international law and agreements are law in the United States is addressed mainly to the courts. They are to apply international law or agreements as if their provisions were enacted by Congress."); *Id.*, Reporters' Notes 1, 2.

[49] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-15 (1829), *ovr'ld on other grounds*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (a treaty is to be regarded as the law of the land wherever it operated of itself, otherwise the legislature must execute it before it becomes a rule for the court).

[50] 217 P.2d 481 (Cal. App. 1950), *superseded*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

[51] 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131(4) (Tent. Draft No. 6, 1985). *See also id.*, comment h.

[52] 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

ment, thus obviating the need of adopting new legislation to implement it."[53]

The Administrative Procedure Act, 5 U.S.C. Section 706, requires federal courts to review and "hold unlawful and set aside agency action . . . found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," thus providing for the application of the United Nations Charter, article 94.

In addition, there is a private right of action under customary international law, for although the United States Constitution is silent on the subject, the Supreme Court held in *The Pacquete Habana*[54] that customary international law is the "law of the land." However, the traditional approach has been that customary international law deals principally with relations among states, and hence it does not give rise to a private right of action in United States' courts. This argument ignores the fact that the plaintiff in *The Paquete Habana* was an individual.[55] As to the contention that the non-self-execution principle should be extended to customary international law to deny a private right of action, which finds support in *Pauling v. McElroy*,[56] I would suggest that in the last twenty-five years, a fundamental change has occurred with respect to the traditional notion of the subjects of international law. Historically, nations alone were the recognized actors in the international arena and individual rights were considered derivative and dependent solely on a nation's rights under international law. However, significant and notable changes in this traditional approach have resulted in the recognition of individuals as subjects of international law and the acknowledgment of the legitimacy of their rights *qua* individuals in the international arena. Consequently, a rich body of international human rights law has developed in the recent past. A large number of conventions under United Nations' auspices and the auspices of various regional bodies accord an individual the right to claim under international law, extending even to the right to bring a claim against one's own state.[57]

---

[53] *See supra* note 51.

[54] *The Paquete Habana*, 175 U.S. at 700.

[55] *See also* Republica v. Delongchamps, 1 U.S. 120 (1 Dall.) (O. & T. Pa. 1784) (violation of the law of nations treated as a common law crime under state law); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (prohibition on torture is enforceable in a private damages action); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (private damages action for state-sponsored assassination); Fernandez v. Wilkinson, 505 F. Supp. 787, 795 (D. Kan. 1980) (recognition of norm against indefinite detention of aliens), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

[56] 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). *See also Tel-Oren*, 726 F.2d at 817 (Bork, J., concurring). Judge Bork, in his concurring opinion, cited for this proposition Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976), which relied solely on *Pauling* to severely limit the application of international law in U.S. courts.

[57] *See, e.g.*, T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE

The United States' courts have appropriately acknowledged this trend toward a broader and more meaningful application to the growing body of international human rights law in our own court system and in acknowledging the validity of individual rights under international law.[58] I would suggest that this development should be accorded the wider respect it deserves in United States' courts, acknowledging the impact of changed circumstances since *Pauling* in 1958.

Application of the non-self-executing principle to customary international law goes well beyond its already questionable usage to limit treaty law.[59] In *Filartiga v. Pena-Irala*, the Second Circuit Court of Appeals unambiguously stated that "international law confers fundamental rights upon all people vis-a-vis their own governments."[60] Furthermore, *Tel-Oren* should not be used to deny an individual's right of action to challenge the United States administration's aid to the contras under customary international law because of factual distinctions between the two situations. In his concurring opinion, Judge Bork distinguished that case from the *Filartiga* decision.[61] The situation of the Reagan administration and the contras is distinguishable on the same grounds.

First, Judge Bork wrote, the defendants in *Tel-Oren* were not state officials acting in their official capacity, as they were in *Filartiga* and as they would be in this situation. Second, the actions of the defendant in *Filartiga*, as in this situation, were in violation of the constitution and laws of his state. Finally, Judge Bork wrote that in *Filartiga*, a clear and unambiguous principle of international law was violated (prohibition against official torture), while in *Tel-Oren*, the court held that terrorism had not transcended to the level of a violation of customary international law. Here, the prohibition on the use of force is an undisputed principle of customary international law. Based upon the distinctions set forth by Judge Bork, the *Tel-Oren* reasoning should not be applied to this situation.

Finally, even if customary international law were non-self-executing, which it is not, the Administrative Procedure Act, 5 U.S.C. section 706 executes it, and provides individuals seeking compliance with the I.C.J. judgment with a private right of action under customary international law.

AMERICAS (1982); H. HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW (1985); Saario & Cass, *The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation*, 7 CAL. W. INT'L L.J. 591 (1977); *Human Rights*, 13 DEN. J. INT'L L. & POL'Y 155 (1984).

[58] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Von Dardel v. U.S.S.R., 623 F. Supp. 246 (D.D.C. 1985); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); *International Human Rights Law in State Courts*, 18 INT'L L. 59 (1984).

[59] *See generally* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); 1 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 (3) & (4) (Tent. Draft No. 6, 1985) (customary international law is "self-executing").

[60] *Filartiga*, 630 F.2d at 885.

[61] *Tel-Oren*, 726 F.2d at 819-20.

V.

When in the fall of 1986, revelations about the Iran-contra affair implicated officials of the National Security Council (NSC) for covert support to the contras and secret arms shipments to Iran,[62] little national debate, if any, occurred specifically addressing any violation of international law by the Reagan administration. In February 1987, the Tower Commission Report, an investigatory report prepared by the President's Special Review Board on the Iran-contra affair,[63] revealed that Lt. Col. Oliver North of the NSC staff, Assistant Secretary of State Elliot Abrams, and United States Ambassador to Nicaragua, Louis Tambs, were involved in the construction of a secret airstrip in northern Costa Rica to help the contras establish a "Nicaraguan resistance southern front."[64] The Costa Rican government was considering a protest against the United States for violating a prohibition against the secret use of the airstrip by contras.[65]

In the U.S. Congress, efforts failed in March 1987 to block the Reagan administration from releasing $40 million in military assistance to the contras.[66] Reportedly, the Central Intelligence Agency continues to provide the contras with precise information on dams, bridges, port facilities, electric substations and other targets deep inside Nicaragua so that rebels can destroy them in guerrilla raids.[67]

Meanwhile, efforts were underway to find a regional peace plan for Central America on which the parties, including the United States and Nicaragua, can agree. Thus, in addition to the continuing contadora efforts, Costa Rican President Oscar Arias Sanchez proposed another plan which was endorsed overwhelmingly by the United States Senate.[68] Under the Arias plan, the contras would receive no further aid in return for political liberalization in Nicaragua.[69] Nicaragua's ambassador to the United States, Carlos Tunnermann, expressed his support for another "proposal made in November 1986 by the Secretaries

---

[62] *See, e.g.*, N.Y. Times, Nov. 9, 1986, at 1, col. 5.

[63] *See* N.Y. Times, THE TOWER COMMISSION REPORT (1987).

[64] *See id.* at 468-74.

[65] *See* LeMoyne, *Costa Rica Weighs Protest to U.S. on Use of Airstrip to Aid Contras*, N.Y. Times, Mar. 9, 1987, at 6, col. 1.

[66] *See, e.g.*, Greenhouse, *Senators Vote, 52 to 48, Not to Block Contra Aid*, N.Y. Times, Mar. 19, 1987, at 8, col. 1; Greenhouse, *Contra Debate Is Over, For Now, but It May Be Really Over Next Fall*, N.Y. Times, Mar. 27, 1987, at 12, col. 5.

[67] *See* Brinkley, *C.I.A. Gives Contras Detailed Profiles of Civil Targets*, N.Y. Times, Mar. 19, 1987, at 1, col. 1.

[68] *See, e.g.*, Kinzer, *Nicaragua Chief Says Peace Plan Will Fail Without Shift by Reagan*, N.Y. Times, Mar. 18, 1987, at 1, col. 1.

[69] *See, e.g.*, LeMoyne, *Costa Rica's Return to Neutrality Strains Its Ties With Washington*, N.Y. Times, Mar. 22, 1987, § 4, at 2, col. 1.

General of the United Nations and the Organization of American States calling for international observers at borders to prevent military incursions into any country in the region."[70] However, no progress has been reached presumably because the Reagan administration is skeptical about the prospects for peace in the region without forcing the Sandinista government to liberalize further and allow pluralism in Nicaragua.

VI.

I find two aspects of the United States interventionist policy in Nicaragua especially disturbing. The first relates to the lack of attention by the Reagan administration to questions of international law, its withdrawal from the I.C.J. proceedings and its rejection of the I.C.J.'s judgment. The second is its apparent rejection of multilateral efforts in favor of a unilateral approach, a "go-it-alone" syndrome. I fear that the administration has embarked on a pattern, as has been evidenced by the United States rejection of the Law of the Sea Treaty, its withdrawal from UNESCO, and its slap in the face of the U.N. by reducing its contribution to the United Nations regular budget and even withholding funds from some United Nations operations, such as United Nations activities concerning population.

Admittedly, international law is normatively ambiguous. Self-defense is hard to define. However, it is imperative that the United States adhere to the rule of law in a world marked by competing and conflicting ideologies, values and perceived national interests. United States interests and the interests of the world community converge on the need to establish a world order which is guided by principled and effective restraints on the use of force.

As to the United States apparently backing into a "neo-isolationist" posture, the United States interests will be best served by its exercising its power and prestige skillfully and in concert with other nations, with the objective of strengthening the existing world order, not by turning its back on the rest of the world. What is needed is joint leadership, by the President and the Congress, developed with vision and executed with skill. I hope that history will record the United States' rejection of the I.C.J.'s decision and the role of international law as an aberration and not a trend.

---

[70] Tunnermann, *Nicaragua's Peace Aims*, N.Y. Times, Mar. 19, 1987, at 23, col. 1.

Who's Minding The Nursery: An Analysis Of Surrogate Parenting Contracts In Hawaii

I. INTRODUCTION

The concept of "family" has undergone a dramatic transformation during the past twenty years. The term "family" no longer connotes simply and universally a mother, father and child or children. Rising divorce[1] and illegitimate birth rates,[2] resulting in an increase in single parent homes and a rising abortion rate,[3] have combined to create a society where options for defining the term "family" are many. The traditional family structure, however, is the basis for much of the existing common and statutory law. Unfortunately, current law is inadequate for dealing with many contemporary issues. Consequently, courts are being forced to grapple with various implications of the changing family structure.

One multi-issue area that courts are facing involves the concept of surrogate parenting.[4] Surrogate parenting has recently assumed greater significance for two reasons. First, there is currently a shortage of adoptable babies in the United States, resulting in a three to seven year waiting period for most couples to

---

[1] In Hawaii, the 1985 divorce rate increased from 3.6 per 1,000 in 1970 to 4.6 per 1,000. *Statistical Supplement, Dep't of Health, State of Hawaii* (1971, 1986).

[2] Each year for the past decade, more than a million teenage girls have become pregnant. The number of illegitimate births has soared. "In 1984, 56 percent of teen births were out of wedlock, compared with only 15 percent in 1960." Kantrowitz, *Kids and Contraceptives*, NEWSWEEK, Feb. 16, 1987, at 54.

[3] The elective abortion rate in Hawaii has increased dramatically from 164 per 1,000 live births in 1970 to 310.4 per 1,000 live births in 1985. *Statistical Supplement, Dep't of Health, State of Hawaii* (1971, 1986).

[4] A surrogate parenting arrangement, as defined in this comment, occurs when a woman, the surrogate mother, pursuant to a written contract, agrees to be artificially inseminated with the natural father's sperm. For purposes of this comment the natural father's spouse has been determined to be infertile. This comment does not address the situation where the woman for whatever reason declines to become pregnant herself. According to Noel Keane, a Dearborn, Michigan attorney who specializes in surrogate arrangements, about 500 children have been born to surrogate parents since 1976, 65 of them last year. TIME, Jan. 19, 1987, at 57, col. 3.

adopt.[5] This lengthy waiting period is largely due to an increase in the number of women who either elect to have abortions or who decide to keep their babies in lieu of placing them for adoption.[6] Second, there is an increasing rate of infertility among American couples, and in particular, American women.[7] These two factors create a larger pool of couples who attempt to obtain a child through adoption, artificial insemination, or non-traditional methods, such as surrogate parenting.

The reasons why couples elect to go through a surrogate parenting arrangement rather than the traditional adoption procedure are two-fold. First, by using a surrogate and artificially inseminating the woman with the natural father's sperm, the blood-line and genes of the father are passed on to the child.[8] These biological ties are not present in the standard adoption where the child has no biological ties to either of the adopting parents. Second, the surrogate parenting contract typically allows the couple to substantially regulate the surrogate's pregnancy, ensuring that the child will have the type of prenatal care the couple desires for their child.[9]

The reasons why a woman decides to act as a surrogate, however, are more complex. Reasons frequently cited include guilt over a past abortion, an enjoyment of pregnancy, an altruistic desire to aid a couple who could not otherwise bear a child, as well as financial reward.[10]

While the subject of surrogate parenting is not new,[11] contract and constitutional jurisprudence in the area of surrogate parenting is of current debate and recent judicial scrutiny. This comment focuses on surrogate parenting in Hawaii with special attention directed to the contract and constitutional law issues underlying the concept. First, the legality of the contract between the surrogate mother and the adopting couple is examined. Second, the constitutionality of surrogate parenting is addressed. Third, the adequacy of traditional contract remedies in the event of a breach of the surrogate parenting contract is analyzed. Finally, the need for and substance of legislation concerning the surrogate

---

[5] Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J.L. & MED. 243, 244 n.8 (1984).

[6] *Id.* at 244 n.6.

[7] *Id.* "An estimated fifteen to twenty percent of American couples of childbearing age are infertile . . . in sixty to seventy percent of infertile couples, the infertile partner is the female. . . . Only 1 of 40 infertile couples has a chance of adopting a child, according to the National Committee for Adoption. Some 2 million couples seek babies to adopt each year but only about 50,000 children are accepted." NEWSWEEK, April 28, 1986, at 39.

[8] L. ANDREWS, NEW CONCEPTIONS 198 (1984).

[9] Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" For a Fee*, 18 GONZ. L. REV. 539, 544 (1982-83) [hereinafter Comment, *Surrogate Mother's Right to a Fee*].

[10] L. ANDREWS, *supra* note 8, at 207.

[11] *See Genesis* 17. Sarah, who was unable to have a child of her own, offered her maidservant, Hagar, to her husband, Abraham, so that Hagar could bear a child for Sarah and Abraham.

parenting arrangement is discussed.

II. THE LEGALITY OF SURROGATE PARENTING CONTRACTS UNDER HAWAII LAW

Two elements are necessary to create a legally binding and enforceable contract: an agreement and bargained-for consideration.[12] Both elements are present in a properly executed surrogate parenting contract. A potential surrogate offers to carry a child resulting from impregnation with the natural father's sperm in consideration for a fee. A typical surrogate parenting contract contains provisions relating to the surrogate's responsibilities prior to being inseminated,[13] during pregnancy[14] and following the birth of the child.[15] In return, the adopting couple promises to pay the medical and other expenses of the surrogate as well as a fee for her services.[16]

An otherwise valid contract, however, will be void and unenforceable if it violates an existing statute or is contrary to public policy.[17] The following sections discuss the impact of various statutory provisions and public policy considerations on the surrogate parenting arrangement.

A. Statutory Prohibitions on the Payment of a Fee in an Adoption Proceeding

Hawaii has no statute addressing surrogate parenting, nor does Hawaii prohibit the payment of a fee in an adoption. To date, only Arkansas has enacted legislation dealing with surrogate parenting.[18] The Arkansas statute is limited,

---

[12] RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979).

[13] Comment, *Surrogate Mother's Right to a Fee*, *supra* note 9, at 543-44. These provisions often include abstention from intercourse for a designated period of time prior to insemination, abstention from drugs and alcohol for a period of time prior to insemination, as well as physical and psychological evaluations of the surrogate mother. *Id.* at 544.

[14] *Id.* Prenatal care provisions and a promise not to abort the fetus are typical post-insemination provisions. Additionally, a promise to abstain from intercourse for a period of time following insemination might also be included in the contract. *See also* Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 295 (1982).

[15] Comment, *Surrogate Mother's Right to a Fee*, *supra* note 9, at 544.

[16] Fees paid to the surrogate mother range from $10,000-$15,000. *Id.* at 542-43. In Hawaii, fees to the surrogate have ranged from $0-$15,000 according to Rosalyn Loomis, a Honolulu attorney who has handled the Hawaii surrogate adoptions in Hawaii, and who is currently a *per diem* judge with Family Court.

[17] "Within the limitations of public policy, and so long as inhibitions of law are not violated, parties *sui juris* may devise their own contracts and fully effectuate their purpose and intention." Hess v. Paulo, 38 Haw. 279, 285 (1949).

[18] Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 638 (1986) [hereinafter Special Project, *Legal Rights and Issues*]. The Arkan-

however, to the issue of determining paternity.[19] No state has passed legislation specifically prohibiting or regulating the use of surrogate parenting arrangements or surrogate parenting contracts.[20] Notwithstanding the lack of precise statutory guidelines, courts of several states have attempted to analyze surrogate parenting contracts within the framework of already existing state statutory law.[21] Two states have declared that surrogate parenting contracts are illegal based on state statutes that prohibit the payment of a fee in connection with an adoption.[22] Two recent decisions, however, dealing with surrogate parenting contracts have upheld the legality of the contracts despite a state law prohibition of the payment of a fee in an adoption proceeding.[23]

In *Surrogate Parenting Associates v. Commissioner ex rel. Armstrong*, the Kentucky Supreme Court concluded that there were fundamental differences between the surrogate parenting procedure and the buying and selling of children, a practice prohibited under Kentucky law. The surrogate parenting procedures at issue were held to be beyond the purview of existing legislation.[24] The court

---

sas statute provides that:

> A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child, shall be for all legal purposes the child of the woman giving birth, except in the case of a surrogate mother in which event the child shall be that of the woman intended to be the mother. For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth can be issued upon orders of a court of competent jurisdiction.

ARK. STAT. ANN. § 34-721(B) (Supp. 1985). Thus, even the Arkansas legislature addressed only the issue of unmarried surrogate mothers, retaining the presumption that in the case of a married woman, the child shall be deemed to be the child of her husband.

[19] Special Project, *Legal Rights and Issues*, *supra* note 18, at 638. *See* ARK. STAT. ANN. § 34-721(B) (Supp. 1985).

[20] A survey conducted during the summer of 1986 by the National Committee of Adoption revealed that eight states have bills pending that would regulate surrogate motherhood but only one, in California, came close to passage. Galen, *Surrogate Law: the decision in a novel case in New Jersey could have wide-reaching implications for infertile couples and surrogate motherhood*, NAT'L L.J., Sept. 29, 1986, at 10, col. 4.

[21] *See* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983) (Michigan's adoption code); Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985) (Michigan's paternity statute); Okla. Op. Att'y Gen. No. 83-162 (1983) (Oklahoma's Trafficking in Children Statutes).

[22] States which have determined that payment of a fee in a surrogate parenting contract is illegal are Michigan and Oklahoma. Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981); Okla. Op. Att'y Gen. No. 83-162 (1983).

[23] Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986); *In re* Baby Girl, L.J., 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. 1986).

[24] 704 S.W.2d at 211. The case arose when the Kentucky Attorney General instituted proceedings against Surrogate Parenting Associates, Inc. (SPA), which operates a medical clinic to assist infertile couples in obtaining a biologically-related child through a surrogate parenting con-

added that it was the legislative and not the judicial perogative to determine public policy regarding health and welfare.[25] In the absence of a clear legislative mandate, the court was unwilling to apply existing adoption law to surrogate arrangements.

In *In re Baby Girl, L.J.*, the Nassau County (New York) Surrogate's Court, in deciding whether to allow the adoption of a child resulting from a surrogate contract, addressed the issue in two phases: (1) whether a particular surrogate arrangement was valid; and (2) whether the payment of a $10,000 fee to the surrogate mother was a violation of New York law.[26] The court determined that the child's best interest was served by allowing the private adoption to take place,[27] thereby validating the arrangement. As to the second issue, the court acknowledged that in New York it was a misdemeanor for anyone except an authorized agency to pay or accept compensation in connection with an adoption.[28] The court, citing *Surrogate Parenting Associates*, concluded nevertheless that "[c]urrent [New York] legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them."[29] Furthermore, the court expressly concurred with the Kentucky Supreme Court and held that surrogate parenting is a matter for legislative rather than judicial action.[30] Thus, in both *Surrogate Parenting Associates* and *Baby Girl, L.J.*, the courts found existing statutes inapplicable to the surrogate parenting arrangement and were unwilling to legislate judicially.

Courts, which earlier held surrogate parenting contracts unenforceable, analyzed the legality of surrogate contracts in a fashion similar to the approach adopted in *Baby Girl, L.J.* The issue of payment of a fee was separated from the issue of the legality of the surrogate contract. In *Doe v. Kelley*, the Michigan

---

tractual arrangement. The complaint alleged that SPA violated existing Kentucky law prohibiting the sale or purchase of any child for the purpose of adoption, KY. REV. STAT. ANN. § 199.590(2) (1985), prohibiting the filing of a petition voluntarily terminating parental rights prior to five days after the birth of the child, *id.* § 199.601(2), and specifying that a consent for adoption shall not be valid if given prior to the fifth day after the birth of the child. *Id.* § 199.500(5).

[25] *Surrogate Parenting Assocs.*, 704 S.W.2d at 213. The court reasoned that the execution of the contract prior to conception is a crucial difference from the objective of existing Kentucky law which is to keep baby brokers from overwhelming an already expectant mother. *Id.*

[26] 132 Misc. 2d 972, 505 N.Y.S.2d 813 (1986). *Baby Girl, L.J.* concerned a private placement adoption where a child was born to a surrogate. The attorney representing the adoptive parents prepared a surrogate parenting agreement under which the surrogate was to receive $10,000 for bearing the child. *Id.* at ____, 505 N.Y.S.2d at 814.

[27] *Id.* at ____, 505 N.Y.S.2d at 815. The court did not explain the reasons for its holding, except to state that no other alternative was appropriate since the child needed a home and the home must be that of the adopting couple. *Id.*

[28] *Id.*

[29] *Id.* at ____, 505 N.Y.S.2d at 817-18.

[30] *Id.* at ____, 505 N.Y.S.2d at 818.

Court of Appeals held that surrogate parenting contracts were not per se illegal, but that the payment of a fee in connection with the adoption was illegal.[31] The litigation arose when a married couple brought action against the Michigan Attorney General seeking a declaratory ruling that statutes prohibiting the exchange of money in connection with adoption procedures were unconstitutional.[32] Specifically, the surrogate contract provided that the adopting couple would pay the surrogate $5,000 plus medical expenses.[33] The court held the statute applicable, noting that "[t]he statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude the plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures."[34] The court thereby permitted the surrogate parenting arrangement but denied the parties the right to contract for a fee because the payment of money violated an existing state adoption statute.[35]

Surrogate Parenting Associates and *Baby Girl, L.J.* are difficult to reconcile with *Doe v. Kelley*. The cases evidence two vastly different interpretations of similar state statutory law.[36] On the one hand, *Doe v. Kelley* literally applied the state statute prohibiting payments in connection with an adoption. In contrast, the courts in *Surrogate Parenting Associates* and *Baby Girl, L.J.* recognized that the statutes involved were not enacted in contemplation of surrogate parenting contracts and that there is a need for legislative action. The latter analysis is the sounder approach, since the evil the legislatures were dealing with in enacting the no-fee statutes was black market baby selling, an evil nonexistent in surro-

---

[31] 106 Mich. App. 169, ____, 307 N.W.2d 438, 441 (1981).

[32] *Id.* at ____, 307 N.W.2d at 438. The statute under consideration reads, "Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following: (a) The placing of a child for adoption." MICH. COMP. LAWS ANN. § 710.54(1)(a) (West 1986).

[33] 106 Mich. App. at ____, 307 N.W.2d at 440.

[34] *Id.*

[35] *Id.* The Michigan Supreme Court addressed the surrogate parenting arrangement in a different context in Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985), four years after the court of appeals decided *Kelley*. In *Syrkowski*, the question was whether the circuit court had subject-matter jurisdiction over a biological father's request under the Paternity Act for an order of filiation declaring his paternity when he and the biological mother had entered into a surrogate parenting arrangement. In holding that the circuit court did have jurisdiction, the Michigan Supreme Court applied a strict statutory analysis and noted, "[w]e express no opinion about the plaintiff's [natural father] entitlement to any relief in the future." 420 Mich. at ____, 362 N.W.2d at 213. Whether the court intended this statement as a continued rejection of surrogate parenting contracts is unclear.

[36] One possible explanation for the current dichotomy in case law might be that while New York and Kentucky both allow private adoptions, Michigan does not, Thus, while not expressed in its opinion, the court in *Kelley* might be reacting to the private adoption as well as to the surrogate parenting contractual arrangement.

gate parenting arrangements.[37]

In Hawaii, private adoptions are expressly permitted by statute.[38] Furthermore, in Hawaii, unlike New York, Michigan, and Kentucky, the payment of a fee in connection with an adoption is not prohibited by statute. Consequently, Hawaii courts need not address the issue of whether surrogate parenting contracts are illegal under a statute which prohibits payment of fees in private adoptions.

B. *Artificial Insemination Statutes*

In addition to interpreting statutes prohibiting the payment of a fee in an adoption proceeding, one court has addressed the relationship of artificial insemination statutes to surrogate parenting contracts. In *Sherwyn & Handel v. California State Department of Social Services*,[39] attorneys Sherwyn and Handel, acting on behalf of one hundred couples who were parties to surrogate parenting arrangements, sought judicial declaratory relief from the California Civil and Evidence Codes[40] on the grounds that the statutes were contradictory and unconstitutional. Although the California Court of Appeals held that the attorneys had no standing and dismissed the case, the court in dictum inferred that the artificial insemination statutes did not apply to surrogate parenting

---

[37] *See infra* notes 88-92 and accompanying text.

[38] Hawaii Revised Statutes § 578-2(e) provides that:

> (e) Any parental consent required hereunder shall be valid and binding even though it does not designate any specific adoptive parent or parents, if it clearly authorized the department of social services and housing, or a child placing organization approved by the department under the provisions of section 346-27 *or some proper person not forbidden by law to place a child for adoption, to select and approve an adoptive parent or parents for the child.*

HAW. REV. STAT. § 578-2(e) (1985) (emphasis added).

[39] 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985).

[40] The specific code sections under review were California Civil Code section 7005 which provides that:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived . . .
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

CAL. CIV. CODE § 7005 (West 1983). California Evidence Code, section 621 provides: "(a) Except as provided in subsection (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621(a) (West 1987). Subdivision (b) allows an exception only after blood-testing shows that the husband is not the father of the child. *Id.* § 621(b).

arrangements.[41]

Hawaii does not regulate artificial insemination.[42] However, Hawaii law does presume that a man is the father of a child if he and the child's natural mother are or have been married to each other and the child is born during the marriage or within three hundred days after the marriage is terminated.[43] The presumption is rebuttable by clear and convincing evidence and/or a court decree establishing paternity of the child in another person.[44] In addition, paternity may be established if the natural father acknowledges his paternity in a writing filed with the Department of Health and the presumed father has by written consent acknowledged that he, as the woman's spouse, is not the natural father of the child.[45] Thus, in Hawaii there is no conflict between artificial insemination statutes and paternity statutes. Furthermore, contractual agreements can

---

[41] The court noted, "we have grave doubts about the applicability of Civil Code section 7005, subdivision (b), to surrogate arrangements entered into by married couples, and the use of Evidence Code section 621 in such situations where the surrogate mother is married and her husband has joined in the arrangement[.]" *Sherwyn & Handel*, 173 Cal. App. 3d at 59, 218 Cal. Rptr. at 783.

[42] A 1986 bill, providing for insurance coverage for *in vitro* fertilization procedures was vetoed by Governor Ariyoshi. H.B. 2062, 13th Haw. Leg., Reg. Sess. (1986).

[43] Hawaii Revised Statutes § 584-4(a)(1) provides that a man will be presumed to be the father of a child if:

> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

HAW. REV. STAT. § 584-4(a)(1) (1985).

[44] Hawaii Revised Statutes § 584-4(b) establishes the means by which a paternity presumption may be rebutted by providing that:

> (b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

HAW. REV. STAT. § 584-4(b) (1985).

[45] Hawaii Revised Statutes § 584-4(a)(5) states that a natural father may establish paternity if:

> (5) [H]e acknowledges his paternity of the child in a writing filed with the department of health, which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgement within a reasonable time after being informed thereof, in a writing filed with the department of health. If another man is presumed under this section to be the child's father, acknowledgement may be effected only with the written consent of the presumed father or after the presumption has been rebutted. If the acknowledgement is filed and not disputed by the mother and if another man is not presumed under this section to be the child's father, the department of health shall prepare a new certificate of birth in accordance with section 584-23.

HAW. REV. STAT. § 584-4(a)(5) (1985).

override statutory presumptions of paternity which would otherwise act contrary to the natural father's interest.[46] In sum, the surrogate parenting contract is not contrary to existing Hawaii statutory paternity and adoption statutes.

C. *Potential Conflict with Child Custody Statutes*

While Hawaii has no statute prohibiting surrogate parenting, Hawaii child custody statutes could be an impediment to enforcement of a surrogate parenting contract.[47] Under Hawaii's child custody statute, the court's primary goal in awarding custody is to determine the best interests of the child.[48] Thus, in the event of a breach by either party to the contract, the court's focus will be on the child rather than on the enforcement of the contract. A refocusing of the court's attention to the best interests of the child arguably supercedes any contractual claims. However, the court's prioritization of interests does not, *a fortiori*, constitute a blanket prohibition of surrogate parenting contracts. Rather, the court's determination of whether to permit the adoption to proceed will depend on facts and circumstances beyond the mere contractual relationship. The fact that a party to the contract is in breach may, in some circumstances, be relevant to the determination of the best interests of the child. This potentially troublesome conflict can be resolved through enactment of legislation tailored to address the consideration and weight the family court affords surrogate parenting contracts in situations involving post-birth breaches.[49]

D. *Surrogate Parenting and Public Policy*

Courts have scrutinized the consistency of surrogate parenting contracts and public policy. The courts in *Surrogate Parenting Associates*[50] and *Adoption of Baby Girl, L.J.*[51] have clearly recognized that public policy should emanate from the state legislature and not from the courts. Absent a mandate from the legislature, the Kentucky and New York courts, at least, would not invalidate a surrogate parenting contract solely on the basis of public policy.[52]

Courts which have held that surrogate parenting contracts are contrary to

---

[46] *Id.*

[47] See *infra* note 133 for Hawaii's custody statute.

[48] *See infra* note 134.

[49] *See infra* note 162 and accompanying text.

[50] Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986).

[51] *In re* Baby Girl, L.J., 132 Misc. 2d 972, 505 N.Y.S.2d 813 (1986).

[52] Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986).

public policy have done so on the basis of the fee-prohibition statutes.[53] The statutes which prohibit the payment of a fee to parties in an adoption proceeding were enacted to curtail black market baby-selling. The courts which have invalidated surrogate contracts reason that the fee prohibition statutes reflect a blanket public policy against the selling of children.[54] Proponents of this theory argue that, by allowing the payment of a fee in a surrogate parenting contract, the court would be acquiescing in the sale of a child, the precise evil the statute was designed to prevent.[55] However, since Hawaii does not have a statute which prohibits the payment of a fee in an adoption proceeding, such an argument is tenuous at best. In addition, Hawaii courts have indicated that adoption statutes should be construed liberally to promote the adoption of children[56] since the best interests of children would be served thereby. Consequently, public policy in Hawaii would be fostered by alternative methods of adoption such as surrogate parenting.

III. The Constitutionality Of Surrogate Parenting Contracts

Constitutional due process and equal protection impact upon surrogate parenting contracts. This section discusses whether the Constitutional guarantees of due process and equal protection suggest constitutional affirmance or disapproval of surrogate parenting arrangements.[57]

---

[53] *See* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981); Okla. Op. Att'y Gen. No. 83-162 (1983).

[54] *Id.*

[55] *See infra* notes 87-93 and accompanying text.

[56] In Hawaii Revised Statutes § 571-1, the legislature set forth the purposes of family court:

> [T]his chapter shall be liberally construed to the end that children and families whose rights and well-being are jeopardized shall be assisted and protected, and secured in those rights through action by the court; that the court may formulate a plan adapted to the requirements of the child and the child's family and the necessary protection of the community, and may utilize all state and community resources to the extent possible in its implementation.

HAW. REV. STAT. § 571-1 (1985). Adoptions fall under the purview of this liberal legislative mandate since they, too, come within the family court's jurisdiction. *Cf. In re* Minor Child, 52 Haw. 395, 477 P.2d 780 (1970).

[57] Before determining whether the Constitution requires states to allow surrogate parenting contracts under due process and equal protection analysis, it must be concluded that the Constitution does not prohibit surrogate parenting contracts. Section 1 of the thirteenth amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crimes whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

There is an argument that surrogate parenting is in violation of the thirteenth amendment because a child may be considered to be sold to the natural father and his wife. However, it has been clearly recognized that involuntary servitude does not apply to the rights of parents to

This analysis is made in light of the following contextual background. First, Hawaii does not currently statutorily preclude the surrogate parenting arrangement. Secondly, the Hawaii Family Court has permitted adoptions resulting from a surrogate parenting contract.[58] The conclusion that is drawn is that any statutory enactment which absolutely prohibited surrogate parenting would not likely pass constitutional muster.

A. *Due Process Analysis*

The emergence of substantive due process in the sphere of procreation and marriage began with *Skinner v. Oklahoma*.[59] In *Skinner*, the court declared unconstitutional a state statute providing for the sterilization of habitual criminals.[60] The court reasoned that "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[61] The United States Supreme Court declared that decisions pertaining to procreation fall within the protection of a basic privacy right within the Constitution. Since surrogate parenting also pertains to the natural father's right of procreation, it too, should be protected.

Skinner was followed in 1965 by *Griswold v. Connecticut*.[62] In *Griswold*, the Court held that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights.[63] The Court acknowledged that the Constitu-

---

custody of their children. Butler v. Perry, 240 U.S. 328 (1916). Thus, when a natural father and his wife adopt the natural father's child, it is unlikely that a form of involuntary servitude occurs. While money may be exchanged between the surrogate and the couple, a court would be hard pressed to call the arrangement a form of slavery when the child will not only be a member of his/her natural father's family, but will be treated as their natural child for inheritance purposes as well as under Hawaii's adoption law. Thus, surrogate parenting lacks the evil connotations normally associated with any form of slavery. Townsend, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 476 (1982).

[58] Rosalyn Loomis, a Honolulu attorney specializing in private adoptions in the State of Hawaii prior to becoming a *per diem* Hawaii Family Court judge in 1986, estimates that she handled from 5-10 adoptions involving surrogate mothers between 1984 and 1986.

[59] 316 U.S. 535 (1942).

[60] *Id.* at 541.

[61] *Id.*

[62] 381 U.S. 479 (1965).

[63] *Id.* at 485. Hawaii's Constitution expressly provides a right of privacy in article 1, section 6. Section 6, adopted in 1978, reads, "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6. *See also* State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983) (analysis of substantive due process and the right of privacy in Hawaii).

tion did not specifically provide for a right to privacy but declared that such a right flowed from the first, third, fourth, fifth and ninth amendments to the Bill of Rights.[64] The Court reasoned that:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects; yet it is an association for as noble a purpose as any involved in our prior decisions.[65]

The right to privacy between married persons was extended to non-married persons in *Eisenstadt v. Baird*.[66] In *Eisenstadt*, the Court held that a statute prohibiting the sale of contraceptives violated the rights of single persons under the equal protection clause of the fourteenth amendment to the Constitution.[67] Although the Court applied an equal protection rather than a due process analysis in extending its *Griswold* holding to unmarried persons, the Court also addressed the right to privacy, reasoning that: "If the right of privacy means anything, it is the right of the INDIVIDUAL, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[68]

---

[64] *Griswold*, 381 U.S. at 479.

[65] *Id.* at 486. In his concurring opinion, Justice Goldberg grounded the right of marital privacy in the ninth amendment, stating that the framers of the Constitution did not intend the first eight amendments to be an exclusive listing of fundamental rights, as is apparent by the inclusion of the ninth amendment. *Id.* at 488.

[66] 405 U.S. 438 (1972).

[67] *Id.* at 443.

[68] *Id.* at 453. The Supreme Court summarized *Griswold* and *Eisenstadt* in *Carey v. Population Servs. Int'l*, noting:

> [T]he Constitution protects "the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child." . . . Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

431 U.S. 638, 687 (1977).

The constitutional protections flowing from and inherent in the fundamental right to bear and beget children as defined by the Supreme Court would extend both to the surrogate and to the natural father. In Granger v. Granger, 147 Ind. 95, 44 N.E. 189 (1896), the court stated, " 'To beget,' as defined by Webster, is, 'to procreate, as a father or sire; to generate, commonly said of the father.' " *Id.* at ____, 44 N.E. at 190. Under a strict reading of *Griswold*, however, the wife of the natural father is not afforded constitutional protection since she neither bears nor begets a child in the surrogate parenting relationship. Therefore, in the event that suit is brought challenging the constitutionality of a statute that prohibits surrogate parenting contracts, only the natural father or the surrogate mother would have standing.

In its most recent pronouncement on fundamental privacy rights under due process, the Supreme Court once again acknowledged the correctness of the decisions reached in *Skinner*, *Griswold* and *Eisenstadt*.[69] *Bowers v. Hardwick* dealt with the issue of whether Georgia's criminalization of consensual sodomy between homosexual males in a private bedroom was unconstitutional.[70] The Court found the statute to be within constitutional boundaries inasmuch as the statute did not interfere with protected fundamental rights of family, marriage or procreation.[71] However, the Court specifically noted that it would be reluctant to recognize new fundamental rights, reasoning that to do so would be overreaching its judicial authority.[72]

The Court, in the interest of delimiting the scope of rights qualifying for heightened judicial scrutiny, rearticulated the test for identifying fundamental liberties. The Court found that the category includes those fundamental liberties that are "implicit in the concept of liberty"[73] or are "deeply rooted in this Nation's history and tradition."[74] If a court views surrogate parenting broadly as a right of privacy implicit in the family, marriage or procreation context, the arrangement should withstand constitutional scrutiny. However, if the surrogate parenting arrangement is viewed more narrowly, that is, merely as a contractual relationship to facilitate the exchange of money for a paternally-linked child, a court may have difficulty in categorizing surrogate parenting as a fundamental liberty right under the test rearticulated in *Bowers*. Surrogate parenting, as such, is not "implicit in the concept of liberty" nor is it "deeply rooted in this Nation's history and tradition."

While a right to privacy should arguably be carefully and meticulously delimited when applied to specific activities, such circumspection is misplaced where the connection to family, marriage and procreation is so obvious.[75] *Griswold*, *Eisenstadt* and *Roe* dealt with the fundamental individual right to decide whether or not to beget or bear a child. The surrogate parenting arrangement merely extends the personal choice to the mode of exercising that right where conventional methods are foreclosed. Such a choice appears more closely aligned with the fundamental privacy rights asserted in *Griswold*, *Eisenstadt* and *Roe* than the right asserted in *Bowers*. Given this link to recognized fundamental rights, the surrogate parenting arrangement appears, under present due process jurisprudence, to be protected from state interference absent adequate

---

[69] Bowers v. Hardwick, 106 S. Ct. 2841, 2843-44 (1986).

[70] *Id.* at 2842.

[71] *Id.* at 2844.

[72] *Id.* at 2846.

[73] *Id.* at 2844 (citing Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

[74] *Bowers*, 106 S. Ct. at 2844 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[75] In *Bowers*, the Court found that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." *Id.* at 2844.

justification.

Once a fundamental right is implicated, limitations on these rights may be justified only in the furtherance of a compelling state interest.[76] Compelling interests include protecting the health,[77] morals[78] and family stability[79] of its citizenry. Furthermore, legislative enactments limiting fundamental rights must be narrowly drawn to address only the legitimate state interests at stake.[80]

The Michigan Court of Appeals in *Doe v. Kelley* recognized that the right to bear or beget a child is a fundamental interest protected by the right of privacy.[81] However, the court asserted that it was not interfering with the fundamental right to bear or beget children by prohibiting the payment of a fee in a surrogate parenting arrangement.[82] The Michigan statute did not prohibit surrogate parenting, but merely prohibited the payment of a fee in connection with an adoption.[83]

By prohibiting the payment of a fee to a surrogate mother, the court in effect has prohibited the surrogate parenting arrangement as a means of begetting a child since the primary motive for most surrogate mothers is financial.[84] The reasoning and result in *Kelley* appears contrary to constitutional jurisprudence. In *Griswold*, the Supreme Court reasoned that "[a] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[85] Surrogate parenting contracts involve a fundamental privacy right, that of the natural father's right to procreate. By applying existing statutes which prohibit the payment of a fee in an adoption to the surrogate parenting relationship, the state is intruding "unnecessarily broadly" into an area of protected freedoms,[86] and hence, is acting unconstitutionally.

In virtually all of the court decisions regarding surrogate contracts, the buying and selling of children is viewed as against public policy. Although fee prohibition statutes do serve to foster a compelling state interest,[87] this interest is not

---

[76] Roe v. Wade, 410 U.S. 113, 155 (1973).

[77] *Id.*

[78] Poe v. Ullman, 367 U.S. 497 (1961).

[79] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[80] Roe v. Wade, 410 U.S. at 155.

[81] 106 Mich. App. 169, 307 N.W.2d 438 (1981).

[82] *Id.* at ____, 307 N.W.2d at 441.

[83] *Id.*

[84] Comment, *Surrogate Mother's Right to a Fee*, *supra* note 9, at 548. *See also* L. ANDREWS, *supra* note 8, at 207.

[85] *Griswold*, 381 U.S. at 485 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)). *See also Carey*, 431 U.S. at 648.

[86] *Griswold*, 381 U.S. at 485.

[87] *See, e.g.*, Surrogate Parenting Assocs., Inc., v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 212 (Ky. 1986); Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981),

threatened by the surrogate parenting arrangement. Statutes prohibiting payment of a fee in connection with adoptions were enacted beginning in the late 1950's over a concern regarding the selling of children on the black market.[88] In the typical black market situation, the woman was already pregnant and unwed.[89] The biological father did not want the child and the mother was financially unable to support it.[90] A baby broker then matched an eager buyer with an indigent, somewhat desperate seller.[91] The adopting couple was biologically unrelated to the child and the best interests of the child were not considered.[92]

The factors found in the black market situation are not present in the typical surrogate parenting arrangement. First, the child is biologically related to the adopting couple through the natural father. Second, there is a voluntary pregnancy that occurs after a contract is drawn between the two parties. Furthermore, when both parties are represented by counsel, as in the typical surrogate arrangement, there is little risk of unequal bargaining power between the parties. Third, the social stigma attached to an unwed mother and illegitimate child has greatly diminished,[93] reducing the pressure on the mother to relinquish the child.

A statute prohibiting the selling of children may pass constitutional muster when applied to the black market situation. Such a statute is arguably unconstitutional, however, when applied to a surrogate parenting situation where a fundamental right of privacy is involved and the factors supporting the prohibition of black marketing are absent.

Not only are the factors which prompted the fee prohibition statutes not present in surrogate parenting arrangements; but arguably, no sale of a child takes place.[94] The critical issue is one of custody; that is, which natural parent shall have custody of his/her child.

Nevertheless, states do discourage the commercialization of children through the prohibition of adoption fees. The objective is to protect the child's best interest in terms of emotional and psychological needs.[95] However, the child's

---

cert. denied, 459 U.S. 1183 (1983); *In re* Baby Girl, L.J., 132 Misc. 2d 972, ____, 505 N.Y.S.2d 813, 814 (1986).

[88] Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. 3001 (1985). In 1955, Senator Estes Kefauver held the first major congressional investigation on interstate adoption practices which resulted in scrutinizing the commercialization of children through the black market. *Id.*

[89] Comment, *Surrogate Mother's Right to a Fee*, *supra* note 9, at 549-50.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Cohen, *supra* note 5, at 214.

[94] Graham, *supra* note 14, at 320.

[95] *Id.*

needs are not guaranteed by the payment of a fee. Whether and how much of an adoption fee is paid will bear little relation to how well parents actually foster the emotional growth and development of a child.

A number of the states which do not allow payment of fees in traditional adoptions, do allow payment of a fee in a stepparent adoption.[96] The biological relationship is assumed to protect the child's best interests.[97] Similarly, in surrogate parenting situations, the child is transferred to the natural biological father who has not only genetic ties to the child but has planned for the child and has a desire to parent the child as well. In addition, the child is transferred to the natural father's wife; and, in states where stepparent adoptions do not preclude payment of a fee, such adoptions would be legal. Thus, a statute which would prohibit fees in surrogate adoptions is not closely tailored to the state's legitimate interest in preventing the commercialization of children.

Another recognized compelling state interest is the promotion of the stability of the family. Surrogate parenting contracts would not undercut familial relationships, but would foster this legitimate state objective. Surrogate parenting allows couples who might otherwise not be able to exercise their fundamental right to raise a family or who may experience a lengthy wait to adopt a child, to both exercise that right and to reduce the waiting period to adopt a child. Not only will they be able to begin raising a family sooner, but the child they adopt will be genetically-linked to one of the parents. In fact, surrogate parenting may well be preferable to the traditional mode of adoption and actually strengthen familial relationships.[98]

The payment of a fee to the surrogate mother should be of minimal consequence when the child is both planned for and desired by the natural father and his wife, the surrogate is fully informed of her rights, and obligations are incurred by the surrogate while under no duress or coercion. When balanced against the fundamental right of procreation, the state's interest in promoting familial relationships would simply not be satisfied by a statute which prohibited surrogate parenting contracts.

B. Equal Protection Analysis

Under equal protection analysis, surrogate parenting contractual arrangements appear constitutional. To withstand equal protection scrutiny, classifications of people "must be reasonable, not arbitrary, and must rest upon some ground of

---

[96] *Id.* at 298 n.29. *See also* L. ANDREWS, *supra* note 8, at 303.

[97] Graham, *supra* note 14, at 320.

[98] Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 815 (1982) [hereinafter Note, *The Surrogate Contract*]. *See also* Special Project, *Legal Rights and Issues*, *supra* note 18, at 642-43.

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[99]

A woman who "rents her womb" for a fee is providing the same services as is a man who sells his sperm to a sperm bank. More than 20,000 children each year are conceived through a means of artificial insemination, whereby the wife of an infertile spouse is impregnated with the sperm from an anonymous donor.[100] For his services, the sperm donor in Hawaii is paid forty dollars per ejaculation.[101] In twenty-five states, the child of a married woman artificially inseminated with the sperm of an anonymous donor with the consent of her husband is the legal child of that couple.[102] These states have given statutory approval to this form of procreation.[103]

A surrogate is enabling an infertile woman to have her husband's genetically-linked child just as the sperm donor enables an infertile man to beget a child.[104] Any statute prohibiting the surrogate parenting contract would violate the equal protection clause of the fourteenth amendment since it would be discriminating against surrogates on the basis of sex.

---

[99] Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[100] Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, 70 A.B.A. J. 50 (Aug. 1984). *See also infra* note 103.

[101] Telephone interview with Dr. Rick Williams on March 4, 1987. Dr. Williams is a Honolulu physician specializing in artificial insemination.

[102] Andrews, *supra* note 100, at 53. While Hawaii adopted the Uniform Parentage Act in 1975, it did not adopt section 5, which reads:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the (State Department of Health), where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979).

[103] Although Hawaii law does not address artificial insemination, Dr. Rick Williams, a Honolulu physician specializing in artificial insemination, estimates that approximately 200 artificial inseminations are performed each year in Hawaii. Legislative acquiescence and the lack of litigation regarding artificial insemination has led to the conclusion by some that artificial insemination is permissible. Telephone interview with Dr. Rick Williams, Mar. 4, 1987.

[104] Comment, *Surrogate Mother's Right to a Fee*, *supra* note 9, at 558.

In *Craig v. Boren*,[105] the Supreme Court recognized sex as a quasi-suspect category and adopted an intermediate standard of review when faced with cases of sexual discrimination.[106] Under the intermediate standard, a classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives."[107] The state's interest in preventing the commercialization of children might very well be an important state interest, but a blanket prohibition of surrogate parenting contracts is not substantially related to achieving that objective. When applied to surrogate parenting arrangements, such a statute is under-inclusive since it does not apply to a man who sells his sperm, but only to a woman who goes through considerably more time and effort as a surrogate than does the sperm donor. Since under-inclusive statutory classifications are unconstitutional,[108] a total prohibition on surrogate parenting contracts cannot stand while a sperm donor remains legally able to sell his sperm.

One possible rationale for this apparent dichotomy between surrogate mothers and sperm donors is that the sperm donor's fee is received prior to the use of his sperm in a fertilization procedure and prior to the actual birth of a child. In contrast, in the surrogate arrangement the final payment is usually not made until the entire contract has been performed at the time the final adoption order is issued. Thus, the state's interest may be considered greater once a child is actually born. This argument falls, however, since the goal of donating sperm is identical to the goal of the surrogate mother. Both surrogate mothers and sperm donors seek to provide a child for persons who are unable to conceive a child themselves. By prohibiting a surrogate mother from receiving a fee, the state is drastically reducing the opportunity for many couples to obtain a genetically-linked child, while allowing a sperm donor to be paid for a service which also culminates in a genetically-linked child. Thus, similarly situated couples would be treated differently strictly on the basis of the role of the sexes in the

---

[105] 429 U.S. 190 (1976).

[106] *Id.* at 197.

[107] *Id.*

[108] In Kramer v. Union School Dist., 395 U.S. 620, (1969), the Court was concerned with the constitutionality of a state statute which provided that in certain school districts residents otherwise eligible to vote in state and federal elections could vote in school district elections only if they owned or leased taxable property in the district or were parents or custodians of children enrolled in the district's public schools. The Court held that the statute was a violation of equal protection and that

> [s]ection 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. These classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.

Id. at 632.

procreation process. This distinction is invalid under equal protection standards.

The state's interest in preventing the commercialization of children is only part of a broader state interest, that of promoting a strong family unit.[109] A prohibition of surrogate parenting contracts is not necessary to promote familial values or public morals. Such a prohibition is over-inclusive. A less drastic means of meeting the same state interest would be a limited and specific regulation of surrogate parenting. A statute regulating surrogate parenting contracts can avoid equal protection problems while maintaining and serving the state's legitimate interest in the family and society's moral values.[110]

IV. THE INADEQUACY OF TRADITIONAL CONTRACT REMEDIES IN THE EVENT OF A BREACH OF THE SURROGATE CONTRACT

Although surrogate parenting contracts appear facially constitutional, consistent with public policy in Hawaii, and not contrary to existing Hawaii statutes, legitimizing surrogate parenting contracts does not address the issues of how the Hawaii courts should deal with a party who breaches the surrogate contract and the assessment of a remedy upon a breach. A breach of the contract may occur prior to the artificial insemination, during the surrogate's pregnancy or after the child is born.[111] The remedies should reflect both the time frame in which the contract is breached and the party in breach.

A. Breach Prior to Artificial Insemination

1. Adopting couple's remedies

The general law of contract damages seeks to give the non-breaching party what the party would have received had the contract been fully performed.[112] In the surrogate parenting context, the adopting couple expects to receive a child in return for payment of a sum of money to the surrogate. In the event

---

[109] Note, *The Surrogate Contract*, *supra* note 98, at 815.

[110] In Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986), the United States Supreme Court applied the rational basis test and found that a state's repugnancy towards homosexual sodomy met the test and upheld the Georgia statute prohibiting sodomy. However, where there exists a quasi-suspect category, it is not at all clear that the rationale in *Bowers* could meet the stricter test for a quasi-suspect category delineated under *Craig*.

[111] Note, *The Surrogate Contract*, *supra* note 98, at 820.

[112] *See* 5 A. CORBIN, CORBIN ON CONTRACTS § 992 (1964) which reads, "[o]ne who commits a breach of contract must make compensation therefor to the injured party. In determining the amount of this compensation as the 'damages' to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised."

the surrogate breaches the contract prior to insemination, traditional contract law would allow the couple to sue for damages based upon the expectation of a child, less what the couple receives through mitigation. The value of a child, however, would be extremely difficult to quantify, particularly if the child has not yet been conceived. Hence, expectation damages would prove an unworkable remedy for the adoptive couple.

In instances where damages are less readily calculable, courts often grant equitable remedies such as specific performance.[113] Courts are reluctant to impose specific performance in personal service contracts, which would include surrogate parenting contracts. This reluctance is the product of the difficulty in enforcing such decrees, the fact that there is a close relationship between the parties which involves confidence and loyalty, as well as a refusal by courts to decree involuntary servitude.[114] Furthermore, the surrogate's constitutional right to privacy would probably be violated should the court force her to perform her contractual obligations by becoming pregnant.[115]

However, while specific performance is not a viable remedy and expectation damages are too difficult to determine, a court should reimburse the adopting couple for any and all expenses incurred to the point of breach. Typical expenses

---

[113] Section 1142 of CORBIN ON CONTRACTS explains that

> [t]here are many factors that may influence a court in determining that damages are an inadequate remedy and in granting a decree for specific performance. . . . Among the factors to be considered in granting a decree for specific performance, the most important seem to be the following: difficulty and uncertainty in determining the amount of damages to be awarded for the defendant's breach; difficulty and uncertainty in the collection of such damages after they are awarded; the insufficiency of money damages to obtain the duplicate or the substantial equivalent of the promised performance, either because the subject matter of the contract is unique in character and cannot be duplicated or because the obtaining of a substantial equivalent involves difficulty, delay, and inconvenience; the fact that injury would be recurring and that just compensation would require multiple actions for damages.

5 A. CORBIN, CORBIN ON CONTRACTS § 1142 (1964). These factors were discussed in Tuttle v. Palmer, 117 N.H. 477, 374 A.2d 661 (1977). The case arose when a mother sought specific performance of a contract where the father of the illegimate child was to pay child support in consideration for an agreement not to sue. In upholding the trial court's order for specific performance, the Supreme Court of New Hampshire noted "that the trend has been to give less consideration to the question of the adequacy of damages and to make specific performance less difficult to obtain than it was formerly." *Id.* at ____, 374 A.2d at 662.

[114] 5 A. CORBIN, CORBIN ON CONTRACTS § 1204 (1964).

[115] In People *ex rel.* S.P.B., 651 P.2d 1213 (Colo. 1982), the Colorado Supreme Court held that the fourteenth amendment precluded a father from compelling the mother of his child to have an abortion since the decision to have an abortion rests solely with the mother during the first trimester of pregnancy. *Id.* at 1216. Likewise, a court would probably find that a woman's constitutional rights were violated should she be forced to perform her contractual obligations by becoming pregnant.

might include medical, travel, as well as legal costs.[116]

2. *Surrogate's remedies*

From the surrogate's perspective, if the prospective adopting couple decides not to go through with the artificial insemination, the surrogate under traditional contract doctrine, should be able to recover the full contract price, less any money the surrogate receives through mitigation. If, for example, the surrogate is listed with an agency that matches infertile couples with surrogates so that the surrogate is able to immediately contract with another couple, she may be able to mitigate her damages to the extent that the adopting couple would have to pay her only a relatively small amount of the contract price. If, on the other hand, the surrogate was unable to mitigate, perhaps due to physical incompatibility with other infertile couples, then the adopting couple would be required to pay most, if not all, of the contract price.

When the couple breaches prior to insemination, some courts might be unwilling to allow full expectation damages so as to avoid a disparity in available remedies in a pre-insemination breach. Rather, the court may award the surrogate reliance damages measured from the point of the adopting couple's breach. Damages would be calculated on the actual costs incurred by the surrogate.

B. Breach During the Surrogate's Pregnancy

1. *Adopting couple's remedies*

If the surrogate breaches the contract during the course of her pregnancy, the remedy may depend on whether the breach was a material breach,[117] such as abortion, or whether the breach was relatively minor, such as missing a prenatal appointment with her physician. In the event of a minor breach the couple would probably not seek a judicial remedy. A material breach, particularly an abortion, which would render the performance of the contract impossible, presents a different situation. The damage remedy would probably be the same as that of a pre-insemination breach, except that the couple might seek additional relief for intentional infliction of emotional distress.[118] Hawaii courts tend to be liberal in applying this relatively recent doctrine[119] and might well look to

---

[116] Note, *The Surrogate Contract*, *supra* note 98, at 821.

[117] 4 A. CORBIN, CORBIN ON CONTRACTS § 946 (1964).

[118] For a discussion on recovery for emotional distress and nonpecuniary damages, see Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. HAW. L. REV. 1 (1986).

[119] *Id.* at 22-25. *See, e.g.*, Quedding v. Arisumi Bros., 66 Haw. 335, 661 P.2d 706 (1983);

factors such as the stage of the surrogate's pregnancy at the time of the abortion and the reason for the abortion.[120]

If the abortion were to occur during the first trimester, the fundamental privacy right of the surrogate to choose to have an abortion[121] would collide with any contractual obligation to give birth. The determinative issue would then be whether the surrogate can contract away her constitutional rights with respect to any right to a remedy.[122] If a court determined that the surrogate could contract away her right to choose to have an abortion, the adopting couple would have all of the remedies usually associated with breach of contract. If, however, a court determined that the surrogate could not contract away her right to choose to have an abortion, the surrogate could rescind the contract and the parties ought to be put into their pre-contract position, which would mean that the surrogate would refund all monies received to the point of breach.[123]

There is also a growing trend towards holding mothers accountable for prenatal negligence.[124] Consequently, contract damages could arguably be awarded for any volitional acts in violation of the contract terms that resulted in the birth of a defective child. However, the burden of proving causation by a claimant may be so extreme in most instances so as to render such a claim fruitless.

Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972).

[120] Surrogate parenting contracts generally permit abortions if they are performed to protect the health of the surrogate mother. Section XX of the Model Surrogate Mother Contract Agreement provides:

> The Surrogate agrees that she will not abort the child once conceived except, if in the opinion of the inseminating physician, such action is necessary for the physical health of the Surrogate or the child has been determined by said physician to be physiologically abnormal. In the event of either of those two (2) contingencies, the Surrogate desires and agrees to have said abortion.

Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 280 (1981-82). *But see* TIME, Jan. 19, 1987, which reports that an abortion by the surrogate is typically forbidden without the consent of the father except where there is a fetal abnormality. *Id.* at 58, col. 3.

[121] Roe v. Wade, 410 U.S. 113 (1973).

[122] For a discussion on whether and when a woman can contract away her constitutional right to an abortion, see Note, *Rumplestiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986) [hereinafter Note, *The Inalienable Rights of Surrogate Mothers*].

[123] *See* 6 A. CORBIN, CORBIN ON CONTRACTS § 1534 (1964); *See also* 17A C.J.S. *Contracts* § 438 (1963).

[124] *See, e.g.*, Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 969 (1980), where the Michigan Court of Appeals overturned a trial court's grant of summary judgment in a case involving a father and son suing the son's mother for negligence when she took tetracycline during her pregnancy.

2. Surrogate's remedies

If the prospective adopting couple breaches during the pregnancy by not paying expenses of the pregnancy or by rescinding the contract, the surrogate can either have an abortion,[125] give birth to the child and put it up for adoption, or keep the child. Regardless of the option selected, the surrogate should be reimbursed for her expenses and sue to obtain the contract price.[126] Both remedies would be inadequate, however, if she decides to keep and raise the child herself since the money she would receive would not pay the cost of raising the child.

If she does choose to keep and raise the child herself she could then bring suit against the natural father under the Hawaii Uniform Parentage Act.[127] Once the alleged natural father is established as the natural father of the child, he would be liable for support and maintenance of the child until the child reaches the age of majority.[128] Under Hawaii law, both parents are responsible for providing child support.[129] However, if the surrogate decides to keep the

---

[125] A woman may elect to have an abortion during the first trimester, during the second trimester if the abortion is performed pursuant to state regulations and during the third trimester if necessary for her life or health. *Wade*, 410 U.S. at 164-65. Thus, the surrogate's decision as to whether to have an abortion in the event the adopting couple breached, would be influenced by the stage of her pregnancy.

[126] Note, *The Surrogate Contract*, *supra* note 98, at 822.

[127] Hawaii Revised Statutes chapter 584, entitled "Uniform Parentage Act," sets forth the means by which paternity actions may be filed and includes sections on paternity presumptions, child support, and the types of evidence that is admissible to prove paternity. HAW. REV. STAT. § 584-12 (1985). See *supra* note 105 and *infra* note 173 and accompanying texts for the statutory language concerning child support and paternity presumptions, respectively.

[128] Hawaii Revised Statutes § 584-15(c) provides that:

> The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. Upon neglect or refusal to give such security, or upon default of the father or his surety in compliance with the terms of the judgment, the court may order the forfeiture of any such security and the application of the proceeds thereof toward the payment of any sums due under the terms of the judgment and may also sequester the father's personal estate, and the rents and profits of his real estate, and may appoint a receiver thereof, and may cause the father's personal estate, including any salaries, wages, commissions, or other moneys owed to him and the rents and profits of his real estate, to be applied toward the meeting of the terms of the judgment, to the extent that the court, from time to time, deems just and reasonable. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

HAW. REV. STAT. § 584-15(c) (1985).

[129] Hawaii Revised Statutes § 577-7(a) provides that "[p]arents . . . shall have control over the conduct and education of their minor children. . . . All parents and guardians shall provide, to the best of their abilities, for the discipline, support, and education of their children." HAW. REV. STAT. § 577-7(a) (1985). The 1986 Child Support Enforcement Act sets forth the guidelines

child as a result of the adopting couple's breach, a court would possibly hold the natural father responsible for the total care and maintenance of the child as a remedy for the adoptive couple's breach. If the surrogate elects to have an abortion, a claim for emotional distress against the breaching couple may also be warranted, depending on the circumstances.[130]

C. *Breach After the Birth of the Child*

1. *Adopting couple's remedies*

If the surrogate mother breaches the contract after the baby is born by keeping the child, the adopting couple should be theoretically able to obtain expectation damages.[131] Again, however, there is the difficulty of putting a monetary figure to the value of a child.[132]

Specific performance raises new concerns since the birth of the child changes the focus of the court's interest from that of the adult parties to the contract to that of the best interests of the child. The issue will then be that of custody rather than adoption, and a court would consider a number of factors.[133] The

---

the court may use in establishing the amount of child support to be paid when a custodial parent applies to the child support enforcement agency for assistance in obtaining a child support order. HAW. REV. STAT. § 576D-3 (Supp. 1986). The guidelines include amounts relating to all earnings, income, and resources of both parents, and the earning potential, reasonable necessities, and borrowing capacity of both parents. *Id.* § 576D-7. The legislature has determined that both parents are responsible for the support of their minor children, and that this mutual obligation continues even when the natural parents are not or are no longer married.

[130] *See supra* note 98 and accompanying text.

[131] *See supra* note 112 and accompanying text.

[132] *See supra* note 93 and accompanying text.

[133] The criteria which the Hawaii Family Court uses to determine custody is set forth in Hawaii Revised Statutes § 571-46:

> In awarding the custody, the court is to be guided by the following standards, considerations and procedures:
>
> (1) Custody should be awarded to either parent or to both parents according to the best interests of the child.
>
> (2) Custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.
>
> (3) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court.
>
> (4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare, and custody of any minor child of the parties. When so directed by the court, investigators or professional personnel attached to or assisting the court shall make investigations and reports which

standard that the family court uses in determining custody of a child is "the best interests of the child."[134] If the surrogate takes the child home from the hospital she will already have begun bonding with the child and many courts would then be very reluctant to force her to relinquish the child.[135] Second, if

---

shall be made available to all interested parties and counsel before hearing, and such reports may be received in evidence if no objection is made and, if objection is made, may be received in evidence provided the person or persons responsible for the report are available for cross-examination as to any matter which has been investigated.

(5) The court may hear the testimony of any person or expert produced by any party or upon the court's own motion, whose skill, insight, knowledge, or experience is such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral, and spiritual well-being of the child whose custody is at issue.

(6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change and wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award.

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

(8) The court may appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payable in whole or in part by either or both parties as the circumstances may justify.

HAW. REV. STAT. § 571-46 (1985).

[134] Hawaii Revised Statutes § 571-46(1) provides that "[c]ustody should be awarded to either parent or to both parents according to the best interests of the child." HAW. REV. STAT. § 571-46(1) (1985). *See also* Turoff v. Turoff, 56 Haw. 51, 527 P.2d 1275 (1974). However, neither the statutory nor the case law clearly articulates how the best interests of the child are to be measured. In Woodruff v. Keale, 64 Haw. 85, 637 P.2d 760 (1981), the court enumerated a number of factors to be considered when evaluating a child's best interests:

> "[T]he concept of the best interests of the child is one that is without any measuring rod," . . . relying on the wisdom and discretion of the family court. . . . Although we previously refused to set out parameters of the "best interests" standard . . . we note that the court may look to the past and present conditions of the home and natural parents so as to gain insights into the quality of care the child may reasonably be expected to receive in the future. . . . Other factors for consideration may include the child's own desires and his emotional and physical needs.

Id. at 99, 637 P.2d at 769 (citations omitted).

[135] Hawaii has no appellate cases focusing on parent-child bonding or the weight that the court should accord bonding in determining the best interests of the child. In other jurisdictions, however, bonding has been a significant factor in determining custody of a child in adoption cases. See, e.g., *In re* Steve B.D., 111 Idaho 285, 723 P.2d 829 (1986), where the court, in affirming the adoption, noted:

> One factor, however, appears to remain constant in all cases. When the natural mother

she has not signed a consent to adoption, a court would be reluctant to force a child away from a natural mother in an involuntary termination of parental rights proceeding.[136]

In order to terminate parental rights under Hawaii Revised Statutes section 571, the surrogate would first have to demonstrate some form of unfitness.[137] Upon such a showing, the state would intervene to consider the best interests of

---

changes her mind and litigation is instituted, there will be a considerable passage of time before there is any resolution. In the instant case the custody of the child has been in the adoptive parents for more than two years, with the strong ties and emotional attachments which inevitably form.

Id. at ____, 723 P.2d at 836. See also State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 290 (1973), where the court defined the best interest of the child and abandoned a presumption in favor of natural mothers receiving custody, noting that "[s]tudies of maternal deprivation have shown that the essential experience for the child is that of mothering—the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function. *Id.* at ____, 350 N.Y.S.2d at 290. But see Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 381 A.2d 1155 (1977), where the court, while acknowledging that the "length of time apart is a factor to be considered in weighing the merits of each potential home[,] psychological parenthood is but one factor and will not be carried to extreme." *Id.* at ____, 381 A.2d at 1164.

[136] In the leading Hawaii case on termination of parental rights, Woodruff v. Keale, 64 Haw. 85, 637 P.2d 760 (1981), the court concluded:

> [B]ecause severance of the natural parent-child tie is such a drastic remedy, the burden of proving that such action would be in the child's best interest must rest with those seeking it. We now follow the lead of the Texas Supreme Court in *Re G.M.*, 596 S.W.2d 846 (1980) [sic], in suggesting that the "clear and convincing evidence" standard of proof govern such a determination.

Id. at 100, 637 P.2d at 770 (footnote omitted).

[137] Hawaii Revised Statutes § 571-61(b)(1) provides that the family court may terminate the parental rights of any legal parent:

> (A) Who has deserted the child without affording means of identification for a period of at least ninety days;
>
> (B) Who has voluntarily surrendered the care and custody of the child to another for a period of at least two years;
>
> (C) Who, when the child is in the custody of another, has failed to communicate with the child when able to do so for a period of at least one year;
>
> (D) Who, when the child is in the custody of another, has failed to provide for care and support of the child when able to do so for a period of at least one year;
>
> (E) Whose child has been removed from the parent's physical custody pursuant to legally authorized judicial action under section 571-11(9), and who is found to be unable to provide now and in the foreseeable future the care necessary for the well-being of the child,
>
> (F) Who is found by the court to be mentally ill or mentally retarded and incapacitated from giving consent to the adoption of or from providing now and in the foreseeable future the care necessary for the well-being of the child;
>
> (G) Who is found not to be the child's natural or adoptive father.

HAW. REV. STAT. § 571-61(b)(1) (1985).

the child.[138] The adoptive parents would have difficulty proving that the surrogate was unfit under the Hawaii statute, particularly if she adhered to contract provisions which included provisions regarding prenatal care.

Once the natural father has established paternity he may be able to obtain custody of the child.[139] This alternative is not as satisfactory as adoption since custody arrangements are subject to challenge and continuous court evaluation; whereas, once a child is adopted, he/she is no longer subject to family court jurisdiction.[140] While not as satisfactory as adoption, custody may be the exclusive alternative for the natural father if the surrogate mother will not consent to the adoption.

Regardless of whether the natural father or surrogate mother obtains custody, Hawaii law provides reasonable visitation rights for the noncustodial parent, unless visitation rights would not be in the best interest of the child.[141] Even if the natural father were awarded visitation rights, he would assuredly consider visitation an inadequate remedy relative to his expectation of fully parenting his child.[142] Consequently, monetary compensation with its attendant difficulties represents the only potential gap filler, and one which the court may be reluctant to award because of quantitative uncertainties. Furthermore, such visitation rights could conceivably cause emotional harm to the child. Thus, if the family court determined that the contract should not be enforced, that the natural father should not have custody, and that visitation rights would not be in the

---

[138] *Woodruff*, 64 Haw. at 99, 637 P.2d at 769.

[139] *See supra* note 133.

[140] Hawaii Revised Statutes § 571-46(6) provides that "any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change[.]" HAW. REV. STAT. § 571-46(6) (1985). On the other hand, Hawaii Revised Statutes section 578-12, pertaining to procedures for adoption, states:

> At any time within one year from the date of entry of any decree of adoption, the court may, for good cause, set aside or modify the decree and, in connection therewith, may make appropriate orders, concerning the custody of the minor child and the disposition and handling of the record of adoption by the department of health. . . .
>
> No decree of adoption shall be subject to attack in any collateral proceeding, and, after the expiration of one year from the date of its entry, no decree of adoption shall be subject to direct attack upon any ground other than fraud rendering the decree void as of the time of its entry.

HAW. REV. STAT. § 578-12 (1985). Thus, after the expiration of the one year period following entry of the adoption decree, the court no longer has jurisdiction over the child.

[141] Visitation rights are addressed in Hawaii Revised Statutes § 591-46(7) which provides that "[r]easonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that such rights of visitation are detrimental to the best interests of the child." HAW. REV. STAT. § 591-46(7) (1985).

[142] Note, *The Surrogate Contract*, *supra* note 98, at 827-28. *See also supra* note 140 and accompanying text.

best interest of the child, the natural father would not only be unable to adopt his own child, he would also be without custody and without an opportunity to get to know and develop ties with his own child. Absent a viable expectancy award, the natural father and his wife may be left with the unfulfilling recovery of reliance costs.

2. *Surrogate's remedies*

The prospective adopting couple might breach the surrogate contract by refusing to adopt the child after its birth. If the surrogate fully performed her contractual obligations she could then sue for the contract price.[143] However, this remedy is inadequate since the mother is saddled with the unsettling decision of disposition of the child.[144] She could offer the child for adoption and receive compensation for all expenses in connection therewith from the natural father and his wife.[145] Her remaining alternative would be to keep the child and bring a paternity action against the natural father, obligating him to provide support for the child.[146] Even this remedy, however, is inadequate compensation when considering the time and effort the surrogate will expend in raising the child.[147] A viable option is to sue the natural father and force him to pay the total cost of care and maintenance of the child as contract damages.

The natural father is least protected during the course of a surrogate parenting arrangement. His vulnerability and exposure is best exemplified in the post-birth breach situation. If the natural father breaches, he will be subject to child support payments;[148] and, if the surrogate breaches, the natural father will still be subject to child support payments once his paternity is established.[149] The natural father will not only have "lost" his child, but he will be supporting that "lost" child for eighteen years with visitation rights, his only potential and inadequate form of solace.[150]

Finally, once the child is born, a breach by either party would be an emotionally devastating experience. This fact would exacerbate the problem of recovery.

---

[143] Note, *The Surrogate Contract*, *supra* note 98, at 824.

[144] *Id.*

[145] *Id.*

[146] *Id. See also supra* note 128 and accompanying text.

[147] Cohen, *supra* note 5, at 258.

[148] *See supra* note 128.

[149] *Id.*

[150] *See supra* note 141 and accompanying text.

V. PROPOSED LEGISLATION FOR SURROGATE PARENTING CONTRACTS

The fact that the state probably cannot constitutionally prohibit surrogate parenting contracts does not mean that the state cannot regulate such arrangements.[151] As long as the regulation meets the specific compelling state interest it is designed to address and does not act to absolutely preclude the surrogate parenting contractual arrangement, regulation in this area appears constitutional.[152] The compelling state interests relevant to drafting legislation on surrogate parenting are the stability of the family unit and the best interests of the child.[153] A complete statutory package regulating surrogate parenting arrangements should cover three specific areas. First, the statute should define the terms and conditions required for an enforceable surrogate parenting contract. Second, the statute must provide the mechanics by which the adoption will take place. Third, the rights and remedies of each party upon breach of the contract must be enumerated.

A. Regulation of the Surrogate Parenting Contract[154]

A statute regulating surrogate parenting contracts should include provisions requiring several mandatory contractual conditions. First, both the adopting couple and the surrogate mother should have independent counsel prior to the execution of the contract. Independent representation reduces the likelihood of coercion or unequal bargaining power between the parties and ensures that both parties fully understand their roles in the surrogate parenting arrangement.[155] Furthermore, respective rights, responsibilities and remedies in the event of a breach can be predetermined with the assistance of counsel. Experienced counsel can outline for the client all potential problems and negotiate for the parties.

The statute should provide that a licensed physician perform the artificial insemination. While it is technically possible for artificial insemination to be

---

[151] In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court was faced with the issue of whether the sale of religious magazines in violation of an ordinance prohibiting minors from selling articles of merchandise was a protected activity under the first amendment. The Court stated: "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation." *Id.* at 166 (citation omitted).

[152] *Griswold*, 381 U.S. at 485.

[153] *Woodruff*, 64 Haw. at 97, 637 P.2d at 770.

[154] A statute on surrogate parenting would be enforced by the Hawaii Circuit Court, Family Court Division, in much the same way that the adoption statute is enforced.

[155] Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1301 (1985) [hereinafter Note, *Proposed Uniform Surrogate Parenthood Act*].

performed by a lay person,[156] risks of infection and complications are reduced when the insemination is performed by a licensed physician.[157]

Mandatory psychiatric evaluations of the surrogate should be required to determine her emotional stability and assess the probability that she will consent to the adoption of the child by the natural father and his wife. The natural father and his wife should also be required to undergo psychiatric evaluations to determine their emotional stability and ability to handle the surrogate parenting arrangement. If the results of the evaluations are not acceptable to either party, each party should be expressly provided the opportunity to walk away from the contract, with the adopting couple paying the costs to date.[158] These psychiatric evaluations will serve the purpose of protecting the best interest of the child by ensuring that the adopting couple can emotionally handle a child resulting from a surrogate parenting arrangement,[159] as well as reducing the likelihood of a conflict between two sets of parents which would be harmful to the child. Requiring the adopting couple to pay the incurred expenses, while potentially costly, puts the burden on the couple who has initiated the surrogate parenting arrangement.

The statute should further require that the surrogate be required to undergo a complete physical prior to insemination with tests for venereal disease and AIDS prior to each insemination and should further require that the contract

---

[156] In his book, THE SURROGATE MOTHER, Noel Keane describes how he first became involved with a surrogate parenting arrangement, which was after a surrogate artificially inseminated herself with the natural father's sperm. N. KEANE, THE SURROGATE MOTHER 66-68 (1981).

[157] The comments to the proposed Surrogate Parenthood Act justify the need for a physician to perform the insemination by stating that:

> One could object to the requirement that a physician perform the insemination on the grounds that it is burdensome and invades privacy interests. This objection is similar to the challenges made to state abortion regulations and statutes that overly burdened the right to choose to terminate a pregnancy. Furthermore, one could argue that the requirement is unnecessary because artificial insemination is not a complex procedure; any two or more persons can perform the insemination by themselves. The Act [proposed Uniform Surrogate Parenthood] takes the position, however, that any burden on the parties' ability to participate in a surrogate parenthood is minimal and is more than outweighed by the health and safety interests advanced by the physician requirement. In *Roe v. Wade*, the Supreme Court recognized that a state may require that physicians perform all abortions. The physician requirement for artificial insemination protects the same interests vindicated there.

Note, *Proposed Uniform Surrogate Parenthood Act*, *supra* note 155, at 1302.

[158] *See* H.B. 1009, 12th Haw. Leg., Reg. Sess., (1983). This proposed bill, which did not move out of committee, contained provisions relating to the medical tests and evaluations to be required by statute. *See also* Note, *Proposed Uniform Surrogate Parenthood Act*, *supra* note 155, at 1303.

[159] Note, *Proposed Uniform Surrogate Parenthood Act*, *supra* note 155, at 1303. A number of proposed bills provide for surrogate counselling for a period of time following the birth and adoption of the child. *See* A.B. 1707, Ca. Leg., Reg. Sess., at 9 (1985-86).

specify the types of prenatal care the surrogate is to follow.[160] In addition, the natural father should be required to undergo a medical evaluation and venereal disease and AIDS testing prior to each donation of sperm in an effort to reduce potential health risks to both the surrogate and the resulting child.[161]

The natural father should be statutorily required to assume legal responsibility for any child born pursuant to the surrogate parenting contract, including any child born with a physical or mental handicap. Again, while this puts a burden on the adopting couple, the adopting couple can better afford the costs of a child, whether born healthy or not. The adopting couple had planned to support a child while the surrogate mother may have become a surrogate to augment the financial resources of an existing family. Again, the provision is designed to protect the best interests of the child.[162]

The statute should also provide that if one of the adopting parents dies prior to the final adoption hearing, the contract will remain in full force and effect. Should both the natural father and his wife die prior to the final adoption hearing, the surrogate should be allowed to receive full compensation from escrow and elect to either keep the child or put it up for adoption.[163]

---

[160] *See supra* notes 13 & 14 and accompanying text.

[161] House Bill 1009 provides:

> [T]hat the natural father agrees to undergo a comprehensive medical evaluation, under the direction and supervision of a licensed physician, to determine whether his physical health is satisfactory. The comprehensive medical evaluation shall include testing for venereal diseases, specifically including, but not limited to, syphilis and gonorrhea.

H.B. 1009, 12th Haw. Leg., Reg. Sess., at 13-14 (1983).

[162] A.B. 1707, Ca. Leg., Reg. Sess., at 9 (1985-86) provides that "the infertile couple shall take custody of, and parental responsibility for, any child conceived pursuant to the terms of the surrogate contract, immediately after the child's birth, regardless of the child's health or any physical or mental condition or defect, unless the child's condition or defect is a result of some action taken by the surrogate in violation of the surrogate contract." In contrast, the Hawaii house bill provided "that the natural father agrees to assume the legal responsibility for any child, or children, in the case of a multiple birth, conceived pursuant to the surrogate agreement. 'Child' includes any deformed child or any child born with a defect." H.B. 1009, 12th Haw. Leg., Reg. Sess., at 14 (1983). Thus, under the proposed Hawaii bill there is no exception for negligence on the part of the surrogate mother. The California provision would appear to be better drafted since it does not force the adoptive couple to be responsible for the fault of the surrogate mother. On the other hand, California law will potentially raise the issue of fault and perhaps encourage litigation, an issue which does not exist under the Hawaii version of the bill.

[163] A.B. 1707, Ca. Leg., Reg. Sess., at 5-6 (1985-86) very explicitly sets forth what will happen should the natural father, his wife, or both of them die prior to the birth of the child. In essence, if the natural father dies, the contract remains intact and the wife can adopt the child. If the wife dies, the contract is still in full force and effect. If both die, the surrogate's consent to terminate parental rights is voidable within 20 days of the child's birth. If she does so, the child has no inheritance or testamentary rights from the adoptive couple. The Hawaii bill is not as detailed as the California bill, providing only that if the natural father or his wife die prior to termination of the surrogate's parental rights, the contract will remain in full force and effect. If

One of the most important aspects of the statute would be a provision establishing rights and remedies upon a breach of the contract. While an enumeration of the various rights and remedies available are beyond the scope of this comment, the goal of this section of the statute should be to overcome the shortcomings of traditional contract law as applied to surrogate parenting contracts. At the very least, a schedule of acceptable reliance damages should be provided and caps on expectation and/or emotional damage recovery should be considered.

In addition, the statute should require that the surrogate contract itself address particular issues. Among the issues a contract should be required to address are the rights and liabilities of the parties if the surrogate terminates her pregnancy prior to the birth of the child. The adoptive parents would want this provision to provide that the surrogate not abort unless her physician advises her to do so for reasons of her health. However, such a provision presents grave constitutional implications.[164]

In *People ex rel. S.P.B.*,[165] the court held that a natural father could not require the pregnant woman to have an abortion since "[i]t is the woman who bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[166] In the surrogate parenting situation, however, the purpose of the pregnancy is to provide a child for the prospective adopting couple. The issue will be whether the surrogate can and does waive her constitutional rights when she executes a contract in which she agrees not to have an abortion unless her health is endangered.[167]

The contract also should specifically provide whether and how much contact the surrogate will have with the child once it is born. It is in the best interest of all parties, including that of the child, if the contract states that the surrogate shall not see or hold the child following its birth. This requirement would protect the natural father since it would reduce the risk that the surrogate would refuse to consent to the adoption. It would also eliminate the issue of who had bonded with the child and established a psychological parent relationship in the event the surrogate would later contest the adoption. The court might be very reluctant to interrupt such a relationship.[168]

---

both adoptive parents die, the surrogate receives full compensation and may elect to keep the child or release the child for adoption. The result in both bills is essentially identical.

[164] *See generally* Note, *The Inalienable Rights of Surrogate Mothers*, *supra* note 122. *See also supra* text accompanying note 101.

[165] 651 P.2d 1213 (Colo. 1982).

[166] *Id.* at 1215.

[167] *See generally* Note, *The Inalienable Rights of Surrogate Mothers*, *supra* note 122. *See also supra* text accompanying note 101.

[168] Courts have begun to focus on the concept of psychological parenthood in awarding child

The statute should also provide that a surrogate parenting contract stipulate clearly and precisely the entire financial arrangements of the parties. A maximum fee which may be paid to a surrogate should be established either by the family court or by statute. By putting a cap on the amount of compensation a surrogate mother can receive, the surrogate is still fairly compensated, but the potential problem of "bidding" for the services of a surrogate is avoided, enabling more couples to afford a child resulting from a surrogate parenting arrangement.

The surrogate should demand partial payment in the event she miscarries after the fifth month of pregnancy.[169] By that time the surrogate has devoted time and adhered to the contract provisions[170] and ought to be compensated for her inconvenience. To protect all parties involved, the adopting couple should be required by statute to deposit the surrogate's agreed-upon consideration in an interest-bearing escrow account and this should be reflected in the contract. The surrogate is thereby protected from a breach of payment by the adopting couple. At the same time, the adopting couple will not have paid the surrogate only to have her decide to keep the child.

Finally, the contract should be required to delineate the surrogate's expenses which the adopting couple will pay, such as all psychiatric and medical tests, prenatal care, and mandatory blood testing following the birth of the child to conclusively determine paternity and whatever other expenses the parties wish to negotiate. Within the provision should be language which specifies whether the adopting couple will compensate the surrogate for any lost wages resulting from the pregnancy.

---

custody. *See supra* note 135 and accompanying text. Bonding and psychological parenthood were the subjects of a book by Goldstein, Freud, and Solnit wherein they wrote:

> Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents. . . . During such an absence for the child under two years of age, the new adult who cares for the child's physical needs is latched onto "quickly" as the potential psychological parent. The replacement, however ideal, may not be able to heal completely without emotional scarring, the injury sustained by the loss.

GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40 (1979) (footnotes omitted). Thus, custody of a child may be favored for the person who has begun bonding with the child.

[169] In only one proposed bill on surrogate parenting, that of South Carolina, is there a provision for partial payment if there is a miscarriage after the fifth month of pregnancy. Pierce, *supra* note 88, at 3003. However, unless the surrogate has been negligent or in breach of the contract, it seems only fair to compensate her for the time and effort she has exerted during the pregnancy. The percentage of the contract price payable on miscarriage would be negotiated between the parties.

[170] *See supra* notes 14 & 15.

B. *Statutory Adoption Proceedings*

In addition to regulating and mandating certain contractual provisions, the legislature should establish adoption procedures specific to surrogate parenting. First, the statute must identify the adopting parent. Some states consider a surrogate adoption to be a stepparent adoption and thus avoid the issue of whether there was a sale of a child.[171]

In Hawaii, in surrogate parenting adoptions to date, both the natural father and the natural father's wife have petitioned the court for the adoption of the child.[172] This is the better approach. By requiring that both the natural father and his wife adopt the child, the best interests of the child are satisfied even in the event of a breach by either the surrogate mother or the adopting couple. Since Hawaii law presumes that the husband of the mother is the father of the child,[173] the child's legal status will always be vested in either the adopting couple upon adoption or the surrogate and her husband, thereby avoiding potential legitimacy issues.

Second, the surrogate parenting statute should require that the prospective adopting couple file a petition with the family court subsequent to the execution of the surrogate contract but prior to the artificial insemination of the surrogate.[174] The petition should include, among other basic biographical information of the parties, a copy of the contract which the parties propose to execute. The court should then direct a social study[175] to determine the suitability of the adopting couple to the raising of a child. The court would be empowered by statute to approve or deny the adopting couple's request to enter into a surrogate parenting arrangement.

Potential due process problems arise in this approach since the state is inter-

---

[171] Andrews, *supra* note 100, at 52.

[172] In adopting the child, the natural father becomes the legal father of the child. HAW. REV. STAT. § 578-16 (1985) (effect of adoption).

[173] Hawaii Revised Statutes § 478-2(d) provides that:

> A man is presumed to be the natural father of a child if: (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

HAW. REV. STAT. § 478-2(d)(1) (1985).

[174] Filing a petition with the family court will put the court on notice that parties are interested in a surrogate parenting contractual arrangement which will entail adoption proceedings under court supervision.

[175] Hawaii law currently provides that prior to entering an adoption decree, the court shall notify the director of social services of the pendency of an adoption petition and further authorizes the director to make an investigation as to the fitness of the petitioners to adopt the individual, although the statute also provides that this requirement may be waived if such a waiver is in the best interests of the individual to be adopted. HAW. REV. STAT. § 578-8 (1985).

fering in a natural father's right to beget a child. However, in the instance of surrogate parenting, the state's interest is compelling and would override the natural father's rights. The state is not prohibiting surrogate arrangements, nor is the state imposing a burden on natural fathers that would effectively preclude their rights to beget a child.[176] Rather, the state is attempting to balance the procreational rights of parents against the best interests of the child. State regulation of surrogate parenting arrangements will only be an extension of existing state rights of approval or disapproval of traditional adoptions.[177] The state's interest in fostering stable family units will encourage the court to approve surrogate parenting arrangements while still protecting the best interests of the child. The statute will not be overly broad nor under-inclusive since it is specifically designed to meet identified compelling state interests.

Third, after the court receives a notice that the surrogate has become pregnant and following the sixth month of the surrogate's pregnancy, the court should issue an interim grant of custody to the adopting couple, effective upon the birth of the child. Such an order would allow the adopting couple exclusive control over the medical and psychological care of the child at its birth.[178]

Fourth, the statute should require that the court enter an order terminating the parental rights of the surrogate and any claim to paternity by the surrogate's husband within a certain period of time following the birth of the child and subsequent to blood testing.[179] The mandatory blood testing of the child and the natural father would assist in answering any claim to paternity that the surrogate's husband might have to the child.

When the surrogate is at the point of terminating her parental rights subsequent to the birth of her child, a breach of contract by the surrogate is most

---

[176] *See* Griswold v. Connecticut, 381 U.S. 479 (1976).

[177] Hawaii's adoption statute is Hawaii Revised Statutes chapter 578.

[178] The Hawaii proposed bill provided for such an interim order granting custody to the natural father and his wife after the surrogate's sixth month of pregnancy. H.B. 1009, 12th Haw. Leg., Reg. Sess. (1983). The California bill makes no such interim custody order, merely providing that the couple take custody of and parental responsibility for any child conceived pursuant to the contract immediately after the child's birth. However, the interim order would foster the concept that the child does not "belong" to the surrogate, but rather to the adoptive parents and may reduce the likelihood of bonding between the surrogate and the child she is carrying. A.B. 1707, Ca. Leg., Reg. Sess. at 9 (1985-86).

[179] There has been some suggestion that the surrogate terminate her parental rights prior to the birth of the child. Pierce, *supra* note 88, at 3003. However, since blood testing is not done until after the birth of the child, there is a possibility that by terminating parental rights prior to the child's birth, the child will be without any legal parent at all if the natural father is deemed not to be the father of the child. Therefore, in order to protect the child's interests by providing for at least one legal parent at all times, termination of parental rights should occur subsequent to the birth of the child. Both the California and Hawaii bills provide for termination of rights following the birth of the child. Currently, termination of parental rights in a surrogate adoption occurs after the child's birth.

likely to occur.[180] The most carefully drafted contract cannot fully protect the natural father nor guarantee his rights during this period of time since the family court may not enforce a contract if the surrogate decides to keep the child prior to her termination of parental rights.[181] Once a child is born, the court will be more protective of the child than of the contract rights of the natural father.

C. The Necessity of a Statute on Surrogate Parenting

Arguably, a statute specifying the terms of a surrogate parenting contract is a futile exercise since it is probable that the contract will not be enforced in the event of all possible breach situations. However, a surrogate contract drafted prior to the birth of a child in conformance with well designed legislation can provide enforceable remedies. The statutorily consistent contract will represent the understanding of all parties at the time the contract is executed. A contract pursuant to statute eliminates the issue of fraud, and protects the surrogate mother from coercion and duress through an independent counsel requirement.

The contract reduces the potential for litigation in the area of responsibilities and obligations of the parties to the contract. By specificially delineating within the surrogate parenting statute the remedies of each party upon breach of the contract, the shortcomings of traditional contract remedies can be avoided. Most importantly, the contract itself forces the parties to take a realistic and non-emotional look at the subsequent relationship which involves a subject that is inherently emotional—the birth of a child.

A statute regulating surrogate parenting is arguably not yet needed since the number of surrogate parenting adoptions in Hawaii are relatively few.[182] This, however, begs the question. Rather than wait for issues regarding surrogate parenting to arise in a judicial setting, potentially decided on an *ad hoc* basis, it is imperative that the Hawaii legislature study how other states are handling the issues of surrogate parenthood without the benefit of a statute and then enact a statute for Hawaii that will avoid these problems. By specifically delineating within the surrogate parenting statute the remedies of each party upon breach of the contract, the shortcomings of traditional contract remedies as applied to surrogate contracts can be avoided.

---

[180] Note, *The Surrogate Contract*, *supra* note 98, at 824.

[181] Hawaii Revised Statutes § 571-61 provides that a parent may petition the court to terminate his/her parental rights at any time following the sixth month of pregnancy. However, a judgment will not be entered until after the birth of the child and after the petitioner has in writing reaffirmed his/her intention to terminate parental rights. HAW. REV. STAT. § 571-61 (1985).

[182] *See supra* note 58.

VI. CONCLUSION

Whether prohibited or regulated, surrogate parenting is likely to remain an alternative for infertile couples. With the increase in infertility and the rising abortion rate, surrogate adoption may be a couple's only recourse for obtaining a child and the best means of ensuring that the child has a biological link to one of its parents. Because of the distortions that would result from attempting to resolve issues pursuant to statutes designed for traditional adoptions, a strong need exists for a statutory scheme specifically addressing, regulating and promoting the surrogate parenting arrangement for couples who are unable to have children by the traditional method. Our society is firmly and constitutionally committed to promoting and protecting the family unit. These goals would be best fostered through statutory recognition of the right to enter surrogate parenting arrangements and through a statutory scheme that promotes those rights through clarity and certainty.[183]

Susan A. Cooper

---

[183] Just prior to publication of this comment, the *Baby M* case was decided in Hackensack, New Jersey. Bergen County Superior Court Judge Harvey R. Sorkow ruled: (1) that the contract executed by surrogate mother Mary Beth Whitehead was valid and enforceable under New Jersey law; (2) that the contract did not constitute baby-selling, illegal under New Jersey law; (3) that Whitehead's parental rights were immediately terminated; and (4) a surrogate agreement is constitutionally protected by the fourteenth amendment's right to privacy. An appeal has been filed in the case. Honolulu Advertiser, Apr. 1, 1987, at A16, col. 1.

Disarray In the Circuits After *Alexander v. Gardner-Denver Co.*

I. INTRODUCTION

Confusion still reigns more than a decade since the controversial United States Supreme Court ruling in *Alexander v. Gardner-Denver Co.*[1] The Court, in attempting to clarify the role of arbitration in employment discrimination actions under Title VII of the Civil Rights Act of 1964,[2] was unclear as to the weight to be given to a prior arbitral decision. The appropriate weight accorded to an arbitral decision was left to the trial court's discretion. Further, in a controversial footnote, the Court recognized that "great weight" could be accorded to an arbitral decision that had given full consideration to the Title VII issue.[3]

---

[1] 415 U.S. 36 (1974).

[2] 42 U.S.C. § 2000e to 2000e-15 (1970), *amended by* 42 U.S.C. § 2000e to 2000e-17 (1982). Under § 2000e-2(a) of Title VII, it is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[3] *Alexander*, 415 U.S. at 60 n.21. In footnote 21 of *Alexander*, the Supreme Court set forth the following:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Consequently, the federal circuit courts are in a state of disarray over how to review such decisions.[4]

This comment will examine the policies underlying arbitration, analyze the decision reached by the Supreme Court in *Alexander*, and review the alternative forms of settling Title VII grievances. Additionally, the three approaches taken by the various circuits: (1) no deference and no weight; (2) limited deference; and (3) admissible evidence, will be scrutinized. The circuits will be further surveyed to determine the appropriate application of the admissible evidence approach. In conclusion, the effects of *Alexander* will be set forth and recommendations will be offered to resolve the uncertainty in the area of Title VII and arbitration.

II. POLICIES OF ARBITRATION

A. The "Steelworkers Trilogy" and Judicial Deference

Arbitration was rare prior to 1940.[5] Since 1942, there has been a strong policy favoring the adoption of arbitration clauses in collective bargaining agreements.[6] However, arbitration clauses were not judicially recognized until much later.[7] In 1960, three landmark Supreme Court decisions,[8] known as the "Steel-

---

[4] *See generally infra* text accompanying notes 123-84.

[5] Cohen & Eaby, *The* Gardner-Denver *Decision and Labor Arbitration*, 27 LAB. L.J. 18 (1976).

[6] From 1942 to 1945, the War Labor Board, through Executive Order 9017, encouraged arbitration clauses in collective bargaining agreements when unions voluntarily gave up their right to strike. *Id.* at 18; Fowler, *Arbitration, the Trilogy, and Individual Rights: Developments Since* Alexander v. Gardner-Denver, 36 LAB. L.J. 173, 175 (1985).

[7] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In 1947, Congress gave parties the right to sue in federal district court for contract violations. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(a) (1982). Cohen & Eaby, *supra* note 5, at 19. Ten years later, the Supreme Court held that arbitration clauses in collective bargaining agreements are enforceable. 353 U.S. at 451.

[8] United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In *American Mfg. Co.*, the union brought an action to compel arbitration based upon the seniority provisions of the collective bargaining agreement. The Court held that a court cannot make a determination on the merits of the case if the collective bargaining agreement provides that the arbitrator resolve all disputes as to the meaning, interpretation and application of the collective bargaining agreement. The collective bargaining agreement process is undermined if the judge takes over the power of the arbitrator. 363 U.S. at 564-69. In *Warrior & Gulf*, the Court held that there was a presumption of arbitrability in an action by the union to compel arbitration under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). 363 U.S. at 582-83. In *Enterprise Wheel & Car*, the Court held that only an award that does not "draw its essence from the collective-bargaining agreement" could be overturned by the district court in an action to enforce an arbitral

workers Trilogy," instituted a federal policy favoring arbitration. The preclusion of federal judicial review established a final and binding effect of arbitral decisions.[9]

In the "Steelworkers Trilogy" cases, the Supreme Court set forth the premise that courts cannot consider the merits of an arbitral decision. On review, the federal district courts were limited to the question of whether the arbitrator exceeded the authority provided by the collective bargaining agreement.[10] Additionally, in actions for performance of arbitration, the Court ruled that arbitration is ordered unless there is "positive assurance" that the dispute is not covered by the collective bargaining agreement. Any doubts of arbitrability are resolved in favor of arbitration.[11] Finally, in the enforcement of arbitral decisions, courts cannot overrule an arbitral decision merely because the court's interpretation differs. The court can only refuse enforcement of the arbitral decision when it is not based on the collective bargaining agreement.[12]

The "Steelworker's Trilogy" cases recognized the arbitrator's greater amount of practical knowledge of labor disputes.[13] A judge may not have the same experience and knowledge as an arbitrator in addressing the interests and expectations of the parties.[14] These interests and expectations include "the effect upon productivity of a particular result, its consequences to the morale of the shop, . . . whether tensions will be heightened or diminished,"[15] and the motivation of the parties on the feasibility of a particular remedy. In contrast, an arbitrator has the ability to encompass the customs of the industry, the law, the underlying conflict within the dispute, the industrial relationship, and the needs of the parties into an arbitral decision.[16] An arbitrator can be flexible in resolving a dispute, whereas a court follows the "law of the land."[17]

Arbitration is a less formal and less complex procedure than adjudication. Thus, it provides for an economical alternative, leading to speedy resolution.[18]

---

award. 363 U.S. 597-99.

[9] *See American Mfg. Co.*, 363 U.S. at 567-68; *Enterprise Wheel & Car*, 363 U.S. at 596-97.

[10] *American Mfg. Co.*, 363 U.S. at 567-68; *Enterprise Wheel & Car*, 363 U.S. at 596-97.

[11] *Warrior & Gulf*, 363 U.S. at 582-83.

[12] *Enterprise Wheel & Car*, 363 U.S. at 598-99.

[13] *Id.* at 596; *Warrior & Gulf*, 363 U.S. at 582. *See* Cohen & Eaby, *supra* note 5, at 19.

[14] *Warrior & Gulf*, 363 U.S. at 582. For a contrasting view, see Bartlett, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. VA. L. REV. 873, 885-86 (1983).

[15] *Warrior & Gulf*, 363 U.S. at 582.

[16] *Id.* at 581-82; *Enterprise Wheel & Car*, 363 U.S. at 596. *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 342-65 (4th ed. 1985).

[17] The "law of the land" extends to statutes and common law precedents which are created for the purpose of stability in the judicial system and the protection of the parties.

[18] *See generally* Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976); Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605 (1985).

Additionally, arbitration aids in the elimination of the backlog of cases for the Equal Employment Opportunity Commission (EEOC)[19] and the federal courts. Arbitration also has a therapeutic effect, giving the parties a feeling of satisfaction by getting "things off their chest"[20] without the emotional stress that often accompanies litigation.[21] Labor and management also gain the advantage of reducing the adverse publicity accompanying a Title VII suit.[22]

B. Individual Statutory Rights

While the courts have favored arbitration, individual statutory rights may not be adequately protected in this form of labor dispute resolution.[23] Arbitrators usually only look to the "law of the shop,"[24] especially when a collective bargaining agreement does not provide for the arbitrator's use of the law.[25] In contrast, courts apply the "law of the land."[26]

An arbitrator may not apply the law or adequately address the discrimination issue in the grievance because there may be no authorization to do so by the parties or in the collective bargaining agreement.[27] In a 1976 American Arbitration Association (AAA) survey of 260 arbitrators, eighteen never used the

---

[19] The EEOC had a backlog of 8,000 cases in its first year of operation. By 1976, this number grew to over 150,000. Rubenfeld & Strouble, *Arbitration and EEO Issues*, 30 LAB. L.J. 489 (1979).

[20] *Id.* at 494; Bartlett, *supra* note 14, at 892.

[21] *Alexander*, 415 U.S. at 55; Note, *The False Hope of a Footnote: Arbitration of Title VII Disputes After* Alexander v. Gardner-Denver Co., 8 LOY. U. CHI. L.J. 847, 855 (1977) [hereinafter Note, *False Hope*].

[22] Pearson v. Western Elec. Co., 542 F.2d 1150, 1153 (10th Cir. 1976). Adverse publicity generates a negative public image, especially when a reputation of discrimination by labor or management is brought to the public's attention. *See also infra* note 162.

[23] *Alexander*, 415 U.S. at 49-58.

[24] The "law of the shop" encompasses the customs of the industry and the standards set forth in the collective bargaining agreement.

[25] *Alexander*, 415 U.S. at 53-57. For discussions on the arbitrator's use of the "law of the shop," see, e.g., A. ZACK & R. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 27-32 (1983); M. HILL & A. SINCROPI, REMEDIES IN ARBITRATION 220-22 (1981); Bloch, *Labor Arbitration's Crossroads Revisited: The Role of the Arbitrator and the Response of the Courts*, 47 U. CIN. L. REV. 363, 363-65 (1978); Hill, *The Authority of a Labor Arbitrator to Decide Legal Issues Under a Collective-Bargaining Contract: The Situation After* Alexander v. Gardner-Denver, 10 IND. L. REV. 899, 907-11 (1977).

[26] The "law of the land" provides protection because the parties are ensured that a discrimination claim will be effectively addressed according to the statutory guidelines of Title VII.

[27] An arbitrator may apply the law if the parties or the collective bargaining agreement gives the arbitrator such authority. For an excellent discussion on an arbitrator's use of the law, see A. ZACK & R. BLOCH, *supra* note 25, at 28-32; F. ELKOURI & E. ELKOURI, *supra* note 16, at 369-84.

law, 104 always used the law, and 112 sometimes used the law.[28] Thus, an individual's statutory rights may not be addressed in arbitration where the arbitral decision is solely based on contract interpretation.

Even where an arbitrator does apply the law, the arbitrator may lack competence and understanding of the law covering employment discrimination.[29] Out of 100 arbitrators in a random sample, 43% were academicians, 38% were lawyers, and the remainder came from various backgrounds.[30] Those arbitrators with law degrees totaled 64%.[31] Although the majority of arbitrators applying employment discrimination law have a legal background, they may not have the expertise necessary to give the protection needed for individual Title VII rights because this area of law is constantly changing and very complex.[32] Full competence requires the arbitrator to be very specialized and current on any new developments in Title VII. In a survey of 200 respondents who were members of the National Academy of Arbitrators, only 52% read labor advance sheets on a regular basis.[33] Further, only 14% felt competent to define Title VII legal terms and the current status of the Title VII law in relation to these terms.[34]

Courts may also be better forums because of the procedural protections and the availability of discovery.[35] Arbitrations have no rules of evidence and rarely have written transcripts or tape recordings. Since there are no rules of evidence, an arbitrator may hear irrelevant evidence and fail to fully consider evidence that is material. Therefore, an arbitral proceeding may not provide adequate protection of individual statutory rights.

The conflict between the "Steelworkers Trilogy" federal policy favoring arbitration and the need to protect individual statutory rights[36] was first addressed

---

[28] Coulson, *Title Seven Arbitration in Action*, 27 LAB. L.J. 141, 143-44 (1976).

[29] An arbitrator must have the same expertise as a judge in analyzing issues, weighing evidence, and interpreting the contract. Unfortunately, many arbitrators lack the necessary competence in order to perform these skills. Bartlett, *supra* note 14, at 886 (citing P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 112 (1966)). One suggestion is to set up training programs to educate and certify arbitrators. Rubenfeld & Strouble, *supra* note 19, at 494.

[30] Bartlett, *supra* note 14, at 881.

[31] Only 10% of the arbitrators were law professors. *Id.*

[32] A. ZACK & R. BLOCH, *supra* note 25, at 36. In a study on the use of arbitration in employment discrimination disputes, it was found that arbitrators who were lawyers were not more qualified to hear discrimination cases. Factors that were more relevant included the familiarity with the industry and discrimination law. Oppenheimer & LaVan, *Arbitration Awards In Discrimination Disputes: An Empirical Analysis*, 34 ARB. J. 12, 16 (1979).

[33] Of the respondents, only 72% felt competent to decide employment discrimination claims. A. ZACK & R. BLOCH, *supra* note 25, at 36.

[34] These terms included "bona fide occupational qualification," "reasonable accommodations/undue hardship," and "preferential treatment." *Id.*

[35] *Id.* at 35.

[36] For example, these statutory rights include legislation enacted to regulate health, safety,

in the area of Title VII statutory rights.[37] It was subsequently addressed in other areas such as civil rights claims under 42 U.S.C. section 1983,[38] the Fair Labor Standards Act (FLSA),[39] the Employment Retirement Security Act,[40] and the Age Discrimination in Employment Act.[41] The Supreme Court attempted to reach an accommodation between the two conflicting policies in *Alexander*[42] by ruling that a prior arbitral decision could be admitted as evidence in Title VII claims. By denying review to cases that would have clarified *Alexander*,[43] the Supreme Court has not subsequently addressed the issue of the appropriate amount of weight that is given to a prior arbitral decision in Title VII cases.[44]

---

security, and other aspects of a business operation. Statutory rights stem from statutes and ordinances enacted by the municipality, state, and federal governments, rather than those rights conferred upon an employee by the collective bargaining agreement. *Id.* at 27-28.

[37] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). *See also* Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (*Dewey* court deferred to the arbitral decision); Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973) (no deference); Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972) (seven standards for deferral); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (the employee could seek Title VII action in federal court and arbitration concurrently as long as one remedy was elected after adjudication). An employee has the right not to be discriminated against by employers and unions. Title VII made such employment discrimination illegal. 42 U.S.C. § 2000e-2(a) (1982).

[38] McDonald v. City of W. Branch Mich., 466 U.S. 284 (1984). In *McDonald*, the Court held that res judicata or collateral estoppel cannot be accorded by the federal courts to unappealed arbitral awards in suits brought under 42 U.S.C. § 1983. *Id.* at 292. Section 1983 provides for the protection of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1982).

[39] Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981). In *Barrentine*, a prior arbitral award did not preclude an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206(a), 254 (1976), which provides minimal labor standards for rights such as minimum wage and overtime. 450 U.S. at 745.

[40] Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984). In *Amaro*, the court held that a prior arbitral award had no res judicata effect under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1982), which provides the right of noninterference with a right that is entitled to the employee under an employee benefit plan. 724 F.2d at 749-50.

[41] Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983); EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982). In *Criswell*, the court held that a federal court is not required to give deference to a prior arbitral decision in a suit under the Age Discrimination Employment Act of 1967, 29 U.S.C. §§ 621, 634, which provides the right of protection from age discrimination. *Criswell*, 709 F.2d at 548-49.

[42] *Alexander*, 415 U.S. at 36.

[43] Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976).

[44] The Supreme Court reinforced the *Alexander* approach in *Barrentine*. In *Barrentine*, the Court set forth the *Alexander* approach for FLSA cases. 450 U.S. at 743 n.22. *See supra* note 39.

Consequently, the lower federal courts do not have clear guidelines for admitting arbitral decisions into evidence because of the conflict between the protection of individual statutory rights and the policy favoring arbitration.

III. THE *Alexander* DECISION

In *Alexander v. Gardner-Denver Co.*,[45] the Supreme Court held that a prior arbitral decision did not limit a de novo Title VII trial.[46] In *Alexander*, the employee submitted a racial discrimination grievance under the collective bargaining agreement[47] after being discharged by the employer.[48] The employer rejected the grievance as provided by the collective bargaining agreement and the grievance proceeded to arbitration.[49] The arbitrator ruled that the employee was discharged for just cause.[50]

The employee filed a claim with the Colorado Civil Rights Commission which was referred to the EEOC.[51] The EEOC issued a determination as to no reasonable cause for a Title VII action.[52] After receiving a right to sue letter from the EEOC, the employee brought suit under Title VII in federal court.[53] The district court held that the arbitral decision precluded the Title VII action.[54] The United States Court of Appeals for the Tenth Circuit affirmed.[55]

In reversing, the Supreme Court concluded that the employee was entitled to trial de novo and the arbitral decision did not preclude the subsequent Title VII

---

[45] 415 U.S. 36 (1974).

[46] *Id.* at 59-60. A de novo trial means trying a matter anew as though it had never been heard and there is no prior decision. Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D.N.J. 1971).

[47] The collective bargaining agreement provided for a grievance procedure in which the employee submits a grievance and management submits answers in response. The final step in the grievance procedure was arbitration. The collective bargaining agreement contained a final arbitration clause. The clause signified that the arbitrator's interpretation of the provisions of the collective bargaining agreement is final and binding on the employer, the union, and the employee. 415 U.S. at 40-42.

[48] *Id.* at 38-39.

[49] *Id.* at 42.

[50] The arbitrator's ruling made no reference to the racial discrimination but stated other grounds for the discharge. *Id.* at 42-43.

[51] *Id.* at 42.

[52] *Id.* at 43.

[53] *Id.* If the EEOC dismisses a claim, or the EEOC has not filed an action or reached a conciliation agreement within 180 days of the filing of the claim, the claimant is required to be notified with a right to sue letter to bring a civil action. 42 U.S.C. § 2000e-5(b) (1982); Equal Employment Opportunity Commission Regulations and Guidelines, 29 C.F.R. § 1601.28 (1986). *See also infra* note 91.

[54] 346 F. Supp. 1012 (D. Colo. 1971).

[55] 466 F.2d 1209 (10th Cir. 1972).

action.[56] The Court recognized that Title VII was a supplement to arbitration and similar forums.[57] Congress intended to allow an individual to pursue a discrimination claim under both Title VII and other federal and state statutes.[58] The election of remedies doctrine did not apply to separate statutory rights.[59]

The *Alexander* Court ruled that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the [trial] court deems appropriate."[60] Although the Court set no definite standards for determining the meaning of appropriate weight, the Court noted that the trial court could accord "great weight" to an arbitral decision that gives full consideration to the employee's Title VII rights. The Court set forth four relevant factors for determining the weight given to an arbitral decision.[61] The four factors set forth in footnote twenty-one were "[1] the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, [2] the degree of procedural fairness in the arbitral forum, [3] adequacy of the record with respect to the issue of discrimination, and [4] the special competence of particular arbitrators."[62]

IV. CRITICISMS OF *Alexander*

In *Alexander*, the Court implied that no weight be given to an arbitrator's Title VII findings since provisions in the collective bargaining agreement are required to conform with Title VII.[63] However, the Court also noted that "great weight" would be accorded when the issue is "especially" one of fact.[64] This language indicates that weight can be accorded even though a decision is not solely based on fact.[65] An arbitral decision may be accorded weight, although not to the extent of "great weight," even though all four factors are not applied by the court. Thus, an arbitral decision can be admitted into evidence

---

[56] 415 U.S. at 59-60.

[57] *Id.* at 48-49.

[58] *Id.* at 48.

[59] The Court in *Alexander* reasoned that the contractual and statutory rights were separate and not inconsistent when enforced in their appropriate forums. These rights complement each other and promote the policies of antidiscrimination. *Id.* at 49-51. An election of remedies occurs when a party chooses one of two or more remedies which are inconsistent with each other and is bound to the one chosen. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1214 (1982).

[60] 415 U.S. at 60.

[61] *Id.* at 60 n.21.

[62] *Id.*

[63] Richards, Alexander v. Gardner-Denver: *A Threat to Title VII Rights*, 29 ARK. L. REV. 129, 176 (1975).

[64] 415 U.S. at 60 n.21.

[65] *See id. See also* Richards, *supra* note 63, at 176.

even if it lacks the procedural protections that concerned the Court in *Alexander*.

In the Hoyman/Stallworth survey, labor favored the *Alexander* decision much more than management.[66] Of the labor advocates, 71.9% supported *Alexander* and only 28.2% of management advocates were in favor of the decision.[67] A major reason for this disparity between labor and management is that an employee may get a second chance at litigation after a decision has already been rendered by an arbitrator.[68] In order to give full protection of Title VII rights, the employee has the advantage of a decision in a second forum.

This unfairness to the employer was alleviated with the inclusion of "great weight" in *Alexander*.[69] Arbitration would work against the employee where great weight is accorded to an arbitral decision adverse to the employee. Risks to both the employer and employee of losing in the Title VII action are apparent consequences of *Alexander*. The employer does not want to multiply any chances of losing. Similarly, the same adverse decision on appeal is not desirous to the employee. Consequently, there is a possibility that these risks will lead to the elimination of arbitration as an alternative for labor dispute resolution.[70] Discarding arbitration, however, is not a reasonable outcome because there are greater advantages such as cost and expediency.[71]

Alexander is unclear on whether the arbitrator's findings of fact alone or the arbitrator's findings on the mixed questions of fact and the antidiscrimination issue are admissible as evidence. If a contract contains authorization for an arbitrator to address antidiscrimination issues, the arbitrator is able to make findings on the facts and resolve the grievance concerning any discrimination. It is

---

[66] There were about four times more management attorneys than labor attorneys represented in the survey. Of 659 respondents, 67.5% represented management, 15.3% represented unions, and the remainder represented neither management nor labor. Hoyman & Stallworth, *Arbitrating Discrimination Grievances in the Wake of* Gardner-Denver, 106 MONTHLY LABOR REV. 3, 4 n.19 (1983).

[67] Of the respondents, 60.3% disagreed with the *Alexander* decision. *Id.* at 5.

[68] Reference to this second chance is termed "two bites of the apple" or "two strings to his bow," *Alexander*, 415 U.S. at 54. *See* Fowler, *supra* note 6, at 179. It has been suggested that it is "one bite at two different apples." Hoyman & Stallworth, *Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 49, 51 n.9 (1984).

[69] 415 U.S. at 60 n.21.

[70] Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). For an interesting discussion on the retention of the arbitration clause in the collective bargaining agreement, see Isaacson & Zifchak, *Fair Employment Forums After* Alexander v. Gardner-Denver Co.*: Separate and Unequal*, 16 WM. & MARY L. REV. 439, 466-70 (1975).

[71] The employer will probably include an arbitration clause because of cost factors and the *quid pro quo* of the no strike clause. *Alexander*, 415 U.S. at 54-55. Richards, *supra* note 63, at 168. *See also* Baab, *A Union View of Arbitration of EEO Actions*, PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL INSTITUTE ON LABOR LAW 347, 353-54 (1979).

implied that equal weight will be accorded to the arbitrator's findings of fact and on the antidiscrimination issue. The standard in *Alexander* requiring conformity of contractual provisions and Title VII indicates that no weight be accorded to the question on the antidiscrimination issue when there is no substantial conformity.[72] Thus, the court must carefully scrutinize the arbitrator's authority and competence in applying antidiscrimination principles that conform with Title VII when admitting the arbitral decision into evidence.

There is the criticism that too much weight is accorded to the arbitrator's findings of facts since "great weight" is similar to the clearly erroneous standard used in reviewing a court's decision.[73] Because arbitral proceedings do not have the procedural protections of court proceedings, a higher standard of review should be used for an arbitral decision. "Great weight," however, is not the same as the clearly erroneous standard. A clearly erroneous standard would defer to the arbitrator.[74] By comparison, "great weight" is conceivably less than the clearly erroneous standard because the arbitral decision is merely admitted into evidence.[75] Additionally, it cannot be readily assumed that federal courts are better forums for discrimination disputes and arbitral decisions are not deserving of a standard which is similar to clearly erroneous.[76]

V. Alternative Forms of Settlement

A. Waiver

Although the Court in *Alexander* ruled that pursuing an employment discrimination dispute to arbitration is not a waiver of a Title VII action,[77] other types of waivers can be viable methods in reaching a binding and final settlement agreement. There are three types of waivers: (1) prospective waiver, (2) pre-arbitration waiver after discrimination, and (3) settlement waiver.

It is well settled that a union cannot prospectively waive Title VII rights of an employee. A prospective waiver is a waiver that is included in the collective bargaining agreement agreed upon by the union but not by the individual em-

---

[72] Richards, *supra* note 63, at 176.

[73] *Id.* at 179.

[74] *See id.* at 179-80 n.144.

[75] A clearly erroneous decision occurs in a decision which is unsuppported by substantial evidence, erroneous as to the law, or contrary to the clear weight of the evidence. Sears, Roebuck & Co. v. Talge, 140 F.2d 395, 396 (8th Cir. 1944).

[76] For discussions on the adequacy of the arbitration proceeding, see Isaacson & Zifchak, *supra* note 70, at 461; Youngdahl, *Arbitration of Discrimination Grievances: A Novel Approach Under One Collective Bargaining Agreement*, 31 ARB. J. 145, 162 (1976). *Alexander*, however, noted that it is unlikely that "arbitral processes are commensurate with judicial processes." 415 U.S. at 56.

[77] 415 U.S. at 52.

ployee.[78] Title VII rights cannot be waived in a collective bargaining agreement because the union is representing all the members of the union as a whole rather than protecting the rights of the individual employee.[79] The union cannot simply bargain away an employee's Title VII rights.[80]

A waiver by an employee after the occurrence of employment discrimination but before arbitration may be valid.[81] As a prerequisite to arbitration, an employee may elect arbitration and waive the right to trial.[82] The validity of the waiver depends on whether it is voluntarily and knowingly entered into by the employee.[83] This type of waiver may not be voluntarily and knowingly entered into when economic coercion is involved in waiving Title VII rights and the employee is forced to select the less expensive alternative of arbitration over the more expensive route of adjudication.[84] Thus, the voluntary and knowing requirement will be more readily fulfilled if the employee is advised of all rights by independent counsel.[85] Alternatively, the arbitrator can make a determination as to whether the employee requires independent counsel to make a voluntary and knowing choice of a waiver.[86]

The most effective type of waiver is the voluntary and knowing acceptance of a settlement in which relief is "substantially equivalent to that obtainable under Title VII."[87] An employee cannot obtain a trial under Title VII for the same discriminatory conduct after this voluntary and knowing acceptance.[88] Factors

---

[78] *See id.* at 51.

[79] A union may only waive rights related to collective activity such as the right to strike. 415 U.S. at 51.

[80] *Id.*

[81] *See In re* Basic Vegetable Products, Inc. and Local 890, International Brotherhood of Teamsters, 64 LAB. ARB. (BNA) 620 (1975) (Gould, Arb.).

[82] Note, *False Hope*, *supra* note 21, at 859.

[83] 415 U.S. at 52 n.15.

[84] Note, *False Hope*, *supra* note 21, at 859.

[85] *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 955 (1976); Coulson, *supra* note 28, at 145.

[86] Coulson, *supra* note 28, at 145.

[87] Strozier v. General Motors Corp., 442 F. Supp. 475, 481 (N.D. Ga. 1977), *appeal dismissed*, 584 F.2d 755 (5th Cir. 1978). In *Strozier*, the employee sought settlements twice and accepted payments on two separate occasions. The court held that there was a voluntarily and knowingly accepted settlement that waived rights under Title VII to seek relief in court. *Id. Cf. Alexander*, 415 U.S. at 52 n.15; Trujillo v. Colorado, 649 F.2d 823 (10th Cir. 1981) (acceptance of benefits barred action); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975) (consent decree could not be invalidated in Title VII suit). *But cf.* Lyght v. Ford Motor Co., 458 F. Supp. 137 (E.D. Mich. 1978), *vacated*, 643 F.2d 435 (6th Cir. 1981) (no preclusion to Title VII suit for back pay). *See generally* Jacobs, *Confusion Remains Five Years After* Alexander v. Gardner-Denver, 30 LAB. L.J. 623, 634-35 (1979). "Voluntary and knowing" and "voluntarily and knowingly" are given the same meaning within this comment.

[88] *Strozier*, 442 F. Supp. at 481.

determinative of whether a waiver is voluntary and knowing are where an employee has representation by independent counsel, seeks a settlement, engages in settlement negotiations, accepts award benefits, and obtains a formalized document such as a consent decree, a written release or a signed settlement agreement.[89] An employee may still file suit after a voluntary and knowing waiver and acceptance of the settlement benefits if the action is based on different discriminatory conduct or if there is an incomplete waiver of a partial settlement.[90]

B. Federal Agencies for Determination of Title VII Claims

1. The Equal Employment Opportunity Commission

The EEOC is the federal administrative agency that has the statutory authority to resolve individual employment discrimination claims and bring civil action in representation of the federal government.[91] The EEOC is not empowered to adjudicate claims and impose sanctions.[92] Its duties include investigation of claims, resolution of disputes through conciliation, recommendation as to a determination of reasonable cause,[93] and prosecution of claims in federal court against nongovernmental persons and entities.[94] The EEOC is authorized to conciliate employment discrimination claims. In the event of a failure to reach an agreement, the EEOC can bring action against employers.[95]

The predecision settlement occurs after a preliminary investigation and before an EEOC determination as to reasonable cause. In reaching a predecision settle-

---

[89] *Id.* Lyght v. Ford Motor Co., 643 F.2d at 440-41.

[90] 643 F.2d at 441.

[91] Under the procedure of filing a Title VII claim, an employee can file a claim with the EEOC. If there is a state antidiscrimination statute, an employee can file a claim with the EEOC sixty days after the filing of a complaint with a state agency or after a state agency has issued a notice of termination of proceedings. The EEOC will investigate the claim and if reasonable cause is found, the EEOC will attempt conciliation. If conciliation fails, the EEOC will bring an action in federal court. If no reasonable cause is found, the EEOC will issue a right to sue letter and the employee can bring a civil action in federal court. 42 U.S.C. § 2000e-5 (1982). *See also supra* note 53.

[92] 42 U.S.C. § 2000e-5(f), (g) (1982). *See also Alexander*, 415 U.S. at 44.

[93] After investigation of an employment discrimination claim, the EEOC makes a determination as to whether there is reasonable cause based on an EEOC field investigative file. Additionally, the EEOC gives substantial weight to final findings and orders of specified local agencies. This determination does not need to reach a standard of the preponderance of the evidence. It only needs to be based on "reasonable cause to believe the charge is true." 42 U.S.C. § 2000e-5(b) (1982); 29 C.F.R. § 1601.21 (1986); B. SCHLEI & P. GROSSMAN, *supra* note 85, at 806.

[94] 42 U.S.C. § 2000e-5(f) (1982); 29 C.F.R. § 1601.27 (1986).

[95] 42 U.S.C. § 2000e-5(f) (1982); 29 C.F.R. §§ 1601.24(a), 1601.27 (1986).

ment, the EEOC engages in, makes, and approves settlements through an informal conciliation process. If settlement occurs, no decision is issued by the EEOC. The predecision settlement agreement is easier to obtain than a conciliation agreement in which the EEOC has already made a determination as to reasonable cause.[96]

After a determination of reasonable cause is issued by the EEOC, the conciliator starts with a proposal of a conciliation agreement which includes Title VII remedies to the employment discrimination. The next step is a conciliation conference where the conciliator and the employer exchange proposals. The employee is generally not present at these conferences unless it is helpful to the conciliator.[97]

The EEOC, the employee, and the employer must all sign the conciliation agreement.[98] If the EEOC does not agree to the terms of the agreement, a private settlement may be entered into by the employee and the employer. After the agreement is reached, the EEOC's involvement ends except for the compliance procedure as set forth in the agreement. If there is a failure to reach an agreement, the employee will be sent a right to sue letter by the EEOC.[99]

2. *Other Federal Agencies*

In *Chandler v. Roudebush*,[100] the Supreme Court held that federal agency review of a Title VII claim is not a preclusion to a trial de novo.[101] Furthermore, the Court ruled that an employee has the right to trial de novo and not merely a review of a federal agency's decision.[102] Congressional intention in not authorizing the EEOC to have final adjudication powers in Title VII suits indicates that trial de novo is appropriate after a federal agency decision.[103]

---

[96] B. SCHLEI & P. GROSSMAN, *supra* note 85, at 810; 29 C.F.R. § 1601.20 (1986).

[97] B. SCHLEI & P. GROSSMAN, *supra* note 85, at 807; 42 U.S.C. § 2000e-5(b) (1982); 29 C.F.R. § 1601.24(a) (1986).

[98] 29 C.F.R. § 1601.24(a) (1986). The employee must sign the agreement for it to be binding on the employee and any employer respondent(s) not signing the agreement will not be bound by it. B. SCHLEI & P. GROSSMAN, *supra* note 85, at 808.

[99] B. SCHLEI & P. GROSSMAN, *supra* note 85, at 808; 42 U.S.C. § 2000e-5(b) (1982); 29 C.F.R. §§ 1601.24, 1601.25 (1986). *See also supra* note 53.

[100] 425 U.S. 840 (1976). In *Chandler*, the employee filed a discrimination claim against her employer, the Veteran's Administration. After an administrative hearing, the agency rejected the findings of the administrator. The Supreme Court held that the right to trial de novo of a Title VII claim after an agency decision applies to federal employees as well as private sector employees. *Id.* at 848.

[101] *Id.* at 863-64.

[102] *Id.*

[103] Congress did not intend to give the EEOC judicial and enforcement authority because the responsibility of enforcement of Title VII was vested in the federal courts. *Id.* at 853-54.

C. State Forums

1. State courts

In *Kremer v. Chemical Construction Corp.*,[104] the Supreme Court held that a state court affirmance of a state agency decision was to be afforded full faith and credit,[105] thus precluding a Title VII trial de novo in federal court.[106] The Court reasoned that federal courts must give the same "preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged."[107] Although the federal courts have the final responsibility in deciding Title VII issues, decisions in another forum should not automatically be denied finality.[108] The Court concluded that Title VII was not a repeal of the full faith and credit statute because state courts sufficiently protect an individual's Title VII rights and afford the minimum due process requirements.[109]

2. State agencies

The EEOC must defer to a state agency in a Title VII dispute for sixty days if the state law gives relief similar to Title VII and authorizes a state agency to resolve the dispute.[110] The state agency, as designated by state law, must then be exhausted as a forum for a remedy prior to any EEOC action.[111] If the state agency fails to take action or waives any action within the sixty day time pe-

---

[104] 456 U.S. 461 (1981).

[105] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1982). Article IV, section 1 of the United States Constitution, and its implementing statute, 28 U.S.C. § 1738 (1982), pertain to the full faith and credit given to previous state court decisions by the other state courts and federal courts.

[106] 456 U.S. at 461. Preclusion refers to the doctrines of res judicata and collateral estoppel. Claim preclusion bars subsequent actions on the same claim(s) by the same parties once a final judgment is rendered. In comparison, issue preclusion bars the relitigation of similar issues even though the claim differs in the subsequent suit. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 59, § 4402.

[107] 456 U.S. at 466 (footnote omitted).

[108] *Id.* at 477.

[109] Due process requirements include a full opportunity to present a claim, rebut evidence against a claim, right to an attorney, public hearing, and appellate review of a claim. *Id.* at 483-85.

[110] 42 U.S.C. §§ 2000e-5(c)-(d) (1982). By allowing the state to resolve a Title VII claim prior to going to the EEOC, an accommodation is reached between the state and federal agencies to enforce antidiscrimination laws. Federal agencies can act after state agencies are given an opportunity to enforce such laws. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1212 (1971).

[111] 42 U.S.C. §§ 2000e-5(b), (d) (1982). *See also* Love v. Pullman Co., 404 U.S. 522 (1972) (the EEOC could file suit on the employee's behalf after the state agency terminated jurisdiction).

riod,[112] the Title VII dispute reverts back to the EEOC and the federal court forum. If the state agency issues a decision, the EEOC will accord the decision "substantial weight" in a determination of reasonable cause.[113]

Although a state agency decision reviewed by a state court is a preclusion to the federal courts in a Title VII action,[114] the United States Supreme Court held that an unreviewed state agency decision does not bar a Title VII trial de novo in *University of Tennessee v. Elliott*.[115] The Court reasoned that the full faith and credit statute did not apply to unreviewed state agency decisions since the EEOC has the authority to accord "substantial weight" to a state decision.[116]

D. Arbitration

Arbitration can be instituted as a forum for an employment discrimination grievance after negotiations have failed between the parties.[117] The parties generally issue a notice or demand for arbitration to invoke the collective bargaining agreement provision providing for arbitration.[118] The arbitrator acts as a neutral third party who settles the discrimination dispute.[119] Authority of the arbitrator stems from the collective bargaining agreement which can empower the arbitrator to apply either discrimination principles or Title VII law or both.[120] Although evidence is admissible in the discretion of the arbitrator, the arbitrator usually admits all relevant evidence.[121] An arbitrator renders a decision after considering the evidence, discrimination principles, Title VII law, customs of the industry, and intent of the parties. Fairness of the arbitral settlement may also be a factor in the decision.[122]

---

[112] Another alternative is a contract between the EEOC and the state agency. B. SCHLEI & P. GROSSMAN, *supra* note 85, at 775.

[113] 42 U.S.C. § 2000e-5(b) (1982).

[114] Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981).

[115] 106 S. Ct. 3220 (1986).

[116] *Id.* at 3225.

[117] F. ELKOURI & E. ELKOURI, *supra* note 16, at 153; Fowler, *supra* note 6, at 174; Isaacson & Zifchak, *supra* note 70, at 461.

[118] The collective bargaining agreement sets forth the manner in which a grievance on the interpretation of an agreement is settled. *See Warrior & Gulf*, 363 U.S. at 577. *See also* Bartlett, *supra* note 14, at 890. Arbitration of discharge issues generally stem from a collective bargaining agreement provision protecting an employee from discharge unless there is just cause. Isaacson & Zifchak, *supra* note 70, at 458.

[119] Fowler, *supra* note 6, at 174.

[120] An arbitral decision must "draw its essence" from the collective bargaining agreement. *Enterprise Wheel & Car*, 363 U.S. at 597.

[121] F. ELKOURI & E. ELKOURI, *supra* note 16, at 296-300; Bartlett, *supra* note 14, at 891.

[122] Arbitration involves the interpretation and application of the contract. In comparison, suc-

VI. The Circuits' Approaches to *Alexander*

In *Alexander*, the Supreme Court ruled that a trial court can accord any amount of weight that is appropriate to an arbitral decision.[123] As a result, the circuits have taken three approaches ranging from no weight to great weight. The first approach, adopted by the Ninth Circuit, is the "no deference and no weight" approach. The second approach is the "limited deference" approach adopted by the Fifth Circuit. Finally, the Third, Sixth, and Seventh Circuits have adopted the "admissible evidence" approach.

A. *No Deference and No Weight*

The Ninth Circuit accords no deference or weight to prior arbitral awards. In *Aleem v. General Felt Industries, Inc.*,[124] the Ninth Circuit held that a Title VII action is not the equivalent of judicial review of an arbitral award. The court reasoned that a Title VII claim is a separate action because an arbitrator only interprets the collective bargaining agreement and the arbitration forum is procedurally inadequate. When a court reviews an arbitral decision, analysis is not on a substantive basis. Instead, the focus is on whether the arbitrator exceeded the authority set forth by the collective bargaining agreement. Therefore, the court concluded that an arbitral decision should not be considered in an independent and separate Title VII action.[125]

Aleem is inconsistent with the later Supreme Court decision in *Kremer v. Chemical Construction Corp.*[126] *Kremer* held that a state court decision precludes a subsequent federal suit. In *Aleem*, the Ninth Circuit relied on decisions set aside by *Kremer* and rejected a decision consistent with *Kremer*.[127] On the premise that state court review of a state agency decision did not bar a Title VII action, the Ninth Circuit reasoned that a claimant was entitled to trial de novo

---

cessful Title VII litigation places reliance on economic power. A. Zack & R. Bloch, *supra* note 25, at 28-30.

[123] 415 U.S. at 60 n.21.

[124] 661 F.2d 135 (9th Cir. 1981), *application in forma pauperis denied*, 106 S. Ct. 54 (1985). The employee challenged an adverse arbitral decision in state court and the action was removed to federal court. The district court upheld the arbitral decision by granting summary judgment in favor of the employer. The employee did not appeal the decision but filed a Title VII claim in federal district court. The district court held that the previous district court judgment barred the action due to res judicata and collateral estoppel. 661 F.2d at 135-36.

[125] 661 F.2d at 136-37.

[126] 456 U.S. 461 (1981). *See supra* text accompanying notes 104-09.

[127] *Aleem*, 661 F.2d at 136-37. The court relied on Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1981), and Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980). The court rejected Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979).

in a Title VII action without any review of an arbitral award.[128] Since the Ninth Circuit's reasoning in *Aleem* was overturned in *Kremer*, the Ninth Circuit may adopt the admissible evidence approach used in prior decisions by the United States District Courts in California. In decisions from the United States District Courts in California, the court gives "considerable weight" to an arbitral decision if it complies with the four factors in *Alexander*.[129] The court does not defer to the arbitral award but considers testimony and gives "considerable weight" to the arbitral decision.[130]

Although the Ninth Circuit's reasoning is inconsistent with *Kremer*, the Ninth Circuit is hesitant to accord any weight to an arbitral decision. The direction of the Ninth Circuit has not changed since *Oubichon v. North American Rockwell Corp.*,[131] a decision prior to *Alexander*. The court in *Oubichon* held that an acceptance of an arbitral award or settlement did not bar a Title VII action. Acceptance was only prima facie evidence that a claimant is fully compensated.[132] There have been no Ninth Circuit decisions contrary to *Oubichon*.

The no deference and no weight approach is inconsistent with the *Alexander* decision. Although the Court noted the disadvantages of the arbitration process in *Alexander*,[133] the Court ultimately adopted an accommodation between the conflicting policies favoring arbitration and protecting Title VII rights.[134] *Alexander*, however, did leave the definition of appropriate weight within the discretion of the district courts. Therefore, the Ninth Circuit's no deference and no weight approach is in line with *Alexander* even though it was not adopted by the Supreme Court.

The admissible evidence approach allows a trial court to accord weight to an arbitral decision that does not comply with all four factors. A court may only be required to apply the four factors when according "great weight." In comparison to the admissible evidence approach, Title VII statutory rights have more

---

[128] 661 F.2d at 137.

[129] Washington v. Johns-Manville Prod. Corp., 17 Fair Empl. Prac. Cas. (BNA) 606, 608 (E.D. Cal. 1978); Corbin v. Pan Am. World Airways, Inc., 432 F. Supp. 939 (N.D. Cal. 1977); Fort v. Trans World Airlines, Inc., 14 Fair Empl. Prac. Cas. (BNA) 208 (N.D. Cal. 1976).

[130] 17 Fair Empl. Prac. Cas. at 608. In *Washington*, the court fully and extensively analyzed the arbitrator's findings, report, and file according to the four factors in *Alexander*. After giving "considerable weight" to the arbitral decision, the court issued a decision consistent with the arbitral decision. The court noted that "I'm not deferring to the Arbitrator's decision. It's just that I did give it considerable weight, which, when put together with the testimony given here, led me to the [above] conclusion." *Id.*

[131] 482 F.2d 569 (9th Cir. 1973).

[132] The employee accepted an out of court settlement consisting of lost wages and the removal of any record of past disciplinary measures. *Id.* at 574.

[133] 415 U.S. at 56-58.

[134] *Id.* at 60 n.21. For an interesting discussion on the conflicting policies, see Note, Alexander v. Gardner-Denver *and Deferral to Labor Arbitration*, 27 HASTINGS L.J. 403, 430-31 (1975).

protection under the no deference and no weight approach because the court considers the Title VII action independently and there is no risk that an inadequate arbitral decision will be admitted as evidence. The employee is favored by the no deference and no weight approach because it affords the employee two bites at the apple without any consideration to the first bite.[135] Therefore, this approach is extremely unfair to the employer or union who is forced to relitigate claims brought by the employee.[136]

Administration of the no deference and no weight approach is also easier than the confusing admissible evidence approach. Under the no deference and no weight approach, the court makes the decision based on the Title VII discrimination issue alone rather than considering an arbitral decision which may be based only on the contract claim. In addition, the no deference and no weight approach is consistent with congressional intent behind the enactment of Title VII. Congress did not set forth the amount of weight that the EEOC should accord to an arbitral decision in making a reasonable cause determination. As a result, a conflict develops between administrative and judicial decision-making if the EEOC is not authorized to give weight but the court accords weight to an arbitral decision. This conflict is resolved when neither the EEOC nor the court gives deference or weight to an arbitral decision.[137] Consequently, consistency will result since both the EEOC and the court base their decisions on the same standards.

The no deference and no weight approach, however, completely ignores federal policy favoring arbitration for the settlement of labor disputes and the industrial harmony of grievance resolution.[138] Implementation of the no deference and no weight approach would contribute to the backlog of cases in the administrative agencies and the courts. The backlog of cases in the courts requires even greater attention since there is no preclusive effect to state administrative decisions.[139] Limiting the value of arbitration as a forum for dispute resolution will only create further problems. Additionally, *Alexander* did not advocate this approach since the admissible evidence approach was adopted by the Court.[140]

---

[135] However, the "two bites at the apple" may not be true in a *Franks* type case where the arbitral award is favorable to the employee. Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *rev'd in part on class action claim*, 424 U.S. 747 (1976).

[136] *See supra* note 68 and accompanying text.

[137] Richards, *supra* note 63, at 183.

[138] *See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[139] *See University of Tennessee v. Elliott*, 106 S. Ct. 3220 (1986).

[140] 415 U.S. at 60 n.21.

B. *Limited Deference*

In comparison to the Ninth Circuit, the Fifth Circuit has adopted a limited deference approach. In *Rios v. Reynolds Metals Co.*,[141] a decision prior to *Alexander*, the Fifth Circuit set forth seven factors that would give deference to an arbitral decision. The court held that deference can occur when: (1) the contractual rights are the same as the Title VII rights; (2) the arbitral decision does not violate the private rights under Title VII or public policy; (3) the factual issues before the court are identical to the issues before the arbitrator; (4) the arbitrator is empowered by the collective bargaining agreement to decide the issue of discrimination; (5) the evidence presented at the arbitration covers all factual issues; (6) the arbitrator decides all factual issues presented to the court; and (7) the arbitration procedure is fair and adequate.[142] The court ruled that the burden to show the existence of these seven factors was on the employer when there is an arbitral decision adverse to the employee.[143]

Although *Alexander* specifically rejected the limited deference approach, the Fifth Circuit continues to apply the seven factors in *Rios*. In *Franks v. Bowman Transportation Co.*,[144] the court held that deference to the arbitral decision would occur if the arbitration was in compliance with the seven factors in *Rios*. Since the arbitral decision was based only on the contract claim and not the Title VII discrimination, the court did not defer to the arbitral decision. The court found the arbitrator's decision on the contract claim to have very little or no bearing on the discrimination claim. There was no deference or weight given to the arbitral decision since it did not comply with all seven factors.[145] This standard of deference is analogous to the National Labor Relations Board (NLRB) process of deferral in which there is deference to an arbitral decision after certain criteria are met. Although *Alexander* rejected the seven factors as a viable solution because they were too stringent,[146] the Fifth Circuit completely ignored this rejection by *Alexander*.[147]

---

[141] 467 F.2d 54 (5th Cir. 1972) (employee brought Title VII suit on basis of race discrimination and the Fifth Circuit set forth a standard of limited deference for the arbitral decision that was adverse to the employee).

[142] *Id.* at 58.

[143] *Id.*

[144] 495 F.2d 398 (1974).

[145] *Id.* at 408-09. The Supreme Court made no reference to the Fifth Circuit's decision on no deference and no weight for the individual plaintiff's claim and reversed the decision on the class action. 424 U.S. 747.

[146] In *Alexander*, the Court reasoned "[n]or are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in Rios v. Reynolds Metals Co." 415 U.S. at 58 (citation omitted).

[147] *Franks* never cited the *Alexander* decision. It is likely that the Fifth Circuit was aware of *Alexander* even though their decision was rendered only four months later. Although the Fifth

In *Alexander*, the Supreme Court did not adopt a deferential approach because the Court viewed the arbitration process as an inappropriate forum for adjudicating Title VII disputes.[148] Arbitration could be "less appropriate" due to an arbitrator's incompetence and compromise of parties' opposite positions. Further, an arbitral decision may be based solely on the collective bargaining agreement that does not include the Title VII issue.[149] The impartiality of the arbitration process may be questionable when the employee has claims against both the union and the employer who control the arbitral process, including the selection of the arbitrator.[150] Arbitration also may not be an appropriate forum since precedents need to be set on public interest issues of employment discrimination.[151] Therefore, total deference inadequately protects an employee's Title VII rights.

The Fifth Circuit's limited deference approach differs from total deference and would protect Title VII rights more fully than the *Alexander* approach.[152] Under the limited deference approach, no deference or weight is accorded if the arbitral decision does not comply with each and every one of the seven factors.[153] In comparison, the *Alexander* approach allows less than "great weight" to be accorded to an arbitral decision that does not comply with all the factors in *Alexander*. The disadvantage of the limited deference approach is that arbitration would become "a procedurally complex, expensive, and time consuming process."[154] Further, de novo review would be necessary if such a standard is adopted because the seven factors would require a full factual and legal analysis. This approach was rejected by the *Alexander* Court because it was too stringent.[155]

In actions brought by the union for the enforcement of prior administrative and arbitral decisions, the Second and Tenth Circuits have applied a limited

---

Circuit never cited *Alexander* in *Franks*, the Fifth Circuit did use language from *Alexander* such as "greater weight." 495 F.2d at 409.

Rios is more stringent than *Alexander* because all standards must be met in order to give deference or any weight to an arbitral decision in *Alexander*. In contrast, weight can still be given to an arbitral decision that does not meet all four factors in *Alexander*.

[148] 415 U.S. at 56-59.

[149] Richards, *supra* note 63, at 169-70.

[150] *Id.* at 169. Conceivably, this control is rather unfair considering that both the employer and the union are in opposition to the employee's discrimination claim.

[151] If a case involves an unsettled area of law, the development of the law should be set forth by the courts through the judicial process. Edwards, *supra* note 18, at 274. Additionally, the most difficult and important discrimination cases should be excluded from arbitration due to the possibility of the arbitrator misapplying the law. Jacobs, *supra* note 87, at 636.

[152] Richards, *supra* note 63, at 177.

[153] *Id.*

[154] *Alexander*, 415 U.S. at 59.

[155] *Id.* at 58-59; *see also supra* note 146

deference type of approach using the four factors in *Alexander*.[156] In *Foreman v. Wood, Wire and Metal Lathers International Union, Local No. 46*,[157] the Second Circuit enforced an administrator's award after applying a scope of review similar to that set forth in *Alexander*. After reviewing the record of the administrator and applying the four factors in *Alexander*, the Second Circuit affirmed the administrative decision.[158]

Similarly, the Tenth Circuit deferred to an arbitral decision in *Communications Workers of America v. Mountain States Telephone & Telegraph Co.*[159] after specifically reviewing the arbitrator's findings and prior consent decree.[160] The arbitral decision was "procedurally proper" because the collective bargaining agreement made reference to antidiscrimination laws and the parties agreed to have the arbitrator interpret and apply the laws.[161] Although the court recognized that de novo review was necessary, the court adopted the deferential approach set forth by the "Steelworkers Trilogy."[162]

In both *Foreman* and *Communication Workers*, the four factors in *Alexander* were applied by the Second and Tenth Circuits. These approaches in actions to enforce administrative and arbitral decisions are analogous to the limited deference approach. In comparison to the *Rios* limited deference approach, these circuits have applied the four factors in *Alexander* rather than the seven standards in *Rios*. Therefore, these circuits may expand the use of a limited deference

---

[156] These actions were based on either the enforcement of arbitral or administrative decisions rather than Title VII actions brought by the employee. *See infra* text accompanying notes 157-61.

[157] 557 F.2d 988 (2d Cir. 1977). In *Foreman*, the government had charged the union with discriminatory practices under Title VII. A settlement agreement between the union and the United States was subsequently approved by the United States District Court for the Southern District of New York. The settlement agreement was based on past discriminatory practices by the union. It empowered the administrator to ensure the performance of the agreement, remedy any breach, decide disputes arising under the agreement, and interpret any questions under the agreement. The administrator's decisions were final. *Id.* at 989-90.

[158] The Second Circuit drew a parallel between the powers of the administrator and an arbitrator. Although the Second Circuit distinguished *Alexander* from *Foreman* because *Alexander* concerned the issue of whether a prior arbitral decision barred a Title VII action, the Second Circuit concluded that "even in that situation, the [*Alexander*] Court recognized that 'a court may properly award [an arbitral decision] great weight.' " *Id.* at 992 n.7 (citation omitted).

[159] 102 L.R.R.M. (BNA) 2161 (10th Cir. 1978).

[160] The consent decree was an affirmative action program that the court found not to be in conflict with the arbitral award. *Id.* at 2162.

[161] *Id.* at 2163.

[162] *Id.* at 2164-65. *Cf.* Pearson v. Western Elec. Co., 542 F.2d 1150 (10th Cir. 1976). In *Pearson*, the Tenth Circuit held that the employee could not recover punitive damages and attorney's fees after a favorable arbitral award. The court further held that an arbitral award was not assumed to be an admission of fault by the employer. Rather, the court reasoned that an arbitral award may be due to other things, such as reducing litigation expenses and avoiding adverse publicity. The arbitral award was not sufficient to show that there was a Title VII violation. *Id.* at 1153.

approach that applies the four factors in *Alexander* to Title VII actions.

C. Admissible Evidence

1. The Third and Seventh Circuits

The Third and Seventh Circuits have taken a more cautious approach.[163] These circuits decide the discrimination claim on the basis of Title VII and only note the existence of the arbitral decision. There is no application of the four factors in *Alexander*.[164] This approach merely supplements and strengthens the court's decision by reference to a corresponding arbitral decision. There are currently no decisions by these circuits which are in conflict with a prior arbitral decision. By not applying the four factors in *Alexander* and failing to analyze the arbitral decision, the Third and Seventh Circuits have been able to avoid interpreting the meaning of appropriate weight.

For example, the Third Circuit affirmed the United States District Court for the Western District of Pennsylvania's adoption of this approach in *Dripps v. United Parcel Service of Pennsylvania, Inc.*[165] The district court noted that its decision was consistent with the arbitral decision and accorded "great weight" to the arbitral decision only after the court had already rendered its decision.[166] "Great weight" was accorded to the arbitral decision even though there was no application of the four factors in *Alexander*.

In *Barnes v. St. Catherine's Hospital*,[167] the Seventh Circuit also considered the arbitral decision only after first deciding the Title VII action. In *Barnes*, the employee objected to the admission of an adverse arbitral award into evidence. The Seventh Circuit rejected the employee's objection and held that the district court has discretion to admit an arbitral decision into evidence.[168]

Because *Alexander* did not set forth clear standards for admitting an arbitral

---

[163] Barnes v. St. Catherine's Hosp., 563 F.2d 324 (7th Cir. 1977); Dripps v. United Parcel Serv. of Pa., Inc., 381 F. Supp. 421 (W.D. Pa. 1974), *aff'd*, 515 F.2d 506 (3rd Cir. 1975).

[164] *See id.* Although the arbitral decision was admitted into evidence, the District Court of Illinois also did not apply the four factors in Davis v. Allis-Chalmers, Inc., No. 80-C-4990 (N.D. Ill. Oct. 7, 1982) (LEXIS, Genfed library, Dist file). In *Davis*, the district court considered the arbitral decision before deciding the Title VII issue. Although the court did not announce a specific amount of weight or apply the four factors in *Alexander*, the arbitral decision along with other evidence was considered in denial of the employer's motion for summary judgment.

[165] 381 F. Supp. 421. In *Dripps*, the court found that there was no sex discrimination against a man with a beard. A rule by the employer prohibiting beards was a bona fide occupational qualification because of the safety factors involved for a welder. *Id.* at 421-22.

[166] *Id.*

[167] 563 F.2d 324. *Cf.* Patterson v. General Motors Corp., 23 Fair Empl. Prac. Cas. (BNA) 888 (N.D. Ill. 1978), *aff'd*, 631 F.2d 476 (7th Cir.), *cert. denied*, 451 U.S. 914 (1980).

[168] 563 F.2d at 330.

decision into evidence and the amount of weight that is accorded to an arbitral decision, the Third and Seventh Circuits have sidestepped the perplexing task of interpreting the confusing standards in *Alexander*. Further, although weight is given to an arbitral decision, there has been an avoidance of the application of the four factors in *Alexander*. Consequently, the Third and Seventh Circuits have only addressed the issue of the arbitral decision that is consistent with the court's decision. The result of an inconsistent arbitral decision is still left open to question. Thus, the lower district courts within these circuits lack guidance and will inconsistently apply the admissible evidence approach.[169]

2. *The Sixth Circuit*

In *Becton v. Detroit Terminal of Consolidated Freightways*,[170] the Sixth Circuit applied the factors in *Alexander* but only considered an arbitral decision as "persuasive evidence." The Sixth Circuit noted that the court should defer to the arbitrator's construction of the contract. The Sixth Circuit further ruled that an arbitral decision is sufficient to carry the employer's burden to show just cause for a discharge.[171] In comparison, the arbitration in *Alexander* dealt with both the contract and the discrimination claim. Even with this distinction, the Sixth Circuit found that *Alexander* could not be narrowly construed to mean that the issue of the contract claim was final with only the discrimination claim being admissible as evidence. The Sixth Circuit recognized that the contract claim could not be severed from the discrimination claim since the two claims are intertwined. Therefore, *Alexander* did not restrict the type of evidence that is deemed admissible. The Sixth Circuit concluded that evidence previously rejected by the arbitrator may be considered by the court.[172]

---

[169] *See, e.g.*, Wade v. New York Tel. Co., 500 F. Supp. 1170 (S.D.N.Y. 1980). In *Wade*, the court held that an employer can rebut an employee's prima facie case, satisfying the employer's burden to show a legitimate discharge, with an arbitral decision. The court did not actually review the arbitral decision. Instead, the court addressed the Title VII issue and used the arbitral decision as evidence to supplement its decision without applying the four factors in *Alexander* to determine the burdens of the parties in establishing sufficient evidence. *Id.* at 1177. This approach implies that the court acknowledges the admissible evidence approach but does not strictly adhere to the application of the four factors set forth in *Alexander*. The court merely gave weight to the arbitral decision to support the employer's other evidence to meet the burden of proof. *Cf.* Farag v. United States Lines, Inc., No. 77-5575 (S.D.N.Y. May 8, 1979) (LEXIS, Genfed library, Dist file) (the court only referred to the arbitral decision by noting that the court need not defer to the arbitrator's decision).

[170] 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

[171] A state committee acting as the arbitrator issued an adverse decision to the employee on the basis of the contract claim. *Id.* at 141.

[172] *Id.* at 142.

In *Burroughs v. Marathon Oil Co.*,[173] the United States District Court for the Eastern District of Michigan held that the "court gives some weight to the arbitrator's decision under the guidelines noted in *Alexander*."[174] After applying three of the four factors in *Alexander*, the court found that the arbitral decision was in compliance with these three factors. The court failed to analyze the factor of the adequacy of the record. The arbitral decision which was adverse to the employee was accorded "some weight" and the court ruled in favor of the employer.[175]

By comparison, in *Kornbluh v. Stearns & Foster Co.*,[176] the United States District Court for the Southern District of Ohio held that a grant of summary judgment could not be based on an arbitral decision. The court applied the four factors in *Alexander* and found that all factors were met except for the factor requiring that the collective bargaining agreement conform with Title VII. The court hypothesized that even if the arbitral decision had met all four factors, summary judgment would still not be granted.[177]

Under *Becton*, the Sixth Circuit enunciated that it will consider an arbitral decision as "persuasive evidence."[178] The district courts within the Sixth Circuit have also been willing to accord "some weight" to an arbitral decision,[179] but it cannot be the basis on which summary judgment will be granted.[180] Although these courts have not given "great weight" to arbitral decisions after finding compliance with the four factors in *Alexander*, there has been a willingness to take them into consideration as evidence of a lesser weight.

3. *The District of Columbia*

The District of Columbia Circuit has also taken the admissible evidence approach. In *Hackley v. Roudebush*,[181] the Court of Appeals for the District of Columbia found an administrative record to be admissible evidence in a Title VII action even though it was insufficient to grant summary judgment. In *Hackley*, the district court had given the claimant no opportunity for discovery or presentation of new evidence by limiting the decision to the administrative

---

[173] 446 F. Supp. 633 (E.D. Mich. 1978).

[174] *Id.* at 636.

[175] *Id.* at 636-38.

[176] 73 F.R.D. 307 (S.D. Ohio 1976).

[177] *Id.* at 312.

[178] 687 F.2d at 142.

[179] *See, e.g., Burroughs*, 446 F. Supp. at 636.

[180] *Kornbluh*, 73 F.R.D. at 312.

[181] 520 F.2d 108 (D.C. Cir. 1975) (employee of Veteran's Administration brought race discrimination claim to federal court after administrative decision).

record.[182] In applying *Alexander*, the District of Columbia Circuit ruled that the administrative record, like an arbitral decision, may "shed evidentiary light" although it would not be the focus of the court's decision.[183] The court noted that additional testimony would not be needed if there was an adequate record. The District of Columbia Circuit's reliance on *Alexander* to determine the admissibility of the administrative record indicates that arbitral decisions may be deemed as admissible evidence in a similar fashion. The concurring opinion recognized that *Alexander* was not fully applicable since administrative proceedings are more formal than arbitration proceedings. The *Alexander* approach, however, would avoid the duplication of testimony while allowing new testimony if needed.[184]

VII. WHAT IS APPROPRIATE WEIGHT?

The Supreme Court has adopted an admissible evidence approach by permitting district courts to accord appropriate weight to an arbitral decision in their discretion.[185] If the arbitral decision meets the four factors set forth in *Alexander*, a district court may accord "great weight" to the arbitral decision.[186] Less weight or no weight will be given to the arbitral decision when it is not in compliance with the four factors.[187]

In determining whether the arbitral decision complies with the four factors, the court must separately analyze each factor with the arbitral procedure, record, and decision. The degree to which the arbitration process must comply with each factor has not been specifically set forth by the Supreme Court.[188] Is minimal compliance with each factor a sufficient amount to accord "great weight" or must each factor be more strictly satisfied? If strict compliance with each factor is necessary, does minimal compliance amount to less than "great weight?" For example, must the Federal Rules of Evidence be strictly applied to the arbitration procedure in order to comply with the second factor of procedural fairness?

---

[182] *Id.* at 158-59.

[183] *Id.* at 156-57.

[184] Although the concurrence was concerned that the hearing was based on statutes rather than on a contract, the hearing was similar to arbitration because of its informal and nonadversary qualities. 520 F.2d at 170-71 (Leventhal, J., concurring).

[185] *Alexander*, 415 U.S. at 60.

[186] *Id.* at 60 n.21.

[187] Richards, *supra* note 63, at 176.

[188] *Id.* at 180-81.

A. The First Factor

The first factor listed in *Alexander*, "the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII,"[189] was applied in the opinions of *Burroughs* and *Kornbluh*.[190] In *Burroughs*, the Michigan federal district court found that the first factor was met when the collective bargaining agreement contained an express antidiscrimination provision.[191] In comparison, the Ohio federal district court in *Kornbluh* merely noted that the arbitral decision was not in compliance with the first factor.[192]

The Sixth Circuit in *Becton* did not directly address the provisions conforming with Title VII. The court, however, found that the arbitration only covered the contract claim and not the Title VII discrimination claim. *Alexander* was distinguished because the arbitration in *Alexander* addressed both claims.[193] An assumption can be made that the contract did not conform with Title VII, giving the arbitrator the authority to address the discrimination issue fully. Thus, the court may have only given the arbitral decision weight as "persuasive evidence" and not "great weight" because the claim still required analysis under Title VII.

This factor is intended to ensure that an arbitrator addressed the discrimination issue. If the collective bargaining agreement does not provide for an antidiscrimination clause, the arbitrator will be precluded from addressing the discrimination issue. Thus, the courts have found compliance with this factor whenever an express antidiscrimination provision was in the collective bargaining agreement.

B. The Second Factor

The second factor in *Alexander* requires the arbitration proceeding to be procedurally fair.[194] In determining the existence of procedural fairness, factors

---

[189] 415 U.S. at 60 n.21.

[190] *Burroughs*, 446 F. Supp. at 636; *Kornbluh*, 73 F.R.D. at 312. The federal court also applied the first factor. The court in *Washington* extensively reviewed this factor by being certain that the arbitrator considered the discrimination issue. 17 Fair Empl. Prac. Cas. at 607-08. *See also supra* note 130.

[191] In *Burroughs*, the collective bargaining agreement prohibited discrimination "because of race, creed, color, sex or national origin," 446 F. Supp. at 636 n.6.

[192] 73 F.R.D. at 312.

[193] 687 F.2d at 141. In *Becton*, the employee only raised the issue of discharge for just cause and not discrimination in the arbitration.

[194] 415 U.S. at 60 n.21. The court in *Washington* noted that the arbitration was "fair and regular and free of procedural infirmities" because the opinion by the arbitrator was one of the best the court had ever read. 17 Fair Empl. Prac. Cas. at 608. *See also supra* note 130.

taken into consideration are the presence of competent counsel[195] and/or union representative, the opportunity to present the case with cross examination of witnesses, the arbitrator's fair conduct in the proceedings, and the adequacy with which the discrimination issue is addressed.[196] In *Burroughs*, the Michigan federal district court found procedural fairness in the arbitration where the employee was represented by competent counsel, there was a full opportunity to present the case with cross-examination of witnesses, and the discrimination issue was the central issue in the arbitration.[197] Similarly, the *Kornbluh* court found a high degree of procedural fairness since a union representative was present at the arbitration and the arbitrator conducted the proceeding in a full and fair manner.[198]

In *Hackley*, the District of Columbia Circuit admitted the administrative record only to "shed evidentiary light" because of procedural inadequacies.[199] The parties are not afforded a full and fair opportunity to present their cases if the court's decision is based on a record with procedural inadequacies. The record contained procedural inadequacies because some of the evidence before the court was not presented at the administrative hearing. Additionally, Title VII requires an assessment of motivational factors which is established through the credibility of live testimony. The court also discussed hearsay evidence which would be admissible before a complaints examiner but not in court. This hearsay evidence would be excluded from the administrative record when the record is admitted as evidence in court.[200] The court may have given the administrative record lesser weight because of these procedural inadequacies. This evidentiary requirement may be stricter for an administrative hearing than for an informal arbitral proceeding.[201]

In the Hoyman/Stallworth survey, the respondents were questioned on subjects concerning the presence of counsel in the arbitral proceeding, rules of evidence,[202] and pre-trial discovery.[203] The survey showed that 55.2% of the re-

---

[195] If there is a conflict of interest between the union and the individual, presence of counsel can be provided by the government or through a special fund set up by the collective bargaining agreement in order to ensure procedural fairness. Rubenfeld & Strouble, *supra* note 19, at 493.

[196] *See, e.g., Burroughs*, 446 F. Supp. at 637; *Kornbluh*, 73 F.R.D. at 311.

[197] 446 F. Supp. at 637.

[198] 73 F.R.D. at 311.

[199] 520 F.2d at 156-57.

[200] *See id.*

[201] *Id.*

[202] Some commentators have advised that rules of evidence are inappropriate for arbitral proceedings since they increases the formality of the proceedings. Hoyman & Stallworth, *supra* note 66, at 7. In contrast, other commentators have suggested that rules of evidence should be observed in an arbitral proceeding. Wrong, *The Social Responsibility of Arbitrators in Title VII Disputes*, 32 LAB. L.J. 621, 626 (1981).

[203] Hoyman & Stallworth, *supra* note 66, at 7-8.

spondents advise clients to have counsel present at the arbitral proceeding, 22.2% of the respondents used strict rules of evidence in the arbitral proceeding at least once after the *Alexander* decision, and 14.8% of the respondents informally or contractually granted pre-trial discovery since *Alexander*.[204] *Alexander* may have had some effect on the presence of counsel but very little effect on pre-trial discovery. This survey indicates that parties to an arbitration do not give utmost consideration to the second factor of procedural fairness. Thus, there is a retention of the notion that arbitration is advantageous as a means of dispute resolution because of its informality.

C. *The Third Factor*

The third factor, adequacy of the record, was briefly addressed by the Sixth Circuit, the District of Columbia Circuit, and the Ohio district court.[205] The Sixth Circuit, in *Becton*, had no written record.[206] This unwritten arbitration proceeding may have been another factor in the court according only "persuasive evidence" to the arbitral decision.

The District of Columbia Circuit implied that additional discovery and evidence would cure any inadequacy in the administrator's record in *Hackley*.[207] The concurring opinion in *Hackley* recognized that the arbitral proceeding usually has an inadequate record as compared to an administrative verbatim record.[208] Arbitrations generally do not have adequate records because arbitral proceedings are informal with no requirements of written transcripts. Accordingly, records were established in *Hackley* which dealt with an administrative proceeding but there was no written record in the *Becton* arbitration proceeding.

In comparison, the Ohio district court merely noted that the record was adequate in *Kornbluh* with respect to the discrimination issue. The court, however, denied a grant of summary judgment because the record did not show that the arbitrator was presented with all the evidence.[209] Therefore, on the basis of an adequate record, the court was able to find that all the evidence was not presented at the arbitration and the arbitrator did not make findings of facts.[210]

In order to obtain an adequate record in an arbitration proceeding, a court reporter should be present at the proceeding.[211] As an alternative, a tape record-

---

[204] *Id.*

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

[206] 687 F.2d at 141.

[207] 520 F.2d at 151.

[208] *Id.* at 171 (Leventhal, J., concurring).

[209] 73 F.R.D. at 312.

[210] An arbitrator should issue a written arbitral decision with findings of fact and conclusions of law. Rubenfeld & Strouble, *supra* note 19, at 493.

[211] Hoyman & Stallworth, *supra* note 66, at 7; Wrong, *supra* note 199, at 626.

ing would be a sufficient means to establish an adequate record. In the Hoyman/Stallworth survey, 84.2% of the respondents agreed with the use of a court reporter. By comparison, only 56.4% of the respondents actually utilized formal transcripts and 25.9% used the inexpensive method of tape recording.[212]

An adequate arbitration record is essential for the court to determine the manner in which the arbitrator reached the decision. Without a record, the court will not know whether the arbitrator addressed the discrimination issue even when an antidiscrimination clause is in the collective bargaining agreement. There is general agreement on the importance of an adequate record, but a reporter and/or tapes are not often used.[213] Thus, a requirement for a reporter or tape recordings should be standard for arbitration proceedings involving Title VII issues.

D. The Fourth Factor

The fourth factor, requiring special competence of the arbitrator,[214] was addressed by four courts.[215] The Sixth Circuit in *Becton* noted that a state committee was acting as arbitrator.[216] The District of Columbia Circuit in *Hackley* also looked to the expertise of a governmental entity, the Civil Service Commission, and found that the administrators were chosen from a certified list.[217] These circuits did not set forth a definite conclusion as to whether the arbitrator was actually found to be competent. In comparison, the district courts in *Burroughs* and *Kornbluh* did recognize that the arbitrator was competent, although no reasons were given for this conclusion.

In the selection of a competent arbitrator, the parties to an arbitration proceeding consider the following to be important: (1) a general labor relations background (this consideration seemed to be the most important because 86.7% of the respondents select an arbitrator on this basis); (2) prior discrimination background (86.4%); (3) years of arbitration experience (83%); (4) law degree (81.6%); and (5) special competence in Title VII (80.6%).[218] Considerations that were of lesser importance included age, sex, race, and membership in the National Academy of Arbitrators.[219] The survey and case law indicate that experience in employment discrimination and Title VII knowledge is a major consideration in selecting an arbitrator. Although arbitrators generally apply the

---

[212] Hoyman & Stallworth, *supra* note 66, at 7.

[213] *Id. See also* Rubenfeld & Strouble, *supra* note 19, at 493.

[214] *See supra* notes 29-34 and accompanying text.

[215] *See infra* notes 216-17 and accompanying text.

[216] 687 F.2d at 141.

[217] 520 F.2d at 171 (Leventhal, J., concurring).

[218] Hoyman & Stallworth, *supra* note 66, at 7.

[219] *Id.*

"law of the shop" rather than the "law of the land,"[220] parties are heading in the direction of selecting an arbitrator on the basis of the arbitrator's Title VII knowledge.[221]

Selecting an arbitrator who fulfills the requirements in *Alexander* provides the parties with the advantage of procedural safeguards. With these safeguards, the dispute is essentially settled at the arbitration stage when a court accords "great weight" to an arbitral decision. The employer additionally benefits in a Title VII action when a court accords "great weight" to an arbitral decision which is adverse to the employee.[222] The most significant impact on arbitral proceedings has come from this fourth factor. The adequacy with which the discrimination issue is fully addressed depends in large part on the arbitrator's competence. Thus, the arbitrator's competence is encompassed within the other three factors.

E. The Courts and the Four Factors

In analyzing the admissible evidence approach, only the Sixth Circuit, the District of Columbia Circuit, and the district courts of Michigan, California, and Ohio have attempted to apply the four factors.[223] The Sixth Circuit is consistent with the *Alexander* decision, although all four factors were not covered in *Becton*.[224] In *Becton*, the court did not look at the procedural fairness of the arbitration.[225] Since the Title VII issue was not adequately covered in the arbitration proceeding and there was no record, the court did not accord "great weight" to the arbitral decision. Instead, the court created a new weight termed "persuasive evidence."[226]

The District of Columbia Circuit has adopted another formula termed "shed evidentiary light."[227] This formula gave the court flexibility in permitting discovery and admitting additional evidence beyond the evidence in the administrative record. Although the standards for an administrative proceeding may be equivalent to an arbitral proceeding, there is the possibility that the standards will be more stringent for the arbitral proceeding because of the administrative

---

[220] *See supra* notes 24-25 and accompanying text.

[221] Hoyman & Stallworth, *supra* note 66, at 7.

[222] Note, *False Hope*, *supra* note 21, at 851.

[223] See *supra* text accompanying notes 189-217.

[224] Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

[225] Although the Sixth Circuit noted that the arbitration committee consisted of an equal number of labor and management representatives, implying impartiality in the process, nothing else was explicitly set forth about procedural fairness. 687 F.2d at 141.

[226] *Id.* at 142.

[227] *Hackley*, 520 F.2d at 157.

proceeding's greater procedural protections.[228]

The Michigan district court covered only three factors, leaving out the adequacy of the record factor.[229] This missing factor may be the cause of the "some weight" and not "great weight" given to the arbitral decision. The California district court accorded "considerable weight" after reviewing the first two factors and ensuring that the arbitrator fully considered the discrimination issue.[230] Finally, summary judgment could not be granted by the Ohio district court on the basis of an arbitral award after the court analyzed all four factors.[231]

These courts, applying the admissible evidence approach, have been consistent with the *Alexander* decision. Courts have required less than minimal compliance with the four factors in *Alexander* in according less than "great weight." Although the *Alexander* factors are difficult to apply, these decisions are resolving the confusion created in defining appropriate weight.

VIII. Effects of the Admissible Evidence Approach

After over a decade, the *Alexander* decision has only produced confusion in the federal courts. Since the weight to be accorded to an arbitral decision is within the discretion of the district courts,[232] diverse decisions between and within the circuits have resulted from the application of the admissible evidence approach. National uniformity and predictability are minimal. Because of *Alexander*'s vague guidelines, parties are unable to predict the outcome of a discrimination case. The circuits have either had difficulty in applying this approach or have chosen to apply other approaches in their discretion.

The difficulty in the application of the admissible evidence approach stems from *Alexander*'s failure to establish a clear standard for according weight to an arbitral decision. The courts are free to adopt inconsistent approaches since the amount of weight to be accorded to an arbitral decision is within the discretion of the trial court.[233] Furthermore, the Supreme Court has not clarified the conflicting use of the limited deference approach and the no deference and no weight approach.[234] Therefore, the *Alexander* Court's purpose to protect both

---

[228] *Id.* at 171 (Leventhal, J., concurring).

[229] Burroughs v. Marathon Oil Co., 446 F. Supp. 633 (E.D. Mich. 1978).

[230] *Washington*, 17 Fair Empl. Prac. Cas. at 607-08.

[231] *Kornbluh*, 73 F.R.D. at 312.

[232] *Alexander*, 415 U.S. at 60.

[233] *See, e.g.*, Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975); Burroughs v. Marathon Oil Co., 446 F. Supp. 633 (E.D. Mich. 1978).

[234] The Fifth Circuit used the limited deference approach in Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *rev'd in part on class action claim*, 424 U.S. 747 (1976), and the

the policies of Title VII and arbitration has been defeated by the discretion of the trial courts. The admissible evidence approach only protects Title VII statutory rights from foreclosure of an action in federal court and total deference to an arbitral decision.

Title VII was enacted to remedy the inadequate forms of relief available for employment discrimination. The admissible evidence approach, however, is not essential because there are other alternative forms of relief for employment discrimination.[235] Relief under the National Labor Relations Act (NLRA),[236] is available to resolve effectively cases involving discrimination as a result of unfair labor practices or a breach of a duty of fair representation by the union. Additionally, most states can effectively address discrimination claims through agencies and courts with state antidiscrimination laws.[237] Title VII supplemented and did not supplant these existing laws.[238]

Once the parties realize the advantages of a pre-arbitration waiver,[239] the parties can circumvent the admissible evidence controversy by entering into a final and binding pre-arbitration waiver. The pre-arbitration waiver is the most effective method for the employer to ensure a final and binding arbitral decision. This waiver can erase the inequity of the employee obtaining two bites at the apple. Although the courts have not specifically addressed this issue,[240] the employer can ensure the validity of the pre-arbitration waiver by allowing the employee to participate in the arbitral process and retain independent counsel throughout the arbitral proceedings.

In addition, arbitration can adequately protect an individual's statutory rights under Title VII. Only three out of thirty-four arbitral decisions that went to trial were reversed in favor of the employee.[241] Furthermore, in the Hoyman/

Ninth Circuit used the no deference and no weight approach in Aleem v. General Felt Industries, Inc., 661 F.2d 135 (9th Cir. 1981), *application in forma pauperis denied*, 106 S. Ct. 54 (1985).

[235] *See generally* Note, *Title VII, The NLRB, And Arbitration: Conflicts In National Labor Policy*, 5 GA. L. REV. 313 (1971). For a contrasting view on the adequacy of other alternative forms of relief, see Comment, *Federal Courts—Labor Arbitration—Employment Discrimination—Federal Courts as Primary Protectors of Title VII Rights*, 28 RUTGERS L. REV. 162, 164-65 (1974) [hereinafter Comment, *Federal Courts*].

[236] National Labor Relations Act (Wagner Act), ch. 372, §§ 1-16, 49 Stat. 449-57 (1935), *amended by* 29 U.S.C. §§ 151-68 (1982).

[237] Hawaii has an antidiscrimination statute which is substantially similar to Title VII. *See* HAW. REV. STAT. § 378-2 (1985).

[238] *Alexander*, 415 U.S. at 48-49.

[239] *See supra* text accompanying notes 81-86. *See also In re* Basic Vegetable Products, Inc. and Local 890, International Brotherhood of Teamsters, 64 LAB. ARB. (BNA) 620 (1975) (Gould, Arb.); Note, *False Hope*, *supra* note 21, at 859.

[240] *In re* Basic Vegetable Products, Inc. and Local 890, International Brotherhood of Teamsters, 64 LAB. ARB. (BNA) 620 (1975) (Gould, Arb.). The issue of the pre-arbitration waiver has only been addressed in an arbitral proceeding.

[241] Only three arbitral decisions were reversed by the courts in the employee's favor. *See* Jones

Stallworth survey, 27% of the arbitral decisions were reviewed by the EEOC or state antidiscrimination agencies and 17% were reviewed by the courts. Of the decisions reviewed, only 4.4% were reversed by the EEOC or state agencies and 1.2% were reversed by the courts. In other words, there was only a one in twenty-five chance of administrative reversal and a one in a hundred chance of court reversal.[242]

As a result of *Alexander*, there has been a large amount of review, but rarely reversal of an arbitral decision. Thus, trial de novo of a Title VII action and the admissible evidence approach has only created extra costs for the parties and more of a backlog for the agencies and federal courts.[243] With this hindsight, the Supreme Court could have recognized that arbitration is quite effective in protecting Title VII rights. Rather than striving for an accommodation of the conflicting policies of arbitration and Title VII individual rights with the approach in *Alexander*, the Court would have instead favored the use of arbitration by providing greater deference to arbitral decisions. Therefore, since arbitration can effectively address discrimination claims, the unnecessary confusion created by *Alexander* can be eliminated with the adoption of a deferral approach with clearer guidelines.

IX. RECOMMENDATIONS

Under a section 301 of the Labor Management Relations Act claim for unfair labor practices, the NLRB in *Spielberg Manufacturing Co.*[244] announced that the NLRB would defer to an arbitral award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the

---

v. Cassens Transp. Co., 538 F. Supp. 929 (E.D. Mich. 1982) (lost at arbitration, won in court on sex discrimination); EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981) (lost at arbitration, won in court on employer having no business justification); Kendall v. United Airlines, 494 F. Supp. 1380 (N.D. Ill. 1980) (lost at arbitration, won in court).

In comparison, twenty-nine arbitral decisions remained the same or were reversed in favor of the employer or union. *See, e.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (arbitral decision sufficient to carry employer's burden to show legitimate discharge); Becton v. Detroit Terminal of Consol. Freightways, 490 F. Supp. 464 (E.D. Mich. 1980), *modified*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (lost at arbitration and in court); Barnes v. St. Catherine's Hosp., 563 F.2d 324 (7th Cir. 1977) (lost at arbitration and in court); Dripps v. United Parcel Serv. of Pa., Inc., 381 F. Supp. 421 (W.D. Pa. 1974), *aff'd*, 515 F.2d 506 (3d Cir. 1975) (lost at arbitration and in court due to valid business justification); Pippin v. United States Truck Co., 520 F. Supp. 144 (E.D. Mich. 1981) (lost at arbitration and in court).

[242] Hoyman & Stallworth, *supra* note 66, at 6.

[243] *Id. See also supra* note 19 and accompanying text.

[244] 112 NLRB Dec. (CCH) 1080 (1955).

Act."[245] The NLRB later expanded this standard of deference further by holding that the NLRB would defer to an arbitral award only if the arbitrator actually considered and resolved the unfair labor practice issue.[246] The *Spielberg* approach is analogous to the *Rios v. Reynolds Metals Co.*[247] approach since both employ limited deference approaches and the standards have the same underlying policies of fair proceedings.

A modified *Spielberg* approach for Title VII cases may be the most feasible method to resolve the *Alexander* confusion. The employee would appeal the arbitral award rather than pursue a trial de novo on the Title VII issue. This approach would encompass the following guidelines for deference by the court to an arbitral decision: (1) the arbitral proceedings appear to have been fair and regular; (2) all parties have voluntarily agreed to be bound by the arbitral decision; (3) the arbitral decision is not "clearly repugnant to the purposes and policies of Title VII;" and (4) the arbitrator actually considered the Title VII issue. Class actions, actions brought by the employee against both the employer and the union, and issues of public interests rather than private interests would be excluded from deferral.[248] This approach would fall somewhere between the very lenient approach taken in the "Steelworkers Trilogy"[249] for deferral by the courts and the stringent approach in *Rios*. There are no costly and stringent disadvantages which were the reasons for the rejection of the *Rios* approach in *Alexander*. A modified *Spielberg* approach would be less complex and clearer guidelines would be set forth in a more lenient form of deferral than the *Rios* approach.

The adoption of a modified *Spielberg* approach is a realistic possibility because of the definite policy favoring arbitration.[250] This policy is seen in section 301 cases where there must be an exhaustion of remedies before bringing suit in federal court.[251] If exhaustion of remedies was not required, there would be a disruption to the orderly settlement of grievances through the procedure set forth in the collective bargaining agreement. Recently, in *Allis-Charmers Corp. v. Lueck*,[252] the Supreme Court held that federal labor law proscribing arbitra-

---

[245] *Id.* at 1082.

[246] Raytheon Co., 140 NLRB Dec. (CCH) 883 (1963), *set aside on other grounds*, 326 F.2d 471 (1st Cir. 1964); Banyard V. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

[247] 467 F.2d 54 (5th Cir. 1972). *See also supra* note 141 and accompanying text.

[248] *See* Edwards, *supra* note 18, at 273-74.

[249] *See supra* notes 8-13 and accompanying text.

[250] The Reagan appointed NLRB and the numerous openings for federal judges show a clear direction favoring arbitration. *See Analysis of NLRB Decisions by United Food and Commercial Workers Legal Department*, 189 Daily Lab. Rep. (BNA) E-1 (Sept. 28, 1984). *See supra* note 6 and accompanying text.

[251] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

[252] *Id.* In *Allis-Chalmers*, the employee who suffered from a nonoccupational injury brought an action under state tort law for bad faith handling of a claim under a disability plan in a collec-

tion in the collective bargaining agreement preempted state law and an exhaustion of remedies was required. Therefore, there is a direction towards the policy favoring arbitration.[253]

There is a further need for arbitration since trial de novo of state agency decisions will create more problems for the backlog of cases in federal forums. Arbitration will be naturally turned to as a forum to relieve the backlog because of the policy favoring arbitration.[254] Although the Supreme Court recently held that unreviewed state agency decisions do not bar Title VII actions,[255] there is still a direction toward an adoption of a modified *Spielberg* deference approach because arbitral decisions are very different from state agency decisions. An employee discriminated against chooses the state agency as a forum for the resolution of a grievance but arbitration is part of the grievance procedure agreed upon by the parties in the collective bargaining agreement. In addition, the administrator of the state agency decision is not chosen by the parties in comparison to the arbitrator who is selected by the parties. There is also no history or policy favoring state agency decisions. State agencies are merely supplemental in the resolution of discrimination grievances.

In order to ensure that the standards of a modified *Spielberg* approach have been met for deferral to an arbitral award, federal court annexed arbitration would be an ideal solution. Federal court annexed arbitration is a system instituted by the judiciary[256] that would replace the arbitration proceeding required by a collective bargaining agreement. Voluntary court annexed arbitration[257] would be an alternative to private arbitration provided for in the collective bargaining agreement. The employee would still have the right to trial de novo

---

tive-bargaining agreement. The action was brought in state court rather than through the grievance procedures outlined in the collective bargaining agreement. *Id.* at 206-08.

[253] Blank v. Donovan, 780 F.2d 808 (9th Cir. 1986). In *Blank*, the Ninth Circuit held that there must be an exhaustion of remedies prior to Title VII suits in federal court. The employee failed to exhaust EEOC administrative remedies prior to bringing a Title VII suit. The Ninth Circuit stressed the importance of attempting to reach voluntary settlements in employment discrimination disputes. *Id.* at 809.

[254] *See supra* note 6 and accompanying text.

[255] University of Tennessee v. Elliott, 106 S. Ct. 3220 (1986). *See also supra* notes 115-16 and accompanying text.

[256] The United States District Courts for the Northern District of California and the Eastern District of Pennsylvania have instituted court annexed arbitration programs. Additionally, state courts have set up programs for court annexed arbitration of disputes prior to any action by the courts. *See* Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 269-71 (1985).

[257] Court annexed arbitration would be a voluntary alternative for the parties rather than a mandatory system which would require the parties to go through the process rather than choose the alternative of private arbitration.

after court annexed arbitration but sanctioned for bringing a frivolous or meritless action.[258] The court annexed arbitration procedure may be instituted either before or after the employee has filed an action with the EEOC.

Under this proposal, the federal district courts would set up a panel of arbitrators with Title VII and employment discrimination expertise, ensure that there is an adequate arbitral record with transcripts, and require the arbitral decision to be in writing with findings of fact and conclusions of law.[259] Voluntary cooperation can be an apparent factor in federal court annexed arbitration where the employee is present throughout the arbitral proceedings and represented by independent counsel.[260]

Another viable solution is a statutory amendment precluding an employee from seeking a Title VII action when the claim is voluntarily and knowingly submitted to arbitration.[261] This solution is similar to the pre-arbitration waiver discussed earlier except that the employee participates fully with independent counsel throughout the grievance procedure.[262] This third party intervention by the employee would be the *quid pro quo* of the waiver.[263]

At the minimum, the four factors in *Alexander*[264] must be satisfied in order to determine the weight to accord to an arbitral decision. Still, additional guidelines are very useful in establishing a procedurally correct arbitration. The American Arbitration Association (AAA) has set forth model rules for arbitration. Other guidelines include suggestions that: (1) the employee should be represented by independent counsel; (2) the Federal Rules of Evidence should be a guidance in the arbitration proceeding; and (3) the selection of the arbitrator should be from a panel of persons who have a background in employment discrimination principles.[265] These standards for arbitration, if followed, will definitely increase the formality of the arbitration process.[266] This increased for-

---

[258] Comment, *Wrongful Discharge: Court-Annexed Arbitration as a Means of Providing Relief*, 21 WILLAMETTE L. REV. 569, 582 (1985).

[259] Interview with Ronald C. Brown, Professor at the William S. Richardson School of Law, Honolulu (Apr. 16, 1986).

[260] *See* Haynie v. TRW Ross Gear Division, Inc., No. 83-5622 (6th Cir. Oct. 30, 1984) (LEXIS, Genfed library, Dist file). In *Haynie*, the Sixth Circuit implied that presence of counsel at the arbitration constituted a voluntary and knowing waiver.

[261] Hoyman & Stallworth, *supra* note 66, at 8.

[262] Haynie v. TRW Ross Gear Division, Inc., No. 83-5622 (6th Cir. Oct. 30, 1984) (LEXIS, Genfed library, Dist file).

[263] Hoyman & Stallworth, *supra* note 66, at 8.

[264] 415 U.S. at 60 n.21.

[265] *See Employment Dispute Arbitration Rules*, 33 ARB. J. 25-26 (1978). One commentator has suggested that the NLRB set guidelines for arbitration and distribute literature on these guidelines. *See* Wrong, *supra* note 202, at 626.

[266] *See supra* note 202. There is no requirement that the arbitral proceeding contain formal court procedures and rules. *See* Comment, *Federal Courts*, *supra* note 235, at 184.

mality will aid the arbitral decision in satisfying the four factors in *Alexander*. Formality, however, will turn the arbitration process into an impractical alternative, as costs and delays will also increase.[267] Therefore, these guidelines should only be voluntarily instituted in a private arbitration proceeding or included in the collective bargaining agreement in the parties' discretion.

X. CONCLUSION

In *Alexander*, the Supreme Court recognized the national policy to eliminate employment discrimination. Since arbitration may be an inadequate forum for addressing Title VII rights, there is a need for trial de novo in addition to an arbitral decision, especially when the decision is based on a contract claim and not Title VII.[268] However, there is a long history favoring arbitration for the settlement of labor disputes. Because of the conflicting policies of arbitration and Title VII rights, the Supreme Court made an accommodation between the two policies with the adoption of an admissible evidence approach which gives the trial court full discretion. The Supreme Court has continued to take this position by refusing to clarify the meaning of appropriate weight.

In response, the different circuits have taken various approaches in according weight to arbitral decisions in Title VII actions. The circuits have either created their own approach, attempted to follow *Alexander*, or evaded the application of the four factors in *Alexander*. In order for the circuits to correctly apply the admissible evidence approach in *Alexander*, it is necessary that the Supreme Court set forth clearer guidelines or Congress must make statutory amendments to Title VII.

The direction favoring arbitration has evolved to a greater extent since the *Alexander* decision. As a result, the courts may adopt a modified *Spielberg* approach rather than the admissible evidence approach. Safeguards to deference can be instituted through federal court annexed arbitration or by the parties in the collective bargaining agreement. Thus, a modified *Spielberg* approach can be a viable method to resolve the confusion.

Lynnette T. Oka

---

[267] 415 U.S. at 58-59; *see also* Note, *False Hope*, *supra* note 21, at 855.

[268] 415 U.S. at 49-50.

Gaining Access to a Federal Forum: The Preclusive Effect of Unreviewed Administrative Determinations in Section 1983 Actions

The doctrines of res judicata and collateral estoppel[1] dictate the preclusive effects of a judgment in a subsequent action on the same claim or issues. These doctrines have their basis in the common law and serve the purpose of repose, judicial economy and finality.[2]

Like other judicially created doctrines, the doctrines of preclusion are not necessarily uniform among the states or between the states and the federal system.[3] The separate judicial systems are at liberty to adopt their own methods of application of the preclusion principles. Thus, the issue of what principles of preclusion the federal courts must apply to determine the effect of a previous state court decision on the same issue was for many years thought to be a question of state law resolved by analysis under *Erie Railroad v. Tompkins*.[4] Analysis of the issue proved to be much simpler and basic.[5]

---

[1] The traditional broad label "res judicata" is termed "claim preclusion" by the RESTATEMENT (SECOND) OF JUDGMENTS (1984) [hereinafter RESTATEMENT]. "Collateral estoppel" is referred to as "issue preclusion" by the RESTATEMENT. This comment will utilize the terms of the RESTATEMENT. For a further discussion of the terminology, see section II *infra*.

[2] The Supreme Court has recently recognized the purposes served by preclusion principles: "res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[3] Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 60 (1984).

[4] 304 U.S. 64 (1938).

[5] *See* Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 750 (1986) ("That is erroneous; *Erie* has no voice on the issue, which should be framed in different terms."). Although a federal court in diversity would be bound to apply a state law of preclusion, the potential conflict of different federal and state principles of preclusion would not be resolved by resort to *Erie* analysis. The Rules of Decision Act, on which *Erie* is based, provides that state law is controlling unless "[a]cts of Congress otherwise require or provide." 28 U.S.C. § 1652 (1982). Congress has required, by enacting the full faith and credit statute, 28 U.S.C. § 1738 (1982), that the federal courts give the same effect to a state judgment as the state from which the judgment came.

Under the scheme of separate state and federal courts, the effect of a judgment from one forum to another is governed by constitutional considerations of full faith and credit. The full faith and credit clause[6] and its implementing statute[7] require that federal courts follow state rules of preclusion in determining the effect of previous state court decisions on federal actions. A federal court hearing a claim that had previously been litigated in state court only need refer to section 1738, which requires that a federal court give the same preclusive effect to a state court judgment as the state in which the judgment was rendered.[8] Thus, if a court of the state in which the judgment was rendered would preclude an issue, the federal court must do likewise. This result is dictated by the full faith and credit statute and federal-state comity,[9] and is consistent with the increasing deference the United States Supreme Court has shown to the procedures of the state courts as embodied by the principle of "our federalism."[10]

---

[6] U.S. CONST. art. IV, § 1. See *infra* text accompanying note 41 for the pertinent text.

[7] 28 U.S.C. § 1738 (1982). See *infra* text accompanying note 42 for the pertinent text of the statute.

[8] *Allen*, 449 U.S. at 96.

[9] "Comity" is prudential deference to the judicial proceedings of another forum. *See, e.g.*, Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 106 S. Ct. 2718 (1986) (discussing federalism and comity principles); Smith v. Murray, 106 S. Ct. 2661 (1986) (federalism and comity discussion); Wilson v. Garcia, 105 S. Ct. 1938 (1985) (federal court's deference to state procedures is preferential, not obligatory); Pulliam v. Allen, 466 U.S. 522 (1984) (reaffirming the comity principles of Mitchum v. Foster, 407 U.S. 225 (1972), in § 1983 actions); Fair Assessment in Real Estate Ass'n, Inc. v. NcNary, 454 U.S. 100 (1981) (discussing comity principles in § 1983 actions challenging state tax schemes); Rizzo v. Goode, 423 U.S. 362 (1976) (federal courts should abstain from intruding in official state functions); Gibson v. Berryhill, 411 U.S. 564 (1973) (comity does not require dismissal of § 1983 suit because of state administrative board bias).

"Federal-state comity" as used in this comment refers to the Supreme Court's application of the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), to non-criminal actions. In *Younger*, the Court held that the federal court should protect federally created rights of individuals in ways that would not interfere with legitimate state criminal proceedings. *Id.* at 44. The application of this doctrine to civil actions has been referred to as the "civil comity" doctrine. *See generally* Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976). The Supreme Court has defined comity in this context as "a proper respect for state functions." *Younger*, 401 U.S. at 44.

In addition to *Younger* abstention, there are several other abstention principles, all of which avoid premature and unnecessary federal constitutional decisions, promote state procedures, and reduce federal court caseload. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 52 (4th ed. 1983) [hereinafter C. WRIGHT, FEDERAL COURTS].

[10] *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter *Section 1983 and Federalism*]. In *Younger*, the Supreme Court stated that "our federalism" is

> the underlying reason for restraining courts of equity from interfering with [state actions

The concept of "our federalism" and the federal courts' application of full faith and credit to a previous state judgment come into conflict with individual civil rights in actions under 42 U.S.C. section 1983.[11] Section 1983 provides a cause of action and a choice of federal or state forum to any person who is deprived, under color of state law, of "any rights, privileges, or immunities secured by the [federal] Constitution and laws . . . ."[12] The statute was enacted after the Civil War due to congressional distrust of the ability and willingness of the Ku Klux Klan-influenced state forums to adequately protect the civil rights of freed slaves.[13] Congress provided a cause of action and the option of a federal forum to persons who allege a violation of a federal constitutional right by persons acting "under color of" state law. Section 1983 allows the federal courts to review the action of state officials, and often requires that the federal courts intervene in state matters.[14] Inherently therefore, section 1983

---

and] is reinforced by an even more vital consideration of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44.

[11] 42 U.S.C. § 1983 (1982).

[12] *Id.* For a full text of the pertinent statute, see *infra* text accompanying note 69.

[13] Section 1983 was intended as a means of allowing private enforcement of the Civil War amendments. Mitchum v. Foster, 407 U.S. 225, 238 (1972). *See infra* notes 69-78 and accompanying text.

The Congressional debates regarding the antecedent statute to section 1983 reflect an intention of Congress to confer jurisdiction to the federal courts due to a recognition that the Ku Klux Klan was influential in many state governments and judicial systems. CONG. GLOBE, 42d Cong., 1st Sess., 374-76 (1871). *See also* Mitchum v. Foster, 407 U.S. 225 (1972); Smith, *supra* note 3, at 101-03. This underlying policy will be referred to in this comment as the "federal remedy policy."

[14] The Supreme Court has held that the purpose of § 1983 was to "interpose the federal courts between the States and the people, as guardians of the peoples' federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " *Mitchum*, 407 U.S. at 242 (quoting *Ex parte* Virginia, 100 U.S. 33, 49 (1879)).

This purpose has been used to justify a federal district court's intervention even after a final state supreme court decision, and there are many cases in which the federal courts have intervened pursuant to § 1983 in state proceedings. *See, e.g.*, Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (collateral attack in federal court under § 1983 of state supreme court decision), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3269 (1986). In *Robinson*, the United States District Court for the District of Hawaii "overruled" a Hawaii Supreme Court decision that arguably altered the rights of riparian land owners in the state. Several of the owners filed suit in federal court under § 1983 alleging that the state supreme court decision had "taken" property without compensation. The district court held that the Hawaii decision had violated the takings clause of the fifth amendment of the federal constitution, and the Ninth Circuit affirmed. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). The United States Supreme Court summarily reversed and remanded in light of Williamson County Regional Planning Comm'n v.

encourages federal courts to review state actions. The conflict between the mandate of the full faith and credit statute and the underlying federal jurisdictional policy of section 1983 is particularly sharp when a plaintiff opts for a federal forum for a civil rights claim after an adverse decision from state proceedings on the same issue.

Until recently, it was recognized that civil rights claims may be implied exceptions to an application of full faith and credit in federal court.[15] The strong federal interest in protecting civil rights was believed to override federal-state comity interests, full faith and credit, and the common-law preclusion principles. In a series of recent cases, the United States Supreme Court has rejected these arguments and has clarified the preclusive effect of prior state proceedings in federal civil rights actions.[16]

In *Allen v. McCurry*,[17] the Court analyzed the competing policies of the full

---

Hamilton Bank, 105 S. Ct. 3108 (1985).

In *Williamson County*, the Court held that a takings claim was not ripe for adjudication because there had been no showing that the plaintifffs had utilized all of the available state procedures to contest the taking. The Court held that although exhaustion of state procedures was not required under Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982), exhaustion and finality are "conceptually distinct." *Williamson County*, 105 S. Ct. at 3120. The Court held that the case was not ripe and the plaintiffs could not show any concrete injury because the state had not implemented the regulations that would arguably "take" the property. *Id.* at 3121. As of this writing, the Ninth Circuit has remanded *Robinson* to the district court and a resolution is pending.

For an analysis of federal intervention after a final state supreme court decision and the *Robinson* litigation, see Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980) (allowing "collateral attack" in federal district court under § 1983 of state supreme court decision deprives the U.S. Supreme Court of appellate jurisdiction and violates the doctrine of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)) [hereinafter Chang, Rooker *Doctrine*]; Chang, *Unraveling* Robinson v. Ariyoshi*: Can Courts "Take" Property*, 2 U. HAW. L. REV. 57 (1979) (state supreme court decisions cannot "take" property under the meaning of the fifth amendment).

For a general discussion of the remedies available under § 1983, see Comment, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U. L. REV. 838 (1964).

[15] *See, e.g.*, Averitt, *Federal Section 1983 Actions After State Court Judgments*, 44 U. COLO. L. REV. 191 (1972); Chang, Rooker *Doctrine*, *supra* note 14; Koury, *Section 1983 and Civil Comity: Two For the Federalism Seesaw*, 25 LOY. L. REV. 659 (1979); Theis, *Res Judicata In Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859 (1976). *But see* Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981); Vestal, *State Court Judgments as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974).

[16] University of Tenn. v. Elliott, 106 S. Ct. 3220 (1986) (administrative proceedings); McDonald v. City of West Branch, 466 U.S. 284 (1984) (arbitrator's decision); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (claim preclusion from state court); Haring v. Prosise, 462 U.S. 306 (1983) (criminal guilty plea); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981) (state court review of administrative proceedings); Allen v. McCurry, 449 U.S. 90 (1980) (issue preclusion from state court).

[17] 449 U.S. 90 (1980).

faith and credit statute and section 1983 and held that the policies underlying the federal civil rights claims are not a categorical bar to application of full faith and credit and preclusion rules. The Court held that federal courts hearing civil rights claims must recognize the final judgments of state courts on the same issue.[18] Further, in *Kremer v. Chemical Construction Corp.*,[19] the Court held that a state court decision that merely affirms a state administrative proceeding serves as a "judgment" that is to be afforded full faith and credit in federal court.[20] Thus, the preclusive effect of state court and state administrative agency decisions that have been reviewed by state courts is settled.

In *University of Tennessee v. Elliott*,[21] the Court set forth conflicting standards regarding the effect of an unreviewed state administrative proceeding on subsequent federal civil rights claims. The Court held that actions under Title VII of the Civil Rights Act of 1964[22] would not be precluded,[23] but that section 1983 claims were precluded by state administrative determinations. The Court held that full faith and credit did not apply to an unreviewed administrative decision. The Court held that federal courts could nonetheless apply other principles of preclusion, and based its decision on federal common law res judicata principles.[24] Until *Elliott*, the federal courts which had addressed the issue of the effect of unreviewed administrative determinations in subsequent section 1983 actions were split, both as to result and method of analysis.[25] While *Elliott* may have provided a resolution to the split, the Court's analysis was far from satisfying.

This comment will examine *Elliott*. Part I will set out background of the issues and the facts and rationale of the case. Part II will discuss the policies

---

[18] *Id.* at 97-98.

[19] 456 U.S. 461 (1981).

[20] *Id.* at 481.

[21] 106 S. Ct. 3220 (1986).

[22] 42 U.S.C. §§ 2000e to 2000e-17 (1982). See *infra* note 136 for an explanation of the procedures under Title VII.

[23] 106 S. Ct. at 3227. *See also Kremer*, 456 U.S. at 470 n.7. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that an unreviewed administrative proceeding would not bar further proceedings in a Title VII action, which it defined as a trial de novo.

[24] 106 S. Ct. at 3224.

[25] *See, e.g.*, Detweiler v. Commonwealth of Va. Dept. of Rehabilitation Serv., 705 F.2d 557 (4th Cir. 1983) (administrative forum inadequate to determine civil rights claim); Griffen v. Big Spring Indep. School Dist., 706 F.2d 645 (5th Cir. 1983) (quality of administrative procedure inadequate to allow preclusion); Dash, Inc. v. Alcoholic Beverage Control Appeals Bd., 683 F.2d 1229 (9th Cir. 1982) (procedural due process is the standard for determining preclusive effect of administrative finding); Steffen v. Housewright, 665 F.2d 245 (8th Cir. 1981) (procedural due process is the standard for determining preclusive effect); Gear v. City of Des Moines, 514 F. Supp. 1218 (D. Iowa 1981) (procedural due process is the standard for determining preclusive effect). *But see* Gargiul v. Tompkins, 704 F.2d 661 (2d Cir. 1983) (choice of *judicial* forum for § 1983 action is plaintiff's).

involved in the full faith and credit and preclusion principles. Part III will detail the balance between the federal and state systems in section 1983 actions and how *Elliott* conflicts with previous Court rulings. This comment will conclude that *Elliott* fails to strike a balance between the competing policies of preclusion, comity, and section 1983, and suggests that an unreviewed administrative agency decision must never be given preclusive effect in federal court in a subsequent action under section 1983.

I. SETTING THE STAGE: *University of Tennessee v. Elliott*

A. *Analysis Prior to* Elliott

As in *Elliott*, many of the federal courts that previously addressed the preclusive effect of an unreviewed administrative decision in a subsequent section 1983 action explicitly or implicitly[26] analyzed the issue by comparing the degree to which the administrative action was procedurally similar to a trial.[27] These courts reasoned that the constitutional mandates of full faith and credit and the policies of preclusion dictated that the federal court determine whether the administrative decision would be binding according to the preclusion rules of the state in which the decision was rendered. These federal courts scrutinized the procedure of the administrative action and gave preclusive effect to those decisions that reflected the same "quality, extensiveness [and] fairness" of a trial.[28] These courts reasoned that a ruling from an administrative agency acting in a judicial capacity had all the qualities of a "judgment," and would be given preclusive effect in state court. Using this reasoning, the standard for resolution of these issues was the same as that for minimum procedural due process.[29] The two key issues under this analysis therefore, were: (1) the degree to which the agency acted in a judicial capacity; and (2) if the parties were afforded a full and fair opportunity to "litigate" the issues.[30] The more an agency proceeding

---

[26] Most courts do not make reference to full faith and credit, preferring to analyze the issue on the basis of the "full and fair opportunity to litigate" exception to federal doctrines of preclusion. *See, e.g., Dash*, 683 F.2d at 1232 ("Res judicata principles do not apply, however 'when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue.' ").

Although full faith and credit principles are generally not discussed by these courts, similar principles and policies are implicit in analysis of the federal preclusion doctrines.

[27] *See, e.g., Elliott*, 106 S. Ct. at 3223 n.2 (five-month proceeding, 100 witnesses, 150 exhibits, and 5,000 pages of transcripts).

[28] *Montana*, 440 U.S. at 164 n.11.

[29] "[S]tate [judicial review] proceedings need no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481.

[30] Although there is no set formula to determine if the parties had an adequate opportunity to

resembled a trial, the more likely the federal court to give preclusive effect to that agency's determination.

While the method utilized by these courts and *Elliott* is appealing in that it merges preclusion and procedural due process analysis,[31] it is inconsistent with the full faith and credit statute, the rationales of common law preclusion, and the policy underlying section 1983. Further, it applies different rules of preclusion to Title VII claims and section 1983 claims, although the causes of action are similar, and the actions are often brought together.[32]

Analysis of the issue dictates that federal courts hearing a section 1983 claim should *never* give preclusive effect or full faith and credit to an unreviewed state administrative decision. This conclusion is supported by the rationales of preclu-

---

litigate in an action, the Court has placed emphasis on several factors including adequate prehearing notice, the right to counsel, the right to present evidence, the availability of discovery, the avilability of a record, and an opportunity to be heard. *See, e.g.*, Loudermill v. Cleveland Bd. of Educ., 105 S. Ct. 1487 (1985); McDonald v. City of West Branch, 466 U.S. 284 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 49 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 502-06 (1978).

[31] "Thus, for our purposes here, the res judicata analysis merges with our analysis of appellants' procedural due process claims." *Dash*, 683 F.2d at 1233.

The more an administrative action resembles a judicial proceeding, the more likely the action to pass muster under the fourteenth amendment due process clause. An administrative action that met these procedural standards would also supposedly allow a party a fair opportunity to "litigate" for *Elliott*'s preclusion analysis purposes.

By comparison, a unanimous Court in McDonald v. City of West Branch, 466 U.S. 284 (1984), noted that since arbitration proceedings did not generally provide for procedural protections such as cross-examination, an available record, or rules of evidence, arbitration proceedings were not entitled to preclusive effect in a subsequent § 1983 action. The Court held that evidence of the arbitrator's ruling was "admissible" in the subsequent § 1983 case, but left the appropriate weight to be given to the arbitrator's findings to the discretion of the trial court. *Id.* at 292 n.13 (quoting *Alexander*, 415 U.S. at 60 n.21). The Court applied a blanket rule to all arbitration proceedings, regardless of the opportunity to "litigate."

[32] *See generally* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 3.2, at 38 n.21 (1986). Although Title VII and § 1983 claims may arise out of a single fact situation, there are key differences between the claims. First, a § 1983 claim, unlike a Title VII action, has no limits to the scope of the administrative charge. Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235 (7th Cir. 1975). Second, no exhaustion of administrative remedies is required in order to file a federal § 1983 claim, while exhaustion is a prerequisite to a Title VII suit. *Compare* Patsy v. Florida Bd. of Regents, 457 U.S. 796 (1982) (§ 1983) *with* Johnson Railway Express Agency, Inc., 421 U.S. 454 (1975) (Title VII). Third, the standards of proof differ. A discriminatory purpose must be proven in a § 1983 claim when a facially neutral state statute has a *de facto* disproportionate impact. *See* Washington v. Davis, 426 U.S. 229 (1976). Title VII has no such requirement. Fourth, the filing deadlines differ: § 1983 is controlled by applicable state statutes and timetables; Title VII has strict statutory timetables. *See infra* note 136. Finally, there are other differences between the claims—back pay awards are not limited under § 1983, and punitive and mental and emotional distress damages are remedies not available under Title VII.

sion, and the plain language and the policy underlying the full faith and credit statute. Non-recognition of unreviewed state administrative findings also implements the underlying federal remedy policy of section 1983.

Without state court review of the administrative decision, federal courts must not recognize the administrative decision, and no effect should carry over into federal court. The Supreme Court in *Elliott*, however, reached a different conclusion.

B. University of Tennessee v. Elliott

In *University of Tennessee v. Elliott*,[33] Robert Elliott, a black employee of the University of Tennessee, was fired and sought administrative redress under Tennessee's review statute.[34] The University asserted that Elliott had been discharged for poor work performance and misconduct. Before the start of the administrative proceeding, Elliott filed suit in federal court under section 1983 and Title VII,[35] claiming that his discharge was racially motivated.

In the administrative action, an administrative assistant to the University's vice president for agriculture[36] was appointed as administrative law judge (ALJ) to hear Elliott's discharge claims. The ALJ specifically disclaimed "jurisdiction" over Elliott's civil rights claims, but allowed Elliott to present his discrimination allegations as an "affirmative defense" to the University's denials of racial discrimination. The ALJ found that Elliott's dismissal was justified and not a result of racial motives. The University vice president affirmed the decision. Elliott did not pursue the state court review that was available under the Tennessee statute, but instead activated his section 1983 and Title VII claims in federal court. The district court precluded both civil rights actions, holding that the federal claims were litigated in the administrative proceeding.[37] The United States Court of Appeals for the Sixth Circuit held that neither Elliott's Title VII nor his section 1983 claim should have been precluded because the full faith and credit statute did not apply to administrative determinations, and federal

---

[33] 106 S. Ct. 3220 (1986).

[34] TENN. CODE ANN. § 4-5-101 (1985).

[35] Elliott also brought claims under 42 U.S.C. §§ 1981, 1985, 1986, and 1988, and under the first, thirteenth, and fourteenth amendments. *Elliott*, 106 S. Ct. at 3222 n.1.

[36] 106 S. Ct. at 3223. The vice president for agriculture of the University was allowed to appoint an assistant to hear Elliott's discrimination claims against the University. See *infra* text accompanying note 127 for a discussion of the possible conflicts of interest inherent in this arrangement.

[37] *Id.* at 3227. It is unclear exactly how Elliott's claims were presented to the ALJ and how the burden of proof, if any, was allocated between Elliott and the University. The characterization of the discrimination claim as an "affirmative defense" indicates that Elliott carried the burden, yet this defense was only allowed in response to the University's "denials." *Id.*

common law rules of preclusion did not bar Elliott's claims.[38]

The Supreme Court agreed that the full faith and credit was not applicable to unreviewed administrative decisions because the statute only governed judgments from state courts. The Court disagreed, though, with the Sixth Circuit's rejection of federal common law principles of preclusion.[39] The Court distinguished section 1983 from Title VII, and noted that the legislative history of Title VII reflected Congress' intent that administrative decisions have no preclusive effect in a subsequent federal action. Conversely, the Court held that since there was "no reason to suppose that Congress, in enacting [section 1983], wished to foreclose" the application of traditional preclusion principles to "20th century" administrative actions, Elliott's section 1983 claim was barred.[40]

II. POLICIES OF PRECLUSION

A. *Section 1738: Full Faith and Credit in a Federal System*

"Full faith and credit" is a principle analogous to common law res judicata. The plain language of the full faith and credit statute commands the federal courts to recognize only "judgments" of courts, and not the unreviewed decisions of an administrative agency. The Constitution is the starting point for analysis of this issue. Article IV, section 1 states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and *judicial Proceedings* of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."[41] Congress implemented the clause in 1790 by enacting the predecessor statute to the current 28 U.S.C. section 1738, which provides that

---

[38] 766 F.2d 982 (6th Cir.), *rev'd*, 106 S. Ct. 3220 (1986). In the majority opinion in *Elliott*, the Court held that § 1738 did not apply to unreviewed state administrative determinations because § 1738 only requires recognition of "judgments and records." 106 S. Ct. at 3224. The Court thus considered whether federal common law doctrines of preclusion were appropriate. *Id.* Under this analysis, state rules of preclusion do not apply, and a federal court may fashion its own preclusion rules. At the end of the majority opinion, however, the Court seemed to misapply this analysis:

> Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the *same preclusive effect to which it would be entitled in the State's courts.*

Id. at 3227 (emphasis added) (footnote omitted) (citing United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)).

[39] *Elliott*, 106 S. Ct. at 3225.

[40] *Id.* at 3226.

[41] U.S. CONST. art. IV, § 5 (emphasis added).

> [a]cts, records and *judicial proceedings* or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[42]

The language of the Constitution and the full faith and credit statute are unambiguous. Full faith and credit only applies to "judicial proceedings." An unreviewed administrative decision does not carry the weight of a "judgment," and administrative decisions are not considered the result of "judicial proceedings."[43]

In *Elliott*, the Court held that the full faith and credit statute did not apply to administrative proceedings that have not been reviewed by state courts. The Court reasoned that since section 1738 preceded the development of administrative agencies, the statute is not applicable to decisions from those agencies.[44]

The congressional intent in implementing the full faith and credit statute also supports the conclusion that federal courts should not recognize the unreviewed decision of an administrative agency. Nothing indicates that Congress intended to include the unreviewed decisions of administrative agencies in those "judg-

---

[42] 28 U.S.C. § 1738 (1982) (emphasis added).

[43] The Supreme Court has permitted determinations from agencies acting in a judicial capacity in Title VII cases to have preclusive effect if the opposing parties had "an adequate opportunity to litigate." United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966). Any application of *Utah Construction* must be tempered with *Kremer*'s holding that an unreviewed administrative decision is not to be afforded full faith and credit in a Title VII action in federal court regardless of the procedural quality of the administrative action. *Kremer*, 456 U.S. at 470 n.7. *Cf. McDonald*, 466 U.S. at 293. The Court, therefore, does not recognize an unreviewed administrative finding as a "judgment," regardless of whether a state court would afford such a decision any preclusive effect. Administrative determinations, standing alone, do not fall within the ambit of § 1738; yet in *Elliott*, those decisions merited preclusive effect. Thus, *Elliott* implies that the standards for full faith and credit are somewhat higher than for federal common law res judicata. Yet this is not the case: "we can certainly look to the policies underlying the [full faith and credit] Clause in fashioning federal common-law rules of preclusion." *Elliott*, 106 S. Ct. at 3227.

In *Elliott*, the Court discussed *Utah Construction*, citing the case as an example of federal common law preclusion rules from an administrative determination. *Elliott*, 106 S. Ct. at 3226. Justice Stevens argued that the *Utah Construction* standard was inapplicable because that case involved an administrative decision from the Federal Board of Contract Appeals, which Congress intended to have preclusive effect. *Elliott*, 106 S. Ct. at 3228 (Stevens, J., dissenting). Justice Stevens contrasted the congressional intent underlying § 1983, and noted that "there is nothing in the legislative history of the post Civil War legislation remotely suggesting that Congress intended to give binding effect to unreviewed rulings by state administrators in litigation arising under that statute." *Id.* (Stevens, J., dissenting) (quoting *Monroe*, 365 U.S. at 180). This argument is more compelling when the very agency charged with discrimination also provides the administrative dispute resolution process. *See infra* note 127 and accompanying text.

[44] 106 S. Ct. at 3224.

ments" that would have preclusive effect in other courts.[45] Regardless of the judicial capacity or procedural quality of an administrative proceeding, therefore, the plain language of the statute indicates that section 1738 should not even apply to unreviewed administrative proceedings.

This conclusion initially may seem to contradict the result in *Kremer v. Chemical Construction Corp.*,[46] which held that administrative decisions that have been reviewed by a state court have preclusive effect in federal court so long as the administrative proceedings met the standards for procedural due process. *Kremer* though, noted that the affirmance by the state court of the administrative proceedings, albeit on a "clearly erroneous" standard, constituted the "judgment"[47] for the purposes of the full faith and credit statute. *Kremer* did not address the effect an unreviewed administrative determination would have in federal court.

Under *Kremer*, without state court review of the administrative decision, federal courts cannot give the decision full faith and credit. In allowing the administrative decision to have preclusive effect, in *Elliott* though, the Court based its analysis on traditional principles of federal common law res judicata.

B. *Traditional Res Judicata: Economy, Repose, and Finality*

The Court in *Elliott* relied on the traditional doctrines of preclusion to exclude a section 1983 claim from a federal forum. This section will explore the doctrines and their underlying policies and will analyze why *Elliott* is inconsistent with these policies.

"Res judicata"[48] consists of two doctrines, claim and issue preclusion, which define the effects of a final judgment on subsequent litigation. The claim preclusion doctrine dictates that a judgment on the merits is an absolute bar to fur-

---

[45] The statute was implemented "to invest congress with the power to declare the judgments of the *courts* of one state, conclusive in every other." Green v. Sarmiento, 10 F. Cas. 1117, 1118 (C.C.D. Penn. 1810 No. 5,760) (emphasis added) *quoted in* Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit Clause and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499, 560 (1981). Full faith and credit principles offer federal protection for state judgments, and insure that the states respect the decisions of other forums. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 505 (2d ed. 1973). For a complete history of the implementation of the full faith and credit clause, see Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

[46] 456 U.S. 461 (1981).

[47] The *Kremer* court made preclusion contingent on state court review of the administrative proceedings. Once a state court reviewed the action, "judgment" was rendered and preclusion was effected. *Kremer*, 456 U.S. at 468-70.

[48] *Res judicata* literally means "the matter adjudged." BLACK'S LAW DICTIONARY 1174 (5th ed. 1979).

ther actions on the same claim or claims which could have arisen from the transaction between the same parties.[49] Claim preclusion prevents further litigation between parties of both claims and defenses that were or could have been brought in the original action.[50] The only requirements for the application of claim preclusion are that the prior judgment is "final," and its claim preclusion effects can only be asserted in another proceeding.[51]

Issue preclusion, traditionally referred to as "collateral estoppel," is a slightly different concept than claim preclusion. Traditionally, an estoppel is considered "collateral" because the cause of action in the subsequent suit is different from that in the original.[52] Although the general claim may be different, issues in common between the suits are prevented from being relitigated. The issue preclusion effect of a previous judgment is necessarily narrower than claim preclusion, and only operates as to those issues that the disputes share.[53] Although claim and issue preclusion are separate and distinct doctrines, their underlying policies are generally the same. Claim and issue preclusion are, for the most part, judicially created doctrines[54] that have their basis in policies of economy and judicial finality.[55] The rules regarding preclusion are not mere procedural technical relics of the common law, and at the most basic level, preclusion of claims and issues serve both the interests of the parties and public policy.[56]

1. *The parties' private interests*

The parties have an interest in economy of effort during the first trial and in

---

[49] Merger and bar are two components of claim preclusion. The merger doctrine dictates that a judgment in favor of the plaintiff will eliminate all causes of action the plaintiff had or could have had as well as all of the defenses the defendant used or may have used in an action that arose from the same incident. RESTATEMENT, *supra* note 1, § 18. *See also* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405 [3] (1984) [hereinafter FEDERAL PRACTICE].

The bar rule precludes a losing plaintiff from attempting another lawsuit on the same claim. RESTATEMENT, *supra* note 1, § 19-20. Therefore, a whole claim is "merged" in a judgment for the plaintiff, or is "barred" by a judgment in favor of the defendant.

[50] Smith, *supra* note 3, at 60.

[51] Chicago, R.I. & P. Ry. v. Schendel, 270 U.S. 611 (1926) (cited in FEDERAL PRACTICE, *supra* note 49, ¶ 0.405 [1], at 185.

[52] 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4402 (1982) [hereinafter FEDERAL PRACTICE & PROCEDURE].

[53] Under the doctrine of collateral estoppel . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 429 U.S. 322, 327 n.5 (1979).

[54] FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4402, at 10.

[55] *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981) (emphasizing that the preclusion doctrines were established for the conclusive resolution of disputes).

[56] *See infra* notes 57-68 and accompanying text.

avoiding the burden of a duplicate trial on the same claim or issue. These parties also have an interest in preventing relitigation of settled issues, and the "attention [of the preclusion doctrines] is focused on the need to protect a victorious party against oppression by a wealthy, wishful, or even paranoid adversary."[57] The doctrines of preclusion encourage the parties to fully litigate the issues to the best of their ability during their first trial by enforcing restrictive rules of preclusion.

In *Elliott*, Justice Stevens dissented on the grounds that section 1983 claims should not be precluded from a federal trial de novo.[58] In *Elliott*, the private interest in economy of effort was not supported—the ALJ specifically disclaimed jurisdiction over the federal claims—and there was no real incentive for Elliott or the University to attempt to fully litigate these issues. In fact, Elliott was only allowed to answer the University's denials with an "affirmative defense" of discrimination.[59] It is unclear how the burden of proof under the discrimination charge, if any, was allocated during the administrative proceeding.

The private policies of preclusion show that the initial attempt at litigation must not be taken lightly as there will be no later opportunity to re-try the issues. The modern rules of procedure allow for liberal joinder of related claims and issues into a single lawsuit. The preclusive effects of merger and bar[60] encourage efficient joinder of all parties or claims that should be included in the lawsuit. The modern rules of civil procedure that allow various parties and claims in a single action compliment the modern approach of restrictive rules regarding claim and issue preclusion.[61] The joinder of all claims and parties increases the potential of a just and valid result arising from the initial litigation. In a judicial proceeding, a civil rights plaintiff may bring both a section 1983 and a Title VII action arising from the same situation. The claim joinder procedures of an administrative action may differ, and the issues may be specifically limited. In *Elliott*, the plaintiff was prevented from affirmatively presenting his section 1983 claim with the understanding of the ALJ that an administra-

---

[57] FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4403, at 14 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)).

[58] *Elliott*, 106 S. Ct. at 3227-29 (Stevens, J., dissenting) Justices Stevens, Brennan and Blackmun dissented only to the application of preclusion to § 1983 actions.

[59] *Id.* at 3223.

[60] *See supra* note 49.

[61] C. WRIGHT, FEDERAL COURTS, *supra* note 9, § 100A, at 679. There is advocacy among some commentators to replace the term "cause of action" with the term "claim," to clearly contrast the oft-confused doctrines of claim preclusion ("res judicata") and issue preclusion ("collateral estoppel"). Replacement of the terms would encourage the use of the concise terminology of the RESTATEMENT. *See generally*, Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964).

This terminology would also comport with the terms used in the Federal Rules of Civil Procedure which replaced the phrase "cause of action" with "claim for relief." *See, e.g.*, FED. R. CIV. P. 8(a).

tive proceeding was inadequate to address *Elliott*'s federal claims.[62] Efficient joinder of claims as allowed by the Federal Rules of Civil Procedure was denied Elliott. In effect, Elliott was prevented from effectively asserting his section 1983 claim in the administrative action, then was barred from "relitigating" in federal court because he should have presented both claims to the ALJ.

Perhaps the most compelling private interest in preclusion is the goal of conclusive dispute resolution, which "is central to the purpose for which civil courts have been established."[63] The initial judgment stands as valid although open to limited attack through the narrow avenues of appeal. To this extent, claim and issue preclusion serve the fundamental purpose of a judicial system—repose, dispute resolution, and reliance on judgments.[64] Binding resolution of disputes allows the parties to "breathe freer" and base future actions on reliance in the results.[65]

The preclusion rules also reduce the costs to the parties of multiple litigation on the same issues. By encouraging the efficient joinder of all claims and parties, the preclusion doctrines dictate that "the expensive and harrowing ordeal of litigation be approached seriously so that it may yield a final result that . . . precludes a second ordeal."[66]

Precluding section 1983 claims will not further this goal. Under *Elliott*, a case will be "bifurcated" into a Title VII claim that continues in federal court and a section 1983 claim that is precluded. Since the facts and issues underlying a section 1983 and Title VII claim are often similar, some issues may effectively be re-tried. After an administrative determination adverse to a plaintiff, a case may therefore continue with the same parties and substantially the same issues in federal court. Arguably, no amount of litigation will be reduced if the same or similar issues are litigated in federal court as were heard at the administrative level. No "second ordeal" is barred; no judicial resources are saved.

---

[62] *Elliott*, 106 S. Ct. at 3223.

[63] FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4403, at 15.

[64] James v. Gerber Prods. Co., 587 F.2d 324, 327 (6th Cir. 1978). "If judgments are not deemed conclusive as to matters which are considered, the judicial system cannot effectively carry out its social function of dispute resolution."

[65] FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4403, at 16. *See, e.g.*, Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation, 402 U.S. 313 (1971) (adandoning the requirement of mutuality in issue preclusion to allow a defendant to assert defensive collateral estoppel to prevent the plaintiff from asserting issues previously litigated and lost against another defendant).

[66] Preclusion "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 154.

2. Public policy

Consistent with the private interest in judicial finality, the public and the court system have an interest in preventing relitigation of identical claims and issues between parties. At the most basic level, public interest is served by maintaining the respect and power of the judicial system. If previous judgments were routinely relitigated with inconsistent results, the public confidence in the ability of the courts to resolve disputes would surely wane.[67] *Elliott* leaves open this possibility; since many of the issues between a section 1983 and a Title VII claim are identical, there is a significant danger of inconsistent findings between the administrative determination on the section 1983 claim and the federal court's de novo determination of the Title VII issue.

Another public policy of the preclusion doctrines is the interest in judicial economy. Resources are scarce, and given the ever-increasing burden of lengthy litigation, the public has an interest in requiring that litigants "make the most" of their initial effort. The dichotomy between section 1983 and Title VII that the Court implemented in *Elliott* will not foster careful use of judicial or administrative resources. Federal civil rights caseloads may increase because of *Elliott*; plaintiffs who do not wish to utilize state administrative proceedings as civil rights forums will presumably bypass those proceedings and pursue the matter directly in federal court. Further, litigants are free under *Elliott* to collaterally attack the administrative determination on the grounds that the administrative proceedings did not afford a full and fair opportunity to litigate the section 1983 issue.[68]

Thus, *Elliott* is inconsistent with the doctrines of preclusion and their underlying rationales. The sounder decision in light of these doctrines would have denied preclusive effect to the unreviewed administrative decision. This result would be consistent with the choice of forum principle that underlies actions brought under section 1983, and the policy of federal-state comity.

III. 42 U.S.C. SECTION 1983: BALANCING THE CHOICE OF FORUM POLICY WITH FEDERALISM INTERESTS

The congressional intent in enacting section 1983 supports the conclusion that unreviewed administrative decisions should not be given any preclusive

---

[67] "It is easier to live with the abstract knowledge that our imperfect trial processes would often produce opposite results in successive efforts than to accept repeated concrete realizations of that fact." FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4403, at 12.

[68] *Elliott*, 106 S. Ct. at 3227 n.1 (Stevens, J., dissenting). Before the Supreme Court, Elliott also argued that the administrative proceedings did not meet the *Utah Construction* due process standards. *Id.* at 3227 n.8.

effect in subsequent section 1983 actions. Section 1983 provides a cause of action for damages or equitable relief to

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [federal] Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[69]

The predecessor statute to the current section 1983 was first enacted in 1871 during the Reconstruction following the Civil War.[70] Prior to Reconstruction, the federal courts had no jurisdiction to hear civil rights cases. The federal judicial system at its inception was created to hear admiralty cases and provide a neutral forum for parties from diverse states. Enforcement of federal constitutional rights was relegated to the state courts, and before the passage of the Civil Rights Act of 1871, no federal cause of action existed against state officials who infringed on federal constitutional rights.[71]

The passage of the thirteenth, fourteenth, and fifteenth amendments led to a shift in the role of the federal courts in civil rights enforcement.[72] These amendments gave Congress the power to enact enforcing legislation.[73] Pursuant to this power, Congress enacted the predecessor to section 1983 to circumvent the in-

---

[69] 42 U.S.C. § 1983 (1982).

[70] Smith, *supra* note 3, at 101. For a more complete history of the enactment of § 1983, see Koury, *supra* note 15; Vestal, *supra* note 15; *Section 1983 and Federalism*, *supra* note 10.

[71] Smith, *supra* note 3, at 101-03.

[72] The thirteenth amendment provides in part:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII.

The fourteenth amendment provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV.

The fifteenth amendment provides that:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. CONST. amend XV. The amendments also enabled Congress to implement enforcing legislation, and the Civil Rights Act of 1871 (current § 1983) was enacted pursuant to this power. *See infra* note 73.

[73] *See, e.g.*, U.S. CONST. amend. XIII: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

fluence of the Ku Klux Klan in state governments, and to allow private suits against state officers who violate the federal Constitution. The Klan's influence had resulted in a failure of the state governments and judicial systems to adequately protect the newly guaranteed constitutional rights.

In addition to creating a federal claim, Congress conferred jurisdiction on the federal courts to hear section 1983 claims due to a belief that state forums could not be trusted to produce fair results.[74] The Civil Rights Act of 1871 provided a right of action and the option of a federal forum to those whose civil rights were violated by any person acting under color of state law.[75]

Although a purpose of section 1983 is to provide a plaintiff access to a federal forum, jurisdiction in section 1983 claims is not exclusive in the federal courts.[76] Federal jurisdiction over constitutional issues is concurrent with the state courts.[77] Thus, a plaintiff may elect to bring an action for violations of federal constitutional rights either in state or federal proceedings. The choice of forum for plaintiffs was created not only because of the general distrust of the state forums, but to encourage those forums to improve their ability to fairly and adequately litigate federal constitutional claims.[78] The concurrent jurisdiction allowed section 1983 actions was the "carrot" by which Congress urged the

---

[74] As a recognition of the Congressional attempt to circumvent the influence of the Ku Klux Klan, the Civil Rights Act of 1871 was also referred to as the Ku Klux Klan Act. Smith, *supra* note 3, at 101-03.

[75] For a discussion of the "color of law" requirement, see Monroe v. Pape, 365 U.S. 167 (1961). Generally, the term "color of law" is similar to the requirement of "state action" under fourteenth amendment analysis. Randal-Baker v. Kohn, 457 U.S. 830 (1982). *See* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 58 (2d ed. 1980 & Supp. 1986). *See also* Comment, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U. L. REV. 839 (1964).

[76] Section 1983's jurisdictional counterpart states:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1982). Jurisdiction over § 1983 actions is not exclusive in the federal courts, but is concurrent with the state courts. The Supreme Court has stated that:

> . . . in enacting [§ 1983] Congress altered the balance of judicial power between the state and federal courts. Congress did so by adding to the jurisdiction of the federal courts and not by subtracting from that of the state courts.

Allen, 449 U.S. at 99.

[77] The supremacy clause requires that state courts apply federal law when deciding federal issues: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the judges of every state shall be bound thereby . . . ." U.S. CONST. art. VI, § 2.

[78] *See Allen*, 449 U.S. at 100 n.16.

states to improve the procedural and substantive ability of their courts to protect federal rights. The "stick" was the capacity of the federal courts to entertain claims that scrutinized the allegedly unconstitutional actions of all state officials, including judicial officers.

The Supreme Court, in *Mitchum v. Foster*,[79] reemphasized the primacy of the choice of forum policy. The Court held that section 1983 was an implied exception to a statute that prohibited federal courts from issuing injunctions to stay state court proceedings.[80] Reviewing the provisions for equitable relief provided for in section 1983 and the federal forum access policy, the Court reasoned that for section 1983 to be effectively implemented, Congress must have intended section 1983 to be an exception to the anti-injunction statute. The *Mitchum* court concluded that the legislative history of section 1983 reflected a strong congressional intent to provide plaintiffs a choice of a federal or state forum to air their constitutional claims.[81] This intent supports the conclusion that a plaintiff should not be precluded from seeking a federal forum by an adverse unreviewed agency determination.

Under *Mitchum*'s rationale, a federal court cannot analyze the issue by determining if a state court would preclude the issue. The choice of whether to pursue review of the agency determination in state court or to seek a de novo trial in federal court should be the plaintiff's.[82] This choice of judicial forum should not be taken away by a federal court's application of a state rule that precludes a de novo trial based on the quasi-judicial function of the agency or the degree to which the parties had a "full and fair opportunity" to litigate in the administrative proceeding. Such a rule would force plaintiffs to choose between foregoing the opportunity to air their claims before an administrative agency and surrendering their potential for access to a federal court forum.

The federal courts, as specialized arbiters of constitutional rights, are inherently more qualified to adequately and fairly determine disputes over these rights than a state administrative agency.[83] The policy of section 1983 seems to

---

[79] 407 U.S. 225 (1972).

[80] The anti-injunction statute prohibits "[a] court of the United States [from granting] an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1978).

[81] 407 U.S. at 240.

[82] Res judicata does not operate until a judgment has been rendered by a court. FEDERAL PRACTICE, *supra* note 49, ¶ 0.404 [1-1], at 301. The preclusion doctrines presuppose a system in which litigants are free to sue at the time and in the forum of their choice. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 395, 401-02 (1981). This precept of the preclusion doctrines coupled with the concurrent jurisdiction allowed § 1983 actions demonstrates that the plaintiff must be free to choose either a federal or state judicial forum.

[83] In McDonald v. City of West Branch, 466 U.S. 284 (1984), the Court held that arbitration decisions had no preclusive effect in a subsequent § 1983 action. The Court noted that

conflict with the line of cases from the Supreme Court addressing civil rights claims previously adjudicated in state proceedings,[84] and the cases emphasizing federal-state comity.[85]

A. Allen v. McCurry

In *Allen v. McCurry*,[86] the Supreme Court held that the policy of section 1983 did not necessarily allow plaintiffs an unrestricted access to a federal forum. The Court held that federal courts must give state judgments issue preclusive effect in a subsequent section 1983 controversy.

McCurry filed a section 1983 action for one million dollars in damages against two police officers for an allegedly unconstitutional search.[87] The district court granted the police officers' motion for summary judgment on the grounds that issue preclusion barred McCurry from relitigating the search issue that had already been decided against him in his state court trial.[88]

The United States Court of Appeals for the Eighth Circuit reversed and remanded the case for trial. The appeals court reasoned that the doctrine of issue preclusion was generally inapplicable in a section 1983 action, and that the

---

arbitration procedures were not well suited to resolution of federal civil rights claims because ". . . an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.' " *Id.* at 290 (quoting *Alexander*, 415 U.S. at 57). The Court held that allowing preclusion from an arbitrator's award would defeat the congressional policy of § 1983. *McDonald*, 466 U.S. at 292. It seems that technical distinctions between arbitration decisions in *McDonald* and administrative proceedings in *Elliott* are tenuous if the only differentiating factor is the minimal procedural protections an administrative proceeding may provide. Such a stance fails to recognize the substantive remedies Congress intended by enacting § 1983. *Allen*, 449 U.S. at 111 (Balckmun, J., dissenting). In *Elliott*, the Court never addressed this issue directly. Further, *Elliott* made no references to *McDonald*. Some commentators note that *Elliott* is "at odds" with the idea that Congress had delegated a special role to the federal courts in protecting federal constitutional rights. M. SCHWARTZ & J. KIRKLIN, *supra* note 32, § 9.10, at 210 (citing *Patsy*, 457 U.S. at 503).

[84] *See* McDonald v. City of West Branch, 466 U.S. 284 (1984) (arbitrator's decision); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981) (administrative decisions reviewed by state courts).

[85] *See* Younger v. Harris, 401 U.S. 37 (1971). *See also* Trainor v. Hernandez, 431 U.S. 434 (1977) (application of *Younger* doctrine to civil action); Juidice v. Vail, 430 U.S. 327 (1977) (same); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); American Trial Lawyers Ass'n v. New Jersey Superior Court, 409 U.S. 467 (1973) (per curiam); Cousins v. Wigoda, 409 U.S. 1201 (Rehnquist, Circuit Justice 1972); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Pullman County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959). See C. WRIGHT, FEDERAL COURTS, *supra* note 9, § 52, at 307 for a discussion of the cases regarding the abstention and federal-state comity doctrines. *See also supra* note 9.

[86] 449 U.S. 90 (1980).

[87] *Id.* at 92.

[88] *Id.* at 93.

federal courts had a special role in the protection of civil rights.[89] Neither the district court nor the court of appeals addressed the issue of full faith and credit; neither party asserted that the state judgment should be given full faith and credit under section 1738. The parties presented the case as a conflict between federal common law principles of issue preclusion[90] and the underlying federal forum access policy of section 1983.[91]

Before the Supreme Court, McCurry argued that the state court's judgment should not be given preclusive effect because section 1983 was implemented to allow a disadvantaged plaintiff the option of a federal forum because of the distrust of state court determinations on civil rights issues.[92] The Supreme Court did not accept this argument on the basis that issue preclusion between state and federal courts not only fosters "reliance on adjudication," but promotes comity between the federal and state courts.[93] Further, the Court rejected McCurry's argument because section 1738 required the federal courts to give the same effect to a judgment as the courts of the state from which the judgment emerged.[94] The Court held that preclusion principles were applicable in section 1983 actions unless the plaintiff could show that section 1983 was intended to be an express or implied repeal of the full faith and credit statute.[95]

Relying on the legislative history of section 1983, the Court asserted that since the common law doctrines of res judicata and collateral estoppel were recognized in 1871 when section 1983 was first enacted, Congress must have been aware that full faith and credit and the preclusion principles would prevent a new trial in federal court after a valid state judgment.[96] The Court held that the legislative history of section 1983 did not in any way suggest that Congress had expressly intended to limit or repeal the full faith and credit statute or the common law doctrines of preclusion.[97] Further analysis of the issue therefore, required the Court to determine if section 1983 was inconsistent with section 1738 and a repeal of preclusion doctrines should be implied.[98] Addressing this issue, the Court held that sections 1738 and 1983 were not in conflict and held

---

[89] *Id.*

[90] The federal courts are free to adopt their own preclusion doctrines when no question of state law is involved. *See supra* notes 48-63 and accompanying text.

[91] Smith, *supra* note 3, at 66.

[92] *Id.*, (citing Brief for Respondent at 9-16, Allen v. McCurry, 449 U.S. 90 (1980) (No. 79-935)).

[93] 449 U.S. at 95-96.

[94] *Id.*

[95] *Id.* at 97-98.

[96] *Id.*

[97] *Id.* at 99.

[98] *Id.* An implied repeal of a previous statute by a subsequent law is implied if the two laws are in "irreconcilable conflict." Radzanower v. Touche, Ross & Co., 426 U.S. 148, 154 (1976). The *Allen* court held that such implied repeals are "disfavored." 449 U.S. at 99.

that

> . . . in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata . . . much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.[99]

The Court thus held that civil rights actions were not a "categorical bar" to the application of preclusion principles,[100] and that the federal courts must recognize "fair procedures" of the state courts.[101] The Court also rejected the argument that every litigant claiming a constitutional violation is entitled to an opportunity to present the claim in federal court. The Court asserted that this argument was based on a general distrust of the ability of the state courts to correctly decide constitutional issues,[102] a distrust the Court "made it clear it did not share."[103]

The dissent by Justice Blackmun focused on whether Congress, by legislative silence in section 1983, had intended common law principles of preclusion to apply.[104] The dissent did not address the majority's application of the full faith and credit statute, instead arguing that the underlying policy of section 1983 required that the doctrines of preclusion be applied flexibly on a case-by-case basis.[105] Justice Blackmun asserted that Congress, by enacting section 1983, was not merely concerned with the procedural unfairness of state courts, but that civil rights litigants were unable to obtain substantive justice in those courts.[106]

The *Allen* decision was unclear in several aspects. The Court seemed to implement a narrower doctrine of issue preclusion by requiring that the federal courts give preclusive effect to prior judgments only as long as the party had a "full and fair opportunity to litigate."[107] The Court replied to this criticism by

---

[99] 449 U.S. at 99.

[100] *Id.* at 97.

[101] *Id.* at 99.

[102] *Id.* at 105. *Cf.* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing the "bureaucratic receptivity" of the federal courts to U.S. Supreme Court decisions and potential inconsistencies between state courts in applying federal law).

[103] C. WRIGHT, FEDERAL COURTS, *supra* note 9, § 100A, at 692.

[104] *Allen*, 449 U.S. at 106 (Blackmun, J., dissenting).

[105] *Id.* at 113 (Blackmun, J., dissenting).

[106] *Id.* at 108 (Blackmun, J., dissenting).

[107] *See Id.* at 101 (Blackmun, J., dissenting). Justice Blackmun argued that the minimum requirement of an opportunity to litigate was more strict than the federal rules of preclusion

asserting that there might be exceptions to preclusion in section 1983 actions in addition to the full and fair opportunity to litigate test.

Allen was also ambiguous regarding the application of the issues to claim preclusion. While the majority specifically limited the holding to issue preclusion,[108] the dissent argued that the "full and fair opportunity to litigate" test would prevent a party from later asserting issues that may have been raised but were not.[109]

B. Huffman v. Pursue, Ltd.

In *Huffman v. Pursue, Ltd.*,[110] the Supreme Court held that the principles of federal-state comity required federal court dismissal of a section 1983 claim during the pendency of state proceedings. The Court gave four rationales for the holding. Federal interference in state court proceedings was disfavored for four reasons: First, federal intervention prevents the state from implementing its substantive policies. Second, it prevents the states from "providing a forum competent to vindicate any constitutional objections interposed against those policies." Third, an opposite result duplicates legal proceedings. Fourth, intervention may be interpreted as a federal mistrust of the state courts' ability to resolve constitutional questions.[111]

The result in *Elliott* will not fulfill these goals. Rather, the decision encourages federal disrespect for state procedures in at least two ways. First, civil rights plaintiffs may be unwilling to submit their claims to state administrative boards.[112] Thus, the state is deprived of an opportunity to possibly resolve the issue in its own forum. The state is effectively prevented from improving the ability of its administrative procedures as a forum for resolving constitutional claims; this can be seen as a mistrust of those state proceedings. Second, to the degree that issues in common between a section 1983 and a Title VII claim are litigated de novo in federal court, legal proceedings are duplicated, perhaps with inconsistent results.[113]

The Supreme Court's policy of restricting access to a federal forum as demonstrated by *Allen*, coupled with the Court's reliance in *Huffman* on federal-state

---

applied in other cases. *Id.* at 112 (Blackmun, J., dissenting). *See also* C. WRIGHT, FEDERAL COURTS, *supra* note 9, § 100A.

[108] *Id.* at 97 n.10.

[109] See *supra* note 49 and accompanying text for a discussion of the merger and bar concepts of claim preclusion.

[110] 420 U.S. 592 (1975).

[111] *Id.* at 604. *See generally* Bartels, *supra* note 9, at 44-63. *Cf.* Neuborne, *supra* note 102.

[112] *See* Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985).

[113] *See* FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4471, at 169 (Supp. 1985), *cited in Elliott*, 106 S. Ct. at 3227 n.1 (Stevens, J., dissenting).

comity principles have placed the federal courts in somewhat of a difficult position in section 1983 actions that follow state administrative proceedings, as the cause of action provided for in section 1983 allows the federal court to scrutinize state procedures.[114] A claim under section 1983 that challenges the action of a state official inherently increases the friction between the state and federal systems by implicitly encouraging plaintiffs to bypass state procedures. While *Elliott* may reduce some of the friction by precluding a federal trial on a section 1983 claim, in another sense it exacerbates the tensions already inherent in a federal system by encouraging plaintiffs to forego state administrative proceedings to avoid their preclusive effect. *Elliott* further raises the tension by opening the possibility of inconsistent determinations on similar issues between the administrative section 1983 claim and the federal court Title VII case. The comity principles were implemented to alleviate these tensions, not increase them.[115]

C. Patsy v. Florida Board of Regents

The conflict between abstention and choice of forum policy was resolved by the Supreme Court in *Patsy v. Florida Board of Regents*.[116] The plaintiff brought a section 1983 claim alleging that her employer had denied her employment opportunities on the basis of her race and sex.[117] The district court dismissed the action because the plaintiff had not exhausted the available administrative remedies. The United States Court of Appeals for the Fifth Circuit determined that exhaustion was required if the administrative remedies available to the plaintiff met minimum procedural standards.[118] Requirement of exhaustion therefore, was to be determined on a case-by-case basis.[119]

The Supreme Court reversed and held that section 1983 was an exception to the judicially-created rules that require exhaustion of administrative remedies before commencing suit in federal court.[120] Reviewing the legislative history of section 1983, the Court held that Congress intended to establish the federal government as the paramount "guarantor of the basic federal rights of individuals against incursions of state power."[121] Thus, the federal courts were thrust

---

[114] By its nature, requiring an action under color of state law, § 1983 invites federal scrutiny of state procedures.

[115] *See supra* note 9.

[116] 457 U.S. 496 (1982).

[117] *Id.* at 498.

[118] See *supra* note 31 for a discussion of the minimum procedural requirements for fourteenth amendment due process.

[119] Patsy v. Florida Int. Univ., 634 F.2d 900 (5th Cir. 1981) (en banc), *rev'd*, 457 U.S. 496 (1982).

[120] 457 U.S. at 495.

[121] *Id.* at 496.

between the people and the states as guardians of the federal constitutional rights of the people.

The Court discussed the tension between federal-state comity and the federal access policy inherent in section 1983 remedies. Although the comity interest in requiring plaintiffs to exhaust state administrative procedures was substantial, the Court determined that it was the proper role of Congress to determine the necessity for exhaustion of administrative procedures when the exhaustion rule conflicts with the intent to establish access to federal courts.[122]

The Court showed no deference to the availability of state administrative proceedings. The Court also demonstrated that the procedural "quality" of administrative proceedings did not affect a section 1983 plaintiff's right to a de novo trial in federal court. The holding that exhaustion is not required shows that a plaintiff may opt out of an administrative action at any time before the proceeding is reviewed by a state court, or may avoid administrative proceedings altogether. *Patsy* read together with *Elliott* provides a strong incentive for civil rights claimants to forego administrative proceedings if those proceedings will bar a de novo federal trial. *Elliott* violates both *Patsy*'s rationale and the policy of section 1983.[123]

Patsy is a strong reaffirmation of the basic policy underlying section 1983: the choice of a federal or state forum for plaintiffs. *Patsy* is also consistent with the policies of federal-state comity delineated in *Huffman*,[124] which encourage plaintiffs to seek redress at the state level before proceeding in federal court. A refusal by the federal courts to recognize the unreviewed findings of an administrative agency would not violate the *Huffman* principles. Adoption of the rule would, in fact, promote federal-state comity.

Allowing a section 1983 plaintiff a de novo trial in federal court even after an unreviewed adverse administrative finding would encourage parties to seek redress first at the state level. Encouraging plaintiffs to submit their claims to administrative agencies would enhance the ability of those forums to competently resolve constitutional issues. Many of these claims would be resolved by the administrative agency in favor of the plaintiffs and the matter would be settled without resort to an action in federal court. Although the state officials charged with violation of section 1983 may then pursue the matter in federal court, this is unlikely, as the officials may not be prepared to claim in federal

---

[122] *See, e.g., id.* at 516-17 (O'Connor, J., concurring).

[123] *Elliott*, 106 S. Ct. at 3228 (Stevens, J., dissenting). *See also* M. SCHWARTZ & J. KIRKLAND, *supra* note 32, § 9.10, at 210 (*Elliott* "at odds" with *Patsy*'s recognition that federal courts are the most qualified forums for adjudicating federal rights). *Cf. McDonald*, 466 U.S. at 292 (footnote omitted) ("according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide.").

[124] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

court that their state's administrative procedures are lacking.[125] *Elliott* conflicts with this basic rationale. Rather than encourage litigants to pursue administrative remedies first, the decision encourages the prudent litigant to skip these procedures to avoid the preclusive effects of merger and bar.[126]

A federal court's denial of preclusive effect to an unreviewed agency finding should be especially merited when the administrative procedure was set up by the state officials who are charged with violation of section 1983. *Elliott* is an example of how administrative proceedings may arguably comply with the procedural due process requirements, and still be questionably equitable: the ALJ was appointed by the university, and the ALJ's decision was reviewed by the vice-president of the department where Elliott was employed.[127] These officials, who either presided over or reviewed the administrative proceeding, were part of the organization that Elliott charged with discrimination.

Other comity principles would be upheld if administrative proceedings did not prevent a de novo trial. The state would not be prevented from establishing its courts as competent to adjudicate constitutional claims, and these courts would not be deprived of jurisdiction to entertain appeals from administrative agencies.

Elliott will result in plaintiffs being hesitant to submit their claims to those agencies. Because of the avoidance of state procedures, constitutional claims would not be given the opportunity for resolution at the state administrative level and would thus defeat the policies of federal-state comity. Since *Patsy* does not require resort to all available administrative remedies, section 1983 plaintiffs would be more reluctant to utilize these procedures if the decisions from these bodies would be preclusive in federal court.[128] Plaintiffs would bypass the available state procedures and would defeat the purposes of federal abstention: encouraging plaintiffs to seek redress via state procedures, reducing federal court caseload, and deference to state procedures.

In *Allen*, the Supreme Court made it clear that it did not distrust the ability of the state courts to adequately resolve federal constitutional issues. This pronouncement has been cited in arguments that federal courts should defer to agency decisions that have all the quality of procedure of a state trial.[129] This position was adopted in *Elliott*, and implies that state administrative proceedings may no longer be inadequate forums to resolve federal civil rights claims. The standard that the federal courts have applied to determine the administrative agency's ability is the minimum requirements for procedural due process.

---

[125] *See generally* FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4471 (Supp. 1985).

[126] *Elliott*, 106 S. Ct. at 3228 (Stevens, J., dissenting). *See also* M. SCHWARTZ & J. KIRKLAND, *supra* note 32, § 9.10.

[127] *Elliott*, 106 S. Ct. at 3222.

[128] *Id.* at 3228 (Stevens, J., dissenting).

[129] *See supra* note 25.

The contention is overbroad, and until *Elliott*, the Court had never faced the issue in the context of state administrative proceedings. *Allen* only addressed the ability of state *courts* to resolve federal constitutional issues. In *Kremer v. Chemical Construction Corp.*,[130] the Supreme Court did not endorse the minimum procedural due process standard as the test for determining the ability of an administrative agency to adjudicate federal civil rights.

D. Kremer v. Chemical Construction Corp.

Kremer v. Chemical Construction Corp.[131] held that an unreviewed administrative decision would not support preclusion in a subsequent Title VII action, but that preclusion would arise if the decision is affirmed through the process of state judicial review.[132] After *Allen*, it was argued that although section 1983 did not impliedly repeal the preclusion doctrines, perhaps Title VII mandated an exception.[133] *Kremer* settled this issue by holding that Title VII did not contain an implied or express repeal of section 1738.[134] Kremer had filed a discrimination charge with the EEOC claiming that his discharge and failure to be rehired were on the basis of his faith and national origin.[135] The EEOC could not consider the claim until a state employment discrimination agency had at least sixty days to act.[136] The state agency determined that there was no

---

[130] 456 U.S. 461 (1981).

[131] *Id.*

[132] *Id.* at 485.

[133] C. WRIGHT, FEDERAL COURTS, *supra* note 9, § 100A, at 692.

[134] 456 U.S. at 485.

[135] *Id.* at 463.

[136] *Id.* Title VII of the Civil Rights Act of 1964 was implemented to combat employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e to 2000e-17 (1982). The method of enforcement under Title VII is a mix of state and federal procedures. A person must first file with the federal Equal Employment Opportunity Commission (EEOC), which will investigate the charge of employment discrimination to determine if there is reasonable cause to believe that the allegation is true. If the EEOC finds that there is reasonable cause, it attempts to resolve the matter through informal arbitration and conciliation procedures, which, if unsuccessful, allow the EEOC to institute an action in federal court. If the EEOC determines that there is no reasonable cause to believe the allegation, it may dismiss the charge and issue the complainant a statutory right-to-sue letter, which allows the complainant to pursue the matter privately in federal court. *Id. See generally* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968).

In those states that have similar laws that prohibit discrimination, Title VII defers to the states and allows the state forums to first make an attempt to remedy the allegedly discriminatory practices. Many states have administrative boards similar to the EEOC, and complainants may seek review of an administrative determination in state courts. Jurisdiction of the states is not exclusive, and complainants may sue in federal court sixty days after filing with a state.

probable cause to believe that there had been discriminatory actions.[137] The agency determination was upheld by its Appeal Board, after which Kremer filed an appeal with the both the state courts and the EEOC. The state court of appeals upheld the agency determination; Kremer could have, but did not pursue further state court review of the matter.[138]

The EEOC ruled that there was no reasonable cause to believe that the charges were true and issued a statutory right-to-sue letter.[139] Kremer then filed in federal district court under Title VII alleging discrimination employment on the basis of national origin and religion. His employer argued that Kremer's claim was previously adjudicated and was thus precluded.[140] The federal district court dismissed the action and the court of appeals affirmed.[141]

The Supreme Court cited section 1738 as authority for the conclusion that the federal courts must give the same preclusive effect to a judgment as the state from which it came.[142] Under state law, Kremer was precluded from bringing a lawsuit on the same issues in state court because the state court of appeals had affirmed the agency decision and Kremer did not choose to pursue the matter further at the state level. The Supreme Court concluded that section 1738 precluded Kremer from a similar action in federal court because the state court affirmance was a "judgment" that merited full faith and credit.[143]

Two possible exceptions to section 1738 full faith and credit were discussed and rejected by the Court. The Court rejected the argument that the provisions of Title VII for a de novo federal court review impliedly repealed section 1738.[144] Kremer argued that the requirement that the EEOC give "substantial weight" to the decisions of state tribunals,[145] evinced an intention of Congress to impliedly repeal section 1738. The Court held that this requirement of "substantial weight" indicated only the minimum level of deference the EEOC must

---

Because many of the states had enacted employment antidiscrimination law, Congress felt that "the states should play an important role in enforcing Title VII, but they also felt that the federal system should only defer to 'adequate' state decisions." Jackson, Matheson & Piskorski, *supra* note 15, at 1493.

[137] 456 U.S. at 464.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 466.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 467.

[144] The Court cited *Allen* for the proposition that an exception to § 1738 will not be recognized unless an express or implied repeal is found in the subsequent statute. Kremer did not argue that Title VII expressly repealed the full faith and credit statute, only that Title VII and § 1738 were in irreconcilable conflict. *Id.* at 468. *See supra* notes 80 and 96 and accompanying text.

[145] 42 U.S.C. §§ 2000e-5(b), 706(b) (1982).

give to the state proceedings, and "[t]o suggest otherwise . . . is to prove far too much."[146] The Court also rejected Kremer's claim that the state proceedings were so inadequate that section 1738 should not be applied to give them preclusive effect.[147] Referring to *Allen*, the Court acknowledged that the lack of a " 'full and fair opportunity' to litigate the issue" is an exception to the usual preclusion requirements.[148]

The Court then set the due process clause of the fourteenth amendment as the procedural limitation for state court actions for application of full faith and credit under section 1738.[149] Under this test, the Court held that Kremer had received all the process that was due under the fourteenth amendment, and that section 1738 applied and commanded preclusion.[150]

The Court's focus on the quality of the state administrative proceedings has been used to support arguments that those proceedings that meet the standards of minimum procedural due process should be given preclusive effect in federal court. These arguments though, overlook the fact that the Court was scrutinizing administrative proceedings that had been reviewed by a state court. The Court had never directly addressed this issue prior to *Elliott*. In that case, although the Court endorsed the procedural due process standard, Justice Stevens pointed out that the case cited did not stand for this proposition.[151] Thus, the procedural due process test for preclusion should only apply once a state court has reviewed the administrative determination.[152] The Court has stated that "it is settled . . . that unreviewed administrative determinations by state agencies . . . should not prelude [de novo federal court Title VII] review *even if* such a decision were to be afforded preclusive effect in a State's own courts."[153]

The Court's recognition that unreviewed state administrative findings would not preclude a Title VII action supports the conclusion that such a rule should operate in section 1983 actions. Since the Court in *Elliott* adopted contrary rules for section 1983 actions and Title VII claims, civil rights claimants face differ-

---

[146] 456 U.S. at 470.

[147] *Id.* at 479.

[148] *Id.* at 480-81 (citing *Allen*, 449 U.S. at 95); *Montana*, 440 U.S. at 153; *Blonder-Tongue*, 402 U.S. at 328-29. The *Kremer* Court noted that although the previous cases had only dealt with issue preclusion, claim preclusion is subject to the same limitation. 456 U.S. at 481 n.22.

[149] 456 U.S. at 481.

[150] *Id.* at 483.

[151] *Elliott*, 106 S. Ct. at 3228 (Stevens, J., dissenting). See *supra* note 43 for the dissenters' criticism of the Court's analogy to *Utah Construction*.

[152] *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981).

[153] *Id.* at 470 n.7 (emphasis added). Prior to *Elliott*, some federal courts did not preclude such unreviewed actions on the basis that the plaintiff in a Title VII action had a full and fair opportunity to litigate. *See, e.g.*, Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 590 F. Supp. 1146 (N.D. Ill. 1984) (If the procedures were adequate, the administrative findings have preclusive effect in subsequent Title VII action.), *aff'd*, 768 F.2d 842 (7th Cir. 1985).

ent rules of preclusion. Such a "schizophrenic"[154] result must not have been intended by the Supreme Court, as the Court's previous decisions have opted for symmetrical preclusion rules in section 1983 and Title VII actions.[155]

E. Haring v. Prosise

In *Haring v. Prosise*,[156] the Supreme Court held that in certain contexts, section 1983 may inherently reserve the power of the federal courts to deny preclusion to prior state decisions, whether from a state court or administrative proceeding. The case demonstrates that when the underlying policy of section 1983 and the preclusion doctrines conflict, the Court has the inherent power to strike the balance in favor of section 1983. In *Haring*, a unanimous Court clarified some preclusion issues left unclear by *Allen* and *Kremer*. Prosise had pleaded guilty to a state charge of manufacturing drugs. The question presented was whether Prosise's guilty plea barred a subsequent section 1983 claim.[157] At the hearing concerning the guilty plea, a police officer gave an account of the search of Prosise's apartment. Prosise then brought a damage action under section 1983 in federal court against the police officers for an unconstitutional search.[158] The district court granted summary judgment for the police officers on the ground that Prosise's guilty plea barred relitigation of his civil rights claim.[159] The court of appeals reversed in pertinent part and remanded for further proceedings.[160]

In affirming, the Supreme Court reiterated the point from *Kremer*: that section 1738 required the federal courts to follow state laws of preclusion.[161] The Court found that under the state's law, a plea of guilty in a criminal action did foreclose civil proceedings.[162] The Court, however, held that this state rule did not merit recognition in a section 1983 action. To allow a guilty plea in state court to bar subsequent civil rights action in federal court under section 1983, "would be wholly contrary to one of the central concerns which motivated the enactment of § 1983, namely, the 'grave congressional concern that the state courts had been deficient in protecting federal rights.' "[163] The Court further announced that the underlying policy of section 1983 may reserve power in the

---

[154] *See generally* FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4407 (Supp. 1985).
[155] *Id.*
[156] 462 U.S. 306 (1983).
[157] *Id.* at 308.
[158] *Id.*
[159] *Id.* at 309.
[160] *Id.* at 310.
[161] *Id.* at 312-13.
[162] *Id.* at 314-16.
[163] *Id.* at 323 (quoting *Allen*, 449 U.S. at 98-99).

federal courts to hear claims when the state courts are unwilling to protect federal rights, and that 42 U.S.C. section 1988[164] allows the federal courts to circumvent the application of similar state law if it is inconsistent with the policy of section 1983. Thus, the *Haring* decision seemed to conflict with the "flat statements" of *Kremer* that a state court proceeding can be disregarded *only* if the procedures did not conform with the minimum due process requirements of the fourteenth amendment.[165] Thus, the due process analysis for determination of the adequacy of administrative procedure is arguably not applicable. *Haring* also held that additional exceptions to preclusion may be warranted where the state courts were unable or unwilling to enforce federal

---

[164] Generally, § 1983 claims are seen "against the backdrop of [state] tort liability." *Monroe*, 365 U.S. at 187 (dictum). Thus, when federal law is incomplete, § 1988 permits the federal court to apply analogous state law so long as it is consistent with the rationale of § 1983. Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1982) (emphasis added). This section also allows the federal court to award attorney's fees to the prevailing party in civil rights actions.

In North Carolina Dep't of Transp. v. Crest Street Community Council, 107 S. Ct. 336 (1986), the Court held that § 1988 does not permit an award of attorney's fees to a "prevailing party" in an administrative civil rights action. *See also* Webb v. Dyer County Bd. of Educ., 471 U.S. 234 (1985) (state administrative hearing is not an action under § 1983); New York Gaslight Club v. Carey, 447 U.S. 54 (1980) (proceedings under state's employment statutes qualify as Title VII proceedings for fee purposes).

The purpose of the fee provision of § 1988 is to encourage attorneys to accept meritorious civil rights clients who otherwise may be unable to afford representation. The Court's holding in *Elliott*, allowing preclusion from administrative action, coupled with *Crest Street*'s limitations on fee awards from such actions, provides two reasons for litigants to avoid administrative forums. First, with no "fee incentive," attorneys may not be as willing to accept clients who wish to pursue state administrative review of a civil rights claim. Second, prudent claimants will likely avoid the state procedures to forestall the possibility of preclusion. Thus, there are strong incentives for both litigant and lawyer to avoid state administrative forums. This result neither promotes federal-state comity nor allows the state forums the opportunity to enhance their civil rights decision-making ability. *Cf. Younger*, 401 U.S. at 44.

[165] FEDERAL PRACTICE & PROCEDURE, *supra* note 52, § 4471, at 160 (Supp. 1985) (emphasis added).

rights—the policy underlying section 1983.[166]

This policy is especially critical when determining if unreviewed agency determinations should be preclusive in section 1983 actions. As discussed earlier, administrative agencies are not necessarily as competent as the federal courts to resolve questions of federal constitutional rights. Under *Elliott*, it is possible, since administrative findings are given preclusive effect in federal court, that a plaintiff would be foreclosed from ever presenting his constitutional claim to a competent forum. Section 1983 was specifically created to avoid such situations by giving plaintiffs the choice of state or federal court. *Haring*'s pronouncements support adoption of a rule that does not recognize unreviewed agency decisions.

IV. CONCLUSION

The conclusion that the federal courts must never give full faith and credit in a section 1983 action to an unreviewed agency determination follows from an analysis of section 1738, the purposes of common law preclusion, the policy of section 1983, and federal-state comity interests.

By plain language analysis, it is clear that the full faith and credit statute, which only requires recognition of judgments of courts, does not apply in federal court. This rule operates regardless of the judicial nature of the agency, the procedural quality of the administrative proceedings, or any state rule of preclusion which would give effect to the agency findings. Further, preclusion does not promote the private or public interests underlying the federal common law preclusion doctrines. *Elliott* provides disincentives for efficient claim and party joinder, and does not bar a "second ordeal" on substantively similar issues. Disrespect for both administrative and judicial decisions would flow from any inconsistent results between the two forums.

Section 1983, as a "uniquely federal remedy," allows plaintiffs who allege violations of federal constitutional rights the choice of a state or federal court forum in which to air their constitutional claims. This underlying policy of section 1983 dictates that federal courts must be willing to entertain claims even following an adverse finding by a state administrative agency. To do otherwise would be to defeat the purpose and core rationale of the civil rights statute. A primary reason section 1983 was created by Congress was to allow plaintiffs to avoid state forums if they so desired. If a plaintiff chooses state judicial review of the administrative agency decision, the judgment of the court has preclusive, binding effect. It should inherently be the plaintiff's choice though, to forego this review and proceed with a trial de novo in federal court. This result not only upholds the forum choice policy of section 1983, but ultimately

[166] 462 U.S. at 305.

increases the willingness of plaintiffs to initially seek state remedies. This is consistent with the Supreme Court's emphasis on federal-state comity and deference to state procedures.

The words of the United States Court of Appeals for the Fourth Circuit sum up the issue: "Inherent in the opportunity of civil rights plaintiffs to have their grievances resolved in either state or federal court is the principle that while plaintiffs are sometimes limited by res judicata and collateral estoppel to only one bite of the *judicial* apple, the choice of the bite is theirs."[167] The adverse conclusion in *Elliott* robs plaintiffs of that choice, and only by reaching the conclusion that unreviewed administrative findings do not have preclusive effect in federal actions under section 1983 does a person alleging violations of constitutional rights gain access to a federal forum.

Robert H. Thomas

---

[167] Moore v. Bonner, 695 F.2d 799, 802 (4th Cir. 1982) (emphasis added).

University of Hawaii Law Review

RECENT DEVELOPMENTS

1986-1987

CIVIL RIGHTS—*Bullen v. DeRego*: Insulation and Immunity From Actions Under Section 1983

I. INTRODUCTION

In *Bullen v. DeRego*,[1] the Hawaii Supreme Court held that Honolulu Police Department officers were insulated from liability for violations of 42 U.S.C. section 1983,[2] because the chain of causation between police conduct and the harm to Bullen was broken by the independent judgment of a judicial officer.[3] Federal law, which governs this action brought in state court,[4] grants qualified immunity to police officers governed by an objective standard of reasonableness. This recent development criticizes the Hawaii Supreme Court's failure to employ qualified immunity as the governing standard.

II. FACTS

Plaintiff Guy Bullen was convicted in 1976 of promoting a dangerous drug in the second degree.[5] Four years later the conviction was vacated by the Hawaii Supreme Court and the indictment was dismissed.[6] Bullen then brought a

---

[1] 68 Haw. ____, 724 P.2d 106 (1986) (*Bullen II*).

[2] 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the Jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[3] The judge's denial of a pretrial motion to either produce the witness or dismiss the indictment constituted the "independent judgment" which intervened to break the chain of causation between the officer's conduct (failing to determine the destination or whereabouts of the witness) and Bullen's incarceration. *Bullen II*, 68 Haw. at ____, 724 P.2d at 110. *See infra* notes 36-38 and accompanying text. *See also* Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982).

[4] The supremacy clause of the federal constitution commands state courts to follow federal decisions when applying a federal statute such as § 1983. U.S. CONST. art. VI, cl. 2. A uniform application of federal law is essential to the appellate process. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 119 (4th ed. 1983).

[5] *Bullen II*, 68 Haw. at ____, 724 P.2d at 107.

[6] 68 Haw. at ____, 724 P.2d at 107. Bullen was convicted under HAW. REV. STAT. § 712-

civil rights action against several police officers and the City and County of Honolulu.

Bullen alleged that he had been unlawfully denied the right[7] to obtain testimony of a material witness at his trial in 1976. The material witness was an informant, James Scott, who was used by police as an intermediary for the drug purchase which led to Bullen's conviction.[8] Scott left Hawaii with the aid of police officers, who made no attempt to ascertain his destination.[9] After an unsuccessful attempt to serve Scott with a subpoena, Bullen moved to compel the State to either produce Scott or dismiss the indictment.[10] The court denied the motion and convicted Bullen on October 13, 1976.[11] In 1980, the Hawaii Supreme Court vacated the conviction, concluding that the circuit court erred in denying the pretrial motion seeking production of Scott or dismissal.[12] The State then chose to dismiss the indictment.[13]

Bullen's civil rights suit sought damages for the loss of his liberty for extended periods of time, the loss of income and wages, severe emotional and mental distress, and punitive damages from the police officers and the City and County of Honolulu.[14] The circuit court granted a directed verdict for the defendants, holding that the police had a qualified "good faith" immunity and that the statute of limitations had run.[15]

III. Background of Section 1983

Section 1 of the Civil Rights Act of 1871, curently 42 U.S.C. section

---

1242(1)(c) (1968).

[7] Bullen alleged that his rights to "due process of law" and "to compulsory attendance of a witness in his behalf" were violated. 68 Haw. at ___, 724 P.2d at 107. The claims were premised on the sixth amendment to the federal constitution, and article I, § 14 of the Hawaii Constitution. Both of these read in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI; HAW. CONST. art. I, § 14.

[8] Scott actively participated in transactions which led to the prosecution of Bullen. *Bullen II*, 68 Haw. at ____, 724 P.2d at 107.

[9] James Scott was promised that criminal charges pending against him would be dismissed if he cooperated in the investigation of drug traffic in Waikiki. Police officers later gave Scott money to purchase a plane ticket and escorted him to the airport. Although the court was satisfied that the police did not act in bad faith, police conduct still made it impossible for the defendant to locate the informer. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at ____, 724 P.2d at 108.

[15] *Id.*

1983,[16] was intended to create a private cause of action for individuals whose constitutional rights were violated by persons acting under color of state law.[17] The broad language of section 1983 evidenced fundamental policy concerns about providing an enforceable federal remedy where state remedies were inadequate.[18] Concurrent jurisdiction allows a section 1983 action to be brought either in state or federal court.[19] As in *Bullen*, when the action is in state court, federal law must be followed.[20] Herein lies the fundamental criticism of the decision in *Bullen*; despite clear federal precedent to the contrary, the Hawaii Supreme Court adopted a divergent line of analysis with respect to immunities under section 1983.[21]

Although no immunities are provided for by its terms, section 1983 is read "in harmony with general principles of tort immunities and defenses rather than in derogation of them."[22] The application of common law tort principles in a section 1983 context is largely due to the influential dictum of Justice

---

[16] 42 U.S.C. § 1983 has its roots in § 1 of the Civil Rights Act, 17 Stat. 13 (1871). Originally entitled the Ku Klux Klan Act, it was intended to be a means of private enforcement enforcing the provisions of the fourteenth amendment.

[17] For a discussion of the "color of law" requirement, see Monroe v. Pape, 365 U.S. 167 (1961). *See also* Comment, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U. L. REV. 839 (1964).

[18] The Supreme Court has recognized that "section 1983's language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." Owen v. City of Independence, 445 U.S. 622, 635 (1980). The purposes of § 1983 are best discerned from its legislative history, which indicates a strong desire to create an enforcement mechanism to effectuate the civil rights granted to newly freed slaves. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 367 (1871) (remarks of Mr. Sheldon): "The Government of the United States was established not merely to declare the true principles of liberty, but to provide for their maintenance and preservation." *See also* Comment, *A New Perspective on Legislative Immunity in § 1983 Actions*, 28 UCLA L. REV., 1088 (1981).

[19] The federal remedy is supplemental to the state remedy. In enacting § 1983, Congress added to the jurisdiction of the federal courts rather than subtracting from that of state courts. *Monroe*, 365 U.S. at 183. Concurrent jurisdiction between federal and state courts is amply supported by the legislative history embodied in the debates surrounding the statute's enactment. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 514 (1871) (Rep. Poland).

[20] *See supra* note 4.

[21] The Hawaii Supreme Court followed Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982) by using a chain of causation analysis to insulate police officers from liability. However, the United States Supreme Court held that a chain of causation analysis is inconsistent with the interpretation of § 1983 where an independent judgement of a judicial officer intervened between the misconduct of the police and the harm to the individual. Malley v. Briggs, 106 S. Ct. 1092, 1098 n.7 (1986). *See infra* notes 44-49 and accompanying text.

[22] Imbler v. Pachtman, 424 U.S. 409, 418 (1976). In *Imbler*, the Court considered whether common law absolute immunity for judges and prosecutors should encompass actions under § 1983. Looking at both the background of the common law immunity and the underlying goals of § 1983, the immunity was established in a § 1983 context. *Id.* at 421.

Douglas in *Monroe v. Pape*,[23] wherein he noted that actions under section 1983 should be viewed "against the backdrop of tort liability."[24] The statute was not, however, intended to automatically incorporate all common law immunities, and the United States Supreme Court has only recognized immunities after a two step inquiry.[25] The initial hurdle requires a common law counterpart to the immunity asserted by the official. If such immunity existed in 1871 when section 1983 was originally enacted, the second step considers whether section 1983's history or purposes counsel against recognizing the same immunity in a section 1983 action.[26]

Both absolute and qualified immunities[27] have been recognized as potentially applicable to section 1983 actions, depending on the proximity of the defendant and the judicial process.[28] Judges and prosecutors enjoyed absolute immunity at common law, and because they are also intimately associated with the judicial process, the absolute immunity was incorporated into section 1983.[29] Extension of absolute immunity for these judicial officers protects them from the threat of a lawsuit and potential liability for their discretionary roles.

Police officers are generally further removed from the judicial phase of criminal proceedings than prosecutors or judges. Qualified immunity has thus been uniformly applied in section 1983 actions against police officers,[30] and repre-

---

[23] 365 U.S. 167 (1961).

[24] The statement in its entirety reads: "Section 1979 (currently 1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. The mention of the "natural consequences" and the context of the statement imply that Justice Douglas meant only to establish that specific intent to deprive a person of a federal right was not necessary to state a claim under § 1983. The use of this statement to incorporate a whole spectrum of defenses from common law may accomplish more than Justice Douglas intended.

[25] Tower v. Glover, 467 U.S. 914 (1984).

[26] *Id.* at 920.

[27] Absolute immunity is conferred on an individual who, by virtue of his title, is immune from liability for damages under the act for all acts performed within the scope of official duty. Scheuer v. Rhodes, 416 U.S. 232 (1974). The liability of an official shielded by *qualified* immunity depends on the facts of the particular case, such as the objective reasonableness of his conduct. *See infra* notes 29-34 and accompanying text.

[28] Section 1983 has been interpreted to give absolute immunity to officials "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. But where the action of the official is further removed, a qualified immunity is appropriate. *Malley*, 106 S.Ct. at 1097 (officer's application for arrest warrant).

[29] *Imbler*, 424 U.S. at 403.

[30] Pierson v. Ray, 386 U.S. 547 (1967). In *Pierson*, police officers arrested petitioners for attempting to use segregated facilities. The petitioners were charged and convicted of violating a Mississippi law, which was later held invalid. The court carefully articulated the policy concerns for extending the qualified immunity to actions under § 1983: "A police officer's lot is not so unhappy that he must choose between dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555. *See also* Harlow v. Fitzger-

sents the norm for executive officials in general.[31]

If qualified immunity is recognized in a section 1983 context, liability will attach only in limited circumstances. In *Malley v. Briggs*,[32] the United States Supreme Court expressed the qualification applied to immunity for police officers. If the officer acted in an objectively reasonable manner, he will be shielded from section 1983 liability.[33] However, if it is obvious from an objective viewpoint that no reasonably competent officer would have acted in such a manner, immunity will not be recognized.[34] Federal and state officers seeking absolute immunity from unconstitutional conduct must bear the burden of showing that public policy requires an exception of that broad a scope.[35]

IV. ANALYSIS

In *Bullen*, the Hawaii Supreme Court found a reason "more compelling" than qualified immunity to shield the police officers.[36] Rather than looking at the objective reasonableness of the police conduct, the court held that a lack of causation immunized the police officers.

The denial of the pretrial motion to produce the witness or dismiss the indictment was held to break the causal chain and insulate the police officers.[37] Noting that the trial court was fully apprised of the circumstances surrounding Scott's departure from Hawaii, and that a specific plea had been addressed to the court to produce Scott or dismiss the indictment, the court concluded that the trial judge's ruling on the motion intervened to insulate the police officers.[38]

The supreme court relied primarily on a decision from the Court of Appeals for the Ninth Circuit for the insulation analysis. In *Smiddy v. Varney*,[39] the plaintiff brought a civil rights action premised on a claim of false arrest.[40] The court found a lack of causation between the arrest of the plaintiff and his subse-

---

ald, 457 U.S. 800 (1982). The qualified immunity analysis was employed by the trial court in *Bullen I*, but was abandoned by the Hawaii Supreme Court in favor of the "insulation" analysis. *Bullen II*, 68 Haw. at ____, 724 P.2d at 109-10.

[31] *Harlow*, 457 U.S. at 807. Although *Harlow* was a suit against federal, not state officials, a distinction between suits brought against a state official and a suit brought directly under the constitution against federal officials is untenable. Butz v. Economou, 438 U.S. 478, 504 (1978).

[32] 106 S. Ct. 1092 (1986).

[33] *Id.* at 1098. *See also Harlow*, 457 U.S. 800.

[34] The "objective reasonableness" standard supplants earlier constructions of qualified immunity that considered subjective factors such as malice. *Harlow*, 457 U.S. at 815-17.

[35] *Malley*, 106 S.Ct. at 1096 (citing *Butz*, 438 U.S. at 506).

[36] *Bullen II*, 68 Haw. at ____, 724 P.2d at 108.

[37] *Id.* at ____, 724 P.2d at 109.

[38] *Id.*

[39] 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982).

[40] *Id.* at 267.

quent prosecution. The prosecutor, in determining probable cause and filing the complaint, was held to have exercised the independent judgement that insulated the police officer.[41] *Smiddy* does offer qualified immunity for police officers as an alternative ground, whereas the court in *Bullen* simply labels the causation analysis more compelling than qualified immunity.

Although section 1983 actions should be viewed against the backdrop of tort liability,[42] testing whether the immunity should be recognized and considering the objective reasonableness of an officer's conduct must control the analysis.[43] Furthermore, a chain of causation analysis has been expressly rejected by the United States Supreme Court under analogous circumstances. In *Malley*,[44] a state trooper presented felony complaints and supporting affidavits to a judge, charging the respondent with possession of marijuana.[45] The judge signed the arrest warrants, and the respondent was arrested. After the grand jury refused to return an indictment due to lack of probable cause, the charges were dropped.[46] The respondent then brought a section 1983 damages action against the arresting officer. The district court directed a verdict for the police officer because the act of the judge in issuing the arrest warrant broke the causal chain between the filing of the complaint and the respondent's arrest.[47] The Ninth Circuit reversed, holding that an officer would only be immune from liability if he had an objectively reasonable basis for believing that the facts alleged in the affidavits are sufficient to establish probable cause.[48] In affirming, the United States Supreme Court agreed with the Ninth Circuit's characterization of qualified immunity, and expressly found that the "no causation" rationale of the district court "is inconsistent with our interpretation of section 1983."[49]

The insulation recognized by the Hawaii Supreme Court in *Bullen* effectively

---

[41] *Id.*

[42] The causation approach to immunities under § 1983 has met with criticism: "It is apparent courts have seized upon the 'background of tort liability' [dicta in *Monroe*] catch phrase with little consideration given to the background of section 1983 liability." Nahmod, *Section 1983 and the Background of Liability*, 50 IND. L.J. 15 (1974).

[43] *See supra* notes 25-34 and accompanying text.

[44] 106 S. Ct. 1092.

[45] *Id.* at 1095.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1098. The actual subjective belief of the police officer concerning the constitutionality of his actions is no longer relevant. "The good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that his [conduct was constitutional]." *Id.*

[49] *Id.* at 1098 n.7. The fact that a judicial officer may have made an equal or even greater error than the police officer does not relieve the police officer of liability. "The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 1099 n.9.

carves out an immunity for police officers which lies somewhere between an absolute and a qualified immunity. The immunity is less than absolute due to a rebuttable presumption of independence for the judicial officer,[50] and greater than a qualified immunity because the officer's conduct is not checked by a standard of objective reasonableness.[51] Despite the creation of this new form of immunity, the supreme court neglected to find any common law counterpart to the immunity, and failed to relate the immunity to the policies of section 1983.[52] In drafting section 1983, Congress intended to create and guard an enforceable remedy, evidenced by both the language[53] and spirit[54] of the statute. Immunities, which by definition conflict with this policy, must be methodically scrutinized before recognition in a section 1983 context.

The impact of *Bullen* on civil rights litigants is substantial. First, governing federal law pertaining to section 1983 immunities has been circumvented by a causation analysis. This undermines efforts of the United States Supreme Court to reconcile the common law backdrop of section 1983 with the goals of the statute's enactment. Second, an insulation analysis promotes an inconsistent approach to a federal statute. Under the appropriate qualified immunity analysis, immunity should be recognized if officers act in an objectively reasonable manner. By contrast, a chain of causation analysis directs attention to intervening causes rather than the reasonableness of the officer's conduct.

In *Bullen*, the court acknowledged that in the particular circumstances the officers "did not act deliberately and intentionally to render the witness unavailable."[55] This conclusion was not necessary to the court's holding. When officers do act maliciously and intentionally in depriving an individual's constitutional rights, the threat of inconsistency arises. Qualified immunity would not shield

---

[50] *Smiddy*, 665 F.2d at 266. The plaintiff has the burden of introducing evidence to rebut the presumption, which may be accomplished by showing that the judicial officer was pressured or misled by the police officer. The court noted that "the presumption may be rebutted in other ways." *Id.* at 267.

[51] *See supra* notes 33 & 34 and accompanying text.

[52] As outlined in Tower v. Glover, 467 U.S. 914 (1984). *See supra* notes 25 & 26 and accompanying text.

[53] The statute provides "every citizen or person within the jurisdiction of the United States" with the right to seek relief. 42 U.S.C. § 1983 (1982). This language has descended to modern law unchanged, and nothing in the statute qualifies or limits its application.

[54] The major source of information concerning the purpose and intended scope of § 1983 comes from the Congressional debates on both the 1866 Act and the Ku Klux Klan Act. Lyan Trumbull, supporting the 1866 Act, stated, "There is very little importance in the declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are affected by them have some means of availing themselves of their benefits." 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 106 (Schwartz ed. 1970).

[55] *Bullen II*, 68 Haw. at ____, 724 P.2d at 108 (quoting State v. Bullen, 63 Haw. 27, 33, 620 P.2d 728, 731 (1980)).

the officer, but he may nonetheless be immunized by a chain of causation analysis.

The failure of the Hawaii Supreme Court to follow binding federal law also discourages civil rights plaintiffs from bringing actions in state courts. State law enforcement officers are thus afforded greater discretion and diminished vulnerability to civil rights actions. Furthermore, officers are not induced to reflect on the objective reasonableness of their conduct, undermining the deterrent value of section 1983 and increasing the margin of error for constitutional violations.

V. CONCLUSION

Bullen v. DeRego held that police officers are insulated from liability when an independent judicial judgment intervenes to break the chain of causation between them and the harm to the plaintiff. This result effectively immunizes police officers from suits arising under section 1983, without inquiring into the objective reasonableness of the officer's conduct. In light of United States Supreme Court precedent calling for such an inquiry while rejecting a causation analysis, *Bullen* sets a dangerous precedent tending toward an inconsistent application of section 1983.

Daniel A. Morris

TORTS—*Campo v. Taboada*: Interspousal Tort Immunity and the Right of Contribution

I. INTRODUCTION

In *Campo v. Taboada*,[1] the Hawaii Supreme Court held that interspousal tort immunity would not preclude a defendant from filing a third-party action for contribution against the plaintiff's spouse.[2] The court reasoned that the policy considerations supporting interspousal tort immunity do not override the policies supporting the right of contribution among joint tortfeasors.[3] This decision is consistent with the result reached by numerous other jurisdictions which have addressed the same issue.[4] This recent development analyzes the decision

---

[1] 68 Haw. ____, 720 P.2d 181 (1986).

[2] The Hawaii Supreme Court affirmed the trial court's order denying the third-party defendant wife's motion to dismiss. *Id.* at ____, 720 P.2d at 183.

[3] *Id.*

[4] Paoli v. Shor, 345 So. 2d 789 (Fla. Dist. Ct. App. 1977), *approved*, 353 So. 2d 825 (Fla. 1977) (interspousal immunity did not preclude judgment debtor's contribution action against plaintiff's wife); Wirth v. City of Highland Park, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981) (trial court's order denying the third-party defendant spouse's motion to dismiss a third-party action for contribution based on interspousal tort immunity affirmed); Smith v. Southern Farm Bureau Casualty Ins. Co., 247 La. 695, 174 So. 2d 122 (1965) (interspousal immunity did not preclude defendant insurer's third-party demand for contribution against plaintiff's husband); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963) (court reinstated defendant driver's third-party claim for contribution against plaintiff's husband even though spouses could not maintain causes of action against each other for negligent torts); Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966) (husband was a "joint tortfeasor" within the meaning of the Uniform Contribution Among Tortfeasors Act, and thus, could be held liable for contribution nothwithstanding the interspousal immunity doctrine).

Contra Yellow Cab Co. of D.C., Inc. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950) (interspousal immunity precluded defendant taxi companies' cross-claim for contribution against the plaintiff's husband); Goldberg v. Faull, 275 F. Supp. 96 (E.D. Tenn. 1967) (whether Michigan or Tennessee law is applied, interspousal tort immunity doctrine precluded a third-party action for indemnity or contribution against plaintiff's spouse); Blunt v. Brown, 225 F. Supp. 326 (S.D. Iowa 1963) (marital immunity doctrine precluded defendant driver from joining plaintiff's husband as a third-party defendant for indemnity or contribution); Chamberlain v. McCleary, 217 F. Supp. 591 (E.D. Tenn. 1963) (court dismissed third-party action against plaintiff's husband for indemnity or contribution on the grounds of domestic immunity); Short Line, Inc. of Pa. v. Perez, 238 A.2d 341 (Del. 1968) (interspousal tort immunity precluded the defendant bus company from

reached by the supreme court, compares it with prior Hawaii case law interpreting the interspousal tort immunity statute[5] and the Uniform Contribution Among Tortfeasors Act,[6] and examines its potential impact.

II. FACTS

Campo involved an auto accident between two vehicles, one driven by the third-party defendant Maria Campo, in which her husband, plaintiff Valentin Campo, was injured as a passenger.[7] The other vehicle was driven by defendant Justina Taboada. The Campos' car was struck from the rear by Taboada's car while Mrs. Campo was braking at a traffic light. Both vehicles were in a funeral procession at the time of the accident.

Mr. Campo filed a negligence action against Taboada, who then filed a third-party complaint against Mrs. Campo for contribution under the Uniform Con-

---

maintaining a third-party action for contribution against the plaintiff's wife); Pennington v. Dye, 456 So. 2d 507 (Fla. Dist. Ct. App. 1984) (applying Ohio law, interspousal immunity doctrine barred defendant driver and his insurer's cross-claim for contribution against plaintiff's husband); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960) (interspousal immunity prevented defendant driver from maintaining a third-party claim for contribution against decedent's husband); Renfrow v. Gojohn, 600 S.W.2d 77 (Mo. Ct. App. 1980) (interspousal immunity prevented defendant driver from filing a counter-claim seeking apportionment of damages against the co-plaintiff husband-driver); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965) (applying West Virginia law, defendant driver was not entitled to maintain a cross-action for contribution against the plaintiff's husband).

[5] HAW. REV. STAT. § 573-5 (1985) provides that "[a] married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."

In Peters v. Peters, 63 Haw. 653, 634 P.2d 586 (1981), the Hawaii Supreme Court reaffirmed the existence of interspousal tort immunity in Hawaii. *See infra* notes 13-15 and accompanying text.

[6] HAW. REV. STAT. § 663-11 (1985) provides:

> For the purpose of this part the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

HAW. REV. STAT. § 663-12 (1985) provides that "[t]he right of contribution exists among joint tortfeasors."

HAW. REV. STAT. § 663-17(a) (1985) provides:

> A pleader may, as provided by the rules of court, bring in as a third-party defendant a person not a party to the action who is or may be liable to the pleader or to the person claiming against the pleader, for all or part of the claim asserted against the pleader in the action, whether or not liability for the claim is admitted by the pleader. A third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of the third party defendant's own liability to the plaintiff or to the third-party plaintiff.

[7] 68 Haw. at ____, 720 P.2d at 182.

tribution Among Tortfeasors Act.[8] Mrs. Campo then filed a motion to dismiss the third-party complaint on the grounds of interspousal tort immunity. The trial court denied Mrs. Campo's motion. On appeal, the Hawaii Supreme Court affirmed the trial court's order, thereby allowing Mrs. Campo to be named as a third-party defendant.[9]

III. ANALYSIS

In *Campo*, the Hawaii Supreme Court addressed the issue of whether the interspousal tort immunity statute precluded Taboada from filing a third-party action for contribution against the plaintiff's spouse.[10] The court was faced with an apparent conflict between two statutes—section 5 of the Married Woman's Act,[11] which codifies the interspousal tort immunity doctrine, and the Uniform Contribution Among Tortfeasors Act,[12] which establishes the right of contribution among joint tortfeasors.

Under section 5 of the Married Woman's Act, suits between spouses are prohibited. In *Peters v. Peters*,[13] the supreme court's application of the interspousal tort immunity statute precluded a direct action between a wife and husband.[14] Although *Peters* failed to address the issue of interspousal tort immunity in the context of a third-party action, the court noted: "We do not foreclose the possibility of a modification of the rule in other contexts where there may be overriding policy or constitutional concerns, for the considerations

---

[8] Taboada alleged that Mrs. Campo's negligence caused some or all of Mr. Campo's injuries. *Id.*

[9] *Id.* at ____, 720 P.2d at 183.

[10] *Id.* at ____, 720 P.2d at 182.

[11] For the text of HAW. REV. STAT. § 573-5, see *supra* note 5.

[12] HAW. REV. STAT. § 663-12 (1985) provides that the "right of contribution exists among joint tortfeasors."

[13] 63 Haw. 653, 634 P.2d 586 (1981).

[14] *Peters* involved an auto accident between a rental vehicle and truck, where the passenger of the vehicle, Mrs. Peters, filed a negligence action against the vehicle's driver, her husband Mr. Peters. *Id.* at 655, 634 P.2d at 588. The Hawaii Supreme Court affirmed the trial court's order granting summary judgment in favor of the defendant husband on the grounds of interspousal tort immunity. *Id.* at 668, 634 P.2d at 595.

The court noted that while the Married Woman's Act "has been subject to extensive amendment since its adoption," HAW. REV. STAT. § 573-5 has remained intact. *Peters*, 63 Haw. at 659, 634 P.2d at 590. Thus, deference to the legislature would be the proper judicial stance in this area. "Where aspects of a legislatively adopted public policy statement have been examined and changed by the legislature, it would be presumptuous to believe an unamended aspect has been left for judicial alteration." *Id.* at 659, 634 P.2d at 590. The court was unable to conclude that the policy supporting interspousal tort immunity was without any rationality, noting that "in the considered judgment of the courts or legislatures of nearly half of the states, the rule may still serve a salutary purpose." *Id.* at 660, 634 P.2d at 591.

supporting immunity are not the same in every adversary situation that may develop between husband and wife."[15]

Section 12 of the Uniform Contribution Among Tortfeasors Act creates a right of contribution among joint tortfeasors. Conversely, a party who is not a "joint tortfeasor," as defined in section 663-11,[16] cannot be held liable for contribution. Thus, if Mrs. Campo was not a "joint tortfeasor" due to interspousal tort immunity, she would be immune from liability to Taboada for contribution. In *Petersen v. City & County of Honolulu*,[17] the supreme court interpreted "joint tortfeasors" in section 663-11 and noted that "whether contribution may be had from a [third-] person depends upon whether the original plaintiff could have enforced liability against him [the third-person], had he chosen to do so."[18]

Pursuant to *Petersen*, Mrs. Campo contended that interspousal tort immunity precluded Taboada's third-party action for contribution.[19] The supreme court acknowledged that although *Peters* "did not address the issue of interspousal tort immunity in the context of a third-party action,"[20] it left open the possibility of modification "in other contexts where there may be overriding policy or constitutional concerns."[21] The court subsequently applied an *in pari materia*[22]

---

[15] 63 Haw. at 659 n.9, 634 P.2d at 590 n.9.

[16] For the text of HAW. REV. STAT. § 663-11, see *supra* note 6.

[17] 51 Haw. 484, 462 P.2d 1007 (1969).

In *Petersen*, a minor child filed a negligence action against the City and County of Honolulu for injuries sustained at Hanauma Bay. The minor's parents joined as co-plaintiffs to recover medical expenses. The City then filed a counterclaim against the parents for contribution under the Uniform Contribution Among Tortfeasors Act. *Id.* at 484-85, 462 P.2d at 1008. Reaffirming its position that it would not adopt the parent-child immunity doctrine in Hawaii, the court held that the minor child could sue his parents and that the counter-claim should have been allowed. *Id.* at 486, 462 P.2d at 1008.

[18] *Id.* at 486, 462 P.2d at 1008 (citing Tamashiro v. DeGama, 51 Haw. 74, 450 P.2d 998 (1969)).

Tamashiro involved an auto accident between two vehicles. Mr. and Mrs. Tamashiro, passengers in the vehicle driven by their minor son, Ronald Tamashiro, sued the driver of the other vehicle, defendant DeGama, for injuries sustained from the accident. 51 Haw. at 74, 450 P.2d at 999. DeGama, in turn, filed a third-party action for contribution against Ronald Tamashiro, which the trial court dismissed. The supreme court interpreted the term "liable" in § 1 of the Uniform Contribution Among Tortfeasors Act [presently HAW. REV. STAT. § 663-11] as follows: "We believe that 'liable' has acquired the technical, legal meaning of 'subject to suit' or 'liable in a court of law or equity.' " 51 Haw. at 75, 450 P.2d at 1000 (footnote omitted). The court then held that the parent-child immunity doctrine would not be adopted in Hawaii and reversed the trial court's order granting the motion to dismiss. 51 Haw. at 79, 450 P.2d at 1002.

[19] 68 Haw. at ____, 720 P.2d at 182.

[20] *Id.*

[21] *Id.* (quoting Peters v. Peters, 63 Haw. at 659 n.9, 634 P.2d at 590 n.9). *See supra* text accompanying note 15.

[22] HAW. REV. STAT. § 1-16 (1985) provides:

construction by construing the Uniform Contribution Among Tortfeasors Act and the interspousal tort immunity statute together and examining the policies supporting both doctrines. The Hawaii Supreme Court recognized that the basic purpose of the Contribution Act was two-fold: (1) to avoid the injustice of one joint tortfeasor paying more than a fair share of the damages;[23] and (2) preventing the multiplicity of suits.[24] By comparison, the policy reasons supporting interspousal tort immunity were the preservation of marital harmony[25] and the prevention of collusive suits between spouses.[26]

The court distinguished *Peters*, which involved a direct action between spouses, by carefully scrutinizing the policies supporting interspousal immunity. First, the court indicated that the likelihood of marital disharmony would be lessened in an action where the spouses were not direct adversaries. Second, the court recognized the judicial system's ability to "ferret out"[27] fraudulent, collusive suits between spouses and the possibility of denying meritorious claims in the future if Taboada's third-party action was not allowed to proceed. The court concluded that in the absence of clear legislative intent that the interspousal tort immunity statute "was meant to bar a third-party action between two unrelated parties especially where the third-party plaintiff may ultimately have a right to contribution,"[28] the contribution action should not be precluded, since the poli-

---

Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.

[23] 68 Haw. at ____, 720 P.2d at 183.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* (citing Wirth v. City of Highland Park, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981)). In *Wirth*, the plaintiff spouse filed a negligence action against the City of Highland Park, owners of a building where she sustained injuries after falling down the building's stairway. The City subsequently filed a third-party action for contribution against the manager of the premises, plaintiff's husband, which was dismissed by the trial court due to interspousal tort immunity. 102 Ill. App. 3d at ____, 430 N.E.2d at 237. The Illinois Appellate Court affirmed, noting that had the legislature intended to bar contribution from a negligent spouse pursuant to the immunity statute, specific language similar to Tennessee's contribution statute could have been inserted to achieve this result. *Id.* at ____, 430 N.E.2d at 242. The court set forth Tennessee's contribution statute:

> [B]ut no right of contribution shall exist where, by virtue of intrafamily immunity, immunity under the workman's compensation laws of the State of Tennessee, or like immunity, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought.

Id. at ____, 430 N.E.2d at 242 (quoting TENN. CODE ANN. § 29-11-102(a) (1980)).

According to the Hawaii Supreme Court, since Hawaii's Contribution Act does not contain a similar provision excluding a contribution action where one of the joint tortfeasors is the plaintiff's spouse, the Hawaii legislature did not intend to preclude Taboada's right of contribution. *See*

cies supporting interspousal immunity did not override the policies supporting an action for contribution.[29] In essence, the supreme court based its decision upon the principles of equity—avoiding the injustice of Taboada paying more than a fair share of the damages and possibly being held liable for the entire judgment.[30]

Campo is inconsistent with *Tamashiro v. DeGama*[31] and *Petersen v. City & County of Honolulu*.[32] In those cases, the court reasoned that a plain reading of "joint tortfeasors" in Hawaii Revised Statutes section 663-11 indicated "liable" to mean "enforced liability"—an enforceable cause of action between the parties. In *Tamashiro*, addressing the issue of whether plaintiffs' son was a "joint tortfeasor" with the defendant, the court defined "liable" in section 663-11 to mean either "subject to suit"[33] or "liable in a court of law or equity."[34] The court in *Petersen* concluded that "whether contribution may be had from a person depends upon whether the original plaintiff could have enforced liability against him, had he chosen to do so."[35] Thus, based upon the court's literal interpretation in *Tamashiro* and *Petersen*, Taboada's third-party complaint for contribution should not have been allowed, since the plaintiff, Mr. Campo, could not have "enforced liability" against his wife, "had he chosen to do so."

The court, however, applied an expansive interpretation to the Uniform Contribution Among Tortfeasors Act to include causes of action which cannot be enforced between a plaintiff and third-party defendant. Therefore, *Campo* effectively negates the *Tamashiro* and *Petersen* requirements that a plaintiff be able to independently enforce liability against a third-party defendant in order for the original defendant to bring an action for contribution against the third-party defendant. This shift from the "enforced liability" element of contribution represents the supreme court's concern with preventing the injustice of Taboada being held liable for the entire amount of any future settlement or judgment.

IV. IMPACT

Campo expands the scope of the Contribution Act to include causes of action which cannot be independently enforced between a plaintiff and third-party defendant. The court gave no indication to whether its ruling would also apply to

---

Campo, 68 Haw. at ____, 720 P.2d at 183.

[29] 68 Haw. at ____, 720 P.2d at 183.

[30] *Id.*

[31] 51 Haw. 74, 450 P.2d 998 (1969).

[32] 51 Haw. 484, 462 P.2d 1007 (1969).

[33] 51 Haw. at 75, 450 P.2d at 1000.

[34] *Id.* (footnote omitted).

[35] 51 Haw. at 486, 462 P.2d at 1008 (citing Tamashiro v. DeGama, 51 Haw. 74, 450 P.2d 998 (1969)).

other types of immunity doctrines in addition to interspousal tort immunity. For example, in *Kamali v. Hawaiian Electric Co., Inc.*,[36] the supreme court held that the exclusive liability provision[37] of Hawaii's workers' compensation law precluded a third-party contribution action against an employer as a joint tortfeasor.[38] The court reasoned that the legislature's intent was "to absolve the employer of all liability save that imposed by statute."[39] The court concluded that any changes to allow contribution against an employer would be for the legislature's determination.[40] Arguably, since the legislature's intent to preclude a defendant from obtaining contribution from an employer as a joint tortfeasor under Hawaii Revised Statutes section 386-5 is unambiguous,[41] a contribution action, in all likelihood, would not be allowed by *Campo*.

Campo's effect on counterclaims under Rules 13(a) and (b) of the Hawaii Rules of Civil Procedure[42] is also unclear. *Campo* would allow a third-party defendant spouse to assert either compulsory or permissive counterclaims against

---

[36] 54 Haw. 153, 504 P.2d 861 (1972). In *Kamali*, Joseph Kamali, a house mover employed by Tanji House Movers, sustained severe burns after coming into contact with electrical wires positioned several feet below the regulatory height requirement. *Id.* at 154, 504 P.2d at 862. Kamali brought a negligence action against Hawaiian Electric, who subsequently filed a third-party complaint against Kamali's employer, Tanji Movers, for contribution or indemnification. While HAW. REV. STAT. § 386-5 precluded Hawaiian Electric's contribution claim, the Hawaii Supreme Court held that a party would be entitled to seek indemnification from an employer covered by Hawaii's workers' compensation law if he assumed liability pursuant to an indemnity agreement. *Kamali*, 54 Haw. at 157-62, 504 P.2d at 864-66.

[37] The exclusive liability provision provided:

> The rights and remedies herein granted to an employee or his dependents on account of a work injury suffered by him shall exclude all other liability of the employer to the employee, his legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

HAW. REV. STAT. § 386-5 (1968). This section has recently been amended to reflect neutral gender language. *See* HAW. REV. STAT. § 386-5 (1985).

[38] 54 Haw. at 159, 504 P.2d at 865. *Accord* Espaniola v. Cawdrey Mars Joint Venture, 68 Haw. ____, 707 P.2d 365 (1985) (overruling Sugue v. Smithe Machine Co., Inc., 56 Haw. 598, 546 P.2d 527 (1976)); Hirasa v. Burtner, 68 Haw. 22, 702 P.2d 772 (1985); Hanagami v. China Airlines, Ltd., 67 Haw. 357, 688 P.2d 1139 (1984); Pacheco v. Hilo Electric Light Co., Ltd., 55 Haw. 375, 520 P.2d 62 (1974).

[39] 54 Haw. at 157, 504 P.2d at 864.

[40] *Id.* at 159, 504 P.2d at 865.

[41] The *Kamali* court noted:

> The purpose of such legislation is to achieve certainty—certainty that an employee will be compensated for all work injuries regardless of his negligence or fault; and certainty with regard to the amount for which the employer shall be liable. The effect is a compromise where the chance that an employee may not recover at all and the chance that an employer will be charged with an excessive judgment are eliminated.

Id. at 157-58, 504 P.2d at 864.

[42] HAW. R. CIV. P. 13(a)-(b).

the plaintiff spouse. The plaintiff spouse, in turn, could be forced to assert similar claims against the third-party defendant spouse. Thus, direct actions between the spouses could be maintained.[43] The effect of the interspousal tort immunity doctrine and its supporting policies would be nullified in this situation. At the same time, however, the court appears reluctant to fully abrogate interspousal tort immunity. This position is consistent with the court's dual statements in *Peters* that while it may take action to modify the interspousal tort immunity doctrine in situations involving overriding policy or constitutional concerns,[44] it will be hesitant to completely abrogate the doctrine, in deference to the legislature.[45]

V. CONCLUSION

The Hawaii Supreme Court's negation of the "enforced liability" element of contribution previously required under *Tamashiro* and *Petersen* represents the court's concern with ensuring an equitable result to a party seeking contribution. At the same time, while the court may further modify the interspousal tort immunity doctrine in future actions, a complete abrogation of the doctrine will be left to the legislature's determination.

Michael A. Azama

---

[43] The result of *Campo*—that spouses may indirectly bring suit against one another—may lead to some curious results, especially in automobile personal injury litigation. In cases similar to *Campo*, defense counsel may be enticed into pitting spouses against one another by impleader under HAW. R. CIV. P. 14 as a matter of course. Joinder of third-party defendant spouses would only be limited by the holding of *Campo* and the bounds of HAW. R. CIV. P. 11 (attorney good faith limitations on signing of pleadings; Hawaii has not adopted the more stringent federal rule 11 standard).

Under *Campo*, spouses who find themselves as adverse parties might would be required to seek separate attorneys, since a lawyer representing both husband and wife would be subject to an actual or potential conflict of interest. *See* HAW. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1981). Litigation costs of the spouses would probably increase because of this rule. In *Campo*, Mr. and Mrs. Campo retained separate counsel. *See Campo*, 68 Haw. at ____, 720 P.2d at 181.

[44] *See supra* text accompanying note 15.

[45] 63 Haw. at 659-60, 634 P.2d at 590-91.

TORTS—*DiCenzo v. Izawa*: Abolition of the "Sudden Emergency" Instruction

I. INTRODUCTION

The "sudden emergency" doctrine[1] has been a source of confusion in courtrooms across the country, as the doctrine is "frequently misapplied on the facts or misstated in jury instructions."[2] As a result, in *DiCenzo v. Izawa*,[3] the Hawaii Supreme Court abolished the use of sudden emergency jury instructions.[4] The court's refusal to permit the sudden emergency jury instruction, however, will possibly prejudice defendants in cases involving sudden emergencies.

II. FACTS

On April 12, 1982, Plaintiff Izawa was driving on a divided highway. De-

---

[1] A sudden emergency occurs "[w]hen a person finds himself confronted with a sudden emergency, which was not brought about by his own negligence or want of care." Swann v. Huttig Sash & Door Company, 436 F.2d 60, 62 (5th Cir. 1970). In that situation, "such person has the legal right to do what appears to him at the time he should do, so long as he acts in a reasonably prudent manner as any other person would have done under like or similar circumstances, to avoid any injury, and if he does so act, he will not be deemed to have been negligent even though it might afterwards be apparent that some other course of action would have been safer." *Id.* Under the sudden emergency doctrine, "one placed in position of sudden emergency or peril, other than by his own negligence, is not held to same degree of care and prudence as one who has time for thought and reflection." Dadds v. Pennsylvania Railroad Company, 251 A.2d 559, 560-61, (Del. 1969).

[2] 68 Haw. ____, ____, 723 P.2d 171, 179-180 (1986) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 196 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]).

[3] *DiCenzo*, 68 Haw. ____, 723 P.2d 171.

[4] In Knapp v. Stanford, 392 So. 2d 196, 198 (Miss. 1980), the Mississippi Supreme Court abolished the sudden emergency doctrine. In Montana, sudden emergency jury instructions are withheld in ordinary automobile accident cases because "[i]t is unnecessary and confusing. The ordinary rules of negligence are applicable and afford a sufficient gauge by which to appraise conduct." Eslinger v. Ringsby Truck Line, Inc., 636 P.2d 254, 260 (Mont. 1981); Ewing v. Esterholt, 684 P.2d 1053, 1059 (Mont. 1984). The model jury instructions in at least four states—Florida, Illinois, Kansas and Missouri—recommend that no sudden emergency instructions be given. For a general discussion on the topic, see Recent Decisions, *The Sudden Emergency Doctrine is Abolished in Mississippi*, 51 MISS. L.J. 301 (1980).

fendant DiCenzo was driving in the opposite direction when her car jumped the highway's grass medial strip and ended up in the opposite-bound lanes.[5] She attributed the erratic movement of her car to the sudden, unexpected appearance of a blue station wagon in the lane in which she was originally travelling. DiCenzo testified that when the station wagon cut in front of her, she had no time to turn left to avoid a collision because "it was happening so quickly" and she panicked when her car started to skid.[6] Evidence showed that DiCenzo's car went over the medial strip, struck Izawa's car, crossed two traffic lanes, crashed into a metal guardrail, and turned over. Izawa suffered extensive injuries in the collision.[7]

Izawa testified she saw DiCenzo's car on the opposite side of the highway as it approached her, then saw it swerve, accelerate across the medial strip, and then hit her car. Izawa further testified that there was no car which cut in front of DiCenzo's car.[8]

The jury was given an instruction on the standard of conduct to which DiCenzo must have conformed to avoid being negligent[9] as well as an instruction on sudden emergency.[10] The Hawaii Supreme Court vacated the judgment

---

[5] *DiCenzo*, 68 Haw. at ____, 723 P.2d at 173.

[6] *Id.*

[7] *Id.* at ____, 723 P.2d at 173-74.

[8] *Id.* at ____, 723 P.2d at 174. Izawa was granted a directed verdict on the issue of whether she was contributorily negligent.

[9] The negligence instruction read:

> Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under the circumstances shown by the evidence. It is the failure to use ordinary care.
>
> Ordinary care is that care which persons of ordinary prudence would, under the circumstances shown by the evidence, exercise in the management of their own affairs in order to avoid injury or damage to themselves or their property, or to the persons or property of others.
>
> Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

68 Haw. at ____, 723 P.2d at 178.

[10] The sudden emergency instruction read:

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

68 Haw. at ____, 723 P.2d at 179.

of the trial court[11] and remanded for a new trial, holding[12] that the sudden emergency instruction only served to confuse the jury.[13] Because the sudden emergency doctrine is "too often misapplied,"[14] the court ruled that the sudden emergency instructions would be withheld.

III. BACKGROUND

When faced with a sudden emergency, the actor cannot reasonably be held to the same accuracy of judgment or conduct as an individual who has had time to decide carefully on his course of action.[15] The rationale behind the sudden emergency doctrine is that the actor is left no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision.[16]

The doctrine is not an affirmative defense; the actor is still held to the standard of a reasonably prudent person in like circumstances. Rather, the emergency is but one factor for the jury to consider in deciding whether the defendant exercised proper care.[17] The doctrine is advantageous to defendants because the jury may receive instructions on the sudden emergency doctrine in addition to instructions on negligence.[18]

---

[11] DiCenzo was awarded judgment on the basis of the special verdict returned by the jury, and Izawa appealed. *Id.*

[12] The supreme court also held that the trial court erred in ruling that statements made by the defendant to her insurance company were privileged under HAW. R. EVID. 503. The supreme court ruled that a communication from insured to insurer is not the same as a privileged communication of client to attorney, and thus the trial court erred by not allowing Mrs. Izawa's discovery of Mrs. DiCenzo's statement to her insurance company. 68 Haw. at ____, 723 P.2d at 177-78.

[13] *Id.* at ____, 723 P.2d at 180.

[14] *Id.* at ____, 723 P.2d at 181 (quoting PROSSER AND KEETON ON TORTS, *supra* note 2, § 33, at 197).

[15] *DiCenzo*, 68 Haw. at ____, 723 P.2d at 179 (quoting PROSSER AND KEETON ON TORTS, *supra* note 2, § 33, at 196).

[16] *DiCenzo*, 68 Haw. at ____, 723 P.2d at 179 (quoting PROSSER AND KEETON ON TORTS, *supra* note 2, § 33, at 196).

[17] It has been noted that "[t]he doctrine of sudden emergency cannot be regarded as something apart from and unrelated to the fundamental rule that everyone is under a duty to exercise ordinary care under the circumstances to avoid injury to others. A claim of emergency is but a denial of negligence." *DiCenzo*, 68 Haw. at ____, 723 P.2d at 179 (quoting Lawrence v. Deemy, 204 Kan. 299, 306, 461 P.2d 770, 774 (1969)).

The standard of care applied to an actor in an emergency situation is set forth in the RESTATEMENT (SECOND) OF TORTS § 296 (1965) as:

> (1) In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action.

[18] See Stump v. Fitzgerald, 14 Ariz. App. 527, ____, 484 P.2d 1056, 1058 (1971) (sudden

Opponents of the sudden emergency doctrine assert that "[d]espite the basic logic and simplicity of the sudden emergency doctrine, it is all too frequently misapplied on the facts or misstated in jury instructions."[19] They argue that a sudden emergency instruction tends to exaggerate the standard of care that is required to be proven in a negligence action. Opponents of the doctrine further contend that even a well-drawn instruction incorrectly suggests that ordinary rules of negligence do not apply to the circumstances constituting the claimed sudden emergency[20]—when in fact they do apply.

Plaintiffs argue that in cases where the sudden emergency doctrine is invoked by the defendant, a sudden emergency instruction may lead the jury to the wrong assumption that, if the jury finds a sudden emergency existed, then the defendant is not liable. On the other hand, defendants contend the instruction is proper where the defendant was faced with a sudden emergency and/or when the evidence presents a question of fact as to whether the defendant contributed to the emergency.[21]

In *DiCenzo*, the Hawaii Supreme Court held that the risk of prejudicial error in instructing the jury on the doctrine exceeds by far the possibility of error in not doing so.[22] Therefore, the court concluded that the wiser course of action would be to withhold sudden emergency instructions.

IV. ANALYSIS

Although it is desirable to have a single jury instruction for each issue, it is well settled that where there is doubt, adequate and thorough instructions are preferred.[23] Further, it is an accepted principle that an individual confronted

---

emergency instruction may be given in appropriate circumstances as a supplement to the standard instruction on negligence); Petefish By and Through Clancy v. Dawe, 137 Ariz. 570, 672 P.2d 914 (1983) (failure to give a proper instruction on the emergency doctrine would be reversible error in automobile accident).

[19] PROSSER AND KEETON ON TORTS, *supra* note 2, § 33 at 197.

[20] *Knapp*, 392 So. 2d at 198.

[21] See Williams v. Worthington, 386 So. 2d 408, 409 (Ala. 1980). In *Williams*, there was a question of fact as to whether the defendant contributed to an emergency in an auto collision. The court held the giving of sudden emergency instructions to the jury was proper and the jury must decide whether the defendant was faced with a sudden emergency.

[22] 68 Haw. at ____, 723 P.2d at 181. The court also held the trial court did not abuse its discretion by giving an instruction on sudden emergency, but held when the trial court decided to give one, it was obliged to explain the law such as not to confuse or mislead the jurors. *Id.* at ____, 723 P.2d at 180.

[23] *See* Barretto v. Akau, 51 Haw. 383, 463 P.2d 917 (1969). In *Barretto*, the trial judge gave six instructions requested by the plaintiff on the general law of damages. The supreme court held that while an effort should be made on retrial to reduce the number of instructions,

> the mere numerical redundancy of instructions is not the operative test for prejudice. Each

with an emergency is not held to the standard of conduct normally applied to another who is not faced with an emergency.[24] Thus, sudden emergency instructions should be given because "where instructions are asked which correctly state the law on any issue presented, it is error to refuse to give them unless the points are adequately covered by instructions given."[25] Moreover, in *Nawelo v. von Hamm-Young Co.*, the supreme court held that it is generally considered error to refuse to give a requested instruction on a particular point which is correct even though the particular point may have been inferentially covered by a more general instruction.[26]

---

case must be considered separately and in light of its own facts, keeping in mind the point that a fair and complete single instruction on each issue is most desirable . . . .

We do not want a trial judge to feel whipsawed by the obligation to give sufficient instructions and the opposing requirement not to give cumulative instructions. . . . Only in the rarest of cases will cumulative instructions be the basis for a new trial.

Id. at 399, 463 P.2d at 926.

[24] PROSSER AND KEETON ON TORTS, *supra* note 2, § 33, at 196.

[25] Young v. Price, 50 Haw. 430, 439, 442 P.2d 67, 73 (1968). In *Young*, the court found that while the defendant's instructions were given on the definition of negligence, the definition of ordinary care, and that the amount of care varied in proportion to the degree of danger present, it was error to refuse to give plaintiff's requested instructions stating (1) presence of a garden hose on a sidewalk creates some risk to a pedestrian, and (2) defendants who placed a hose on the sidewalk were required to take steps commensurate with the danger created to warn pedestrians. *Id. See also* Gibo v. City & County of Honolulu, 51 Haw. 299, 459 P.2d 198 (1969) (trial judge's refusal to give an instruction which correctly stated the applicable law was prejudicial error).

[26] Nawelo v. von Hamm-Young Co., 21 Haw. 644 (1913). In *Nawelo*, plaintiff was run over by an automobile operated by defendant's chauffeur. The jury returned a verdict for the plaintiff. The jury was instructed on the issues of negligence and contributory negligence and was instructed that if it should find the chauffeur not guilty of negligence, or that the plaintiff was guilty of contributory negligence, their verdict should be for the defendant. The defendant was refused these additional instructions:

The mere happening of a casualty is not evidence of negligence. The presumption is that in the performance of a lawful act ordinary care is used. In this case the mere fact that the plaintiff was injured or that the auto backed into the plaintiff is not in itself alone evidence of negligence. In spite of those admitted facts the burden is still upon the plaintiff to prove by other evidence that the chauffeur did not on that occasion use the same degree of care and prudence in the management of his auto which an ordinarily careful and prudent driver of automobiles would have used under the same circumstances. For an accident purely unavoidable no one is liable. If all persons concerned in a collision on a public highway do and omit to do all that ordinarily prudent and careful persons placed under the same circumstances would have done and omitted to do and still an injury results, that injury is an unavoidable accident and the results of it, whether it be suffering, or payments of money, or other financial loss, must be left upon those upon whom they were unfortunately placed by the accident itself.

Id. at 650.

The supreme court held that the defendant's requested instructions should have been given even though the content of the requested instructions could have been inferred from the negli-

In analyzing *DiCenzo*, therefore, the issue is whether the sudden emergency instruction correctly stated the law or whether the negligence instruction in itself adequately covered the elements of a sudden emergency instruction. In *DeCenzio*, the jury instructions[27] were correct statements of the law. In addition, the sudden emergency instruction was a fair supplement to the negligence instruction under *Nawelo*[28] since the question of sudden emergency was raised and the negligence instruction did not address points covered by the sudden emergency instruction.[29]

The court in *DiCenzo* was concerned that the sudden emergency instruction may have misled the jury to believe that an emergency situation invoked a different standard of care. The court noted that the sudden emergency instruction focused too much attention on the issue of a sudden emergency. Consequently, the court concluded that the instruction was confusing.[30] The sudden emergency instruction, however, adequately stated that an emergency situation does not invoke a standard of care different from that required in other situations:

> Thus if you find that [the defendant] faced an emergency situation on April 12, 1982 which was not of her making, you must find that she was not negligent in her conduct if you also find that her actions were those of a reasonably prudent person in a similar emergency . . . .[31]

The supreme court seems to be abandoning the policy of favoring thorough jury instructions, at least in regard to sudden emergency instructions, because of an unfounded fear of confusing the jury. Here, the court was concerned that the words "sudden emergency" in the jury instruction focused undue attention on the circumstances facing the person invoking the doctrine and perhaps skewed

---

gence and contributory negligence instructions that were given. The court noted that

> the question of unavoidable accident was also involved and nothing in the charge given [to the jury] was calculated to call to the attention of the lay mind the points covered by these requests. There is merit in the contention of defendant's counsel that the case from the standpoint of the defense was not fully and fairly covered by the charge . . . .

Id. at 651.

[27] See *supra* notes 10 and 11 for the *DiCenzo* jury instructions.

[28] *Nawelo*, 21 Haw. at 650-51.

[29] *Id.* at 651.

[30] *DiCenzo*, 68 Haw. at ____, 723 P.2d at 180. The supreme court was also concerned that the order in which the jury instructions were given may have been confusing. The court noted that the negligence instruction was recorded on page 18 of the transcript of proceedings conducted in the trial court while the sudden emergency instruction was recorded on page 21—after the jury was instructed on the plaintiff's duty to mitigate damages and before an instruction advising the jury that counsel's calculation of damages was not evidence. *Id* at ____ n.10, 723 P.2d at 178-79 n.10.

[31] *Id.* at ____, 723 P.2d at 179.

the jury's sympathy in favor of that person. The emergency instruction, however, correctly conveyed the concept of unavoidability.[32] To deny the jury an opportunity to consider whether or not a sudden emergency existed, unfairly prejudices defendants.[33]

In addition, the court held that while sudden emergency instructions should be withheld, circumstances purportedly constituting an emergency are properly matters for argument by counsel.[34] By allowing sudden emergency arguments without providing the jury with a statement clarifying the law, the court may have caused even greater confusion.

V. CONCLUSION

In *DiCenzo v. Izawa*, the Hawaii Supreme Court rejected the sudden emergency jury instruction. This decision makes it easier for plaintiffs to show that the defendant was negligent because the mere recital of the words "sudden emergency" tends to skew the jury's sympathy in favor of the defendant. Defendants, however, will be disadvantaged when a question of sudden emergency arises since it will no longer be as large a factor for juries to consider in deciding whether the defendant exercised due care.

The advantage of having a well-drawn instruction outweighs any benefit in withholding such instruction. Withholding a well-drawn jury instruction on sudden emergency may cause greater jury confusion and greater prejudice for the defendant. Any benefit gained by the plaintiff is minimal by comparison.

Laurel K. S. Loo

---

[32] Boatright v. Bruening, 363 Mo. 494, ____, 251 S.W.2d 709, 712 (1952) (plaintiff criticized use of the words "sudden emergency" in the jury instructions as a "color word" with an emotional quality. The court held that the term is an expressive one which helps make the applicable legal principle clear to laymen—the purpose of jury instructions.). *But see* Messmer v. Ker, 96 Idaho 75, ____, 524 P.2d 536, 540 (1974) (court criticism of the sudden emergency jury instruction as generally being counterproductive because juries are deluged with numerous instructions which cover complex questions of law).

[33] RESTATEMENT (SECOND) OF TORTS § 296 comment (a) (1965) provides that the sudden emergency doctrine "is applicable where the sudden emergency is created in any way other than by the actor's own tortious conduct, as where it is created by the unexpected operation of a natural force or by the innocent or wrongful act of a third person."

[34] *DiCenzo*, 68 Haw. at ____, 723 P.2d at 181.

CRIMINAL LAW—*State v. Rodgers*: Touching Through Clothes and the Definition of "Sexual Contact"

I. INTRODUCTION

In *State v. Rodgers*,[1] the Hawaii Supreme Court held that a person does not commit sexual abuse in the first degree by touching a thirteen-year-old girl's breasts to gratify his sexual desire when the presence of clothing prevents contact with her skin. Concluding that the statutory definition of "sexual contact"[2] could be construed to exclude touching through clothes, the court ruled that a penal statute capable of two constructions must be interpreted in favor of the defendant. In so ruling, the court signaled its intention to adhere to a rule of strict construction of penal statutes.

II. FACTS

Harry Allen Rodgers was accused of rubbing the breasts of his thirteen-year-old adopted daughter through her nightgown in violation of Hawaii Revised Statutes section 707-736.[3] The statute prohibits intentional sexual contact with another person below the age of fourteen. Section 707-700(9) defines sexual contact as "any touching of the sexual or other intimate parts of a person not married to the actor, done with the intent of gratifying the sexual desire of either party."[4]

The family court[5] noted that the penal code definition of "sexual con-

---

[1] 68 Haw. ____, 718 P.2d 275 (1986).

[2] Sexual contact is defined as follows: " 'Sexual contact' means any touching of the sexual or other intimate parts of a person not married to the actor, done with the intent of gratifying the sexual desire of either party." HAW. REV. STAT. § 707-700(9) (Supp. 1984).

[3] The statute reads:

(1) A person commits the offense of sexual abuse in the first degree if

. . . .

(b) He intentionally has sexual contact with another person who is less than fourteen years old or causes such a person to have sexual contact with him.

HAW. REV. STAT. § 707-736 (1976).

[4] HAW. REV. STAT. § 707-700(9) (Supp. 1984).

[5] The statute conferring jurisdiction on the family court provides that the court shall have exclusive jurisdiction over cases involving "any offense committed against a child by his parent or

tact"[6] as applied to sexual abuse offenses in Hawaii Revised Statutes chapter 707 differs from the definition of "sexual conduct"[7] in chapter 712 relating to obscenity offenses.[8] The obscenity definition prohibits certain acts upon a person's clothed or unclothed intimate parts. In contrast, the sexual abuse definition omits such language, referring only to "any touching of the sexual or other intimate parts of a person."[9] Consequently, the family court reserved for decision by the appellate court the question whether "sexual contact" as defined in Hawaii Revised Statutes section 707-700(9) includes touching the sexual or intimate parts of a person through clothing.[10]

The Hawaii Supreme Court concluded that the legislature's failure to specify clothed or unclothed in defining sexual contact, as distinguished from sexual conduct, was "significant to show that a different intention existed."[11] The two definitions appear in separate chapters of the penal code, however, obscenity

---

guardian or by any other person having his legal or physical custody . . . ." HAW. REV. STAT. § 571-14 (1976).

[6] HAW. REV. STAT. § 707-700(9) (Supp. 1984). See *supra* note 2 for the applicable statutory language.

[7] Sexual conduct under the obscenity law is defined as ". . . acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's *clothed or unclothed* genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perversion." HAW. REV. STAT. § 712-1210(8) (Supp. 1984) (emphasis added).

[8] Both the sexual abuse and obscenity statutes are included in the Hawaii penal code. Chapter 707, containing the definition of sexual contact, is entitled "Offenses Against the Person" and includes the offenses of criminal homicide, assault, kidnapping, and the following sexual offenses: rape, sodomy, and sexual abuse. Hawaii Revised Statutes chapter 712, entitled "Offenses Against Public Health and Morals," covers prostitution, obscenity, gambling, drugs, and nuisance. Part II, entitled "Offenses Related to Obscenity" contains the definition of "sexual conduct."

[9] HAW. REV. STAT. § 707-700(9) (Supp. 1984) (emphasis added). See *supra* notes 2 & 7 for the relevant text of the statutes.

[10] 68 Haw. at ____, 718 P.2d at 276. Under Rule 15 of the Hawaii Rules of Appellate Procedure, a trial court may, on motion of any party or on its own motion, "reserve for the consideration of the Hawaii appellate courts, a question of law arising in any proceeding before it." HAW. R. APP. P. 15. Thus, the family court judge moved to reserve this question of statutory interpretation pursuant to Rule 15, since the issue was likely to recur and a ruling in defendant's favor would not have brought this issue before the supreme court for review. 68 Haw. at ____, 718 P.2d at 276.

[11] *Rodgers*, 68 Haw. at ____, 718 P.2d at 277 (quoting People v. Valentine, 28 Cal. 2d 121, 142, 169 P.2d 1, 14 (1946) (superceded by statute as held in People v. Spurline, 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (1984)). "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." *Valentine*, 28 Cal. 2d at 142, 169 P.2d at 14. The California Supreme Court rejected the practice of some courts to instruct juries using the language of a repealed statute which required a higher degree of provocation to reduce murder to manslaughter. The court adhered to the policy that criminal statutes will not be built up "by judicial grafting upon legislation." *Id.*

and sexual abuse are related subjects.[12] Thus, the court held that the statutory definition of "sexual contact" was capable of two constructions.[13] The broader interpretation included touching of sexual parts through clothing, while the narrower construction, urged by the defendant, required touching the victim's bare skin.[14]

The court reasoned that the Hawaii legislature easily could have defined sexual contact more precisely.[15] The court noted that Hawaii's statute was derived from the same draft model statute as the Michigan Criminal Code,[16] yet the Michigan legislature eventually rejected the draft in favor of more explicit language. The Michigan legislature specifically included touching through clothes within the definition of sexual contact.[17]

---

[12] HAW. REV. STAT. § 712-1210(8) (Supp. 1984). The dissent pointed out that the words "clothed or unclothed" in the obscenity statute are expressly related to the type of offenses prohibited in that section. 68 Haw. at ____, 718 P.2d at 279 (Wakatsuki, J., dissenting). The sexual abuse and obscenity provisions not only define different terms, but are located in separate chapters dealing with different types of offenses, one penalizing physical crimes against the person and the other dealing primarily with visual displays, specifically, displaying indecent matter and promotion of pornography. *Id.* In contrast, the majority concluded that the omission of the words "clothed or unclothed" from the definition of sexual contact compelled a conclusion that the legislature intended to exclude clothed touchings from the ambit of sexual abuse. *Id.* at ____, 718 P.2d at 277.

[13] The court also noted that the legislative history did not indicate which meaning was intended by the lawmakers. *Id.* at ____ n.6, 718 P.2d at ____ n.6.

[14] *Id.* at ____, 718 P.2d at 277. The court reasoned that a "touching" clearly occurs within the meaning of the statute if the defendant rubs the intimate part directly. In *Rodgers* however, the touching was through the victim's clothes. "Granted, the relevant language can readily be construed to include such conduct within its proscriptions. But it is subject also, as the defendant maintains, to a reading that contact with a person's clothed breasts does not constitute 'sexual contact.'" *Id.*

[15] For example, observed the court, the definition of "sexual conduct" demonstrates the ease with which the task could have been accomplished. *Id.* at ____, 718 P.2d at 278 (emphasis added).

[16] The table of derivation appended to the penal code indicates that the language of § 707-700(9) was derived from § 2301 of the proposed draft of the Michigan Criminal Code. The appendix also lists the New York Penal Code as a source of the definition of sexual contact. HAW. REV. STAT. § 700-712 app. at 499 (1976).

[17] The Michigan statutory definition presently reads:

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching *of the clothing* covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

MICH. COMP. LAWS ANN. § 750.520a(k) (West Supp. 1986) (emphasis added).

The Hawaii Supreme Court noted that the New York statute was also amended to include touching "whether directly or through clothing." *Rodgers*, 68 Haw. at ____, 718 P.2d at 278 (quoting N.Y. PENAL LAW § 130.00(3) (Consol. 1976)). The comments to the original New York provision, on which the Hawaii definition was based, emphasized that "it is not necessary

Having determined that the statutory definition of sexual contact was reasonably susceptible of two constructions, the court applied the interpretation more favorable to the defendant.[18] The court observed that it was appropriate "to require that the legislature should have spoken in language that is clear and definite."[19] Underlying this conclusion was the due process principle that criminal laws must clearly define proscribed conduct so that "no individual is forced, at his peril, to speculate whether his conduct is prohibited."[20] The court also relied on previous Hawaii decisions setting forth the rule that criminal statutes must be strictly construed.[21]

---

that there be a direct contact with the victim's body to constitute a 'sexual contact'; a touching through clothing will be sufficient." Comment, *Sex Offenses and Penal Code Revision in Michigan*, 14 WAYNE L. REV. 934, 960 (1968) (citing N.Y. PENAL LAW § 130.55 (Consol. 1976), comment at 307).

The Model Penal Code definition of sexual contact is also very similar to the Hawaii statute. The Model Penal Code defines sexual contact as "any touching of the sexual or intimate parts of the person for the purpose of arousing or gratifying sexual desire." MODEL PENAL CODE § 213.4 (Official Draft and Revised Comments 1980). The commentary to § 213.4 notes that "section 213.4 requires an actual touching of the 'sexual or other intimate parts of the person' . . . . Such touching need not involve naked contact between the actor's hand and another's sexual or intimate parts, but may be accomplished through the clothing." *Id.* commentary at 400-01. Thus, both the commentary to the original New York statute and the Model Penal Code commentary, demonstrate that the drafters intended the statutory language to include both clothed and unclothed touchings. That New York and Michigan later amended their statutes did not alter the legislative intent; the intent was simply clarified.

[18] Thus, the court adopted the narrower meaning of sexual contact which excluded touching of sexual parts through clothing. "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." *Rodgers*, 68 Haw. at ____, 718 P.2d at 278 (quoting People v. Ralph, 24 Cal. 2d 575, 581, 150 P.2d 401, 404 (1944)). In *Ralph*, the California Supreme Court held that minor defendants given indeterminate sentences were not "sentenced to imprisonment for life" within the meaning of a statutory provision excluding from the Youth Correction Authority anyone sentenced to life imprisonment. Thus, the court adopted the statutory meaning more favorable to minors, allowing them the right to be admitted to the Youth Authority rather than go to state prison.

[19] *Ralph*, 24 Cal. 2d at 581, 150 P.2d at 404 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)). In *Universal*, the Court held that the Fair Labors Standards Act should be construed to penalize a single "course of conduct," not a series of separate offenses for each employer's violation as to each employee during any work week as the government urged. Had Congress intended the act to penalize each violation as a separate offense, it could easily have specified this in the statute.

[20] *Rodgers*, 68 Haw. at ____, 718 P.2d at 277 (quoting Dunn v. United States, 442 U.S. 100, 112 (1979) (doubt concerning scope of criminal statutes should be resolved in favor of lenience)). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (laws must give the ordinary person notice of what is prohibited so that he may act accordingly); United States v. Harriss, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

[21] *Rodgers*, 68 Haw. at ____, 718 P.2d at 278 (citing State v. Smith, 59 Haw. 456, 461,

III. ANALYSIS

The Hawaii Supreme Court appeared to ignore a basic purpose underlying the sexual abuse statute in holding that fondling the clothed breasts of a thirteen-year-old girl does not constitute first degree sexual abuse. In dissent, Justice Watkatsuki emphasized that the primary purpose for enacting sexual abuse laws was to protect children who may be incapable of protecting themselves.[22] He commented: "[I]t is inconceivable that the legislature intended to permit a person to derive sexual gratification by fondling an underaged girl's breasts simply because there is no direct contact with her skin."[23]

Justice Wakatsuki disagreed that the definition of sexual contact could reasonably be interpreted to exclude clothed touchings,[24] and urged a plain meaning application of the statutory language "any touching."[25] The plain and natural reading of those words compels the conclusion that a person who rubs a child's sexual parts through her nightgown is engaged in "any touching" within the meaning of the statute.[26]

By adhering to a very narrow interpretation of sexual contact, the majority did not follow the approach of other jurisdictions attempting to effectuate legislative intent through a broad interpretation of sexual abuse statutes.[27] The

---

583 P.2d 337, 341 (1978); Coray v. Ariyoshi, 54 Haw. 254, 261, 506 P.2d 13, 17 (1973)). In *Coray*, the Hawaii Supreme Court held that certain behavior by poll watchers was not prohibited "campaign activity" within 1,000 feet of the polling area. The court concluded that "where a criminal statute . . . fails to proscribe specifically the alleged offense, it cannot be said that appellees are in violation of the statute." *Coray*, 54 Haw. at 262, 506 P.2d at 17. The court was also influenced by a related statute that authorized the poll watchers to be in place, and did not specifically proscribe the activity in question. "Laws in pari materia, or upon the same subject matter, will be construed with reference to each other." *Id.* For a discussion of *Smith*, see *infra* note 43.

[22] *Rodgers*, 68 Haw. at ____, 718 P.2d at 280 (Wakatsuki, J., dissenting).

[23] *Id.*

[24] Justice Wakatsuki noted: "There is nothing in the statute which expressly required that the touching of an intimate part be upon the skin." *Id.*

[25] The dissent cited the definition of "touch" in the American Heritage Dictionary, Second College Edition (1982): "To cause or permit a part of the body, esp. the hand or fingers, to come in contact with so as to feel." *Rodgers*, 68 Haw. at ____, 718 P.2d at 279 (Wakatsuki, J., dissenting).

[26] *Id. See also* Resnick v. State, 574 S.W.2d 558 (Tex. Crim. App. 1978) (placing hand on trousers covering genitals constituted "sexual contact"). In *Resnick*, the court declared: "It is a matter of the commonest knowledge that the interposition of a layer of fabric between a person's hand and an object upon which the hand is placed will not prevent that person from feeling the object thus concealed." *Id.* at 560.

[27] *See, e.g.*, People v. Elliot, 158 Cal. App. 2d 623, 322 P.2d 1029 (1958) (no statutory requirement that bare skin of minor be touched); People v. Keesee, 47 Ill. App. 3d 637, 365 N.E.2d 53 (1977) (statute did not require flesh to flesh contact); State v. Samson, 388 A.2d 60 (Me. 1978) (discussed *infra* notes 28-30 and accompanying text); State v. Kocher, 112 Mont.

Maine Supreme Court, in *State v. Samson*,[28] construed an "indecent liberties" statute[29] to include the defendant's touching of a ten-year-old girl's sexual parts through her underpants. In *Samson*, the court held that defining sexual contact to include only skin-to-skin contact would substantially frustrate the statutory purpose.[30]

Similarly, the Nebraska Supreme Court in *State v. Reich*,[31] held that an "indecent fondling" statute[32] did not require touching of the victim's naked body. The court emphasized that the legislature intended the law to protect clothed as well as unclothed minors. The court concluded that although penal statutes must be strictly construed, they should not be given a "strained or unnatural construction."[33]

511, 119 P.2d 35 (1941) (attempt to remove minor's clothing to gratify sexual desire constitutes required physical contact under statute; flesh to flesh contact is not necessary); State v. Reich, 186 Neb. 289, 183 N.W.2d 223, *cert. denied*, 404 U.S. 846 (1971) (See *infra* notes 31-33 and accompanying text for a discussion); *In re* David M., 93 Misc. 2d 545, 403 N.Y.S.2d 178 (1978) (accused's thrusting penis into buttocks of victim while both fully clothed constituted "sexual contact" within meaning of sexual abuse statute).

[28] 388 A.2d 60 (Me. 1978).

[29] The Maine indecent liberties statute prohibited:

> taking . . . any indecent liberty or liberties or indulg[ing] in any indecent or immoral practice or practices with the sexual parts or organs of any other person, male or female, who has not attained his or her 16th birthday, either with or without the consent of such male or female person. . . .

388 A.2d at 62 n.2 (quoting ME. REV. STAT. ANN. tit. 17, § 1951 (1969)). The statute was repealed and replaced by the enactment of the Maine Criminal Code in 1976. *See* ME. REV. STAT. ANN. tit. 17-A, § 255 (1983). The unlawful sexual conduct prohibited in § 255 is defined as follows: " 'Sexual contact' means any touching of the genitals, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire." *Id.*

[30] The Maine Supreme Court concluded:

> We cannot believe that our Legislators intended that a piece of clothing, as flimsy and truth-revealing as a female's panties in the instant case, would insulate a child molester from the reach of our indecent liberties statute. The legislative intent was to protect children against the perpetration of sexual indignities to their person in a manner abhorrent to society and to save them from being subjected to iniquitous conduct having a tendency to produce serious emotional and psychological impact on such minors who, because of their tender age, are deemed incapable of protecting themselves.

388 A.2d at 63.

[31] 186 Neb. 289, 183 N.W.2d 223, *cert. denied*, 404 U.S. 846 (1971).

[32] The Nebraska statute punished "whoever shall fondle or massage in an indecent manner the sexual organs of any . . . girl under the age of sixteen years . . . ." NEB. REV. STAT. § 28-929(2) (1943) (quoted in *Reich*, 186 Neb. at 290, 183 N.W.2d at 224). The Nebraska statutes currently define sexual contact as "the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts." NEB. REV. STAT. § 28-318(5) (1985).

[33] 186 Neb. at 290, 183 N.W.2d at 244. In *Reich*, the court held that the touching of a ten-year-old girl's sexual organs through her shorts constituted indecent fondling or massaging within

In contrast, the Hawaii Supreme Court excluded touching through clothes, holding that courts must not punish actions that are not "plainly and unmistakably proscribed,"[34] and suggesting that the legislature clarify the definition of sexual contact.[35] The result is a narrow approach to statutory construction that appears inconsistent with the court's earlier decisions interpreting penal statutes more broadly to accomplish legislative intent. In *Rodgers*, the court concluded that when a penal statute is reasonably susceptible of two interpretations, the one most favorable to the offender will be adopted.[36] In *State v. Prevo*,[37] however, the court held that although a penal statute can be construed either to sustain a conviction or an acquittal "does not require that the interpretation be made in favor of freedom."[38] In *Prevo*, the court interpreted a gambling statute[39] to include the defendant's conduct, although it was not expressly proscribed by the statute, on the rationale that the legislature intended a broad prohibition to discourage all forms of gambling.[40] In contrast, the court in *Rodgers* did not display similar concern about discouraging sexual abuse, particularly the intentional fondling of a child's intimate parts.[41]

In *State v. Smith*,[42] the Hawaii Supreme Court emphasized that the rule of strict construction[43] of penal statutes did not permit a court to ignore the legis-

---

the meaning of the statute. *Id.*

[34] *Rodgers*, 68 Haw. at ____, 718 P.2d at 277 (quoting United States v. Gradwell, 243 U.S. 476, 485 (1917)). See *supra* note 19 for cases holding that criminal statutes must clearly define prohibited conduct.

[35] *Rodgers*, 68 Haw. at ____, 718 P.2d at 278.

[36] *Id.*

[37] 44 Haw. 665, 361 P.2d 1044 (1961).

[38] *Id.* at 669, 361 P.2d at 1049.

[39] The statute made it a misdemeanor to conduct, participate in, bet on, or be present at certain listed games or "any other game in which money or anything of value is lost or won . . . ." 44 Haw. at 667, 361 P.2d at 1046 (quoting REV. LAWS HAW. § 288-4 (1955)).

[40] *Prevo*, 44 Haw. at 672, 361 P.2d at 1048-49. The court reasoned that, in construing the statute, the proper course was "to search out and follow the true intent of the legislature, and to adopt that sense of the words which . . . promotes in the fullest manner the apparent policy and objects of the legislature." *Id.* at 674, 361 at 1049. *See also* State v. Ogata, 58 Haw. 514, 572 P.2d 1222 (1977) (unconcealed weapon in vehicle violates statute prohibiting carrying deadly weapons). In *Ogata*, the Hawaii Supreme Court emphasized that statutory language must be read in the context of the entire statute, and "the harm or evil it seeks to prevent must point the way to its construction." *Id.* at 518, 572 P.2d at 1225.

[41] In *Prevo*, the court concluded that the statute prohibited all gambling games, since it specified "any other game" in which money or property was risked upon the outcome. *Id.* at 679, 361 at 1049-50. In similar manner, the sexual abuse statute at issue in *Rodgers* prohibits "any touching" of sexual or intimate parts. However, the Hawaii Supreme Court rejected an interpretation of the statutory language that would include any touching of a child's intimate parts whether directly on the skin or through clothing. *See supra* notes 26 and 27 and accompanying text.

[42] 59 Haw. 456, 583 P.2d 337 (1978).

[43] *Smith* is cited by the majority for the proposition that Hawaii adheres to a rule of strict

lative intent, "nor does it require the rejection of that sense of the words used which best harmonizes with the design of the statute or the end in view."[44] The court's interpretation of the sexual abuse law in *Rodgers* appears to "reject that sense of the words" which best harmonizes with the "end in view" as contemplated by the Hawaii legislature. The end in view is clearly the prevention of sexual abuse crimes against minors.

The Hawaii Supreme Court's earlier decisions indicate an unwillingness to literally interpret statutes leading to absurd results.[45] However, the court's interpretation of sexual contact in *Rodgers* raises the possibility of absurd and inconsistent results. On one hand, the court held that touching a victim's clothed sexual parts was not sexual contact. The court noted though, that if the victim's naked sexual part was touched with a gloved hand, sexual contact occured.[46] Thus, a gloved hand touching a bare breast falls within the definition of sexual contact, but a bare hand touching a clothed breast does not. The latter conduct is obviously no less offensive or dangerous than the former, especially when the victim is a child.

The Hawaii Supreme Court's narrow construction of sexual contact in *State v. Rodgers* failed to achieve the legislative goal of protecting minors and other victims from sexual abuse. The decision induced Hawaii legislators to introduce eight bills during the 1987 session to amend the penal code definition of sexual contact.[47] Amending the statutory definition to include touching through

---

construction of penal statutes. In *Smith*, the court noted that when the legislature adopted the Hawaii penal code, it rejected proposed language providing: "the rule that a penal statute is to be strictly construed does not apply to this Code . . . ." *Id.* at 461, 583 P.2d at 341.

[44] *Id.* at 461-62, 583 P.2d at 342 (quoting State v. Prevo, 44 Haw. 665, 669, 361 P.2d 1044, 1047 (1961)). In *Smith*, appellant claimed not to have committed the offense of "escape" because he was on leave from the Hawaii Youth Correctional Facility and merely failed to return. *Id.* at 460, 583 P.2d at 341. The Hawaii penal code provides that "[a] person commits the offense of escape in the second degree if he intentionally escapes from a correctional or detention facility or from custody." HAW. REV. STAT. § 710-1021(1) (1976). In affirming the conviction, the Hawaii Supreme Court adopted a broad view of "custody" which it stated would better effectuate the legislative purpose. "In our opinion, this broader view of custody is consistent with the legislative policy, with the design of the statute, and does no violence to the end or object in view." 59 Haw. at 462, 583 P.2d at 342.

[45] *See* State v. Ogata, 58 Haw. 514, 572 P.2d 1222 (1977) ("[A] departure from the literal application of statutory language will be justified if such literal application will lead to absurd consequences."). *See also* State v. Lee, 67 Haw. 307, 686 P.2d 816 (1984) (interpreting wiretapping law to allow participant to testify about a conversation, while prohibiting admission of the tape, would bring about an absurd result); State v. Prevo, 44 Haw. 665, 361 P.2d 1044 (1961) (legislative intent controls strict letter of law when latter would lead to absurdity).

[46] The court indicated that "[i]f the 'sexual or other intimate part' rather than clothing is actually touched, even with a gloved hand, we would not hesitate to rule 'sexual contact' has occurred." 68 Haw. at ____ n.8, 718 P.2d at 279 n.8.

[47] All of the proposed bills amend the definition of sexual contact to add touching through

clothes will help insure that future defendants do not escape criminal liability.

IV. CONCLUSION

In *State v. Rogers*, the Hawaii Supreme Court declined to engage in what it considered judicial grafting[48] upon a penal statute. The court sought to avoid enlarging the scope of proscribed conduct beyond what is statutorily defined. This conservative approach is mindful of due process considerations that require criminal statutes to provide clear notice to individuals whether their conduct falls within or beyond the boundaries of the law.

The court's narrow interpretation of sexual contact, however, fails to achieve this goal. Rather, it results in a strained and unnatural construction, allowing the person who touches a child's intimate parts through a nightgown or pair of panties to remain beyond the reach of the sexual abuse laws. The effect of the court's decision is to allow adults to fondle the sexual or other intimate sexual parts of minors for the purpose of sexual gratificiaton and escape criminal liability.

The clear implication of *Rodgers* is that the Hawaii Supreme Court will apply a rule of strict construction of penal statutes. The court also sent an unmistakable message to the legislature that in enacting criminal laws, it must specify in detail the boundaries of prohibited conduct.

Cindy Miller

---

clothes. Representative is the following:

> "Sexual contact" means any touching whether directly or through clothing of the sexual or other intimate parts of a person not married to the actor.

S.B. 786, 14th Leg., 1st Sess. (1987). This amendment spells out the legislature's intent to punish *any* touching of a victim's intimate parts.

[48] See *supra* note 13 for a discussion of *People v. Valentine* in which the California Supreme Court rejected a policy of "judicial grafting" upon criminal statutes. The Hawaii Supreme Court refused to read into the statutory definition of "sexual contact" an intent to include clothed touchings. *Rodgers*, 68 Haw. at ____, 718 P.2d at 277.

CRIMINAL LAW—*State v. Uehara*: Driving Under the Influence of Intoxicating Liquor and its Effect on the Motorist's Implied Consent Statute

I. INTRODUCTION

In *State v. Uehara*,[1] the Hawaii Supreme Court addressed two issues relating to driving under the influence of intoxicating liquor (DUI):[2] (1) whether a driver can circumvent the penalties of the motorist's implied consent statute[3] by claiming that he was too intoxicated to have knowingly refused to submit to a chemical sobriety test;[4] and (2) whether a driver's guilty plea to a DUI charge would affect his liability for refusing to submit to a chemical sobriety test.[5] The supreme court ruled that the defendant's intoxicated condition would not vitiate his implied consent to submit to chemical testing, and held that the defendant's guilty plea to the DUI charge would not affect his liability for refusing to submit.[6]

II. FACTS

On August 26, 1985, defendant Yoshio Uehara appeared in district court to answer charges for criminal contempt, driving under the influence of intoxicating liquor, and refusing to submit to a breath or blood test.[7] The court dismissed the contempt charges[8] and Uehara pled guilty to the DUI charge.[9] Uehara then moved to dismiss the charge of refusal to submit to a chemical

---

[1] 68 Haw. ____, 721 P.2d 705 (1986).

[2] For the text of Hawaii's DUI statute, see HAW. REV. STAT. § 291-4 (1985).

[3] HAW. REV. STAT. § 286-151 (1985). See *infra* note 14 for the text of the motorist's implied consent statute.

[4] 68 Haw. at ____, 721 P.2d at 706.

[5] *Id.*

[6] *Id.* at ____, 721 P.2d at 706-07.

[7] *Id.* at ____, 721 P.2d at 706.

[8] The two criminal contempt charges were based on Uehara's failure to appear in court on two previous occasions. Uehara's attorney claimed responsibility for Uehara's nonappearances. After questioning Uehara, the court stated that it would not take any action on the criminal contempt charges. State's Opening Brief at 2-3, State v. Uehara, 68 Haw. ____, 721 P.2d 705 (1986) [hereinafter State's Opening Brief].

[9] 68 Haw. at ____, 721 P.2d at 706.

sobriety test.[10] After informally questioning Uehara, the court dismissed the charge. The trial court reasoned that "Uehara could not have knowingly waived his requirement to take the chemical breathlizer-intoxilyzer test and that he was too intoxicated to know what he was doing at that time."[11]

On appeal, the State argued that Uehara's intoxicated condition did not excuse him from liability for refusing to submit to a breath or blood test.[12] The supreme court agreed, and held that Uehara's guilty plea to the DUI charge would not affect his liability for refusing to submit to chemical testing.[13]

III. ANALYSIS

Under the motorist's implied consent statute, any person who operates a motor vehicle on the state public highways is deemed to have consented to submit to testing in order to determine the alcoholic content of his blood.[14] Implied consent is not withdrawn because of the person's death, unconsciousness, or any other state which renders the person incapable of consenting to testing.[15] However, once a person actually refuses to submit to a breath or blood test, no test can be given; but he may be prosecuted for refusing to do so.[16] Moreover, the penalties for refusing to submit to a chemical sobriety test "are additional penalties and not substitutes for other penalties provided by law."[17]

---

[10] Defendant's Answering Brief at 1-2, State v. Uehara, 68 Haw. ____, 721 P.2d 705 (1986).

[11] State's Opening Brief, *supra* note 8, at 3.

[12] 68 Haw. at ____, 721 P.2d at 706.

[13] *Id.* at ____, 721 P.2d at 706-07.

[14] The motorist's implied consent statute provides in pertinent part:

> Any person who operates a motor vehicle on the public highways of the State shall be deemed to have given consent . . . to a test . . . of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood; such person shall have the option to take a test of the person's breath or blood, or both.

HAW. REV. STAT. § 286-151 (1985).

If a person refuses to submit to a breath or blood test, HAW. REV. STAT. § 286-155 (1985) provides that "none shall be given" but the following penalties may be imposed:

> [T]he judge shall revoke the arrested person's license . . . as follows:
>
> (1) For a first revocation, or any revocation not preceded within a five-year period by a revocation under this section, for a period of twelve months; and
>
> (2) For any subsequent revocation under this section, for a period not less than two years and not more than five years.

[15] HAW. REV. STAT. § 286-154 (1985) provides that "[t]he consent of a person deemed to have given the person's consent pursuant to section 286-151 shall not be withdrawn by reason of the person's being dead, unconscious, or in any other state which renders the person incapable of consenting to examination, and the test may be given."

[16] HAW. REV. STAT. § 286-155(a) (1985).

[17] *Id.* § 286-155(e).

The supreme court initially ruled that Uehara's inebriated condition did not render him incapable of consenting to submit to chemical testing.[18] This ruling is consistent with *Rossell v. City & County of Honolulu*,[19] which found that "a driver will not be allowed to defeat the intent of the implied consent laws by later claiming that because he was too intoxicated to refuse to take the sobriety test, his license cannot be revoked."[20] A contrary decision would have nullified the motorist's implied consent statute, since a driver charged with DUI could effectively argue that he was too drunk at the time of his arrest to have knowingly refused to submit to a chemical sobriety test. While the driver would be essentially admitting that he was sufficiently inebriated to have been driving under the influence of intoxicating liquor, he could effectively avoid prosecution under both the implied consent statute and the DUI statute.

Nevertheless, Uehara contended that the trial court had the discretion to dismiss the refusal to submit charge since he had already pled guilty to the underlying DUI charge.[21] Uehara argued that the purpose of the implied consent statute was to secure sufficient evidence to support a DUI conviction. Therefore, once he pled guilty to the DUI charge, the need for additional penalties for refusing to submit no longer existed.[22] The supreme court disagreed.

---

[18] 68 Haw. at ____, 721 P.2d at 706.

[19] 59 Haw. 173, 579 P.2d 663 (1978). The *Rossell* court adopted a narrow construction to the "any other state which renders the person incapable of consenting to examination" phrase in HAW. REV. STAT. § 286-154 to apply only in situations where the person "is incapable of manifesting *any* consent *or* refusal to take a sobriety test." 59 Haw. at 184-85, 579 P.2d at 670-71 (emphasis original). The court then held that § 286-154 would apply "only where an arrestee is absolutely incapable of manifesting, through words, acts, conduct or other means, his willingness or unwillingness to submit to a test." 59 Haw. at 185, 579 P.2d at 671. In an accompanying footnote, the court addressed the situation of extreme intoxication, which is the language cited in *Uehara*:

> However, if the arrestee is incoherent merely because of extreme intoxication, the arrestee would be regarded as having refused to submit to any test for purposes of HRS 286-155 (1976 Repl.) and no test would be administered. . . .We agree with the general rule that a driver will not be allowed to defeat the intent of the implied consent laws by later claiming that because he was too intoxicated to refuse to take the sobriety test, his license cannot be revoked.

Rossell, 59 Haw. at 185-86 n.13, 579 P.2d at 671 n.13 (citations omitted).

[20] 68 Haw. at ____, 721 P.2d at 706 (quoting Rossell v. City & County of Honolulu, 59 Haw. at 185-86 n.13, 579 P.2d at 671 n.13).

[21] 68 Haw. at ____, 721 P.2d at 706.

[22] *Id.* 721 P.2d at 706. This position has been adopted by at least one state court. *See* State v. Brooks, 113 Wis. 2d 347, 335 N.W.2d 354 (1983) (Once a driver pleads guilty to drunken driving, the need to secure accurate, scientific evidence to support a conviction no longers exists, since "the ultimate purpose of the implied consent law—successful prosecution of drunken drivers—has been accomplished."). *But see* Covington v. Department of Motor Vehicles, 102 Cal. App. 3d 54, 162 Cal. Rptr. 150 (1980) (driver's DUI conviction would not prevent imposition of sanctions for violation of implied consent law); People v. Shaffer, 134 Ill. App. 3d 548, 481

In allowing the implied consent hearing to proceed,[23] the court distinguished between a criminal offense and a civil violation, reasoning that the DUI statute and the implied consent statute "are separate and distinct and should be enforced separately."[24] The court also noted that the penalties for refusing to submit to testing "are additional penalties and not substitutes for other penalties provided by law."[25]

IV. IMPACT

Uehara raises the dilemma of how a court should treat an arrestee who refuses to submit to a chemical sobriety test. A first-time offender who refuses to submit would face the threat of a mandatory one-year license revocation and also a trial on the DUI charge. Thus, the defendant, if convicted of DUI, could suffer additional penalties for refusing to submit to chemical testing.[26] At the same time, however, in the absence of scientific evidence—specifically the results of a chemical sobriety test—the State's case-in-chief would rely mainly on the testimony of the arresting officer and anyone who witnessed the defendant's behavior at the time of his arrest.[27] The credibility and ability of the State's witnesses to withstand ensuing cross-examination would be extremely crucial in this situation.

N.E.2d 61 (1985) (driver who pled guilty to DUI could still be penalized for refusing to submit to a chemical sobriety test); *In re* Burnham, ___ Mont. ___, 705 P.2d 603 (1985) (driver who pled guilty to DUI could still face license suspension for refusing to submit to chemical testing).

[23] After the arresting officer submits an affidavit to the district judge, HAW. REV. STAT. § 286-156 provides that:

> The district judge shall hear and determine:
>
> (1) Whether the arresting officer had reasonable grounds to believe that the person had been either driving or in actual physical control of a motor vehicle upon the highways while under the influence of intoxicating liquor;
>
> (2) Whether the person was lawfully arrested;
>
> (3) Whether the arresting officer had informed the person of the sanctions of section 286-155; and
>
> (4) Whether the person refused to submit to a test of the person's breath or blood.

[24] 68 Haw. at ___, 721 P.2d at 706. The court noted that "[a] DUI violation is a criminal offense, whereas an implied consent violation is *'civil* in nature, and hearings before a district judge, pursuant to statute, are in the nature of administrative proceedings." *Id.* at ___, 721 P.2d at 706-07 (citations omitted) (emphasis original).

[25] *Id.* 721 P.2d at 707 (quoting HAW. REV. STAT. § 286-155(e) (Supp. 1984)).

[26] *See* Note, State v. O'Brien: *Right to Jury Trial for Driving Under the Influence of Intoxicating Liquor*, 8 U. HAW. L. REV. 209, 225 (1986) ("If the accused is convicted of DUI, the resulting penalties will be in addition to the license revocation.").

[27] *Id.*

While a person arrested for DUI who refuses to submit to a chemical sobriety test faces the consequences of additional penalties, the liability of an individual who submits to testing is restricted to the penalties enumerated in the DUI statute.[28] Therefore, implicit in the supreme court's decision is its assumption that after considering the alternatives, a driver arrested for DUI will consent to a chemical sobriety test. This ensures the securing of accurate, scientific evidence to support a DUI conviction.

V. CONCLUSION

State v. Uehara represents the Hawaii Supreme Court's attempt to alleviate the serious problems associated with drunken driving in Hawaii. A defendant cannot escape the penalties for refusing to submit to a chemical sobriety test by arguing that he was too intoxicated to have knowingly refused to submit. Furthermore, a defendant convicted of DUI who refused to submit to chemical testing also risks a revocation of his driver's license. Implicit in *Uehara* is that its ultimate effect will result in increasing the rate of DUI convictions in the State of Hawaii by securing accurate, physical evidence to support such convictions.

Michael A. Azama

[28] This assumes that the individual is convicted of DUI pursuant to HAW. REV. STAT. § 291-4 (1985).

CRIMINAL LAW—*State v. Dumlao*: Hawaii's "Extreme Mental or Emotional Disturbance" Defense

I. INTRODUCTION

In *State v. Dumlao*,[1] the Hawaii Intermediate Court of Appeals (ICA) reversed and remanded the murder conviction[2] of Vidado B. Dumlao. The court held that because he was suffering from a paranoid personality disorder,[3] he was entitled to a jury instruction[4] regarding the defense of "extreme mental or emotional disturbance" set forth in Hawaii Revised Statutes section 707-702(2).[5] This section reduces the offense of murder to the lesser crime of manslaughter. In construing the language of section 702(2), the court distinguished the reasonable person test used in the "heat of passion/provocation" defense,[6] and adopted instead a more subjective test.[7] This recent development analyzes the court's holding and the impact of the subjective test on Hawaii law.

---

[1] 68 Haw. ____, 715 P.2d 822 (1986).

[2] Dumlao was convicted under HAW. REV. STAT. § 707-701(1) (1976), which provides:

> Except as provided in section 707-702, a person commits the offense of murder if he intentionally or knowingly causes the death of another person.

[3] *Dumlao*, 68 Haw. at ____, 715 P.2d at 831.

[4] The trial court instructed the jury that they could find Dumlao guilty of manslaughter if they concluded that he had recklessly shot Pacita Reyes to death. *Id.* at ____ n.3, 715 P.2d at 825 n.3.

[5] The statute providing for the defense reads as follows:

> In a prosecution for murder it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of the person in the defendant's situation under the circumstances as he believed them to be.

HAW. REV. STAT. § 707-702(2) (1976).

The *Dumlao* court interpreted the statute as a "partial defense" rather than a "true defense," because the charge of murder is acquitted "when the jury finds that the defendant is guilty only of manslaughter." 68 Haw. at ____ n.2, 715 P.2d at 825 n.2 (quoting State v. Ott, 297 Or. 375, ____ n.2, 686 P.2d 1001, 1003 n.2 (1984)).

[6] For further discussion of the heat of passion defense, see *infra* note 50.

[7] *See* People v. Casassa, 49 N.Y.2d 668, 404 N.E.2d 1310, 427 N.Y.S.2d 769, *cert. denied*, 449 U.S. 842 (1980). For a discussion of the objective/subjective test, see *infra* notes 48, 53-54 and accompanying text.

II. FACTS

At trial, Dumlao was diagnosed as suffering from a long term "paranoid personality disorder"[8] that included pathological jealosy and hypersensitivity. Dumlao's jealosy[9] resulted in the belief that his wife, Florentina, was engaging in sexual relations with other men, including her brothers, even though Dumlao had no objective basis for his belief.[10] Dumlao's hypersensitivity was characterized by his being easily slighted, and a readiness to counterattack when he perceived a threat.[11] For example, if a stranger glanced at his wife, he believed that a sexual overture had been made and he became personally affronted.[12]

One evening, he became jealous of his wife because of the way his brother-in-law, Agapito Reyes, looked at him.[13] After accusing his wife of having sexual relations with Agapito, he kicked or pushed her on the side.[14] His father counselled him and he returned to his room, but he heard voices from the living room. He believed they were talking about him, and he came out to investigate with his gun in his waistband. He saw another brother-in-law, Pedrito, "with his eyes at [him,] burning eye, angry eye, angry,"[15] and testified that Pedrito rushed at him with a knife.[16] Dumlao's gun discharged, killing his mother-in-law, Pacita M. Reyes.[17]

Dumlao was convicted of Reyes's murder,[18] and with the reckless endanger-

---

[8] *Dumlao*, 68 Haw. at ____, 715 P.2d at 831. Dumlao was diagnosed by Arthur Golden, M.D., who served as Dumlao's expert witness.

[9] *Id.* Dumlao was diagnosed as suffering from unwarranted suspiciousness, one of the basic indicators of the "paranoid personality disorder." Dumlao's unwarranted suspiciousness included pathological jealousy, which Dumlao suffered throughout his ten-year marriage.

[10] *Id.*

[11] Dr. Golden believed that at the time of the offense Dumlao felt the need to counterattack because he perceived a very substantial threat. "[P]erhaps an ordinary individual in his situation would not have. He did." *Id.*

[12] There were other examples of Dumlao's behavior. His wife, Florentina, testified that his excessive jealousy had caused him to beat and kick her, throw a knife at her, and threaten her with a gun. He had threatened on numerous occasions to beat or kill her. *Id.* When she stood behind a man in the grocery store checkout line, Dumlao would get angry and jealous, concluding that she was "talking to him or whatever, like that." *Id.* Even his family members were not immune to his suspicion. His brother-in-law testified that he and his brothers could not talk to Florentina in Dumlao's presence "because he suspects us." *Id.*

[13] *Id.* Dumlao testified that Agapito "look at me on, the kine. He make sure—he make sure that—I don't know, making sure if I leave the house or I don't know so I got the bad feeling so I never leave." *Id.* at ____, 715 P.2d at 832.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at ____, 715 P.2d at 825.

ing of his brother-in-law, Pedrito Reyes.[19] Dumlao appealed only the murder conviction, arguing that he was wrongfully denied the instruction that if the jury found that he was under an "extreme mental or emotional disturbance" at the time of the offense, the charge must be reduced from murder to manslaughter.

III. BACKGROUND

A. *The Extreme Mental or Emotional Disturbance Defense*

Extreme mental or emotional disturbance could be explained under three general approaches to behaviorism.[20] The behaviorist view analyzes human action as a mechanistic response to external stimuli.[21] The psychoanalytic approach analyzes behavior as a product of unconscious drives and conflicts shaped by childhood experiences.[22] Finally, the physiological contention theorizes that behavior is ruled by chemical reactions in the body.[23] All these approaches explain the extreme emotional disturbance condition as a defense without requiring the actor to be insane, by recognizing that certain actions are beyond human ability to control. One commentator noted, "if an individual's behavior *is* caused by factors outside his control, how can we hold him morally and legally responsible for it?"[24]

Indeed, assuming that a defendant is not responsible for his extreme mental or emotional disturbance, measures of deterrence would prove useless against his behavior.[25] Thus, any punishment against him, except for purely retributive purposes, is unjustified. Likewise, use of the strict objective standard in assessing the defendant's responsibility may be inappropriate. Although this standard provides an incentive to behave normally,[26] it ignores the fact that any incentive

---

[19] *Id. See* HAW. REV. STAT. § 707-713 (Supp. 1984).

[20] *See* Slobogin, *A Rational Approach to Responsibility*, 83 MICH. L. REV. 820 (1985) (discussing determinism, the idea that human behavior is caused by factors beyond the individual's control).

[21] *Id. See generally* B. SKINNER, BEYOND FREEDOM AND DIGNITY (1984); E. SPENSE, BEHAVIOR AND THEORY CONDITIONING (1956).

[22] *See generally* Freund, *A General Introduction to Psycho-Analysis*, reprinted in 54 GREAT BOOKS OF THE WESTERN WORLD 449 (R. Hutchins ed. 1952).

[23] *See generally* N. CHOMSKY, RULES AND REPRESENTATIVES 217-54 (1980); Rapaport, *On the Psychoanalytic Theory of Motivation*, reprinted in NEBRASKA SYMPOSIUM ON MOTIVATION 173, 183-212 (M. Jones ed. 1960).

[24] Slobogin, *supra* note 20, at 821.

[25] *But see id.* ("if the idea of personal blameworthiness is meaningless, punishment could instead be premised on the need to prevent future crime by the individual in question").

[26] Gray v. State, 482 So.2d 1318, 1320 (Ala. Crim. App. No. 85-322 Jan. 31, 1986), *cert. denied*, ____ So.2d ____ (Ala. 1986).

to behave normally has little or no effect on the actor.

B. *The Extreme Mental or Emotional Disturbance Defense in Other Jurisdictions*

Hawaii, New York,[27] and Oregon[28] are the only states that currently recognize the extreme mental or emotional disturbance defense. The heat of passion/provocation defense rejected in *Dumlao* remains the law in other jurisdictions.[29]

In *Gray v. State*,[30] the Alabama Supreme Court rejected the extreme emotional disturbance defense as "unsound, unclear and susceptible to abuse."[31] The court observed that the defense "decreases the incentive for [a defendant] to behave as if he were normal."[32]

---

[27] *See, e.g.*, People v. Casassa, 49 N.Y.2d 668, ___, 404 N.E.2d 1310, 1316, 427 N.Y.S.2d 769, 775, *cert. denied*, 449 U.S. 842 (1980).

[28] *See, e.g.*, State v. Ott, 297 Or. 375, 686 P.2d 1001 (1984) (psychotic jealousy over wife's lovers prompted by stress); State v. O'Berry, 11 Or. App. 552, 503 P.2d 505 (1972) (defendant's violence after rape victim resisted advances does not justify extreme emotional disturbance defense).

[29] *See, e.g.*, Lalonde v. State, 614 P.2d 808 (Alaska 1980) (revenge motive insufficient to establish provocation); State v. Manley, 128 Ariz. 40, 623 P.2d 829 (1980) (sufficient passion shown where defendant with history of barbiturate abuse was refused entrance to mother's room and retaliated by kicking and yelling for twenty minutes); People v. Wickersham, 185 Cal. Rptr. 436, 650 P.2d 311 (1982) (victim grabbing defendant's gun prompting fear that it be used against him held insufficient to establish provocation defense); State v. Guebara, 236 Kan. 791, 696 P.2d 381 (1985) (furious resentment may be sufficient); State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979) (murder of policeman while blinded by lights and while investigating for prowlers held insufficient to justify provocation defense); State v. Castro, 92 N.M. 621, 593 P.2d 621 (1979) (sudden quarrel may suffice, although words alone do not); Wood v. State, 486 P.2d 750 (Okl. Cir. 1971) (passion or great danger from fright or terror in street brawl); State v. Ross, 28 Utah 2d 279, 501 P.2d 632 (1972); Krucheck v. State, 702 P.2d 1267 (Wyo. 1985) (victim must be source of provocation). Both the extreme mental or emotional disturbance defense and the heat of passion/provocation defense reduce only homicide, and no less serious form of murder, to manslaughter. *See* P. LAW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 815 (1982). *See also* State v. Grunow, 102 N.J. 133, 506 A.2d 708 (1986) (aggravated manslaughter not reduced to simple manslaughter by heat of passion where the defense reduces only homicide to manslaughter); People v. Wingate, 72 A.D.2d 955, 422 N.Y.S.2d 245, 246 (1979) (extreme mental or emotional disturbance defense does not reduce deprived mind murder [second degree murder] to manslaughter).

[30] 482 So.2d 1318 (Ala. 1986). In Alabama, manslaughter consists either of a reckless killing or an intentional killing committed in the heat of passion. *Id.* at 1319. In *Gray*, the defendant walked off his front porch, drew his pistol and shot the victim in the neck. *Id.* The court found that the defendant was not reckless nor in the heat of passion at the time of the crime, and therefore denied his request for a manslaughter instruction.

[31] *Id.* at 1320.

[32] The court observed that

> [i]t blurs the law's message that there are certain minimal standards of conduct to which

The Oregon case of *State v. Ott*[33] represents the opposite view of the defense. In *Ott*, the defendant was convicted of murdering his wife out of jealousy over her other lovers.[34] The Oregon Supreme Court reversed the conviction. The court held that since Ott was diagnosed as exhibiting psychotic behavior under stress,[35] he was entitled to the extreme mental or emotional disturbance defense. Where Ott's psychotic jealousy was triggered by an external factor such as stress, it was unlikely that any degree of incentive would have affected Ott's ability to behave as if he were normal.

In assessing the defendant's culpability under the extreme mental or emotional disturbance defense, the Oregon Supreme Court looked to certain external circumstances. The court in *Ott* specifically analyzed the defense from the standpoint of the person in the actor's "situation."[36] Thus, a defendant's age, sex, nationality,[37] race, physical stature, and mental and physical handicaps were considered.[38] The defendant's personality characteristics, however, were not included.[39] Additionally, the court recognized that the outcome of the case would be affected by the jury's "empathy" to the actor's condition.[40]

> every member of society must conform. . . . It . . . undercuts the social purpose of condemnation. And the factors that call for mitigation are the very aspects of the individual's personality that make us most fearful of his future conduct. In short, diminished responsibility brings formal guilt more closely in line with moral blameworthiness, but only at the expense of driving a wedge between dangerousness and social control.

Id.

[33] 297 Or. 375, 686 P.2d 1001 (1984).

[34] *Id.* at ____, 686 P.2d at 1011.

[35] *Id.*

[36] *Id.* at ____, 686 P.2d at 1014.

[37] The *Dumlao* court also requires the jury to look at the actor's situation. The court in *Ott* discussed a hypothetical involving an Asian American who was previously interned during World War II for being Japanese, and who killed a co-worker in response to repeated racial prejudice suffered at his job. The court recognized that the situation of this actor might justify a heat of passion defense, even though a reasonable man is not likely to be raised to the heat of passion by such insults. *See also* Donovan & Wildman, *Is the Reasonable Man Obsolete?*, 14 LOYOLA L. REV. 435, 438 (1981).

[38] 297 Or. at ____ n.20, 686 P.2d at 1014 n.20. In states following the "heat of passion" doctrine, characteristics such as low intelligence or easily aroused passion is not to be considered. *See* State v. Guebara, 236 Kan. 791, ____, 696 P.2d 381, 385 (1985).

[39] To the extent the jury is capable of empathizing accurately with the defendant, personality characteristics seem very relevant. That personality is not considered may reflect the court's desire to retain greater objectivity to the objective/subjective test.

[40] 297 Or. at ____, 686 P.2d at 1012. *See also* Wechsler, *Codification of Criminal Law in the United States, the Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968).

IV. ANALYSIS

In *Dumlao*, the ICA reversed the murder conviction and remanded the case for a new trial.[41] The court held that because "there was evidence, no matter how weak, inconclusive or unsatisfactory," that Dumlao killed Pacita while under the influence of extreme emotional disturbance, the trial court should have given the extreme mental or emotional disturbance defense instruction.[42]

The ICA distinguished the "extreme mental or emotional disturbance" defense from the "insanity" defense,[43] noting that the disturbance defense "was meant to be understood in relative terms as referring to a loss of self-control due to intense feelings."[44] The court also distinguished the disturbance defense from the "diminished capacity" defense,[45] reasoning that the "extreme emotional disturbance" defense adopted by the Model Penal Code represented an expanded concept of diminished capacity that had been merged with the "heat of passion" defense.[46] The court concluded that the language of section 702(2) may allow inquiry into areas which have traditionally been treated as part of the law of diminished responsibility or the insanity defense.[47]

The court explained that the term "extreme emotional disturbance" denotes the emotional state of an individual who (1) has no mental disease or defect that rises to the level of insanity, (2) is exposed to an extremely unusual and overwhelming stress, and (3) has an extreme emotional reaction to it, as a result of which there is a loss of self-control. Further, that person's ability to reason is also overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions.[48] The court reasoned that the "extreme

---

[41] *Dumlao*, 68 Haw. at ____, 715 P.2d at 832.

[42] *Id.* at ____, 715 P.2d at 832 (quoting State v. O'Daniel, 62 Haw. 518, 527-28, 616 P.2d 1383, 1390 (1980)).

[43] *Id.* at ____, 715 P.2d at 828. HAW. REV. STAT. § 704-400 describes insanity as the mental state of a person who, as a result of mental disease, disorder or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. See also commentary to § 704-400 for additional background to Hawaii's insanity defense.

[44] *Id.*

[45] *Id.* The diminished capacity defense "provides that evidence of an abnormal mental condition not amounting to legal insanity but tending to prove that the defendant could not or did not entertain the specific intent or state of mind essential to the offense should be considered for the purpose of determining whether the crime charged or a lesser degree thereof was in fact committed." *Id.* at ____, 715 P.2d at 829 (quoting State v. Baker, 67 Haw. 471, 473-74, 691 P.2d 1166, 1168 (1984)) (footnote omitted).

[46] *Id.* at ____, 715 P.2d at 829. See *infra* note 50 for a discussion of the heat of passion/provocation defense.

[47] *Id.* at ____, 715 P.2d at 828. *See* People v. Spurlin, 156 Cal. App. 3d 119, 127 n.4, 202 Cal. Rptr. 663, 668 n.4 (1984).

[48] *Dumlao*, 68 Haw. at ____, 715 P.2d at 829 (quoting People v. Shelton, 88 Misc.2d 136,

emotional disturbance" language was a modification of the "heat of passion/provocation" defense that traditionally served as a mitigating factor in reducing murder to manslaughter.[49] The heat of passion/provocation defense had been applied using an objective test.[50] The ICA criticized this test, however, for not focusing on the mental state of the accused.[51] "The objective test placed the jury in the conceptually awkward, almost impossible, position of having to determine when it is reasonable for a reasonable person to act unreasonably."[52]

The court adopted a mixed objective/subjective test[53] to determine whether there was reasonable explanation or excuse for a particular emotional disturbance. Under this test, the court considers the subjective, internal emotional situation of the defendant, and the external attendant circumstances as he perceived them at the time, however inaccurate that perception may have been. The court then assesses from that standpoint whether the explanation for his emotional disturbance was reasonable, so as to entitle the defendant to a reduction of the crime charged from murder to manslaughter.[54]

The court further noted that the testimony of other witnesses, which contradicted Dumlao's account of his being attacked by Pedrito,[55] was irrelevant as to whether Dumlao was entitled to the manslaughter instruction. Moreover, Dumlao's right to the instruction was not impaired because his testimony that he was only trying to scare Pedrito did not comport with the manslaughter

---

149, 385 N.Y.S.2d 708, 717 (1976)). The court noted that extreme emotional disturbance could not reduce murder to manslaughter if the actor had intentionally, knowingly, recklessly or negligently brought about his own mental disturbance such as by involving himself in a crime. *Id.* at ____ n.13, 715 P.2d at 829 n.13.

[49] *Id.* at ____, 715 P.2d at 826. The court noted that the extreme emotional disturbance defense is broader than the heat of passion doctrine in that "a cooling off" period intervening between the fatal act and the disturbance does not negate the defense. *Id.* at ____ n.12, 715 P.2d at 829 n.12.

[50] *Id.* The provocation/heat of passion defense has four elements: (1) provocation that would rouse a reasonable person to the heat of passion; (2) actual provocation of the defendant; (3) a reasonable person would not have cooled off in the time between the provocation and the offense; and (4) the defendant did not cool off. *See* Donovan & Wildman, *supra* note 37, at 435-49 (1981). *See also* People v. Casassa, 49 N.Y.2d 668, 404 N.E.2d 1310, 427 N.Y.S.2d 769, *cert. denied*, 449 U.S. 842 (1980). The *Dumlao* court noted, however, that "to hold that the pre-penal code law of provocation continues to hold sway would be to render the language of section 707-702(2) meaningless." *Dumlao*, 68 Haw. at ____, 715 P.2d at 830. *See* State v. Smith, 59 Haw. 456, 460-62, 583 P.2d 337, 341 (1978). *See also* HAW. REV. STAT. § 701-104 (1976).

[51] 68 Haw. at ____, 715 P.2d at 827. *See* Donovan & Wildman, *supra* note 37, at 451.

[52] 68 Haw. at ____, 715 P.2d at 827. *See* State v. Ott, 297 Or. 375, ____, 686 P.2d 1001, 1005-6 (1984). *See also* Ingber, *A Dialectic: The Fullfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 947 (1975).

[53] *See* People v. Casassa, 49 N.Y.2d 668, 404 N.E.2d 1310, 1316, 427 N.Y.S.2d 769, 775, *cert. denied*, 449 U.S. 842 (1980).

[54] *Dumlao*, 68 Haw. at ____, 715 P.2d at 832.

[55] *Id.*

defense.[56] The court concluded that "Dumlao was entitled to an instruction on every theory of defense shown by the evidence."[57]

V. IMPACT

The extreme mental or emotional disturbance defense recognizes that "one whose ability to reason practically is significantly impaired cannot justly be held responsible."[58] The determination of whether the defendant's ability to reason is sufficiently impaired is the very subject of judicial debate. The court in *Dumlao* seems to have chosen the subjective/objective standard as an attempt to combine the relative ease in applying the objective standard, and the desirability of matching punishment with the defendant's true mental condition at the time of the offense.

The ICA's adoption of a partly subjective test[59] is suspect because one can never truly place oneself in the shoes of a defendant. But as one commentator noted, "when a defendant claims that his psychological aberration has, or ought to have, exculpatory or mitigating significance, the risk of unreliable decision-making is often accepted in deference to the perceived ethical imperatives of individualization."[60] Whether and to what extent later decisions employing the extreme emotional disturbance defense are "unreliable" depends on the jury's ability to empathize with the defendant.[61] By requiring only that the explanation for the emotional disturbance be "reasonable," however, the lack of total empathy with the defendant may not prove fatal to him. Indeed, a test that allows external circumstances incident to the defendant's situation to be consid-

---

[56] *Id.*

[57] *Id. See* State v. O'Daniel, 62 Haw. 518, 616 P.2d 1383 (1980).

[58] Slobogin, *supra* note 20, at 828.

[59] People v. Casassa, 49 N.Y.2d 668, ___, 404 N.E.2d 1310, 1316, 427 N.Y.S.2d 769, 775, *cert. denied*, 449 U.S. 842 (1980). An interesting side issue, not before the *Dumlao* court, was whether due process required the prosecution to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation. The United States Supreme Court answered this question affirmatively in Mullaney v. Wilbur, 421 U.S. 684 (1975) (Maine homicide laws). New York later found that *Mullaney* was not controlling, however. People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573, *aff'd*, 432 U.S. 197 (1977). The New York court distinguished *Mullaney* on the ground that although the prosecution must prove all elements in the crime, including the defendant's intent, an extreme mental or emotional disturbance does not negate intent. *See* 432 U.S. at 207. *See generally* Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 225 (1984).

[60] Slobogin, *supra* note 20, at 845 (quoting Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 434-35 (1980)).

[61] *See supra* note 40.

ered should provide the able jury with sufficient tools to weed out unmeritorious assertions of the defense, while more closely tailoring the punishment of the crime with the culpability of the criminal.

VI. CONCLUSION

In *State v. Dumlao*, the ICA joined Oregon and New York in adopting an objective/subjective test to construe the extreme mental or emotional disturbance defense. Hence, the jury must place itself in the situation of the defendant as he believed it to be at the time, taking into account both external and internal factors, and assessing from that viewpoint whether the defendant's actions were objectively reasonable. The court reasoned that such a standard better equates the severity of the crime with the defendant's state of mind at the time of the offense, while maintaining some degree of objectivity.

The alternative of a purely objective test for determining a defendant's culpability is based on a belief that all persons should conform to certain minimum standards of conduct, and that anyone deviating from those standards should be punished to deter further misconduct. This attempt at social control, however, ignores the fact that extreme emotional disturbance is caused by external factors beyond the defendant's control. Deterrence, which lies at the heart of the objective basis test, is therefore ineffective against a defendant suffering from extreme emotional disturbance.

Although the disturbance defense bears the risk of overrelying on the jury's ability to fully empathize with the defendant, the test requires only that the jury find the explanation for such emotional disturbance be reasonable. It is likely that the subjective aspect of the test will have a favorable impact on defendants properly asserting the defense.

Roy John Tjioe

CRIMINAL LAW—*State v. Kam*: Do Community Standards on Pornography Exist?

I. INTRODUCTION

In *State v. Kam*,[1] the Hawaii Supreme Court held that in a prosecution for promotion of pornography brought under Hawaii Revised Statutes section 712-1214,[2] it is necessary to specifically instruct the jury that in order to convict, they must find that a contemporary community standard exists and that the materials violated it.[3] *Kam* did not overrule *State v. Han*,[4] which held that the prosecution is not required to introduce any evidence addressed to community standards in Hawaii if the materials in evidence provide a sufficient basis for the factfinder's determination of obscenity.[5] *Kam* does, however, strongly encourage the prosecution to present evidence that a contemporary standard exists in the community of the State of Hawaii.[6]

II. FACTS

In separate trials, Brian Kam was charged with selling a pornographic video-

---

[1] 68 Haw. ____, 726 P.2d 263 (1986).

[2] HAW. REV. STAT. § 712-1214(1)(a) (1985) provides that "[a] person commits the offense of promoting pornography if, knowing its content and character, he . . . [d]isseminates for monetary consideration any pornographic material." Under HAW. REV. STAT. § 712-1210 (1985):

> Any material or performance is "pornographic" if all of the following coalesce:
>
> (a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest.
>
> (b) It depicts or describes sexual conduct in a patently offensive way.
>
> (c) Taken as a whole, it lacks serious literary, artistic, political, or scientific merit.

The commentary to § 712-1210 notes that the statute was amended in 1981 to conform to the holdings of the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973), and the Hawaii Supreme Court in State v. Manzo, 58 Haw. 440, 573 P.2d 945 (1977).

[3] 68 Haw. at ____, 726 P.2d at 265.

[4] 63 Haw. 418, 629 P.2d 1130 (1981).

[5] *Id.* at 422-23, 629 P.2d at 1130.

[6] This recent development does not detail the history or development of obscenity law. For a complete study, see generally, F. SCHAUER, THE LAW OF OBSCENITY (1976).

tape and Debbie Cohen was charged with selling four magazines.[7] The cases were consolidated for argument in the Hawaii Supreme Court because they involved common questions of law regarding the issue of jury instructions given in pornography prosecution cases.[8] The allegedly pornographic materials were admitted into evidence in both cases, and there was no dispute that Kam and Cohen did sell them.[9] In both cases, the trial court instructed the jury[10] regarding the finding of a community standard on pornography.[11] The courts instructed the jury that "[i]n determining whether the material, taken as a whole, appeals to the prurient interest, and whether it portrays sexual conduct in a patently offensive way, you must, as an average person, determine and apply the contemporary community standards of the State of Hawaii."[12] In Cohen's case, the court refused to give Cohen's instruction that "if you are unable to identify the statewide community standard, Defendant is entitled to a finding in her favor."[13]

The respective juries convicted Kam and Cohen of promoting pornography in

---

[7] 68 Haw. at ____, 726 P.2d at 264.

[8] *Id.*

[9] *Id.*

[10] *Id.* The standard instruction given in both cases reads in relevant part:

> The court will instruct you now concerning the law which you must follow in arriving at your verdict.
>
> You are the exclusive judges of the facts of this case. However, you must follow these instructions even though you may have opinions to the contrary.
>
> You must consider all of the instructions as a whole and consider each instruction in the light of all of the others. Do not single out any word, phrase, sentence or instruction and ignore the others. Do not give greater emphasis to any word, phrase, sentence or instruction simply because it is repeated in these instructions.

Id. at ____, 726 P.2d at 264-65.

[11] The instructions given, in relevant part, were:

> COMMUNITY STANDARDS
>
> In determining whether the material, taken as a whole, appeals to the prurient interest, and whether it portrays sexual conduct in a patently offensive way, you must, as an average person, determine and apply the contemporary standards of the State of Hawaii.
>
> Contemporary community standards are determined by what the people of the State of Hawaii, as a whole, in fact find presently acceptable.
>
> In determining what the contemporary community standards of the State of Hawaii are, you may consider your knowledge of what is acceptable in the community.

Id. at ____, 726 P.2d at 265.

[12] *Id.* In Cohen's case, the trial judge also instructed the jury that "[a]scertainment of the standard must be based upon an objective determination of what affronts, and is intolerable to, the community as a whole." *Id.*

[13] *Id.* Cohen offered this instruction in light of Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d 1216 (1978), which held that a defendant was entitled to rulings or instructions that, if the trier of fact could not determine community norms, the defendant was entitled to a finding in his favor.

violation of Hawaii Revised Statutes section 712-1241(1)(a).[14] On appeal, the Hawaii Supreme Court reversed, holding that the jury must be instructed that in order to convict, they must first find that a contemporary community standard exists.[15]

III. ANALYSIS AND COMMENTARY

A. *Determining a "Community Standard"*

The Hawaii Supreme Court reasoned that the community standard instruction given in each trial could have been construed by the jury as "mandating them to decide that there are contemporary community standards."[16] The court found that under such a mandate, there arises a problem because community standards may or may not exist.[17] The court observed that the questions raised by the juries during deliberations in each case evidenced their confusion regarding the community standards.[18] At Kam's trial, the jury asked "[s]hould the understanding of 'community standards' affect our decision and/or can you further define community standards?"[19] No clarification was given by the court.[20] At Cohen's trial, the jury asked "[m]ay we have the charts that have the definition of pornography?" The trial court answered by giving the jury extensive instructions including a repetition of the instruction on determining community standards, but no further clarification of "community standards" was given.[21]

In *Smith v. United States*,[22] the United States Supreme Court noted the particular importance of jury instructions given in obscenity prosecutions. The Court averred that "[j]uries must be instructed properly so that they consider the entire community and not simply their own subjective reactions or the reac-

---

[14] 68 Haw. at ____, 726 P.2d at 264. For the pertinent statutory language of HAW. REV. STAT. § 712-1214, see *supra* note 2.

[15] 68 Haw. at ____, 726 P.2d at 265.

[16] *Id.*

[17] *Id.* The court reasoned that without a clarification of the community standards issue, such as the instruction offered by Cohen there existed "a substantial likelihood that the juries in these cases were misled into not considering the issue of whether such standards do, in fact, exist." *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* Appellant Kam's opening brief gives a more specific response: "The judge responded to this question as follows: 'Please rely on the instructions you have been given as well as your collective memories of the evidence.' " Appellant's Opening Brief at 3, State v. Kam, 68 Haw. ____, 726 P.2d 263 (1986) (No. 86-11016) (citing Record at 184).

[21] 68 Haw. at ____, 726 P.2d at 265. For the instructions previously given by the trial court, see *supra* notes 10 and 11.

[22] 431 U.S. 291 (1977).

tions of a sensitive or of a callous minority."[23] Jury instructions are critical to a case because they set forth for the jurors the rules of law they must follow in their deliberations. The instructions given, therefore, must impart adequate guidance for the jurors to follow in reaching their verdicts.

The Supreme Judicial Court of Massachusetts in *Commonwealth v. Trainor*[24] held that in an obscenity prosecution, "a defendant is entitled to rulings or instructions that, if the trier of fact cannot determine Commonwealth norms, the defendant is entitled to a finding in his favor."[25] The court reasoned that the existence of a community standard of what is pornographic was vital because if no such standard existed, the statute would fail for unconstitutional vagueness.[26] In *State v. Taylor*,[27] however, the Supreme Court of Utah held that there is no requirement of an "independent factual determination of what the community standard on pornography is in the abstract in order for the jury to find that the defendant has violated it."[28] In *Taylor*, the defendant urged an adoption of the *Trainor* standard to instruct the jury that if they are unable to determine a community standard, they must acquit.[29] The court held that Taylor was "asking the jury or individual jurors to do something which a juror is not capable of doing nor is required to do."[30] The court determined that "[i]t is only necessary that each individual juror be able to apply his or her view of the community standard as the average person would apply it."[31] Thus, each juror may have possessed an independent view of what the prevailing community standard was, but if all of the jurors found that the material violated their respective views, the prosecution met its burden.

The *Kam* court followed *Trainor* by holding that the jury should have been

---

[23] *Id.* at 305 (citing *Miller*, 413 U.S. at 30).

[24] 374 Mass. 796, 374 N.E.2d 1216 (1978).

[25] *Id.* at ____, 374 N.E.2d at 1219. Arguably, if no community standard exists, the public would not have fair notice of what constitutes a violation of the law prior to arrest. State v. Taylor, 664 P.2d 439, 448 (Utah 1983). The fair notice argument, however, was not successful in *Taylor*.

[26] 374 Mass. at ____, 374 N.E.2d at 1219.

[27] 664 P.2d 439 (Utah 1983).

[28] *Id.* at 449. The court in *Taylor* reasoned that it was an erroneous assumption that "the jury must first collectively determine what the community standard is and then apply that standard as the average person would to the allegedly obscene material." It found that each juror makes his or her own factual determination on the question of whether specific material violates the community standard and does not necessarily determine an abstract definition of the community standard on pornography. *Id.* The court, however, granted Taylor a new trial on other grounds.

[29] *Id.* at 448.

[30] The court reasoned that "even if a juror could arrive at an abstract community standard, it would not be necessary for the jury itself to reach a concensus on what that standard is." *Id.* at 449.

[31] *Id.* The court held that a juror would vote to acquit only if he or she could not arrive at the community standard, or determines that one does not exist. *Id.*

instructed that they must find that some community standard exists before the defendant can be convicted.[32] Because *Kam* requires a jury to make a threshold determination that some community standard exists before there can be a finding that the defendant violated it, obscenity prosecutions now often include the introduction of public polls as evidence of that standard.

B. *A Public Opinion Sample on Community Standards: The Next Step?*

In *Paris Adult Theater I v. Slaton*,[33] the United States Supreme Court held that expert testimony on behalf of the prosecution is not constitutionally required if the allegedly obscene material itself is sufficient evidence for the determination of the question of obscenity.[34] The Hawaii Supreme Court followed *Paris Adult Theater I* in *State v. Han*,[35] holding that the prosecution is not required to introduce evidence regarding Hawaii's community standards.[36] Although *Han* was not directly affected by *Kam*, the introduction of evidence of community views has become an important aspect of a pornography prosecution because of that case.[37] *Kam* allows a finding of a guilty verdict only if the jury determines that a community standard exists, and only if the material in ques-

---

[32] In Commonwealth v. Mascolo, 7 Mass. App. Ct. 275, 386 N.E.2d 1311 (1979), the Massachusetts Appeals Court followed *Trainor* and reversed convictions for the knowing dissemination of an allegedly obscene film because the jury should have been instructed that "if you are unable to agree on what the views of the average person are on the subject of prurient or patent offensiveness, then I instruct you to return a verdict of not guilty." *Id.* at ____, 386 N.E.2d at 1314.

[33] 413 U.S. 49, *reh'g denied*, 414 U.S. 881 (1973).

[34] 413 U.S. at 56. See also Hamling v. United States, 418 U.S. 87 (1974), which held that the government is under no constitutional obligation to provide evidence of community standards. These cases, however, do not deny the defendant in an obscenity case the right to introduce the best evidence he can produce upon a material element of the definition of obscenity. Kaplan v. California, 413 U.S. 115, 121 (1973) (citing Smith v. California, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring)); People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980). For other cases adopting the *Paris Adult Theater I* rule, see *infra* note 36.

[35] 63 Haw. 418, 629 P.2d 1130 (1981) (expert evidence that materials are obscene unnecessary when materials provide sufficient basis for the jury's determination of obscenity).

[36] *Id.* at 422-23, 629 P.2d at 1134. The *Paris Adult Theater I* rule has also been adopted in several other states. *See, e.g., Illinois*: People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264 (1974), *cert. denied*, 421 U.S. 993 (1975); *Massachusetts*: Commonwealth v. United Books, Inc., 389 Mass. 888, 453 N.E.2d 406 (1983); Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d 1216 (1978); *Oregon*: State v. Childs, 252 Or. 91, 447 P.2d 304 (1968) (en banc), *cert. denied*, 394 U.S. 931 (1969); *Wisconsin*: State v. Simpson, 56 Wis. 2d 27, 201 N.W.2d 558 (1972).

[37] See also United States v. Various Articles of Merchandise, 750 F.2d 596 (7th Cir. 1984), which recognized that although the government is not constitutionally obligated to provide evidence of community standards, if no evidence is presented, "it must be prepared to have the court find that, by its lights, the material is not self-evidently offensive to the community." *Id.* at 599.

tion violates that standard. Therefore, the production of evidence substantiating this standard, although not mandatory, is strongly advisable.

The confusion over community standards in Hawaii has prompted both the prosecution and defense in pending obscenity cases to commission public opinion surveys of community standards on "patently offensive" explicit materials.[38] Not surprisingly, the prosecution's poll found that "a majority of Hawaii adults are offended by graphic depictions of sexual activity" while the defense poll reflected "a more liberal attitude among Hawaii adults."[39]

Both the Federal and the Hawaii Rules of Evidence state that "[e]vidence which is not relevant is not admissible."[40] Therefore, in order to be admissible, any survey offered as evidence must be relevant to the issue of community standards on pornography.[41] Relevancy, and therefore admissibility, of a survey depends primarily upon two issues: first, whether the survey was properly conducted, the "form" issue, and second, whether the survey considered proper and relevant subject matter, the "content" issue.[42]

---

[38] In an article in the Honolulu Advertiser, City Prosecutor Charles Marsland was reported as saying that "one 'factor' prompting the commission of the poll was a recent Hawaii Supreme Court decision [referring to *Kam*]. In October, the high court overturned two pornography convictions and ruled that the prosecution must prove the existence of community standards condemning the sexually explicit materials. 'In order to represent the state, we had to commission the survey.' " Honolulu Advertiser, Dec. 29, 1986, at A3, col. 6, A6, col. 4.

[39] *Id.* at A6, col. 3.

[40] FED. R. EVID. 402; HAW. R. EVID. 402. The Federal and Hawaii rules both define relevant evidence as "evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; HAW. R. EVID. 401.

[41] Although relevant, surveys have been objected to under FED. R. EVID. 801, the hearsay objection. Zippo Mftg Co. v. Rogers Imports, Inc., 216 F. Supp 670, 682-84 (1963). The court in *Zippo* reasoned that "the hearsay rule should not bar the admission of properly conducted public surveys." The court found that when the hearsay objection has been raised, courts generally admit the survey in one of two ways. Some courts hold that surveys are not hearsay at all because they are not offered to prove the truth of what the respondents said. Other courts hold that although the surveys are hearsay, they fall within a recognized exception because they represent statements of present state of mind, attitude or belief. *Id.* (citations omitted). *See also* MANUAL FOR COMPLEX LITIGATION § 21.484 (1985). For discussion on whether the hearsay objection to opinion research evidence is valid, see Sorensen & Sorensen, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U. L. REV. 1213, 1231-37 (1953).

[42] 374 Mass. 796, 374 N.E.2d 1216. In *Trainor*, the Supreme Judicial Court held that a public opinion survey would be admissible to show the community standards if it were properly conducted and tended to show relevant norms. The court found "no meaningful distinction between a properly conducted public opinion survey offered to show community norms and the testimony of an expert who states his views on the opinion of the public concerning the portrayal of certain allegedly obscene conduct." 374 Mass. at ____, 374 N.E.2d at 1220. The court reasoned that "if expert testimony may give the jury appreciable assistance in resolving a fact question, it is admissible in the judge's discretion." *Id.* (citing Commonwealth v. Fournier, 372

1. Proper administration: a question of form

Relevant public opinion polls and other survey evidence are generally admissible if properly conducted.[43] Thus, admissibility of the survey turns on whether it was properly conducted.[44] One generally accepted methodology outlines seven foundational requirements which the proponent of the poll has the burden of establishing:

> (1) the poll was conducted by an expert in the field of surveying;
> (2) the relevant universe was examined;
> (3) a representative sample was drawn from the relevant universe;
> (4) the mode of questioning was "correct" (mail, telephone, personal interview, etc.);
> (5) the sample, questionnaire, and the interviews were designed in accordance with generally accepted standards;
> (6) the data gathered was accurately reported; and
> (7) the data was analyzed in a statistically correct manner.[45]

If these general guidelines are closely followed, the admission of relevant surveys would aid juries in determining prevailing community standards. Yet, even

---

Mass. 346, 361 N.E.2d 1294 (1977)). For more discussion on the admission of expert testimony *see* People v. Hanserd, 136 Ill. App. 3d 928, 483 N.E.2d 1321 (1985) (testimony of defendants' psychologist on prurient interest and social value of materials at issue held admissible). *But see* Albright v. State, ____ Ind. App. ____, 501 N.E.2d 488 (1986) (defendant failed to establish that sex therapist was qualified to testify on community attitudes towards sexually explicit material). For a discussion on whether the presentation of opinion research evidence qualifies as "expert testimony," see Sorensen & Sorensen, *supra* note 41 at 1221-30.

[43] "[A] properly conducted public opinion survey itself adequately ensures a good measure of trustworthiness, and its admissibility may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter." 374 Mass. at ____, 374 N.E.2d at 1221. The court in *Trainor* denied the admission of the poll offered, however, because the survey "failed to demonstrate the representativeness of the persons interviewed and failed to show that the survey results were relevant to any material issue in the case." *Id.* at ____, 374 N.E.2d at 1222.

[44] *Zippo*, 216 F. Supp. at 681. "[T]he weight to be given a survey, assuming it is admissible, depends on the procedures by which the survey was created and conducted." *Id.* (citations omitted).

[45] 475 N.E.2d at 1188 (citing 1 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 2.712, at 138 (1982)). *Trainor* also recognized that:

> [i]f the universe surveyed is relevant, if the sample questioned is representative of the relevant universe, if the questions are in a form appropriate to obtain unbiased answers within a reasonable margin of error, and if the pollster is qualified, the weight of authority supports the admission of a public opinion survey tending to prove a fact relevant to a material issue.

374 Mass. at ____, 374 N.E.2d at 1220.

with safeguards to legal relevance, different polls, both following these guidelines, may produce divergent results.[46] The discrepancy in outcome is often irreconcilable.[47]

Although surveys can be very helpful in conveying information about public views, the limitations of surveys must also be recognized. An analysis of the relevant factors listed above discloses a few problems. Guideline three, for example, requires that the survey be a representative sample of the community.[48] People who are indifferent or apathetic to the dissemination of sexual materials may also be indifferent to partaking in surveys. They would be less inclined to answering surveys even though they may be a large and important part of the community whose standards the survey is trying to predict. Because indifference towards surveys as well as to sexually explicitly materials precludes a part of the community from participating in public surveys, these surveys may not be a true indication of community views on obscenity.[49] Another problem arises when one considers the type of people who allow interviewers into their home with knowledge that the pending interview will consist of viewing sexually explicit photographs. Those who consent to discussions on sexually pornographic and unacceptably obscene materials in this scenario may be a fairly limited sector of the community, thereby limiting the sample surveyed from the outset.

The fourth guideline raises questions dealing with the proper methods of questioning. There are different modes of interviewing people including telephone surveys, face to face interviews, and mass distribution of questionnaires

---

[46] Arguably, if two polls, each meeting the procedural safeguards for relevance and admissibility convey different results, then no community standard exists. If both polls are accepted as valid declarations of community standards, then a single notion of what is "obscene" evades determination. Perhaps the court should admit both polls into evidence and allow the jury to determine which poll, if any, represents the community standard.

[47] But see Sorensen & Sorensen, *supra* note 41, at 1242, arguing that different results can often be traced to "the nature of a given opinion research undertaking and the manner in which it was both designed and conducted." The authors note that "[o]pinion research results may only appear to differ; careful attention must be paid to the units of measurement used both in opinion measurement and in the presentation of the results. Furthermore, the differences may not actually be significant beyond a given margin of error which is subject to chance." *Id.* at 1241.

[48] For more on the requirement that a representative sample be taken, see United States v. Various Articles of Merchandise, 750 F.2d 596 (7th Cir. 1984) (obscenity survey rejected because results offered were taken from a general national poll). *See also* Bank of Utah v. Commercial Sec. Bank, 369 F.2d 19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967) (survey inadmissible when clearly not representative of universe it is intended to reflect).

[49] Another facet of this concept is the notion of "non-response." One author explains the phenomenon this way: "[t]here are always some individuals in any sample from whom it is impossible to obtain the desired information, either because they could not be located (e.g., were not at home) or because they refused to answer the questions asked of them." Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 341 (1960).

to a large sample of people.[50] An individual may be more likely to give an honest or more direct answer to a survey when his anonymity is protected.[51] He may be more open about his attitudes toward sexually explicit material over the telephone because his identity is undisclosed.[52] On the other hand, sexually explicit material cannot be conveyed over the telephone as bluntly or starkly as when viewed in person.[53]

Guideline number five necessitates that the sample, questionnaire, and interview be executed in accordance with accepted standards.[54] Many problems often arise in the word choice and answer scales used in questionnaires.[55] Surveys which ask "yes or no" type questions, even when they give answer scales which offer seven different responses varying from strongly agree to strongly disagree, can be very misleading. A good way to avoid problems in this area is to conduct pre-test surveys of a smaller sample. These pre-tests can discover questionnaire problems before the survey is administered to a large sample of the population.

Guideline number six requires that the data gathered by the survey be accurately reported.[56] When a court derives results from data incongruent with the

---

[50] Among the differing modes, it is found that: "[p]eople ordinarily are more willing to talk about some subjects than others, and more truthfully about some than others, depending upon such tested factors as . . . their expectations of what people generally may think of their opinions." Sorensen & Sorensen, *supra* note 41, at 1250.

[51] Sorensen & Sorensen have found:

> Anonymity and rapport are considered invaluable aids to the valid interview. Studies indicate that the great majority of people are willing to share their opinions with strangers whom they are not likely to see again. The confidence they reveal to strangers is safely hidden from their social group and will not return to embarass them.

Id.

[52] Another consideration is that the interviewees who cannot confirm the authority or authenticity of a survey being administered over the telephone may become subject to some interesting prank questionnaires.

[53] The description of a sexually explicit picture over the telephone may not convey the graphic quality of viewing glossy photographs of two people entwined in some deviate sexual act.

[54] For more on foundational requirements of questionnaire and interview procedure, see People v. Thomas, 37 Ill. App. 3d 320, 346 N.E.2d 190 (1970) (foundational proof insufficient to warrant admission of poll when methods and circumstances used suggest results favorable to the party sponsoring the survey and cast doubt on survey's trustworthiness).

[55] In People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980), the Illinois Appellate Court held a public opinion poll admissible because its results showed the degree, if any, of public acceptance of sexually explicit material. A copy of the poll was appended to the opinion. The poll consistently used the words "nudity and actual or pretended sexual activities" to describe "sexually explicit" materials. *Id.* at ____, 410 N.E.2d at 480. These words appear passive and unoffensive, especially in the context of the form-type questionnaire utilized. They do not accurately portray the physical bluntness of sexually explicit materials which could be expressed through pictures or more descriptive word choice.

[56] Data gathered may often report that people find the material patently offensive. These re-

results offered by experts conducting the poll, the accuracy of the report may become clouded. In *People v. Nelson*,[57] for example, the expert conducting the poll described his concept of "consensus," stating that "approximately 75% of the population would have to agree on a proposition before one could say there was a consensus."[58] In analyzing the results of the survey, he found that "there was no consensus about whether it was acceptable or not acceptable to have depictions of sexually explicit materials."[59] The court maintained that the survey was admissible because it showed that "a majority of Illinois residents find depictions of 'nudity and actual or pretended sexual activities' acceptable."[60] Although the court's interpretation of the data was not in opposition to the expert testimony proffered, it inferred a more conclusive result.[61]

Finally, the seventh guideline requires that the data is analyzed in a statistically correct manner. Statistics are manipulable and susceptible to flagrant misinterpretation. Even similar data results can be interpreted to produce surprisingly different outcomes.[62] Although statistics can be very enlightening in many areas of social science, their overall value must be considered in light of their susceptibility to manipulation.

Despite procedural problems, public surveys are useful in obscenity trials. For example, public surveys may result in more objective jury verdicts. Justice Stevens noted that:

> The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context . . . the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the

---

sults, however, fail to reveal people who find the material personally offensive, but who do not object to other willing adults viewing the material.

[57] 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980).

[58] *Id.* at ____, 410 N.E.2d at 784.

[59] The highest percentage of agreement regarding any of the questions posed was that 67.4% of those surveyed agreed that "adults who want, in the privacy of their homes, to see movies and publications that depict nudity and actual or pretended sexual activities." *Id.* at ____, 410 N.E.2d at 748.

[60] *Id.*

[61] If the expert in *Nelson* could not conclude that a consensus existed regarding a community standard on sexually explicit material, then under *Trainor*, the defendant could not be prosecuted. If, in order for a community consensus to exist, 75% of the population must agree on a given proposition, it becomes much more difficult for the prosecution to convict.

[62] Researchers have noted that:

> A common objection to the utilization of opinion research evidence in the courts lies with the court's incredulity aroused when each opposing litigant introduces an opinion survey with widely differing results, each claiming that his own constitutes a scientific analysis of the state of public or mass opinion with respect to the issue being litigated.

Sorensen & Sorensen, *supra* note 41, at 1240.

> minority. A juror might well find certain materials appealing and yet be unwilling to say so. He may assume, without necessarily being correct, that his reaction is aberrant and at odds with the prevailing community view.[63]

When sitting on a jury with eleven other members of his local community, an individual juror may be more likely to say that the material in question is offensive because he does not want to be thought of poorly by his peers. Unintentional pressure from other jury members may sway a juror towards the majority. A public poll, on the other hand, allows a juror to justify his ultimate decision based upon the relevant statistics given by an admitted poll. He can be more objective, and perhaps more open, because he has confirmed his more liberal, or more conservative, feelings with the survey results.

Finally, defects in the manner in which the poll was conducted do not necessarily invalidate the admissibility of the poll. In *Carlock v. State*,[64] the Texas Court of Criminal Appeals held that any defects in the manner in which the poll was conducted should affect only the weight to be accorded the survey results rather than the admissibility of the survey itself.[65] Thus, a poll with an arguable defect in administration may be relevant and therefore admissible, with the jury ultimately determining its credibility.[66]

2. *Subject matter relevancy: a question of content*

A survey must address relevant community standards on pornography in order to be admissible into evidence.[67] Whether a survey provides adequately relevant information often depends upon the relationship between the subject matter of the poll and the subject matter of the allegedly obscene materials. The amount of content relevancy the survey must have to the materials in question varies among jurisdictions.

The Georgia Court of Appeals in *Flynt v. State*[68] upheld the exclusion of a public opinion survey because the results were not relevant to the issue of whether the magazines in dispute were obscene within the statute.[69] The court

---

[63] Smith v. United States, 431 U.S. 291, 315-16 (1977) (Stevens, J., dissenting).

[64] 609 S.W.2d 787 (Tex. Crim. App. 1981).

[65] *Id.* at 788.

[66] *See also Thomas*, 37 Ill. App. 3d at ____, 346 N.E.2d at 194 ("[T]he technical adequacy of a survey is a matter running only to the question of its weight and not its admissibility.").

[67] 374 Mass. at ____, 374 N.E.2d at 1220.

[68] 153 Ga. App. 232, 264 S.E.2d 669 (1980).

[69] The court found that there was no attempt in the survey to determine whether the interviewees were of the opinion that "the contents of the eleven magazines would or would not exceed the limits of permissible candor in the depiction of 'nudity and sex.' " *Id.* at ____, 264 S.E.2d at 672. In *Flynt*, the court also discussed the issue of "comparable evidence" that allows the jury to compare other magazines with the one in question in determining its alleged obscen-

reasoned that in order for a survey to be admissible as evidence, its questions and results must relate to the specific issues being tried and directly or indirectly affect those issues. The questions could not merely elicit general opinions concerning the depiction of nudity and sex.[70] Thus, a survey must reflect the community's opinion about the specific media or depictions involved. Similarly, the Illinois Appellate Court in *People v. Hall*[71] upheld the exclusion of a public survey because its results reflected a general acceptance by the public of sexually explicit materials, but were inconclusive as to whether the magazine in question would be acceptable according to statewide community standards regarding obscene materials.[72]

The Massachusetts Court of Appeals in *Commonwealth v. Mascolo*[73] also upheld the exclusion of a poll not found to be relevant. The court held that the trial judge "acted within his discretion in excluding the results of a public opinion poll offered by the defendants to assist the jury in ascertaining community standards with respect to the film [in question]."[74] The *Mascolo* court noted a difference between a poll which primarily examines whether the community sanctions the dissemination of sexually explicit material to willing adults, and a poll determining whether the community regards such material as obscene in

---

ity. *Id.* at ____, 264 S.E.2d at 673. *Flynt* followed Womack v. United States, 294 F.2d 204 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961), by holding that material which is similar to the material in question, and which enjoys a reasonable degree of community acceptance, is admissible as comparable evidence. The *Flynt* court reasoned that comparable evidence allows a defendant to attempt to persuade the trier of fact that the challenged material does not exceed contemporary standards as represented by the comparable material available. 153 Ga. App. at ____, 264 S.E.2d at 674. *See Womack*, 294 F.2d at 206 (defendant in an obscenity trial may introduce comparable materials to those he is charged with distributing). *But see Various Articles of Merchandise*, 750 F.2d at 599 (evidence of availability and non-availability does not translate inexorably into acceptability and unacceptability).

[70] 153 Ga. App. at ____, 264 S.E.2d at 672.

[71] 143 Ill. App. 3d 766, 491 N.E.2d 757 (1986).

[72] *Id.* at ____, 491 N.E.2d at 762. *But see Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476, an earlier decision also by the Illinois Appellate Court, which held that the trial court should not have excluded a public opinion poll which indicated that a majority of Illinois residents considered it acceptable for adults to view sexually explicit material. *Id.* at ____, 410 N.E.2d at 478-79. The court in *Nelson* pointed out that although the survey was clearly not determinative since it did not deal with the movie in question, it was nevertheless clearly relevant. *Id.* at ____, 410 N.E.2d at 478. The court held that a public opinion poll may be admissible evidence since the results showed the degree, if any, of public acceptance of the material in question. *Id.* at ____, 410 N.E.2d at 478.

[73] 7 Mass. App. Ct. 275, 386 N.E.2d 1311 (1979).

[74] *Id.* at ____, 386 N.E.2d at 1314. *Mascolo* was decided in the trial court before the *Trainor* decision. The appellate court's decision applied *Trainor*. The appellate court held that if the jury could not determine community norms then the defendant is entitled to a finding in his favor, but it upheld the exclusion of the poll.

itself.[75] The court held that only the latter type of poll is admissible.

In *Flynt*, *Hall*, and *Mascolo*, the courts excluded surveys because they did not relate, directly or indirectly, to the allegedly obscene materials. The courts seem to require very specific surveys which gather opinions about material similar to, or actually the same as, the material the defendant is charged with promoting. In *Saliba v. State*,[76] however, the Indiana Court of Appeals adopted a less stringent approach to the relevancy issue. In allowing the admission of a public survey, the court held that the survey was relevant because it assisted the jury in determining "general community standards."[77] In *Saliba*, the defendant was charged with exhibiting an obscene film in his adult bookstore. He commissioned Dr. Roderick Bell to conduct a public opinion poll regarding the depiction of sexual activities in movies and publications to determine local community standards.[78] The prosecution relied on *Flynt* and *Mascolo*, arguing that community acceptance of "sexually explicit materials" in general was not relevant to a determination of whether the particular material in question was obscene.[79]

In admitting the survey, the *Saliba* court held that because the poll questioned the interviewees regarding their view of community acceptance of sexually explicit materials rather than their personal acceptance of such materials, the results were relevant evidence of the community standards, and should have been admitted.[80] The court reasoned that "the defendant in an obscenity prosecution is entitled to introduce relevant and appropriate expert testimony on the issue of contemporary community standards."[81]

The court in *Carlock* adopted a similar interpretation of the relevancy re-

---

[75] *Id.* at ____, 386 N.E.2d at 1314.

[76] ____ Ind. App. ____, 475 N.E.2d 1181 (1985).

[77] *Id.* at ____, 475 N.E.2d at 1186-87. The court reasoned that "[a]lthough the poll did not present the interviewees with the ultimate question to be decided by the jury (whether the particular film was obscene), the poll was relevant to an application of community standards." *Id.* at 1187. The court allowed admission of the poll, but left the ultimate question to the jury to determine whether the film in question violated the general standards established by the poll.

[78] *Id.* at 1184. Dr. Bell is the same expert who testified in *Hall*, 143 Ill. App. 3d at ____, 491 N.E.2d at 761; *Nelson*, 88 Ill. App. 3d at ____, 410 N.E.2d at 477; and *Carlock*, 609 S.W.2d 787, 788.

[79] *Id.* The State argued that the surveys were irrelevant because they "only examined whether the community sanctioned the dissemination of sexually explicit materials to willing adults" and did not examine "whether the community regarded similar materials or the particular materials in issue as obscene." *Id.*

[80] ____ Ind. App. at ____, 475 N.E.2d at 1185. The court reasoned that expert testimony based on a public opinion poll is "uniquely suited to a determination of community standards." The court stated that "perhaps no other form of evidence is more helpful or concise [than a properly conducted public opinion survey]." *Id.*

[81] *Id.* at 1185 (citing Kaplan v. California, 413 U.S. 115 (1973)).

quirement. In that case, the court reversed the defendant's conviction[82] because the expert testimony and a survey summary offered as evidence of contemporary standards concerning explicit sexual materials should have been admitted.[83] The court held that because the community's contemporary standards regarding obscenity were at issue, evidence which tended to show such standards would assist the jury in resolving the factual issues raised and should therefore be admissible.[84]

While *Flynt*, *Hall*, and *Mascolo* required that admissible surveys specifically examine whether the community regarded similar materials of the particular materials in question as obscene, *Saliba* allowed a survey that determined whether the community generally sanctioned the dissemination of sexually explicit materials to willing adults. In *Carlock*, the court ordered the admission of a survey as being relevant even though it may have had some defects in its administration.[85] The *Kam* opinion did not discuss the issue of public surveys because the supreme court reversed on the issue of jury instructions. Although the scope of the relevancy requirement in community standards polls has not been settled by the court, the utilization of public opinion surveys in obscenity prosecutions has become generally accepted at the trial level.[86]

---

[82] Carlock was convicted of commercially distributing obscene material. 609 S.W.2d at 788.

[83] *Id.*

[84] *Id.* at 789. The court reasoned that because the jury is the exclusive judge of the weight to be given to the testimony, the jury should have been permitted to hear and consider the opinion survey. *Id.* The *Carlock* court placed faith in the jury's capacity to properly weigh the evidence admitted.

[85] *Id.* at 788. The court also found that a public survey attempts to define the applicable community standards, and, although not required, it is certainly relevant to the determination of a material fact issue. *Id.* at 789.

[86] The effects of *Kam* may extend beyond the bounds of obscenity prosecutions. Other areas such as defamation may require proof of a community standard or opinion of a particular communication. *See* Kahanamoku v. Advertiser Pub. Co., 25 Haw. 701 (1920); W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 111, at 737 (4th ed. 1971). Whether a particular communication is defamatory depends, in part, upon "the current of contemporary public opinions." Beamer v. Nishiki, 66 Haw. 572, 580, 670 P.2d 1264, 1271 (1983). See also Fong v. Merena, 66 Haw. 72, 655 P.2d 875 (1982), where the court held that a communication is defamatory when it tends to harm reputation of another as to lower him in the *estimation of the community* (emphasis added). While specific proof may be had as to particular instances of reputation damages, arguably under *Kam*, a poll of community standards may be helpful, especially if the publication is alleged to be libelous per se. *See* Russell v. American Guild of Variety Artists, 53 Haw. 456, 497 P.2d 40 (1972) (libel per se presumes damages; special damages need not be shown). While the interests at stake in obscenity prosecutions (personal liberty) differ from defamation (reputation), *Kam*'s threshold requirement for a finding of the existence of a community standard may apply by analogy.

IV. CONCLUSION

In *State v. Kam*, the court held that the jury must be instructed that before a defendant can be convicted, the jury must determine that a community standard exists and that the material in question violates that standard. As a result of *Kam*, a public opinion survey recently has been used by the city prosecutor's office to convict four people of pornography distribution.[87] These district court decisions are expected to be appealed by the defense, who had also submitted a poll purporting its view of the community standard.[88] The *Kam* decision just may have resulted in the latest development in the war on pornography—the battle of the surveys.[89]

Trudie L. Tongg

---

[87] Honolulu Star-Bull., Jan. 31, 1987, at A3, col. 1.

[88] *Id.*

[89] On April 14, 1987, the United States Supreme Court held in Pope v. Illinois, 55 U.S.L.W. 4595 (U.S. Apr. 14, 1987) that an *objective* standard of reasonableness should be applied rather than the prevailing community standard to determine "value" under the third prong of the *Miller* test.

CRIMINAL PROCEDURE—*State v. Narvaez*: A Rejection of Vicarious Standing Under the Exclusionary Rule

I. INTRODUCTION

In *State v. Narvaez*,[1] the Hawaii Supreme Court held that a defendant had no standing[2] to invoke the exclusionary rule[3] by vicariously asserting the consti-

---

[1] 68 Haw. ____, 722 P.2d 1036 (1986).

[2] The concept of "standing" is a modern consideration of criminal law. The term refers to the ability of a party to assert a claim, dependent upon either an interest in the outcome of the case, or upon violation of the right of the individual raising the claim. *See generally* W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3 (1978). "Standing" is an adjunct of the exclusionary rule, and serves as a limitation upon the operation of that rule. *See, e.g.*, Amsterdam, *Search and Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964). Historically, the law of standing was largely derived from the common law rules of property trespass. Early interpretation of the standing concept presented subtle and technical questions concerning property interests and resulted in confusing and contradictory decisions. *See* White & Greenspan, *Standing to Object to Search and Seizure*, 119 U. PA. L. REV. 333, 338-39 (1970). In modern search and seizure jurisprudence, the Hawaii Supreme Court noted that only those directly affected by an illegal search and seizure have standing: "Suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing." *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038. (quoting Alderman v. United States, 394 U.S. 165, 171-72 (1969)).

[3] The term "exclusionary rule" is employed in a variety of contexts where a court suppresses evidence acquired in violation of a defendant's constitutional rights. In the federal constitution, the term refers to the exclusion of evidence seized in violation of the fourth amendment prohibition against unreasonable searches and seizures, first required in Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule in Hawaii is based upon HAW. CONST. art. I, § 5, under which there exists the same freedom of individuals from unreasonable searches and seizures. *See, e.g.*, State v. Abordo, 61 Haw. 117, 596 P.2d 773 (1979) (a legitimate expectation of privacy depends on a subjective expectation of privacy which society is prepared to acknowledge as reasonable). For a full range of criticisms of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672-736 (1970).

The term has also been applied to the exclusion of evidence obtained in violation of the fifth amendment to the United States Constitution. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467 (1966) (right to counsel under fifth amendment insures individual's knowing and intelligent excercise of right against self-incrimination); Harrisson v. United States, 392 U.S. 219, 222-26 (1968) (poisonous tree doctrine applies to illegally obtained confessions under the fifth amend-

tutional right of a co-defendant. This recent development analyzes the court's holding and compares it with the treatment of vicarious standing by other courts. Because the court may have carved an exception in its third footnote to the rule against vicarious standing, this recent development shall also examine the impact of this possible exception on Hawaii criminal procedure.

II. FACTS

On February 20, 1984, three servicemen were robbed.[4] Police interrogation of Samson Fernandez, Jr. yielded a confession that implicated Lawrence Wah Kwai Narvaez in the crime.[5] A photograph of Narvaez was placed in a police photo album and identified by the victims. As a result, Narvaez was indicted for three counts of robbery in the first degree in violation of Hawaii Revised Statutes section 708-840(1)(b)(ii).[6]

The trial court suppressed Fernandez' confession, holding that the interrogation violated his fifth amendment right against self-incrimination.[7] Narvaez

---

ment); State v. Furuyama, 64 Haw. 109, 637 P.2d 1095 (1981) (proper remedy when the government acquires evidence in violation of the fifth amendment is the suppression of the evidence and its fruits); State v. Keaka, 3 Haw. App. 444, 653 P.2d 96 (1982) (custodial interrogation must cease if the defendant wishes to remain silent, or until an attorney is present if the defendant so desires). For further background discussion of the exclusionary rule, see Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459 (1986); Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983).

[4] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1037.

[5] *Id.*

[6] The statute reads in pertinent part:

> (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:
>
> . . . .
>
> (b) He is armed with a dangerous instrument and:
>
> . . . .
>
> (ii) He threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

HAW. REV. STAT. § 708-840 (1)(b)(ii) (Supp. 1984).

[7] Both the U.S. Constitution and the Hawaii Constitution provide that: "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; HAW. CONST. art. I, § 5. The United States Supreme Court has held that "[t]he object of the [Fifth] Amendment is to establish . . . that no one shall be compelled to give testimony which may expose him to prosecution for crime . . . ." Hale v. Henkel, 201 U.S. 403 (1906). For a general discussion of the fifth amendment as construed by the Hawaii Supreme Court, see State v. Grahovac, 52 Haw. 527, 480 P.2d 148 (1971) (citizens may voluntarily answer police questions, but may not be compelled to do so, even by subsequent state legislation).

then filed a Motion to Dismiss Indictment with Prejudice.[8] He asserted that because the interrogation of Fernandez had been suppressed, his identification should also be suppressed as fruit[9] of the illegal interrogation.[10] The trial court denied the motion and Narvaez was convicted on all three counts of first degree robbery.[11] On appeal, the Hawaii Supreme Court affirmed Narvaez' conviction.

III. ANALYSIS

The primary issue on appeal was whether Narvaez had standing to invoke the exclusionary rule by vicariously asserting Fernandez' fifth amendment right against self-incrimination. Narvaez first asserted that the illegally obtained confession should not have been used against him regardless of whether he had the requisite standing.[12] He argued that the California case of *People v. Martin*[13] established the rule that confers standing on a defendant to assert a violation of another's constitutional rights.[14] The Hawaii Supreme Court dismissed Narvaez' claim, however, by noting that *Martin* had been overruled.[15]

In addressing the issue of "vicarious standing," the court noted that the majority of cases addressing standing to raise a co-defendant's personal rights involved the fourth amendment.[16] Narvaez, however, attempted to assert vicarious standing under the fifth amendment. Drawing an analogy between the fourth and fifth amendments "because both concern rights which are personal to the individual,"[17] the court held that the analysis of standing under the

---

[8] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1037.

[9] Under the "fruit of the poisonous tree" doctrine, evidence derived from other, already suppressed evidence is "tainted" and therefore must also be suppressed. Wong Sun v. United States, 371 U.S. 471, 491-92 (1963).

[10] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1037.

[11] *Id.*

[12] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038.

[13] 45 Cal. 2d 755, 290 P.2d 855 (1955).

[14] The *Martin* opinion, written by Justice Traynor, focused heavily on the need to deter lawless police conduct. *See id. See also infra* notes 55-57.

[15] The California Supreme Court overruled People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), in *In re* Lance W., 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744 (1985). The holding in *Lance* reflected California's adoption of CAL. CONST. art. I, § 28, which provides that "relevant evidence shall not be excluded in any criminal proceeding." *See Narvaez*, 68 Haw. at ____ n.2, 722 P.2d at 1038 n.2.

The holding in *Lance*, however, is expressly limited to searches and seizures and is thus not authority for issues involving the fifth or sixth amendments. *Lance*, 37 Cal. 3d at 885 n.4, 694 P.2d at 751 n.4. *See* Allen, *Defense Motions after* Lance W., 13 W. ST. U. L. REV. 35, 42 (1985). Whether California will allow vicarious standing in fifth or sixth amendment issues remains to be seen.

[16] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038.

[17] *Id.* In fact, the early basis for the standing doctrine is the "joint foundation of the fourth

fourth amendment could be applied to fifth amendment issues.

Under the fourth amendment, the exclusionary rule has two rationales.[18] The rule has been used to both deter police misconduct[19] and protect individual rights.[20] Following the analysis adopted by California,[21] the Hawaii Supreme Court chose to focus its analysis on the defendant's individual rights under the fourth amendment.[22] Individual rights in search and seizure analysis, for instance, requires that fourth amendment interests be examined under the *Katz* test.[23]

---

amendment and the self-incrimination clause of the fifth." Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L. J. 144, 156 (1948).

[18] *See* Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983).

[19] *Id.*

[20] *Id.*

[21] The court noted that People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), which recognized the deterrence rationale, was overruled by *In re* Lance, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). *See supra* note 15.

[22] The *Narvaez* court quoted Rakas v. Illinois, 439 U.S. 128, 139 (1978): "The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038. *See also* State v. Abordo, 61 Haw. 117, 121, 596 P.2d 773, 776 (1978).

On some occasions, however, the United States Supreme Court continues to discuss these issues in terms of standing. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 85-97 (1980); United States v. Paynor, 447 U.S. 727, 737-38, 748 (1980); Arkansas v. Sanders, 442 U.S. 753, 761 n.8 (1979). The lower federal courts have followed suit. *See, e.g.*, United States v. Kember, 648 F.2d 1353, 1365-66 (D.C. Cir. 1980); United States v. Penco, 612 F.2d 19 (2d Cir. 1979); United States v. Mazzelli, 595 F.2d 1157 (9th Cir. 1979), *vacated on other grounds sub nom.*, United States v. Conway, 448 U.S. 902 (1980).

The court in *Abordo* noted that if the defendant had been charged with a crime "for which possession is an essential element, the rule of 'automatic standing' established in Jones v. United States, 362 U.S. 257, 261-65 (1960), may have been invoked and, under such circumstances, the need for this type of inquiry would be vitiated." *Abordo*, 61 Haw. at 121 n.3, 596 P.2d at 776 n.3. Under such a "target" theory, standing would be extended to "anyone legitimately on the premises when the search occurs . . . [if] its fruits are proposed to be used against him." Jones v. United States, 362 U.S. 257, 267 (1960). *See*, Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151, 176-77 (1979). However, *Jones* was overruled by United States v. Salvucci, 448 U.S. 83 (1980), in which the United States Supreme Court held: "[D]efendants charged with a crime of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. The automatic standing rule of Jones v. United States, [362 U.S. 257, (1960)] is therefore overruled." 448 U.S. at 85.

One author argues persuasively for the re-introduction of the *Jones* standing rule. *See* Doernberg, *supra* note 18.

[23] The court in *Abordo* was faced with a defendant who argued that his fourth amendment right to privacy had been violated by a warrantless search of the car he was driving, despite the fact that the car was stolen. In deciding whether a legitimate expectation of privacy extended to

By analogy, Narvaez' individual interests were examined under substantive fifth amendment principles.[24] The court concluded that "[t]he fifth amendment privilege [against self-incrimination was] never intended to protect third parties from being implicated by the testimony of the accused."[25] However, in footnote three of *Narvaez*,[26] the court suggested that evidence may be excluded in certain circumstances to deter police misconduct.[27] As opposed to focusing on the substantive rights involved, however, the court couched the deterrence rationale in terms of the court's inherent supervisory power to dismiss an indictment,[28] which power should be exercised when the "interests of justice require," and when the defendant has shown "actual prejudice" to his due process rights.[29]

Narvaez had contended[30] that, because he was barred from challenging the statements that incriminated him, the trial court violated his sixth amendment right of confrontation.[31] The supreme court summarily rejected this claim because the interests covered by the fifth and sixth amendments were different.[32] Concomitantly, the court implied that the use of the sixth amendment argument was inappropriate.[33]

---

that defendant, the court required, first, that the individual involved must have exhibited an actual expectation of privacy and second, the expectation must be one that society is prepared to accept as reasonable. *Abordo*, 61 Haw. at 122, 596 P.2d at 776. *See also* Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring).

[24] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038-39.

[25] *Id.* at 1039 (citing Hale v. Henkel, 201 U.S. 43 (1906)). "It is . . . a personal privilege, belonging only to the person who is himself incriminated by his *own* testimony." S. SALTZBURG, INTRODUCTION TO AMERICAN CRIMINAL PROCEDURE 77 (1980) (emphasis added). *See also* Long v. United States, 360 F.2d 829, 833 (D.C. Cir. 1966) (a defendant has no standing to challenge incriminating evidence obtained in violation of another's fifth amendment rights); 8 WIGMORE, EVIDENCE §§ 2196, 2270 (rev. ed. 1960).

[26] *Narvaez*, 68 Haw. at ____ n.3, 722 P.2d at 1039 n.3.

[27] *Id.*

[28] *Id. See infra* notes 34-44 and accompanying text.

[29] *Id.*

[30] *Narvaez*, 68 Haw. at ____, 722 P.2d at 1038.

[31] Both the sixth amendment of the United States Constitution, and article I, § 14 of the Hawaii Constitution provide that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused." *See, e.g.*, State v. Adrian, 51 Haw. 125, 131-32, 453 P.2d 221, 225 (1969).

[32] The court noted that:

> [while the Fifth Amendment] protects the accused from the state's use of arbitrary power to compel self-incrimination even at the expense of truth, the interests safeguarded under the Sixth Amendment guarantee of confrontation protects the individual from the incriminating testimony of others in an attempt to ascertain the truth.

Narvaez, 68 Haw. at ____, 722 P.2d at 1039.

[33] The court observed:

> Narvaez argued that this right was violated because he was barred from challenging these

IV. COMMENTARY

A. *Vicarious Standing Under* State v. Narvaez

The Hawaii Supreme Court rejected the concept of "vicarious standing." However, footnote three of the opinion[34] provided an exception to this decision. There, the court stated that an indictment may be dismissed when "the interests of justice require," and "actual prejudice" to the defendant is shown.[35] The court thus reserved the right to exercise its inherent dismissal power in certain circumstances to allow "vicarious standing."

The limits of this exception are unclear because the court has been hesitant in the past to exercise its inherent dismissal power. For example, the court in *State v. Alvey*[36] held that dismissal of an indictment simply to ease a crowded docket amounted to an abuse of discretion.[37] But the *Alvey* court held that exercising the inherent power to dismiss "is a matter of balancing the interest of the State against fundamental fairness to a defendant with the added ingredient of orderly functioning of the court system."[38] The court did not challenge this balancing test in *Narvaez*.

Although the court has cautioned that the dismissal power may not be exercised too liberally,[39] the court in *Narvaez* noted that it may dismiss an indictment if the police conduct is so outrageous that it "shocks the conscience."[40] In *State v. Tookes*,[41] the Hawaii Supreme Court implied that a case-by-case ap-

---

statements which implicated him in the alleged robbery, he was denied due process under the Sixth Amendment. . . . In order for Narvaez to prevail, the interests that he alleges were disregarded must be interests protected by the *Fifth Amendment*.

Narvaez, 68 Haw. at ____, 722 P.2d at 1038-39 (emphasis added).

[34] *Id.* at ____ n.3, 722 P.2d at 1039 n.3.

[35] *Id.*

[36] 67 Haw. 49, 678 P.2d 5 (1984).

[37] *Id.* at 58, 678 P.2d at 11.

[38] State v. Alvey, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984) (trial court abused its discretion in dismissing an indictment after only one trial, where no governmental misconduct or violation of due process was even alleged) (citing State v. Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982) (trial court has inherent power to dismiss an indictment with prejudice after two mistrials)).

[39] *Alvey*, 67 Haw. at 57, 678 P.2d at 10. To that end, the court stated:

> Such supervisory power will be used to dismiss an indictment only when the misconduct represents 'a serious threat to the integrity of the judicial process . . . .' Other state courts require a 'clear denial of due process' . . . evidence some constitutional right has been violated . . . arbitrary action, or governmental misconduct.

67 Haw. at 57, 58, 678 P.2d at 10 (citations omitted).

[40] *Narvaez*, 68 Haw. at ____ n.3, 722 P.2d at 1039 n.3 (quoting State v. Tookes, 67 Haw. 608, 611, 699 P.2d 983, 986 (1985)).

[41] 67 Haw. 608, 699 P.2d 983 (1985).

proach will be adopted in deciding whether certain conduct is so outrageous as to "shock the conscience."

In *Tookes*, police officers used a civilian volunteer to engage in sexual activity with certain prostitutes to secure their convictions.[42] The court held that this type of conduct did not "shock the conscience" sufficiently to bar prosecution of the prostitutes.[43] The court supported its case-by-case approach by observing that "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining those 'standards of conduct required of the state in its efforts to prosecute crimes.' "[44]

In the second tier of the analysis, the court in *Narvaez* stated that even where police conduct is found to be outrageous, a defendant must show "actual prejudice"[45] to due process rights before a court may exercise its dismissal power.[46]

B. *Vicarious Standing in Other Jurisdictions*

Vicarious standing has been rejected by many state courts which hold that only those directly prejudiced by incriminating evidence have the right to challenge its admissibility.[47] However, Alaska and Louisiana join Hawaii in allowing a defendant to assert vicarious standing in certain circumstances.

For example, article I, section 5 of the Louisiana State Constitution provides: "Any person adversely affected by a search or seizure conducted in violation of

---

[42] *Id.* at 610, 699 P.2d at 986.

[43] *Id.* at 611, 699 P.2d at 986.

[44] *Id.* (quoting Rochin v. California, 342 U.S. 165, 173 (1952)).

[45] *Narvaez*, 68 Haw. at ____ n.3, 722 P.2d at 1039 n.3.

[46] *See* State v. Lincoln, 3 Haw. App. 107, 643 P.2d 807 (1982). In *Lincoln*, the defendant appealed a murder conviction on the basis of prosecutorial misconduct. This consisted of the police allegedly telling the defendant that he was being misled, misinformed, ill-advised, and misrepresented by his attorney in violation of his sixth amendment right to counsel. The court held that dismissal of an indictment was not the appropriate remedy, absent a showing of prejudice or a substantial threat thereof. *Id.* at 114, 643 P.2d at 813. *See also* United States v. Morrison, 449 U.S. 361 (1981). Since Lincoln had not even alleged or demonstrated prejudice in any way, the Court did not reach the merits of Lincoln's contentions.

[47] *See* State v. McElyea, 130 Ariz. 185, 635 P.2d 170 (1981); State v. Forbes, 185 Colo. 410, 524 P.2d 1377 (1974); State v. Whitfield, 212 N.W.2d 402 (Iowa 1973); State v. Braden, 163 Mont. 124, 515 P.2d 692 (1973); People v. St. Onge, 63 Mich. App. 16, 233 N.W.2d 874 (1975); State v. Perea, 210 Neb. 613, 316 N.W.2d 312 (1982); State v. Light, 119 N.H. 400, 402 A.2d 178 (1979); State v. Petrovich, 125 N.J. Super. 147, 309 A.2d 281 (1973); State v. Lipford, 344 S.E.2d 307 (N.C. 1986), Master v. State, 702 P.2d 375 (Okla. 1985); Commonwealth v. Butler, 448 Pa. 128, 291 A.2d 89 (1972). *But see* THE MODEL PRE-ARRAIGNMENT CODE § SS290.1(5) (allowing limited vicarious standing in search and seizure). *See also* discussion *infra* note 49.

this Section shall have standing to raise its illegality in the appropriate court."[48] This provision gives defendants much broader standing than they have under the federal or Hawaii constitutions,[49] in addition to providing a constitutional basis for broadened standing.

The Louisiana Supreme Court in *State v. Burdgess*,[50] however, held that the constitutional provision applies only where the illegality complained of is a wrongful search or seizure.[51] Nevertheless, with regard to fifth or sixth amendment issues, the court reserved judgment on the "question of whether gross police misconduct against third parties in the overly zealous pursuit of criminal convictions might lead to limited standing."[52] Consequently, the *Burdgess* dicta is broader than the "shocks the conscience" language under *Narvaez* because the "actual prejudice" tier is omitted.

Similarly, the Alaska Supreme Court in *Waring v. State*[53] adopted a position similar to that of *Burdgess*. In *Waring*, the court held that vicarious standing may be asserted only if: (1) the police officer obtained the evidence as a result of

---

[48] LA. CONST. art. I, § 5. Note the constitutional basis for the assertion of vicarious standing in search and seizure analysis.

[49] *See* Rakas v. Illinois, 439 U.S. 128 (1978). The United States Supreme Court, however, has in certain civil cases allowed a party to assert the constitutional rights of another. *See* Doernberg, *supra* note 18 (citing Barrows v. Jackson, 346 U.S. 249 (1953) (white landowners granted standing on behalf of black purchasers and would-be purchasers of such land to assert their equal protection rights against a challenge that the land purchases violated a restrictive covenant)); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (organizations permitted to assert first amendment rights of their members); Helvering v. Gehardt, 304 U.S. 405 (1938) (workers for Port of New York Authority seeking immunity from federal income taxation permitted to assert constitutional rights of the states of New York and New Jersey to be free from federal taxation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private school challenging compulsory education law permitted to assert constitutional rights of parents to control education of their children). *See also* Craig v. Boren, 429 U.S. 190 (1976) (beer vendor permitted to assert equal protection rights of prospective purchasers); Eisenstadt v. Baird, 405 U.S. 438 (1972) (distributors of contraceptives barred to unmarried users by state law had standing to challenge the statute and assert the constitutional privacy rights of prospective users). *See generally* Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599 (1962).

[50] 434 So. 2d 1062 (La. 1983).

[51] *See id.* In *Burdgess*, the Louisiana Supreme Court held that the defendant had no standing to prevent a co-defendant's voluntary statement from being used against him, even if it was originally obtained in violation of the codefendant's fifth or sixth amendment rights.

[52] *Id.* at 1065. *See Narvaez*, 68 Haw. at ____ n.3, 722 P.2d at 1039 n.3. *See also* Note, *Pretrial Criminal Procedure*, 44 LA. L. REV. 613 (1983) (containing a section entitled "standing: the limits of Louisiana's broad rule"). Note, however, that vicarious standing in search and seizure issues is given a constitutional basis. It is only in fifth or sixth amendment issues, for example, that Louisiana conditions vicarious standing on a finding of gross police misconduct. *See infra* note 54.

[53] 670 P.2d 357 (Alaska 1983).

gross or shocking misconduct; or (2) that the officer deliberately violated a co-defendant's rights.[54]

V. IMPACT

Narvaez provides that the inherent dismissal power shall be exercised when police misconduct[55] is so outrageous as to "shock the conscience." This sound decision reflects the Hawaii Supreme Court's implicit recognition that police misconduct should be deterred.[56]

The inherent dismissal power should be exercised, however, only in those rare circumstances when the conduct of police violates a defendant's (own) constitutional rights, such as his right against self-incrimination and the right to privacy.[57] The phrase "shocks the conscience" is sufficiently broad for future courts to determine the propriety of police conduct as the "interests of justice require." It is also a sufficiently low standard for police to conduct themselves without the fear that indictments they secure will be easily dismissed.

---

[54] *Id.* at 363.

[55] The California Supreme Court in *In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985), noted its concern for prosecutorial misconduct:

> Police misconduct occurs whenever the government is allowed to profit by its own wrong by basing a conclusion on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule, its deterrent effect is as to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties.

Id. at 883, 694 P.2d at 750, 210 Cal. Rptr. at 637.

[56] Justice Brandeis warned that:

> Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

For an excellent discussion of the deterrence argument in support of broadened standing to claim the exclusionary rule, see Doernberg, *supra* note 18. The deterrence rationale of the exclusionary rule prompted the shift from procedural standing analysis to substantive right analysis. Therefore, anyone whose right to privacy was violated, for example, would have standing to challenge the seized evidence.

[57] For a discussion of actionable police misconduct and related cases under the federal civil rights act, see M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION § 2 (1986).

The open standard may impose on the court's burgeoning caseload by providing prospective defendants with at least the argument that police conduct "shocked the conscience." In view of the strong deterrence rationale[58] behind the "shock the conscience" exception, however, the additional burden on the court calendar may be justified.

VI. CONCLUSION

In *State v. Narvaez*, the Hawaii Supreme Court rejected an assertion of vicarious standing to invoke another person's exclusionary rule protection under the fifth amendment. However, the court did not completely close the door on vicarious standing. The court ruled that future instances should be reviewed on a case-by-case basis, and where government conduct is so outrageous as to "shock the conscience," vicarious standing may be allowed, permitting a defendant to assert the exclusionary rule protection of another person. It remains to be seen how this nascent exception will be applied.

Roy John Tjioe

---

[58] *See supra* notes 56-57.

SEARCH AND SEIZURE—*State v. Biggar*: A Reasonable Expectation of Privacy in a Public Restroom

I. INTRODUCTION

The fourteenth amendment to the United States Constitution[1] and article 1 section 7 of the Hawaii State Constitution[2] guarantee individuals a right to privacy. In *State v. Biggar*,[3] the Hawaii Supreme Court held that this right to privacy precludes a narcotics agent from searching and seizing a packet of contraband from a public toilet stall without a warrant or probable cause. The court maintained that the defendant had a reasonable expectation of privacy to use the stall which protected any warrantless search of the stall without probable cause.

II. FACTS

Honolulu police detective Dennis Peterson,[4] responded to a call from a United Airlines ticket agent regarding a suspicious ticket purchase by defendant Terrance Biggar.[5] Terrance Biggar had paid cash for two one-way tickets from Vancouver to Honolulu to Kona for a "P. Biggar" and an "L. Robinson."[6] Detective Peterson learned from Canadian police that Terrance Biggar had an arrest record for a narcotics violation, and that Percy Biggar, an associate of

---

[1] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[2] The Hawaii constitution provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated . . . ." HAW. CONST. art. I, § 5.

[3] 68 Haw. ____, 716 P.2d 493 (1986).

[4] Detective Peterson was assigned to the Drug Enforcement Administration airport task force. *Id.* at ____ n.1, 716 P.2d at 494 n.1.

[5] *Id.* at ____, 716 P.2d at 494.

[6] Apparently, the tickets purchased by Terrance Biggar were for Percy Biggar and Lorna Robinson. *Id.*

Terrance Biggar, had been denied entry into the United States.[7]

Upon arrival in Honolulu, Percy Biggar and Lorna Robinson were detained by Peterson and customs agents. Peterson then went to the ticket counter of the airline providing the couple's connecting flight to Kona where he observed Terrance Biggar inquiring about Percy Biggar and Lorna Robinson. Peterson identified himself to Terrance Biggar and informed him that his friends were being detained on the grounds of their possible illegal entry. Peterson also informed Terrance Biggar that he matched the description of the suspicious ticket purchaser. Consequently, Peterson agreed to take Terrance Biggar to the detention area where Percy Biggar and Lorna Robinson were being held.[8]

On the way to the detention area, Terrance Biggar asked to use the restroom. Peterson grew "very suspicious" because Terrance Biggar first stated that he had to urinate and then, when followed into the restroom, stated that he had to defecate. Terrance Biggar went into the stall and shut the door, which did not close completely. Through the opening, Detective Peterson observed Biggar stand near the toilet without using it. Peterson went into the adjacent stall, climbed onto the toilet, looked over the partition, and observed Biggar withdrawing his hand from the disposable seat cover dispenser.[9] After Biggar left the stall, Peterson found a packet of cocaine in the seat cover dispenser and placed Biggar under arrest.[10]

The trial court found that reasonable grounds and exigent circumstances justified Peterson's warrantless surveillance of Biggar's toilet stall.[11] Biggar was convicted by a circuit court jury for promoting a dangerous drug in violation of Hawaii Revised Statutes section 712-1241(1)(a)(i).[12] Biggar appealed to the Hawaii Supreme Court claiming that the lower court should have suppressed the evidence obtained by Detective Peterson's surveillance in the closed toilet stall.[13] The Hawaii Supreme Court reversed the conviction because it found that Peterson lacked the requisite probable cause to climb on the seat of the

---

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] A subsequent search of Biggar's pockets found a second packet of cocaine. *Id.*

[11] *Id.* Under exigent circumstances, a court may extend the exception to the warrant requirement to searches for "evanescent" evidence or in situations when immediate police action is required to prevent the imminent removal or destruction of evidence. *See* State v. Dorson, 62 Haw. 377, 384, 615 P.2d 740, 746 (1980) (citing State v. Texeira, 62 Haw. 44, 609 P.2d 131 (1980)).

[12] 68 Haw. at ____, 716 P.2d at 493-94. In relevant part the statute reads: "A person commits the offense of promoting a dangerous drug in the first degree if he knowingly . . . [p]osesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of . . . [o]ne ounce or more, containing heroin, morphine, or cocaine or any of their respective salts." HAW. REV. STAT. § 712-1241(1)(a)(i) (1985).

[13] 68 Haw. at ____, 716 P.2d at 494.

adjacent toilet to look over the partition.[14]

III. Analysis and Commentary

The Hawaii Supreme Court identified two issues in *Biggar*. First, whether Terrance Biggar had a reasonable expectation of privacy in the public restroom once he closed the stall door, and whether the officer's action constituted a "search" at all. Second, if Biggar did have a reasonable expectation of privacy, whether Detective Peterson had probable cause to search, without a warrant, the restroom stall.[15]

A. An Expectation of Privacy

Prior to *Katz v. United States*,[16] fourth amendment inquiry into a right to privacy claim was limited by the doctrine of trespass.[17] In *Katz*, however, the United States Supreme Court expanded the scope of protection afforded to individuals to include a right to privacy in places beyond the original areas of one's home or car.[18] The Court held that the inquiry of what constitutes an intrusion should consider an individual's reasonable expectation of privacy, and should not depend on whether or not a given "area" is constitutionally protected against governmental trespass.[19] Pursuant to *Katz*, other factors, including the nature and degree of privacy of the property involved, may be considered in determining the extent and possible violation of one's reasonable expectation of privacy.[20]

Justice Harlan's concurring opinion in *Katz* sets forth a two-part test to de-

---

[14] The court briefly dismissed the issue of exigent circumstances because Peterson lacked probable cause. *Id.* at ____, 716 P.2d at 495. See *infra* text accompanying notes 32-49 for further discussion of probable cause.

[15] 68 Haw. at ____, 716 P.2d at 495.

[16] 389 U.S. 347 (1967) (electronic bugging of public telephone booth without warrant constitutes illegal search and seizure).

[17] Under the doctrine of trespass, the courts used a very rigid application of technical property doctrines in the law of search and seizure. Penetration of or trespass into a constitutionally protected area was determinative of whether or not a search and seizure violated fourth amendment rights. State v. Kaaheena, 59 Haw. 23, 26-27, 575 P.2d 462, 465 (1978).

[18] 389 U.S. at 351-52.

[19] The Court in *Katz* specifically held that:

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. (citations omitted).

[20] *Kaaheena*, 59 Haw. at 27, 575 P.2d at 465.

termine whether a reasonable expectation of privacy exists. This test was adopted by the Hawaii Supreme Court in *State v. Kaaheena*,[21] which stated:

> The test used in determining one's reasonable expectation of privacy is twofold. First, one must exhibit an actual, subjective expectation of privacy. Second, that expectation of privacy must be one that society would recognize as objectively reasonable.[22]

Applying this test, the court in *Biggar* held that the defendant's subjective expectation of privacy was objectively reasonable. The court found that Biggar exhibited a "subjective expectation of privacy" when he closed the stall door.[23] Closing the door, however, is not necessarily required to constitute a subjective expectation of privacy. In *California v. Triggs*,[24] for example, the California Supreme Court upheld as reasonable a defendant's expectation of privacy in a bathroom stall even though the stall had no doors. The officer in *Triggs* entered an access room adjacent to a public restroom. From his concealed position, the officer observed Triggs in one of the doorless toilet stalls engaged in oral sodomy, a prohibited act at the time.[25] The court held that the officer, without probable cause to suspect Triggs of criminal conduct, conducted an illegal search by observing the restroom stall from the access room. The court reasoned that the "expectation of privacy a person has when he enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door."[26]

The court in *Biggar* alluded to *Brown v. Maryland*[27] in holding that Biggar's expectation of privacy in the bathroom stall was not only subjectively reasonable

---

[21] *Id.* at 27-28, 575 P.2d at 466. In *Kaaheena*, an officer's climbing on crates to look into an opening in the blinds of defendant's apartment was held to be illegal because defendant had reasonable expectation of privacy. *Biggar* suggested that the result in *Kaaheena* may have been different if the hole in the blinds was at ground level. *See Biggar*, 68 Haw. at ____ n.4, 716 P.2d at 495 n.4.

[22] *Kaaheena*, 59 Haw. at 27-28, 575 P.2d at 466.

[23] The court in *Biggar* noted that although the door did not close completely, Biggar's expectation of privacy was not eliminated because the crack was too small to afford Peterson more than an occassional glimpse of Biggar's shoulder. 68 Haw. at ____, 716 P.2d at 495.

[24] 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

[25] *Id.* at 888-89, 506 P.2d at 234-36, 106 Cal. Rptr. at 410-11.

[26] 8 Cal. 3d at 891, 506 P.2d at 236, 106 Cal. Rptr. at 412. *But see* State v. Holt, 291 Or. 343, 630 P.2d 854 (1981) (Although defendant in doorless restroom stall has expectation of privacy from concealed officer's observations, once officer's presence becomes known to defendant, expectation of privacy is no longer reasonable.). *See also* Buchanan v. Texas, 471 S.W.2d 401 (Tex. Crim. App. 1971), *cert. denied*, 405 U.S. 930 (1972) (Defendants engaged in acts of sodomy have no reasonable expectation of privacy where there are no doors provided on the restroom stalls, but in stalls with lockable doors, a reasonable expectation of privacy exists.).

[27] 3 Md. App. 90, 238 A.2d 147 (1968).

but objectively reasonable as well.[28] In *Brown*, the Court of Special Appeals of Maryland suppressed narcotics paraphernalia evidence obtained by an officer who had looked over a toilet stall's closed door to observe Brown.[29] The *Brown* court reasoned that:

> we believe that a person who enters an enclosed stall in a public toilet, with the door closed behind him, is entitled, at least, to the modicum of privacy its design affords, certainly to the extent that he will not be joined by an uninvited guest or spied upon by probing eyes in a head physically intruding into the area.[30]

In *Biggar*, the supreme court held that the modicum of privacy in a bathroom stall with the door closed allowed Biggar a reasonable expectation of privacy which could not be infringed upon without probable cause.[31]

B. *Probable Cause*

Once a right to privacy is established under the fourth amendment, any warrantless search becomes "presumptively unreasonable unless there is both probable cause and a legally recognized exception to the warrant requirement."[32] The court in *Biggar* followed *State v. Texeira*[33] in determining what constitutes "probable cause."[34] In *Texeira*, the Hawaii Supreme Court held that an informer's call, which led to the subsequent arrest of Texeira,[35] provided probable cause for the arresting officers to command a warrantless search of Texeira's person because the police had substantial basis for crediting the information.[36]

---

[28] The court found that "an expectation of privacy in a closed toilet stall is one that society would recognize as objectively reasonable." 68 Haw. at ____, 716 P.2d at 495.

[29] In *Brown*, the door was only five feet, five inches high, thereby allowing the officer who was about six feet tall to see into the stall without any effort of getting up on his toes or standing on an adjacent toilet. 3 Md. App. at ____, 238 A.2d at 148-49 (1968).

[30] *Id.* at ____, 238 A.2d at 149.

[31] 68 Haw. at ____, 716 P.2d at 495. For more on reasonable expectation of privacy in a public restroom see also Pennsylvania v. Demchak, 251 Pa. Super. 253, 380 A.2d 473 (1977) (defendant using syringe in gas station restroom had justifiable expectation of privacy).

[32] 68 Haw. at ____, 716 P.2d at 495 (citing State v. Elderts, 62 Haw. 495, 498, 617 P.2d 89, 92 (1980) (warrantless search justified under exigent circumstances of ongoing burglary)).

[33] 50 Haw. 138, 433 P.2d 593 (1967).

[34] 68 Haw. at ____, 716 P.2d at 495-96.

[35] A reliable informer notified the Police Department that Texeira would be driving a light gray foreign station wagon from Kalihi to Palolo Housing, would be accompanied by a woman named Linda, and would be in possession of marijuana. Texeira arrived at Palolo Housing with Linda in the car described, and the police arrested him and found a marijuana cigarette on his person. 50 Haw. at 139, 433 P.2d at 595.

[36] The informer had provided the police with accurate information between 20 and 30 times over the past four years. *Id.*

Texeira adopted the test set forth in *Carroll v. United States*[37] which determined that officers have probable cause when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [a crime was being committed]."[38] In *Biggar*, the supreme court found no exigent circumstances to justify Peterson's actions.[39] The court held that Peterson lacked the requisite probable cause to stand on the seat of the adjacent toilet stall to observe Biggar's actions.[40] Although Peterson testified that he was "very suspicious" of Biggar's requests and actions,[41] the court found insufficient probable cause for Peterson to believe that Biggar was about to destroy any evanescent evidence.[42]

The Hawaii Supreme Court mandates that governmental intrusions into an individual's privacy must be justified by a compelling governmental interest.[43] The court requires a high standard of probable cause on the part of an acting officer. The application of this standard, however, can appear quite random and subjective, even when applied in similar cases. For example, in its discussion of probable cause, the court in *Biggar* alluded to *State v. Delmondo*,[44] another case involving the search of a public toilet stall.

In *Delmondo*, a police officer was using a public urinal when he heard two voices discussing money and prices coming from one of the stalls. His "curiosity"[45] aroused, the officer pushed open the door and found Delmondo and another man conducting a drug transaction.[46] The supreme court upheld the

---

[37] 267 U.S. 132 (1925) (Probable cause existed when officers patrolling highway stopped and searched automobile based upon informant's notification that occupants were known bootleggers.).

[38] 50 Haw. at 142, 433 P.2d at 597 (citing *Carroll*, 267 U.S. at 162).

[39] *See supra* text accompanying notes 11 & 17.

[40] 68 Haw. at ____, 716 P.2d at 496 (citing Wong Sun v. United States, 371 U.S. 471 (1963) (Officers had no probable cause to arrest defendant when information regarding his possession of narcotics came from an unreliable source.)).

[41] 68 Haw. at ____, 716 P.2d at 496.

[42] In *Biggar*, the detective lacked probable cause even though he was aware of Biggar's narcotics violation, viewed his demeanor as "very suspicious," and matched him to a person involved in a suspicious international ticket purchase. 68 Haw. at ____, 716 P.2d at 494-96.

[43] "In our view, the right to be free of 'unreasonable' searches and seizures under article I, section 5 of the Hawaii Constitution is enforcable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this state be no greater in intensity than absolutely necessary under the circumstances." State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1971) (footnote omitted).

[44] 54 Haw. 552, 512 P.2d 551 (1973).

[45] When asked why he opened the door, the officer testified that "[t]he only reason I opened the door [was] because; like I said, there was a conversation concerning money and so forth . . . so more or less to satisfy my curiosity. . . ." *Id.* at 553 n.1, 512 P.2d at 552 n.1.

[46] 54 Haw. at 553, 512 P.2d at 552.

search on the grounds that there was probable cause on the part of the officer to believe that a crime was being committed.[47] In *Biggar*, the detective appeared to have good reason to be "very suspicious," yet his suspicions did not reach the requisite level of probable cause that the "curious" officer in *Delmondo* was deemed to have met. Even though the outcomes of these otherwise similar cases seem irreconcilable, the issue of probable cause, even under such a subjective standard, can be appreciated. The rule of probable cause helps to maintain the careful balance between law enforcement and individual rights. In *Brinegar v. United States*,[48] the United States Supreme Court recognized this balance noting that:

> [t]he rule of probable cause is a practical non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of officers' whim of caprice.[49]

The compromise reached by balancing a right to privacy with probable cause may produce subjectively varied results, but it nevertheless encourages good law enforcement without sacrificing an individual's well-valued constitutional right to privacy.

IV. CONCLUSION

The Hawaii Supreme Court has not been hesitant to interpret the Hawaii Constitution as providing more protection of a right to privacy than the protection provided for by the United States Constitution.[50] In *State v. Biggar*, however, the court did not need to extend the protections of the state constitution in order to protect Biggar's right to privacy. The court's holding in *Biggar* is

---

[47] *Id.* at 556-57, 512 P.2d at 554.

[48] 338 U.S. 160 (1949) (After pursuing and catching suspected bootlegger on highway, Federal agents had probable cause to search and seize twelve cases of contraband liquor from his car.).

[49] *Id.* at 176.

[50] In State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974), the Hawaii Supreme Court noted that "[w]e have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted." *Id.* at 369, 520 P.2d at 58 (citations omitted).

consistent with the *Katz* test and is also in accord with other state interpretations of their respective constitutions.[51]

Trudie L. Tongg

[51] *See* Jacobs v. Superior Court, 36 Cal. App. 3d 489, 111 Cal. Rptr. 449 (1973) (Persons engaged in drug activities in room with windows covered had reasonable expectation of privacy which was violated by officer climbing onto planter adjacent to window to see through small opening in curtains.). *See also* Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (Evidence obtained by officers who climbed onto trellis outside defendant's apartment to look into small opening in drawn curtains suppressed because by closing curtains, defendant exhibited reasonable expectation of privacy.); Brown v. State, 3 Md. App. 90, 238 A.2d 147 (1968) (Narcotics paraphernalia obtained by officers looking over closed toilet stall door suppressed because person who enters closed stall has reasonable expectation of privacy.); Buchanan v. Texas, 471 S.W.2d 401 (Tex. Crim. App. 1971), *cert. denied*, 405 U.S. 930 (1972) (*see supra* note 26).

SEARCH AND SEIZURE—*State v. Enos*: Reaffirming the Narrow Interpretation of the "Incident to Lawful Arrest" Exception

I. INTRODUCTION

In *State v. Enos*,[1] the Hawaii Supreme Court held that a search incident to a lawful arrest was strictly limited to the discovery of weapons unless the searching officer had reason to suspect the presence of contraband, or fruits or instrumentalities of the crime committed. *Enos* reaffirmed the Hawaii Supreme Court's nearly unique[2] adherence to greater protection against unreasonable searches and seizures[3] than that provided by the United States Supreme Court under the fourth amendment of the United States Constitution.

II FACTS

On December 6, 1984, Honolulu Police Officer Yomes stopped defendant Enos for speeding. The officer noticed the smell of alcohol and other signs of intoxication.[4] When Enos failed the road sobriety test, Yomes arrested him and conducted a pat-down search. During the search, the officer felt what he

---

[1] 68 Haw. ____, 720 P.2d 1012 (1986).

[2] California and Alaska also construe the incident to lawful arrest exception to their state constitution's parallel provision more narrowly than the United States Supreme Court construes the federal constitution. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975); Zehrung v. State, 569 P.2d 189 (Alaska), *modified on reh'g*, 573 P.2d 858 (Alaska 1978). At least one commentator has stated that the Washington Supreme Court has also "seemingly rejected" the United States Supreme Court's broad interpretation of this exception in State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978) (en banc). *Developments in the Law—The Interpretation of State Constitutional Law*, 95 HARV. L. REV. 1324, 1372 (1982). In contrast to Hawaii, Alaska and California, the Washington state constitution's search and seizure provision is worded significantly different from the United States Constitution.

[3] Article I, section 7 of the Hawaii Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

HAW. CONST. art. I, § 7.

[4] *Enos*, 68 Haw. at ____, 720 P.2d at 1014.

thought might be cellophane packets in Enos' pants pocket.[5] Yomes had previous experience in narcotics investigations, and suspected that the objects in Enos' pocket might contain contraband. He removed the objects from Enos' pocket and found four heat-sealed cellophane packets which contained a white powdery substance. Yomes seized the packets as evidence.[6]

Enos was convicted[7] of driving under the influence of alcohol.[8] He was also charged with promoting a dangerous drug in the third degree,[9] but moved to suppress the introduction of the four cellophane packets into evidence. The trial court held the packets were found during a search incident to a lawful arrest, a recognized exception to the search warrant requirement.[10] Subsequently, Enos was convicted of promoting a dangerous drug in the third degree.[11]

Enos appealed the drug conviction contending that the search violated his constitutional right to be free from illegal searches and seizures.[12] The Hawaii

---

[5] *Id.*

[6] The trial court's undisputed findings of fact as quoted by the Hawaii Supreme Court were:

> 6. . . .Officer Yomes then conducted a pat-down search of the Defendant for weapons and contraband without any prior knowledge or suspicion of weapons or contraband on Defendant's person prior to placing him in the police vehicle.
>
> 7. . . .During the pat-down search, Officer Yomes felt what appeared to be cellophane packets in the Defendant's left front pants pocket. Based on his prior experience in narcotics investigations, Officer Yomes suspected that the packets contained contraband. On that basis, he removed the packets from the Defendant and seized them as evidence.

Id. at ____, 720 P.2d at 1013-14.

[7] *Id.* 68 Haw. at ____, 720 P.2d at 1013.

[8] Hawaii's DUI statute reads in pertinent part as follows:

> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor; or
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

HAW. REV. STAT. § 291-4 (Supp. 1984).

[9] The statute prohibiting promotion of dangerous drugs reads as follows:

> (1) A person knowingly commits the offense of promoting a dangerous drug in the third degree if he knowingly possesses any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the third degree is a class C felony.

HAW. REV. STAT. § 712-1243 (1976).

[10] 68 Haw. at ____, 720 P.2d at 1014. The fourth amendment to the United States Constitution and article I, § 7 of the Hawaii Constitution guarantee to the people a right to be free from unreasonable searches and seizures. Probable cause is necessary for a warrant, but certain exceptions to the warrant requirement have been carved out by the courts over the years. For a concise history of the warrant exceptions when the search is incident to a lawful arrest, see State v. Kaluna, 55 Haw. 361, 364-70, 520 P.2d 51, 55-9 (1974).

[11] 68 Haw. ____, 720 P.2d at 1013. See *supra* note 8 for the text of the statute under which Enos was convicted.

[12] Enos also appealed the denial of suppression of statements made by him in relation to his

Supreme Court reversed the trial court's denial of the motion to supress.[13] Finding *State v. Kaluna*[14] to be directly applicable, the court upheld its narrow[15] interpretation of the incident to lawful arrest exception.

III BACKGROUND

In 1974, the Hawaii Supreme Court took a landmark step in construing the Hawaii's constitution's search and seizure provision. The Court explicitly rejected the rationale of the United States Supreme Court's interpretation of the fourth amendment in UNITED STATES V. ROBINSON.[16] In *State v. Kaluna*,[17] the court afforded Hawaii's citizens broader protection against searches and seizures, based on the Hawaii constitution.

A. United States v. Robinson: *The Broad Interpretation*

Robinson was arrested for operating a motor vehicle after revocation of the operator's permit and for obtaining a temporary permit by misrepresentation.[18] During the search of Robinson prior to transportation to the police station, the arresting officer found a crumpled cigarette package in Robinson's coat pocket, which he then opened. Inside, the officer found fourteen "capsules of white powder which he thought to be, and which later analysis proved to be, heroin."[19] Robinson was convicted for possession of heroin.[20] His conviction was overturned by the court of appeals.[21] The United States Supreme Court reversed, holding that a case-by-case adjudication of whether the circumstances involved justified the search was not necessary because a full body search inci-

---

drug conviction. The parties stipulated that the admissibility of these statements depended on the validity of the search and seizure of the drugs. *Id.*

[13] *Id.* at ____, 720 P.2d at 1014.

[14] 55 Haw. 361, 520 P.2d 51 (1974).

[15] The term "narrow" is used in this recent development to refer to a constitutional interpretation which construes exceptions to the warrant requirement more strictly, affording the citizens more rights than would be afforded under a broad interpretation.

[16] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Supreme Court held in Michigan v. Long, 463 U.S. 1032 (1983), that the Court will not overturn a state court decision affording its citizens more rights under a state constitutional provision than those afforded by the United States Constitution, so long as "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state constitutional] grounds . . . ." 463 U.S. at 1041.

[17] 55 Haw. 361, 520 P.2d 51 (1974).

[18] 414 U.S. at 219.

[19] *Id.* at 223.

[20] *Id.* at 219.

[21] United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972) (en banc).

dent to a lawful custodial arrest was reasonable per se under the fourth amendment.[22] Justice Rehnquist, writing for a six member majority, reasoned that the right to conduct a full body search depended upon the fact of the lawful custodial arrest itself, "not on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[23]

Robinson had a "significant impact"[24] on the individual states' interpretations of their parallel constitutional provisions. "Only rarely has a state court rejected *Robinson* . . . and construed a state constitutional provision more narrowly."[25] But this adherance to *Robinson* is a matter of choice, not obligation, and even "the Supreme Court has clearly recognized that state courts are the ultimate arbiters of state law, even textually parallel provisions of state constitutions, unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."[26] As a result, in *State v. Kaluna*, the Hawaii Supreme Court adopted broader protections for Hawaii citizens under the Hawaii constitution.

B. State v. Kaluna: *Hawaii's Uniquely Narrow Interpretation*

In *Kaluna*, a female robbery suspect was lawfully arrested by two male officers.[27] The officers did not search Kaluna at the scene, but transported her to the police station, where she was searched with a full body search by a matron.[28] After being told to strip to her underwear, Kaluna handed a folded tissue from her brassiere to the matron, who then, out of curiosity, opened the tissue to find "four red capsules which later laboratory analysis showed to be Seconal, a barbiturate."[29] Kaluna was charged with possession of narcotics.[30]

---

[22] *Robinson*, 414 U.S. at 235.

[23] *Id.*

[24] W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2 at 264 (1978).

[25] *Id.* at 264-65. *See supra* note 2.

[26] People v. Brisendine, 119 Cal. Rptr. 315, 328, 531 P.2d 1099, 1112 (1975) (citing Cooper v. California, 386 U.S. 58, 62 (1967); Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 491-92 (1965)).

[27] 55 Haw. at 362, 520 P.2d at 54.

[28] *Id.* The Supreme Court has pointed out that even the pat-down for weapons is not a "petty indignity", but "a serious intrusion upon the sanctity of the person . . . ." Terry v. Ohio, 392 U.S. 1, 17 (1968). A full body search includes close examination of the person arrested as well as all articles of clothing, whereas the "frisk" or "pat-down" is limited to achieve only "the detection of bulky weapons or objects, but the officer must feel with sensitive fingers every portion of the prisoner's body." Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954).

[29] 55 Haw. at 363, 520 P.2d at 54.

The trial court suppressed the evidence and the case was subsequently dismissed.[31] On appeal, the Hawaii Supreme Court affirmed.[32]

The court initially tested the validity of the search on the basis of two exceptions to the search warrant requirement: (1) the search incident to a lawful arrest exception, and (2) the pre-incarceration search exception. The court summarized the development of the incident to lawful arrest exception to the warrant requirement under the United States and Hawaii Constitutions.[33] The court agreed with the *Robinson* dissent that the approach adopted by that majority "represent[ed] a clear and marked departure from . . . [a] long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment."[34]

In contrast to the Supreme Court's holding in *Robinson*, the Hawaii Supreme Court adhered to a narrow standard for warrantless searches. The court held that a search incident to a lawful arrest is allowed only to the extent reasonably necessary under the circumstances to discover fruits or instrumentalities of the crime for which the arrest was made, to uncover hidden weapons or to prevent the arrestee's escape.[35] Kaluna's search was reasonable in only two aspects. It was reasonable to search for implements of the robbery and, due to the violent nature of robbery, to search for weapons. "[N]either of these justifications . . . authorized [the] matron . . . to open the tissue-paper packet which the defendant held in her brassiere."[36] The court stressed "that a search incident to a valid custodial arrest does not give rise to a unique right to search"[37] and that each case must turn upon its own facts. The nature of the offense and the circumstances of the arrest give rise to what the scope of a permissible search will be.[38]

In *Kaluna*, the court emphasized its divergence from the United States Supreme Court in interpreting the Hawaii Constitution's search and seizure provision. Having "final, unreviewable authority to interpret and enforce the Hawaii Constitution,"[39] the Hawaii Supreme Court asserted its prerogative to extend the individual rights afforded to Hawaii's citizens by their state constitution

---

[30] *Id.*

[31] *Id.* at 363, 520 P.2d at 55.

[32] *Id.* at 375, 520 P.2d at 62.

[33] *See Kaluna*, 55 Haw. at 364-370, 520 P.2d at 55-59.

[34] *Robinson*, 414 U.S. at 239 (Marshall, J., dissenting). Justice Levinson of the Hawaii Supreme Court focused on the reasoning in the *Robinson* dissent which pointed out that the extent of the power authorized by the majority could "introduce serious dangers of abuse." *Kaluna*, 55 Haw. at 369, 520 P.2d at 59.

[35] *Kaluna*, 55 Haw. at 370-71, 520 P.2d at 59.

[36] *Id.* at 370, 520 P.2d at 59.

[37] *Id.* at 372, 520 P.2d at 60.

[38] *Id.*

[39] *Id.* at 369, 520 P.2d at 58.

beyond those afforded by the United States Constitution.[40] The court explained that although article I, section 7 of the Hawaii Constitution was identical to the fourth amendment to the United States Constitution,

> the Hawaii Supreme Court, as the highest court of a sovereign state, is under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state. As long as we afford the defendants the minimum protection required by federal interpretations of . . . the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection.[41]

Next, the court analyzed the search of Kaluna on the basis of the pre-incarceration exception to the warrant requirement. The State asserted two purposes for this type of a search:[42] "(1) to prevent the entry into jail of weapons or harmful drugs, and (2) to inventory. . .belongings to facilitate the processing of subsequent claims for loss or damage to them."[43] The court held that these were legitimate purposes which required the surrender of "*any* possible repositories"[44] for weapons, drugs, or other harmful items, but that "a concomitant of this wide authority to prohibit the entry of personal belongings which may harbor forbidden contents is a complete *absence* of authority to conduct a general exploratory search of the belongings themselves."[45]

The court recognized that the arrestee does not surrender all expectations of privacy by the mere fact of police custody. At that point, the State's interest of preventing the entry of weapons, drugs or other harmful items into the jail has been satisfied.[46] The State's purpose, the court observed, must be achieved by

---

[40] *See supra* text accompanying note 26.

[41] *Texeira*, 50 Haw. at 142 n.2, 433 P.2d at 597 n.2.

[42] Another purpose asserted for the pre-incarceration search is ascertainment or verification of the identification of the detainee. LAFAVE, *supra* note 24, § 5.3(a) at 307.

[43] *Kaluna*, 55 Haw. at 373, 520 P.2d at 60-61.

[44] *Id.* at 373, 520 P.2d at 61 (emphasis original).

[45] *Id.* (emphasis original). The court clarified its statement about an absence of authority to conduct an exploratory search in a footnote:

> [I]f in the process of a lawful pre-incarceration search the police obtain probable cause to believe that the internee is then and there committing an offense other than that for which he was arrested, they may conduct a second search incident to arrest geared in scope to the nature of the new offense. . . . In the present case, for example, it would have been proper for matron Mehau to open the defendant's packet *if* she had had probable cause to believe that the packet contained unlawful drugs, and therefore, that the defendant was committing the continued offense of unlawful possession of those drugs.

Id. at 373-74 n.9, 520 P.2d at 61 n.9 (citations omitted) (emphasis original).

[46] *Id.*, 55 Haw. at 374, 520 P.2d at 61.

the least intrusive means.[47]

IV ANALYSIS

In *Enos*, the Hawaii Supreme Court reaffirmed the standard delineated in *Kaluna*. The court mandated that a warrantless search must be "no greater in intensity than is absolutely necessary under the circumstances."[48] The court noted, however, "that on an arrest for drunken driving, it is per se reasonable for an officer to conduct a pat-down for weapons."[49] The court based this statement on the "repeatedly . . . upheld . . . right of an officer making an arrest to take reasonable and appropriate steps to protect himself from possible weapons to which the arrestee may have access."[50]

Because a drunk driving arrest is custodial in nature, the arrestee and the officer are in close proximity for an extended period of time. Under the circumstances, a search would be reasonable to allow the officer to make sure that the arrestee does not have a weapon to which he could gain access during transportation to the police station and up to the time of the pre-incarceration search.[51] Consequently, it is reasonable for an officer to conduct a pat-down for weapons upon an arrest for drunk driving.

In Hawaii, the permissible scope of a search incident to a lawful custodial arrest also includes a search for fruits or instrumentalities of the crime for which the suspect is arrested.[52] The search for evidence is justified in order to prevent its concealment or destruction.[53] In *Enos*, fruits or instrumentalities of the crime

---

[47] *Id.*, 55 Haw. at 374, 520 P.2d. at 61.

[48] *Id.*, 55 Haw. at 369, 520 P.2d at 58-59.

[49] 68 Haw. at ____, 720 P.2d at 1014.

[50] *Id.* The court cited to State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985), State v. Ortiz, 67 Haw. 181, 683 P.2d 822 (1984) and *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974) as upholding this proposition. In *Ortiz*, the circumstances of the arrest were such that the safety of the officer justified the search and seizure involved. The circumstances in *Barrett* and *Kaluna* were such that there was no possibility of the officer conducting the search being subjected to a dangerous situation and the searches were held to be unreasonable.

[51] To protect the safety of the arresting officer, the courts justifiably seem to accept as reasonable a search at the earliest point in time. One might argue that handcuffing the arrestee would prevent access to any weapon that might be concealed and therefore would obviate the need even for a frisk for weapons. Even with handcuffs on it would be possible for an arrestee to maneuver his body into a position in which he could fire a gun or even use a gun or a knife upon himself. Also, upon arrival at the police station the handcuffs must come off to facilitate the booking procedure, fingerprinting in particular. At some point prior to the pre-incarceration search a weapons frisk will be necessary.

[52] 68 Haw. at ____, 740 P.2d at 1014; State v. Park, 50 Haw. 275, 276, 439 P.2d 212, 213 (1968).

[53] *See* Chimel v. California, 395 U.S. 752, 763 (1969); *Kaluna*, 55 Haw. at 372, 520 P.2d at 60.

of drunk driving would have been items such as bottles or similar containers suitable for holding alcohol. As a result, the court found that the officer's search which yielded four cellophane packets within the defendant's pocket was beyond the scope of what the circumstances justified.[54] The court noted that prior to the pat-down, the arresting officer demonstrated no knowledge or suspicion that defendant was concealing contraband, fruits or instrumentalities relating to the charge of driving while intoxicated. The court concluded that the officer's pat-down should have been strictly limited to a search for weapons.

Presumably, a permissible search for weapons would also enable discovery of any fruits or instrumentalities of the crime of drunk driving, since a container large enough to be used to carry alcohol would be at least as bulky as a small weapon. Thus, the type of search permissible incident to a lawful arrest for drunk driving should be the same whether for weapons or for fruits or instrumentalities of the crime, absent any other facts giving the officer "prior knowledge or suspicion of the existence of contraband . . . ."[55]

V. IMPLICATIONS OF *Enos*

The Hawaii Supreme Court's decision in *Kaluna* gives rise to interesting implications if one asks, hypothetically, what might have occured in a fact situation similar to that of *Enos* had the arresting officer not exceeded the proper scope of the initial search incident to arrest. Arguably, once the officer performed the pat-down for weapons and transported Enos to the police station, it was only a matter of time until the drugs in Enos' pocket would be discovered as the pre-incarceration search would have required him to empty his pockets.[56] Since the cocaine was contained in a clear cellophane packet, not a tissue packet or other container not readily open to visual discovery, the police would have had probable cause to obtain a warrant to test the white powdery substance. The search would then have been proper and the evidence would not have been supressed.

The problem with this hypothetical scenario is that the pre-incarceration search is not necessarily inevitable. The Hawaii Supreme Court has agreed, in principle,[57] with other jurisdictions "that a pre-incarceration search is not proper if upon posting collateral the arrested person has a right to release without any incarceration."[58]

Under a drunk driving offense the arrestee may be allowed to post bail prior

---

[54] *Enos*, 68 Haw. at ____, 720 P.2d at 1014.

[55] *Id.*

[56] *See supra* note 53 and accompanying text.

[57] State v. Vance, 61 Haw. 291, 300, 602 P.2d 933, 940 (1979).

[58] *Id.* at 299-300, 602 P.2d at 940.

to incarceration and the pre-incarceration search.[59] Had Enos been carrying sufficient cash to post bail, or if someone had posted bail for him prior to the necessity of his incarceration, it is possible that Enos could have been released without a search of his pockets. The likelihood of this occuring would depend on the facts and circumstances occurring prior to posting of bail. The Hawaii Supreme Court relies on a fact-specific, case-by-case analysis in determining whether an arrestee has a right to release prior to the pre-incarceration search.[60]

Because Enos' arrest was for an offense which authorized that he be admitted to bail without unnecessary delay, the relevant inquiry turns on the definition of unnecessary delay.[61] The Hawaii Supreme Court has held that the physical condition and conduct of the person arrested are factors which it will consider in the decision as to whether unnecessary delay has occurred.[62]

Not only would Enos have to have been able to post bail almost immediately, but his conduct at the police station and possibly his method of transportation from the station would be crucial factors the court would consider.[63] If Enos was so intoxicated that his release would have been sufficient for rearrest[64]

---

[59] State v. Langley, 62 Haw. 79, 81, 611 P.2d 130, 132 (1980); *Vance*, 61 Haw. at 302, 602 P.2d at 941. The offense of drunk driving carries a maximum penalty of less than two years imprisonment. HAW. REV. STAT. § 291-4(b) (Supp. 1984).

[60] In *Vance*, defendant John Ray Vance, had been incarcerated when his mother and brother, Michael, arrived to post bail. Michael Vance became belligerent and threatening and was cited for disorderly conduct, a petty misdemeanor. His mother immediately offered to post bail for him. *Id.* at 293, 602 P.2d 936. A search of Michael Vance's pockets uncovered a plastic packet containing three white tablets. The police then charged Michael with promoting a dangerous drug in the third degree, booked and incarcerated him. Michael Vance moved to suppress the evidence "on the ground that the warrantless pre-incarceration search following his arrest was without justification and constitutionally impermissible because of his right to be released on bail." *Id.* at 298, 602 P.2d at 939 (footnote omitted).

HAW. REV. STAT. § 804-5 (1976) allows persons authorized by the Chief of Police to admit to bail persons charged with offenses which carry a maximum penalty of two years imprisonment or less. The maximum penalty for the crime for which Michael was arrested was less than one year. *Vance*, 61 Haw. at 301 n.9, 602 P.2d at 940 n.9. Rule 5 (a)(2) of the Hawaii Rules of Criminal Procedure states that when authorized by law the accused shall be admitted to bail without unnecessary delay. *Vance*, 61 Haw. at 300-301, 602 P.2d at 940. The court in *Vance* found that the physical condition and conduct of the person arrested are factors which may legitimately be considered in the decision as to whether the defendant has been admitted to bail without unnecessary delay. *Id.* at 302, 602 P.2d at 941. Considering the facts of Michael Vance's hostility and threats, the Hawaii Supreme Court held that "the trial court could have reasonably concluded that the delay in admitting Michael to bail and his temporary incarceration were necessary . . . ." *Id.*

[61] *See supra* note 60.

[62] *Vance*, 61 Haw. at 302, 602 P.2d at 941. *See supra* note 60.

[63] *Vance*, 61 Haw. at 302, 602 P.2d at 941 (citing Sheffield v. Reece, 201 Miss. 133, 28 So.2d 745 (1947)).

[64] *Id.*, 61 Haw. at 303, 602 P.2d at 941.

either for public intoxication or drunk driving, or if his conduct otherwise justified incarceration based on the facts and circumstances of the case,[65] a pre-incarceration search would then be inevitable.

VI CONCLUSION

The Hawaii Supreme Court has adhered to a narrow interpretation of the incident to lawful arrest exception to the warrant requirement in article I, section 7 of the Hawaii Constitution for over twelve years. The decision in *State v. Enos*, reaffirming *Kaluna*, indicates the court's commitment to adhere to a higher standard of protection for Hawaii's citizens against unreasonable searches and seizures than is provided for by the United States Supreme Court under the fourth amendment to the United States Constitution.

In the case of a lawful custodial arrest, it is reasonable per se for the arresting officer to conduct a pat-down search for weapons in order to protect his safety during transportation to the police station. If the arrestee is incarcerated, it is also reasonable to conduct a search to prevent weapons, contraband and other harmful items from accompanying the arrestee into jail. The arrestee, however, continues to maintain a reasonable expectation of privacy, especially in containers which do not give rise to probable cause that another offense is being committed.

Given the facts of *Enos*, it may be possible for an arrestee to avoid the pre-incarceration search altogether, depending on his ability to post bail and a number of other factors. Whether these factors can lead to avoidance of the pre-incarceration search is also judged by the reasonableness standard adhered to by the court for a warrantless search incident to lawful arrest.

Kelly J. Salling

---

[65] *Id.*

CONTRACT LAW—*Eastern Star, Inc. v. Union Building Materials Corp.*: Do Treble Damages Preclude a Claim for Punitive Damages Based on Deceptive Trade Practices?

I. INTRODUCTION

In *Eastern Star, Inc. v. Union Building Materials Corp.*,[1] the Hawaii Intermediate Court of Appeals (ICA) upheld an award of treble damages[2] against a contractor corporation and its president for violating Hawaii Revised Statutes section 480-2.[3] The statute prohibits unfair or deceptive acts or practices in the conduct of trade or commerce. The court also held that the statutory remedy of treble damages did not preclude a remedy for common law fraud in the course of trade and commerce. In *Eastern Star*, the ICA infused Hawaii's consumer protection law with increased vitality as a weapon against all forms of unscrupulous and misleading business practices.[4]

---

[1] 6 Haw. App. ____, 712 P.2d 1148 (1985).

[2] Section 480-13 provides for treble damages, reasonable attorney's fees and costs to a plaintiff who successfully proves a § 480-2 violation. *See infra* note 3 for text of § 480-2. HAW. REV. STAT. § 480-13(a)(1) (1976) provides:

> Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter:
>
> (1) May sue for damages sustained by him, and, if the judgment is for the plaintiff, he shall be awarded a sum not less than $1,000.00 or threefold damages by him sustained, whichever sum is the greater, and reasonable attorneys fees together with the cost of suit; provided that no showing that the proceeding or suit would be in the public interest . . . is necessary when the party against whom the proceeding or suit is brought is a merchant as that term is defined in chapter 490 . . . .

[3] The statute reads: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." HAW. REV. STAT. § 480-2 (1976). In 1965 the Hawaii legislature amended the Hawaii Antitrust Act to include the language now contained in § 480-2. *See* Kemper, *Hawaii's Section Five of the FTC Act: The Ubiquitous Antitrust Law*, 6 HAW. B.J. 5 (1969).

[4] Because it provides for minimum damages of $1,000, mandatory treble damages, and attorneys' fees to the successful plaintiff, HAW. REV. STAT. ch. 480 is considered the strongest consumer protection statute in the nation. *See, e.g.*, Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972). In an analysis of state consumer protection laws, Hawaii's statute was rated most favorably amongst the states according to factors that discourage or encourage private actions by consumers. Comment, *Consumer Protection: The Practical Effectiveness of State*

II. FACTS

Plaintiff Eastern Star, a Panamanian corporation, executed a contract with defendant Robert Graves[5] for the purchase of a lot in Hawaii Kai. The contract included a single family dwelling to be constructed by Graves[6] who represented to Eastern Star that he was an experienced licensed contractor. After the contract was signed, Graves contacted defendant Keith Kranz who prepared a construction contract and performance and payment bond. Kranz was owner and president of defendant Union Building Materials Corporation (UBM), a building materials and supply company. The performance and payment bond was signed by Graves, Inc. as "principal," UBM by Kranz as "surety," and Eastern Star as "owner." The bond provided for the surety's liability upon the principal's failure to complete construction in accordance with the terms of the construction contract.[7]

When the dwelling was not completed by the contract deadline, Eastern Star learned Graves was in fact not a licensed contractor and no building permit had been issued for the dwelling.[8] As a result, Eastern Star terminated the contract.[9] Kranz subsequently represented to Eastern Star that UBM had a contractor's license and authorized Graves to use it.[10] Thus, UBM was actually the contractor with Graves serving as UBM's agent. In executing the performance and payment bond, UBM was not a true surety but merely a guarantor of its own contractual obligations.[11]

Deceptive Trade Practices Legislation, 59 TUL. L. REV. 427, 443 (1984).

[5] Robert Graves was sole owner and operator of Graves, Inc., a Hawaii construction company. 6 Haw. App. at ____, 712 P.2d at 1151.

[6] The contract, executed by Eastern Star's agent, was accepted by Graves on July 16, 1979, and provided for a purchase price of $210,000 ($70,000 for the leasehold lot and $140,000 for construction of the dwelling). *Id.* at ____, 712 P.2d at 1152.

[7] *Id.* The bond was in the amount of $70,000, one half the contract price. The construction contract provided for the $140,000 contract price to be deposited with the surety upon signing and called for completion within 120 working days. Both the bond and contract were dated August 23, 1979. *Id.*

[8] *Id.* at ____, 712 P.2d at 1152. A consent judgment had been filed in the First Circuit Court on April 23, 1979, enjoining Graves from further engaging in any type of construction contracting activity until such time as he procured a proper license from the Department of Regulatory Agencies. *Id.* at ____, 712 P.2d at 1158.

[9] *Id.* at ____, 712 P.2d at 1152.

[10] An individual named Alfred Cambra had transferred his contractor's license to UBM and was designated as UBM's "responsible managing employee" (RME) as required by law. In return, Cambra received one percent of the price of each construction contract. However, Cambra did not actually perform any duties of a RME. *Id.* at ____ n.7, 712 P.2d at 1152 n.7.

[11] Suretyship is a tripartite relationship requiring three indispensable parties, the principal obligor, the surety, and the party insured (obligee). There can be no true suretyship if any one is lacking. Thus, a person cannot be a surety for himself. 72 C.J.S. *Principal and Surety* § 9 (1951)

The parties executed an amended construction contract with UBM designated as contractor and calling for a one hundred percent performance and payment bond.[12] Eastern Star expected UBM would obtain a third party surety. UBM, however, did not disclose that the company intended to bond itself without any third-party surety.[13] Again, construction was not completed by the deadline. Eastern Star terminated the amended contract and hired another builder to finish the dwelling.[14] Consequently, Eastern Star filed a complaint against UBM, Graves, Inc., Kranz, and Graves alleging breach of contract, fraud, and unfair and deceptive acts and practices under Hawaii Revised Statutes section 480-2.[15]

The trial court directed a verdict dismissing Eastern Star's common law fraud claim on two grounds. First, there was insufficient evidence proving fraud; second, the fraud claim was precluded by the remedy provided by sections 480-2 and 480-13.[16] The jury returned a special verdict in Eastern Star's favor finding UBM breached the amended contract and all the defendants committed unfair or deceptive acts or practices. The jury awarded treble damages in the amount of $651,000.[17] UBM and Kranz appealed on the issues of corporate[18] and individual[19] liability under section 480-2, claiming insufficient evidence to support the jury's finding of unfair and deceptive acts. Eastern Star cross-appealed from dismissal of its common-law fraud claim.[20]

(cited in *Eastern Star*, 6 Haw. App. at ____ n.12, 712 P.2d at 1155 n.12). Here, UBM claimed a bipartite "suretyship" in which the principal and surety were one and the same. 6 Haw. App. at ____, 712 P.2d at 1154-55.

[12] The amended contract, dated April 23, 1980, extended the completion deadline to August 1, 1980, and increased the contract price to $156,580. Graves signed as "agent" for UBM the "contractor." *Id.* at ____, 712 P.2d at 1152-53.

[13] *Id.* at ____, 712 P.2d at 1155.

[14] Kailua Builders completed the construction by December 1980 for a price of $103,000. Thereafter, problems developed with leaks, seepage, and cracks in the floors and walls. An engineer determined that the problems were caused by improper laying of the floor slab and insufficient waterproofing of the outer walls, and estimated cost of repairs at $68,000. Eastern Star amended its complaint alleging construction " 'in a deficient and unworkmanlike manner' " by the defendants. *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1153. Subsequently, Eastern Star attempted to sell the property and eventually exchanged it "as is" for a condominium worth $168,000. *Id.*

[15] *Id.* See *supra* note 1 for text of § 480-2.

[16] 6 Haw. App. at ____, 712 P.2d at 1158.

[17] The jury found that the total amount of money damages suffered by Eastern Star was $217,000 and that 100 percent of such damages resulted from unfair or deceptive acts or practices by the defendants. The $217,000 was trebled to $651,000. *Id.* at ____, 712 P.2d at 1153.

[18] *Id.*

[19] *Id.* at ____, 712 P.2d at 1155.

[20] *Id.* at ____, 712 P.2d at 1158. Graves and Graves, Inc. did not appeal. Defendants UBM and Kranz raised an additional issue on appeal that the trial court erred in its jury instruction on the doctrine of waiver. UBM claimed the unfair or deceptive acts or practices, if any, occurred

III. ANALYSIS

Hawaii Revised Statutes section 480-2 is a powerful remedy against unfair or deceptive business practices. Plaintiffs who prove a section 480-2 violation can recover reasonable attorney's fees and costs as well as treble damages.[21] In addition, the requirements of proving a section 480-2 violation[22] are less stringent than proving the elements of common law fraud.[23] Unlike fraud, no reliance or actual deception is required to establish a violation of section 480-2.[24]

Eastern Star involved both a fraud claim and a claim for treble damages under sections 480-2 and 480-13. The Intermediate Court of Appeals upheld both claims, clarifying the relationship between the statutory remedy for deceptive trade practices and the common law remedy for fraud. The ICA also enunciated additional standards for the application of the consumer protection law.[25]

---

prior to April 23, 1980, the date of the amended contract. Thus, by executing the amended contract, Eastern Star waived its claim for any damages arising from such acts. The ICA held that the jury instruction was neither incorrect nor prejudicial to defendants. *Id.* The court also concluded that, even assuming Eastern Star's execution of the amended contract constituted a waiver of all prior violations of HAW. REV. STAT. § 480-2, there was substantial evidence for the jury to find an unfair or deceptive trade practice in UBM's actions in executing the second contract. *Id.* at ____, 712 P.2d at 1154.

[21] See *supra* note 2 for the statutory provision.

[23] The Hawaii Supreme Court has identified the elements of a cause of action for treble damages under § 480-13 as follows: "(1) a violation of chapter 480; (2) injury to plaintiff's business or property resulting from such violation; (3) proof of the amount of damages; and (4) a showing that the action is in the public interest or that the defendant is a merchant." Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 617, 607 P.2d 1304, 1311 (1980). In *Ai*, a collection agency violated § 480-2 by misrepresenting that plaintiffs' obligation under a promissory note might be increased by the addition of attorney's fees. However, since the offending portion of the promissory note was severable, plaintiffs were not legally injured, and thus not entitled to damages under § 480-13. *Id.*

[22] See *infra* note 26 for the elements necessary to establish fraud as identified by the Hawaii Supreme Court in Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978).

[24] Proof of actual deception is unnecessary to establish that a defendant committed unfair or deceptive acts. The plaintiff must merely show that the misrepresentation has a tendency to deceive. *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1154. *See infra* notes 40 and 41 and accompanying text.

[25] The Hawaii courts have construed § 480-2 on several previous occasions. *See, e.g.*, Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980) (collection agency violated § 480-2 by misrepresenting that balance of plaintiff's note could be increased by addition of attorney fees); Island Tobacco Co. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 627 P.2d 260 (1981) (below cost pricing practices constitute a violation of § 481-3, not § 480-2); Ailetcher v. Beneficial Fin. Co., 2 Haw. App. 301, 632 P.2d 1071 (1981) (it was a jury question whether finance company's threat to cut off business with debtor's employer until debt paid in full was an unfair business act); Beerman v. Toro Mfg. Corp., 1 Haw. App. 111, 615 P.2d 749 (1980) (no cause of action for personal injuries against manufacturer and distributor of allegedly defective lawnmower under HAW. REV. STAT. §§ 480-2, -13); Wigincon v. Pacific Credit Corp., 2 Haw. App.

A. *Treble and Punitive Damages*

Initially, the ICA reversed the trial court's directed verdict on Eastern Star's fraud claim. The ICA found sufficient evidence to support a jury verdict of fraud[26] and rejected the lower court's conclusion that a treble damages award under sections 480-2 and 480-13(a)(1) constitutes the exclusive remedy for common law fraud in the trade and commerce area.[27]

The court concluded that neither the statute nor its history evidenced any legislative intent to discard the common law fraud action and remedy.[28] The ICA also recognized that other jurisdictions permit both statutory and common law theories of recovery in the same action.[29] Reasoning that an award of both treble damages and punitive damages for the same act constitutes an improper double recovery,[30] the ICA held that recovery should be either treble damages

---

435, 634 P.2d 111 (1981) (de minimis damages sufficient to show injury in treble damages action under § 480-13; unfair and deceptive collection practices in violation of HAW. REV. STAT. ch. 443 constitute per se violation of § 480-2); Rosa v. Johnston, 3 Haw. App. 420, 651 P.2d 1228 (1982) (solar water company violated § 480-2 by misrepresenting company's credentials and installing a defective system).

[26] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1158. The ICA applied the rule cited by the Hawaii Supreme Court:

> To support a finding of fraud, it must be shown that "the representations were made and that they were false, . . . [and] that they were made by the defendant with knowledge that they were false, (or without knowledge whether they were true or false) and in contemplation of the plaintiff's relying upon them and also that the plaintiff did rely upon them."

Eastern Star, 6 Haw. App. at ____, 712 P.2d at 1158 (citation omitted) (quoting Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 289 (1978)). The court found that the defendants committed fraud. First, Graves represented to Eastern Star that he was a licensed contractor, knowing he was in fact unlicensed. He contemplated Eastern Star would rely on this representation which Eastern Star did by signing the contract. Second, UBM and Kranz knew Graves was unlicensed and permitted him to "use" UBM's license, thus supporting a jury finding that UBM conspired with Graves or that UBM was the principal responsible for the fraud and that Kranz participated in the acts of fraud. Finally, Eastern Star was induced to enter into the amended contract by relying on UBM and Kranz's representation that UBM would obtain a surety bond when UBM actually intended to bond itself. *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1158-59.

[27] *Id.* at ____, 712 P.2d at 1159.

[28] *Id.*

[29] *Id. See, e.g.*, Evans v. Yegen Assoc., 556 F. Supp. 1219 (D. Mass. 1983) (statutory deceptive practices and common law fraud); Perry v. Hansen, 120 Ariz. 266, 585 P.2d 574 (1978) (statutory fraud and common law fraud); Young v. Joyce, 351 A.2d 857 (Del. 1975) (statutory consumer fraud and common law deceit). In a case involving false and deceptive business practices, the plaintiff frequently claims damages for both fraud and violation of § 480-2. If the stricter elements of fraud are not proven, the case may proceed under the statutory theory only.

[30] 6 Haw. App. at ____, 712 P.2d at 1159. The ICA agreed with the Wisconsin Supreme Court in John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402, 198 N.W.2d 363 (1972). In

or punitive damages, whichever is the greater amount.[31]

As the court recognized, holding treble damages the exclusive remedy for fraud would weaken the deterrent effect intended by the legislature.[32] If a defendant's flagrant misconduct resulted in large punitive damages while the plaintiff's actual damages were minimal, then treble damages would serve as a poor deterrent.[33]

Consumer advocates maintain injured consumers should recover both measures of damages since treble and punitive damages serve different purposes and are awarded for different policy reasons. Treble damages were designed to promote consumer enforcement and deter deceptive business practices, not to displace punitive damages.[34] Other commentators contend an award of both is duplicative because each measure has a punitive element.[35] The ICA adopted a

---

Mohr, an employer sued to compel the assignment of a patent he claimed the defendant inventor designed while under his employ. The trial court found for the inventor on his counterclaim under the state antitrust act, awarding treble damages and punitive damages. The Wisconsin Supreme Court upheld $35,000 in compensatory damages and $20,000 in attorney's fees and costs, but disallowed the $25,000 punitive damages award on the basis of its previous holding that treble damages were in part punitive in nature. Thus, awarding two penalties of a punitive nature for the same act violated basic fairness and due process of law. *Id.* at ____, 198 N.W.2d at 368.

[31] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1160. The ICA adopted the approach of the Florida Court of Appeals in Bill Terry's, Inc. v. Atlantic Motor Sales, Inc., 409 So. 2d 507 (Fla. Dist. Ct. App. 1982). In that case, suit was brought against an automobile dealer for tampering with odometers on used cars. The plaintiff/purchaser sought recovery for common law fraud as well as violation of a federal treble damage statute. The jury assessed compensatory damages of $2,845 (trebled to $8,535) and punitive damages for fraud of $10,000. The court held it was proper to award the larger amount of damages, in that case, the punitive damages. *Id.* at 509.

[32] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1159. The Hawaii Supreme Court determined § 480-2 was enacted to "stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen." *Ai*, 61 Haw. at 616, 607 P.2d at 1311.

[33] For example, assume that a multi-millionaire defendant committed fraud as well as a violation of § 480-2. If the plaintiff's out-of-pocket loss was only $1,000 and a fair award of punitive damages for fraud was $50,000, then the defendant would pay only $3,000 ($1,000 trebled) instead of the more meaningful punitive damage award.

[34] The justification for awarding statutory treble damages contrasts sharply with the common law justification for punitive damages. Treble damages do not require a finding of intentional wrongdoing and are designed to encourage a consumer to bring suit by expanding his recoverable damages. Punitive damages, on the other hand, require a showing of willful or outrageous conduct and are designed to punish the wrongdoer. *See* Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75.1.1?*, 62 N.C.L. REV. 1139, 1142 (1984); Roberts & Martz, *Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions—The Ohio Consumer Sales Practices Act*, 42 OHIO ST. L.J. 927, 958-59 (1981).

[35] *Id.* This argument is more persuasive if the statute requires a showing of intentional wrong-

balanced approach, allowing a plaintiff to recover the higher award when punitive damages exceed treble damages, while precluding the possibility of a double recovery. The court's conclusion that the statute was never intended to bar the common law remedy for fraud is consistent with the fact that a section 480-2 cause of action does not require proof of intentional wrongdoing.[36]

B. *Unfair and Deceptive Acts and Practices*

The ICA clarified the phrase "unfair or deceptive acts or practices" in holding UBM liable under section 480-2.[37] In so doing, the court emphasized its continued intention to construe the broad language of the statute to effectuate the legislative purpose of creating a strong and effective tool to protect consumers and prevent deception in business.[38] The court noted that "[a] practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[39] The ICA expanded this rule by defining "deception" as "an act causing,

---

doing to recover treble damages. The Wisconsin Supreme Court held punitive damages are duplicative of treble damages: "Our court has long taken the view a statute creating a cause of action for treble damages is punitive in nature to the extent damages above the actual damages are recovered . . . ." *Mohr*, 55 Wis. 2d at ____, 198 N.W.2d at 368. See *supra* note 30 for a discussion of the case.

[36] See *infra* notes 40 and 41 and accompanying text discussing the definition of "deception" within the meaning of § 480-2. A deceptive act or practice violation may be found regardless of the intent of the wrongdoer. *See* Kemper, *Misrepresentation and Deception Under Section 480-2 of the Hawaii Revised Statutes*, 10 HAW. B.J. 69 (1973).

[37] The court noted the phrase "unfair or deceptive acts or practices in the conduct of any trade or commerce" is not defined in HAW. REV. STAT. ch. 480. However, § 480-3 provides that the chapter "shall be construed in accordance with judicial interpretations of similar federal antitrust statutes . . . ." *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1154 (quoting HAW. REV. STAT. § 480-3 (Supp. 1984)). The federal counterpart of § 480-2 is § 5(a)(1) of the Federal Trade Commission Act which reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (Supp. 1974).

[38] The purpose of the bill was to provide a means to "enjoin unfair and deceptive business practices by which consumers are defrauded and the economy of the State is harmed." H.R. STAND. COMM. REP. NO. 55, 3d Haw. Leg., Reg. Sess., 1965 HOUSE J. 538. The reason for the broad sweeping language of the statute was announced by Congress in enacting the Federal Trade Commission Act and adopted by the Hawaii legislature: " 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again.' " *Id. See supra* note 37 for the language of the federal act.

[39] Rosa v. Johnston, 3 Haw. App. 420, 651 P.2d 1228 (1982). In *Rosa*, the ICA upheld an award of treble damages in connection with the sale of a solar water heating system. The defendant committed unfair and deceptive acts by (1) misrepresenting that the company had 16 years experience in the business and had licensed engineers on its staff, (2) installing a system knowing

as a natural and probable result, a person to do that which he would not otherwise do."[40] The court held that under section 480-2, actual deception need not be shown; the capacity to deceive is sufficient.[41]

Applying these definitions, the ICA concluded that UBM's actions constituted an "unethical design . . . to profit at the expense of the consuming public."[42] UBM deceived Eastern Star by not disclosing that UBM would be bonding itself without any third-party surety. Thus, UBM induced Eastern Star to execute the amended contract to its detriment.[43]

C. Individual Liability of Corporate Officers

In addition to holding UBM liable for unfair and deceptive acts, the ICA found Kranz jointly and personally liable for treble damages.[44] A treble damage action based on a section 480-2 violation is a tort action; consequently, a corporate officer who participates in the violation is a joint tortfeasor.[45] The court also applied the general rule that a corporate officer is not immune from personal liability if he participates in the tortious conduct.[46] Since the evidence showed

---

it was defective, and (3) failing to reasonably and effectively correct the system. *Id.* at 425-26, 651 P.2d at 1233.

[40] 6 Haw. App. at ____, 712 P.2d at 1154 (quoting *Rosa*, 3 Haw. App. at 427, 651 P.2d at 1234). In *Rosa*, the ICA adopted the definition set forth in Spiegel, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1976) (unfair to use state long-arm statutes to sue delinquent mail order customers in distant courts).

[41] 6 Haw. App. at ____, 712 P.2d at 1154 (citing Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957)). In *Goodman*, the defendant made false, misleading, and deceptive representations in advertisements to induce salesmen to sell a home study course. The court declared: "[C]apacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act." *Id.* at 604. In its earlier decision in *Rosa*, the ICA noted, under § 5 of the Trade Commission Act, proof of actual deception is unnecessary. 3 Haw. App. at ____, 651 P.2d at 1234. *See generally* Kemper, *supra* note 36.

[42] 6 Haw. App. at ____, 712 P.2d at 1155. The court's decision was based on evidence that UBM knowingly (1) allowed Graves to illegally use UBM's contractor's license to enter into construction contracts, (2) served as the "surety" on the bonds required by those contracts when it was the principal, (3) charged fees for issuing such bonds, and (4) bonded itself without a third-party surety when UBM was the designated contractor. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id. See* Tondas v. Amateur Hockey Ass'n of U.S., 438 F. Supp. 310 (W.D.N.Y. 1977). In *Tondas*, the court held that conspirators in a private antitrust action are joint tortfeasors and jointly and severally liable. There, the director of a local hockey association who participated in an alleged antitrust conspiracy would be personally liable regardless of whether the association was or was not sued.

[46] 6 Haw. App. at ____, 712 P.2d at 1155. For rules on personal liability of corporate officers see Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 526, 543 P.2d 1356, 1360 (1975); Burgess v. Arita, 5 Haw. App. ____, ____, 704 P.2d 930, 939 (1985).

Kranz's active participation in the unfair or deceptive acts committed by UBM, he was personally liable.[47]

Kranz argued that Hawaii Revised Statutes section 480-17[48] limits individual liability of corporate officers to the penal provisions of chapter 480.[49] Section 480-17 expressly imputes a corporation's violation of penal provisions to the individual corporate officers, directors, or agents who authorized, ordered, or did the violative act. The court rejected Kranz's assertions and held that section 480-17 imputes civil, as well as criminal liability of officers.[50] As mandated by section 480-3, the court relied on federal decisions construing similar federal antitrust statutes.[51] The ICA's interpretation supports chapter 480's purpose of deterring a wide range of deceptive business conduct, and is clearly supported by decisions holding that a corporate officer may be liable under analogous federal laws if he knowingly participates in the prohibited conduct.[52]

---

[47] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1156.

[48] The statute reads as follows:

> Whenever a corporation violates any of the penal provisions of this chapter, the violation shall be deemed to be also that of the individual directors, officers, or agents of the corporation who have authorized, ordered, or done any of the acts constituting in whole or in part such violation.

HAW. REV. STAT. § 480-17 (1976).

[49] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1156. Kranz maintained that the omission of "civil" provisions in § 480-17 indicated there can be no imposition of personal liability on corporate officers in a civil proceeding under § 480-13 based on a violation of § 480-2. *Id.*

[50] *Id.*

[51] See *supra* note 37 for the applicable statutory language. Section 480-3 mandates that ch. 480 shall be interpreted in accordance with judicial interpretations of similar federal antitrust statutes. The court construed § 480-17 in accordance with the federal judicial interpretation of its counterpart, the Clayton Act § 14, 15 U.S.C. § 24 (1982). The court noted that § 14 was added to make clear that corporate directors, officers, and agents *as well as* corporations could be held criminally liable for antitrust violations. It was never intended to do away with the civil liability of such officers. 6 Haw. App. at ____, 712 P.2d at 1156. *See* United States v. Wise, 370 U.S. 405 (1962) (§ 14 intended to reaffirm penal provisions, not preclude civil liability of a corporate officer when he knowingly participates in restraint of trade).

[52] Specifically, the court adopted the reasoning of Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300 (S.D.N.Y. 1956). There, the defendants argued they were not civilly liable under a similar statute:

> The defendants suggest that by enacting [15 U.S.C. § 24], making directors criminally liable, while omitting to provide, in terms, for their civil liability in treble damage suits, Congress manifested an intention to make them only criminally but not civilly liable. This suggestion which is utterly without support in the Congressional debates is rejected. Moreover no such provision was needed in order to make directors liable for torts in which they have participated. . . .

Id. at 302. In *Cott*, the court held that individual directors, acting for the corporation within the scope of their employment, could be held personally liable in a treble damages action for conspiring to restrain interstate commerce in soft drinks. *See also* Tondas v. Amateur Hockey Ass'n of U.S., 438 F. Supp. 310 (W.D.N.Y. 1977).

D. Individual Liability as a Merchant

Kranz further argued that he could not be individually liable for treble damages under section 480-13 because he was not a "merchant."[53] The court disagreed, noting that the statutory definition of "merchant" includes a person who "deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . . ."[54] The person need not actually hold himself out as having some particular knowledge or skill, but by his occupation holds himself out as having that knowledge or skill.[55]

The ICA did not question whether Kranz's role in the deceptive transaction involved dealing in "goods," in contrast to an earlier decision[56] requiring a defendant to deal in goods to qualify as a merchant under section 480-13.[57] Rather, the court emphasized Kranz's role in overseeing UBM's business operations. As president and chief operating officer of UBM, Kranz held himself out as having knowledge of UBM's business practices. Thus, held the court, he was a merchant within the meaning of the statute.[58] This ruling emphasizes the

---

[53] 6 Haw. App. at ____, 712 P.2d at 1157. To recover treble damages under § 480-13, a plaintiff must prove four essential elements, including that the action is in the public interest or that the defendant is a merchant. *Id.* See *supra* note 22 listing the other elements of a cause of action.

[54] *Id.* at ____, 712 P.2d at 1157 (quoting HAW. REV. STAT. § 490: 2-104(1) (1976)). Section 480-13 (1) adopts the uniform commercial code definition of the term "merchant." See *supra* note 2 for the text of § 480-13(a)(1). "Merchant" is defined as:

> [A] person who deals in goods of the kind *or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction* or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

HAW. REV. STAT. § 490: 2-104(1) (1976) (emphasis added).

[55] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1157. The court relied on decisions interpreting an identical definition of merchant. *See* Nelson v. Union Equity Co-Op. Exch., 548 S.W.2d 352, 355-56 (Tex. 1977) (merchant status under the U.C.C. should focus on person's *occupation*, not his actual knowledge or skill); K & M Joint Venture v. Smith Intern, Inc., 669 F.2d 1106 (6th Cir. 1982) (specialized knowledge of goods not required for defendant sewer contractors to be considered merchants under the U.C.C.).

[56] Ailetcher v. Beneficial Fin. Co., 2 Haw. App. 301, 632 P.2d 1071 (1981).

[57] In *Ailetcher*, the court held a lender of domestic currency is not a merchant under chapter 480 because, in a loan transaction, money is not "goods;" it is the price paid for the loan. *Id.* at 306, 632 P.2d at 1076. In *Eastern Star*, the ICA simply noted that the statutory definition of "merchant" is broader than the dictionary meaning: " 'a person, whose business is buying and selling goods for profit.' " 6 Haw. App. at ____, 712 P.2d at 1157 (quoting WEBSTER'S NEW WORLD DICTIONARY (2d college ed. 1982)).

[58] *Eastern Star*, 6 Haw. App. at ____, 712 P.2d at 1157.

broad reach of the statutory definition and is clearly consistent with the underlying intent to prevent all forms of unfair and deceptive business practices.[59]

E. *Implications of* Eastern Star

The ICA's decision in *Eastern Star* is significant in several respects. First, in a suit involving common law fraud as well as unfair or deceptive acts, the plaintiff may seek punitive as well as treble damages. The measure of recovery is the greater of the two. Second, it is now clear that corporate officers can be individually liable in a civil suit for treble damages if they participate in the deceptive acts. Finally, in order to be considered a "merchant," such an officer need only hold himself out as having knowledge or skill of the business practices involved in the transaction.

IV. CONCLUSION

In *Eastern Star v. Union Building Materials Corp.*, the Hawaii Intermediate Court of Appeals continued to construe section 480-2 broadly, upholding the legislature's intent to create "a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen."[60] The court's ruling emphasizes the strength of Hawaii's consumer protection law, demonstrating that the statute remains a powerful vehicle for consumer protection.

Cindy Miller

---

[59] The court's interpretation of "merchant" in *Eastern Star* is consistent with the weight of authority that a defendant need not be a purveyor of goods in order to be considered a "merchant" within the meaning of the statute. The commentary to the HAW. REV. STAT. definition of "merchant" stresses the breadth of the term:

> For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . . ." . . .In this type of provision, banks or even universities, for example, well may well be [sic] "merchants."

HAW. REV. STAT. § 490: 2-104 comment 2 (1976). *Accord* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 345 (1980) ("Only rarely will one have occasion to wonder whether a potential defendant is a 'merchant.' "). See also cases discussed *supra* note 55.

[60] *Ai*, 61 Haw. at 616, 607 P.2d at 1311.

CONTRACT LAW—*Kinoshita v. Canadian Pacific Airlines, Ltd.*: Judicial Exception to the "Employment-at-Will" Doctrine

I. INTRODUCTION

In *Kinoshita v. Canadian Pacific Airlines, Ltd.*,[1] the Hawaii Supreme Court adopted an exception to the general "employment-at-will" rule.[2] Holding that representations regarding job security in Canadian Pacific Air's Employee Manual constituted part of the employment contract between employees and the company, the court recognized a limitation on an employer's common law right to discharge an employee at-will.

II. FACTS

In 1978, Defendant Canadian Pacific promulgated employee rules, with specific provisions covering suspension and discharge, to stem a union attempt to organize its workers.[3] The rules included protection against discipline or discharge without prior investigation and also provided for hearing and appeal procedures.[4]

---

[1] 68 Haw. ____, 724 P.2d 110 (1986).

[2] The employment-at-will rule was first adopted in Hawaii in Crawford v. Stewart, 25 Haw. 226, 237 (1919) which held:

> [A] hiring at a certain sum per month, no time being specified, unaccompanied by any facts or circumstances or any proof from which a different intention may be inferred and when the testimony as to the contract is . . . not conflicting, is an employment for an indefinite term and not for a month, and terminable at the will of either party.

See also infra note 18.

[3] 68 Haw. ____, 724 P.2d 113.

[4] The text of the rules is as follows:

> 27.04 No permanent employee will be disciplined or discharged until his case first has been investigated. The decision in such cases to be reached within ten (10) calendar days from the date of suspension.
>
> 27.05 No employee may be held out of service without pay pending investigation for more than seven (7) work days . . . .
>
> 27.06 If, as a result of any hearing or appeal therefrom, as provided herein, an employee is exonerated, who has been held out of service, he shall be reinstated without loss of seniority, and shall be paid for such time lost in an amount that he would have earned as regular salary had he continued to be in service during that period.

Plaintiffs Kinoshita and Nakashima[5] were employed as part-time passenger agents for Canadian Pacific. Nakashima testified that he actually saw a copy of the employee rules at the time they were issued. Kinoshita stated that he was merely aware that rules had been issued during a unionization attempt.[6]

In 1979, Canadian Pacific employees again unsuccessfully attempted to organize a union. At that time, Canadian Pacific issued another communication to the employees assuring continuation of the practices set forth in the written Employee Rules. The letter stated that the rules constituted an enforceable contract under state labor law and that rights as employees were guaranteed.[7] There was no evidence that either Kinoshita or Nakashima received a copy of this letter.[8]

On October 19, 1982, Kinoshita and Nakashima were arrested on charges of suspected involvement in a cocaine promotion conspiracy.[9] After learning of the plaintiffs' arrests, Canadian Pacific suspended them without pay. Following an investigation, Canadian Pacific discharged the plaintiffs and specifically denied them an opportunity to appeal as had been guaranteed in the written Employee Rules. This denial of appeal was justified by Canadian Pacific "because of the gravity of their misconduct" and because the decision to discharge them was made by Canadian Pacific's Vancouver headquarters.[10]

Alleging breach of contract, wrongful discharge, infliction of emotional distress, and violations of Title VII of the Civil Rights Act of 1964[11] and Hawaii Revised Statutes section 378-2,[12] the plaintiffs filed suit in the First Circuit

---

> 26.01 Employees who consider themselves unfairly treated shall have the right to file a grievance detailing the complaint and requesting a hearing . . . .
>
> 26.05 Should no decision be given within the time limit specified, or the decision be unsatisfactory, the employee may appeal progressively to the Depart- ment Head, applicable Vice-President and, in turn, to the President or his designated representative.

Kinoshita, 68 Haw. at ____, 724 P.2d at 114.

[5] Kinoshita's co-worker filed a separate suit, Nakashima v. Canadian Pacific Airlines, which was consolidated with Kinoshita's case. *Id.* at ____, 724 P.2d at 113.

[6] *Id.* at ____, 724 P.2d at 114.

[7] *Id.* at ____ n.2, 724 P.2d at 114 n.2.

[8] *Id.* at ____, 724 P.2d at 114.

[9] The plaintiffs were also part-time employees of World Airways and were arrested along with three other World employees suspected of being involved in the cocaine conspiracy. *Id.*

[10] In discharging the plaintiffs, Canadian Pacific Air relied on a memo issued on August 2, 1982 which stated:

> Any employee who commits any act of an illegal nature when off duty which harms or has the potential to harm the Company's reputation will be subject to disciplinary action which may include dismissal.

Id. at ____, 724 P.2d at 114-15.

[11] 42 U.S.C. §§ 2000(e)-2000(e)(17) (1976).

[12] HAW. REV. STAT. § 378-2(1) (1985) provides that "it is an unlawful discriminatory practice

Court, State of Hawaii, seeking reinstatement, damages, attorneys' fees and costs.[13] Canadian Pacific removed the case to federal district court.[14] The federal district court awarded Canadian Pacific a judgment,[15] holding that the Employee Rules were not binding because there was no mutual agreement and assent. The court concluded that Canadian Pacific as the employer had the right to make unilateral changes in the Employee Rules.[16]

The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit found the outcome dependent on a question of Hawaii state law on which there was no clear judicial precedent. As a result, certification was subsequently granted by the Hawaii Supreme Court on the issue of whether Canadian Pacific's Employee Rules constituted a valid and enforceable contract under Hawaii state law.[17]

III. ANALYSIS

The Hawaii Supreme Court found that the plaintiffs' positions were not protected by a collective bargaining agreement or any other agreement of definite duration. Their jobs were therefore considered of indefinite duration and tradi-

---

[f]or an employer to . . . discharge from employment any individual . . . because of . . . arrest and court record."

The language in the Hawaii Revised Statutes is similar to the language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 (1976). The district court noted:

> There is no Hawaii case law that sets out the parties' burdens of persuasion. Because both parties have argued that HAW. REV. STAT. § 378 should be construed similarly to T-VII, and because the language is similar to the language under T-VII, the court shall apply the T-VII framework to this case.

Kinoshita v. Canadian Pacific Air, No. 83-0012 (D. Haw. Nov. 6, 1984) (findings of fact and conclusions of law order).

[13] The plaintiffs also sued D.W. Merrell, Canadian Pacific Air's Hawaii manager, but the charges against him were dismissed by the district court. The plaintiffs did not appeal the dismissal. *Kinoshita*, 68 Haw. at ____, 724 P.2d at 113.

[14] The plaintiffs filed in state court and the defendants removed the causes to federal district court under 28 U.S.C. § 1441.

[15] The district court had dismissed the Title VII and emotional distress claims at the close of the plaintiff's evidence under FED. R. CIV. P. 41(b). All remaining claims were dismissed after close of all evidence. *Kinoshita*, 68 Haw. at ____, 724 P.2d at 113.

[16] *Id.* at ____, 724 P.2d at 116.

[17] *Id.* at ____, 724 P.2d at 113. HAW. R. APP. P. 13(a) provides for the certification of questions on Hawaii law to the Hawaii Supreme Court by federal courts:

> When a federal district or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

Kinoshita, 68 Haw. at ____, 724 P.2d at 113.

tionally held to be terminable at the will of either themselves or their employer.[18] This common law rule is based on the principle of mutuality of obligation. Because the employee may end his employment at anytime, the employer similarly has an absolute right to discharge an employee.[19] Under this rule, employees are subject to the whims of employers and can be discharged for no cause or even for reasons morally objectionable.[20] The court discussed judicial exceptions,[21] based upon contract and tort theories, to harsh applications of the "employment-at-will" rule and reviewed Hawaii decisions which have adopted several of these exceptions.[22]

The "public policy" exception to the employment-at-will rule was adopted by the Hawaii Supreme Court in *Parnar v. Americana Hotels.*[23] The employee in *Parnar*, alleged she was discharged in retaliation for her cooperation in a United States Department of Justice investigation against her employer. She claimed that the discharge was an attempt to induce her to leave the jurisdic-

---

[18] The employment-at-will rule, also known as the American rule, evolved in the mid-nineteenth century. Notions of "freedom of contract," which limited the employer's duties to employees, was evolving simultaneously. The employment-at-will rule was defined in H. WOODS, TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877):

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring, . . . no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even . . . .

See also Parnar v. Americana Hotels, Inc., 65 Haw. 370, 374-75, 65 P.2d 625, 628 (1982).

The American employment-at-will rule was adopted by the Hawaii Supreme Court in Crawford v. Stewart, 25 Haw. 226 (1919), in which the issue was whether a contract of carriage at the rate of $10 a month was terminable at will or terminable only at the end of the month. The court considered but rejected the English rule which held that the agreed rate of pay also establishes the duration of the contract. *Id.* at 237. *See supra* note 2.

[19] Note, Ravelo v. County of Hawaii: *Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163, 167 (1986) [hereinafter Note, *Promissory Estoppel*].

[20] *Parnar*, 65 Haw. at 375, 652 P.2d at 628.

[21] Legislative exceptions have also been created to counteract the harshness of the judicially created employment-at-will rule. *See, e.g.*, the National Labor Relations Act of 1935, 29 U.S.C. § 160(c) (1976); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1976); and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976). Note, *Promissory Estoppel, supra* note 19, at 168 and n.37.

[22] In Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983), the Hawaii Supreme Court did not expressly adopt detrimental reliance as an exception to the employment-at-will rule although its holding is virtually identical to the application of the exception. *See* Note, *Promissory Estoppel, supra* note 19, at 178. *But see* Stancil v. Mergenthaler Linotype Co., 589 F. Supp. 78 (D. Haw. 1984) where one year after *Ravelo*, the federal district court for Hawaii held that Hawaii had not adopted the detrimental reliance exception. *See* Note, *Promissory Estoppel, supra* note 19, at 186. In Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982), the Hawaii Supreme Court adopted a public policy exception.

[23] 65 Haw. 370, 652 P.2d 625 (1982).

tion so she would be unavailable to testify against her employer on charges of antitrust violations.[24] The court held that an employer may be liable in tort where the discharge of an employee violates a clear mandate of public policy.[25]

The court in *Parnar* also observed that other jurisdictions have judicially adopted several contractual exceptions to the employment-at-will doctrine.[26] For example, one contractual theory accepted in other jurisdictions is that an employer's absolute right to discharge an employee at-will "can be contractually modified and, thus, qualified by statements contained in employee policy manuals or handbooks issued by employers to their employees."[27]

One approach to the employee manual exception requires a valid offer, acceptance and consideration to establish the manual as part of the original contract or as a modification of the original contract.[28] In *Kinoshita*, the Hawaii Supreme Court noted that the conclusion reached by the federal district court was consistent with this approach.[29] The federal district court held that there

---

[24] *Id.* at 373, 652 P.2d at 627.

[25] *Parnar* noted that courts should be cautious in declaring public policy absent some prior legislative or judicial expression on the subject. In *Parnar* the public policy issue involved was Parnar's cooperation with the Antitrust Division of the United States Department of Justice in their investigation of possible violations of the Sherman Antitrust Act by her employer. The court also reminded that the burden is on the plaintiff to prove that the discharge violates some clear mandate of public policy. *Id.* at 380, 652 P.2d at 631.

[26] The court in *Parnar* considered and rejected an exception to the employment-at-will rule based on an implied duty to terminate only in good faith. Parnar's allegation that she was discharged in bad faith was rejected by the court because it "would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith." The court did not believe that "protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts." *Id.* at 377, 652 P.2d at 629.

Kinoshita and *Parnar* cited Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), as an example of a court adopting the "bad faith" or implied "good faith" exception when the plaintiff alleged she had been fired for refusing to date her foreman. Another case adopting the bad faith exception was Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), in which the plaintiff was discharged prior to payment of a commission he had earned. *Parnar*, 65 Haw. at 377, 652 P.2d at 629.

In *Parnar*, the Hawaii Supreme Court also noted that contractual relief had been granted to employees by courts through "implying a promise for employment of a fixed duration from the facts and circumstances surrounding the making of an agreement." 65 Haw. at 376, 652 P.2d at 629. But the court did not pass on the possible applicability of this or other theories of contractual recovery because they were not advanced by the parties in *Parnar*. *Kinoshita*, 68 Haw. at ____, 724 P.2d at 115.

[27] *Kinoshita*, 68 Haw. at ____, 724 P.2d at 116, (citing Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, ___, 685 P.2d 1081, 1087 (1984)). The employee in *Thompson* was discharged because he "stepped on someone's toes." The plaintiff in *Thompson*, like the plaintiff in *Kinoshita*, was protected by an employment policy manual.

[28] *Kinoshita*, 68 Haw. at ____, 724 P.2d at 116 (1986) (citing *Thompson*, 102 Wash. 2d at ____, 685 P.2d at 1087).

[29] *Id.*

was "no meeting of the minds and [the employer] retained the right to unilaterally change the rules."[30]

Although not specifically observed by the Hawaii Supreme Court, the central problem in *Kinoshita* was that the Employee Rules assuring specific grievance and appeal procedures were made subsequent to the plaintiffs' employment. The court noted that there was no evidence of individualized bargaining between Canadian Pacific and its employees over the terms in the Employee Rules.[31] Therefore, the provisions in Canadian Pacific's Employee Rules covering suspension and discharge appeared to be merely gratuitous promises, unsupported by any consideration on the part of the employees. The question was thus raised whether the assurances made in Canadian Pacific's Employee Rules could be considered enforceable as part of the employment contract, and if so, on what basis.

The supreme court rejected the notion that an Employee Manual can serve as an exception to the employment-at-will rule only if it is a bilaterally negotiated agreement. Instead, the court adopted the reasoning of the Michigan Supreme Court in *Toussaint v. Blue Cross & Shield.*[32] As in *Kinoshita*, the plaintiff in *Toussaint* was denied the discipline and termination procedures set out in an Employee Manual. The court in *Toussaint* held that an employer's statements of policy are binding even without evidence of mutual agreement. Furthermore, it made no difference that the employer could unilaterally change the policy without notice, that the policy was not signed, that it contained no reference to specific employees, or that an employee learned of its existence only after his hiring.[33]

The court in *Kinoshita* also discussed other opinions adopting the Employee Manual exception, including that of the Washington Supreme Court in *Thompson v. St. Regis Paper Co.*[34] The plaintiff in *Thompson* had no written agreement concerning his employment.[35] After seventeen years of apparently satisfactory service, he was asked to resign merely because he had "stepped on somebody's

---

[30] *Id.* Nothing prevents an employer from making a commitment to a definite term of employment or restricting his right to discharge an employee. The employment-at-will doctrine merely serves as an interpretive presumption in the absence of any express agreement as to duration. Leikvold v. Valley View Community Hosp., 141 Ariz. 544, at ____, 688 P.2d 170, 173 (1984). Permanent or lifetime contracts, however, are also considered to be hirings at will because of their inherently indefinite nature. Note, *Promissory Estoppel, supra* note 19, at 167 n.27.

[31] *Kinoshita*, 68 Haw. at ____, 685 P.2d at 117.

[32] 408 Mich. 579, 292 N.W.2d 880 (1980).

[33] *Id.* at 614-15, 292 N.W.2d at 892.

[34] Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081. The exception was also adopted in Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984).

[35] *Thompson*, 102 Wash. 2d at ____, 685 P.2d at 1083.

toes."[36] As in *Kinoshita* and *Toussaint*, the plaintiff in *Thompson* was protected by a Policy and Procedural Guide and by internal memoranda which stated that terminations would be processed in a fair, reasonable and just manner.[37]

The Michigan Supreme Court in *Toussaint* and the Washington Supreme Court in *Thompson* based their decisions on a similar rationale. In *Thompson*, the Washington Supreme Court noted that employers exercise a great deal of control over the work relationship through their power to unilaterally enact policy. Once enacted, the court concluded, these policies are binding on the employees who must accept these policies, quit or risk being discharged.[38]

The *Toussaint* court assumed that an employer voluntarily chooses to establish such policies and procedures in the interest of "[securing] an orderly, cooperative and loyal work force."[39] The employer has then created an environment in which the employee believes that whatever policies and procedures are promulgated they will be fair, consistent and uniformly applied.[40] The *Thompson* court similarly recognized that the main reason policy manuals are issued is to "create an atmosphere of fair treatment and job security."[41] The Washington Supreme Court therefore held that once an employer promulgates specific policies he may not treat them as illusory because he expects the employees to likewise abide by them.[42]

In *Kinoshita*, Canadian Pacific's purpose for promulgating its Employee Rules was to defeat a unionization of its employees. The airline further guaranteed the validity of its rules the following year during another attempt at unionization. The Hawaii Supreme Court suggested that the atmosphere created was one in which the employer's specific promises could be relied upon by the employees as providing the same job security and fair treatment that might alternatively

---

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Toussaint*, 408 Mich. at 614-15, 292 N.W.2d at 892.

[40] *Id.* 613, 292 N.W.2d at 892 (quoting Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917)). In *Wood*, the plaintiff had a contract for the exclusive right to market the defendant's indorsements and designs. The defendant breached that agreement claiming that the plaintiff had not bound himself to use reasonable efforts to market her designs and indorsements. The court held that such a promise was implied and noted that "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." 222 N.Y. at ____, 118 N.E. at 214.

Thus, the court in *Toussaint* is reasoning that in an employment situation, an employee may assume that any subsequent rules issued by the employer will be applied fairly and consistently.

[41] *Thompson*, 102 Wash. 2d at ____, 685 at 1087.

[42] *Id.* at ___, 685 P.2d at 1088.

be provided by a union.[43] Thus, the rules were enacted by Canadian Pacific in its own best interest and the airline was neither free to treat its promises as illusory nor to be selective in their application.

In holding that Canadian Pacific's Employee Rules constitute an enforceable contract, the supreme court indicated that the employees had relied on the rules. This reliance was evidenced not only by their continued performance of work, but also by the two unsuccessful attempts to unionize the airline's workers.[44] However, there were problems in basing the holding in *Kinoshita* on reliance theory or on promissory estoppel.[45] Actual reliance by the two discharged employees might be difficult to prove in this case because Canadian Pacific issued its Employee Rules sometime after Kinoshita and Nakashima were hired.[46] Regardless of the plaintiffs' knowledge, or lack of knowledge, as to the specific assurances in the Employee Rules, it would be unfair to allow relief to some employees and refuse relief to others based on whether or not they could each prove actual knowledge and reliance.[47]

Although the supreme court was not specific in addressing these limitations of reliance theory, it held that the plaintiffs' right to the promised protections did not depend on whether or not they received all communication addressed to the employees.[48] The court recognized that the typical employment contract is more often a standardized agreement "between the employer *organization* and

---

[43] *Kinoshita*, 68 Haw. at ____, 724 P.2d at 117

[44] *Id.*

[45] Section 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1979), entitled "Promise Reasonably Inducing Action or Forbearance," sets out the principles of promissory estoppel:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

[46] Nakashima testified that he had seen a copy of the Employee Rules when they were circulated and Kinoshita stated that he was aware rules had been issued during the unionization drive. *Kinoshita*, 68 Haw. at ____, 724 P.2d at 114. *See supra* note 6.

[47] In Dangott v. ASG Indus., Inc., 558 P.2d at 383 (Okla. 1976), the employer contended that an employee who brought suit for severance pay did not know about the existence of the severance pay policy until shortly before his termination, and therefore, did not rely upon it. The court could have applied the RESTATEMENT (SECOND) OF CONTRACTS § 51 (1979) which provides that "an offeree who begins performance without knowledge of an offer can accept by completing performance with knowledge." The court, however, did not use reliance theory as the basis for its decision.

Dangott was unusual because the court specifically addressed the knowledge or reliance issue and held that the plaintiff did not need to prove actual reliance or knowledge. To illustrate the rationale of *Dangott*, suppose that Employee *A* and Employee *B* are both hired and fired by the employer on the same dates. Employee *A* knew of the employee severance pay policy before he started work but Employee *B* did not learn of it until after his discharge. If employer refuses to honor the policy and both *A* and *B* sue, it would be unfair to allow *A* the pay and not *B*. Pettit, *Modern Unilateral Contract*, 63 B.U. L. REV. 551, 580-583 (1983).

[48] *Kinoshita*, 68 Haw. at ____, 724 P.2d at 117.

the *class* of employees,"[49] and characterized Canadian Pacific's written Employee Rules as such an agreement. The court concluded that Canadian Pacific intended the employees as a group to rely upon its written rules, and therefore, should not be allowed to defend on the grounds that an individual employee, unaware of the written policies, was not a recipient of any promise.[50]

IV. CONCLUSION

In *Kinoshita v. Canadian Pacific Air*, the Hawaii Supreme Court, ruled that an employer's written statements of policies in an Employee Manual may limit an employer's absolute right to discharge-at-will. When an employer unilaterally promulgates rules and policies, he presumedly does so in the interest of creating a cooperative and loyal work force. The employee is expected to abide by the rules and policies at the risk of being discharged if he does not. As a result, the employer has created an atmosphere in which the employee is justified in assuming that rules and policies will be applied fairly, consistently and uniformly. The employer may not treat such specific policies as illusory nor defend on the ground that there was no bilaterally negotiated agreement.

Joan E. Engelbart

---

[49] *Id.* at ____, 724 P.2d at 117 (citing Pettit, *supra* note 47, at 583 (emphasis original)). The RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1979) defines a standardized agreement as one that "is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing."

[50] *Kinoshita*, 68 Haw. at ____, 724 P.2d at 117.

ATTORNEY'S FEES—*Hoddick, Reinwald, O'Connor & Marrack v. Lotsof*: Rejection of the Doctrine of "Division of Highest Ethical Contingency Percentage"

I. INTRODUCTION

Hoddick, Reinwald, O'Connor & Marrack v. Lotsof[1] involved a dispute between attorneys over the division of a settlement achieved in a case on which the attorneys had worked under contingency fee contracts. The Hawaii Intermediate Court of Appeals (ICA) rejected the doctrine of "division of the highest ethical contingency percentage to which the client contractually agreed"[2] as inconsistent with the quantum meruit[3] rule adopted by the Hawaii Supreme Court. The court held that when an attorney employed under a contingency fee contract was discharged by the client, the contingency fee contract ended. The discharged attorney was then entitled to reimbursement for the reasonable value of his services.

II. FACTS

In *Manley v. Akamai Corp.*,[4] Plaintiff Jacob Manley was represented by a succession of law firms. Hyman Greenstein was the fourth lawyer hired by Manley, and Charles Lotsof was a salaried attorney employed by Greenstein. Manley had agreed to pay Greenstein all out-of-pocket costs plus a contingent fee of one-third of any recovery.[5] Greenstein assigned Charles Lotsof to work on the *Manley* case.[6] On May 5, 1975, Greenstein relieved Lotsof of any further duty or responsibility in connection with the *Manley* case.[7]

---

[1] 6 Haw. App. ____, 719 P.2d 1107 (1986).

[2] Under the doctrine of "division of the highest ethical contingency percentage to which the client contractually agreed," the client is responsible for only one contingency fee. That fee is to be divided between all attorneys who worked on the one case under contingency fee contracts. *See infra* text accompanying notes 22-23.

[3] Under quantum meruit, an attorney is entitled to a reasonable attorney's fee. *See infra* text accompanying notes 31-32.

[4] Manley v. Akamai Corp., Civ. No. 3214 (Haw. 3d Cir. Jan. 11, 1974).

[5] *Hoddick*, 6 Haw. App. at ____, 719 P.2d at 1109.

[6] *Id.*

[7] *Id.*

On May 15, 1975, Manley informed Greenstein of his intent to retain attorney Dennis O'Connor of Hoddick, Reinwald, O'Connor & Marrack (HROM) as his exclusive representative.[8] Manley agreed to reimburse Greenstein for all actual out-of-pocket expenses and costs advanced by the firm. In the event his suit was successful, Manley agreed to reimburse Greenstein for an amount representing the work expended by his associate, Lotsof. He also agreed to assign to Greenstein ten percent of the net amount received by him as a result of his lawsuit.[9]

When Manley hired O'Connor, they agreed upon a contingent attorney fee of fifty percent of any recovery.[10] Manley informed O'Connor that he would take responsibility for paying his previous lawyers.[11]

On August 27, 1975, the *Manley* suit was settled for $26,000 cash and a $75,000 secured five-year installment promissory note.[12] Manley and HROM then put their fee agreement in writing. All outstanding attorneys fees and costs were to be paid from the $26,000 and the balance to be paid to Manley.[13] The $75,000 note was to be held by HROM and all proceeds, both principal and interest, were to be distributed two-thirds to the law firm and one-third to Manley.[14]

On September 9, 1975, Greenstein wrote to HROM requesting information on the amount, nature and form of the settlement in the *Manley* case. Greenstein notified HROM that he was claiming an attorney's lien in the amount of $1,651.16 as balance due on costs advanced, plus $3,000.00 for two months work by Lotsof, plus ten percent of the amount to be received by Manley under

---

[8] *Id.*

[9] *Id.* at ____, 719 P.2d at 1109-1110. The letter, in part, was as follows:

> I hereby agree to reimburse you for all actual out-of-pocket expenses and costs that your firm has advanced (excepting, of course, fees for attorneys, secretarial or overhead expenses). In the event I am successful in the above captioned matter, I agree to pay you the following:
>
> a. Such sum as fairly represents the work your associate Mr. Charles Lotsof has expended in the matter up to date;
>
> b. I agree to pay to you or assign to you 10% of the net amount received by me either by way of funds or property derived as a result of the within lawsuit. (The term net shall be construed to be net amount received by me after deduction of all attorneys' fees.)

[10] Manley stated that he felt his need for O'Connor was greater than O'Connor's need for him. He therefore let O'Connor know that he was prepared to make an exceptional offer. *Id.* at ____ n.2, 719 P.2d at 1110 n.2.

[11] *Id.*

[12] *Id.* at ____, 719 P.2d at 1110.

[13] *Id.* Approximately $3,200 was owed to previous attorneys Greenstein, Levin, and Christensen. Costs expended by O'Connor and HROM were approximately $800. The balance from the $26,000, approximately $22,000, was paid to Manley.

[14] *Id.*

the settlement.[15]

HROM sent Greenstein a check for $1,651.16 for the balance due on costs advanced. HROM also informed Greenstein that Manley had agreed to take care of the fees and costs incurred by previous counsel.[16]

Greenstein then assigned to Lotsof his entire claim for attorneys' fees in the *Manley* case.[17] Thereafter, HROM filed a complaint for a declaratory judgment to relieve them of any further financial obligation to Lotsof.[18] Lotsof counterclaimed for all or a portion of HROM's share of the recovery in the *Manley* case plus punitive and treble damages.[19]

As Greenstein's assignee, Lotsof claimed the fees due Greenstein under the lien for fees. He also claimed fees of $65 per hour for 27.4 additional hours of work on the *Manley* case.[20] Lotsof 's claims were denied by the trial court. The ICA subsequently affirmed the lower court's decision.[21]

---

[15] *Id.*

[16] *Id.*

[17] Greenstein assigned his claim to Lotsof by letter dated February 6, 1980. The letter was as follows:

> This is to affirm our agreement that I have assigned to you my entire claim for attorneys' fees in the aforereferenced matter on the condition that if you are successful in realizing any monies, you shall remit to my office the first $3,000.00, representing two months of your salary while in my employ.

Id. at ____, 719 P.2d at 1111.

[18] *Id.*

[19] Manley was not made a party in the suit. *Id.*

[20] *Id.* The additional hours were for work Lotsof claimed to have put in on the case during the time he was on vacation and after he and Greenstein were no longer counsel in the case.

[21] The Intermediate Court of Appeals found no error in the denial of Lotsof's claim for payment of services during his vacation and thereafter because there was no evidence that Manley had agreed to pay for them. *Id.* at ____ n.4, 719 P.2d at 1114 n.4.

As to the enforcement of the attorney's lien, the ICA recognized that an attorney discharged under a contingent fee contract has a right to assert a charging lien for reimbursement of costs and reasonable attorney's fees against the client's recovery. Carroll v. Miyashiro, 50 Haw. 413, 441 P.2d 638 (1968). Before substitution of one attorney for another, the client should reimburse the outgoing attorney for any costs advanced. This was apparently not done when Greenstein was replaced by HROM. *Hoddick*, 6 Haw. App. at ____ n.3, 719 P.2d at 1113-14 n.3.

HROM did remit a check to Greenstein for the portion of the lien for costs. Lotsof failed to prove any specific amount due as Greenstein's assignee. The court indicated that Lotsof's alternative source of payment was from Manley: Lotsof believed that Manley had paid his one ethically permissible contingency fee, but that it had all been paid to HROM. Lotsof wanted the portion he felt he deserved. The court noted that if Manley overpaid HROM, that only meant that HROM owed Manley and not Lotsof. If Manley did not owe Lotsof, then Lotsof had no basis for a lien against the amount which HROM owed to Manley. *Hoddick*, 6 Haw. App. at ____ n.4, 719 P.2d at 1114 n.4.

III. ANALYSIS

The primary issue in *Hoddick* was whether the doctrine of "division of the highest contingency fee to which the client agreed" is applicable in Hawaii. Under this doctrine, the client is responsible for a single contingency fee. Where the client has contracted with more than one attorney on a contingency fee basis, the amount of the client's total fee is limited to "the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts he executed."[22] The one contingency fee is divided among the attorneys who worked on the case. The amount each received would be determined by their individual contributions and on factors set forth in the Code of Professional Responsibility.[23]

The highest ethical contingency percentage doctrine is viewed as an equitable solution assuring that a client will never be required to pay more than one reasonable contingency fee.[24] It further allows a client to change attorneys, with or without cause, without fear of undue financial consequence.[25] By recognizing the contingency fee contract rather than basing the discharged attorney's fees on quantum meruit[26] the attorney is protected from a client who might benefit financially by discharging him prematurely.[27] Moreover, the doctrine allegedly assures ethical conduct by failing to reward attorneys who solicit other attorneys' clients.[28]

---

[22] This doctrine and the policy reasons supporting it are explained in Saucier v. Hayes Dairy Prod., Inc., 353 So. 2d 732 (La. App. 1977), *rev'd*, 373 So. 2d 102 (La. 1978). As an example, suppose a client contracted with attorney X to handle a particular claim and agreed to a contingncy fee contract of 30%. The client then dismisses X and hires attorney Y agreeing to pay him a contingency fee of 50%. The client then dismisses Y and hires attorney Z on a contingency fee basis of 35%. The one contingency fee which the client would be responsible for would be the 50% contingency fee basis if it were determined to be ethical.

[23] *Saucier*, 373 So. 2d at 118. Under this doctrine, if a subsequent attorney has collected a contingent fee, the client should be able to recover that fee as a payment for a thing not due. The subsequent attorney and any preceding attorneys, then have the opportunity to establish their rights to receive appropriate portions of the one contingent fee owed by the client. *Id.* at 119. For the relevant text of the Code of Professional Responsibility, see *infra* note 30.

[24] *Id.* at 119.

[25] *Id.*

[26] *See infra* text accompanying note 32.

[27] *Saucier*, 373 So. 2d at 118. The client might at the last minute, when settlement or judgment seems imminent, try to replace the original attorney with another or to proceed on his own in an attempt to avoid responsibility to pay a contingency fee. *Id.* at 118 n.8.

[28] The *Saucier* court noted:

> Knowing that a contingent fee may have to be shared provides an incentive for successor attorneys to encourage a client who has no just cause for complaint to maintain relations with his first attorney. And it encourages the lawyer first retained to seek resolution of the client's misgivings, thereby avoiding needless controversy and engendering public respect.

For example, under this doctrine Lotsof could assert a right to a portion of the single contingency fee owed by the client.[29] The highest contingency percentage to which Manley contractually agreed was the fifty percent contingency fee contract with HROM. Thus, Lotsof would claim a portion of that contingency fee based on factors such as those set forth in the Code of Professional Responsibility.[30]

In *Hoddick*, however, the ICA rejected the highest ethical contingency percentage doctrine. First, the court found it incompatible with the quantum meruit rule in *Booker v. Midpac Lumber Co.*[31] In *Booker*, the Hawaii Supreme Court held:

> We believe that this resolution will discourage professional disputes and encourage out-of-court settlements since each attorney will be encouraged to emphasize the positive contribution he made to the end result and subsequent counsel will be less inclined to contend there was cause to discharge all previous counsel.

373 So. 2d at 118-19.

[29] *Id.* at 119.

[30] HAWAII CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 provides as follows:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.
>
> (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

[31] 65 Haw. 166, 649 P.2d 376 (1982). In *Booker*, attorney Ingman was hired by a client on a one-third contingency fee basis. The client subsequently sought to discharge Ingman. Ingman unsuccessfully resisted the dismissal and filed a Notice of Lien for Attorney's Fees. He argued that he had a continued right to the contracted for one-third interest in the ultimate recovery from the suit less the percentage of time that subsequent counsel put into the case.

The court noted that the client generally has a right to discharge his attorney without cause and that the presence of a contingent fee contract does not change that right. It does, however, leave the problem of how to compensate the discharged attorney who had been hired under a contingency agreement. *Id.* at 168, 649 P.2d at 378.

> The discharge of an attorney employed under a contingent fee contract prior to the occurrence of the contingency puts an end to the contract. However, he is entitled to a reasonable attorney's fee to be determined, upon consideration of all relevant factors, before or after the final disposition of the client's case.[32]

Second, the doctrine did not provide for situations where the client knowingly and voluntarily made separate fee arrangements with each attorney.[33] In *Hoddick*, the original contingency contract between Manley and Greenstein for one-third of the recovery ended when Manley dismissed Greenstein and retained HROM. Under the quantum meruit rule, Greenstein would be entitled to an award based on reasonable fees. However, Manley voluntarily made a new contract with Greenstein in which he agreed to pay Greenstein ten percent of whatever he had left from his recovery after paying the fifty percent contingency fee he agreed to pay to HROM.

Third, a contingency fee of one hundred percent or greater may be ethically permissible where the value of the recovery is less than the value of the ethically permissible fee.[34] Likewise, under the factors listed in the Code of Professional Responsibility,[35] a fee based on hourly rates or quantum meruit might exceed the client's recovery.[36]

The court indicated that other factors relevant to a particular case might also be considered in determining the reasonable attorney's fee. The court specifically referred to Manley's statement that he "needed O'Connor more than O'Connor needed [him]" and also considered the "law of supply and demand."[37] In *Booker*, the Hawaii Supreme Court recognized that the contingency fee contract and the estimated value of the case might be relevant in determining the reasonable fee for an attorney prematurely discharged.[38]

The court held that as Greenstein's assignee, Lotsof was entitled to recover the reasonable value of his and Greenstein's services under the quantum meruit rule.[39] The later agreement, in which Manly agreed to pay Greenstein 10% of

---

[32] *Id.* at 166, 649 P.2d at 376. This is a statement of the quantum meruit rule.

[33] *Hoddick*, 6 Haw. App. at ____, 719 P.2d at 1112.

[34] *Id.*

[35] *See supra* note 30.

[36] *Hoddick*, 6 Haw. App. at ____, 719 P.2d at 1112.

[37] *Id. See supra* note 10.

[38] 65 Haw. at 171, 649 P.2d at 379-80. *See supra* note 31.

[39] *Id.* at ____, 719 P.2d at 1113. The guidelines under which the court may determine the reasonable value are described in Sharp v. Hui Wahine, Inc., 49 Haw. 241, 413 P.2d 242 (1976), a case which involved the reasonableness of an attorney fee allowed by a trial judge in a mortgage foreclosure action. The Hawaii Supreme Court noted that the message in *Sharp* was that "a reasonable attorney's fee is one that is fair to both attorney and client under the particular circumstances involved. And a contingent fee agreement, without more, is not good reason for boosting an attorney's compensation or denying him a fee that adequately compensates him for

Manley's net recovery, was enforceable only to the extent that the actual dollar amount it represented did not exceed the reasonable value of Greenstein's and Lotsof 's services. In the court's view, however, the percentage fee agreed upon after the discharge was presumptively reasonable.[40]

IV. CONCLUSION

In *Hoddick*, the Intermediate Court of Appeals held that when an attorney employed on a contingent fee contract is discharged without fault on his part before the happening of the contingency, the contingent fee contract is ended. The attorney is then entitled to an award of the reasonable value of his services as agreed upon or as determined by the court in the exercise of its discretion. The court rejected the doctrine of "division of the highest ethical contingency percentage to which the client contractually agreed" as inconsistent with the quantum meruit rule.

As a result, a client's ultimate fee will not be limited to one ethically permissible contingency fee. It is possible in some cases for a contingency fee of 100% or more to be ethically permissible. Under the Hawaii Code of Professional Responsibility, a fee based on hourly rates or quantum meruit may also exceed the amount of the client's recovery.

Joan E. Engelbart

---

actual services performed." 65 Haw. at 173, 649 P.2d at 382.

[40] *Hoddick*, 6 Haw. App. at ____, 719 P.2d at 1113.

INSURANCE—*Doi v. Hawaiian Insurance & Guaranty Co., Ltd.*: *Yamamoto* Revisited

I. INTRODUCTION

In *Doi v. Hawaiian Insurance & Guaranty Co., Ltd.*,[1] the Hawaii Intermediate Court of Appeals (ICA) held that an injured party and her loss of consortion[2] claiming spouse could not recover uninsured motorist benefits from their insurer where the tortfeasor's liability insurance policy met the minimum requirements of Hawaii's no-fault law. In reaching its holding, the ICA declared that loss of consortium is a derivative claim dependant upon an injury to one's spouse.[3] As a result, the ICA overruled the 1983 case of *Yamamoto v. Premier Insurance Co.*[4] This recent development will examine *Doi* and the law regarding coverage of loss of consortium damages arising from automobile collisions in Hawaii.

II. FACTS

On July 10, 1980, Florence H. Doi was seriously injured when the automobile she was driving was involved in a collision with an automobile driven by Aquamarine Pahio.[5] Pahio's automobile insurance policy provided for maximum liability coverage of $25,000, thus meeting the requirements for no-fault insurance at that time. Mrs. Doi sued Pahio for injuries she suffered in the collision. Mr. Donald Doi claimed damages for loss of consortium.[6] The Dois

---

[1] 6 Haw. App. ____, 727 P.2d 884 (1986).

[2] Damages for loss of consortium are commonly sought when a spouse has been seriously injured through the negligence of another. "Loss of consortium means loss of society, affection, assistance, and conjugal fellowship, and includes loss or impairment of sexual relations." Deems v. Western Maryland Ry., 247 Md 95, 231 A.2d 514 (1966).

[3] 6 Haw. App. at ____, 727 P.2d at 884.

[4] 4 Haw. App. 429, 668 P.2d 42 (1983). For a general discussion of *Yamamoto*, see Recent Development, *Motor Vehicle Liability Insurance: Uncertainty in the Hawaii Uninsured Motorist Insurance Law*—Yamamoto v. Premier Insurance Company, 6 U. HAW. L. REV. 733 (1984).

[5] 6 Haw. App. at ____, 727 P.2d at 885.

[6] At the time of the plaintiff's injury and lawsuit, HAW. REV. STAT. § 294-10(a)(1) (1976) provided:

(a) In order to be a no-fault policy, an insurance policy covering a motor vehicle shall

expected that Mrs. Doi's damages would exceed Pahio's $25,000 policy and leave Mr. Doi's claim uncompensated. The Dois, therefore, demanded that their insurer, Hawaiian Insurance & Guaranty Company, Ltd. (HIG), indemnify them for their damages exceeding $25,000 under the uninsured motorist provision of their policy.[7] The Dois claimed that their policy provided coverage for up to $25,000 for each of their four automobiles. Further, they asserted that the ICA's decision in *Yamamoto*[8] was controlling. In *Yamamoto*, the ICA held that where the injured parties' claims against the tortfeasor exceed the minimum coverage required to be maintained by the tortfeasor, the injured parties are entitled to recover against their insurer under their uninsured motorist coverage.[9] Relying upon *Yamamoto*, the Dois claimed that they were entitled to recover up to $100,000 less Pahio's liability coverage.[10]

The trial court awarded Mrs. Doi damages of $111,813.86 and Mr. Doi damages of $15,000. Consequently, the Dois' renewed their demand on HIG for uninsured motorist coverage.[11] HIG rejected their demand. The Dois subse-

---

> provide, in addition to the coverage specified in § 294-4, insurance to pay on behalf of the owner or any operator of the insured motor vehicle, . . . sums which the owner or operator may legally be obligated to pay for injury, death, . . . which arise out of the ownership, operation, maintenance, or use of the motor vehicle:
>
> (1) Liability coverage of not less than $25,000 for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm arising out of ownership, maintenance, use, loading, or unloading, of the insured vehicle . . . .

The minimum no-fault coverage requirement for accidental harm was raised from $25,000 to $35,000 in 1985. Act 181, § 3, 1985 HAW. SESS. LAWS 309, 310.

Also at the time of plaintiff's injury, the statute relating to uninsured motorist coverage, HAW. REV. STAT. § 431-448 (1976), provided:

> No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this State, with respect to any motor vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 287-7, under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom, provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage in writing.

Act 181, § 4, 1985 HAW. SESS. LAWS 309, 311, added subsections (b) and (c) to the statute, relating to "underinsured motorists." *See* HAW. REV. STAT. § 431-448 (1985).

[7] 6 Haw. App. at ____, 727 P.2d at 886.

[8] *Id.*

[9] 4 Haw. App. 429, 668 P.2d 4 (1983).

[10] 6 Haw. App. at ____, 727 P.2d at 886.

[11] *Id.* at ____, 727 P.2d at 887.

quently filed for a declaratory judgment to determine insurance coverage.[12]

The trial court held that pursuant to *Yamamoto*, the Dois were entitled to uninsured motorist coverage. On appeal, the ICA overruled *Yamamoto* and reversed the decision of the lower court.[13]

III. BACKGROUND

In *Palisbo v. Hawaiian Insurance & Guaranty Co., Ltd.*[14] the Hawaii Supreme Court addressed the issue of whether a tortfeasor is "uninsured" for purposes of the no-fault law when his coverage, which meets the minimally required statutory amount, is inadequate to fully compensate an injured party's damages. The court held that the tortfeasor is considered uninsured for the purposes of uninsured motorist coverage under the injured parties' automobile insurance policies, up to the extent of the insufficiency.[15] In *Allstate Insurance Co. v. Morgan*,[16] the supreme court held that where the injured party has automobiles insured under a single liability insurance policy providing uninsured motorist coverage, separate uninsured motorist coverage is created for each vehicle and the insured may recover up to the maximum amount of the coverage for each vehicle.[17] Thus, an insured party may "stack" his coverage.

Finally, in *Yamamoto v. Premier Insurance Co.*,[18] the ICA, relying on *Palisbo*

---

[12] Plaintiffs filed an action for a declaratory judgment to establish the rights, duties and liabilities of the parties under the insurance contract, and for compensatory and punitive damages. Both HIG and the Dois filed motions for summary judgment on the issue of the limits of insurance coverage. The Dois claimed that under *Yamamoto*, they were entitled to recover their damages from their uninsured motorist coverage less the $25,000 recovered from Pahio; HIG denied coverage on the grounds that Pahio was not "uninsured" and that *Yamamoto* was contrary to Hawaii statutes regarding automobile insurance coverage for bodily injury and uninsured motorists. *Id.* at ____, 727 P.2d at 887.

[13] *Id.* at ____, 727 P.2d at 892.

[14] 57 Haw. 10, 547 P.2d 1350 (1976). In *Palisbo*, the plaintiff and three other passengers were injured in an automobile accident. The plaintiff received damages of $30,000. Because the other passengers were also awarded damages, the trial court prorated the tortfeasor's policy limit among the four, resulting in an award to the plaintiff that was less than the minimum policy limit required by the financial responsibility law. The Hawaii Supreme Court held that because the tortfeasor was uninsured for the purposes of the uninsured motorist statute, his policy could not provide minimum coverage to the plaintiff, and the plaintiff could therefore recover from his own uninsured motorists benefits the difference between the minimum policy limit required by law and his pro rata share.

[15] *Id.* at 17, 547 P.2d 1355.

[16] 59 Haw. 44, 575 P.2d 477 (1978). In *Morgan* the driver was using a friend's car when she was struck by an uninsured automobile. The driver was allowed to stack the $10,000 uninsured motorist coverage for each of the three cars owned and insured by her father.

[17] *Id.*

[18] 4 Haw. App. 429, 668 P.2d 42 (1983).

and *Morgan*, held that if the injured parties' combined entitlement exceeded the minimum coverage required to be held by the tortfeasor under the financial responsibility law, then the tortfeasor was uninsured as to both plaintiffs. At that point, the injured parties could recover against their insurer under their uninsured motorist coverage. The court in *Yamamoto* noted that a strict application of the term "uninsured motor vehicle" would be inconsistent with the legislative intent of encouraging voluntary insurance.[19]

In *Yamamoto*, Mrs. Yamamoto claimed loss of consortium damages when her husband was injured in an automobile accident.[20] The Yamamotos claimed that their insurance company wrongfully denied them uninsured motorist coverage. The ICA held that Mrs. Yamamoto's claim, even though derived from her husband's injuries, "is a claim for damages independent and separate from the spouse's claim for damages."[21] Thus, the court concluded that Mrs. Yamamoto's derivative claim did not have to meet the threshold requirements.

In *Doi*, the Dois' insurance contract required payment from HIG of the damages caused by the owner or operator of an "uninsured highway vehicle."[22] The plaintiffs' insurance policy specifically defined "uninsured highway vehicle as excluding "an insured highway vehicle."[23] HIG claimed Pahio was not an "uninsured motorist"[24] because Pahio's insurance policy met the minimum amount proscribed by law. HIG further asserted that *Yamamoto* was incorrectly decided.

IV. ANALYSIS

In *Doi*, unlike *Yamamoto*, the ICA analyzed Hawaii's no-fault automobile insurance statutes in light of the common-law right to sue for loss of consortium. The court noted that although there is a trend in tort law to consider loss of consortium as an injury to the deprived spouse that gives rise to a separate and independent action for damages, "nevertheless, it remains a derivative claim dependent for its viability upon the personal injury to one's spouse."[25]

The ICA noted that Hawaii Revised Statutes section 294-6,[26] did not specif-

---

[19] *Id.* at 434, 668 P.2d at 46.

[20] *Id.* 430, 668 P.2d at 43.

[21] *Id.* at 435, 668 P.2d at 48.

[22] *Doi*, 6 Haw. App. at ____, 727 P.2d at 887.

[23] *Id.*

[24] *Id.*

[25] *Id.* at ____, 727 P.2d at 891 (citations omitted).

[26] HAW. REV. STAT. § 294-6 (1976) abolished tort liability for the owner or user of a vehicle involved in an accident unless death or serious injury occurs. The statute was enacted to reform the time-consuming system of establishing fault arising from motor vehicle accidents. At the time of injury, the statute provided:

ically abolish a loss of consortium claim. The court observed, however, the plain language of the section would seem to abolish derivative claims where the party suffering "accidental harm" does not meet the threshold requirements, "since they can only arise from the accidental harm suffered by the injured person."[27]

The ICA, in interpreting chapter 294, determined that there was no intent by the legislature to abolish derivative claims arising from bodily injuries suffered by one's spouse in an automobile accident.[28] Therefore, the ICA concluded, derivative claims resulting from injuries arising from automobile accidents were not abolished by Hawaii Revised Statutes section 294-6, but such claims must meet that section's threshold requirements.[29] The court noted that "derivative claims are not independent to the extent that they may be asserted

---

(a) Tort liability of the owner, operator, or user of an insured motor vehicle, or the operator or user of an uninsured motor vehicle who operates or uses such vehicle without reason to believe it to be an uninsured motor vehicle, with respect to accidental harm arising from motor vehicle accidents occurring in the State, is abolished, except as to the following persons or their personal representatives, or legal guardians, and in the following circumstances:

(1) Death occurs to such person in such a motor vehicle accident; or injury occurs to such person which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body; or injury occurs to such person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering;

(2) Injury occurs to such person in a motor vehicle accident in which the amount paid or accrued exceeds the medical-rehabilitative limit established in section 294-10(b) for expenses provided in section 294-2(10) (A) and (B);

(3) Injury occurs to such person in such an accident and as a result of such injury the aggregate limit of no-fault benefits outlined in section 294-2(10) payable to such person are exhausted.

HAW. REV. STAT. § 294-6(2) (1976).

The legislature recognized that the purpose of the statute was

to provide motor vehicle accident assured, adequate and prompt reparation for certain economic losses without regard to fault. The clear objectives of the law are to:

(1) institute insurance reform in order to (a) expedite the settling of all claims, (b) create a system of reparations for injuries and loss arising from motor vehicle accidents, (c) compensate these damages without regard to fault, and (d) modify tort liability for these accidents; and

(2) to reduce the cost of a motor vehicle insurance by establishing a uniform system of motor vehicle insurance.

H.R.J. STAND. COMM. REP. NO. 187, 7th Haw. Leg., Reg. Sess., 1973 HOUSE J. 836.

[27] 6 Haw. App. at ____, 727 P.2d at 889. Since the effect of the no-fault law on derivative claims was unclear, the court looked to rules governing statutory construction. The ICA noted the Hawaii Supreme Court had held that where statutes are in derogation of the common law, such statutes are to be strictly construed and, where there is no legislative intent to supersede the common law, the common law applies. *Id.*

[28] *Id.* at ____, 727 P.2d at 891.

[29] *Id. See supra* note 21.

without regard to the nature or extent of the injuries to the person suffering accidental harm. Our decision in *Yamamoto* caused confusion by emphasizing the independent nature of the loss of consortium claim."[30]

Finally, the ICA found that *Yamamoto* did not consider the interrelation between the common-law right to sue for loss of consortium and Hawaii's no-fault statutes. The court then expressly overruled *Yamamoto*, holding that where a tortfeasor's automobile liability insurance policy meets the minimum required by law, the tortfeasor is not "uninsured." This rule applies even where the spouse of a person injured in an automobile accident is unable to recover loss of consortium damages from the tortfeasor's policy because the injured spouse's damages exceed the limits of the tortfeasor's policy.[31]

V. CONCLUSION

Under *Doi*, an injured person's spouse may claim loss of consortium damages only when the injured person meets the threshold requirements of Hawaii Revised Statutes section 294-6. Consequently, the spouse who is awarded loss of consortium damages may collect damages only to the extent that the injured spouse's damages do not exceed the tortfeasor's insurance policy limit.

The spouse seeking damages for loss of consortium can no longer look to his uninsured motorist policy to satisfy his award merely because the tortfeasor's insurance policy is exceeded. This will limit loss of consortium damages a spouse will receive—particularly where the tortfeasor is insured only to the amount minimally required by law. *Doi*, therefore, excludes any loss of consortium damages where the injured spouse's award exceeds the tortfeasor's insurance policy. Alternatively, where the spouse has been awarded damages for loss

---

[30] 6 Haw. App. ____, 727 P.2d at 891.

[31] *Id.* at ____, 727 P.2d at 891-892. The court observed:

> Under § 287-7, an automobile insurance liability policy must provide coverage for "all damages arising out of accidental harm sustained by any one person as a result of any one accident," as required by § 294-10(a)(1). Since a loss of consortium claim is derivative only, such damages as may have been sustained by the deprived spouse necessarily arise out of the injury to the injured spouse. Consequently, we construe the phrase "all damages" in § 294-10 (a)(1) to include loss of consortium damages, and hold that where a tortfeasor's automobile liability insurance policy meets the requirements of § 294-10(a)(1), the tortfeasor is not an uninsured motorist, notwithstanding the fact that the spouse of a person injured in an automobile accident is unable to recover his or her loss of consortium damages from the tortfeasor's policy because the injured spouse's damages exceed the limits of the tortfeasor's policy. In such circumstances, the injured parties' automobile insurer is not liable to compensate them under their uninsured motorist coverage.

Id.

of consortium, he may seek recovery directly from the tortfeasor[32]—if the tortfeasor is solvent or not judgment proof.

Laurel K. S. Loo

---

[32] *Id.* at ____ n.7, 727 P.2d at 892 n.7.